

INTRODUCTORY NOTE TO APPLICATION OF THE INTERNATIONAL
CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION
(QATAR V. UNITED ARAB EMIRATES):
REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES (I.C.J.)
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Introduction

On July 23, 2018, the International Court of Justice issued its Order on Qatar's request for provisional measures in the *Qatar v. United Arab Emirates* ('UAE') case in which Qatar claims the UAE is responsible for violating the Elimination of all Forms of Racial Discrimination (CERD).¹ The Court has previously ordered provisional measures under the CERD in the context of the *Ukraine v. Russia* case² and in the *Georgia v. Russia* proceedings.³ As is already apparent in the Order and the dissenting and separating opinions, the *Qatar v. UAE* case raises important issues pertaining to the interpretation of racial discrimination on the basis of "national origin" under Art. 1(1) CERD as well as to the reading of the procedural conditions under Art. 22 CERD.⁴

Background

Qatar initiated proceedings against the United Arab Emirates (UAE) under the CERD and submitted its request for provisional measures to the Court on June 11, 2018.⁵ The complaint before the ICJ is the latest in a series of attempts by the Qatari state to challenge the legality of measures adopted against it by Saudi Arabia, the UAE, Bahrain and Egypt ('the Quartet') on June 5, 2017. On that date, in support of Bahrain and Saudi Arabia, the UAE announced, *inter alia*, that it was breaking off diplomatic relations with Qatar, that Qatari residents were prevented from entering UAE territory, that Qatari nationals were given 14 days to leave the UAE, and that it was closing off all forms of transport to Qataris, including the use of the UAE's airspace and seaports.⁶ Additional measures were adopted since then, notably against the Qatari news outlet Al-Jazeera.

The UAE is the only state among the Quartet to not have made a reservation against CERD Art. 22, which allows State Parties to submit a dispute with respect to the interpretation or application of the Convention before the ICJ. Prior to submitting the dispute to the ICJ the Parties must attempt to reach a resolution "by negotiation or by the procedures expressly provided for in [the] Convention", in particular submitting a communication to the Committee on the Elimination of Racial Discrimination ("the Committee") pursuant to CERD Art. 11.

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According to Qatar's application instituting proceedings, discrimination on basis of nationality is encompassed in CERD Art. 1(1) which prohibits, amongst others, acts of discrimination based on an individual's "national origin". This reading would be confirmed by the CERD Committee recommendation XXX.⁷ Qatar claims that by collectively expulsing Qatari nationals, the UAE is violating their basic human rights solely on the basis of their nationality in breach of CERD Articles 2 and 5. The UAE would also be in breach of Articles 4 and 7 by inciting anti-Qatari racial discrimination and hate speech. Finally, in failing to provide effective judicial protection and remedies, the UAE would be responsible for violating CERD Art. 6. Qatar thus requested provisional measures to prevent further, irreparable harm and to prevent the aggravation or extension of the dispute. In its oral arguments, the UAE countered, *inter alia*, that CERD Art. 1(1) does not encompass discrimination on basis of nationality⁸ and that Qatar's interpretation of the rights enshrined in CERD Art. 5 is too broad.⁹ Nor has Qatar provided sufficient evidence to substantiate its claims under the CERD, stating that there is no policy to expulse Qatari nationals or to separate UAE-Qatari families.¹⁰

The Court's Decision

As is well known, in order to grant provisional measures the Court needs to be satisfied that: it has *prima facie* jurisdiction, that the rights claimed by the Applicant are plausible, that there is a link between the rights whose protection is sought and requested provisional measures, and that there is a real and imminent risk that irreparable prejudice will be caused to those rights. The bench found these conditions were met, albeit by a split vote. By eight votes against seven, the judges granted three of the nine provisional measures requested by Qatar. It essentially ordered the UAE to reunite families that had been separated following the statement of June 5, 2017, to allow Qatari students to pursue their education in UAE and to enable Qataris affected by the measures to have access to tribunals and other judicial institutions. By eleven votes to four, the Court indicated that "both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

The Court first established that it has *prima facie* jurisdiction under Art. 22 of the Convention. There would be a dispute between Qatar and the UAE on the interpretation and application of the CERD¹¹ and at least one of the procedural conditions provided under Art. 22 has been met, that is the attempt to solve the dispute through negotiation.¹² An issue that arose in *Ukraine v. Russia* and that surfaced during the present proceedings, is whether the procedural conditions under CERD Art. 22 are cumulative or alternative. During the oral pleadings, the UAE contended that the conditions should be understood as cumulative. Although Qatar had submitted a communication to the Committee pursuant to Art. 11,¹³ during the hearings it submitted that the conditions in Art. 22 are alternative. It is anticipated that

the ICJ will provide clarity on the matter in the *Ukraine v. Russia* preliminary objections' judgment, which will be delivered prior to the preliminary objections phase in *Qatar v. UAE*, and that this will influence the claims put forward by Qatar and the UAE. It remains to be seen during the preliminary objections phase whether Qatar's current communication to the Committee will impede the Court's jurisdiction, an argument raised by the UAE during the oral proceedings.¹⁴

The majority found that the measures announced June 5, 2017 only target Qatari nationals living in the UAE and that no account was taken of individual circumstances of Qatari residents living in UAE. Thus some of the rights asserted in CERD Article 5 are plausible, for example "the alleged racial discrimination in the enjoyment of rights such as the right to marriage and to choice of spouse, the right to education, as well as freedom of movement, and access to justice".¹⁵ However this was contested by the dissenting judges, who found that in CERD Art. 1(1) the definition of racial discrimination and the Committee's General Recommendation 30 do not encompass discrimination on the basis of nationality. Based on this interpretation of "national origin", the dispute would fall outside the scope of the CERD and the rights Qatar claims would not be plausible.¹⁶ Meanwhile the Order differed the matter to a later stage.¹⁷ The dissenting judges not only disagreed with the majority's interpretation of the law, they also found that Qatar's claims failed on the facts. They were not convinced that Qatar provided sufficient evidence that the measures announced on June 5, 2017 were put into effect. Under these conditions there was no risk of irreparable prejudice nor was there urgency,¹⁸ contrary to what the majority decided.¹⁹

Conclusion

The *Qatar v UAE* Order is the third instance where the ICJ indicated provisional measures under the CERD. As the outcome of the *Georgia v. Russia* preliminary objections judgment of April 1, 2011 demonstrates,²⁰ it is not because provisional measures are granted that the judges will rule in the preliminary objections stage that they can hear the merits of the case. In addition to the debate regarding the interpretation of the procedural conditions under CERD Art. 22, the issues raised by the dissenting and separate opinions highlight the multiple challenges Qatar's application to the ICJ faces as the proceedings move forward.

ENDNOTES

¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Order on Provisional Measures (July 23, 2018), available at <https://www.icj-cij.org/en/case/172/orders> [hereinafter Order].

² *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), Order on Provisional Measures (April 19, 2017), available at <https://www.icj-cij.org/files/case-related/166/166-20170419-ORD-01-00-EN.pdf>.

³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Order on Provisional Measures (October 15, 2008), available at <https://www.icj-cij.org/files/case-related/140/140-20081015-ORD-01-00-EN.pdf>.

⁴ CERD, January 4, 1969, 660 UNTS 212.

⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings (June 11, 2018), available at <https://www.icj-cij.org/files/case-related/172/172-20180611-APP-01-00-EN.pdf> and Request for the Indication of Provisional Measures (June 11, 2018), available at <https://www.icj-cij.org/files/case-related/172/172-20180611-WRI-01-00-EN.pdf>.

⁶ Ministry of Foreign Affairs, UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar, available at <https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-06-2017-UAE-Qatar.aspx>.

⁷ UN Committee on the Elimination of Racial Discrimination, CERD General Recommendation XXX on Discrimination Against Non-Citizens, October 1, 2002, available at <http://www.refworld.org/docid/45139e084.html>.

⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), verbatim record of the oral hearings, June 28, 2018, available at <https://www.icj-cij.org/files/case-related/172/172-20180628-ORA-01-00-BI.pdf> (hereinafter ‘Oral hearings, June 28, 2018’), 40-48, ¶ 27-60.

⁹ *Id.* 51-53, ¶ 77-91.

¹⁰ *Id.* 10-11, ¶ 2-3, and 63-65, ¶ 24-31.

¹¹ Order, *supra* note 1, ¶ 14-28.

¹² *Id.* ¶ 36-38.

¹³ Application Instituting Proceedings, *supra* note 5, 14, fn 28.

¹⁴ Oral hearings, June 28, 2018, *supra* note 8, 26-27, ¶ 20-24.

¹⁵ Order, *supra* note 1, ¶ 54.

¹⁶ Order, *supra* note 1, Joint Declaration of Judges Tomka, Gaja and Gevorgian, available at <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-01-EN.pdf>; Dissenting Opinion of Judge Crawford, available at <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-04-EN.pdf>; Opinion Dissidente de M. le Juge Salam, available at <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-05-FR.pdf>.

¹⁷ Order, *supra* note 1, ¶ 27.

¹⁸ Order, *supra* note 1, Dissenting Opinion of Judge Bhandari, available at <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-03-EN.pdf>; and Dissenting Opinion of Judge Crawford, *supra* note 16.

¹⁹ Order, *supra* note 1, ¶ 67-71.

²⁰ Where the ICJ concluded that the procedural conditions under Art. 22 CERD were not met, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment on Preliminary Objections (April 1, 2011), available at <https://www.icj-cij.org/files/case-related/140/140-20110401-JUD-01-00-EN.pdf>.