

**AN ANALYSIS OF THE INTERNATIONAL JURISPRUDENCE CONCERNING THE STATE  
OF QATAR'S PARALLEL LEGAL ACTIONS AGAINST THE UAE BEFORE THE CERD  
COMMITTEE AND THE INTERNATIONAL COURT OF JUSTICE**

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**ABSTRACT**

*In this paper, I explore the trending international jurisprudential conflict bordering on the State of Qatar's institution of parallel proceedings against the United Arab Emirates ("UAE"), before two international bodies – the Convention on the Elimination of All Forms of Racial Discrimination Committee ("CERD Committee") – a treaty body, and the International Court of Justice (the "ICJ"). This research invites reflection on the novelty of the above and allied questions arising from this case. My review of the existing literature indicates that the question of coexistent proceedings at a treaty body and the ICJ has not been previously brought up for consideration before the ICJ. More so, the ICJ has not been asked to terminate such simultaneous proceedings, as the United Arab Emirates' ("UAE") request for provisional measures of March 22, 2019, seems to indicate. This paper addresses three main questions emanating from the preliminary stage of the proceedings before the ICJ, namely: the problem of reading nationality into national origin; the question of overlapping legal proceedings in two international dispute settlement fora with Lis Pendens and hierarchy of these venues in view; and the issue of preconditions to jurisdiction of the ICJ in light of Article 22 of the CERD.*

*I commence by capturing the ICJ's reasons for granting provisional measures in favour of Qatar before proceeding to consider arguments of disputants on the preliminary objections raised by the UAE. I will then proffer legal opinions on all three questions mentioned above and thereafter provide a fitting summary. My considered view is that first, there was needless filibustering on the issue of "national origin" and "nationality" as the CERD Convention impliedly envisaged both terminologies in its grouping of racial discrimination. Second, on the issue of overlapping legal proceedings, it is my take that an international treaty body like the CERD Committee will be incapable of creating a situation of conflicting judgments such as affects our international jurisprudence. And finally, on the issue of procedural preconditions, it is my considered opinion that the preposition "or" which separates the preconditions (negotiations OR the CERD procedures) must have been intended to be interpreted alternatively.*

## 1.0 INTRODUCTION

Eyes have been fixed on the gulf region in recent times. The Gulf Cooperation Council (“GCC”), of which Qatar and the UAE are members, has been largely divided owing to diplomatic crises. Qatar has been accused of supporting and promoting terrorist activities within territories of the embittered member states. The consequences have been terse – cut all diplomatic ties with Qatar; take Qatar before international tribunals and courts; take drastic measures against Qatar; compel the State of Qatar to stop participating in terrorist activities; and comply with the Riyadh Agreements.

On what was arguably a measure too far, the UAE, on 5 June, 2017, announced that Qataris had fourteen (14) days to vacate the Emirates. The citizens of the UAE in Qatar were to obey the order and go back home. Qatar has alleged human rights violations of Qataris in UAE and claimed they have proceeded to the negotiation table countless times but UAE’s representatives were either absent or outrightly refused to negotiate.

On 8 March 2018, Qatar filed a Communication with the CERD Committee under Article 11 of the CERD claiming that the UAE had breached the CERD by allegedly implementing a series of coercive measures announced on 5 June 2017. Even as this Communication pended before the CERD Committee, on 11 June 2018, the State of Qatar filed in the Registry of the ICJ, an application instituting proceedings against the UAE with regard to alleged violations of the CERD. Qatar contends that the UAE enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin, in violation of Article 1, paragraph 1, of CERD. Relying, inter alia, on General Recommendation XXX of the CERD Committee, Qatar argues that the Convention applies to discriminatory conduct based on Qatari national origin or nationality. Expectedly, the UAE denied liability to violation of human rights of Qataris and racial discriminations. It considered that the term “national origin” in Article 1, paragraph 1, of CERD is “twinned with” “ethnic origin” and that “national origin” is not to be read as encompassing “present nationality”. It explains that such an interpretation flows from the ordinary meaning of that provision when read in its context and in light of the object and purpose of the Convention. The UAE also underscored that its interpretation is confirmed by the *travaux préparatoires*, and further argued that Qatar’s claims relating to alleged differences of treatment of Qatari nationals based solely on their present nationality fall outside the scope *ratione materiae*.

What is evident is that there are parallel legal actions involving same parties, similar issues but different reliefs. Whether the UAE is making light of the legal implication of the parallel claims or Qatar is merely oversimplifying the jurisprudence behind jurisdiction of courts or tribunals in this rather novel situation, is yet to be determined by the ICJ as the dispute has not been heard on the merits. So far, the ICJ has granted the Order for provisional measures as requested by Qatar, as well as instructed both parties not to take any actions to aggravate the dispute.

## 2.0 COURT’S REASONS FOR GRANTING PROVISIONAL MEASURES

In a rather slim call of 8 to 7 Judges, the State of Qatar was awarded provisional measures. By 11 to 4, the Court indicated a non-aggravation order as provisional measure with binding effects to be obeyed by both State Parties. As is trite law, the Court may grant provisional measures of protection under Article 41 of its Statute in order to preserve the respective rights of parties. The purpose of the interim measures being to ensure that irreparable prejudice was not caused to rights which were the subject of dispute in judicial proceedings.<sup>1</sup> The call was narrow owing to dissenting opinions bordering on whether the provisions

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<sup>1</sup> *The Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland)*, Interim Protection, Order of August 17, 1972, ICJ Rep, 1972, 30, 34, para 22. This has been affirmed in a number of other cases, including: *Land and Maritime Boundary between*

(Article 22 of the CERD) invoked by the applicant, Qatar, did in fact appear *prima facie* to afford a basis upon which the jurisdiction of the Court might be founded.<sup>2</sup>

The majority, in reaching a conclusion, considered first, the existence or otherwise of a dispute concerning the interpretation or application of CERD.<sup>3</sup> The compromissory clause *vide* Article 22 reads thus:

***Any dispute between two or more State Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.***

A careful reading of the above provision evinces that the Court's jurisdiction is conditioned on the existence of a dispute arising out of the interpretation or application of CERD. In dealing with the problem of existence of a legal dispute, the Court considered arguments and the documents placed before it. Ultimately, the Parties differ on the nature and scope of the measures taken by the UAE beginning on 5 June 2017 as well as on the question whether those measures relate to rights and obligations under the CERD. Paragraph 2 of the Statement made by the UAE on 5 June 2017 captures the following:

***Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.***

In the Court's view, the acts referred to by Qatar, in particular the statement of 5 June 2017 – which allegedly targeted Qataris on the basis of their national origin and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal treatment before tribunals, were capable of falling within the scope of CERD *ratione materiae*. The Court considered that, while the Parties differ on the question whether the expression “national... origin” mentioned in Article 1, paragraph 1, of CERD encompasses discrimination based on the “present nationality” of the individual, it need not decide at the stage of indicating interim measures, which of the diverging interpretations of the Convention is the correct one. For ease of reference, Article 1, paragraph 1, is reproduced *infra*:

***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***

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*Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996 (Cameroon v. Nigeria)*, ICJ Rep, 1996, 13, 22 para 35; p. 23, para 42.

<sup>2</sup> In the joint declaration of Judges Tomka, Gaja and Gevorgian, it was their position that with respect to the factors to be taken into account for the purposes of the prohibition of racial discrimination, national origin is not identical to nationality; discrimination based on nationality does not *prima facie* fall within the scope of CERD.

<sup>3</sup> A dispute between States exist where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (see *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*, p. 115, para. 22, citing *Interpretation of Peace Treaties Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1960*, p. 74).

*equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*<sup>4</sup>

As observed in the compromissory clause, Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court.<sup>5</sup> Regarding the first precondition, namely the negotiations to which the compromissory clause refers, the Court observed that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, “the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question”.<sup>6</sup>

With a view to resolving their dispute concerning Qatar’s compliance with its substantive obligations under CERD, and whether Qatar appeared to have pursued these negotiations as far as possible, the Court first had to assess whether Qatar genuinely attempted to engage in negotiations with the UAE. Instructive is the fact that it was not challenged by the Parties that issues relating to the measures taken by the UAE in June 2017 had been raised by representatives of Qatar on several occasions in international fora, including at the United Nations, in the presence of representatives of the UAE.<sup>7</sup>

The Court further noted the State of Qatar through a letter dated 25 April 2018 and addressed to the Minister of State for Foreign Affairs of the UAE, had invited the UAE for negotiations concerning the alleged violations of CERD arising from the measures taken by the UAE beginning on 5 June 2017. The letter read, in part, as follows: “it [was] necessary to enter into negotiations in order to resolve these violations and the effects thereof within no more than two weeks.” It was on the strength of the foregoing that the Court considered that there was an offer from the State of Qatar to negotiate the alleged violations with regard to the UAE’s compliance with the substantive obligations under the CERD.

On the second precondition relating to “the procedures expressly provided for in the Convention”, the Court noted that Qatar deposited, on 8 March 2018, a Communication with the CERD Committee under Article 11 of the Convention. It observed however, that Qatar does not rely on this Communication for the purpose of showing *prima facie* jurisdiction in the present case. As expected, Parties disagreed as to whether negotiations and recourse to the procedures referred to in Article 22 of CERD constitute alternative or cumulative preconditions to be fulfilled before the seisin of the Court, but since that was not an issue to be determined at such a stage, the Court made no pronouncement on the steaming disagreements. The Court was satisfied that Qatar had *prima facie* met the preconditions required under Article 22 of CERD.

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<sup>4</sup> We would consider this in fuller details in subsequent subheads.

<sup>5</sup> Where there are procedural preconditions before the Court’s jurisdiction can be evoked, the Court will have to satisfy itself that such preconditions were met to avoid embarking on a futile endeavor. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 141).

<sup>6</sup> *Ibid.*, p. 133, para. 161.

<sup>7</sup> For example, during the 37<sup>th</sup> session of the United Nations Human Rights Council in February, 2018, the Minister for Foreign Affairs of Qatar referred to “the violations of human rights caused by the unjust blockade and the unilateral coercive measures imposed on [his] country that have been confirmed by the . . . report of the Office of the United Nations High Commissioner for Human Rights Technical Mission”, while the UAE – along with Bahrain, Saudi Arabia and Egypt – issued a joint statement “in response to [the] remarks” made by the Minister for Foreign Affairs of Qatar.

On granting requests for provisional measures, it is trite law that the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.<sup>8</sup> The Court was convinced that the UAE's acts of singling out Qataris and only Qataris en masse for discriminatory treatment, particularly, deprivation of Qataris from a variety of civil and political rights, economic, cultural and social rights such as right to marriage and choice of spouse for instance,<sup>9</sup> raised plausible rights supporting an indication of provisional measures. The Court was also convinced that since the measures requested by Qatar are aimed not only at ending any collective expulsion of Qataris from the territory of the UAE, but also at protecting other specific rights contained in Article 5 of CERD, then a link existed between the rights<sup>10</sup> whose protection is being sought and the provisional measures requested by Qatar.

On the issue whether risk of irreparable prejudice and urgency was prevalent or caused to the rights sought to be protected, the Court was convinced that such risk was in the offing. Bearing in mind that a prejudice could be considered as irreparable when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress; when students are prevented from taking their exams due to a refusal by academic institutions to provide educational records; or when the persons concerned are impeded from being able to physically appear in any proceedings or to challenge any measure they find discriminatory. Thus, the meaning read into the UAE's announcement in June 2017 carried the weight of such nature as to cause irreparable harm to the Qatari nationals, and rightly so.

## 2.1. NOTABLE ARGUMENTS OF QATAR AND THE UAE

On 29 April 2019, the UAE filed preliminary objections challenging the Court's jurisdiction to adjudicate on the dispute on grounds of lack of jurisdiction and the inadmissibility of the action filed by the State of Qatar. In summary, the UAE believes that: the acts Qatar complains of differentiates between individuals on the basis of current nationality and does not fall within the CERD; that Qatar has not fulfilled the procedural preconditions of Article 22 of the Convention; and that Qatar's claims are abusive and must be deemed inadmissible. While Qatar has long filed a response to the above preliminary objections, the Court is yet to give a judgment on the preliminary stage. I shall now consider the main arguments of the parties, succinctly.

According to the UAE, the crucial jurisdictional flaw in Qatar's case is that nationality (as equivalent to citizenship) is not a basis of racial discrimination under the CERD. The term "national...origin" in the CERD does not mean or encompass current nationality or citizenship. The UAE explained that while Qatar has repeatedly described the UAE's measures as measures which discriminate against the Qataris on basis of their "national origin", the attempts to bring its claims within the provisions of the CERD is undermined by the description of those who Qatar alleges have been "targeted" by or are subject of such measures – who are exclusively citizens of Qatar, i.e., persons having Qatari nationality. For the UAE, Qatar's complaints are about an alleged different treatment of Qataris *qua* citizens of Qatar; it believes that even if the allegations were to be conceived as true, they would only go to establish differentiation on the basis of current nationality – a situation not deemed as a breach of the CERD. This they argue, is because the Convention in its quest to stamp out racial discrimination, does not prohibit differentiation on the basis of current nationality. UAE contends that even the measures it took on 5 June 2017 would only have applied to citizens of Qatar on the basis of their nationality in the sense of citizenship, that is, based on an

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<sup>8</sup> *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, p. 126, para. 63*

<sup>9</sup> Article 5 of CERD.

<sup>10</sup> On the rights invoked by Qatar, see Articles 2, 4, 5, 6 and 7 of the Convention.

individual's legal bond with a state.<sup>11</sup> Ultimately, the UAE argues that the ordinary meaning of “national...origin” vide Article 1, paragraph 1 of CERD, read in good faith in its context and in light of the object and purpose of the Convention, does not equate with an individual's current nationality. It referred to the *travaux préparatoires* of the CERD for confirmation of its submissions and concluded that the alleged acts complained of in Qatar's Application did not concern the interpretation or application of the CERD and thus, does not come within the scope of the compromissory clause in Article 22 of the CERD.

On the second preliminary objection, it was argued that the Court could only have jurisdiction if negotiation **and** the procedures provided under Articles 11 to 13 of the Convention were **both** pursued as far as possible and neither had resulted in settlement of the dispute. For the UAE, the State of Qatar had failed to satisfy either of these preconditions before filing its Application.

The third preliminary objection bordered on abuse of Court process. The UAE argued that the initiation of parallel proceedings before the Court in respect of the same dispute while an Article 11 procedure was pending before the CERD Committee constitutes an abuse of process, rendering Qatar's Application inadmissible. This was the last issue before the UAE closed curtains.

In reaction to the preliminary objections of the UAE, Qatar filed a written statement comprising five chapters followed by its submissions. Qatar demonstrates, in reaction to the first preliminary objection, that the objection on nationality-based discrimination should be rejected for two independent reasons. First, Qatar argues that the UAE was wrong in submitting that “national origin” excludes “nationality” because if analyzed according to the framework established by Article 31 of the Vienna Convention of the Law of Treaties (“VCLT”), the term “national origin” as used in the CERD must be understood to encompass nationality. It is their take that while the terms “national origin” and “nationality” may not be synonymous, that does not mean that discrimination based on the ordinary meaning of “national origin” read in context does not encompass discrimination predicated on present “nationality”. Qatar argued further that the UAE's interpretation seeking to exclude present nationality would have an extraordinarily limiting effect upon the CERD by excluding discrimination between certain groups of non-nationals; a category of conduct that the CERD Committee has called “one of the main sources of contemporary racism”.<sup>12</sup> Like the UAE, Qatar relied on CERD's *travaux préparatoires* for confirmation of its submission that the drafters expressly declined to exclude nationality-based discrimination from the scope of the CERD prohibitions. Second, it was argued by Qatar that the UAE's conduct violated the CERD because its measures of 5 June 2017 were discriminatory in both purpose and effect by “intentionally” targeting and having a disproportionately negative impact on persons of Qatari “national origin” in the historical-cultural sense, irrespective of their present nationality. Giving this a little flesh, Qatar argued that the UAE's preliminary objections did not address Qatar's argument or evidence on the point, but accepted that the term “national origin”, *at a minimum*, referred to characteristics related to country of birth and parentage – characteristics which were possessed precisely by the population of Qataris impacted by the measures against nationals of Qatar in June 2017. For Qatar, even on UAE's case, the acts alleged by Qatar are clearly capable of falling within the scope *ratione materiae* of the CERD, as a conclusion to the contrary would require the Court to either read the term “national origin” out of the CERD or deny the very existence of Qataris as a people possessing a unique national origin – it believes neither can be sustained.

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<sup>11</sup> To buttress their points further, the UAE cited Lassa Oppenheim, *International Law*, (8<sup>th</sup> ed., Longmans, Green & Co. 1995), p. 645 (“Nationality, in the sense of citizenship of a certain State, must not be confused with “nationality” as meaning membership of a certain nation in the sense of race.”).

<sup>12</sup> **Memorial Vol. IV, Annex 109**, CERD Committee, General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session (2005), Preamble.

As to the second preliminary objection of the UAE which bordered on whether the requirements in Article 22 of the CERD are cumulative, Qatar argued that imposing a cumulative reading of the Article 22 requirement was at odds with not only the text, but also the principle of effectiveness, the object and purpose of the provision, and the protective purpose of the CERD and human rights treaty generally.

In addressing the UAE's third and final preliminary objection, Qatar contends that such position was inconceivable and utterly baseless. Qatar argued that claims of abuse of process are subject to a high threshold and the party asserting it must prove "extreme circumstances which have never been present in any of the cases decided either by the PCIJ or the ICJ."<sup>13</sup> It argued further that a mere inference does not meet the threshold for an abuse of process (as canvassed by the UAE) especially as the Court in *Certain General Interests in Polish h Upper Silesia (Germany v. Poland)*<sup>14</sup> clearly rejected such position. Qatar squeezed in the poser that the UAE had presented inconsistent remarks – how can Qatar have no real interest in pursuing negotiation under the CERD yet be found wanting of either looking to spread its claims in two courts in a bid to succeed in any of them. Qatar found it difficult to see how it could "leverage any success" it might have had if it had "no real intention of pursuing the CERD Committee proceedings to their end".

### 3.0 LEGAL OPINION/ANALYSIS ON ISSUES FOR DETERMINATION

In the subheads that follow, this paper focuses on three legal issues as raised in the preliminary objections of the UAE. It should be understood that while this paper will not lay weight on the merits of this case as that is a matter solely within the office of the Judges of the ICJ. There will however, be need to engage those reasonings that may have been twisted in enormous proportions by the parties, with a view to analyzing international law's position on same. The three issues of utmost focus are:

- A. Whether the term "national origin" encompasses the term "nationality"?
- B. Whether Qatar's institution of parallel proceedings at both the International Court of Justice and the CERD Committee amounts to an abuse of court process?
- C. Whether the procedural preconditions, in light of Article 22 of the CERD, are to be read cumulatively or alternatively?

#### A. WHETHER THE TERM "NATIONAL ORIGIN" ENCOMPASSES THE TERM "NATIONALITY"?

Since the foundation of the conflict of interpretation on the rubric above is pursuant to the appreciation of Article 1 of the CERD, the said provisions will be reproduced hereunder for ease of reference. It reads:

##### Article 1, Paragraph 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 in the political, economic, social, cultural or any other field of public life.*

##### Article 1, Paragraph 2

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<sup>13</sup> Qatar cited Vol. II, Annex 20, C. Tomuschat, "Article 36", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 789, para. 131.

<sup>14</sup> Judgment, P.C.I.J. Reports 1926, Series A, No. 7, p. 30 ("[O]nly a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.")

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

#### Article 1, Paragraph 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.*

#### Article 1, Paragraph 4

*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

Evident from Article 1, Paragraph 1, of CERD is that while “national...origin” was mentioned, there was no provision for the term “nationality”. It must be understood that Article 1, Paragraph 1 was the definition section of the term “racial discrimination” and the choice words “...**any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin**” clearly established the subjects that should be protected from racial discrimination. A take home from Article 1, Paragraph 1 of CERD is that racial discrimination encompasses distinctions, exclusions or bias based on national...origin.

The UAE relied on Article 1, Paragraph 2, of CERD to establish the fact that the Convention did not envisage “nationality” as one of the earlier discussed subjects in need of protection from racial discriminations. The accuracy of the UAE’s claims is subject to the facts and evidence before the Court but taking the assertion from a surface level makes it plausible to the extent that Article 1, Paragraph 3 of CERD is to be deliberately misunderstood. A careful reading of Article 1, Paragraph 2 goes to make known the fact that distinctions, exclusions, restrictions or preferences made by a State Party to the Convention between its citizens and foreign nationals are excluded from the scope of racial discrimination. This particular provision did not expressly permit or encourage nationality-based discrimination and it would only make for good logic to imply a *good faith* interpretation of the provision if to truly reflect the intention of the draftsmen and signatories to the Convention. In fact, nationality-based discrimination was considered as one of the forms of racial discrimination in Article 1, Paragraph 3 when after the exclusion of the Convention to legal provisions of States Parties concerning “nationality”, “citizenship” or naturalization, it went on to add a timely proviso: “**provided that such provisions do not discriminate against any particular nationality.**” Twist in all directions, Article 1, Paragraph 3 will always mean that while States Parties can show some measure of favouritism to some foreign national groups (even have legal provisions for distinctions and exclusions between its nationals and foreigners), the Convention however kicks against measures against those nationalities where it appears as nationality-based discrimination.<sup>15</sup> It is submitted that it is needless to read “nationality” into “national origin” ordinarily as they both amount to protected subjects under racial discrimination; racial discrimination encompasses both terminologies. If at all, the term “nationality” can be read into (not in the sense of “encompasses” as a continuous enterprise) “national

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<sup>15</sup> Not to dillydally on the merits of the case at this juncture but it must be said that it is blind an argument to propose that the announcement on the 5<sup>th</sup> day of June, 2017, could only have intended the Qatari nationals and not persons of that descent by way of national origin if it indeed turns out to be accurate that over 95% of Qataris in the UAE have Qatar as their national origin. In effect, it would still amount to a discrimination.

origin” where the former is both a citizen and a descent of same nation – reason being that national origin is of a wider class and is immutable whereas nationality can be acquired by means other than bloodline or inheritance in addition or in replacement of an erstwhile nationality from which the true national origin can be traced or gotten. It is not the case that “national origin” encompasses “nationality” especially as the word “encompasses” presupposes a continuous or permanent state of affair rather than a situational or momentary affair made possible by unification of both terminologies of interest in an individual. Simply put, it comes down to margins. Understood in the light of the purposeful distinctions of terms in Article 1, Paragraphs 1, 2 and 3 of CERD, we would see that they could not have been meant as synonyms neither was there an attempt to enlarge the scope of national origin. But since a group could be current nationals of their national origin at the same time, the terms can be used interchangeably so long as referring to the same group.<sup>16</sup>

Since Article 1, Paragraph 3 CERD had a proviso that brought nationality-based discrimination into the scope of the CERD and in light of definition of racial discrimination, there is need to consider General Recommendation XXX on Discrimination Against Non-Citizens. Relevant measures from the CERD Committee will be reproduced hereunder:

***1)...Article 1, Paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;*** (Underlined words mine)

***10)Ensure that any measures [sic] taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;***

***26)Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;***

***28)Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;***

It is clear therefore that discrimination lies, where the measures taken by a State Party are such that targets a particular nationality – in this case, the announcement by the UAE were directed at only Qataris on grounds of “security reasons” on a rather short notice and with no counter or further statements on the duration of the expulsion to bring it within the frame of special measures reasonably excluded as discriminatory. A typical instance of nationality-based discrimination is found in the above provisions – measures involving a “collective” expulsion of a particular nationality is a nationality-based discrimination. The question whether the State of Qatar based its dispute on the issue of “collective expulsion” was

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<sup>16</sup> Vide s.31 of the VCLT, an interpretation of a treaty cannot be had without recourse to its object and purpose. The purpose of the Convention was clearly to curb racial discrimination of which nationality-based discriminations are part of its scope. The interchangeability of terms does not defeat the ultimate purpose of the Convention so long there will not be a confusion as to the intent of drafters or all States Parties when national origin is used in a broader sense to envision the presence of nationality.

confirmed in the judgment for provisional measures where the judges in their wisdom captured the main gist from Qatar's Application.<sup>17</sup>

Where it is dicey is that the UAE is convinced Qatar used "national origin" in its Application whereas its announcement was allegedly targeted at "Qatari nationals", the implication of which takes the action away from the scope of the CERD under strict consideration of the CERD. However, it must be said that the use of "national origin" could suffice in place of "nationality" where the nationals can indeed trace their national origin to Qatar – in which case, it is a nationality-based discrimination by virtue of collective expulsion of a particular nationality as it is a discrimination based on the national origin of same Qatari nationals. While it may be a case of loose definitions at play here (assuming the UAE is correct in its proposition), it is submitted that justice is not to suffer at the altar of technicalities.<sup>18</sup>

Lexical definitions of terminologies may not at this juncture be necessary, bearing in mind the effect already given to both terminologies by the CERD. Conflicts will often abound in conceptualizing or appreciating "national", "origin", "national origin" and "nationality" as dictionary definitions could pose a slippery slope thus making "the most appropriate" interpretations subject to the whims of the disputants who must often tilt the scale towards the path that favours them. For instance, the UAE drew its "most appropriate" interpretation without recourse to a lexical or judicial backing when it proposed as follows:

***"National" is used as the adjectival form of "nation", which is defined as "the people living in, belonging to, and together forming, a single state" or "a race of people of common descent, history, language or culture, etc, but not necessarily bound by defined territorial limits of a state." When taken with "origin", the second sense of "nation" is the most appropriate.***

It is not said what inspired the belief that it could only have been "most appropriate" in the second sense.<sup>19</sup> It is for the issue of conflicting lexical definitions that I am rather convinced that a further dwelling on dictionary appreciations of the concepts are wholly unnecessarily as the CERD had already done justice in clarifying in what sense it intended the terminologies – all of which have been discussed above.

## **B. WHETHER QATAR'S INSTITUTION OF PARALLEL PROCEEDINGS AT BOTH THE INTERNATIONAL COURT OF JUSTICE AND THE CERD COMMITTEE AMOUNTS TO AN ABUSE OF COURT PROCESS?**

It is accurate to say that an abuse of court process can constitute a ground of inadmissibility. However, in order for an objection based on abuse of court process to succeed, the party asserting it must prove "extreme circumstances" which have never been present in any of the cases decided either by the PCIJ or the ICJ.<sup>20</sup> The threshold for admitting an abuse is quite high, and possibly exacting.<sup>21</sup> Thus, while an abuse of process maintains the ordinary meaning of an unjustified or unreasonable use of legal proceedings or process to

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<sup>17</sup> See *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*, p. 6, para. 2

<sup>18</sup> *British Yearbook of International Law*, Volume 83, Issue 1, 2013, Pages 13-60, <https://doi.org/10.1093/bybil/brt003>

<sup>19</sup> In fact, according to Merriam-Webster Dictionary, its very first definition of "nationality" is such that shows its similarity with "national origin". It stated, at the bottom of its definition, that nationality and race or ethnicity were synonyms.

<sup>20</sup> C. Tomuschat, "Article 36", in A. Zimmerman et al., ed., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 789, para. 131

<sup>21</sup> R. Kolb, "General Principles of Procedural Law", in A. Zimmerman et al., ed., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 1000, para. 50; see also *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Judgment, 1932, P.C.I.J., Series A/B, No. 46*, pp. 97, 167; *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 1925, P.C.I.J. Series A, No. 6*, pp. 5, 30, 37-38

further a cause of action by an applicant or plaintiff in an action, the ICJ rarely finds for an abuse on many occasions it has been raised. The high threshold placed on proving the abuse means that where an objection on abuse of process is based on an inference, the threshold is not met and the objection not sustained.<sup>22</sup>

The UAE was not incorrect to argue that where a claim is pending before an international body, a further institution of same claims before another international body or tribunal, while it pends in the former international body, could create a situation of **Lis Pendens**. It must however be stressed that under public international law, diplomatic negotiations and judicial settlement could be pursued *pari passu*. In other words, ‘the facts that negotiations are being actively pursued ...is not, legally, any obstacle to the exercise by the Court of its judicial function’.<sup>23</sup> Where, however, negotiation is a precondition to judicial settlement, the Court will be unable to assume jurisdiction in the absence of negotiation.

One question that comes timely is whether negotiations at the CERD Committee was a precondition to judicial settlement before the Court? From the above settled facts, that question would be answered in the affirmative. Sometime in March 2018, the State of Qatar brought an Application under Article 11 of CERD before the CERD Committee. For ease of reference, Article 11, Paragraph 1, shall be reproduced hereunder:

***If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.***

It would appear that since Qatar did not wait for the expiration of the three months period allowed by the CERD procedures for the respondent to reply, then it was practically impossible for the Court to have been seised with jurisdiction to adjudicate on a matter still before the CERD Committee. However, one must be mindful of the provision of Article 22 of CERD. In the later provision, it was not said that “negotiations” must be brought before the CERD Committee; the CERD made provisions for the CERD Committees’ procedures for reconciling or renegotiating seeming deadlocks between disputants vide Articles 11 to 13 of CERD. Article 22 of CERD does not contain an ouster clause or ban to further employ a negotiation option after initial negotiation fails. By implication, the moment negotiation between the disputants failed courtesy of UAE’s insistence on non-involvement in settling differences; mitigating its alleged harsh measures; or even negotiating mode of judicial settlement, the condition precedent had been met enough to seise the ICJ of jurisdiction. Accordingly, since Article 22 or the rest of the provisions of the CERD did not bar a further resort to the CERD Committee when same claim had been validly entered before the Court, then a subsequent Communication before the CERD Committee which creates a seeming parallel proceeding is not an abuse of process. It becomes a question of whether the parallel claims before the different

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<sup>22</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, para. 150 (finding that it only in “exceptional circumstances” and with “clear evidence that its conduct amounts to an abuse of process”); *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, P.C.I.J. Reports 1926, Series A, No. 7, p. 30 (“Only a misuse of this right could endow an act of alternation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.”)

<sup>23</sup> See *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)* ICJ Rep, 2011, 644, 664, para 57, citing with approval, *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Rep, 1978, 3, 12, para. 29; Judge Nervo, dissenting in *Fisheries Jurisdiction, (Germany v. Iceland)*, *Jurisdiction of the Court*, ICJ Rep, 1973, 48, 90 (declaring that the institution of proceedings before a court does not mean that agreement by negotiation was impossible and that all efforts in that direction should be abandoned)

international bodies can possibly create prejudice to the respondent even though the law allows for such pursuit *pari pasu*?

In establishing whether the parallel proceedings are prejudicial to the UAE, it has to be determined if the international bodies were capable of giving conflicting decisions such that would plausibly prolong the dispute. The ICJ is the premier international court that adjudicates general disputes between countries, with its rulings and opinions serving as primary sources of international law. Judgments delivered by the Court in disputes between States are binding upon the parties concerned.<sup>24</sup> On the one hand, the ICJ's judgment carries a binding force on affected parties because of the authoritative character of the Court's decisions. It is also the case that the ICJ's judgment binds parties on the day the Court reads the decision in open Court.<sup>25</sup> The CERD Committee on the other hand, being a Conciliation body, does not have the authority to give binding decisions. While Articles 11 to 13 of CERD establish the CERD procedures, Article 22 merely speaks to the presence of procedural preconditions of non-judicial settlement mechanisms before the ICJ can be seised with jurisdiction. Logically therefore, there cannot be said to be found prejudice in the institution of parallel claims before the distinct international bodies. Should it have been a case of parallel legal claims before two international *courts* or *tribunals*, there would have been valid worries as the ICJ, not being an appellate Court, cannot order that the Communication be quashed.

### **C. WHETHER THE PROCEDURAL PRECONDITIONS, IN LIGHT OF ARTICLE 22 OF THE CERD, ARE TO BE READ CUMULATIVELY OR ALTERNATIVELY?**

Convinced that it is for the Court to determine on the merits the extent to which the State of Qatar fulfilled its preconditional procedures, I will focus on the legal implication of "or" as inserted in the compromissory clause. For the umpteenth time, Article 22 of CERD will be reproduced hereunder for considerations. It reads:

*Any dispute between two or more State Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.* (Underlined words mine)

From the above provision, the procedural preconditions are just two but the presence of "or" makes a resort to one of the conditions sufficient in discharging the condition precedent. "OR" has been defined by the Merriam-Webster Dictionary as,

*-used as a function word to indicate an alternative <coffee or tea> <sink or swim>, the equivalent or substitutive character of two words or phrases <lessen or abate>, or approximation or uncertainty <in five or six days>*

*-used in logic as a sentential connective that forms a complex sentence which is true when at least one of its constituent sentences is true*

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<sup>24</sup> Article 94 of the United Nations Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of [the Court] in any case to which it is a party."

<sup>25</sup> See *Fordham International Law Journal* (vol. 20), Issue 4 1996 Article 11: H. Vern Clemons, *The Ethos of the International Court of Justice Is Dependent Upon the Statutory Authority Attributed to its Rhetoric: A Metadiscourse*

Of the two definitions, the former is more ideal given its close relationship with this discourse. There, the choice word “alternative” is used which, as an adjective, means to offer or express a choice. Thus, a way to look at the underlined words above is to treat the procedural preconditions as existing alternatively – at least, on the surface.

According to the UAE, Article 22 of the Convention refers not only to negotiation, but also to the procedures expressly provided for in the Convention, *i.e.*, Articles 11-13 of the CERD. For the Court to have jurisdiction under Article 22, a dispute must have been settled neither by negotiation nor by the CERD procedures. The UAE dwelt on the negative character of the preposition as used in Article 22 to mean the exact opposite of what, Merriam-Webster, for instance, defines it to be.<sup>26</sup> It called its own perspective “the good faith interpretation of the ordinary meaning of the terms of Article 22 of the CERD”.

While it is true that “or” could translate to mean “neither...nor”, it is not always so. For example, if one says: “The Case has not been settled by conciliation or arbitration...” and then says: “I will not be attending court today or tomorrow”, the sense in using the “neither...nor” tests is blurred. In the second sense, it clearly translates as “I would neither attend school today nor tomorrow” as the negation was clearly set out to remove an offer or expression of choice between two alternatives. In the first sense, however, it does not necessarily mean that the case must have been settled by both dispute resolution mechanisms. It would appear sufficient if it was settled by at least one of the means. If both means were intended, the use of “both” would have made a lot of difference in making both means conjunctive and further away from the likelihood of an expression of choice. Perhaps, Qatar made more instructive points to note – in reaction to the issue of “neither...nor”. Qatar submitted as follows:

***The UAE’s first argument is that the term “or” in Article 22 “is the equivalent of ‘neither . . . nor’” and as such the procedural preconditions are cumulative. This argument depends on a tortured reading of paragraph 42 of the joint dissenting opinion of five Judges in the preliminary objections phase of the Georgia v. Russian Federation case<sup>27</sup>. However, the Court will recall that those Judges found that the “neither . . . nor” structure does not . . . tell us any more about whether the two modes are alternative or cumulative<sup>28</sup>. In fact, they concluded, based on other considerations, that the Article 22 preconditions are alternative, not cumulative. The opinion thus actually undermines, rather than supports, the UAE’s position.***

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<sup>26</sup> For example, five judges in the *Georgia v. Russian Federation Preliminary Objections case* further specified, inter alia, as follows: “Matters become less clear however when ‘or’ is used in a clause in the negative, as in the present case (‘which is not settled by negotiation or by the procedures...’). In such a case, ‘or’ need not mean something other than ‘and’, but the latter word cannot be used because it would not make sense in the context of the sentence. In fact, here, ‘or’ is the equivalent of ‘neither...nor’: any dispute which is settled neither by negotiation nor by the procedures expressly provided.

<sup>27</sup> See UAE Preliminary Objections, pp. 78-79, para. 151 (citing *Application of the International Convention on the Elimination of All Forms Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 42). A sixth dissenting Judge, Judge Cancado Trindade concluded that “the conjunction ‘or’ indicates that the draftsmen of the CERD Convention clearly considered ‘negotiation’ or ‘the procedures expressly provided for in this Convention’ as *alternatives*”. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Dissenting Opinion of Cancado Trindade, I.C.J. Reports 2011*, para. 116 (emphasis in original).

<sup>28</sup> *Application of the International Convention of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, paras. 39-47.

With little need to consider the *travaux préparatoires*, we shall reflect on the ‘good faith interpretation’ posed by the UAE. According to Article 31, Paragraph 1, of the VCLT, “***A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.***” What then is the object and purpose of the CERD?

On the object and purpose of CERD, Article 2, Paragraph 1, of CERD is apt. It shall be reproduced, in parts, hereunder for ease of reference:

***State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...*** (Underlined words mine for emphasis)

Therefore, one may say CERD is about a fight against all forms of racial discrimination through appropriate means and without delay. To read the procedural preconditions as cumulative would aim to suggest that despite the object and purpose of the CERD, it went ahead to shoot itself on the foot especially if we concede to the fact that ‘negotiations’ and ‘Article 11-13 procedures’ are of same effect<sup>29</sup> – all geared towards attempting to reconcile a dispute albeit without a legally binding consequence. I am more aligned with the arguments of Qatar in this regard where it posited as follows:

***The CERD procedures are lengthy by design: in the present case, for example, more than a year and four months have passed since Qatar submitted its communication under Article 11, and a conciliation commission has not yet even been constituted. To interpret Article 22 as requiring States to wait for negotiations AND all of the CERD procedures to be exhausted before seeking recourse to the Court would be contrary to the stated purpose of the treaty itself.***

It should be observed that even Article 11 suggests that the intent of the CERD drafters was an alternative reading of the procedural preconditions. It reads *inter alia*:

***If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee.*** (Underlined words mine for emphasis)

In line with the principle of *effet utile*<sup>30</sup>, this writer submits that it would be contrary to a good faith interpretation if a cumulative effect is read into the compromissory clause. It defeats the purpose of speedy resolution of legal disputes between or among State Parties. With the presence of the above indicators suggesting ‘alternative effect’, it is my opinion that the principle of effectiveness of interpretation of treaties becomes satisfied. It should however be made clear that the purpose of this submission is to bring to a halt, building controversies on the ‘alternative’ or ‘cumulative’ effect of satisfying the procedural preconditions; the argument on the merits whether Qatar indeed satisfied either or both condition precedents is for the Courts to resolve. That said, it was held by the five dissenting judges in *Georgia v Russian Federation*<sup>31</sup> that objections requiring or suggesting a State that has already exhausted negotiations to also exhaust the

<sup>29</sup> Ibid. para. 44 (they are two different ways of doing the same thing)

<sup>30</sup> Otherwise the ‘principle of effectiveness’ or ‘useful effect’ is a form of interpretation of treaties which looks to the object and purpose of the treaty and posits that terms of a treaty must always be interpreted with a view to effectively achieving the intent of the legislation.

<sup>31</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Joint Dissenting Opinions of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011, paras. 43-44.

CERD procedures before seising the ICJ of jurisdiction would be *illogical, senseless, highly unreasonable* and *inconsistent with the spirit of the text* of the Convention. I find the above judicial opinion rather inspiring and instructive.

As earlier submitted, the surface interpretation of “*which is not settled by negotiation or by the procedures expressly provided for in this Convention*” is that “or” means “an expression of choice” thus ‘alternatively’ is the most plausible meaning to be attached to the compromissory clause. As earlier discussed, Article 11, Paragraph 1, makes it clear that intended by the draftsmen was an alternative effect to be employed in the reading of the condition precedents vide the choice word “may”. With “may” it is obvious that the CERD recognized two options which could be pursued alternatively. More so, it has been held by the ICJ that in fulfilment of the conditions precedent to the ripeness of the case for adjudication before the Court on legal issues surrounding the interpretation of Article 22 of the CERD, the procedural preconditions should be interpreted in their ordinary meaning.<sup>32</sup>

#### 4.0 CONCLUSION

While we must await the Court’s decision on the merits, we have identified the key legal issues emanating from the dispute. It is not to be feared whether the *Lis Pendens* debate is fruitful as the CERD Committee is a conciliation committee which cannot possibly give a binding conflicting decision. Supposing the ICJ is wrong in assuming jurisdiction over the dispute, the party prejudiced can sadly not hope for the CERD Commission to give a soothing contradictory decision as binding judgments are outside the scope of the CERD Committee. It would be a stretch to concern oneself with a possible novelty where the CERD Committee ranks of equal or higher status to the ICJ for the purpose of upturning its “wrong” judgment on the merit. Equally, the ICJ cannot order the CERD Committee to dismiss the Communication as it is not an appellate court.

It is equally submitted that nationality and national origin are distinct terminologies if looked at from the object of the CERD. Nationality could however be read into National Origin where the subject can lay claim or trace to both terminologies – such as one person being a national of Nigeria and having as his roots (national origin which is immutable), the same country, Nigeria. In this paper, we are of the opinion that it is more important to concern oneself with whether CERD envisaged “nationality” in its definition of “racial discrimination” and it is submitted here that same was envisaged especially when “nationality-based discrimination” is put into proper perspective.

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<sup>32</sup> See, *Georgia v. Russian Federation* note 4, p. 128 para 141