

JOINT DECLARATION OF JUDGES TOMKA, GAJA AND GEVORGIAN

Dispute should prima facie fall within the scope of the treaty containing the compromissory clause — Factors to be taken into account for the purposes of the prohibition of racial discrimination — “National origin” not identical to “nationality” — Discrimination based on nationality does not prima facie fall within the scope of CERD.

We have not been able to support the Court’s Order for the reasons explained below. Our vote, however, does not imply that we have no understanding for the humanitarian considerations underlying a call that the mixed Qatari–Emirati families remain united or, if they were separated, be able to reunite, that Qatari students be able to continue their studies in the United Arab Emirates (hereinafter “UAE”) or elsewhere and that Qataris have access, in case of need, to tribunals and other judicial organs in the UAE. We do hope that the rights of these people are respected. However, we believe that certain legal requirements for the Court to indicate provisional measures are not met in the present case.

1. When assessing prima facie its jurisdiction and the plausibility of the rights invoked by the requesting Party in view of the adoption of provisional measures, the Court has to ascertain that prima facie the dispute falls within the scope of the treaty that contains the compromissory clause conferring jurisdiction on the Court and that the claimed rights are plausibly based on that treaty. Thus, for instance, in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* the Court found that “prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention d[id] not exist” (*Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1160, para. 50). Similarly, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, the Court concluded that “the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met” (*Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 132, para. 76).

2. In the present case, Qatar alleges certain violations by the UAE of obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), which contains in Article 22 a compromissory clause with respect to disputes concerning the interpretation or application of CERD.

3. The basis of the alleged discrimination in the treatment of individuals by the UAE of which Qatar has complained consists in the Qatari nationality of the persons concerned. However, CERD only applies to some specific factors of discrimination: “race, colour, descent, or national or ethnic origin”. Nationality is not listed in Article 1, paragraph 1, among the bases of discrimination to which CERD applies.

4. When the Convention considers “national origin” as one of the prohibited bases for discrimination, it does not refer to nationality. In our view, the two terms are not identical and should not be understood as synonymous. The *travaux préparatoires* support this view and indicate that States sought to exclude distinction on the basis of nationality from the scope of CERD. In the discussions of the draft Convention in the Third Committee of the General Assembly, an amendment specifying that “the expression ‘national origin’ does not mean ‘nationality’ or ‘citizenship’” was withdrawn by their sponsors, but this was done only in favour of the final text of Article 1, which evidently was considered to make matters equally clear (United Nations,

doc. A/6181, pp. 12-13). The omission of a reference to nationality may be easily explained. Should CERD be considered as covering also discrimination based on nationality, the Convention would be a far-reaching instrument, that contains a clause providing that, with regard to the wide array of civil rights that are protected under CERD, all foreigners must be treated by the host State in the same way as nationals of the State who enjoy the most favourable treatment.

5. The CERD Committee has taken the view — in particular, in paragraph 4 of its General Recommendation No. XXX on discrimination against non-citizens — that the Convention should be interpreted as covering also differences of treatment on the basis of nationality. However, the CERD Committee has not stated in as many words that nationality is equivalent to national origin. It has rather identified certain conditions for the prohibition of discrimination that are specific to nationality and immigration and do not apply when the bases of discrimination listed in Article 1, paragraph 1, are in question. It would be difficult to give weight to this view of the CERD Committee since it gives no reason for its interpretation that different treatment based on nationality constitutes racial discrimination under CERD, albeit only to a certain extent.

6. It is true that, when Article 1, paragraph 2, sets forth that CERD does not apply to differences of treatment between citizens and non-citizens, it does not exclude that the Convention applies to differences between a group of foreigners and another group of foreigners. However, even in that case, in order to be relevant under CERD, discrimination must rest on one of the bases listed in Article 1, paragraph 1. Differences of treatment of persons of a specific nationality may target persons who also have a certain ethnic origin and therefore would come under the purview of CERD, but this possibility has not been suggested by Qatar.

7. These remarks lead to the conclusion that the dispute of which the Court is seised does not fall prima facie within the scope of CERD and that the rights that are invoked under CERD are not plausible. This does not mean that the conduct of the UAE could not be viewed as inconsistent with other rules of international law, but in the present case the Court is called to examine only the claims put forward under CERD.

(Signed) Peter TOMKA.

(Signed) Giorgio GAJA.

(Signed) Kirill GEVORGIAN.
