

2023

Qatar v. UAE-- The Weight of Words

Samantha H. Hughes

Loyola University Chicago Law School

Follow this and additional works at: <https://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Samantha H. Hughes *Qatar v. UAE-- The Weight of Words*, 19 Loy. U. Chi. Int'l L. Rev. 231 ().

Available at: <https://lawcommons.luc.edu/lucilr/vol19/iss2/6>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

QATAR V. UAE — THE WEIGHT OF WORDS

Samantha H. Hughes*

Abstract

In 2021, the International Court of Justice decided, in *Qatar v. United Arab Emirates*, that the term “national origin” does not include current nationality as used in the International Convention on the Elimination of all Forms of Racial Discrimination (“CERD”). While the Court’s decision is supported by various legal arguments, the majority’s approach seems to stray from practices regarding interpreting ambiguous terms, and is contradictory to some of its earlier opinions. This Note uses CERD, other International Court of Justice opinions, and the dissenting opinions to the *Qatar v. United Arab Emirates* decision to critically analyze the strength of the majority’s opinion. It then compares the dissenting opinions to conclude which Justice wrote the strongest argument. Finally, this Note explores the potential impacts of the decision in *Qatar v. United Arab Emirates*.

Table of Contents

I. Introduction	232
II. Background	232
A. The Origin of the Dispute	232
B. Background on the International Convention on All Forms of Racial Discrimination (“CERD” or “the Convention”).....	233
C. History of Conflict between Qatar and United Arab Emirates (“UAE”).....	234
D. Background on the Alleged Discrimination	236
III. Discussion	237
A. The UAE’s Argument	237
B. Qatar’s Argument	238
C. Discussion of Majority Opinion	240
D. Discussion of Dissenting Opinion	242
E. The Court’s Opinion in a Related Matter	244
IV. Analysis	245
A. Majority Opinion.....	245
B. Dissenting Opinions	245
V. Impact	245
VI. Conclusion.....	247

* Samantha Hughes is a second-year law student at Loyola University Chicago School of Law. She is originally from Cincinnati, Ohio and attended the University of Alabama, where she obtained her degree in International Studies. While in law school, Samantha has enjoyed her various classes and roles, but she has particularly enjoyed her position on the International Law Review because of the numerous opportunities it provides to explore important global events and legal theories.

I. Introduction

Human rights legal documents aim to provide broad protection of human rights and freedoms without distinction among those they protect.¹ With growing racial tensions, discrimination, and violence around the world, it is important that people within these countries are afforded maximum protection. In today's world, many of the "barriers to racial equality" are facially neutral laws that may seem fair but actually have a discriminatory effect.² However, the recent 2021 International Court of Justice (the "ICJ" or the "Court") opinion in *Qatar v. United Arab Emirates* ("*Qatar v. UAE*") takes the position of a limited definition of "national origin," as it is used in the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD" or the "Convention"), and refuses to provide protection against discrimination of Qataris.³ The ICJ's decision in *Qatar v. UAE* on the meaning of "national origin" is too restrictive and unnecessarily limits the scope of CERD's protection, providing room for disguised discrimination. Instead, Judge Bhandari's dissenting opinion provides the strongest legal reasoning and conclusion because he found that the term "national origin" includes current nationality, and he supported his opinion with reference to linguistic sources to determine the term's meaning, as well as the intent of CERD.⁴

This paper will provide background on the history, scope, and purpose of CERD and the specific case at issue. It will then delve into the claims of each country, the majority's opinion, and each dissenting opinion. Finally, this paper will argue that Judge Bhandari's dissenting opinion provides the strongest argument on the application of "national origin" in *Qatar v. UAE*, and evaluate the opinion's textual argument, as well as its potential impact for future decisions.

II. Background

A. The Origin of the Dispute

In June 2017, the United Arab Emirates ("UAE") enacted and implemented discriminatory measures against Qataris, including prohibiting entry by Qatari nationals and requiring Qatari residents to leave the country within fourteen days, allegedly based on their national origin.⁵ The UAE Attorney General also issued a statement that any objections to the measures were considered crimes.⁶ Furthermore, the UAE blocked Qatari company websites and prohibited broadcasting

¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Unofficial Summary, 2021 I.C.J. 2, ¶ 103-04 (Feb. 4), <https://www.icj-cij.org/public/files/case-related/172/172-20210204-SUM-01-00-EN.pdf> [hereinafter *Qatar v. UAE*].

² Gay McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. AUDIOVISUAL LIBR. INT'L L. 1, 3, https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf.

³ *Qatar v. UAE*, *supra* note 1, ¶ 105.

⁴ *Id.* at 2-4 (Annex to Summary 2021/2).

⁵ *Qatar v. UAE*, *supra* note 1, ¶ 26.

⁶ *Id.*

Qatar v. UAE – The Weight of Words

television channels operated by Qatari companies.⁷ Subsequently, in June 2018, Qatar instituted proceedings against the UAE for these actions, alleging violations of CERD.⁸ The three racial discrimination claims Qatar asserted were: (1) the travel bans and expulsion orders were discriminatory and expressly mentioned Qatari nationals; (2) the restrictions on Qatari media corporations were discriminatory; and (3) the discriminatory measures resulted in indirect discrimination based on Qatari national origin.⁹

In its July 23, 2018 provisional measures order, the ICJ concluded that the UAE's acts were possibly within the scope of CERD.¹⁰ UAE then objected that the Court lacked jurisdiction *ratione materiae*, or subject matter jurisdiction, over the case because, in its opinion, the conflict did not fall within the scope of CERD.¹¹ The term “national origin” is central to the ICJ opinion in *Qatar v. UAE* because, as the Court found, it is determinative of whether the case falls under the ICJ's jurisdiction.¹²

Ultimately, the majority opinion in *Qatar v. UAE* held that the case was outside the scope of the Court's jurisdiction because it found the term “national origin” refers to a person's place of birth, and not their current nationality.¹³ The majority based this on several factors, including its conception of the traditional meaning of the term, the language of CERD, and the object and purpose of CERD.¹⁴

B. Background on the International Convention on All Forms of Racial Discrimination (“CERD” or “the Convention”)

CERD serves as the primary international organ for enforcement against racial discrimination and unjust measures.¹⁵ Entered into force in 1969, CERD was enacted in partial response to international events like WWII, African State independence and decolonization, and the recognized need to address the United Nations' obligation to eliminate racial discrimination and require a standard of substantive equality of outcomes.¹⁶ The Preamble of CERD sets its purpose as to promote observance of human rights and fundamental freedoms for all humans without distinction, to end practices of segregation, discrimination, and the exis-

⁷ *Qatar v. UAE*, *supra* note 1, ¶ 26.

⁸ *Id.* ¶ 27.

⁹ *Id.* ¶ 43.

¹⁰ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Provisional Measures Order, 2018 I.C.J. 406 (July 23).

¹¹ *Qatar v. UAE*, *supra* note 1, ¶ 39.

¹² *Id.* ¶ 105.

¹³ *Id.*

¹⁴ *Id.* ¶¶ 74-105; James Hendry, *A Narrowed Scope of “National Origin” Discrimination under CERD by the International Court of Justice*, QUEENS L. GLOB. JUST. J. (Mar. 30, 2021), <https://globaljustice.queenslaw.ca/news/a-narrowed-scope-of-national-origin-discrimination-under-cerd-by-the-international-court-of-justice>.

¹⁵ McDougall, *supra* note 2, at 1.

¹⁶ *Id.* at 1-3.

tence of racial barriers, and to “implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.”¹⁷

CERD, in Article 1, defines “racial discrimination” as:

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.¹⁸

Article 1 also contains a list of persons or groups that are protected under CERD.¹⁹ However, the Convention has also adopted General Recommendations to afford protection to groups that are not specifically listed, such as women, non-citizens (including refugees), and certain religious groups facing intolerance.²⁰ This demonstrates that CERD has adopted a broad definition of protected groups. One of the CERD’s specifically protected freedoms is that of movement.²¹

CERD evaluates a discriminatory act in terms of its nature, and not on whether the action intentionally or unintentionally has a discriminatory impact.²² An action under CERD is discriminatory if it has “an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national origin.”²³ CERD imposes several obligations on States who ratify the Convention. For example, States who ratify the Convention obligate themselves to “end racial discrimination ‘in all its forms.’”²⁴ It also urges States to condemn racial hate speech and propaganda, and requires the States to make it illegal to spread racially bigoted views and violent acts.²⁵ The jurisdictional scope of CERD is contained in Article 22, which provides that the Court has jurisdiction over disputes arising between member States relating to CERD’s application and interpretation.²⁶

C. History of Conflict between Qatar and United Arab Emirates (“UAE”)

There has been a long history of conflict between Qatar and the UAE, rooted in their divide in the 1700s, colonial pasts, and extreme differences in politics.²⁷ An important divisive factor between the countries, which arose over time, was their respective relationships with other nations, specifically Saudi Arabia.

¹⁷ G.A. Res. 2106 (XX), at 1-2, (Dec. 21, 1965).

¹⁸ McDougall, *supra* note 2, at 2; G.A. Res. 2106, *supra* note 17, at 2.

¹⁹ McDougall, *supra* note 2, at 2; G.A. Res. 2106, *supra* note 17, at 2.

²⁰ McDougall, *supra* note 2, at 2.

²¹ *Id.*; G.A. Res. 2106, *supra* note 17, at 3.

²² McDougall, *supra* note 2, at 3.

²³ *Id.* (citation omitted).

²⁴ *Id.*

²⁵ *Id.* at 5; *see also* G.A. Res. 2106, *supra* note 17, at 3.

²⁶ G.A. Res. 2106, *supra* note 17, at 9.

²⁷ KRISTIAN ULRICHSEN, QATAR AND THE GULF CRISIS, 17-41 (C. Hurst & Co. Ltd., 2020).

Throughout the 1930s, Qatar was subject to various expansion claims by Saudi officials, and oil prospects in the country led to further conflicts.²⁸ The Qataris' fears of border invasion by Saudi Arabia continued into the 1990s.²⁹ In response to these many threats, Qatar eventually adopted a political policy to “step beyond the overbearing ‘Saudi shadow’” and establish their own independence.³⁰ Qatar attracted criticism from other Arab states for accepting political exiles from other parts of the Middle East.³¹

The UAE was also in conflict with Saudi Arabia until 1974, when the two countries executed a border agreement.³² The relationship between the UAE and Saudi Arabia continued to be tense through the 2000s, but the two countries were eventually forced into a partnership with the onset of the Arab Spring.³³ Ultimately, the Arab Spring represented a diverging point for Qatar and the “troika” of Saudi Arabia, Bahrain, and the UAE, in which political conflict further divided the countries.³⁴

Qatar had a change of leadership in 1995 that Saudi Arabia, the UAE, and Bahrain opposed and actively attempted to reverse.³⁵ The UAE gave refuge to some Qatari leaders who opposed the country's politics, namely Sheikh Hamad bin Khalifa, who was a member of the royal family.³⁶ In 1996, Sheikh Khalifa successfully seized power as Emir through a coup, assisted by Saudi Arabia, the UAE, Bahrain, and Egypt.³⁷ The effects of the coup sustained throughout history and led to further conflicts between the countries.³⁸

Now, Qatar and the UAE are both members of the Gulf Cooperation Council (“GCC”), which also includes Saudi Arabia, Bahrain, Kuwait, and Oman.³⁹ The main objective of the GCC is to achieve unity among the member states and strengthen their diplomatic and economic relations.⁴⁰ UAE and Saudi Arabia, the two largest members of the GCC, have pushed to have unified GCC policy.⁴¹ This push may be attributable to their own desires of establishing a more dominant position.⁴² Qatar has challenged this by having independent foreign policy

²⁸ See ULRICHSEN, *supra* note 27, at 21.

²⁹ *Id.* at 29.

³⁰ *Id.* at 30.

³¹ *Id.* at 28.

³² *Id.* at 25.

³³ *Id.*

³⁴ *Id.* at 41.

³⁵ *Id.* at 30.

³⁶ *Id.*

³⁷ *Id.* at 31.

³⁸ See *id.* at 32.

³⁹ Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E), Memorial of the State of Qatar, 2019 I.C.J. 1, ¶ 2.6 (Apr. 25) [hereinafter Qatar Pleadings].

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 2.7.

⁴² *Id.*

and maintaining relationships with UAE competitors.⁴³ Another source of conflict between Qatar and the GCC has been its support and funding of an independent Middle Eastern news channel.⁴⁴ The UAE has expressly opposed this, labeling it as a “conduit of ‘hate speech’ and ‘pro-terrorist output.’”⁴⁵

In its preliminary objections, the UAE challenged Qatar’s statements of the facts and claimed that it instituted the measures at issue because of Qatar’s violation of the Riyadh Agreements, in which Qatar promised to terminate its support of regional threats, such as terrorists and violent extremist groups.⁴⁶ One provision of the Riyadh Agreements provides that if any country breached compliance, then the other “GCC countries were permitted to implement any ‘appropriate action to protect their security and stability.’”⁴⁷ The UAE claimed that Qatar breached the agreements by failing to prosecute terrorists living in Qatar and supporting the Muslim Brotherhood.⁴⁸ The UAE also alleged Qatar provided millions of dollars to extremist and terrorist groups.⁴⁹ Therefore, the UAE claimed that its response, namely the enactment of the three measures at issue in *Qatar v. UAE*, was lawful.⁵⁰

D. Background on the Alleged Discrimination

Qatar characterized the UAE’s measures as “a series of coordinated and interconnected measures against Qataris, which separately and together, have had a serious impact on their fundamental rights.”⁵¹ The first UAE measure was announced on June 5, 2017.⁵² This measure (i) ordered “Qatari residents and visitors in the UAE” to leave the country within 14 days for “precautionary security reasons”; (ii) enacted an unconditional travel and entry ban against “Qatari nationals”; (iii) banned “UAE nationals” from travel or entry into Qatar; and (iv) closed UAE airspace and seaports “for all Qataris” within 24 hours.⁵³

Media outlets quickly reported on the announcement, and under a Qatari narrative, stated the basis of the UAE’s motivation for the measures was to protect against Qatar and its citizens as security threats.⁵⁴ The announcement allegedly created panic among Qataris and a fear for their safety and that they would be seen as a threat to the UAE, making them potential victims of abusive police acts

⁴³ Qatar Pleadings, *supra* note 39, ¶2.7.

⁴⁴ *Id.* ¶ 2.8

⁴⁵ *Id.*

⁴⁶ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Preliminary Objections, 2019 I.C.J. 1, ¶ 19 (Apr. 29) [hereinafter UAE Preliminary Objection].

⁴⁷ *Id.* ¶ 22 (internal citation omitted).

⁴⁸ *Id.* ¶ 23.

⁴⁹ *Id.* ¶ 24.

⁵⁰ *Id.* ¶ 30

⁵¹ Qatar Pleadings, *supra* note 39, ¶ 2.10.

⁵² *Id.* ¶ 2.11.

⁵³ *Id.* ¶ 2.12.

⁵⁴ *Id.* ¶ 2.15.

or arrest.⁵⁵ This purported fear was supported by stories from Qataris of hearing constant anti-Qatari messaging and becoming victims of vandalization.⁵⁶

Next, Qatar stated that the travel bans were immediate and severe, particularly to citizens of both countries who previously moved between the two countries freely.⁵⁷ These bans affected students, people who owned property in the UAE, families with cross-national ties, and companies.⁵⁸ Although the UAE made modifications to the bans, Qatar claimed none sufficiently ameliorated their discriminatory application, nor the effects on Qataris.⁵⁹

The third contested UAE measure were the restrictions on speech, specifically suppressing criticism of the UAE's actions and criminalizing Qatar sympathy.⁶⁰ Qatar claimed this "allowed the UAE to pursue its anti-Qatar narrative unfettered. . . leading to the creation and perpetuation of a climate of fear and hostility against Qatar and Qataris."⁶¹ Qatar further alleged that the UAE's suppression of free speech was paired with anti-Qatari propaganda of false news and state-sponsored hate speech, which fostered more hostility towards Qataris.⁶² Qatar ended its review of the measures in its Application with a powerful statement:

[T]he UAE's incitement and perpetuation of this climate of racial hatred and xenophobia, and its silencing of both Qatari voices and any potentially dissenting voices, in addition to causing harm in their own right, have also exacerbated the effects of the UAE's other measures against Qataris, and made their impacts particularly devastating for Qataris and their families.⁶³

III. Discussion

A. The UAE's Argument

In response to Qatar's filings, the UAE presented preliminary objections to the Court's jurisdiction.⁶⁴ "The UAE argue[d] that the term 'national origin' does not include current nationality and that the Convention does not prohibit differentiation based on [an individual's] current nationality."⁶⁵ The UAE asserted that

⁵⁵ See Qatar Pleadings, *supra* note 39, ¶¶ 2.19-2.20.

⁵⁶ *Id.* ¶ 2.25.

⁵⁷ *Id.* ¶ 2.33.

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 2.35.

⁶⁰ *Id.* ¶ 2.36.

⁶¹ *Id.*

⁶² *Id.* ¶ 2.45.

⁶³ *Id.* ¶ 2.61.

⁶⁴ Qatar v. UAE, *supra* note 1, ¶ 25.

⁶⁵ *Id.* ¶ 74.

CERD is limited to racial discrimination, and not discrimination generally.⁶⁶ Thus, the UAE took a narrow approach to interpreting race and ethnicity.⁶⁷

The UAE rested its argument on four main points.⁶⁸ First, the UAE claimed that when considered with the other terms in Article 1, which, in its view, were “immutable characteristics,” “national origin” could not include “nationality” since nationality can change over time.⁶⁹ Second, the UAE argued that the drafters would have used the term “nationality” if they intended “national origin” to have that meaning.⁷⁰ Third, the UAE referenced other provisions of the CERD and stated, because Article 1(2) “permits differential treatment on the basis of nationality” and Article 1(3) “expressly uses the word ‘nationality,’” it must mean “national origin” does not include “nationality.”⁷¹ Finally, the UAE turned to Article 5 of the CERD and argued that, because States could not discriminate based on “national origin” against certain enumerated rights, including “nationality” within “national origin,” it would mean that States could not afford certain rights to citizens and not to non-citizens.⁷² It contrasted this with the fact that many States do treat citizens and non-citizens differently, both practically and under law or regulations.⁷³

B. Qatar’s Argument

Qatar believed that the UAE’s measures fell within the scope of CERD.⁷⁴ Qatar argued that the term “national origin,” as used in Article 1, paragraph 1 of CERD, includes current nationality.⁷⁵ In Qatar’s view, the purpose of CERD is to outlaw discrimination of individuals because of “certain shared characteristics. . . which extends beyond the concept of ‘race’ alone to include, among others, national origin.”⁷⁶ Qatar asserted that the only interpretation of CERD consistent with its plain text results in “national origin” including nationality-based discrimination, and not just racial discrimination.⁷⁷

First, Qatar claimed that the plain meaning of “national origin” includes current nationality.⁷⁸ Qatar used dictionary definitions, including in different lan-

⁶⁶ Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E*), Written Statement of the State of Qatar Concerning the Preliminary Objections of the United Arab Emirates, 2019 I.C.J. 1, ¶ 2.16 (Aug. 30) [hereinafter *Qatar’s Written Statement*].

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 2.30.

⁶⁹ *Id.* ¶ 2.31.

⁷⁰ *Id.* ¶ 2.33.

⁷¹ *Id.* ¶ 2.36.

⁷² *Id.* ¶ 2.44.

⁷³ *Id.*

⁷⁴ *Qatar v. UAE*, *supra* note 1, ¶ 74.

⁷⁵ *Id.*

⁷⁶ *Qatar’s Written Statement*, *supra* note 66, ¶ 2.15.

⁷⁷ *Id.* ¶¶ 2.17-2.18, 2.20.

⁷⁸ *Id.* at 25.

guages, to demonstrate that “nation” refers to both where a person lives and to a common descent, race or culture, and that “origin” normally means where a person comes from, but does not exclude a person’s current State-association.⁷⁹ Thus, from Qatar’s view, “national origin” includes “nationality” when “taken in context and in accordance with the CERD’s object and purpose.”⁸⁰ Qatar also relied on jurisprudence of human rights courts, including the European Court of Human Rights, to show that certain courts have held that discrimination on the basis of nationality includes discrimination based on national origin.⁸¹

Next, Qatar argued that the context of the term “national origin” in Article 1 of CERD shows that it encompasses current nationality.⁸² Qatar supported its interpretation by emphasizing that the term “national origin” has an independent meaning from “ethnic origin,” which is also in Article 1 of CERD.⁸³ So, Qatar argued the terms were meant to cover separate characterizations, and that because where a person is born could reasonably fit under “ethnic origin,” in order for “national origin” to have any purpose, it must also include current nationality.⁸⁴ Moreover, Qatar explained that Article 1, section 2, of CERD, which excludes distinctions between citizens and non-citizens from its scope as stated in Article 1, Section 1, does not “permit differential treatment on the basis of nationality,” but instead permits States to distinguish between “their own citizens and non-citizens.”⁸⁵

Qatar claimed this argument was consistent with the Committee’s interpretation.⁸⁶ Qatar explained how this supported its argument by saying,

the inclusion of Article 1(2) suggests two points: first, that non-citizens generally fall under the protection of Article 1(1), and second, that Article 1(1) prohibits nationality-based discrimination. If Article 1(1) did not include nationality-based discrimination, Article 1(2) would be superfluous: none of the other grounds of discrimination in Article 1(1) implicate the treatment of non-citizens or non-nationals *as such*.⁸⁷

Qatar also challenged some of the UAE’s points. First, it contradicted the UAE’s assertion that current nationality could not be within the CERD’s scope because it could change over time, with the reference to “restrictive citizenship regimes” in Gulf countries that depend on immutable characteristics, namely birthplace and heritage.⁸⁸ This, Qatar claimed, shows nationality cannot be

⁷⁹ Qatar’s Written Statement, *supra* note 66, ¶¶ 2.23-2.24.

⁸⁰ *Id.* ¶ 2.29.

⁸¹ *Id.* ¶ 2.26.

⁸² *Id.* at 31.

⁸³ *Id.* ¶ 2.32.

⁸⁴ *Id.* ¶ 2.32.

⁸⁵ *Id.* ¶ 2.37.

⁸⁶ *Id.*

⁸⁷ *Id.* ¶ 2.40.

⁸⁸ *Id.* ¶ 2.31.

wholly excluded from “immutable characteristics.”⁸⁹ Next, Qatar challenged the UAE’s claim that the drafters did not intend to include “nationality” because they chose not to use that word.⁹⁰ Qatar claimed that the drafters’ interchangeable use in the CERD between “nationality” and “national origin” showed that they intended both terms to include, among other characteristics, present nationality.⁹¹

Finally, Qatar claimed that “nationality” must fit within the term “national origin” so that CERD could accomplish its purpose of eliminating racial discrimination.⁹² Under this approach, Qatar claimed the Court was required to interpret terms to allow the treaty to achieve its stated goals and purposes.⁹³ Qatar provided various examples and arguments to establish that in order for CERD to fully accomplish its goals, nationality-based discrimination must be prohibited, and that the CERD Committee had “expressly relied on ‘national origin’ to assess violations of the Convention in the context of nationality-based discrimination between different non-citizen groups.”⁹⁴ In conclusion, Qatar claimed that the ordinary meaning, context of CERD, and its purpose all support interpreting “national origin” to include “nationality.”

C. Discussion of Majority Opinion

Ultimately, the majority of the Court agreed with the UAE and found that the term “national origin” does not encompass current nationality, and that therefore the UAE’s allegedly discriminatory measures did not fall within CERD’s scope.⁹⁵ The majority based its opinion on three main grounds: the term’s ordinary meaning, read in light of CERD’s purpose, the term’s meaning from supplementary means of interpretation, and the practice of the CERD Committee.⁹⁶

The Court initially aimed to interpret the term in accordance with its ordinary meaning, as required by the Vienna Convention.⁹⁷ Reading the term in its context to racial discrimination, the Court said that the ordinary meaning of “national or ethnic origin” refers to a person’s relationship to a group at birth, while the term “nationality” relates to whether a person is within the power of the State and can change over someone’s life.⁹⁸ The Court noted that CERD also lists other characteristics to define racial discrimination, like race, that are decided at birth.⁹⁹

Next, the Court turned to reading “national origin” as used in CERD. The majority concluded that because the Convention, in Article 1, states that laws

⁸⁹ Qatar’s Written Statement, *supra* note 66, ¶ 2.31.

⁹⁰ *Id.* ¶ 2.34.

⁹¹ *Id.* ¶ 2.35.

⁹² *Id.* at 44.

⁹³ *Id.* ¶ 2.55.

⁹⁴ *Id.* at 44-49.

⁹⁵ *Qatar v. UAE*, *supra* note 1, ¶ 105.

⁹⁶ *Id.* at 5-7.

⁹⁷ *Id.* ¶ 78.

⁹⁸ *Id.* ¶ 79.

⁹⁹ *Id.*

concerning nationality and laws discriminating between citizens and non-citizens are outside its scope, it impliedly means “national origin” does not encompass current nationality.¹⁰⁰ The majority ended this part of its analysis by examining how the term related to the purpose of CERD, specifically looking at its Preamble.¹⁰¹ The Court framed CERD’s purpose as to “eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth.”¹⁰²

It is important to note that the Court did not support those conclusions with any scientific findings, and failed to consider race as a social construct.¹⁰³ The Court rationalized its reasoning with the assertion that because CERD intends to eliminate practices that establish superiority between racial groups, it could not then intend to protect against all differentiation, including based on nationality.¹⁰⁴ The Court further supported its conclusion with evidence that many States do have legislation that differ between people based on nationality.¹⁰⁵

The Court then turned to the supplementary materials the parties used in their arguments on the meaning of “national origin.”¹⁰⁶ Focusing on the drafts of CERD, the Court found the drafters intended to definitionally distinguish “national origin” and “nationality”¹⁰⁷ Thus, the Court concluded CERD does not include current nationality.¹⁰⁸

Finally, the majority addressed whether its interpretation of “national origin” fit within the Committee’s practices. It first noted that in a General Recommendation, the Committee stated that

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.¹⁰⁹

However, the Court stated it was not required to conform its interpretation around the Committee’s, and therefore could diverge if it found rules of treaty interpretation supported the finding of a different meaning.¹¹⁰ Following its prior explanations surrounding the terms’ meanings, the Court then concluded that be-

¹⁰⁰ *Qatar v. UAE*, *supra* note 1, ¶ 80.

¹⁰¹ *Id.* ¶ 86.

¹⁰² *Id.*

¹⁰³ Dianne Desierto, *A Study in Contrasting Jurisdictional Methodologies*, *BLOG EUR. J. INT’L L.* (Feb. 15, 2021), <https://www.ejiltalk.org/a-study-in-contrasting-jurisdictional-methodologies-the-international-court-of-justices-february-2021-judgments-in-iran-v-usa-and-qatar-v-uae/>.

¹⁰⁴ *Qatar v. UAE*, *supra* note 1, ¶ 86-88.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* ¶ 89-97.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 97.

¹⁰⁹ *Id.* ¶ 98.

¹¹⁰ *Id.* ¶ 101.

cause “national origin” is determined at birth, and “nationality” can change, the object and purpose of CERD does not encompass current nationality.¹¹¹ In summation, the Court determined its interpretation of the term “national origin” in CERD meant current nationality did not fall within its scope, and refused to allow the answers to the legal and factual questions to proceed to the merits stage.¹¹²

D. Discussion of Dissenting Opinion

Six judges ultimately did not join the majority’s opinion on dissented on both issues.¹¹³ Judge Iwasawa did not join the majority, but instead appended a separate opinion.¹¹⁴ He agreed with the majority’s conclusion, but supported his opinion on different grounds.¹¹⁵ The five dissenters included President Yusuf, Judge Cançado Trindade, Judge Sebutinde, Judge Bhandari, and Judge Robinson.¹¹⁶ President Yusuf appended a declaration to the Court’s judgment, while Judges Sebutinde, Bhandari, and Robinson appended dissenting opinions. Judge Cançado Trindade did not have a published opinion, so there will be no discussion of his position. This section, therefore, discusses the four published dissenting opinions.

First, President Yusuf disagreed with the majority on its conclusions and its reasoning on two issues: the subject-matter of the dispute, and the Court’s jurisdiction regarding the indirect discrimination claim.¹¹⁷ President Yusuf wrote that the way the Court “framed the subject-matter of the dispute [was] in a manner totally disconnected from [Qatar’s] written and oral pleadings,” because while Qatar claimed the UAE’s actions were racially discriminatory based on a person’s “national origin,” the Court’s entire judgment rested on “nationality,” therefore not addressing the specific argument Qatar raised.¹¹⁸

In President Yusuf’s opinion, the majority erred in its decision because it failed to give adequate attention to the applicant’s framing of the issue, thereby departing from the Court’s “long-standing jurisprudence.”¹¹⁹ Therefore, President Yusuf determined that if the majority followed its jurisprudence, it would have found that Qatar’s claims of racial discrimination fit within CERD’s scope.¹²⁰ Regarding the majority’s determination regarding “indirect discrimination,” President Yusuf thought that Qatar’s claims of racial discrimination raised

¹¹¹ *Qatar v. UAE*, *supra* note 1, ¶ 98-101.

¹¹² *Id.* ¶ 105; *Desierto*, *supra* note 103.

¹¹³ *Qatar v. UAE*, *supra* note 1, ¶ 115.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1 (Annex to Summary 2021/2).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

questions of fact, and that therefore the determination of the merits of those claims should have happened at the merits stage.¹²¹

Next, Judge Sebutinde wrote a dissenting opinion. First, she wrote that the UAE's objection was not worthy of a preliminary disposition of the case, and a decision of the effects of the racial discrimination could only be decided during the merits stage of the dispute.¹²² Second, she held that the UAE's second preliminary objection, that Qatar could not pursue action simultaneously from the CERD Committee and the ICJ, should have been rejected because CERD does not expressly prohibit concurrent actions, and because both bodies serve "fundamentally distinct roles."¹²³ Finally, Judge Sebutinde wrote that the Court should have rejected the UAE's third preliminary objection because it had not met the threshold of "exceptional circumstances" to warrant a claim dismissal on the grounds of "abuse of process."¹²⁴

Judge Bhandari dissented based on disagreement regarding UAE's first preliminary objection and the Court's rejection of jurisdiction.¹²⁵ He framed the central issue as "whether the term 'national origin' in Article 1, paragraph 1, of CERD encompasses current nationality."¹²⁶ Judge Bhandari took a linguistic approach to his opinion on the difference between the two words.¹²⁷ He emphasized that the term "national origin" is the combination of two words, and when they are analyzed, "'national origin' refers to a person's belonging to a country or nation."¹²⁸ Based off this reasoning, Judge Bhandari concluded current nationality "is an event encompassed within the broader term 'national origin'" and that the terms were not sufficiently different to warrant exclusion of the matter based on the terms.¹²⁹ Judge Bhandari also supported his opinion with the explanation that practically, the UAE's measures targeted at Qatari nationals were "inevitable also affected persons of Qatari 'national origin' since Qatari nationals are primarily persons of Qatari heritage."¹³⁰

Judge Robinson disagreed with the upholding of the the UAE's "first preliminary objection of no jurisdiction."¹³¹ First, he concluded that Qatar was correct that the term "national origin," as used in Article 1 of CERD, includes nationality.¹³² In his opinion, "nothing in the ordinary meaning of the term 'national origin' [renders] it inapplicable to a person's current nationality."¹³³ Judge

¹²¹ *Qatar v. UAE*, *supra* note 1, at 1.

¹²² *Id.* at 1-2.

¹²³ *Id.*

¹²⁴ *Id.* at 2.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 4.

¹³² *Id.*

¹³³ *Id.*

Qatar v. UAE – The Weight of Words

Robinson found the majority's stance that nationality is changeable while national origin is instead acquired at birth was questionable and not persuasive enough to hold the matter fell outside CERD jurisdiction.¹³⁴ Further, Judge Robinson disagreed with the majority's diversion from the CERD Committee's recommendation that "national origin" includes nationality, and he also "noted that the majority did not offer any explanation for not following it."¹³⁵ He therefore dissented because he found the Court did have jurisdiction.¹³⁶

E. The Court's Opinion in a Related Matter

The International Court of Justice faced a similar issue in *Iran v. USA*, a judgment it rendered in February 2021.¹³⁷ In *Iran v. USA*, Iran alleged that the United States' sanctions violated a Treaty of Amity, Economic Relations, and Consular Rights ("Treaty of Amity") between the two countries.¹³⁸ The United States argued that the subject matter of the dispute was another treaty, and so the Court was forced to determine whether the measures fell within the scope of the Treaty of Amity.¹³⁹ In determining the court's subject matter jurisdiction, the Court stated:

to identify the subject-matter of the dispute, the Court bases itself on the application, as well as on the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim.¹⁴⁰

This demonstrates that the Court's test and approach for determining subject-matter in *Iran v. USA* was very different from that in *Qatar v. UAE*, as discussed earlier. In this case, the court heavily relied upon the claimant's framing of the issue in its interpretation.¹⁴¹ Another methodical distinction between the Court's approach in these two cases was its willingness to allow *Iran v. USA* to proceed to the merits stage with some legal and factual ambiguities left unanswered, whereas in *Qatar v. UAE* it took the completely opposite approach.¹⁴²

¹³⁴ *Qatar v. UAE*, *supra* note 1, at 4-5.

¹³⁵ *Id.* at 5.

¹³⁶ *Id.* at 4-5.

¹³⁷ Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Rep. of Iran v. U.S.), Unofficial Summary, 2021 I.C.J. (Feb. 3), <https://www.icj-cij.org/sites/default/files/case-related/175/175-20210203-SUM-01-00-EN.pdf> [hereinafter *Iran v. U.S. Summary*]; *see* Desierto, *supra* note 103.

¹³⁸ *Iran v. U.S. Summary*, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (quoting *Iran v. US Judgment on Preliminary Objections*).

¹⁴¹ *Id.*

¹⁴² *Id.*

IV. Analysis

A. Majority Opinion

The concern with the majority's opinion in this case is that the Court "decide[d] questions of law and fact at the jurisdictional stage, without fully explaining its reasons for doing so."¹⁴³ Some people "criticized the Court [in this decision] for not referring to some of its assumptions" that "national origin" is an "inherent characteristic" and "for not examining the idea that 'race is a social construct.'"¹⁴⁴ Furthermore, its opinion is not entirely convincing because the Court itself has issued contradictory opinions, exemplified in *Iran v. USA*.¹⁴⁵ Ultimately, the majority's opinion is not convincing enough because it jumped to a conclusory dismissal, that it not only failed to fully support, but has contradicted other cases and matters.

B. Dissenting Opinions

On the other hand, some of the dissenting opinions are stronger than the majority, and Justice Robinson's dissent is the strongest.¹⁴⁶ Although all dissenters agreed, for different reasons, that the Court should not have dismissed the case at this stage, Judge Robinson's opinion is the most persuasive.¹⁴⁷ First, his approach to interpreting the term "national origin" is both more logical and fits with the Court's approach in other matters.¹⁴⁸ Second, he is fully respecting the CERD Committee's interpretation of the term, which the majority seemingly failed to do.¹⁴⁹ Robinson's opinion is also stronger from the majority's because he seems to recognize the possibility that the answer to the questions could be different once it proceeds past the preliminary stage; he is ultimately deciding that it is too early to entirely dismiss the case based on the meaning of two words.¹⁵⁰

V. Impact

The "international society" at large has taken a firm stance against racism and racial discrimination.¹⁵¹ However, what those terms include has proven to "divide the Court and has now engendered a conflict between the ICJ and the CERD Committee."¹⁵² The ICJ represents the primary judicial system of the United Nations, but has also, in other cases and conflicts, relied on the interpretation of the

¹⁴³ *Iran v. U.S. Summary*, *supra* note 137.

¹⁴⁴ Hendry, *supra* note 14.

¹⁴⁵ See Desierto, *supra* note 103.

¹⁴⁶ See *Qatar v. UAE*, *supra* note 1, at 2 (Annex Summary 2021/2).

¹⁴⁷ See generally *id.* at 1-8.

¹⁴⁸ *Id.* at 4.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ Geir Ulfstein, *Qatar v. United Arab Emirates*, 116 AM. J. INT'L L. 397, 400 (2021).

¹⁵² *Id.* at 401.

drafter of specific instruments, such as the CERD Committee.¹⁵³ Although it is unclear who should hold a position of interpretation supremacy, this decision seems to cast the ICJ as the ultimate interpreter, and diminishes the influence from human rights perspectives.¹⁵⁴ Therefore, the Court's decision in this case could create an unstable front in the realm of international law, especially concerning human rights. Additionally, because the Court's approach with many human rights cases often appears to be similar to that in treaty interpretation and human rights court's decisions, it is possible this case and the Court's interpretation of "national origin," will impact its decisions in future disputes within those areas.¹⁵⁵

Furthermore, this decision appears to add another challenge to the already difficult battle of eliminating racial discrimination.¹⁵⁶ Despite measures and promises to fight racial discrimination, like the Universal Declaration of Human Rights (1948) and CERD, "many individuals and groups belonging to the minority continue to experience various forms of discrimination."¹⁵⁷ The Court's decision in *Qatar v. UAE* also arguably seems to challenge the CERD's own recognition of "the importance of decision-making. . . 'to detect and prevent at the earliest possible stage developments in racial discrimination'" through its refusal to hear this case.¹⁵⁸ It is possible to imagine how the UAE's actions could lead to further discrimination, and by limiting the definition of "national origin," the Court seems to be disregarding this duty.

Lastly, this decision affects both the people who are the direct targets of the measure, as well as victims of discrimination in the broader context. First, because the ICJ was unwilling to hear this case for lack of jurisdiction, the Qatari people are still subject to acts of alleged discrimination. Furthermore, the decision of the Court in *Qatar v. UAE* potentially leaves large group of people unprotected, while at the same time protecting many forms of indirect discrimination.¹⁵⁹ Statelessness remains a huge problem throughout the world, impacting more than an estimated twelve million people, which means for many people "their current nationality is their 'national origin.'"¹⁶⁰ These people are already especially vulnerable, facing "denial of a legal identity when they are born, access to education, health care, marriage and job opportunities" and more.¹⁶¹ The United Nations has even identified that those affected by stateless-

¹⁵³ Ulfstein, *supra* note 151, at 402.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 401.

¹⁵⁶ See Alex Otieno, *Eliminating Racial Discrimination: The Challenges of Prevention and Enforcement of Prohibition*, U.N. CHRON., <https://www.un.org/en/chronicle/article/eliminating-racial-discrimination-challenges-prevention-and-enforcement-prohibition> (last visited Jan. 6, 2023).

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*

¹⁵⁹ Hendry, *supra* note 14.

¹⁶⁰ U.N. Office of the High Commissioner, *OHCHR and the Right to a Nationality*, U.N., <https://www.ohchr.org/en/nationality-and-statelessness> (last visited Apr. 5, 2023).

¹⁶¹ *Id.*

ness tend to be members of already disadvantaged groups.¹⁶² Therefore, rejecting the idea that “national origin” cannot encompass current nationality only further denies these people protection and human rights that others enjoy.¹⁶³

VI. Conclusion

The majority’s opinion, especially when considered in context with its *Iran v. USA* opinion, exemplifies the “argumentative practice” of international law.¹⁶⁴ International law is sometimes described as an “argumentative practice” because of the relationship between “political claims” and “international legal reasoning [that oscillates] between arguments on legal normativity and arguments on concreteness and social facts.”¹⁶⁵ This kind of legal practice, though, tends to make decisions unpredictable and demonstrates that the International Court has a more potent power of discretion, which therein emphasizes its power to impact the world of international law.¹⁶⁶

The first major impact of the Court’s decision in *Qatar v. UAE* is how it limits the protections of CERD to characteristics a person obtains at birth.¹⁶⁷ This means that CERD could potentially not be an option for challenging laws that discriminate for characteristics that are not ascribed at birth, which seriously limits the people who will be protected under CERD. However, *Qatar v. UAE* is not the sole case in this area of law, and due to somewhat contradictory cases, like *Iran v. USA*, it is not especially clear if the Court will take the same stance in other cases for perpetuity.

Another impact of this case is that many in the international law field are left with more questions, and arguably distrust in the predictably of International Court of Justice decisions.¹⁶⁸ Further, the question stands on where the true balance is between the Court’s interpretation of a treaty term and the treaty creating body.¹⁶⁹ Ultimately, though, the country of Qatar is left with the burning question of whether the alleged acts of discrimination would have ultimately been found to violate CERD, had they fit the Court’s ultimate interpretation of those two words.

¹⁶² OHCHR and the Right to a Nationality, *supra* note 160.

¹⁶³ *See id.*

¹⁶⁴ *See* Desierto, *supra* note 103.

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ Hendry, *supra* note 14.