

DECLARATION OF PRESIDENT YUSUF

Majority frames subject-matter of dispute in manner totally disconnected from Applicant's written and oral pleadings — This leads to mischaracterization of subject-matter of dispute — Subject-matter of dispute concerns alleged measures of racial discrimination on basis of "national origin", not current nationality — Majority should have applied long-standing jurisprudence in identifying subject-matter of dispute — No need for factual assessment of measures complained of by Qatar — Issues of fact are a matter for the merits — Whether "Qataris" form distinct national origin and effects of impugned measures may only be addressed at the merits stage — At this stage Court must only satisfy itself that such measures are "capable of having an adverse effect" on enjoyment of rights protected under Convention — They appear to have that effect in the present circumstances.

I. INTRODUCTION

1. I disagree with the conclusions of the Court and the reasoning of the majority on two interrelated issues dealt with in the Judgment: (a) the determination of the subject-matter of the dispute; and (b) the jurisdiction *ratione materiae* of the Court with regard to what is referred to as "indirect discrimination".

2. On the first issue, the entire reasoning of the Judgment turns on the concept of "nationality", without taking adequately into consideration Qatar's claims regarding racial discrimination on the basis of "national origin". By focusing almost exclusively on the question of nationality, the formulation of the object of the claim chosen by the Applicant is ignored, leading to the mischaracterization of the subject-matter of the dispute. As discussed below, this approach is inconsistent with the jurisprudence of the Court on the determination of the subject-matter of the dispute.

3. Secondly, apart from the fact that the above mischaracterization results in an erroneous conclusion on the jurisdiction of the Court, the majority also finds that some of the measures complained of by Qatar, which are referred to as "indirect discrimination" in the Judgment, do not fall within the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD" or the "Convention"), even if they have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin. There is, however, no meaningful analysis in the Judgment to support such a statement.

II. THE SUBJECT-MATTER OF THE DISPUTE

4. Qatar has consistently claimed that the measures adopted on 5 June 2017 by the United Arab Emirates (hereinafter the “UAE”) against Qataris amount to a “distinction, exclusion, restriction or preference based on . . . national . . . origin” both in purpose and in effect within the meaning of Article 1, paragraph 1, of CERD. In its Application (AQ), Qatar argued that “[t]he UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin” (AQ, para. 3; see also paras. 34, 44, 54, 58, 62-63, 65 (a) and 66 (a)); that the “blanket expulsion of Qataris from the UAE and the ban on entry by Qataris into the UAE discriminate against Qataris on the basis of national origin” (*ibid.*, para. 59); that “[t]he UAE has also enacted various measures interfering with rights to property based on Qatari national origin” (*ibid.*, para. 44; see also para. 63); and that “[t]he UAE has . . . unlawfully targeted Qataris on the basis of their national origin” (*ibid.*, para. 54).

5. Similar statements are made by the Applicant in its Memorial (MQ) and in its Written Statement (WSQ), clarifying that its claims were predicated on “national origin” both in purpose and in effect (MQ, paras. 1.2, 1.8, 1.11-1.13, 1.15, 1.23, 1.25, 3.5, 3.21, 3.24 and 3.86 to 3.113), and alleging that the measures adopted by the UAE were “discriminatory in both purpose and effect, by intentionally targeting and having a disproportionately negative impact on persons of Qatari ‘national origin’ in the historical-cultural sense, irrespective of their present nationality” (WSQ, para. 1.18). Moreover, during the oral proceedings, Qatar explained that it “has from the beginning framed its case as one of discrimination ‘based on’ national origin, including in the sense of intentional targeting and of disparate impact” (CR 2020/7, p. 45, para. 40 (Amirfar)).

6. Instead of paying particular attention to the above formulation of the dispute by the Applicant, as the Court has always done in determining the subject-matter of the dispute, the majority frames the subject-matter of the dispute in a manner totally disconnected from the Applicant’s written and oral pleadings. For example, after quoting paragraph 2.6 of Qatar’s Written Statement, which refers to acts and omissions of the UAE that “discriminate against Qataris on the basis of national origin” (paragraph 44 of the Judgment), the Judgment surprisingly states that “[a]s can be seen from Qatar’s characterization of the subject-matter of the dispute (see paragraph 44 above), Qatar makes three claims of racial discrimination” (paragraph 56 of the Judgment). The Judgment then proceeds to make an artificial classification of Qatar’s claims, the first category of which is purportedly a “claim arising out of the ‘travel bans’ and ‘expulsion order’, which make express reference to Qatari nationals” (*ibid.*). However, the text of Qatar’s Written Statement, quoted in para-

graph 44 of the Judgment, and to which reference is made in paragraph 56, does not mention even once the word “nationality”, while it clearly explains that the alleged acts and omissions of the UAE discriminate against Qataris “on the basis of national origin”. Nor does this text provide a basis for the classification of Qatar’s claims into the three categories indicated in the Judgment.

7. It is true that Qatar argued in its pleadings that the concept of “national origin” in Article 1, paragraph 1, of CERD encompasses discrimination based on nationality. Qatar based such interpretation on General Recommendation XXX of the CERD Committee, which reads as follows:

“Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” (CERD Committee, General Recommendation XXX on Discrimination against Non-Citizens, UN doc. CERD/C/64/Misc.11/rev.3 (2005), para. 4.)

8. In General Recommendation XXX, the CERD Committee seems to suggest that a measure that seeks to differentiate between individuals on the basis of their current nationality might, deliberately or inadvertently, have a disproportionately adverse impact on a group of people having a common “national or ethnic origin”, taking into account the objective underlying that measure and the criteria chosen for differentiation, or may not be applied pursuant to a legitimate aim, in which case it would constitute discrimination under CERD.

9. The Court may endorse such interpretation or may decide, as the majority appears to favour in the present Judgment, that the term “national origin” cannot encompass measures predicated on current nationality. In either case, it cannot be held, on the basis of the written and oral pleadings of the Applicant, that the claims of Qatar mostly relate to racial discrimination on grounds of current nationality, and that consequently they fall outside the scope of the Convention as such. The content of those pleadings clearly indicates otherwise.

10. The insistence of the majority on characterizing the subject-matter of the dispute in a manner which does not take into consideration the actual formulation put forward by the Applicant in its written and oral pleadings departs from a long-standing jurisprudence of the Court referred to in paragraph 42 of the Judgment itself. According to this jurisprudence, it is for the Court to determine on an objective basis the subject-matter of the dispute between the Parties, “while giving particular attention to the formulation of the dispute chosen by the applicant” (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports*

2007 (II), p. 848, para. 38; *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30).

11. Had the majority applied this jurisprudence to the present case, it would have come to the conclusion that the subject-matter of the dispute relates to “the interpretation or application” of CERD, and that Qatar’s claims fall squarely within the scope of Article 1, paragraph 1, of the Convention, since those claims concern alleged measures of racial discrimination on grounds of “national origin”.

III. THE JURISDICTION OF THE COURT WITH REGARD TO “INDIRECT DISCRIMINATION”

12. According to the artificial classification of Qatar’s claims mentioned above (para. 6), the only claim that is described as relating to discrimination on grounds of national origin is the so-called claim of “indirect discrimination”, as opposed to “direct” discrimination on the basis of nationality; a distinction which has no basis in the text of the Convention. However, even in the case of this claim, the majority concludes that,

“In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court’s view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its ‘indirect discrimination’ claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.” (Paragraph 112 of the Judgment.)

The reasons of my disagreement with this sweeping statement are set out below.

13. First, it is rather odd to find in a judgment on preliminary objections an attempt at a factual assessment of whether the measures complained of actually constitute racial discrimination under CERD. In a very recent judgment of the Court dealing also with jurisdiction *ratione materiae* under CERD, it was clearly stated as follows:

“In order to determine whether it has jurisdiction *ratione materiae* under CERD, the Court does not need to satisfy itself that the meas-

ures of which Ukraine complains actually constitute ‘racial discrimination’ within the meaning of Article 1, paragraph 1, of CERD. Nor does the Court need to establish whether, and, if so, to what extent, certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. Both determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by Ukraine, and are thus properly a matter for the merits, should the case proceed to that stage.” (*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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, para. 94.)

In the present case, however, issues of fact, which are normally a matter for the merits, appear to be summarily dismissed in a single paragraph at the jurisdictional stage of the proceedings.

14. Secondly, the majority offers no meaningful analysis to support the above-mentioned statement. The question whether or not the term “Qatari” is to be understood solely as synonymous to “current nationality” or as indicating “national origin”, or both, and whether as a consequence measures targeting “Qataris” come within the ambit of Article 1 of CERD, is a question of fact that should be addressed at the merits stage. In this connection, it is to be noted that the majority does not even acknowledge — let alone examine — the Expert Report adduced by the Applicant to establish that “Qataris” form, apart from a legal nationality, a socio-cultural national group distinct from the Emiratis (cf. MQ, paras. 3.94-3.112; MQ, Vol. VI, Ann. 162, Expert Report of Dr. J. E. Peterson dated 9 April 2019, paras. 28-30; WSQ, para. 2.121).

15. Thirdly, the “Court’s view” cannot simply be asserted. It needs to be based on legal and factual analysis. This is not the case here. The fact that Article 1, paragraph 1, of CERD distinguishes between “purpose” and “effect” suggests that, under CERD, discrimination may also derive from the collateral effects of the measure on a particular group, without having to establish a discriminatory purpose or intent. As the CERD Committee observed in its General Recommendation XIV,

“particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.” (CERD Committee, General Recommendation XIV on Article 1, Paragraph 1, of the Convention, UN doc. A/48/18 (1993), p. 115, para. 2.)

16. Thus, a measure may amount to *de facto* racial discrimination when it has a disproportionate effect on a group of people having a common “national or ethnic origin”, regardless of whether that measure was intended to target a particular “nationality”. This is essentially a question of fact and may only be established after having heard both Parties in the merits phase. It cannot be used at this stage of the proceedings to justify a finding that the measures complained of by Qatar fall outside of the scope of the jurisdiction of the Court, particularly when they are alleged to have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin.

17. The determination of the jurisdiction of the Court *ratione materiae* does not require the Court to satisfy itself at this preliminary stage that the measures complained of by the Applicant constitute racial discrimination within the meaning of Article 1, paragraph 1, of the Convention. What matters is whether the measures complained of by Qatar “are capable of having an adverse effect on the enjoyment of certain rights protected under CERD” (*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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, para. 96; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 820, para. 51).

18. It is my view that the measures complained of by Qatar were capable of having such an adverse effect on persons of Qatari national origin, and that the Court should have left the examination of the actual effect of these measures for the merits stage.

(Signed) Abdulqawi Ahmed YUSUF.
