# DISSENTING OPINION OF JUDGE ROBINSON

1. I disagree with the finding in paragraph 115 of the Judgment upholding the first preliminary objection of the United Arab Emirates ("UAE") and the finding that the Court has no jurisdiction to entertain the Application filed by Qatar.

2. It is settled that for the Court to have jurisdiction to entertain the Application, the violations of which Qatar complains must fall within the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "Convention" or "CERD")[1].

## First Preliminary Objection

3. In paragraph 56 of the Judgment the Court refers to Qatar's characterization of the dispute as follows:

> "[t]he first is its claim arising out of the 'travel bans' and 'expulsion order', which make express reference to Qatari nationals. The second is its claim arising from the restrictions on Qatari media corporations. Qatar's third claim is that the measures taken by the UAE, including the measures on which Qatar bases its first and second claims, result in 'indirect discrimination' on the basis of Qatari national origin."

4. The majority has wrongly concluded that the claims arising from the first and third measures do not fall within the provisions of the Convention.

### *A. The First Claim*

5. Article 1 of CERD reads as follows:

> "1. 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

[1] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing 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."

*The meaning of the term "national origin" in Article 1 (1) of the Convention*

6. The dispute between the Parties concerns the question whether the term "national origin" in the definition of racial discrimination in Article 1 (1) of CERD excludes or encompasses differences of treatment based on nationality. Qatar is correct in its argument that the term "national origin" encompasses differences of treatment based on nationality.

7. By virtue of customary international law, the provisions of Article 1 of the Convention must be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the Convention. According to the ordinary meaning of the words "national" and "origin", the term "national origin" refers to a person's historical relationship with a country where the people to which that person belongs are living. This relationship may extend for a short period or for a relatively long period. In some cases, the person may, while living in another country and having the citizenship of that country, retain citizenship of the country with which he also has a historical relationship. In other cases, he may not. There is nothing in the ordinary meaning of the term "national origin" that would render it inapplicable to a person's current nationality. The majority has argued as a general proposition that, while nationality is changeable, national origin is a characteristic acquired at birth and for that reason is immutable. As a general proposition, the validity of this statement is questionable. It is too stark in its presentation of the difference between nationality and national origin and does not reflect the nuances distinguishing one from the other.

8. National origin refers not only to the place from which one's forebears came; it may also refer to the place where one was born. For that reason, it is clear that national origin can encompass nationality because the place where one was born can give rise to both one's nationality as well as one's national origin. The directive of 5 June 2017 referred not only to Qatari nationals but also to Qatari residents and visitors in the UAE and the Qatari people, the latter categories clearly referring to

national origin. As a matter of fact, the vast majority of persons who acquire nationality on the basis of *jus sanguinis* will spend the rest of their lives holding that nationality. In Qatar and the UAE, nationality is acquired on the basis of *jus sanguinis*. Therefore, a person who acquires nationality on the basis of *jus sanguinis* will, more likely than not, retain that nationality along with his national origin. In that sense, that person's nationality would seem to be just as unchangeable as his national origin.

9. The majority has relied on the Court's Judgment in *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 20, to support its reasoning that nationality is subject to the discretion of the State. However, that case, decided in 1955, reflects a substantially State-centred approach to international law that has been affected by subsequent developments in human rights law. For example, it is now generally accepted that a State is not entirely free to deprive a person of his nationality where this act would render the person stateless.

10. The ordinary meaning of the term "national origin" must be read in its context and in light of the Convention's object and purpose.

11. As far as context is concerned, the exceptional régime in Article 1 (2) providing for distinctions between citizens and non-citizens is only intelligible on the basis that the definition of racial discrimination in Article 1 (1) also covers such distinctions; if those distinctions were not part of the definition that includes discrimination on the basis of national origin, there would be no need to provide for the exception in this paragraph. There is no merit in the UAE's submission that the paragraph was inserted "for the avoidance of doubt"; the drafters inserted the paragraph because they considered it necessary, since nationality was encompassed by national origin. Article 1 (2) therefore must be seen as carving out from Article 1 (1) an exceptional régime relating to distinctions that a Contracting Party may make between citizens and non-citizens; in effect, Article 1 (2) allows States parties to derogate from the prohibition of discrimination in Article 1 (1) by measures that distinguish between citizens and non-citizens. While Article 1 (3) allows States to adopt legal provisions that distinguish between nationals and non-nationals, importantly it requires that those provisions must not discriminate against a particular nationality. In that regard, it is noteworthy that Qatar alleges that the UAE's measures discriminate against persons of the specific nationality of Qatar. As far as the aim of the Convention is concerned, its Preamble and operative provisions make clear that its purpose is to eliminate racial discrimination in *all* its forms, an objective that would not be achieved if States were left entirely free to discriminate between citizens and non-citizens. Interpreting "national origin" in the Convention as encompassing nationality is therefore consistent with the Convention's object and purpose. Consequently, the ordinary meaning of the term "national origin" when read in its context and in light of the Con-

vention's object and purpose encompasses differences of treatment based on nationality.

*The* Travaux Préparatoires

12. Recourse may be had to the *travaux préparatoires* to confirm the ordinary meaning of the term "national origin" set out above. The *travaux préparatoires* show that during the discussion in the United Nations Third Committee of what ultimately became Article 1 (1), some members understood the term "national origin" to include nationality or understood it as equated with the word "nationality". On the other hand, some delegations argued that the inclusion of the term "national origin" might oblige States to give to non-citizens in their territory rights that would normally be reserved for their own citizens. To take account of the latter concern, France and the United States proposed an amendment, the effect of which was to exclude "nationality" from the definition of "national origin". However, this proposal met with strong opposition and was withdrawn. A nine-power compromise proposal was made and accepted, resulting in the addition to Article 1 of paragraphs 2 and 3. France and the United States indicated that the compromise proposal was "entirely acceptable". The acceptance of the compromise proposal indubitably indicated the rejection of the exclusion of nationality from the concept of national origin. The majority attempts to make much of the fact that the proposal was a compromise. Of course, the text of paragraph 2 is a compromise, but its meaning is clear. It reflects the agreement reached between the position of those States, such as France and the United States, that the Convention should not prevent States parties from distinguishing between citizens and non-citizens, and the position of those States who were concerned that the term "national origin" should not be construed narrowly and restrictively. The entire Committee therefore accepted the compromise that the term "national origin" would encompass current nationality, but would leave States with the ability to reserve certain rights to their citizens. The *travaux préparatoires* therefore confirm the interpretation resulting from the ordinary meaning of the term "national origin".

*The work of the CERD Committee and General Recommendation XXX*

13. On 1 October 2002, 32 years after its establishment, the CERD Committee adopted General Recommendation XXX, paragraph 4 of which provides that

> "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in 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".

This recommendation replaced General Recommendation XI of 1993. Qatar embraces General Recommendation XXX, paragraph 4, because, in its view, the UAE's measures had a disproportionate impact on Qataris. The UAE on the other hand argues that this recommendation does not reflect the law and should not be followed by the Court. The matter is of some importance because the Court has in the past taken account of the work of the United Nations supervisory bodies of human rights treaties. While the Court is not bound by the recommendations of such bodies, in *Ahmadou Sadio Diallo*, it indicated that it would attach "great weight" to the interpretations of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") by the Human Rights Committee[2]. The contribution, made by the CERD Committee to the protection of human rights by its monitoring of the implementation of the Convention, cannot be questioned. There is no reason why the Court should not attach great weight to the recommendations of the CERD Committee (which is properly seen as the guardian of the Convention), if they are not in conflict with international human rights law or general international law. This approach will promote the achievement of the clarity, consistency and legal security which the Court referred to in *Ahmadou Sadio Diallo*[3]. It is regrettable that, in this case, the Court did not follow the CERD Committee's recommendation. Notably, the majority did not offer any explanation for not following it.

14. Paragraph 4 of Recommendation XXX reflects the tug between State power and the stress placed in international law after World War II on the fundamental rights of the individual. The paragraph seeks to strike a balance between measures taken by a State in the exercise of its sovereign powers and the extent to which those measures may properly derogate from a fundamental human right. The principle of proportionality is applied in the implementation of all the major global and regional human rights instruments; it is also applied by the multitude of States, which have, in their national constitutions and laws, provisions relating to the protection of fundamental rights and freedoms that have been influenced by the Universal Declaration of Human Rights and the European Convention on Human Rights. The principle of proportionality is applied by all regional human rights courts. My own view is that the principle may very well reflect a rule of customary international law. It is a principle

[2] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 663-664, para. 66.
[3] *Ibid.*

that is applied in the interpretation and application of human rights instruments even though the word "proportionality" may not be found in those instruments. The principle requires States to justify a derogation from a fundamental human right by showing that the derogatory measure serves a legitimate aim and is proportional to the achievement of that aim. As the Court itself held in its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* in its interpretation of Article 12 (3) of the ICCPR, the derogation must be the least restrictive measure needed to achieve that aim[4]. Once the Court is satisfied that measures taken by a State in the implementation of Articles 1 (2) and 1 (3) are properly seen as raising a question of derogation from the prohibition of racial discrimination under Article 1, it must, if it is to be consistent with the development of the *corpus* of international human rights law since 1945, apply the principle of proportionality in order to determine whether that question arises. Such a question, if it arises, falls within the provisions of the Convention and would be an important aspect of the dispute relating to its interpretation or application.

15. If the Convention is interpreted as not requiring the application of the principle of proportionality set out in paragraph 4 of General Recommendation XXX, it would be an outlier among the number of human rights treaties that have been adopted since World War II. Moreover, the Committee's recommendation is wholly consistent with the purpose of the Convention to eliminate all forms of racial discrimination, since it confirms that States are not free to adopt measures that disproportionately discriminate against persons on the basis of their nationality. The effect of the recommendation is not to prevent States from adopting measures that differentiate between citizens and non-citizens. It only prohibits measures that cannot be justified on the basis that they serve a legitimate aim and are proportional to the achievement of that aim.

16. In the circumstances of this case and in the context of Article 1 (2) and (3) of the Convention, it was open to the UAE to adopt measures distinguishing between United Arab Emirates' citizens and the citizens of other States, including those of Qatar. However, in adopting those measures, the UAE was obliged to ensure that the measures served a legitimate aim and were proportionate to the achievement of that aim. Qatar has argued that Qataris were disproportionately targeted by the measures. Moreover, although Article 1 (3) allows a State to adopt measures providing for distinctions on the basis of nationality, it specifically

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 192-193, para. 136.

provides that such measures must not discriminate against a particular nationality.

17. Paragraph 4 of General Recommendation XXX becomes relevant in light of Qatar's claim that the measures disproportionately targeted persons of Qatari citizenship. As noted before, the principle of proportionality becomes applicable once a treaty or national law provides for what is in effect a derogation from a fundamental human right. In the particular context of this case therefore, Qatar's claim that the measures disproportionately affected Qataris on the basis of their nationality, which is encompassed by the term "national origin", falls within the provisions of the Convention.

18. In light of the foregoing, Qatar's first claim falls within the provisions of CERD.

### *B. The Second Claim*

19. I am in agreement with the finding of the majority that Qatar's claim relating to discrimination against media corporations does not fall within the provisions of the Convention.

### *C. The Third Claim*

20. According to the Convention, the term "racial discrimination" refers to a restrictive measure that is based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of impairing the enjoyment, on an equal footing, of fundamental human rights. However, as Judge Crawford stated in his declaration in *Ukraine* v. *Russian Federation*,

> "[t]he definition of 'racial discrimination' in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds"[5].

Qatar relies on this analysis by Judge Crawford in order to distinguish between a restrictive measure that is based expressly on one of the protected grounds (direct discrimination) and one that, although not based expressly on one of those grounds, nonetheless directly implicates a group on one of the protected grounds. Translated to the circumstances of this

[5] *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.

case, Qatar's submission is that although the UAE's measures do not on their face refer to persons of Qatari national origin, as a matter of fact by their effect they directly implicate persons of Qatari national origin. Qatar describes this as indirect discrimination. Although Qatar has framed this part of its case as one of indirect discrimination, in my view, since labels such as "indirect discrimination" are very often misleading, it is better to concentrate on the essence of Qatar's claim.

21. Some comments on indirect discrimination are appropriate. First, the label "indirect discrimination" may be misleading because, for the so-called indirect discrimination to occur, the measures in question must by their effect directly implicate persons in the protected group. In this case, the measures directly implicate persons of Qatari national origin. There is nothing that is indirect in the way the measures by their effect implicate persons of Qatari national origin. Second, the kind of treatment described by Qatar as indirect discrimination occurs frequently in the practice of States. Third, another drawback with the label "indirect discrimination" is that it would seem to suggest or imply that indirect discrimination is inferior to what is called direct discrimination, and for that reason, there may be a tendency to undervalue indirect discrimination. This tendency is evident in paragraph 112 of the Judgment where the majority speaks of "collateral or secondary effects" of the measures. Fourth, the kind of restriction that gives rise to indirect discrimination is frequently disguised discrimination; the discrimination may be difficult to detect because, on its face, the restrictive measure is not based expressly on racial or other grounds.

22. For all these reasons, it is regrettable that the majority did not address Qatar's third claim in a satisfactory manner.

23. The substance of Qatar's third claim is that while the travel ban, the expulsion order and the restrictions on media corporations do not, on their face, purport to discriminate against Qataris on the basis of their national origin — that is, are not based expressly on national origin — by their effect, they constitute discrimination on that basis.

24. It must be emphasized that Qatar's third claim operates independently of its claim that the measures discriminated against Qataris by reason of their nationality; Qatar argues that by reason of their effect the measures also discriminate against Qataris because of their cultural links with Qatar and, therefore, by reason of their Qatari national origin. The examples given by Qatar of how Qataris have been impacted by the measures are a classical illustration of discrimination based on national origin; they show precisely how Qataris were impacted by the measures by reason of their cultural ties with Qatar as a nation. It follows, therefore, that Qatar's third claim, based as it is on the effect of the measures on Qataris as persons of Qataris national origin, is not affected by the majority's finding in paragraph 105 that "the measures complained of by Qatar

in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD". Qatar's third claim is that the measures that are based on national origin, a protected ground in the Convention, fall within the provisions of the Convention.

25. Qatar's examples of how the UAE's measures as a matter of fact directly implicated persons of Qatari national origin on the basis of identification with Qatari national traditions and culture, their dress and accent include the following:

> "(i) As a general matter, Qatar argues that the measures target and discriminate against 'Qataris' as a historical-cultural community and not merely as holders of a Qatari passport. In this regard, Qatar cites the statement of a person, not a Qatari national who had lived in Qatar for over 60 years and who was denied entry into the UAE because, as he stated, 'the immigration officer saw me as Qatari because of the way I was dressed'; on the other hand, his travel companions who were not wearing traditional Qatari dress were allowed to enter. That person stresses that prior to the measures he had travelled to and from the UAE on many occasions without experiencing any problem at the border.
>
> (ii) Another person who identifies completely as Qatari, but is not a Qatari citizen relates that he was subjected to interrogation by the UAE's officials merely because his passport showed that he was born in Qatar."

There is merit in Qatar's argument that the treatment to which these persons were subjected at the border on the basis of their national origin resulted from the travel ban which targeted Qataris. Consequently, the obligation under the Convention not to discriminate against persons on the basis of their national origin was engaged and the treatment falls within the provisions of the Convention.

26. Despite these clear examples of how the measures discriminate by their effect on persons of Qatari national origin, the majority concluded that they do not constitute racial discrimination within the meaning of the Convention. In paragraph 112 of the Judgment the majority makes a statement of questionable validity. It states that

> "[i]n the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari

citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention".

This finding is questionable because in this part of its case Qatar is not complaining about the measures that are based on current Qatari nationality. As the majority itself noted in paragraph 60 of the Judgment: in setting out Qatar's complaint, Qatar's case in relation to what it describes as indirect discrimination is independent of its complaint about the measures on the basis of nationality; Qatar has made it clear that this part of its case is based on national origin, which is one of the protected grounds in the definition of racial discrimination. The second comment that may be made on this finding relates to the regrettable reference to the "collateral or secondary effects" of the measures. The finding is regrettable because it suggests that what Qatar describes as indirect discrimination is equivalent to what the majority describes as the collateral or secondary effects of the measures. As noted before, the essence of Qatar's third claim is that these measures directly implicate Qataris on the basis of their national origin. There is nothing collateral or secondary about the impact of the measures on Qataris on the basis of their national origin. Moreover, in this statement the majority seems to be referring to the collateral or secondary effects of the measures on persons of Qatari national origin; however, this is not at all clear from its reference to those effects on "persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE", since that categorization of persons could also refer to persons of Qatari nationality.

27. The majority does not seek to substantiate its finding by way of reason; it proceeds by way of assertion by simply stating that "the various measures of which Qatar complains do not, either by their purpose or their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin" (paragraph 112 of the Judgment). It is not clear what the majority means by racial discrimination against Qataris as a "distinct social group". It certainly could not mean that the majority does not accept that Qataris constitute a distinct social group, since uncontradicted evidence was given by Qatar through its expert, Mr. John Peterson, that Qataris constitute such a group. If the majority accepts that Qataris constitute a distinct social group, then certainly cogent evidence has been provided to illustrate the discriminatory effect of the measures on Qataris as such a group, and therefore, on the basis of their national origin. For what could be more illustrative of the distinctiveness of the social group to which a person belongs than his dress and speech and, if this cultural linkage is exploited for discriminatory reasons as a result of the travel ban, why is that treatment not capable of constituting racial discrimination on the basis of national origin? The majority is silent as to a reason but strong in its oracular declaration

that "the measures of which Qatar complains . . . are not capable of constituting racial discrimination within the meaning of the Convention". In its reasoning, the majority does not even pause to identify and examine the factual circumstances cited by Qatar as giving rise to discrimination by effect on the basis of national origin. If there is an inherent element in these measures that renders them incapable of resulting in discrimination by effect on the basis of national origin, the majority has not identified it.

28. In sum, Qatar's claim that the measures by their effect discriminated against Qataris on the basis of their national origin falls within the provisions of the Convention.

## Conclusion

29. In light of the foregoing, the first preliminary objection should have been rejected as the dispute between the Parties concerns the interpretation or application of the Convention, and the Court should have found that it has jurisdiction *ratione materiae* under Article 22 of CERD in respect of the Qatar's first and third claims in its first preliminary objection.

*(Signed)* Patrick L. Robinson.