

SEPARATE OPINION OF JUDGE IWASAWA

Non-citizens are entitled to human rights under international law — The jurisdiction of the Court is limited to disputes with respect to the interpretation or application of CERD — For the Court to have jurisdiction, the measures of which the Applicant complains must be capable of constituting racial discrimination within the meaning of CERD — The term “national origin” in Article 1, paragraph 1, of CERD does not encompass current nationality — If differentiation of treatment based on nationality has the “purpose or effect” of discrimination based on “national origin”, it is capable of constituting racial discrimination within the meaning of CERD — International human rights courts and bodies have embraced and developed the notion of indirect discrimination — The Court does not have all the facts necessary to make determinations on the Applicant’s claim of indirect discrimination — The issues raised constitute the very subject-matter of the dispute on the merits — The Court should have declared that the first preliminary objection does not possess an exclusively preliminary character.

1. The Court finds that the term “national origin” in Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD” or the “Convention”) does not encompass current nationality (Judgment, para. 105). The Court also examines whether the measures taken by the UAE discriminate indirectly against Qataris on the basis of their “national origin”, and holds 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” (*ibid.*, para. 112). Accordingly, the Court concludes that the first preliminary objection raised by the UAE, that the dispute falls outside the scope *ratione materiae* of CERD, must be upheld (*ibid.*, para. 114).

2. I agree that the term “national origin” in Article 1, paragraph 1, of CERD does not encompass current nationality. However, I do not agree with the Court’s analysis and its conclusion regarding Qatar’s claim of indirect discrimination. The UAE’s objection, inasmuch as it relates to Qatar’s claim of indirect discrimination, raises issues that require a detailed examination by the Court at the merits stage. The Court therefore should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

3. This opinion is structured as follows. I shall first review the position of non-citizens under international law. I will explain that since human

rights are inalienable rights of everyone, non-citizens are also entitled to human rights under international law. In the second Section, I will first show that, because the jurisdiction of the Court in the present case is limited to the interpretation or application of CERD, in order for the Court to have jurisdiction, the measures taken by the UAE must be capable of constituting “racial discrimination” under CERD. Secondly, I shall explain the reasoning for my view that current nationality is not encompassed within the term “national origin” in Article 1, paragraph 1, of CERD. Thirdly, I shall discuss the notion of indirect discrimination and describe how differentiation of treatment based on current nationality can have the “purpose or effect” of discriminating on the basis of a prohibited ground listed in Article 1, paragraph 1, of CERD. Finally, I shall explain the reasons why the Court should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

I. HUMAN RIGHTS OF NON-CITIZENS UNDER INTERNATIONAL LAW

4. The protection of the rights of non-citizens has a long history in international law, which pre-dates the protections accorded to States’ own nationals. In the nineteenth and early twentieth centuries, an international minimum standard of treatment of aliens developed in international law. By contrast, international law at that time contained few rules regulating States’ treatment of their own nationals, which was traditionally considered to be part of the internal affairs of States.

5. At the Paris Peace Conference held in 1919-1920, proposals were made to include in the Covenant of the League of Nations clauses on freedom of religion and racial equality. These proposals were ultimately defeated, and the Covenant failed to stipulate even minimum rules concerning human rights. Instead, a number of mostly Central and Eastern European States concluded treaties or made declarations committing themselves to protect minorities within their territories. In addition, the International Labour Organization, which was established in 1919, began adopting conventions on the rights of workers. Thus, while some efforts were made in the interwar period to protect human rights under international law, this protection was extended only to certain rights or covered only a limited number of States.

6. In 1945, this situation changed dramatically with the adoption of the Charter of the United Nations. The Charter was revolutionary in that it

not only included the promotion and encouragement of respect for human rights as one of the purposes of the Organization, but also declared that human rights were guaranteed for “all without distinction” (Art. 1, para. 3, and Art. 55 (c)). The adoption of the Charter marked the beginning of a process of continual expansion of international human rights law.

7. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (hereinafter the “UDHR”), which set out a catalogue of human rights to be protected by States under the Charter. Influenced by the idea of natural rights, it provided that “[a]ll human beings are born free and equal in dignity and rights” (Art. 1; emphasis added) and that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*” (Art. 2; emphasis added). From the phrase “such as”, it is clear that the list of prohibited grounds of discrimination in Article 2 of the UDHR is illustrative, and not exhaustive. Moreover, the list includes the catch-all term “other status”. Thus, even though nationality is not expressly mentioned in the list of prohibited grounds, it may be concluded that discrimination based on nationality is prohibited by the UDHR and that non-citizens are also entitled to the human rights enshrined therein.

8. In 1966, the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (hereinafter the “ICESCR”) and the International Covenant on Civil and Political Rights (hereinafter the “ICCPR”). The ICCPR provides in Article 2, paragraph 1, that

“[e]ach State Party . . . undertakes to respect and to ensure to *all individuals . . . the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*” (emphasis added).

Article 26 of the ICCPR, a self-standing non-discrimination clause, contains comparable language. As with the UDHR, it may be concluded that, in principle, non-citizens are entitled to the human rights provided for in the ICCPR, and that the States parties are prohibited from discriminating on the basis of nationality.

9. The wording used by the ICESCR is slightly different. Article 2, paragraph 2, provides that the States parties “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind *as to* race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or *other status*” (emphasis added). The words “as to” are more restrictive than the words “such as” used in the UDHR and the ICCPR. Nevertheless, because the list of prohibited grounds of discrimination, like those in the UDHR and the ICCPR, contains the catch-all term “other status”, it may be concluded that this list is also illustrative, and not exhaustive. Moreover, Article 2, paragraph 3, provides that “[d]eveloping countries . . . may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”. Interpreting this clause *a contrario*, it may be concluded that the human rights provided for in the ICESCR are also guaranteed in principle to non-nationals.

10. Regional conventions on human rights likewise contain non-discrimination clauses, such as Article 14 of the European Convention on Human Rights and Articles 1 and 24 of the American Convention on Human Rights. The lists of prohibited grounds of discrimination in these clauses also contain catch-all terms: “other status” in Article 14 of the European Convention and “other social condition” in Article 1 of the American Convention. Thus, these lists of prohibited grounds are equally considered to be illustrative, and not exhaustive. Accordingly, like the international conventions discussed above, regional conventions are understood to protect the rights of non-citizens.

11. The international human rights bodies and courts established by these treaties to monitor their implementation by States have confirmed that non-citizens are entitled to the human rights provided for therein and that discrimination based on nationality is prohibited.

12. With regard to the ICCPR, in 1986 the Human Rights Committee adopted General Comment No. 15 on *the position of aliens under the Covenant*, in which it affirmed that “[i]n general, the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality”, and that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens”¹.

13. Subsequently, in a number of individual communication cases, the Human Rights Committee has held that discrimination based on nationality is prohibited by Article 26 of the ICCPR. In *Gueye et al. v. France*,

¹ Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant, 22 July 1986, paras. 1-2.

retired soldiers of Senegalese nationality who had served in the French Army prior to the independence of Senegal claimed that France was in breach of Article 26 because the pensions they received were inferior to those enjoyed by retired soldiers of French nationality. The Committee considered that this practice constituted discrimination based on nationality in violation of Article 26². The Committee also found violations of Article 26 in a number of cases brought against the Czech Republic. These cases concerned Czech nationals who had fled Czechoslovakia under communist pressure and had their property confiscated under the legislation then applicable. The Czech Restitution Act of 1991 provided for restitution of property or compensation, but only if a person was a citizen of the Czech and Slovak Republic and was a permanent resident in its territory. Persons who lost Czech citizenship after leaving the country submitted communications to the Committee, claiming that they had been discriminated against because of their lack of citizenship. The Committee found the condition of citizenship unreasonable and discriminatory, in violation of Article 26 of the ICCPR³.

14. The Committee on Economic, Social and Cultural Rights (hereinafter the “CESCR”) has similarly confirmed that the ICESCR applies to non-citizens. In General Comment No. 20 of 2009, the CESCR declared that “[t]he ground of nationality should not bar access to Covenant rights”, while noting that this was “without prejudice to the application of art. 2, para. 3, of the Covenant”. It confirmed that “[t]he Covenant rights apply to everyone including non-nationals”⁴.

15. The monitoring bodies established by regional conventions on human rights have taken the same position. The European Court of Human Rights (hereinafter the “ECtHR”) has held that discrimination based on nationality is prohibited by the European Convention on

² Human Rights Committee, *Gueye et al. v. France*, 3 April 1989, Communication No. 196/1985, para. 9.4.

³ E.g. Human Rights Committee, *Simunek et al. v. Czech Republic*, 19 July 1995, Communication No. 516/1992, para. 11.6; *Adam v. Czech Republic*, 23 July 1996, Communication No. 586/1994, para. 12.6; *Blazek et al. v. Czech Republic*, 12 July 2001, Communication No. 857/1999, para. 5.8; *Des Fours Walderode v. Czech Republic*, 30 October 2001, Communication No. 747/1997, para. 8.4. See also Human Rights Committee, *Karakurt v. Austria*, 4 April 2002, Communication No. 965/2000, para. 8.4 (finding a distinction between aliens made solely on the basis of their different nationalities concerning their capacity to stand for election to a works council to be discrimination in violation of Article 26).

⁴ CESCR, General Comment No. 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 18 May 2009, para. 30.

Human Rights⁵. So has the Inter-American Court of Human Rights (hereinafter the “IACtHR”) with regard to the American Convention on Human Rights⁶.

16. Furthermore, the General Assembly of the United Nations adopted in 1985 the Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live (resolution 40/144), which lists rights applicable to individuals present in States of which they are not nationals. A substantial number of the rights mentioned therein replicate provisions contained in the International Bill of Human Rights (the UDHR, the ICESCR and the ICCPR), emphasizing their applicability to non-citizens, albeit using somewhat different wording. This declaration provides further evidence that non-citizens are entitled to most of the human rights contained in these instruments.

17. While it is clear that non-citizens are entitled to human rights under international law, international law does allow States to draw distinctions between citizens and non-citizens in respect of certain rights, such as political rights and the right to enter a country. For example, Article 25 of the ICCPR provides that “[e]very citizen” shall have the right to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service; and Article 12, paragraph 4, states that no one shall be arbitrarily deprived of the right to enter “his own country”. In General Comment No. 15 of 1986, the Human Rights Committee acknowledged that “some of the rights recognized in the Covenant are expressly applicable only to citizens”⁷.

18. In addition, international law allows States to draw distinctions between citizens and non-citizens in time of public emergency. Article 4, paragraph 1, of the ICCPR permits States, in time of public emergency, to take measures derogating from their obligations under the Covenant, provided such measures do not involve discrimination on the ground of “race, colour, sex, language, religion or social origin”. Neither “nationality” nor “other status” is included in this list. Since Article 4, paragraph 2, makes certain rights non-derogable even in time of public emergency, no one, including non-citizens, can be deprived of these non-derogable rights. With regard to the other rights, however, States are not prohibited from

⁵ E.g. ECtHR, *Andrejeva v. Latvia*, Grand Chamber, judgment of 18 February 2009, No. 55707/00, para. 87; *Biao v. Denmark*, Grand Chamber, judgment of 24 May 2016, No. 38590/10, para. 93.

⁶ E.g. IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, advisory opinion of 17 September 2003, OC-18/03, para. 118; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, advisory opinion of 19 August 2014, OC-21/14, para. 53.

⁷ Human Rights Committee, General Comment No. 15, *supra* note 1, para. 2.

introducing restrictions that apply only to non-citizens in time of public emergency.

19. Furthermore, even in respect of the rights to which non-citizens are entitled under international law, States are not prohibited from making certain distinctions based on nationality. The monitoring bodies established by the international and regional human rights treaties use similar frameworks to determine whether a distinction constitutes discrimination. A differentiation of treatment is considered to constitute discrimination, unless the criteria for such a differentiation are reasonable and objective; in other words, unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved⁸. This general framework also applies to the question of whether particular distinctions based on nationality constitute discrimination. Thus, for instance, preferential treatment given to certain groups of non-citizens by virtue of international agreements may be considered reasonable and objective and therefore would not constitute discrimination⁹.

20. The Committee on the Elimination of Racial Discrimination (hereinafter the “CERD Committee”), in its General Recommendation XXX on *discrimination against non-citizens*, took note of the aforementioned protections that international law provides to non-citizens¹⁰. Article 1, paragraph 2, of CERD provides that “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”. In the General Recommendation, the Committee stressed that “Article 1, paragraph 2 . . . should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in [the UDHR, the ICESCR and the ICCPR]”¹¹. Similarly, the Committee noted:

“Although some of [the rights listed in Article 5 of CERD], such as the right to participate in elections, to vote and to stand for elec-

⁸ E.g. Human Rights Committee, General Comment No. 18 on non-discrimination, 9 November 1989, para. 13; ECtHR, *Biao v. Denmark*, *supra* note 5, para. 90; IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, advisory opinion of 19 January 1984, OC-4/84, para. 57.

⁹ E.g. Human Rights Committee, *van Oord v. Netherlands*, 23 July 1997, Communication No. 658/1995, para. 8.5; ECtHR, *C. v. Belgium*, judgment of 7 August 1996, No. 21794/93, para. 38.

¹⁰ CERD Committee, General Recommendation XXX on discrimination against non-citizens, 5 August 2004.

¹¹ *Ibid.*, para. 2. This paragraph essentially repeats what the Committee had already affirmed in 1993. CERD Committee, General Recommendation XI on non-citizens, 9 March 1993, para. 3.

tion, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”¹²

21. As I will explain in more detail below, the present dispute concerns solely “the interpretation and application of [CERD]” and not other rules of international law. The Court has no jurisdiction to make determinations as to whether the measures taken by the UAE comply with other rules of international law.

II. “RACIAL DISCRIMINATION” UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

1. The Court Has Jurisdiction with respect to the Interpretation or Application of the International Convention on the Elimination of All Forms of Racial Discrimination

22. The present dispute has been brought to the Court pursuant to Article 22 of CERD. According to this clause, the Court’s jurisdiction is limited to disputes “with respect to the interpretation or application of this Convention”. In order to determine whether the present dispute is one with respect to the interpretation or application of CERD, the Court needs to examine whether Qatar’s claims fall within the scope of CERD (Judgment, para. 72). For Qatar’s claims to fall within the scope of CERD, the measures of which it complains must be capable of constituting “racial discrimination” within the meaning of CERD. Accordingly, whether the measures at issue are capable of constituting racial discrimination under CERD is critically important in the present case. If they are not, the Court has no jurisdiction, irrespective of whether the same measures could constitute discrimination based on nationality under other rules of international law.

23. Just as it has done before this Court, the UAE raised before the CERD Committee the objection that its dispute with Qatar falls outside the scope *ratione materiae* of CERD. In accordance with Rule 91 of its Rules of Procedure, the Committee dealt with the preliminary issue of its competence *ratione materiae* as a question of admissibility¹³. For this Court, however, this objection raises an issue of jurisdiction. If the measures taken by the UAE are not capable of constituting racial discrimina-

¹² CERD Committee, General Recommendation XXX, *supra* note 10, para. 3.

¹³ CERD Committee, Decision on the jurisdiction of the inter-State communication submitted by Qatar against the United Arab Emirates, dated 27 August 2019, UN doc. CERD/C/99/3, para. 57.

tion under CERD, the dispute falls outside the jurisdiction *ratione materiae* of the Court.

24. Article 1, paragraph 1, of CERD defines “racial discrimination” as follows:

“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.”

25. The definition of “racial discrimination” under this provision has two elements. First, the measures must constitute a distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights. In other words, they must entail differential treatment. Secondly, the differential treatment must be based on one of the prohibited grounds, namely, “race, colour, descent, or national or ethnic origin”.

26. As noted by the Court, it is not disputed that the “expulsion order” and the “travel bans”, as well as the “measures to restrict broadcasting and internet programming by certain Qatari media corporations”, constitute differential treatment (Judgment, paras. 57 and 59). It is, however, disputed whether these measures are “based on” one of the grounds listed in Article 1, paragraph 1, of CERD and are thus capable of constituting racial discrimination.

27. In its first preliminary objection, the UAE maintains that the Court lacks jurisdiction *ratione materiae* over the present dispute because the alleged acts differentiate on the basis of “current nationality” and do not fall within the scope of CERD. Article 1, paragraph 1, of CERD, unlike the non-discrimination provisions of the other human rights instruments discussed above, contains neither a phrase like “such as” before the list of prohibited grounds, nor a catch-all term like “other status”. The wording of Article 1, paragraph 1, therefore clearly indicates that the list of prohibited grounds is exhaustive, and not illustrative. In order for differential treatment to constitute “racial discrimination”, it must be based on one of the specified prohibited grounds: “race, colour, descent, or national or ethnic origin”. “Nationality” is not included in the list. Nonetheless, Qatar argues that the term “national origin” encompasses nationality, including present nationality, while the UAE disagrees. The Court examines this issue in detail and concludes that “national origin” does not encompass current nationality (Judgment, paras. 74-105). I agree with

this conclusion of the Court. The next Section of this opinion will explain my reasoning, including additional reasons to those provided by the Court.

2. “Nationality” and “National Origin”

28. The prohibited grounds listed in Article 1, paragraph 1 — “race, colour, descent, or national or ethnic origin” — are inherent, immutable and permanent characteristics of individuals. “National origin” is not listed independently, but together with “ethnic origin” as “national or ethnic origin”. Thus, the text indicates a close relationship between the terms “national origin” and “ethnic origin”. Read in its ordinary meaning in this context, “national origin” can be understood as referring to the country or cultural group (nation) from which a person originates.

29. “Nationality”, on the other hand, is a legal bond a State creates with certain persons whom it accepts as its nationals. It is a person’s legal status as a citizen of a State. Nationality is an alterable condition and is fundamentally different in nature from the characteristics of individuals listed in Article 1, paragraph 1, which are inherent, immutable and permanent. This crucial difference suggests that nationality is not encompassed within any of the prohibited grounds listed in Article 1, paragraph 1, including “national origin”.

30. Article 1, paragraph 1, must also be read in the context of the Convention’s other provisions. Paragraph 2 of Article 1 provides that “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, and paragraph 3 provides that “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, *provided that such provisions do not discriminate against any particular nationality*” (emphasis added). It is reasonable to consider that this proviso was inserted in paragraph 3 because CERD does not otherwise prohibit discrimination based on nationality. Furthermore, in Article 5, States parties undertake to guarantee the right of everyone to equality before the law in the enjoyment of the listed rights, which include rights that are typically reserved for citizens, such as political rights.

31. Qatar argues that since paragraphs 2 and 3 of Article 1 are exceptions to the definition established in paragraph 1, they imply that nationality is a prohibited ground under the definition in paragraph 1. However, paragraphs 2 and 3 rather convey the drafters' intent to exclude differential treatment based on nationality from the scope of the Convention and to make sure that the Convention does not prevent States parties from regulating questions of nationality. They are not exceptions to paragraph 1, but instead clarify that the definition of racial discrimination in paragraph 1 should not be read to encompass distinctions based on nationality.

32. Interpreting "national origin" as not encompassing nationality is also consistent with CERD's object and purpose of eliminating racial discrimination "in all its forms and manifestations" (Preamble; see also Arts. 2 and 5). Although nationality is not encompassed within "national origin", Article 1, paragraph 1, still prohibits differential treatment based on nationality when it has the "purpose or effect" of discriminating on the basis of "national origin" (see Section II (3) below).

33. The *travaux préparatoires* of CERD confirm that the drafters did not intend nationality to constitute a ground of racial discrimination. The Court analyses the *travaux préparatoires* in detail (Judgment, paras. 89-97). I would draw attention to the following two points in particular. First, the definition of racial discrimination prepared by the Commission on Human Rights and presented to the Third Committee of the General Assembly in 1964 contained the following sentence: "[In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]" (See Judgment, para. 94.) Secondly, in the course of the work of the Third Committee, France and the United States of America proposed an amendment that would have provided that "the expression 'national origin' does not mean 'nationality' or 'citizenship'" and that the Convention was not applicable to distinctions "based on differences of nationality or citizenship"¹⁴. In withdrawing this proposal, the French delegate stated that the alternative text, which was eventually adopted as Article 1, was "entirely acceptable" to both France and the United States (see *ibid.*, paras. 90 and 96). The CERD Committee has also accepted that "the *travaux préparatoires* of the Convention show that in the different stages of the elaboration of the Convention . . . the ground 'national origin' was understood as not covering 'nationality' or 'citizenship'"¹⁵.

¹⁴ United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, "Draft International Convention on the Elimination of All Forms of Racial Discrimination", UN doc. A/6181, 18 December 1965, p. 12, para. 32.

¹⁵ CERD Committee, Decision on the admissibility of the inter-State communication submitted by Qatar against Saudi Arabia, dated 27 August 2019, UN doc. CERD/C/99/6, para. 12.

34. An additional reason to distinguish “national origin” from “nationality” relates to the different levels of scrutiny that are required in reviewing the lawfulness of differential treatment under each ground. Racial discrimination is one of the most invidious forms of discrimination. Differentiation of treatment based on a prohibited ground listed in Article 1, paragraph 1, of CERD is inherently suspect and must meet the most rigorous scrutiny. For example, the ECtHR has held that “[w]here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible”¹⁶. The ECtHR has gone so far as to affirm that “[n]o difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin is capable of being justified in a contemporary democratic society”¹⁷. In this way, if the difference in treatment is based on “race, colour, descent, or national or ethnic origin”, States bear a very heavy burden in demonstrating that the difference pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The scrutiny must be most rigorous and the threshold must be very high.

35. When the difference in treatment is based on nationality, the level of scrutiny required is different. Since non-citizens normally have no right to vote or be elected, and thus are unable to protect their interests through the political process, rigorous scrutiny is warranted for distinctions based on nationality. However, because States are entitled to make distinctions between citizens and non-citizens in respect of some rights or in certain circumstances, the level of scrutiny required need not be as rigorous as in cases of distinctions based on “race, colour, descent, or national or ethnic origin”. The ECtHR has declared that “very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention”¹⁸. While that threshold remains high, the scrutiny required by the ECtHR is not as rigorous and the threshold is not as high as for cases of distinctions based on “race, colour, descent, or national or ethnic origin”¹⁹.

¹⁶ ECtHR, *D. H. and Others v. Czech Republic*, Grand Chamber, judgment of 13 November 2007, No. 57325/00, para. 196.

¹⁷ ECtHR, *Biao v. Denmark*, *supra* note 5, para. 94.

¹⁸ ECtHR, *Andrejeva v. Latvia*, *supra* note 5, para. 87; *Biao v. Denmark*, *supra* note 5, para. 93.

¹⁹ See also ECtHR, *Biao v. Denmark*, *supra* note 5, joint dissenting opinion of Judges Villiger, Mahoney and Kjølbrot, para. 30 (“a wide margin of appreciation is afforded to member States in relation to differences in treatment on the basis of ‘other status’ [in this case, length of nationality], as opposed to ‘national’ or ‘ethnic’ origin”).

36. As noted in the Judgment, the Court has taken into account in its jurisprudence the practice of bodies and courts established by international and regional human rights conventions, in so far as it is relevant for the purposes of interpretation (Judgment, para. 77). In the present case, however, the Court considers the jurisprudence of regional human rights courts to be “of little help for the interpretation of the term ‘national origin’ in CERD”, because the purpose of the regional instruments “is to ensure a wide scope of protection of human rights and fundamental freedoms” (*ibid.*, para. 104). CERD prohibits *racial* discrimination and certainly differs from general human rights conventions, which prohibit many kinds of discrimination. Nevertheless, the general prohibition of discrimination includes the prohibition of *racial* discrimination and the other human rights conventions also list “national origin” among the prohibited grounds of discrimination. Therefore, the practice of bodies and courts established by international and regional human rights conventions is relevant to the interpretation of Article 1 of CERD.

37. Interpreting the term “national origin” in Article 1, paragraph 1, of CERD as not encompassing nationality is consistent with the interpretation of similar language in other human rights conventions by these bodies and courts. As noted above (see Section I), international human rights conventions usually contain non-discrimination provisions with a list of prohibited grounds of discrimination that includes “national origin” but not “nationality”. In interpreting these provisions, these bodies and courts typically distinguish “nationality” from “national origin” and do not consider the former to be encompassed by the latter.

38. Non-discrimination provisions of the core human rights treaties adopted by the United Nations do not contain nationality among the prohibited grounds of discrimination, except for the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, which lists “nationality” separately from and in addition to “national origin” as a prohibited ground (Arts. 1 and 7). In interpreting that Convention, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has explicitly treated “national origin” and “citizenship status” as two distinct grounds of discrimination²⁰.

²⁰ E.g. Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, para. 3.

39. Similarly, the Human Rights Committee does not view the term “national origin”, as used in the ICCPR, as encompassing nationality. Rather, it has taken the position that nationality falls within the term “other status”, which is listed along with “national origin” among the prohibited grounds of discrimination in Article 26 of the ICCPR. In *Gueye et al. v. France*, the case concerning the pensions of retired French soldiers of Senegalese nationality (see paragraph 13 above), the Committee held that there was discrimination based on nationality, while finding “no evidence to support the allegation that the State party has engaged in *racially* discriminatory practices *vis-à-vis* the authors”. In doing so, the Committee expressly stated that a differentiation by reference to nationality “falls within the reference to ‘other status’ in . . . article 26”²¹.

40. *Karakurt v. Austria*, another case before the Human Rights Committee, is even more illuminating. The case involved a claim by a Turkish national that a labour law of Austria which barred non-Austrian nationals from holding positions on works councils violated his rights under Article 26 of the ICCPR. Upon its ratification of the ICCPR, Austria entered a reservation that “Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of [CERD]”. The Committee considered that it was precluded by this reservation from examining the claim of the author of the communication in so far as it related to the distinction between Austrian nationals and non-nationals, but that it was not precluded from examining the author’s claim relating to the distinction made by Austria between nationals of the European Economic Area (EEA) and non-EEA nationals. Two members disagreed with the first conclusion of the Committee. They maintained that Austria’s intention was to harmonize its obligations under the ICCPR with those under CERD. Hence, in their view, “the Committee [was] precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on grounds of ‘race, colour, descent or national or ethnic origin’”. They contended, however, that nationality was not a ground of racial discrimination under CERD and, therefore, that the Committee was not barred by the Austrian reservation from examining the author’s claim on the distinction between Austrian nationals and non-nationals. For them, “Article 1, paragraph 2, of [CERD] makes it clear that citizenship is not covered by the notion of ‘national origin’”. By contrast, “distinctions based on citizenship fall under the notion of ‘other status’ in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of [CERD]”. They con-

²¹ Human Rights Committee, *Gueye et al. v. France*, *supra* note 2, para. 9.4; emphasis added.

cluded that “the Austrian reservation to article 26 does not affect the Committee’s competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds than those covered also by [CERD]”²².

41. The CESCR, like the Human Rights Committee, has taken the view that “national origin”, which is listed among the prohibited grounds of discrimination in Article 2, paragraph 2, of the ICESCR, “refers to a person’s State, nation, or place of origin”²³, and that nationality falls within “other status”²⁴.

42. As previously noted, regional conventions on human rights also contain non-discrimination provisions with lists of prohibited grounds of discrimination, which are recognized to be illustrative, and the monitoring courts and bodies established by these conventions have confirmed that the human rights provided for therein also apply to non-citizens (see paragraphs 10 and 15 above). These courts and bodies usually do not consider nationality as falling within “national origin”. For example, in *Luczak v. Poland*, the ECtHR stated that “a difference in treatment on the basis of nationality . . . falls within the non-exhaustive list of prohibited grounds of discrimination in Article 14”²⁵.

43. The CERD Committee has confirmed in its jurisprudence that differentiation of treatment based on nationality does not per se constitute “racial discrimination” under CERD. In *Diop v. France*, a Senegalese citizen claimed that France was in violation of CERD because his application for membership of the Bar of Nice had been rejected for the reason that he was not a French national. The Committee found no violation, stating that “the refusal to admit [the author] to the Bar was based on the

²² Human Rights Committee, *Karakurt v. Austria*, *supra* note 3, individual opinion by Committee Members Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting).

²³ CESCR, General Comment No. 20, *supra* note 4, para. 24.

²⁴ *Ibid.*, paras. 15 and 30.

²⁵ ECtHR, *Luczak v. Poland*, Fourth Section, judgment of 27 November 2007, No. 77782/01, para. 46. See also ECtHR, *Andrejeva v. Latvia*, *supra* note 5, paras. 87-92 (examining under Article 14 of the European Convention a distinction based on the “sole criterion” of nationality without any reference to national origin). For the IACtHR, see e.g. *Judicial Condition and Rights of Undocumented Migrants*, *supra* note 6, para. 101 (listing “nationality” separately from “national . . . origin”).

fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1”²⁶. Similarly, in *Quereshi v. Denmark*, the CERD Committee held that it could not conclude that the Danish authorities had reached an inappropriate conclusion in determining that offensive statements made at a party about “foreigners” did not amount to an act of racial discrimination, because “a general reference to foreigners does not at present single out a group of persons . . . on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin”²⁷.

44. For the reasons given by the Court (Judgment, paras. 74-105) and the reasons set out above, I am of the view that current nationality is not encompassed within “national origin” under Article 1, paragraph 1, of CERD and, therefore, that differentiation of treatment based on current nationality does not per se constitute “racial discrimination” within the meaning of CERD.

45. In accordance with Article 22 of CERD, the Court has jurisdiction only if the challenged measures are capable of constituting “racial discrimination” within the meaning of CERD. The next Section turns to examine whether differential treatment based on nationality, although it does not per se constitute racial discrimination under CERD, can nonetheless have the purpose or effect of discrimination on the basis of one of the prohibited grounds listed in Article 1, paragraph 1, of CERD and thus constitute racial discrimination indirectly.

3. *Distinctions Based on “Nationality” Can Have the Purpose or Effect of Discrimination Based on “National Origin”*

46. With regard to Qatar’s claim of indirect discrimination, the majority of the Court considers 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” (Judgment, para. 112), and concludes that the first preliminary objection of the UAE must therefore be upheld (*ibid.*, para. 114). I respectfully disagree. Qatar’s claim of indirect discrimination requires a detailed examination at the merits stage. The Court should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

²⁶ CERD Committee, *Diop v. France*, 18 March 1991, Communication No. 2/1989, para. 6.6.

²⁷ CERD Committee, *Quereshi v. Denmark*, 9 March 2005, Communication No. 33/2003, para. 7.3. See also CERD Committee, *P. S. N. v. Denmark*, 8 August 2007, Communication No. 36/2006, para. 6.4.

47. I shall start by examining the notion of indirect discrimination as embraced and developed by international human rights courts and bodies and the role it plays under CERD. Then, in the next Section, I will explain why Qatar’s claim of indirect discrimination should have been examined in detail at the merits stage.

48. The definition of racial discrimination in Article 1, paragraph 1, of CERD sets out two conditions. First, there must be a distinction, exclusion, restriction or preference “based on race, colour, descent, or national or ethnic origin”. Secondly, the differential treatment must have 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.

49. If differentiation of treatment based on nationality has the “purpose or effect” of discrimination based on one of the prohibited grounds listed in Article 1, paragraph 1, it is capable of constituting “racial discrimination” within the meaning of the Convention. The object and purpose of CERD is to eliminate racial discrimination “in all its forms and manifestations” (Preamble; see also Arts. 2 and 5). Ensuring that differentiation of treatment based on nationality does not have the “purpose or effect” of discriminating based on any of the prohibited grounds in Article 1, paragraph 1, is consistent with, and indeed required by, the object and purpose of the Convention.

50. Judge Crawford has acknowledged that “[a restriction] may constitute racial discrimination if it has the ‘effect’ of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD”²⁸. Likewise, Judges Tomka, Gaja and Gevorgian observed in their joint declaration appended to the Court’s first provisional measures Order in the present case that “[d]ifferences 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”²⁹.

51. International human rights courts and bodies, including the CERD Committee, have embraced and developed the notion of indirect discrimination. If a rule, measure or policy that is apparently neutral has an unjustifiable disproportionate prejudicial impact on a certain protected

²⁸ *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, declaration of Judge Crawford, p. 215, para. 7.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6.

group, it constitutes discrimination notwithstanding that it is not specifically aimed at that group. The analysis of disproportionate impact requires a comparison between different groups. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measure amounts to discrimination.

52. The CERD Committee has recognized in its practice the need to address not only direct but also indirect discrimination. In its 1993 General Recommendation XIV on *article 1, paragraph 1, of the Convention*, the Committee stated that “[i]n seeking to determine whether an action has an effect contrary to the Convention, it 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”³⁰. In *L. R. et al. v. Slovakia*, it recalled that

“the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.”³¹

53. The other human rights treaty bodies have likewise embraced the notion of indirect discrimination. The Human Rights Committee has recalled that

“article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons”³².

The CESCR has declared that “[b]oth direct and indirect forms of differential treatment can amount to discrimination under article 2, para-

³⁰ CERD Committee, General Recommendation XIV on article 1, paragraph 1, of the Convention, 17 March 1993, para. 2.

³¹ CERD Committee, *L. R. et al. v. Slovakia*, 7 March 2005, Communication No. 31/2003, para. 10.4. See also CERD Committee, General Recommendation XXXII on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, August 2009, para. 7.

³² Human Rights Committee, *Derksen v. Netherlands*, 1 April 2004, Communication No. 976/2001, para. 9.3. See also Human Rights Committee, *Althammer et al. v. Austria*, 8 August 2003, Communication No. 998/2001, para. 10.2.

graph 2, of the Covenant”, defining indirect discrimination as “laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination”³³. Similarly, the Committee on the Elimination of Discrimination against Women has declared that “States parties shall ensure that there is neither direct nor indirect discrimination against women”, and explained when indirect discrimination occurs³⁴.

54. Regional human rights courts have accepted the notion of indirect discrimination as well. For example, the ECtHR has stated that “a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group”³⁵. Similarly, the IACtHR has considered that

“a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups”³⁶.

55. The CERD Committee has applied the notion of indirect discrimination in the context of the treatment of non-citizens. In *B. M. S. v. Australia*, the Committee examined a quota system introduced by Australia that limited the number of doctors trained abroad who were permitted to pass the first stage of the medical examination process to be registered as a doctor in that country. The Committee held that it could not reach the conclusion that “the system works to the detriment of persons of a particular race or national origin” and therefore found that the facts as submitted did not disclose a violation of CERD. It nonetheless recommended to Australia to take measures and improve the transparency of the medical registration procedure to ensure that “the system is in no way discriminatory towards foreign candidates irrespective of their race

³³ CESCR, General Comment No. 20, *supra* note 4, para. 10.

³⁴ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, para. 16.

³⁵ ECtHR, First Section, *J.D. and A v. the United Kingdom*, judgment of 24 October 2019, Nos. 32949/17 and 34614/17, para. 85.

³⁶ IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, judgment of 24 October 2012, para. 235.

or national or ethnic origin”³⁷. In addition, the Committee has consistently asked States parties to report on the status of non-citizens, particularly migrants and refugees, who often belong to a single ethnic group and are susceptible to racial discrimination based on one of the prohibited grounds listed in Article 1, paragraph 1, of CERD. It has rejected an interpretation of Article 1, paragraph 2, that would “absolv[e] States parties from any obligation to report on matters relating to legislation on foreigners”, affirming that “States parties are under an obligation to report fully upon legislation on foreigners and its implementation”³⁸. After considering reports submitted by States parties, the Committee regularly adopts concluding observations that include recommendations on the treatment of non-citizens. These practices of the CERD Committee can be explained by the notion of indirect discrimination. While differentiation of treatment based on nationality does not per se constitute racial discrimination within the meaning of CERD, it constitutes racial discrimination if it has the “purpose or effect” of discrimination based on one of the prohibited grounds in Article 1, paragraph 1.

56. In September 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, adopted a Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance (hereinafter the “Durban Declaration”). The Durban Declaration stated that “racism, racial discrimination, *xenophobia* and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin” (Durban Declaration, para. 2; emphasis added), and that

“xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and . . . human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices” (*ibid.*, para. 16).

The drafters of the Durban Declaration considered that xenophobia against non-nationals “constitutes one of the main sources of contemporary racism”, presumably because it often has the purpose or effect of discrimination based on “race, colour, descent or national or ethnic origin”. Thus, the concern expressed by the Durban Declaration about xenophobia against non-nationals may also be explained by the notion of indirect discrimination.

³⁷ CERD Committee, *B. M. S. v. Australia*, 12 March 1999, Communication No. 8/1996, paras. 9.2, 10 and 11.1.

³⁸ CERD Committee, General Recommendation XI, *supra* note 11, para. 2.

57. In 2004, influenced by the Durban Declaration, the CERD Committee adopted General Recommendation XXX on *discrimination against non-citizens*³⁹. In its paragraph 4, the Committee proclaimed:

“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.”⁴⁰

The phrase “judged in the light of the objectives and purposes of the Convention” in this context may be understood as referring to situations where differential treatment based on citizenship has the purpose or effect of discriminating on the basis of a prohibited ground listed in Article 1, paragraph 1, of CERD, that is, indirect discrimination.

58. Finally, the notion of indirect discrimination presumably underlies the CERD Committee’s decision on the admissibility of the inter-State communication brought by Qatar against the UAE pursuant to Article 11 of CERD. The Committee concluded that the allegations submitted by Qatar “do not fall outside the scope of competence *ratione materiae* of the Convention”, relying primarily on its previous practice, in particular paragraph 4 of General Recommendation XXX⁴¹. As noted above, paragraph 4 can be explained by the notion of indirect discrimination. The Committee may have come to the above conclusion precisely because differentiation based on current nationality is capable of constituting racial discrimination indirectly.

4. *The Objection of the UAE Does Not Possess an Exclusively Preliminary Character*

59. In accordance with the notion of indirect discrimination explained in the previous Section, if differentiation of treatment based on current nationality has an unjustifiable disproportionate prejudicial impact on an identifiable group distinguished by “race, colour, descent, or national or ethnic origin”, it constitutes racial discrimination within the meaning of Article 1, paragraph 1, of CERD.

60. In the present case, Qatar has explicitly acknowledged that “it is on

³⁹ CERD Committee, General Recommendation XXX, *supra* note 10.

⁴⁰ *Ibid.*, para. 4. The Committee thus employed the framework it had used for discrimination under Article 1, paragraph 1, to examine differential treatment based on citizenship. See CERD Committee, General Recommendation XIV, *supra* note 30, para. 2.

⁴¹ CERD Committee, Decision on the admissibility of the inter-State communication submitted by Qatar against the United Arab Emirates, dated 27 August 2019, UN doc. CERD/C/99/4, paras. 57-63.

‘national origin’ that [it] bases its claims”⁴². It claims that the UAE has engaged in indirect discrimination against persons of Qatari national origin. It does not claim that the measures taken by the UAE were discriminatory on the basis of another protected ground — “race, colour, descent, or ethnic origin”. The UAE for its part contends that the measures complained of by Qatar do not constitute indirect discrimination on the basis of national origin. It maintains that no measure was taken, in terms of either purpose or effect, against any person other than those belonging to the group defined by Qatari nationality.

61. The task of the Court, therefore, is to determine whether the measures taken by the UAE on the basis of current nationality have an unjustifiable disproportionate prejudicial effect on an identifiable group distinguished by national origin. In order to make this determination, it is first necessary to identify a group that is distinguished by “national origin” and entitled to protection under CERD. Subsequently, it must be assessed whether the measures have an unjustifiable disproportionate prejudicial impact on that protected group compared to other groups.

62. With regard to the first issue, Qatar contends that Qataris can be distinguished by their “national origin” in the historical-cultural sense, defined by their heritage or descent, family or tribal affiliations, national traditions and culture, and geographic ties to the peninsula of Qatar. It argues that several factors, including dialect or accent, traditional dress and family affiliations, distinguish Qataris from other national communities in the Gulf region. Qatar relies mainly on an expert report in support of this contention⁴³. The UAE for its part argues that Qatari and Emirati people share geographical ties, as well as a common ancestry, language, heritage, traditions and culture, to such an extent that they are the same people, albeit with different nationalities. However, it submits no evidence in support of this contention. The UAE accepts that “[d]isguised discrimination would come within the scope of . . . CERD”, but maintains that “there is no discrimination, whether open or disguised, direct or indirect, *against a CERD protected group*”⁴⁴. Thus, the very existence of a protected group under CERD is contested by the Parties. Based on the pleadings of the Parties and the evidence submitted, the Court is not in a position to establish whether a CERD protected group can be distinguished by national origin. The materials before the Court do not provide it with all the facts needed to resolve the first issue.

⁴² CR 2020/9, p. 17, para. 19 (Amirfar).

⁴³ Memorial of Qatar (MQ), Vol. VI, Ann. 162, Expert Report of Dr. J. E. Peterson, 9 April 2019.

⁴⁴ CR 2020/8, p. 14, para. 10 (Bethlehem); emphasis in the original.

63. The second issue is whether the challenged measures have an unjustifiable disproportionate prejudicial impact on the protected group compared to other groups. Qatar claims that the measures have a “disproportionate impact” on the rights of Qataris⁴⁵. The UAE for its part contends that the measures are addressed to Qatari nationals, and not persons of Qatari national origin. It maintains that persons of Qatari national origin but not possessing Qatari nationality were neither addressed nor affected by the measures, and that persons of Qatari nationality but possessing some other national origin were nonetheless addressed and affected by the measures.

64. In order for the measures challenged here to constitute indirect discrimination, they must have an unjustifiable disproportionate prejudicial impact on the identified protected group in comparison with other groups. Qatar bears the burden of establishing such a disproportionate impact. On the other hand, the UAE has the burden of demonstrating that the measures were based exclusively on nationality. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measures amount to discrimination. The examination of these questions requires extensive factual analysis. In the same way as for the first issue addressed above, the materials before the Court do not provide it with all the facts necessary to address the second issue. Moreover, these issues constitute the very subject-matter of the dispute on the merits, and as such their determination should be left to the merits stage. The Court should rule on them only after the Parties have presented their arguments and evidence at that stage.

65. The majority of the Court considers that “[w]hile in the present case 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”, because they “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”. In its view, “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” (Judgment, para. 112). Accordingly, it concludes that the Court “does not have jurisdiction *ratione materiae* to entertain Qatar’s [claim of indirect discrimination]” (*ibid.*, para. 113).

66. I disagree with the majority’s analysis and its conclusion on Qatar’s claim of indirect discrimination. If it were proven on the facts that the measures have an unjustifiable disproportionate prejudicial impact on an

⁴⁵ MQ, para. 3.109; Written Statement of Qatar on the Preliminary Objections of the United Arab Emirates (WSQ), para. 2.111.

identifiable group distinguished by national origin and that they were not based exclusively on nationality, the measures would constitute racial discrimination within the meaning of the Convention, in accordance with the notion of indirect discrimination. The majority provides little analysis in support of its conclusion that while the measures based on current Qatari nationality may have “collateral or secondary effects” on Qataris, they 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”. By drawing that conclusion, the majority has in effect determined the dispute on the merits at the preliminary objections stage.

67. In the case concerning the *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 pointed out that, at the preliminary objections stage, it only needs to ascertain whether the challenged measures are capable of affecting the rights protected by CERD, and that it does not need to satisfy itself that the measures actually constitute racial discrimination within the meaning of Article 1, paragraph 1, of CERD, or to what extent certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. The Court explained that “[both of these] determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged . . . and are thus properly a matter for the merits”⁴⁶. The same is true for Qatar’s claim of indirect discrimination in the present case.

68. It is also a relevant consideration that Qatar developed its claim of indirect discrimination significantly during the preliminary objections stage. In the Court’s first provisional measures Order in the present case, five judges took the view that nationality was not encompassed within the term “national origin”⁴⁷. Judges Tomka, Gaja and Gevorgian observed in addition that “[the] possibility [of indirect discrimination] has not been suggested by Qatar”⁴⁸. During the oral proceedings on the preliminary objections in the present case, the UAE contended that “nowhere is [the] indirect discrimination claim referred to in Qatar’s Application” and that

⁴⁶ *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; emphasis added.

⁴⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, *Provisional Measures, Order of 23 July 2018*, I.C.J. Reports 2018 (II), joint declaration of Judges Tomka, Gaja and Gevorgian, p. 436, paras. 4-5; dissenting opinion of Judge Crawford, p. 475, para. 1; dissenting opinion of Judge Salam, pp. 481-483, paras. 2-7.

⁴⁸ *Ibid.*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6.

“to try and patch a leaky argument, Qatar’s counsel asserted . . . that Qatar’s is an indirect discrimination claim”⁴⁹. It should be noted, however, that in its Application, Qatar did refer to discrimination “*de jure* or *de facto*” on the basis of national origin and that in its Request for the indication of provisional measures, it requested that the Court order the UAE to cease and desist from any and all conduct that could result, “directly or indirectly”, in any form of racial discrimination against Qatari individuals and entities⁵⁰. In its Memorial, Qatar also contended that the UAE’s measures had a discriminatory “effect” on Qataris⁵¹. Nevertheless, it is true that the Applicant significantly developed its arguments on indirect discrimination at the preliminary objections stage, in its Written Statement⁵² and in particular in its oral pleadings. The Court properly points out in this regard that “the subject-matter of a dispute is not limited by the precise wording that an applicant State uses in its application” (Judgment, para. 61), and that “the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments” (*ibid.*, paras. 63 and 68).

69. It is nonetheless important to keep in mind that in preliminary objection proceedings, the parties have only one chance to exchange written submissions. After Qatar submitted its Written Statement in response to the UAE’s Preliminary Objections, the UAE had no further opportunity to refute in writing the arguments made by the Applicant therein, including those pertaining to the claim of indirect discrimination. During the oral proceedings, the Parties did exchange arguments on indirect discrimination, but only to a limited extent and not thoroughly. Qatar’s claim of indirect discrimination should have been examined in detail by the Court at the merits stage, after being fully apprised of the relevant facts, evidence and arguments of the Parties.

70. Under Article 79*ter*, paragraph 4, of the Rules of Court, when it is called upon to rule on a preliminary objection, the Court shall uphold or reject it, or “declare that, in the circumstances of the case, [it] does not possess an exclusively preliminary character”.

71. The Court has previously expressed its view on the resolution of preliminary objections as follows:

“In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the pro-

⁴⁹ CR 2020/8, p. 28, para. 25 (Sheeran).

⁵⁰ Application of Qatar, p. 60, para. 66; Request for the indication of provisional measures of Qatar, para. 19.

⁵¹ MQ, Chap. III, Sec. I.B.2.

⁵² WSQ, Chap. II, Sec. III.

*ceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits.*⁵³

In the present case, the Court does not have before it all facts necessary to decide the two issues raised in relation to Qatar's claim of indirect discrimination. They are precisely the issues that should be examined in detail by the Court at the merits stage. Furthermore, while the UAE's objection contains "both preliminary aspects and other aspects relating to the merits", it is "inextricably interwoven with the merits"⁵⁴. Thus, the present case fulfils the criteria laid down by the Court for finding that a preliminary objection does not possess an exclusively preliminary character.

72. For the reasons set out above, the Court should have declared that, in the circumstances of the present case, the first preliminary objection of the UAE does not have an exclusively preliminary character.

73. This conclusion is in line with the final submissions that the Applicant made at the end of the oral pleadings. It asked the Court to "(a) Reject the Preliminary Objections presented by the UAE; . . . (d) Or, in the alternative, reject the Second Preliminary Objection . . . and hold . . . that the First Preliminary Objection . . . does not possess an exclusively preliminary character"⁵⁵. Qatar's claim of indirect discrimination should have been examined in detail by the Court at the merits stage, on the basis of facts and evidence submitted by the Parties. The conclusion drawn in paragraph 72 above should not be interpreted as prejudging in any way the potential findings of the Court on the merits.

(Signed) IWASAWA Yuji.

⁵³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51; emphasis added.

⁵⁴ See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 133-134, para. 49; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 28-29, para. 50.

⁵⁵ CR 2020/9, p. 45, para. 9 (Al-Khulaifi).