DISSENTING OPINION OF JUDGE BHANDARI

The subject-matter of the dispute — Article 22 of CERD and the Court's jurisdiction ratione materiae *— Interpreting the term "national origin" contained in Article 1, paragraph 1, of CERD pursuant to the customary rules on treaty interpretation — The term "national origin" under Article 1, paragraph 1, of CERD encompasses current nationality — The provisions which form the context of Article 1, paragraph 1, of CERD in light of the object and purpose of CERD — The* travaux préparatoires *of CERD and the exclusion of amendments which had the effect of excluding nationality from the purview of "national origin" in Article 1, paragraph 1, of CERD — The CERD Committee and its General Recommendation XXX.*

1. Regrettably I disagree with the finding in the Judgment which upholds the first preliminary objection raised by the United Arab Emirates (hereinafter "UAE") and finds that the Court has no jurisdiction to entertain the Application filed by the State of Qatar (hereinafter "Qatar"). In my view, the discriminatory measures allegedly promulgated by the UAE against Qatar and Qatari nationals are capable of falling within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). With great respect to the views expressed in the Judgment, I endeavour to explain the reasoning behind my decision not to concur with the majority.

A. Subject-matter of the dispute between Qatar and the UAE

2. The case of Qatar is based on a series of measures taken by the UAE against Qatar, Qatari nationals and individuals of Qatari national origin on 5 June 2017 and the days that followed[1]. These measures, which were accompanied by the severing of diplomatic relations with Qatar, fell within the following categories:

(a) requirement that all Qatari residents and visitors leave the UAE in fourteen days, as well as a ban on Qatari nationals from entering the UAE. This was subsequently modified to a requirement of permission for entry of Qatari nationals into the UAE;

(b) closure of land borders, airspace and seaports of the UAE to all Qatari nationals and Qatari means of transportation; and

(c) suppression of Qatari media outlets and speech deemed to support Qatar, and the enactment of measures "perpetuating, condoning, and encouraging anti-Qatari hate propaganda"[2].

3. It is recalled that the Court is to objectively determine the subject-matter of the dispute while giving particular attention to the formulation of the dispute chosen by the Applicant, identifying the object of those claims, and taking into consideration the written and oral pleadings of the Parties[3]. Accordingly, the disagreement between Qatar and the UAE, with respect to the UAE's alleged violation of obligations under CERD fall under three heads of claims which form the subject-matter of the dispute as follows:

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[1] Application of Qatar, para. 3.

[2] Memorial of Qatar (MQ), Vol. I, para. 1.7.

[3] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31, pp. 449-450, para. 33.

(a) the first is the claim by Qatar that the "travel bans" and "expulsion order" by their express reference to Qatari nationals and Qatari residents and visitors discriminate against Qataris on the basis of their national origin;

(b) the second is the claim by Qatar arising out of the restrictions on Qatari media corporations; and

(c) the third is the claim by Qatar that, through these measures, the UAE has engaged in "indirect discrimination" against persons of Qatari national origin.

4. The jurisdiction of the Court in the present case is based on Article 22 of CERD. As per the test for jurisdiction *ratione materiae* laid down by the Court in its previous cases, the Court needs to determine whether it can be established that the "alleged violations . . . are capable of falling within the provisions of the [CERD] and whether, as a consequence . . . the dispute is one which the Court has jurisdiction to entertain"[4]. In order to invoke the Court's jurisdiction under Article 22 of CERD, the discriminatory measures allegedly promulgated by the UAE must fall within one of the prohibited categories of "racial discrimination", as defined under Article 1, paragraph 1, of CERD, which provides:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

5. Qatar has consistently claimed that the alleged acts of the UAE amount to a "distinction, exclusion, restriction or preference based on . . . national . . . origin" within the meaning of Article 1, paragraph 1, of CERD[5] and thus within the compromissory clause contained in Article 22 of CERD. The UAE, on the other hand, argues there is a crucial jurisdictional flaw in the case, that these measures differentiate between individuals on the basis of their current nationality, which is not included within the scope of the term "national origin" in Article 1, paragraph 1, of CERD[6]. In its first preliminary objection to the jurisdiction of the Court, the UAE argues that the dispute falls outside of the scope *ratione materiae* of CERD.

6. Accordingly, at this preliminary stage, the Court is called upon to interpret whether the term "national origin", as contained in Article 1, paragraph 1, of CERD, encompasses current nationality.

B. The term "national origin" under Article 1, paragraph 1, of CERD in accordance with its ordinary meaning

7. The customary international law on the rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties (hereinafter the "VCLT") is applicable to the interpretation of the terms of CERD. Article 31, paragraph 1, of the VCLT stipulates that

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[4] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, paras. 46, 106; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, para. 16.

[5] CR 2020/7, p. 33, para. 36 (Klein); CR 2020/7, p. 40, para. 26 (Amirfar).

[6] CR 2020/6, p. 52, para. 56 (Sheeran).

"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[7].

8. The majority takes the following position regarding the ordinary meaning of the term "national origin" in paragraph 81 of the Judgment:

> "the definition of racial discrimination in the Convention includes 'national or ethnic origin'. These references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime. The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth."

9. In its attempt to distinguish between "nationality" and "national origin", the majority highlights the immutable nature of the meaning of "national origin" and frames it in opposition to the transient nature of the meaning of "nationality". In doing so, the majority attempts to allude that the two terms are fundamentally disparate. As a result of this approach, the Judgment insufficiently delineates the ordinary meaning of the term "national origin" and thereby reaches no real consensus on its meaning for the reasons set out below.

10. The term "national origin" presents an amalgamation of the words "national" and "origin". The ordinary meaning attributable to these two words, read conjunctively, would have led to a more harmonious interpretation of its meaning as Article 31, paragraph 1, of the VCLT stipulates. When the ordinary meaning of the words "national" and "origin" are analysed to determine the meaning of the term "national origin", it is evident that the term is capable of being construed in both of the ways argued by the Parties. It can either carry the meaning attributed to it by Qatar, that is of nationality and of "relat[ing] to the country or nation where a person is from"[8], or that argued by the UAE, that is of an "association with a nation of people, not a State", which is distinct from nationality[9]. As a general proposition, in my view, the definitions of the two words indicate that "national origin" refers to a person's belonging to a country or nation. Belonging in this sense may be long standing or historical, and defined by ancestry or descent, or it may be confirmed by the legal status of nationality or national affiliation. Thus, current nationality, even if considered in a purely legal sense to be within the discretion of the State and subject to change over a person's lifetime, is in any event encompassed within the broader term "national origin". Since there is no doubt that these terms coincide, it is difficult to simply distinguish one from the other solely on the basis relied upon in paragraph 81 of the Judgment.

11. Furthermore, the Judgment's attempt to distinguish between "nationality" and "national origin" becomes more complex and difficult to differentiate on the basis of immutability in the context of countries where nationality is based on *jus sanguinis*. Where nationality follows a *jus sanguinis* model, as is the case in many Gulf States, nationality coincides with national origin. Under the *jus sanguinis* model, in Qatar, "nationality is conferred by parentage — and naturalization is rare . . . the vast majority of Qatari nationals, including those affected by the measures, were born Qatari nationals and are Qatari in the sense of heritage — in other words, of

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[7] United Nations, *Treaty Series*, Vol. 1155, p. 340.

[8] MQ, Vol. I, para. 3.30.

[9] Preliminary Objections of the United Arab Emirates, para. 76.

Qatari 'national origin'"[10]. Nationality in this context is as immutable as "national origin" and is a characteristic that is inherent at birth contrary to the Court's assertion in paragraph 81. When the UAE adopted measures targeting "Qatari residents and visitors" and "Qatari nationals", they inevitably also affected persons of Qatari national origin since Qatari nationals are primarily persons of Qatari heritage.

C. The context of Article 1, paragraph 1, of CERD

12. The ordinary meaning of a term in a treaty is to be determined in light of its context and not in the abstract[11]. Under Article 31, paragraph 2, of the VCLT, the context for interpretation purposes includes, the text of the treaty, its preamble and annexes. In its contextual reading of the term "national origin", in light of the object and purpose of CERD, in paragraph 83 of the Judgment, the Court begins its reasoning by acknowledging that any legislation concerning nationality, citizenship or naturalization by States parties would not be affected by the provisions of CERD provided that they do not discriminate against any particular nationality (Article 1, paragraph 3, of CERD). However, in its conclusion on this point, the Judgment seems to rely solely on the broader terminology found in Article 1, paragraph 2, of CERD which expressly excludes "from the scope of the Convention . . . differentiation between citizens and non-citizens". Consequently, to the exclusion of the prohibition of discrimination "against any particular nationality" in Article 1, paragraph 3, of CERD, the Judgment concludes that

> "such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there — rights that are in dispute in this case — on the basis of their current nationality".

13. I find it difficult to concur with a contextual reading that allows differentiation between citizens and non-citizens, as well as particular groups of non-citizens on the basis of their current nationality. If one is to pay close attention to Article 1, paragraphs 2 and 3, of CERD — the provisions which form the context of Article 1, paragraph 1, of CERD — they do not seem to envisage broad and unqualified distinctions to be drawn between citizens and non-citizens.

14. Article 1, paragraph 1, of CERD provides a broad definition of racial discrimination which includes discrimination based on "national origin". The plain text of CERD makes it clear that this definition is to protect against "all forms" of racial discrimination. Article 1, paragraph 2, in functional terms, establishes an exception to the broader principle contained in Article 1, paragraph 1, of CERD, by permitting a distinction to be drawn between citizens and non-citizens. However, this exception is limited by the object and purpose of the Convention, as made clear in its preamble and operative provisions, to eliminate racial discrimination in all its forms and manifestations. This object and purpose cannot be furthered if States are permitted to draw broad and unqualified distinctions as have been drawn by the UAE through its measures vis-à-vis Qataris, Qatari nationals, residents and visitors. Second, Article 1, paragraph 3, establishes a further exception to Article 1, paragraph 1. Article 1, paragraph 3, while implicating the treatment of non-citizens, clarifies that a State can dictate how, in particular, non-citizens acquire or lose its nationality; however, it reinforces the aforesaid reading of the Convention through the explicit indication in its proviso that "such provisions [should] not discriminate against any particular nationality".

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[10] MQ, Vol. I, para. 1.25.

[11] Art. 31, para. 1, VCLT; *Yearbook of the International Law Commission, 1966*, Vol. II, p. 221.

15. Therefore, the context makes it clear that — even though nationality-based distinctions are specifically permitted by paragraphs 2 and 3 of Article 1 which permit distinctions between citizens and non-citizens — it cautions that even in making such permitted distinctions, "such provisions [should] not discriminate against any particular nationality" when considering non-citizens *inter se*. In my view, only such an interpretation would be consistent with the object and purpose of CERD to "eliminat[e] racial discrimination throughout the world in all its forms and manifestations". To interpret "national origin" as entirely excluding nationality-based discrimination would, on the other hand, lead to absurd results.

D. The *travaux préparatoires* of CERD

16. When interpretation under Article 31 of the VCLT leaves the meaning ambiguous or obscure, or leads to manifestly absurd or unreasonable results, Article 32 of the VCLT provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". The Judgment, in paragraph 96, in reference to the amendment submitted by France and the United States of America and the subsequent withdrawal of the amendment, states that this

> "was done in order to arrive at a compromise formula that would enable the text of the Convention to be finalized, by adding paragraphs 2 and 3 to Article 1 . . . As the Court has noted . . . paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States' legislation on nationality, thus fully addressing the concerns expressed by certain delegations, including those of the United States of America and France, regarding the scope of the term 'national origin'".

17. The *travaux préparatoires* makes it clear that the term "national origin" should have a wider application than that envisaged by the majority in paragraph 96. The Judgment does not touch upon the fact that the nine-power compromise proposal, highlighted in this paragraph, was the result of the deliberate exclusion of certain proposed amendments which had the effect of excluding nationality from the purview of "national origin". The debate on the term "national origin" indicates that the drafters of the Convention leaned towards rejecting the approach of excluding differential treatment on the basis of nationality from the purview of Article 1, paragraph 1, of CERD. The delegate of the United States of America for instance stated that "[n]ational origin differed from nationality in that national origin related to the past — the previous nationality or geographical region of the individual or his ancestors — while nationality related to the present status"[12]. The delegate of France explained the specific meaning attributed to the word "nationality" in French legal terminology; that it was strictly understood to "cover all that concerned the rules governing the acquisition or loss of nationality and the rights derived therefrom"[13]. In the Third Committee of the United Nations General Assembly, the delegate of France, along with the United States of America, suggested an amendment which excluded the word nationality from the purview of the term "national origin". If that joint amendment had been adopted, Article 1, paragraph 2, would have read as follows: "[i]n this Convention the expression 'national origin' does not mean, 'nationality' or 'citizenship', and the Convention shall therefore not be applicable to distinctions, exclusions, restrictions, or preferences based on differences of

[12] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, doc. A/C.3/SR 1304 (14 October 1965), p. 85, para. 23.

[13] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, doc. A/C.3/SR 1299 (11 October 1965), p. 60, para. 37.

nationality of citizenship"[14]. The amendments proposed were all withdrawn subsequently in favour of a compromise which formed the final text of paragraphs 1, 2, and 3 of Article 1 of CERD.

18. Certain arguments during the debates of the Commission on Human Rights highlights the compromise that the meaning of "national origin" represents. The delegate of Lebanon argued that "[t]he convention should apply to nationals, non-nationals, and all ethnic groups, but it should not bind States parties to afford the same political rights to non-nationals as they normally granted to nationals"[15]. The delegate of India proposed the deletion of the words "the right of everyone" in Article V, instead of altering the definition of "national origin". This was for the purpose of leaving it for the States to decide for themselves whether the same guarantees were to be afforded to aliens and nationals[16].

19. The drafter's rejection of the approach that excluded nationality-based discrimination in Article 1, paragraph 1, indicates that CERD's inclusion of "national origin" protects against discrimination on the basis of current nationality. The rejection of the amendment proposed by France and the United States of America, which narrowed the definition of racial discrimination in Article 1, paragraph 1, indicates that the drafters adopted an approach whereby citizens and non-citizens were to be guaranteed the same rights, notwithstanding certain exceptions outlined in Article 1, paragraph 2, and Article 1, paragraph 3. It is particularly telling that this compromise was accepted by France and the United States of America as "entirely acceptable". Such acceptance coupled with a reading of the *travaux préparatoires* as a whole makes it clear that the compromise does not indicate that nationality was to be left out of the scope of "national origin"; in fact, it only seems to allow States to reserve certain rights to their citizens.

20. In light of the foregoing, in my view, the ordinary meaning of the term "national origin" encompasses one's nationality, including current nationality. The ordinary meaning in its context in light of CERD's object and purpose to eliminate "all forms" of racial discrimination converges to confirm that the term "national origin" encompasses current nationality. An interpretation that categorically excludes current nationality would undermine this object and purpose. Considering the fundamental ambiguity resulting from the approach adopted by the majority to determine the ordinary meaning, the *travaux préparatoires* reinforces the conclusion that CERD's definition of racial discrimination should have a wide application. The *travaux préparatoires* thus confirms the ordinary meaning of "national origin" as encompassing current nationality.

E. The CERD Committee and its General Recommendation XXX, paragraph 4

21. In relation to the CERD Committee and its General Recommendation XXX, paragraph 4, the majority cites the Court's observation in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II),* p. 664, para. 66 (hereinafter *"Diallo"*) that it is "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee" and does not take into account the observation that it "should ascribe great weight" to interpretations by the independent body established for the purpose of supervising the application of the treaty concerned.

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[14] United Nations General Assembly, *Twentieth Session, Report of the Third Committee — Draft International Convention on the Elimination of All Forms of Racial Discrimination,* doc. A/6181 (18 December 1965), p. 12, para. 32.

[15] United Nations, *Official Records of the Economic and Social Council, Commission on Human Rights, Twentieth Session,* doc. E/CN.4/SR 809 (14 May 1964), p. 5.

[16] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee,* doc. A/C.3/SR 1299 (11 October 1965), p. 59, para. 30.

The Judgment provides no compelling reason as to why it has chosen to depart from the reasoning in *Diallo* in this dispute, despite the fact that the CERD Committee remains "the guardian of the Convention" — an assertion that both Parties appear to agree on. The functions carried out by the CERD Committee and the manner in which they are carried, as well as the composition of the Committee and its members offer insights as to why the majority should have taken account of General Recommendation XXX, paragraph 4.

22. The CERD Committee's primary function is to analyse and comment on reports submitted to it by States parties pursuant to Article 9, paragraph 1, of CERD. In reporting under Article 9, paragraph 1, of CERD, each State party undertakes to submit a report on the legislative, judicial, administrative or other measures which it has adopted in relation to its obligations under CERD. Each dialogue with a State party is followed by a set of concluding observations by the Committee which may contain statements of concern and recommendations for further action. This framework allows the CERD Committee to establish certain rules in dialogue, which include the establishment of the CERD's rules of procedure, and the translation of general principles and rights enshrined in the Convention into rules applicable to problems faced in implementation. Under Article 14 of CERD, once a State declares that it recognizes the competence of the CERD Committee, it may receive and consider communications from individuals or groups of individuals within the jurisdiction of that State claiming to be victims of a violation by that State of rights set forth in the Convention. The State is thereby obliged to revise its law or practice in light of the Committee's findings. Through this framework of consistent dialogue with States, the CERD Committee is engaged in the development of consistent interpretations of CERD. Moreover, in the performance of its tasks, the CERD Committee has sought to act judicially since its very first meeting in 1970[17]. Furthermore, as per Article 8, paragraph 1, of CERD, the CERD Committee comprises of 18 experts, who are individuals of "high moral standing and acknowledged impartiality" and "who shall serve in their personal capacity". These individuals fall into the category of the "most highly qualified publicists" in this field. General Recommendation XXX, paragraph 4, of the CERD Committee therefore offers a consistent interpretation of CERD by the most highly qualified publicists because of which it should have been ascribed great weight in the Court's Judgment.

23. The Judgment further insufficiently addresses the jurisprudence of the Court which indicates the Court's willingness to take into account the work of United Nations supervisory bodies of human rights treaties in its judgments in the past. While reference to external precedents is not a common feature of the Court's case law, there is evidence of a change[18]. The clearest endorsement of such a supervisory body in the jurisprudence of the Court is contained in its 2010 merits Judgment in *Diallo*, p. 692, para. 165, subparas. 2 and 3. In *Diallo,* while finding that the Democratic Republic of the Congo had violated provisions of the International Covenant on Civil and Political Rights, 1966 (hereinafter the "ICCPR") and the African Charter on Human and Peoples' Rights, 1981 (hereinafter the "ACHPR"), the Court specifically pointed out that its interpretation of the provisions of the ICCPR and the ACHPR was "fully corroborated by the jurisprudence of the Human Rights Committee established by the [ICCPR] to ensure compliance

[17] Michael Banton, "Decision-taking in the Committee on the Elimination of Racial Discrimination", in *The Future of UN Human Rights Treaty Monitoring*, Philip Alston, James Crawford (eds.), Cambridge, Cambridge University Press, 2000, pp. 55-57.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I),* p. 43; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p. 179, para. 109; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 244, para. 219; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II),* p. 663, para. 66.

with that instrument by the States parties"[19]. Subsequently, in the same Judgment, the Court noted that,

> "[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty"[20].

24. I am therefore obliged to conclude that, since the Court ascribed great weight to the interpretations of the ICCPR by the Human Rights Committee, the body of independent experts that monitors the implementation of the ICCPR by its States parties; there is no compelling reason for the Court not to have attached "great weight" to General Recommendation XXX, paragraph 4, of the CERD Committee, the independent body of experts established specifically to supervise the application of CERD. The necessity to consider General Recommendation XXX, paragraph 4, of the CERD Committee is reinforced by the observation in *Diallo* that "[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled"[21].

25. Furthermore, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 179-180, paras. 109-112 — (hereinafter "*Construction of a Wall*") — while quoting from Human Rights Committee General Comment 27, paragraph 14, the Court stated that, the restrictions to the freedom of movement in Article 12, paragraph 3, of the ICCPR, "[a]s the Human Rights Committee put it", "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result"[22]. The Court thereby acknowledged that the derogatory measure in question had to be proportionate to the achievement of a legitimate aim. The principle of proportionality is found in all global and regional human rights instruments[23]. It is also enshrined in the national constitutions of numerous States. It is generally couched in terms of requiring a justification from States for derogation from a fundamental human right or freedom. Such derogation ought to serve a legitimate aim and should be proportional to the achievement of that aim. General Recommendation XXX, paragraph 4, reflects this widely accepted principle. Considering its widespread acceptance, including in the Court's own jurisprudence in *Construction of a Wall*, there appears to be no reason to disregard its application in the present case.

26. I will proceed to make some observations on the relevance of General Recommendation XXX, paragraph 4, to the claims made by Qatar and the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

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[19] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 663, para. 66.

[20] *Ibid.*

[21] *Ibid.*

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 193, para. 136.

[23] European Convention on Human Rights, Arts. 8 (2) and 15; ICCPR, Arts. 12, 19 (2) *(b)*, 21 and 22; International Covenant on Economic, Social and Cultural Rights, Article 8 (1) *(a)* and *(c)*; Inter-American Convention on Human Rights, Arts. 13 (2) *(b)*, 15, 16, 22; African Charter on Human and Peoples' Rights, Arts. 11, 12 (2) and 29.

27. The CERD Committee adopted General Recommendation XXX on 1 October 2002. General Recommendation XXX, paragraph 4, provides that differential treatment 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". Therefore, even if nationality-based discrimination were to be interpreted as falling within the meaning of "national origin", the beneficial treatment of some categories of non-nationals by a State would not necessarily violate Article 1, paragraph 1, of CERD, provided these beneficial rights were granted to some nationalities pursuant to the legitimate aim of regional integration or friendly relations and were proportionate to the achievement of that aim. Such differential treatment would be unlikely to fall afoul of the restriction against nationality-based discrimination. To interpret "national origin" so that it entirely excludes nationality-based discrimination would, on the other hand, lead to incongruent results.

28. The UAE announced a series of measures with specific application to Qataris on the basis of their nationality and with the specific purpose of using such measures to "induc[e] Qatar to comply with its obligations under international law". Accordingly, if nationality is determined to be a prohibited basis of discrimination under Article 1, paragraph 1, of CERD, distinctions on this basis are capable of falling within the provisions of CERD, when they do not fulfil "a legitimate aim, and are not proportional to the achievement of this aim". The stated purpose of using such measures to induce compliance with unrelated treaty obligations appears neither legitimate nor proportionate, given the fundamental human rights claimed to have been affected. The alleged acts by the UAE thus disproportionately affect Qatari nationals and satisfy the conditions for exercise of the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

29. In light of the foregoing, in my considered opinion, CERD encompasses discrimination against a particular group of non-nationals on the basis of their current nationality, within the prohibition on discrimination based on "national origin" in Article 1, paragraph 1. As such, the measures adopted by the UAE which disproportionately affected individuals of Qatari nationality by explicitly discriminating against "Qatari nationals" and "Qatari residents and visitors" — in particular through the "expulsion order" and the "travel bans", which form the first claim of Qatar, are capable of falling within the scope of CERD. Furthermore, the majority fails to identify that the 5 June 2017 statement affects "all Qatari residents and visitors". Leaving aside "visitors", "residents" is broad enough to include not only Qatari nationals but also people of Qatari national origin. If the measures were to only affect Qatari nationals, the measures would have mentioned so explicitly. However, such terminology is not to be found. Thus, even from this perspective the measures are capable of falling within the protective scope of CERD.

30. Article 1, paragraph 1, of CERD defines "racial discrimination" as distinctions with either the "purpose or effect" of impairing the enjoyment of human rights. It is noted that the majority of Qatari nationals are defined by their Qatari heritage, ancestry or descent. The Qataris, in the sense of constituting a historical-cultural community undoubtedly fall within the scope of "national origin" as contained in Article 1, paragraph 1, of CERD. The ordinary meaning, in its context and in light of the object and purpose of CERD, and the *travaux préparatoires* of CERD also support this finding. As such, the discriminatory effect of the measures which forms the third claim of indirect discrimination, are capable of falling within the provisions of CERD. This is particularly so in relation to the adverse media coverage and the anti-Qatari propaganda that Qatar alleges. The effect of such broadcasts against Qatari nationals impair the enjoyment of rights by individuals of Qatari national origin. The attempt to limit these measures to nationality alone is untenable.

31. While a full assessment of these claims would appear more appropriate at the merits stage of the proceedings, at the jurisdictional stage, there is a sufficient basis to reject the first preliminary objection of the UAE.

Conclusion

32. In my view, Qatar's submission that the term "national origin" encompasses differential treatment on the basis of current nationality is correct and, as a consequence, the dispute concerns the interpretation or application of CERD; the UAE's case, which is grounded on its objections to the jurisdiction *ratione materiae* of the Court, on the basis that the contested measures do not fall within the scope of application of CERD, should therefore fail. Consequently, the Court has jurisdiction to entertain the Application filed by Qatar, on 11 June 2018, pursuant to the compromissory clause contained in Article 22 of CERD. The majority ought to have rejected the first preliminary objection of the UAE.

(Signed) Dalveer BHANDARI.