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Discrimination on the Basis of Nationality Under the Convention on the Elimination of Racial Discrimination

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DISCRIMINATION ON THE BASIS OF NATIONALITY UNDER THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

William Thomas Worster*

ABSTRACT

Following a recent judgment by the International Court of Justice (ICJ), a divergence has opened between the Court and the Committee on the Elimination of Racial Discrimination (CERD Committee) over whether the Convention on the Elimination of All Forms of Racial Discrimination (CERD) covers nationality-based discrimination. The ICJ held that the CERD does not, but the CERD Committee had previously held the opposite. The solution to this difference is to recognize that the CERD excludes discrimination between citizens and aliens, and, in this, the ICJ was correct. However, this discrimination is distinct from discrimination between foreign persons on the basis of their nationality, which is covered by the CERD. It is for this latter form of discrimination that the CERD Committee is correct. In essence, the ICJ and the CERD Committee are both partly wrong and partly correct, and by identifying this nuance between forms of nationality discrimination, we can reconcile the two views.

KEYWORDS

nationality, citizenship, discrimination, CERD, International Court of Justice, CERD Committee

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TABLE OF CONTENTS

I. Introduction.....	42
II. Background	44
III. Nationality Discrimination in Human Rights Law.....	48
IV. Nationality Discrimination in the Convention on the Elimination of Racial Discrimination	67
A. Provisions in the CERD.....	67
B. General Recommendation 30 of the CERD Committee.....	69
C. Qatar v UAE CERD case before the ICJ.....	72
V. Conclusion.....	81

I. INTRODUCTION

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) clearly prohibits certain forms of discrimination, but less clear is whether it prohibits discrimination on the basis of nationality.¹ Currently, the Committee on the Elimination of Racial Discrimination (“CERD Committee”) and the International Court of Justice (“ICJ”) appear to take different approaches to this question.² However, this article will argue that the divergent views of the CERD Committee and the ICJ can be reconciled by identifying precisely which nationals are being distinguished on the basis of nationality. The practice under other human rights treaties shows that a distinction has emerged between discrimination between citizens and aliens, on the one hand, and discrimination among nationalities, on the other.³ While both may be covered under nationality discrimination, the CERD appears to diverge from this practice and only cover discrimination among nationalities.⁴ Both the ICJ and CERD Committee appear to have overlooked this critical distinction, leading to the resulting conflict in their views.⁵ This paper will analyze the judgment of the ICJ in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case⁶ brought by Qatar against the

¹ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

² William Thomas Worster, *The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination regarding Nationality-Based Discrimination*, 26 AM. SOC’Y INT’L L. INSIGHT (Nov. 30, 2022), <https://www.asil.org/insights/volume/26/issue/13>; Geir Ulfstein, *Who is the Final Interpreter in Human Rights: the ICJ v CERD?*, EJIL:TALK! (Feb. 22, 2021), <https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/>.

³ See *infra* note 18 (explaining the semantics of nationality versus citizenship which this paper will not strictly distinguish).

⁴ See CERD, *supra* note 1, art. 1, ¶¶ 2-3 (stating that the Convention does not apply to States’ distinctions, exclusions, restrictions, or preferences based on citizenship, and that states may have provisions concerning nationality, citizenship, or naturalization, provided they do not discriminate against any particular nationality).

⁵ See Worster, *supra* note 2 (explaining the conflicts between the ICJ and CERD regarding discrimination among nationalities).

⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71 (Feb. 4); see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. U.A.E.), 2018 I.C.J. (June 11), <https://www.icj-cij.org/en/case/172> [hereinafter *Overview of the Case, Qatar v. U.A.E.*].

United Arab Emirates ("UAE") and the two parallel inter-state communications brought by Qatar against the UAE and Saudi Arabia before the CERD Committee,⁷ as well as prior CERD Committee views on the question of nationality, in particular General Recommendation No. 30.⁸ It will identify the distinction between the two forms of discrimination in human rights law and apply that distinction to resolve the divergence between the ICJ and CERD Committee.

II. BACKGROUND

During the brief diplomatic dispute between Qatar and several Gulf states, the UAE, Saudi Arabia, and other states took a wide range of measures against Qatar and its nationals, including expulsions and blockades.⁹ As a result, Qatar brought multiple legal claims before several institutions, including parallel claims under the CERD at both the ICJ and CERD Committee.¹⁰ Due to issues of jurisdiction, the claim at the ICJ was lodged only against the UAE, whereas two separate claims were made before the CERD Committee against the UAE and Saudi Arabia.¹¹ Qatar requested provisional measures from the Court, which were partially granted¹² and the UAE requested provisional measures as well, although those

⁷ Qatar v. U.A.E., 2021 I.C.J. ¶ 110; Jurisdiction of the Inter-State communication submitted by Qatar against the United Arab Emirates, ¶ 60, Comm. on the Elimination of Racial Discrimination, CERD-C/99/3 (Aug. 30, 2019) [hereinafter *Jurisdiction, Qatar v. U.A.E.*]; Jurisdiction of the Inter-state communication submitted by Qatar against the Kingdom of Saudi Arabia, ¶ 53, Comm. on the Elimination of Racial Discrimination, CERD-C/99/5 (Aug. 27, 2019) [hereinafter *Jurisdiction, Qatar v. Saudi Arabia*]; Decision on the admissibility of the Inter-State communication submitted by Qatar against Saudi Arabia, ¶ 22, Comm. on the Elimination of Racial Discrimination, CERD-C/99/6 (Aug. 27, 2019).

⁸ See CERD, *supra* note 1, art. 1, ¶ 2 (stating that the Convention shall not apply distinctions, exclusions, restrictions, or preferences between citizens and non-citizens).

⁹ Christopher R. Rossi, *Game of Thrones: The Qatar Crisis, Forced Expulsions on the Arabian Peninsula*, 7 PENN. ST. J.L. & INT'L AFF. 1, 21-22 (2019).

¹⁰ See *id.* at 2 (explaining Qatar's 2018 complaint against the UAE).

¹¹ Overview of the Case, *Qatar v. U.A.E.*, *supra* note 6 (explaining the issues of jurisdiction between the parties); see also *Interstate communications*, U.N. COMM. ELIMINATION RACIAL DISCRIMINATION (Mar. 8, 2018), <https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications> (discussing how CERD received two inter-state communications submitted by Qatar against the Kingdom of Saudi Arabia and the United Arab Emirates).

¹² Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Order, 2018 I.C.J. 406, ¶ 79 (July 23).

were refused.¹³ Ultimately, the Court rejected Qatar's case at the preliminary objections phase.¹⁴ Although the CERD Committee proceeding remained pending before an *ad hoc* Conciliation Committee after the ICJ case ended,¹⁵ it has now also been discontinued¹⁶ due to the thaw in diplomatic relations between the states.¹⁷ Without an active case, the CERD Committee cannot affirm its position, aside from issuing a clarification to General Recommendation 30.

In its 2021 judgment on preliminary objections, the Court concluded that the CERD did not prohibit discrimination on the basis of nationality, or, in the words of the Court, on the basis of "current citizenship."¹⁸ Instead, the term "national origin" in the CERD should be read to refer to the immutable characteristic of personal heritage and family descent with a link to a nation,¹⁹ unlike nationality which was a changeable political bond.²⁰ The Court based this

¹³ *Id.* ¶ 32.

¹⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71 ¶ 105 (Feb. 4);

¹⁵ *Jurisdiction, Qatar v. U.A.E., supra* note 7; Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates, Comm. on the Elimination of Racial Discrimination, CERD/C/99/4 (Aug. 30, 2019); Rep. of the Comm. on the Elimination of Racial Discrimination, at 15, U.N. Doc. A/76/18 (2021).

¹⁶ Qatar v. UAE, Dec. on the req. for suspens. submitted by Qatar (Mar. 15, 2021), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf.

¹⁷ *See id.* (explaining that the parties held joint meetings in March 2021).

¹⁸ *See* Qatar v. U.A.E., 2021 I.C.J. ¶¶ 88, 105 ("The term 'national origin' in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality." It further recognizes that the provisional measures determination of plausibility does not prejudice the eventual decision of the Court, stating that it is remarkable that, in a preliminary objections phase – not even a merits phase – that the Court took such a sudden swing in the opposite direction to conclude that "nationality" was clearly not covered by "national origin"); Qatar v. U.A.E., 2021 I.C.J. ¶¶ 3, 4 (dissenting opinion by Bhandari, J.); *see also* Qatar v. U.A.E., 2018 I.C.J. ¶ 13 (noting that the Court had previously, in two requests for provisional measures, agreed that it was at least "plausible" that nationality was covered by "national origin").

¹⁹ Qatar v. U.A.E., 2021 I.C.J. ¶ 81 ("The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, color and descent, are also characteristics that are inherent at birth").

²⁰ *See id.* (citing *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4, 20, 23 (Apr. 6)) ("Nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime").

conclusion on the text, context, and object and purpose, in addition to the preparatory works of the CERD.²¹ Firstly, regarding the text of the CERD, the Court noted that the other characteristics listed in article 1 for which discrimination is prohibited include “race, colour, [and] descent” and that the term “national origin” should be read to be more aligned with the meaning of the other listed characteristics, than political affiliation.²² Secondly, the Court observed that the CERD expressly excluded application to the distinction of citizenship: “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”²³ As for the object and purpose of the CERD, the Court looked to the preamble, stating that the CERD was negotiated in the context of decolonization and expressly rejected the flawed doctrine of racial superiority.²⁴ Lastly, the Court noted that discrimination on the basis of nationality was common in state practice and, implicitly, could not have been intended to be prohibited by the drafters.²⁵ To confirm this interpretation, the Court consulted the *travaux préparatoires*.²⁶ It noted that an amendment had been suggested that would have clarified that citizenship was not included in the definition of “national origin,”²⁷ but that amendment was withdrawn.²⁸ However, the Court did not understand the withdrawn amendment to remove the distinction between national origin and political nationality.²⁹ In its view, the reason that the amendment to article 1 was rejected was the addition of paragraphs 2 and 3 to article 1, which clarified that distinctions between citizens and aliens, were permissible.³⁰ Thus, the

²¹ *Id.* ¶ 88.

²² *Id.* ¶ 74.

²³ *Id.* ¶ 82.

²⁴ *See id.* ¶ 86 (citing Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 150) (explaining that the court in Legal Consequences of the Separation of the Chagos Archipelago believed that the G.A. Res. 1514 (XV) Dec. 14, 1960 was a defining moment in the creation of CERD).

²⁵ *See Qatar v. U.A.E.*, 2021 I.C.J. ¶ 87 (explaining differentiation on the basis of nationality is common and is reflected in the legislation of most States parties).

²⁶ *Id.* ¶ 89.

²⁷ *See id.* ¶¶ 90, 94.

²⁸ *Id.* ¶ 96.

²⁹ *See id.*

³⁰ *See id.* (citing U.N. GAOR, Third Committee, 20th Sess., 1307th mtg. at 95, ¶ 1, U.N. Doc. A/C.3/SR.1307 (Oct. 18, 1965)) (“[A]lthough the amendment was withdrawn, this was done in order to arrive at a compromise formula that would

Court concluded that differentiation on the basis of political nationality was not covered by CERD, and dismissed the case on the preliminary objection.³¹

However, the CERD Committee interprets the definition differently than the ICJ.³² In General Recommendation 30, the Committee specifically addressed the issue of discrimination against non-citizens.³³ The Committee appeared to contemplate some distinction between nationality, as in citizenship, and national origin, as in descent, when it determined that states must report fully on legislation pertaining to non-citizens disaggregated by national origin within their jurisdiction in their compliance reports.³⁴ Nonetheless, the Committee concluded that nationality discrimination is protected by the CERD.³⁵ Specifically, the Committee noted that “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”³⁶ It also observed that persons who have “lived all their lives on the same territory” might face discriminatory practices if they are unable to “establish the nationality of the State on whose territory they live.”³⁷ The Committee consulted the text, just as the ICJ did, listing the various characteristics on

enable the text of the Convention to be finalized, by adding paragraphs 2 and 3 to Article 1 (see the compromise amendment presented by Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland and Senegal, UN doc. A/C.3/L.1238). As the Court has noted (see paragraphs 82-83 above), paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States’ legislation on nationality, thus fully addressing the concerns expressed by certain delegations, including those of the United States of America and France, regarding the scope of the term ‘national origin’ (see the explanations provided by Lebanon in presenting the compromise amendment ...”).

³¹ Qatar v. U.A.E., 2021 I.C.J. ¶ 105.

³² See generally UN Comm. on the Elimination of Racial Discrimination (CERD), General recommendation XXX on discrimination against non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Mar. 12, 2004) [hereinafter CERD Recommendation 30] (noting that differential treatment based on citizenship or immigration status is covered under the Convention, subject to certain limitations).

³³ See *id.* (noting that the Committee organized a discussion between parties, Committee members, and experts regarding discrimination against non-citizens).

³⁴ See *id.* ¶ 5.

³⁵ *Id.*

³⁶ See *id.* pmb1.

³⁷ See *id.*

which basis discrimination was prohibited: "race, colour, descent, and national or ethnic origin."³⁸ Although paragraph 2 of the article does indeed provide the possibility for discrimination on the basis of citizenship, paragraph 3 provides that in matters of "nationality, citizenship or naturalization," states may not discriminate against any particular nationality.³⁹ In addition, the Committee argued, paragraph 2 cannot be understood to abridge human rights that individuals enjoyed regardless of citizenship.⁴⁰ Certainly, some distinctions between citizens and aliens are permitted, such as rights to vote in elections or stand for political office, but the vast array of human rights do not permit such a distinction.⁴¹ Thus, in the view of the Committee, differential treatment on the basis of citizenship must pursue a legitimate aim and be proportional to that aim.⁴²

III. NATIONALITY DISCRIMINATION IN HUMAN RIGHTS LAW

Most major human rights treaties covering "national origin" have been interpreted to also cover nationality.⁴³ The Universal Declaration on Human Rights, though not a treaty, sets the typical phrasing,⁴⁴ stating that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any

³⁸ CERD Recommendation 30, *supra* note 32.

³⁹ *Id.* ¶ 1.

⁴⁰ *See id.* ¶ 2 (clarifying states' responsibilities in agreeing to the International Convention on the Elimination of All Forms of Racial Discrimination that, "Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights").

⁴¹ *See id.* ¶ 3 (acknowledging that human rights belong to all people, "Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law").

⁴² *See id.* ¶ 4 ("Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination....").

⁴³ *See, e.g.,* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (recognizing fundamental human rights, including national origin and nationality, and declaring them as a common standard for individuals across nations).

⁴⁴ *See id.* (wording the declaration in a standardized way to ensure human rights are all-encompassing).

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁵ The use of “everyone” and the prohibition of distinction “of any kind,” where the listed characteristics are merely indicative (the use of “such as” to introduce the list and “other status” to end the list), suggests that a wide variety of possible personal attributes are protected, citizenship being one possibility.⁴⁶

The International Covenant on Civil and Political Rights (“ICCPR”) also uses similar open-ended terminology.⁴⁷ In Article 2, the ICCPR prohibits “distinction” and lists the protected grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁸ However, it does mention “other status” and elsewhere adopts slightly more inclusive language.⁴⁹ In Article 26, when the ICCPR addresses the right of equality before the law, it “prohibit[s] any discrimination” for “all persons” and when listing the grounds of “race, colour, sex, [etc.]” identical to that in article 2, it mentions that this list is indicative (here using “such as” and “other status”).⁵⁰

That being said, the drafters of the ICCPR clearly had the differentiations between citizens and non-citizens in mind.⁵¹ In both article 13, on expulsion, and article 25, on civil and political participation, the drafters refer to “alien” and “citizens” as distinct categories, respectively.⁵² Thus, the ICCPR provides an exception for the general rule of non-discrimination, permitting discrimination between citizens and non-citizens for purposes of expulsion of

⁴⁵ *Id.* art. 2.

⁴⁶ *Id.*

⁴⁷ See International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴⁸ *Id.* art. 2, ¶ 1.

⁴⁹ *Id.* art. 2, ¶ 1, art. 26.

⁵⁰ *Id.*

⁵¹ Off. of the U.N. High Comm’r for Hum. Rts., *The Rights of Non-Citizens*, at 5 U.N. Doc HR/PUB/06/11 (2006).

⁵² See ICCPR, *supra* note 47, arts. 13, 25.

foreign nationals,⁵³ voting,⁵⁴ elections,⁵⁵ and other public service.⁵⁶ Even detention of aliens attempting entry was permissible subject to the condition that it was only implemented when strictly necessary.⁵⁷ The Human Rights Committee also added, in an earlier comment, that the rights in the ICCPR applied to persons regardless of whether they were citizens or aliens.⁵⁸ While a state might restrict entry or set conditions for aliens,⁵⁹ once admitted, they enjoyed freedom of movement which could only be restricted following a proportionality analysis.⁶⁰ Ultimately, the Committee concluded, in *Gueye v. France*, that discrimination between citizens and aliens fell under discrimination on the basis of "other status."⁶¹

The discrimination mentioned so far involves the differentiation between citizens and aliens, though there is another form of discrimination with nationality as its basis: the discrimination among nationalities. In the former situation, the state is making a distinction between its own nationals and foreign nationals, between "us" and "them."⁶² All of the discriminatory acts mentioned above entail this type of discrimination: prohibiting aliens from political participation, but permitting nationals;⁶³ refusing or

⁵³ See *id.* art. 13; Off. of the U.N. High Comm'r for Hum. Rts., General Comment No. 15: The Position of Aliens Under the Covenant, ¶¶ 5, 10 (Apr. 11, 1986) [hereinafter HRC, *Gen. Comment No. 15*] (notwithstanding the exception for political participation, the exception for expulsion has additional conditions for its exercise, such as the provision of due process and cannot be arbitrary).

⁵⁴ ICCPR, *supra* note 47, art. 25.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ Human Rights Committee, *A. v. Austl.*, Communication No. 560/1993 ¶¶ 9.3-9.4 (Apr. 1997).

⁵⁸ See HRC, *Gen. Comment No. 15*, *supra* note 53, ¶ 7.

⁵⁹ See *id.* ¶ 6 (explaining conditions imposed on aliens in transit until they are allowed to enter the territory of the State at which time they will be granted the rights in the Covenant).

⁶⁰ See *id.* ¶ 8 (explaining that once an alien is lawfully within a territory, his freedom of movement within that territory, as well as his right to leave may only be restricted in accordance with article 12, paragraph 3. Additionally, differences need to be justified under article 12, paragraph 3).

⁶¹ Human Rights Committee, *Gueye et al. v. Fr.*, Communication No. 196/1985, ¶ 9.4, U.N. Doc. CCPR/C/35/D/196/1985 (1989).

⁶² See HRC, *Gen. Comment No. 15*, *supra* note 53, ¶ 2 (explaining the differentiation between the way citizens and aliens are discriminated against).

⁶³ See ICCPR, *supra* note 47, art. 25 (explaining the political rights that only citizens have).

expelling foreign nationals but admitting citizens.⁶⁴ But in the latter situation, the state is treating different foreign aliens distinctly on the basis of their particular nationality.⁶⁵ The Human Rights Committee has acknowledged this difference, albeit without boldly highlighting the distinction.⁶⁶ The Human Rights Committee held that the expression “his own country” in article 12,⁶⁷ referring to the right to leave and return, was broader than the concept of nationality, after all, the drafters had used “citizen” in article 25 and not in article 12.⁶⁸ Such omission must have significance. But this omission also meant that some aliens were treated differently than others.⁶⁹ Because of the alien’s “special ties to or claims in relation to a given country, [the alien] cannot be considered to be a mere alien.”⁷⁰ This kind of distinction among nationalities was not prohibited and was expressly required in the text of the ICCPR.⁷¹ However, in the *Šipin v. Estonia* case, the Human Rights Committee needed to further apply the general prohibition on nationality-based discrimination, but in the context of discrimination among nationalities, not

⁶⁴ See *id.* art. 13; HRC, *Gen. Comment 15*, *supra* note 53, ¶ 5.

⁶⁵ See ICCPR, *supra* note 47, art. 13 (discussing differential treatment of foreign aliens based on nationality in situations involving national security).

⁶⁶ See HRC, *Gen. Comment 15*, *supra* note 53, ¶ 2 (highlighting the subtle recognition of differential treatment of aliens under the aforementioned covenant).

⁶⁷ ICCPR, *supra* note 47, art. 12.

⁶⁸ See HRC, *Gen. Comment 15*, *supra* note 53, ¶ 8 (highlighting the wording of article 12, paragraph 4, and its lack of distinction between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien); compare *id.* art. 12, ¶ 2 (comparing “Everyone shall be free to leave any country, including his own”) and *id.* art. 12, ¶ 4 (“No one shall be arbitrarily deprived of the right to enter his own country”) with *id.* art. 25 (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs ...”) and *id.* art. 13 (“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom ...”).

⁶⁹ See HRC, *Gen. Comment 15*, *supra* note 53.

⁷⁰ Off. of the U.N. High Comm’r for Hum. Rts., General Comment No. 27: Article 12 (Freedom of Movement), ¶ 20, CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

⁷¹ See ICCPR, *supra* note 49, art. 2.

against all aliens.⁷² In this case, Estonia refused the naturalization of an ethnic Russian because the law prohibited naturalization for "a former member of the armed forces of another country," a national security issue.⁷³ The Committee concluded that such a justification, though reviewable, was legitimate.⁷⁴ The critical issue is that the discrimination was not strictly between citizens and aliens.⁷⁵ Even though it was an application for naturalization, it could have easily been an application for a professional license or other administrative act.⁷⁶ The basis of discrimination was among nationalities, in this case, Russian nationality compared to any other nationality.⁷⁷ In finding that the case was reviewable, though acceptable, the Committee affirmed that discrimination among nationalities is also covered by the ICCPR, similar to discrimination between citizens and aliens.⁷⁸

Turning to other treaties, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") also applies the distinction between citizens and aliens.⁷⁹ Following the structure of the ICCPR, the ICESCR specifies that it covers "discrimination of any kind", and though apparently limited to a closed list of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, [or] birth" it also adds the possibility of "other status."⁸⁰ Since the treaty does not cover equality before the law, as the ICCPR did, it does not have another list elsewhere in the text that might be phrased differently with a "such as," but "other

⁷² See Human Rights Committee, *Šipin v. Estonia*, Communication No. 1423/2005, ¶¶ 7.4-7.5, U.N. Doc. CCPR/C/93/D/1423/2005 (2008) (establishing legitimacy of a denial of citizen application based on national security reasons).

⁷³ *Id.* ¶ 2.1.

⁷⁴ *Id.* ¶¶ 7.4-8.

⁷⁵ *Id.* ¶ 9.

⁷⁶ *Id.* ¶ 7.

⁷⁷ *Id.* ¶¶ 1-2.1.

⁷⁸ See *Šipin v. Estonia*, ¶¶ 6.2, 7.2 (explaining that art. 26 of the "Covenant," also known as the International Covenant on Economic, Social and Cultural Rights, refers to classes of individuals who shall not be discriminated against according to their citizenship or birth); see also ICCPR, *supra* note 47, art. 26 (guaranteeing equal protection for all individuals against discrimination based on "race, colour, sex, language . . . national or . . . other status").

⁷⁹ International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR].

⁸⁰ *Id.*

status” may serve the same purpose.⁸¹ In the treaty as well, the drafters clearly contemplated distinctions on the basis of nationality.⁸² In Article 2, paragraph 3, they specifically permitted “developing nations,” in their discretion, to limit the “economic rights” of non-citizens.⁸³ With a clear distinction between nationals and aliens, and yet no other provisions limiting rights on that basis, the Economic, Social and Cultural Rights Committee easily held that the ICESCR applied to both citizens and non-nationals, regardless of the legal status of the non-national, or lack thereof. Since the CESCR does not contain political rights or rights of admission to a state like the ICCPR, there does not appear to be any effort (aside from article 2(3)) to limit the rights of non-nationals to any of the rights in the Covenant.⁸⁴

The evolution to embrace citizenship as a protected characteristic is also affirmed by the Migrant Workers Convention.⁸⁵ In that Convention, the text clearly identifies “nationality,” along with “national ... origin,” as a protected characteristic.⁸⁶ This coverage is stated in article 1 and repeated in article 7.⁸⁷ The express inclusion of nationality in this Convention might suggest that it could have been purposefully omitted in the ICCPR and ICESCR.⁸⁸

⁸¹ *Id.*; see also ICCPR, *supra* note 47, art. 26 (indicating all individuals of member states are equal before the law).

⁸² See e.g., ICESCR, *supra* note 80, art. 2, ¶ 3 (showing the distinction between national and non-nationals).

⁸³ See *id.* (“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”); but see VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW 160 (2019) (noting that it does not appear that this provision has ever been invoked by any “developing state”).

⁸⁴ See ICESCR, *supra* note 80, art. 2, ¶ 3 (demonstrating how article 2, ¶ 3 limits the rights of nationals).

⁸⁵ See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, pmbl., Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention] (discussing the rights of migrant workers and their families).

⁸⁶ See *id.* art. 1, ¶ 1 (“The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”).

⁸⁷ See *id.* arts. 1, 7 (defining “nationality” compared to “national origin”).

⁸⁸ See *id.* arts. 1, ¶ 1, 7 (demonstrating a multilateral treaty that provides new protections for migrant workers and their families); see ICESCR, *supra* note 80, pmbl. (demonstrating example of exclusion of nationality); see also ICCPR, *supra*

However, the use of “such as” and “other status” in those treaties⁸⁹ and the same usage in the Migrant Workers Convention,⁹⁰ suggests the opposite.

A similar analysis applies to the European Convention on Human Rights (“ECHR”).⁹¹ In article 1, the ECHR states that the rights in the Convention apply to “everyone,”⁹² and specifically that discrimination is prohibited on various grounds “such as” sex, race, and so on, including “national or social origin” and “other status”.⁹³ The ECHR does permit – perhaps surprising to modern ears – discrimination between nationals and aliens in rights of expression, assembly, association and liberty.⁹⁴ Importantly, this exception for

note 47, art. 24 (demonstrating an international covenant on civil and political rights without referring to nationality).

⁸⁹ See ICCPR, *supra* note 47, art. 2, ¶ 1, art. 14, ¶ 4, art. 26 (demonstrating the scope and explaining the non-discrimination with respect to rights); see ICESCR, *supra* note 80, art. 2, ¶ 2 (clarifying the enunciation that the covenant will be executed without discrimination as to race, color, sex, language, religion, political... or other status and providing examples where “other status” is included); compare Migrant Workers Convention, *supra* note 87, art. 1, ¶ 1, art. 7, art. 13, ¶ 3, art. 18, ¶ 4 (providing examples where “such as” and “other status” is included in various articles’ language).

⁹⁰ See ICCPR, *supra* note 47, art. 2, ¶ 1, art. 26 (providing examples where “other status” is included in various articles’ language).

⁹¹ See Council of Europe, *Explanatory Report to the European Convention on Nationality*, art. 5, ¶ 1, § 43, E.T.S. No. 166 (Nov. 6, 1997), <https://rm.coe.int/16800ccde7> (detailing the analysis of nationality in the European Convention on Human Rights).

⁹² See [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 005 [hereinafter ECHR] (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention [right to life, fair trial, private and family life, thought, conscience and religion, etc.]”).

⁹³ See *id.* art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”); Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 2000, 2465 U.N.T.S. 203, E.T.S. No. 177 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”).

⁹⁴ See ECHR, *supra* note 94, art. 16 (noting that nothing in Articles 10 [expression], 11 [assembly and association], and 14 [discrimination] prevent the imposition of restrictions on political activity of aliens); see ECHR, *supra* note 90, art. 5, ¶ 1 (permitting discrimination in rights to liberty to allow detention, deportation and extradition of individuals in irregular immigration status); see e.g. *Saadi v U.K.*,

permissible discrimination expressly notes that it is a deviation from the general prohibition on discrimination in article 14.⁹⁵ Had article 14 not provided for nationality discrimination, this observation in the text of the ECHR itself would not have been necessary, thus, the drafters of the ECHR must have considered that nationality discrimination was covered by article 14.⁹⁶ In addition, in several cases at the European Court of Human Rights (“ECtHR”), the Court has found that an individual’s nationality is a part of their identity and should be protected as such.⁹⁷ In *Gaygusuz v. Austria*, the ECtHR held that a public law openly discriminating between citizens and aliens⁹⁸ had to be measured against a proportionality analysis.⁹⁹ In fact, the Court found that the proportionality analysis

App. No. 13229/03cli, ¶ 64 (Eur. Ct. Hum. Rts., Gr. Ch., Jan. 29, 2008) (suggesting that, although these measures are most commonly applied to aliens, they are not necessarily exclusively applied to aliens. Nationals can certainly be subject to extradition and could even, although quite unusually, attempt irregular entry. Therefore, while this provision suggests a possible permission to discriminate between citizens and nationals, it is not conclusive so).

⁹⁵ See ECHR, *supra* note 974 art. 16 (explaining the importance behind an exception to prohibited discrimination as seen in article 14 in order to prevent restrictions on political activity of aliens).

⁹⁶ See *id.* art. 14 (interpreting the intent of the drafters as to why article 14 covered nationality discrimination when addressing the topic of discrimination itself).

⁹⁷ See, e.g., *Mennesson v. Fr.*, 2014-III Eur. Ct. H.R. ¶ 97-99 (June 26, 2014) (referencing *Genovese v. Malta*, App. No. 53124/09, ¶ 33 (Oct. 11, 2011) (explaining that while Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person’s identity)), <https://www.refworld.org/cases,ECHR,509ea0852.html> (describing that the effects of non-recognition in French law of the legal parent-child relationship also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected)); see also Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (stating, “[s]tates Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”).

⁹⁸ See *Gaygusuz v. Austria*, App. No. 17371/90, ¶ 43 (Sept. 16, 1996), <https://hudoc.echr.coe.int/eng?i=001-58060> (explaining how the applicant maintained that the difference in treatment between Austrians and non-Austrians was not based on any objective and reasonable justification because he had paid contributions to the unemployment insurance fund on the same basis as Austrian employees).

⁹⁹ See *id.* ¶ 42 (describing the high threshold for balancing difference in treatment with objective and reasonable justification, legitimate aims, or reasonable relationship of proportionality).

for discrimination between nationals and aliens demanded “very weighty reasons” from the state to justify the differentiation.¹⁰⁰ Such a standard was affirmed in *Bah v. UK*, where the ECtHR held that a distinction on migration status, in essence the sub-category of the difference between a citizen and an alien, was a suspect classification falling under “other status.”¹⁰¹ In fact, the Court rejected a rigid application of the immutable characteristic test¹⁰² applied in some of the other situations mentioned above.

The Court has also affirmed that the discrimination prohibited by the ECHR is not limited to discrimination between nationals and aliens, but also discrimination among nationalities.¹⁰³ In *C v. Belgium*, an individual with Moroccan nationality complained that while he was subject to deportation from Belgium, other individuals, with nationality in European Union (“EU”) Member States, were not.¹⁰⁴ He submitted that this amounted to discrimination on

¹⁰⁰ *Id.*; see also *Andrejeva v. Lat.*, App. No. 55707/00, ¶ 87 (Feb. 18, 2009), <https://hudoc.echr.coe.int/eng?i=001-91388> (describing how the court requires very weighty reasons to base different treatment in retirement pension eligibility solely on nationality).

¹⁰¹ *Bah v. U.K.*, App. No. 56328/07, ¶ 45 (Sept. 27, 2011), <https://hudoc.echr.coe.int/eng?i=001-106448>.

¹⁰² See *id.* (“The Court does not agree with the Government that immigration status cannot amount to a ground of distinction for the purposes of Article 14, since it is a legal rather than a personal status. The Court has previously found that a person’s place of residence constitutes an aspect of personal status within the scope of Article 14 (see *Carson and Others*, cited above, §§ 70-71), in spite of the fact that a person can choose their place of residence, meaning that it is not an immutable personal characteristic. Similarly, immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national. . . . the Court notes that it has in its previous case law found that a large variety of different statuses, which could not be considered to be “personal” in the sense of being immutable or innate to the person, amounted to “other status” for the purposes of Article 14 . . .”).

¹⁰³ See *C. v. Belg.*, App. No. 21794/93, ¶ 37 (Aug. 7, 1996), <https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20C.%20v.%20BELGIUM.PDF> (holding that although discrimination among nationalities is prohibited, the ruling was not upheld here because member States of the European Union form a special legal order, which has established its own citizenship and is not considered a nationality).

¹⁰⁴ *Id.* ¶¶ 37, 38 (claiming that Mr. C., a Moroccan national, was a victim of discrimination on the grounds of nationality and race. His deportation amounted to less favorable treatment than was accorded to criminals who, as nationals of a member State of the European Union, were protected against such a measure in Belgium).

the basis of nationality.¹⁰⁵ It was not discrimination between nationals and aliens, even though a deportation matter, because all of the individuals being compared were aliens; the measures at issue were differential treatment based on differing foreign nationality.¹⁰⁶ The Court held that the Member States of the EU had created EU citizenship, a citizenship common among themselves, so that the distinction between an EU citizen and non-EU citizens was legitimate, but importantly, the Court did demand that the measures satisfy the legitimacy and proportionality test.¹⁰⁷

The case of *Koua Poirrez v. France* at the ECtHR covered both forms of nationality discrimination regarding the payment of disability benefits.¹⁰⁸ As far as the distinction between citizens and aliens was concerned, the Court noted that the nationality requirement had later been abolished in law,¹⁰⁹ and therefore could not now be invoked as a proportionate measure, regardless of whether the measure was legitimate.¹¹⁰ As far as the discrimination among foreign nationalities, the Court observed that France permitted the benefits for nationals of states with which France had entered into an international agreement, but not for the nationals of other

¹⁰⁵ See *id.* (maintaining that his deportation amounted to less favorable treatment due to his nationality).

¹⁰⁶ See *id.* (discussing how Mr. C's deportation amounted to less favorable treatment than criminals who were members of the European Union and thus were protected from such differential treatment).

¹⁰⁷ See *id.* ¶ 38 ("Like the Government and the Commission, the Court considers that such preferential treatment is based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship. There has accordingly been no violation of Article 14 taken in conjunction with Article 8 (art. 14+8)").

¹⁰⁸ *Koua Poirrez v. Fr.*, App. No. 40892/98, ¶ 3 (Sept. 30, 2003), <http://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-61317&file-name=CASE%20OF%20KOUA%20POIRREZ%20v.%20FRANCE.docx&logEvent=False>.

¹⁰⁹ See *id.* ¶ 40 ("The Court notes that the nationality condition for the award of the allowance was abolished by the Act of 11 May 1998. The AAH has therefore been awarded without any distinction on grounds of nationality since that Act was enacted. The applicant has indeed received it since June 1998, that is immediately after the Act was passed.").

¹¹⁰ See *id.* ¶¶ 38-42 (explaining that the nationality condition was abolished in May 1998).

states.¹¹¹ In principle, such distinction among nationalities would broadly appear to be justifiable under *C. v. Belgium*.¹¹² Both the differential treatment in *C. v. Belgium* and that in *Koua Poirrez v. France* were based on international treaty obligations incumbent on the state that specifically demanded such discriminatory treatment.¹¹³ However, the Court did not find any appreciable justification for such discrimination for purposes of disability benefits.¹¹⁴ In so concluding, the Court relied on views of the European Union Committee of Ministers and European Committee of Social Rights, focusing on the need for everyone with a disability to receive assistance on that basis.¹¹⁵ One can surmise that *C v. Belgium* can be distinguished because it dealt with deportation and involves strong considerations of sovereignty, and thus where a state might have greater margin of appreciation, rather than payment of social benefits which everyone in the same condition needs.¹¹⁶ Thus, both discrimination between citizens and aliens, and discrimination among

¹¹¹ See *id.* ¶¶ 38-39 (explaining that the claim was denied solely on the ground that the applicant was a national of a state that had signed a reciprocity agreement with France. Note that the Court of Justice of the European Union (CJEU) had previously upheld the discriminatory treatment against the same individual in the *Koua Poirrez* case on the argument that EU law did not apply to a situation where there was no cross-border, intra-EU movement, and thus the status of worker under EU law was not triggered); see Case C-206/91, *Koua Poirrez v. Caisse d'Allocations Familiales de la Seine-Saint-Denis (CAF)*, *in loco* Caisse d'Allocations Familiales de la Region Parisienne (CAFRP), Judgment, 1992 ECR I-06685 (Ct. Just. EU, 2d Ch., Dec. 16, 1992) ¶ 12 ("Community [European Community, now European Union] legislation regarding freedom of movement for workers cannot be applied to the situation of workers who have never exercised the right to freedom of movement within the Community"); see also *Koua Poirrez v. Fr.*, App. No. 40892/98, ¶ 16 (explaining that the ECtHR took notice of the CJEU judgment).

¹¹² See *C. v. Belg.*, App. No. 21794/93, ¶ 38.

¹¹³ *Id.* ("The member States of the European Union form a special legal order, which has, in addition, established its own citizenship"); *Koua Poirrez v. Fr.*, App. No. 40892/98, ¶ 38-39 (stating, "neither a French national nor a national of a country that had signed a reciprocity agreement ...").

¹¹⁴ See *Koua Poirrez v. Fr.*, App. No. 40892/98, ¶ 39 (holding that "[i]n the Court's view, the fact that the applicant's country of origin had not signed such an agreement [...] did not in itself justify refusing him the allowance in question [...] the allowance is moreover intended for persons with a disability...").

¹¹⁵ *Id.*

¹¹⁶ Compare *C. v. Belg.*, App. No. 21794/93, ¶ 37 (exemplifying the harsh treatment that occurred prior to deportation based on the individual's nationality), with *Koua Poirrez v. Fr.*, App. No. 40892/98, ¶ 39 ("The allowance is moreover intended for persons with a disability").

nationalities, are limited by the ECHR and subjected to a proportionality analysis, and some justifications are more compelling.

Lastly, the American Convention on Human Rights (“ACHR”)¹¹⁷ has also been held to cover citizenship discrimination, both discrimination between citizens and aliens, and among nationalities. The ACHR provides that the rights in the Convention shall be applied to “all persons” “without any discrimination” on the grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”¹¹⁸ The Convention does not use “such as,” but does include “any other social condition.”¹¹⁹ Rights to equal protection before the law are open-ended, as it simply states that “all persons are equal before the law” without specifying any grounds of discrimination.¹²⁰

In addition, the Convention employs the term “national” in multiple contexts. For example, freedom of expression can be curtailed for “propaganda for war and any advocacy of national, racial, or religious hatred [towards any] person or group of persons on any grounds including those of race, color, religion, language, or national origin.”¹²¹ Following similar provisions in the Refugee Convention, individuals cannot be expelled to a “country of origin” where that person’s life or freedom is at risk on the basis of “race, nationality, religion, social status, or political opinions.”¹²² Presumably, such a provision would be interpreted in line with the practice of the Refugee Convention which reads “nationality” broader than citizenship.¹²³

Yet in other contexts in the ACHR, the meaning of “national” or “nationality” is citizenship.¹²⁴ The Convention provides for a

¹¹⁷ See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 9 I.L.M. 99 [hereinafter ACHR] (discussing the rights of citizens and aliens and the protection against discrimination regardless of race and nationality).

¹¹⁸ *Id.* art. 1, ¶ 1.

¹¹⁹ *Id.*

¹²⁰ *Id.* art. 24.

¹²¹ *Id.* art. 13, ¶ 5.

¹²² *Id.* art. 22, ¶ 8.

¹²³ See Convention Relating to the Status of Refugees, art. 1(a)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention] (stating that one retains a nationality in each of the countries where they are a national).

¹²⁴ ACHR, *supra* note 118, art. 20, ¶ 3 (suggesting that one can change their nationality, which implies that citizenship is the basis of its meaning).

"right to a nationality,"¹²⁵ referencing the "right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality"¹²⁶ and prohibiting the arbitrary deprivation of nationality or restrictions on changing nationality.¹²⁷ Individuals cannot "be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."¹²⁸ All of these terms contemplate nationality as citizenship in a state. The preamble of the ACHR also observes that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."¹²⁹ In addition, the Convention uses the term "national" repeatedly in the sections establishing the Inter-American Commission on Human Rights and Inter-American Court of Human Rights, including, *inter alia*, the requirements for members and judges, clearly using the term "national" throughout in the sense of citizenship.¹³⁰ In one instance the ACHR uses the term "citizen."¹³¹ Specifically, this term is used to refer to rights of participation in politics and public affairs.¹³² However, the ACHR also provides that these rights pertaining to the "citizen" may be restricted on the basis of "nationality,"¹³³ clearly meaning foreign citizenship.

The case law of the Inter-American Court of Human Rights ("IACtHR") confirms that nationality discrimination is covered by the ACHR and both discrimination against aliens and among nationalities fall under the prohibition of nationality discrimination.¹³⁴ In its advisory opinion *Juridical Condition and Rights of the Undocumented Migrants*, the IACtHR noted that all discrimination is in

¹²⁵ *Id.* art. 20, ¶ 1.

¹²⁶ *Id.* art. 20, ¶ 2.

¹²⁷ *Id.* art. 20, ¶ 3.

¹²⁸ *Id.* art. 22, ¶ 5.

¹²⁹ *Id.* pmbi.

¹³⁰ See ACHR, *supra* note 118, art. 36, ¶ 2, art. 37, ¶ 2, art. 46, ¶ 1(d), arts. 149-50, art. 52, ¶ 1-2, art. 53, ¶ 1-2, art. 154, art. 55, § 1-3, arts. 156-158.

¹³¹ *Id.* art. 23.

¹³² See *id.* art. 23, ¶ 1 (noting citizens' rights to participate in government and to have access to the public service of their country).

¹³³ *Id.* art. 23, ¶ 2.

¹³⁴ See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sep. 17, 2003) (acknowledging that discriminatory treatment based on national origin, nationality, civil status or birth status is unacceptable and this right of non-discrimination is a fundamentally recognized principle in international law).

principle prohibited by the ACHR, but that “not all differences in treatment are in themselves offensive to human dignity.”¹³⁵ States are required to protect ACHR rights to all persons without distinction between citizens and aliens.¹³⁶ Thus, whether a person was documented or undocumented, he or she was still an alien that benefitted from the ACHR.¹³⁷ Of course, states can prevent the entry of undocumented persons,¹³⁸ or arrest and expel them.¹³⁹ They can deny them voting and political participation rights.¹⁴⁰ They can also prohibit employers from hiring undocumented persons.¹⁴¹ These measures, and others like them, are subjected to a proportionality assessment and can be applied.¹⁴² But aside from those and similar measures, states may not otherwise discriminate in protecting human rights of undocumented persons.¹⁴³ Because labor and employment provisions, aside from the initial hiring, are rights enjoyed by all persons without discrimination, then they are enjoyed by all aliens, including undocumented persons.¹⁴⁴ Therefore, much like the ICCPR and other instruments, discrimination between nationals and aliens is included in the prohibited grounds in the ACHR despite not being expressly listed, though certain measures can survive the proportionality test, such as voting and lawful admission to the state.¹⁴⁵

However, the *Undocumented Migrants* advisory opinion said nothing about discrimination among nationalities and whether that form of discrimination was covered by nationality discrimination under the ACHR.¹⁴⁶ This question was answered twenty years

¹³⁵ *Id.* ¶ 89.

¹³⁶ *Id.* ¶ 118.

¹³⁷ *Id.*

¹³⁸ *See id.* ¶ 119 (allowing states to implement regulations to control the mobilization of migrants within their state without depriving them of their due process and human rights).

¹³⁹ *See id.* ¶ 118 (permitting states to take action against migrants who fail to comply with the national law).

¹⁴⁰ *See* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 119 (Sep. 17, 2003).

¹⁴¹ *Id.* ¶ 135.

¹⁴² *Id.* ¶ 119.

¹⁴³ *Id.* ¶¶ 118-22.

¹⁴⁴ *Id.* ¶¶ 133, 36.

¹⁴⁵ *Id.* ¶ 94.

¹⁴⁶ *See generally* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 47, 101 (Sep. 17, 2003) (showing how the ACHR states that human rights do not depend on the

prior in the advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*.¹⁴⁷ In this opinion, the Court determined that the prohibition on nationality discrimination also covered this form of discrimination.¹⁴⁸ The Court was asked whether proposed legal provisions on naturalization that distinguished between nationals of different countries, and their means of acquiring their nationality, were prohibited.¹⁴⁹ Specifically, Costa Rica proposed to look more favorably on naturalization applications by “native-born nationals” as opposed to naturalized citizens of other countries of “Central America, Spaniards and Ibero-Americans”.¹⁵⁰ The Court subjected these provisions to the normal proportionality assessment,¹⁵¹ confirming that such measures do trigger the application of the ACHR discrimination provisions, but found that the distinctions between nationals was justifiable.¹⁵² The Court found it reasonable that Costa Rica preferred new nationals who would have a “closer affinity than others to Costa Rica’s value system and interests”¹⁵³ that would ensure better assimilation¹⁵⁴ and a more “effective link between them and the value system and interests of the society to which they wish to

nationality of a person while the advisory focuses on the labor rights of undocumented migrants and how their nationality is not a basis for discrimination).

¹⁴⁷ Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 54 (Jan. 19, 1984).

¹⁴⁸ See *id.* (explaining that prohibition against these types of discrimination has also been maintained through the usage of discriminatory regulations).

¹⁴⁹ See *id.* ¶ 40 (explaining that the court was asked whether the proposed amendment, when eliminating privileged naturalization status is indicative of a position rejecting unity and solidarity of the peoples who have achieved independence as a single nation in Central American countries).

¹⁵⁰ *Id.* ¶ 7.

¹⁵¹ See *id.* ¶ 57 (explaining that there is a relationship of proportionality between the differences in treatment of discrimination).

¹⁵² See *id.* ¶ 63 (reconciling the ramifications of these discriminatory provisions, but explaining they are justifiable).

¹⁵³ Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 59 (Jan. 19, 1984).

¹⁵⁴ See *id.* ¶ 60 (“The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve”).

belong.”¹⁵⁵ The Court also found that it was reasonable for Costa Rica to believe that individuals having a certain nationality would have “much closer historical, cultural and spiritual bonds with the people of Costa Rica.”¹⁵⁶ Moreover, the Court also found that it was reasonable, though perhaps “more difficult to understand,”¹⁵⁷ to view individuals who had acquired nationality by birth rather than through naturalization later in life as having those stronger bonds.¹⁵⁸ The critical conclusion in this decision for this article, however, is that the ACHR also covered discrimination between nationalities, and, though the proposed measures survived scrutiny in this opinion, they were subjected to a proportionality assessment.¹⁵⁹

On an important side note, the Court also concluded that similar discrimination, distinguishing between nationals who acquired nationality by birth or by naturalization, would not survive such scrutiny when the state was distinguishing between its nationals.¹⁶⁰ Thus, in the view of the IACtHR, discrimination based on nationality has three different modalities, with differing approaches for assessment.¹⁶¹ (1) Discrimination between one’s nationals will hardly be permitted; (2) discrimination among foreign nationalities will need to be justifiable and proportionate; and (3) discrimination between foreigners and aliens also must be justifiable and proportionate, but there are strong exceptions for political and civil rights.¹⁶²

¹⁵⁵ See *id.* ¶ 59 (highlighting that certain nationalities will engage with the societal values of Costa Rica better than others).

¹⁵⁶ See *id.* ¶ 60 (showing that it is logical to believe individuals of certain nationalities will be more connected to Costa Rican culture).

¹⁵⁷ See *id.* ¶ 61 (showing the logical, yet confusing, relation between individuals who acquire nationality by birth as opposed to those who acquire naturalization later in life and the strength of their tie to Costa Rica).

¹⁵⁸ See *id.* ¶¶ 60-61 (discussing distinction between individuals who acquire nationality by birth and those who acquire naturalization later in life).

¹⁵⁹ Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 59 (Jan. 19, 1984).

¹⁶⁰ See *id.* ¶ 62 (establishing that the “[c]ourt’s conclusion should not be viewed as approval [. . .] to an exaggerated and unjustified degree pertaining to the political rights of naturalized individuals. Most of these situations involve cases [. . .] that [. . .] constitute clear instances of discrimination”).

¹⁶¹ See *id.* ¶¶ 31-33 (declaring that rights pertaining to one’s nationality also involve human rights).

¹⁶² See *id.* ¶¶ 33-35 (determining the right to one’s nationality and the subsequent assessment of discrimination based on nationality).

In addition to the human rights treaties mentioned above, other treaties with similar terms have also been understood to cover nationality.¹⁶³ For example, the International Criminal Tribunal for Rwanda in *Akayesu* understood the term “national,” as expressed in the Genocide Convention, to cover only citizenship.¹⁶⁴ The Tribunal noted that the Genocide Convention criminalized genocidal acts with the intent to “destroy, in whole or in part, a national, ethnical, racial or religious group, as such”¹⁶⁵ and that the purpose of identifying these categories, as revealed by the *travaux préparatoires*, was to prohibit the intent to destroy any “stable groups”¹⁶⁶ where membership is “normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.”¹⁶⁷ This view suggests that “national ... group” should be interpreted as “national origin”; however, the Tribunal concluded that actually the meaning was citizenship.¹⁶⁸ It stated that “[b]ased on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹⁶⁹ Thus, the Tribunal understood that citizenship was a “stable group ... normally not challengeable by its members” comparable to ethnicity, race or religion.¹⁷⁰

But there are also other approaches. The Refugee Convention, for example, provides that a refugee is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

¹⁶³ See *id.* ¶ 37 (establishing that naturalization is an event of fundamental importance in the life of a human being which comports consequences and profound changes).

¹⁶⁴ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 510, 512 (Sept. 2, 1998) (defining nationality as synonymous with citizenship); see also *Nottebohm* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, at 22-23 (Apr. 6) (listing several factors for determining an individual’s nationality).

¹⁶⁵ *Prosecutor v. Akayesu*, ¶ 510 (quoting Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277)

¹⁶⁶ *Id.* ¶ 511 (quoting HIRAD ABTATH & PHILIPPA WEBB, *THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES* 1360 (2008)).

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* ¶¶ 510, 512 (holding that a national group is characterized as those who have an equal legal relationship based on mutual citizenship).

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* ¶ 511.

owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁷¹ A definition that has been repeated verbatim in other instruments, such as the EU Qualification Directive.¹⁷² The EU Qualification Directive notes that “the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State,”¹⁷³ providing that nationality and national origin are covered; however, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* argues that “nationality” refers to “citizenship.”¹⁷⁴ There appears to be a disagreement over the meaning of nationality in the Convention.¹⁷⁵ This disagreement, however, can be resolved because the definition of a refugee actually uses the term “nationality” twice in the same sentence,¹⁷⁶ and each time with different meaning.¹⁷⁷ The grounds of persecution are interpreted to include not only nationality but also national origin, though the country of nationality for physical location is interpreted as nationality of a state.¹⁷⁸ In the former case, the term “nationality” exists alongside other characteristics which, although they might not all be absolutely immutable, are certainly difficult to change or unreasonable

¹⁷¹ Convention Relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 137, *as amended*, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

¹⁷² Council Directive 2011/95 art. 9, 2011 O.J. (L 337) (EU) [hereinafter EU Qualification Directive].

¹⁷³ *Id.* art. 10(1)(c).

¹⁷⁴ U.N. High Comm’n for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol U.N.H.C.R. Relating to the Status of Refugees*, ¶ 87, HCR/1P/ENG/REV. 2 (Apr. 2019) [hereinafter *UNHCR Refugee Status Determination Handbook*].

¹⁷⁵ See *id.* ¶¶ 74-76 (providing an example of various interpretations of “nationality” - “nationality” refers to membership of an ethnic group and overlaps with the term “race”, creating danger for persecution regarding political opinions and national minorities).

¹⁷⁶ See Refugee Convention, *supra* note 125 (“[P]ersecuted for reasons of ... nationality ... is outside the country of his nationality...”).

¹⁷⁷ See *id.* art. 1(A)(2) (exemplifying the different meanings of “nationality”).

¹⁷⁸ See *UNHCR Refugee Status Determination Handbook*, *supra* note 176 (“In this context, ‘nationality’ refers to ‘citizenship’. The phrase ‘is outside the country of his nationality’ relates to persons who have a nationality, as distinct from stateless persons. In the majority of cases, refugees retain the nationality of their country of origin”).

to change.¹⁷⁹ National origin certainly cannot be changed and state nationality is typically very difficult to change.¹⁸⁰ In the latter case of the physical location, the interpretation makes sense, since a refugee, to be considered such, must be outside of the territorial boundaries of his or her country of nationality, thus it must be a territorial entity, a state.¹⁸¹ Similarly, the EU Qualification Directive, in addition to refugee status, also provides for "subsidiary protection" for certain persons at risk who do not otherwise qualify under the refugee definition.¹⁸² This definition provides that the person qualifies if

"substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."¹⁸³

The "country of origin" from which the person must be protected is further defined as state of nationality,¹⁸⁴ in line with the similar definition in the Refugee Convention.¹⁸⁵ Thus, the same term, in this case "nationality" rather than "national origin," can be interpreted in the same sentence to mean either political nationality or descent.¹⁸⁶

¹⁷⁹ See *id.* ¶ 74 ("The term 'nationality' in this context is not to be understood only as 'citizenship'. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution").

¹⁸⁰ See generally *id.* ¶ 101 ("... [T]he 'country of nationality' is replaced by 'the country of his former habitual residence', and the expression 'unwilling to avail himself of the protection. . . ' is replaced by the words 'unwilling to return to it'. . . once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return").

¹⁸¹ See *id.* ¶¶ 88, 91 (explaining the interpretation of physical location as to the light in which a refugee is deemed outside their territorial boundaries).

¹⁸² EU Qualification Directive, *supra* note 173, art. 2(f).

¹⁸³ *Id.*

¹⁸⁴ *Id.* art. 2(n).

¹⁸⁵ See *Refugee Convention*, *supra* note 125, art. 25, ¶ 1 (explaining the correlation between the term nationality and its ability to be used to define country of origin).

¹⁸⁶ See, e.g., CERD Recommendation 30, *supra* note 32, ¶ 1 (using nationality, rather than 'country of origin,' as a synonym for political nationality or descent).

The practice of the drafters of the various treaties mentioned above, and the interpretations of the various treaty monitoring bodies, shows that when the drafters have included the term “national origin” and left the categories of prohibited discrimination relatively open (using “such as” and “other status”), they have intended to include nationality discrimination as a prohibited ground. Also, in some cases, nationality is viewed as comparable to national origin and other characteristics in that it is difficult to change, or unreasonable to expect someone to change. In this light, it is interesting to note that some authorities have argued that nationality is a part of a person’s identity, and should be protected on that basis.¹⁸⁷ In addition, nationality discrimination has generally been understood to include either discrimination between citizens and aliens or discrimination among foreign nationalities.

IV. NATIONALITY DISCRIMINATION IN THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

At this point, this article turns to the Convention on the Elimination of Racial Discrimination to attempt to resolve the tension between the conflicting interpretations of the ICJ and CERD Committee.

A. *Provisions in the CERD*

Like many of the other treaties mentioned above, the CERD covers “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”¹⁸⁸ Given the interpretations of the many other treaties mentioned above, where national origin and “other status” were generally sufficient to include nationality discrimination, the CERD is less straightforward. The CERD does not state as sweeping an assertion that “any discrimination” is forbidden by the treaty and that the list is only

¹⁸⁷ See e.g. CRC, *supra* note 99, art. 8, ¶ 1 (explaining that a child is legally entitled to nationality as part of identity); see also *Mennesson v. Fr.*, App. No. 65192/11, Eur. Ct. H.R. ¶¶ 97-99 (June 26, 2014) (citing *Genovese v. Malta*, App. No. 53124/09, ¶ 33 (2011) (finding that citizenship is a part of a person’s social identity)).

¹⁸⁸ CERD, *supra* note 1, art. 1, ¶ 1.

indicative by the use of “such as” and/or “other status”.¹⁸⁹ This language suggests that the scope of the CERD is indeed narrower than the other treaties. One possible explanation is that the CERD, unlike the other treaties mentioned above, is strictly focused on discrimination, whereas the other treaties include discrimination as only one of many provisions. With a wider range of rights, perhaps a wider range of prohibited grounds for discrimination makes sense, and in a treaty, such as the CERD, focused on racial and related forms of discrimination, a narrower range of discrimination is warranted. After all, article 1 of the CERD does not prohibit discrimination generally, but “racial discrimination” specifically.¹⁹⁰ Yet at the same time, the CERD includes “national origin” and falls into a pattern of practice for interpreting this expression and a generally flexible interpretative approach.¹⁹¹ Nationality discrimination has also been – at least on some occasions – viewed as a status that is certainly difficult to change and no one should be expected to change.

But by far the most compelling distinction between the CERD and other human rights treaties with discrimination provisions is the other provisions in the article 1 which produce the tension that the ICJ and CERD Committee have unsuccessfully addressed.¹⁹² Paragraph 2 of article 1, immediately following the definition of “racial discrimination” to include “national origin” and other bases, states that “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and noncitizens.”¹⁹³ This provision clearly excludes nationality discrimination. However, paragraph 3 of the same article adds that “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any

¹⁸⁹ See *id.* art. 1, ¶¶ 1-3 (showing that the CERD forbids discrimination between race, color, descent, or national or ethnic origin and does not apply to distinctions between citizens and non-citizens).

¹⁹⁰ See *id.* art. 1, ¶ 1 (stating the Convention defines ‘racial discrimination’ as any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin).

¹⁹¹ *Id.*

¹⁹² See *id.* (stating the CERD’s definition of discrimination); see Worster, *supra* note 2 (explaining the conflicts between the ICJ and CERD regarding discrimination among nationalities).

¹⁹³ CERD, *supra* note 1, art. 1, ¶ 2.

particular nationality.”¹⁹⁴ This paragraph appears to, at least partly, contradict the second and includes nationality discrimination. The resolution of these two provisions lies in distinguishing between, on the one hand, discrimination between citizens and aliens, and, on the other hand, among foreign nationalities. It is this distinction that can resolve the disconnect between the approaches of the ICJ and CERD Committee.

B. General Recommendation 30 of the CERD Committee

The view of the CERD Committee was that the CERD prohibited nationality discrimination in the sense of discrimination among nationalities. To the degree that the Committee may have thought that discrimination between citizens and aliens was also covered, it was wrong.

In General Recommendation 30, the CERD Committee appeared to overlook paragraph 2 of article 2 that exempts “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”¹⁹⁵ The Committee stated that the CERD prohibits discrimination for various rights, ranging from the right to equal treatment before the law, to the right to security of the person, to civil, economic, social, and cultural rights.¹⁹⁶ These rights accrue to all persons.¹⁹⁷ In the view of the Committee, some of those rights enumerated in article 5 may clearly be restricted by states between citizens and aliens.¹⁹⁸ The Committee gives the example of political rights.¹⁹⁹ However, the list of rights in article 5 does not say anything about being limited to only citizens.²⁰⁰ Instead, it describes the application of political

¹⁹⁴ *Id.* art. 1, ¶ 3.

¹⁹⁵ *Id.* art. 1, ¶ 2.

¹⁹⁶ See CERD Recommendation 30, *supra* note 32, § 1, ¶ 3 (“Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights”).

¹⁹⁷ See *id.* (establishing that “human rights are ... to be enjoyed by all persons”).

¹⁹⁸ See *id.* (declaring that human rights are to be enjoyed by all persons even if some of these rights are intended to only apply to citizens of a country).

¹⁹⁹ See *id.* (stating that some rights, like the right to vote, participate in, and stand for elections may be reserved to citizens).

²⁰⁰ See CERD, *supra* note 1, art. 5(c) (“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the

rights in the same manner as all other rights in article 5.²⁰¹ Although the Committee does not mention it, other rights in article 5 are generally understood to permit distinction between nationals and aliens, for example, rights to property, inheritance, employment and certain associations.²⁰² In fact, article 5 even mentions the right to a nationality and the rights to enter and leave "one's own country,"²⁰³ which would be particularly badly placed in a treaty that prohibits distinctions on the basis of nationality. These omissions suggest that indeed the CERD does not apply to distinctions between citizens and aliens.

Along with the express exclusion of the CERD to distinctions between citizens and aliens, the Committee could only have been observing that human rights obligations in general, perhaps from other treaties, prohibit discrimination between citizens and aliens in the application of those rights. However, the Committee then states, in paragraph 4 of General Recommendation 30 that, *under the CERD*, states may not make distinctions for these rights on the basis of "citizenship or immigration status" that do not pass the proportionality test.²⁰⁴ Placing citizenship alongside immigration status suggests that the CERD Committee was contemplating differing statuses, and differing nationalities, within the same state. Thus, this discrimination is not differentiation between citizens and nationals as a whole, but rather differentiation between nationalities and immigration statuses.

right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [. . .] (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service").

²⁰¹ Compare *id.* art. 5(c), with *id.* art. 5 (a), (b), (d), (e), (f).

²⁰² See *id.* art. 5(d)(v) (stating that the right to "own property alone as well as in association with others," "inherit," "form and join trade unions," and "free choice of employment" are parallel for both nationals and aliens).

²⁰³ See *id.* art. 5 (listing the enjoyment of rights such as: "Other civil rights, in particular: ... The right to leave any country, including one's own, and to return to one's country; The right to nationality").

²⁰⁴ See CERD Recommendation 30, *supra* note 32, ¶ 4 (explaining that "[u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim").

Its reasoning appears to be that discrimination against aliens (“xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers”) is often simply racism masquerading as restrictions on aliens.²⁰⁵ Anti-foreigner practices might be a means by which a state could discriminate by refusing to extend nationality to certain groups.²⁰⁶ These views of the Committee could, however, be limited to just those distinctions made among nationalities. Xenophobic practices and refusal of nationality are not necessarily practiced by a state against all foreigners, but rather more likely only against certain nationalities.

In addition, where paragraph 2 of article 1 of the CERD excludes covering distinctions between citizens and aliens, in paragraph 3 of the same article the CERD expressly covers distinctions among nationalities.²⁰⁷ “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.”²⁰⁸ In other words, the CERD has no impact on nationality or naturalization laws of states, with the exception of nationality and naturalization laws that discriminate on the basis of nationality.²⁰⁹ Because naturalization only applies to aliens, then the distinction in that paragraph is the one being made among nationalities. By affirming that the CERD includes distinctions between nationalities for one set of domestic laws, though within certain limitations, it implicitly covers other areas of laws without that limitation.

Therefore, the CERD Committee is incorrect when it says that the CERD prohibits unjustifiable distinctions between citizens and aliens. Those distinctions are clearly permitted by the CERD, though they may be prohibited by other treaties.²¹⁰ However, the Committee is correct insofar as it states that the CERD prohibits

²⁰⁵ See *id.* §1, ¶ 3 (“Xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices”).

²⁰⁶ See *id.* (“[Persons who have] lived all their lives on the same territory [might face discrimination if unable to] establish the nationality of the State on whose territory they live”).

²⁰⁷ See CERD, *supra* note 1, art. 1, ¶ 3

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ CERD, *supra* note 1, art. 1, ¶ 2; see e.g., Off. U.N. High Comm’r Hum. Rts., *The Rights of Non-Citizens*, at 8, U.N. Doc HR/PUB/06/11 (2006).

unjustifiable distinctions among nationalities. This reading of the CERD Committee's General Recommendation and the CERD itself is the only option for bringing harmony to the various provisions and views.

C. *Qatar v UAE CERD case before the ICJ*

The view of the ICJ is just the opposite of the CERD Committee. Its view is that the CERD does not prohibit discrimination between citizens and aliens,²¹¹ and, in this conclusion, it was correct. However, to the degree that the ICJ may have thought that the CERD also did not cover discrimination among nationalities, it was wrong. The ICJ failed to appreciate the difference between discrimination between citizens and aliens and among nationalities, broadly classifying both types as nationality discrimination,²¹² and failing to appreciate that the practice of discrimination law makes an important distinction between the two. The Court correctly observed that discrimination on the basis of nationality was widespread,²¹³ but failed to carefully note that there are different standards for the two forms of discrimination. While both are ultimately a proportionality analysis, certain rights are exempted when discriminating between citizens and aliens. A similar analysis as that in the section above can bring harmony to the ICJ judgment and the CERD General Recommendation, while remaining faithful to the CERD text.

In terms of framing the question, the Court ignored the question that was posed. Qatar complained that the UAE had been taking measures against its nationals as compared to other foreign nationals.²¹⁴ Had the case been a claim of discrimination between citizens and aliens, then the claim would have been that the UAE was discriminating against foreigners, but that was not the claim.²¹⁵ The ICJ stated that excluding the distinction between citizens and

²¹¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Judgment, 2021 I.C.J. 71, ¶ 83 (Feb. 4).

²¹² *Id.* ¶ 87.

²¹³ *Id.*

²¹⁴ See, e.g., *id.* at 908 ["Thus, in Qatar's view, the *travaux préparatoires* confirm that the scope of the Convention extends to discrimination based on current nationality, in particular where, as in the present case, a State singles out an entire group of non-citizens for discriminatory treatment"].

²¹⁵ *Id.* at 923.

aliens from the CERD meant that states parties may “adopt[] measures that restrict the right of non-citizens to enter a State and their right to reside there,”²¹⁶ which the Court understood to be the “rights that are in dispute in this case.”²¹⁷ But Qatar was not arguing that the UAE may not impose restrictions on all non-citizens. It was arguing that the UAE may not impose unique restrictions on its nationals specifically and distinctly compared to other nationals, without satisfying the proportionality assessment.²¹⁸ President Yusuf and Judge Robinson objected to the characterization of the dispute, though not on the grounds argued in this article.²¹⁹ They would have given more attention to Qatar’s argument of indirect discrimination, i.e. discrimination on the basis of citizenship that has the indirect effect of discrimination on the basis of national origin.²²⁰ Thus, while the UAE implemented measures that targeted one discrete group of foreign nationals, and none other, the Court simply grouped this action in a general category of nationality discrimination.²²¹

Then, in its analysis, the ICJ largely omitted any appreciation of the distinction between the two forms of discrimination. It disregarded, without notice, citation or comment, other interpretations of “national origin” in similar treaties with similar contexts that carefully distinguish between the two forms of nationality

²¹⁶ *Id.* at 907.

²¹⁷ *Id.* at 907.

²¹⁸ *Id.* at 941.

²¹⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Declaration, 2021 I.C.J. 71, ¶ 1 (Feb. 4) (separate declaration by President Yusuf); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶¶ 3, 4 (Feb. 4) (separate dissenting opinion by Robinson, J.).

²²⁰ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Declaration, 2021 I.C.J. 71, ¶¶ 2, 3 (Feb. 4) (separate declaration by President Yusuf) (noting that the majority mischaracterized indirect discrimination without providing an analysis to support that statement); see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶¶ 21, 22 (Feb. 4) (separate dissenting opinion by Robinson, J.) (mentioning several reasons why “indirect discrimination” is a misleading characterization and it should have been further addressed in the majority’s opinion).

²²¹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶ 105 (Feb. 4)

discrimination,²²² including the practice of the CERD Committee to whom the Court, by its own stated policy, should normally grant considerable deference.²²³ The Court cited to the CERD preparatory works, but they do not necessarily have the significance that the Court sees. Indeed an amendment was proposed to clarify that national origin did not include nationality, and was later withdrawn in favor of paragraph 2, stating that the distinctions between citizens and aliens was excluded from the CERD.²²⁴ However, the proposed amendment would have also excluded distinctions among nationalities,²²⁵ whereas paragraph 2 was not so broad, and, read with paragraph 3 which expressly forbid states to make distinctions among nationalities, suggests that discrimination among nationalities remains after the amendment was withdrawn. The Court understood paragraphs 2 and 3 to both exclude distinctions between citizens and aliens,²²⁶ yet paragraph 3 includes no language on that

²²² See *id.* (stating that the Court's interpretation of national origin does not include current nationality).

²²³ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 21 (Feb. 4) (separate dissenting opinion by Bhandari J.) ("The Judgment provides no compelling reason as to why it has chosen to depart from the reasoning in *Diallo* in this dispute, despite the fact that the CERD Committee remains "the guardian of the Convention" – an assertion that both Parties appear to agree on."); see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 21 (Feb. 4) (separate dissenting opinion by Robinson J.) ("On October [1] 2002, 32 years after its establishment, the CERD Committee adopted General Recommendation XXX 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"); see also Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶ 66 (Nov. 30) ("Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant [ICCPR] on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty").

²²⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶¶ 90, 96 (Feb. 4).

²²⁵ See *id.* ¶¶ 90, 94 (explaining that the proposed amendment excluded the terms "nationality" and "citizenship" from the term "national origin").

²²⁶ See *id.* ¶ 96 ("... paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States' legislation on nationality, thus fully addressing the concerns expressed by certain delegations ... regarding the scope of the term "national origin").

point and instead forbids differentiations on the basis of nationality.²²⁷ The Court cited to paragraph 3 but disregarded its content.²²⁸ Bhandari would have interpreted the withdrawal of the amendment as a complete exclusion of distinctions between citizens and aliens, seemingly in contradiction with paragraph 2 of article 1.²²⁹ Robinson took a more limited view of the withdrawn amendment, and concluded that it confirmed that national origin included nationality, with the exception of limited distinctions between citizens and aliens.²³⁰

And while the Court observed that “national . . . origin” should be read as an immutable characteristic, acquired at birth,²³¹ it overlooked that other authorities have concluded that citizenship

²²⁷ See CERD, *supra* note 1, art. 1, ¶ 3 (“[N]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality”).

²²⁸ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶ 96 (Feb. 4) (“[P]aragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States’ legislation on nationality, thus fully addressing the concerns expressed by certain delegations . . . regarding the scope of the term ‘national origin’”).

²²⁹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 19 (Feb. 4) (separate dissenting opinion by Bhandari J.) (“The rejection of the amendment . . . indicates that the drafters adopted an approach whereby citizens and non-citizens were to be guaranteed the same rights, notwithstanding certain exceptions outlined in Article 1, paragraph 2, and Article 1, paragraph 3. . . . Such acceptance coupled with a reading of the *travaux préparatoires* as a whole makes it clear that the compromise does not indicate that nationality was to be left out of the scope of “national origin”; in fact, it only seems to allow States to reserve certain rights to their citizens”).

²³⁰ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 12 (Feb. 4) (separate dissenting opinion by Robinson J.) (“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”).

²³¹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶ 81 (Feb. 4).

is also largely immutable, at least in the same sense as other “immutable” characteristics such as religion, that one cannot be expected to change to avoid discrimination. Judges Bhandari and Robinson noted that for a state that follows *jus sanguinis*, such as Qatar, and where naturalizations are rare, “nationality” may be more likely to be synonymous with “national origin” and just as immutable.²³² To dismiss citizenship as simply “changeable”²³³ forces one to wonder whether the thousands of stateless persons in the world would agree. In a curious irony, the ICJ cited to *Nottebohm* for the proposition that nationality is changeable,²³⁴ never minding that in that case, the Court itself actually held that change

²³² See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 11 (Feb. 4) (separate dissenting opinion by Bhandari J.) (“Furthermore, the Judgment’s attempt to distinguish between “nationality” and “national origin” becomes more complex and difficult to differentiate on the basis of immutability in the context of countries where nationality is based on *jus sanguinis*. Where nationality follows a *jus sanguinis* model, as is the case in many Gulf States, nationality coincides with national origin. Under the *jus sanguinis* model, in Qatar, “nationality is conferred by parentage — and naturalization is rare . . . the vast majority of Qatari nationals, including those affected by the measures, were born Qatari nationals and are Qatari in the sense of heritage — in other words, of Qatari ‘national origin’”. Nationality in this context is as immutable as “national origin” and is a characteristic that is inherent at birth contrary to the Court’s assertion in paragraph 81 . . .”) (internal citations omitted); see Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 7-8 (Feb. 4) (separate dissenting opinion by Robinson J.) (“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. . . . 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. . . . 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”).

²³³ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶ 81 (Feb. 4).

²³⁴ *Id.* (citing *Nottebohm* (Liecht. v. Guat.), 2d Ph., Judgment, 1955 I.C.J. 20 (Apr. 6)).

in nationality need not be recognized by other states, permitting Guatemala to continue to treat the individual as if he had an immutable nationality and subject him to discriminatory treatment on that basis.²³⁵

Curiously enough, in its oral submissions, the UAE inadvertently suggested that national origin would include nationality as an immutable characteristic.²³⁶ Qatar argued that nationality, along with national origin, was covered by the CERD.²³⁷ The UAE countered that nationality was a changeable legal bond.²³⁸ Qatar agreed that, at least in theory, nationality can be changed, but in practice such changes were not so easy. As Qatar argued, Gulf states in particular tended to base nationality on the immutable characteristics of birth and descent,²³⁹ making nationality itself largely immutable.²⁴⁰ In addition, Qatar argued that the *Nottebohm* case demanded that nationality be based on a genuine connection.²⁴¹ The UAE replied at oral argument that *Nottebohm* actually stood for the proposition that nationality was fundamentally a legal bond,²⁴² as it flows

²³⁵ *Nottebohm (Liecht. v. Guat.)*, Judgment, 1955 I.C.J. 20, 23 (Apr. 6).

²³⁶ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Written Statements of the State of Qatar Concerning the Preliminary Objections of the United Arab Emirates, vol. I, ¶ 2.31 (Aug. 30, 2019) [hereinafter Written Statements by Qatar], <https://www.icj-cij.org/public/files/case-related/172/172-20190429-WRI-01-00-EN.pdf>.

²³⁷ See *id.* (“As an initial matter, the UAE’s apparent assumption that legal nationality is universally fluid in this sense is at odds with restrictive citizenship regimes, including in the Gulf region, that depend on immutable characteristics, such as birthplace and heritage”).

²³⁸ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections of the United Arab Emirates, vol. I of IV, ¶ 78 (Apr. 29, 2019) <https://www.icj-cij.org/public/files/case-related/172/172-20190429-WRI-01-00-EN.pdf>.

²³⁹ Written Statements by Qatar, *supra* note 241, vol. I, ¶ 2.31.

²⁴⁰ See *id.*

²⁴¹ See *id.* vol. I, ¶ 2.31, fn 94 (“The UAE also disregards the fact that nationality in the legal sense nevertheless relates to a genuine connection between the individual and the State, often arising from the very social ties that the UAE considers relevant to “national origin.”); see *Nottebohm (Liecht. v. Guat.)*, 2d Ph., Judgment, 1955 I.C.J. 23 (Apr. 6).

²⁴² See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Verbatim Record, ICJ Doc. CR 2020/6 ¶¶ 36-37 (Aug. 31, 2020) (Bethlehem), <https://www.icj-cij.org/public/files/case-related/172/172-20200831-ORA-01-00-BI.pdf> (“A person ... may try to hide these traits, but they cannot escape them. They were born with them and they are a matter of fact. They carry these traits with them throughout their lives.

from “an express politico-legal act by a State.”²⁴³ In support of this argument, the UAE also cited to *Akayesu* for the underlying rationale of the CERD definition covering “hereditary physical traits.”²⁴⁴ This citation is a bit of a distraction because the UAE cited to paragraph 514 of *Akayesu* that specifically only discusses the definition of “racial group” and ignored paragraph 512 of the same judgment that discusses the far more relevant category of “national group.”²⁴⁵ In any event, as mentioned above and contrary to the UAE’s intended argument, the ICTR in *Akayesu* specifically held that “nationality,” for purposes of the Genocide Convention, covered the legal bond of nationality.²⁴⁶ Nationality was largely immutable, just as much as other grounds in the Genocide Convention.²⁴⁷ *Akayesu* cited to *Nottebohm*, the same authority cited by the UAE, for this conclusion.²⁴⁸ As such, this citation to *Akayesu* by the UAE undermines the Emirates’ argument that the CERD only protects individuals from discrimination on the basis of hereditary traits.

In the end, the Court concluded that “national origin” does not include “nationality” under the CERD and dismissed the case at the preliminary objections phase.²⁴⁹ Bhandari and Robinson were the only judges to specifically argue that “national origin” can include “nationality,”²⁵⁰ although President Yusuf and Judge Sebutinde

They cannot be divested. They are intrinsic to the individual. It is these intrinsic, hereditary characteristics of all human beings that the CERD had the purpose of addressing. Not so with nationality.”).

²⁴³ See *id.* ¶ 37 (citing *Nottebohm* (Liecht. v. Guat.), 2d Ph., Judgment, 1955 I.C.J. 20 (Apr. 6)).

²⁴⁴ See *id.* (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 514 (Sept. 2, 1998)).

²⁴⁵ See *id.*; see also Prosecutor v. Akayesu, ¶¶ 512, 514.

²⁴⁶ See Prosecutor v. Akayesu, ¶ 510.

²⁴⁷ See *id.* ¶ 512.

²⁴⁸ See *id.* ¶ 512 (citing *Nottebohm* (Liecht. v. Guat.), 2d Ph., Judgment, 1955 I.C.J. 20 (Apr. 6)).

²⁴⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. ¶ 115.

²⁵⁰ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 10 (Feb. 4) (separate dissenting opinion by Bhandari J.) (indicating that national origin is when an individual belongs to a particular country or nation); see Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 7 (Feb. 4) (separate dissenting opinion by Robinson J.) (stating that the ordinary meaning of the phrase national origin, describes an individual’s historical relationship with the country where the people to which that individual belongs to are living).

preferred to reserve final decision on the matter to the merits.²⁵¹ Noting that citizenship and national origin are distinct, the interaction of the two categories is complex and nuanced, Judge Sebutinde also took issue with the Court's general gloss over distinctions between "national origin" and "nationality."²⁵² Bhandari and Robinson were the only judges to implicitly pick up on the distinction between citizen/alien discrimination and discrimination among nationalities, although they generally framed differences in treatment among nationalities as still fundamentally a citizen/alien distinction.²⁵³

²⁵¹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Declaration, 2021 I.C.J. 71, ¶ 14 (Feb. 4) (separate declaration by President Yusuf) (concluding the meaning of the phrase national origin is a matter of law to be decided on the merits); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 20 (Feb. 4) (separate dissenting opinion by Sebutinde, J.) (maintaining the line between national origin and citizenship is delicate and should be determined on the merits).

²⁵² See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 20 (Feb. 4) (separate dissenting opinion by Sebutinde, J.) (expressing his concern that the majority failed to conduct a detailed analysis of the evidence when distinguishing between national origin and nationality); see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J., ¶ 7 (separate dissenting opinion by Robinson, J.) (noting the majority did not sufficiently distinguish between citizenship and national origin).

²⁵³ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶¶ 13, 15 (Feb. 4) (separate dissenting opinion of Bhandari, J.) ("I find it difficult to concur with a contextual reading that allows differentiation between citizens and non-citizens, *as well as particular groups of non-citizens* on the basis of their current nationality. If one is to pay close attention to Article 1, paragraphs 2 and 3, of CERD — the provisions which form the context of Article 1, paragraph 1, of CERD — they do not seem to envisage broad and unqualified distinctions to be drawn between citizens and non-citizens ... Therefore, the context makes it clear that — even though nationality-based distinctions are specifically permitted by paragraphs 2 and 3 of Article 1 which permit distinctions between citizens and non-citizens — it cautions that even in making such permitted distinctions, "such provisions [should] not discriminate against any particular nationality" when considering non-citizens *inter se*. ...") (emphasis added); see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 11 (Feb. 4) (separate dissenting opinion of Robinson, J.) (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

Therefore, the ICJ is incorrect when it says that the CERD does not cover any nationality discrimination. While the ICJ is correct that the CERD permits states to distinguish between their own citizen and aliens, states may be limited from making this distinction under other human rights treaties. However, the CERD should also be understood to prohibit unjustifiable discrimination among nationalities. This interpretation acknowledges the practice of separating the two forms of discrimination and brings consistency to the CERD, the CERD Committee, and the ICJ. This argument does not mean that the UAE was completely prohibited from making any distinctions between Qatari nationals and the nationals of other countries. It simply means that the CERD applies and demands that such distinctions be legitimate and proportionate.

In the future, the ICJ should take a more nuanced approach, holding that, insofar as the measures are discrimination among foreign nationalities, they are covered by the CERD and must be legitimate and proportionate.²⁵⁴ Then, considering that measures such as those in the case concern immigration, visas and deportation, the state likely has a high margin of appreciation. In this regard, compare the deferential view of the ECHR in *C v. Belgium* concerning deportation²⁵⁵ with the far less deferential view of the same Court in *Koua Poirrez v. France*, concerning disability benefits.²⁵⁶ Similarly, as mentioned above, the IACHR held that, for measures concerning

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).

²⁵⁴ See generally see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Dissent, 2021 I.C.J. 71, ¶ 11 (Feb. 4) (separate dissenting opinion of Robinson, J.) (“[CERD] . . . was clearly not intended to cover every instance of differentiation between persons based on their nationality”).

²⁵⁵ See *C. v. Belg.*, App. No. 21794/93, Eur. Ct. H.R. ¶¶ 37-38 (Aug. 7, 1996) (finding no alleged violation of Article 14 and Article 8 of the Convention because Belgium’s preferential treatment of nationals over non-nationals is objectively and reasonably justified based on the special legal order between the European Union and member states”).

²⁵⁶ See *Koua Poirrez v. Fr.*, App. No. 40892/98, 2003-X Eur. Ct. H.R. 73, 88, ¶ 39 (Sept. 30, 2003) (finding disability allowances “could be awarded both to French nationals and to nationals of a country that had signed a reciprocity agreement” but even where “the applicant’s country of origin had not signed such an agreement . . . did not in itself justify refusing the allowance”).

naturalization, the state could discriminate among nationalities.²⁵⁷ Such reasoning for the ECHR and ACHR might apply by analogy to the CERD, especially in light of the express exceptions in the CERD for nationality, citizenship and naturalization measures.²⁵⁸ Of course, such a margin of appreciation for migration measures does not mean they survive scrutiny. Given that the measures were quite arbitrary and disproportionate – punishing nationals for the political choices of the state leadership that have nothing to do with migration or security threats, and result in separated families and disrupted education among other infringements – it is likely that they would still not be permissible.

V. CONCLUSION

This article has identified the disagreement between the ICJ and CERD Committee expressed in the *Qatar v UAE CERD case* and General Recommendation No. 30 of whether nationality discrimination is covered by the CERD. This article has argued that the best approach to resolving the tension is to distinguish between two forms of nationality discrimination: (1) discrimination by a state in favor of its own nationals and against foreign aliens and (2) discrimination by a state among foreign nationals on the basis of their differing nationalities. This distinction emerges from the practice of discrimination in many human rights treaties where states have a wide degree of permission to discriminate against foreigners generally for political and other rights traditionally only enjoyed by the citizens of a state. However, when states propose to discriminate among foreign nationals, such different treatment must be justified and proportionate to legitimate aims.

That does not mean that all distinctions between foreigners are prohibited. This article has already cited several times to the judgment of the ECtHR in *C v. Belgium* concerning discrimination among nationalities for deportation²⁵⁹ and to that of the IACHR in

²⁵⁷ See Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 52-57 (Jan. 19, 1984).

²⁵⁸ See CERD, *supra* note 1, art. 1, ¶ 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.”).

²⁵⁹ See *C. v. Belg.*, App. No. 21794/93, Eur. Ct. H.R. (Aug. 7, 1996) (discussing the discrimination that nationals face during deportation).

the *Proposed Amendments* advisory opinion permitting states to discriminate among nationalities for purposes of naturalization.²⁶⁰ In fact, there are many cases of distinction among nationalities, as the ICJ rightly noted,²⁶¹ far beyond the examples in this article. Many treaties provide for certain benefits for persons with specified nationality, such as Bilateral Investment Treaties that include investment protection, investor-state dispute mechanisms and Most-Favored-Nation clauses for nationals of certain states.²⁶² The World Trade Organization ("WTO") General Agreement on Trade in Services largely bans discrimination among nationals (of WTO member states), but exempts requirements for visas.²⁶³ However, under the CERD, such distinctions must be justified. Distinctions between foreign nationals on the basis of nationality can nevertheless survive scrutiny provided they are legitimate and closely tailored to achieve the legitimate aim. The precise degree of probing scrutiny will have to await future analysis.

However, the conclusions in this article also do not mean that a state is generally free to discriminate between citizens and aliens.

²⁶⁰ See Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 52 (Jan. 19, 1984) (providing specific proposed article provisions addressing permissible discrimination with respect to naturalization).

²⁶¹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 71, ¶ 87 (Feb. 4) ("Differentiation on the basis of nationality is common and is reflected in the legislation of most States parties.").

²⁶² See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Alb.-U.S., Jan. 11, 1995, T.I.A.S. 98-104, S. Treaty Doc. No. 104-19 (entered into force Jan. 4, 1998) (displaying the benefits associated with treaties aimed towards persons with specified nationality); see also Treaty of Friendship, Commerce, and Navigation, Arg.-U.S., July 27, 1853, 10 Stat. 1005; T.S. 4; 5 Bevans 61 (entered into force Dec. 20, 1854) (explaining the benefits of privilege, exemption, and immunity associated with this treaty); see also U.S.-Australia Free Trade Agreement Implementation Act, Austl.-U.S., May 18, 2004, 118 Stat. 919, Pub. L. No. 108-286, (entered into force Jan. 1, 2005) (displaying the benefits associated with this treaty through economic and trading advantages); but see *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 176 (1982) (holding that a treaty providing for protected treatment of certain nationalities does not apply to cases where the company is incorporated in the US, whereas laws prohibiting national origin discrimination would apply).

²⁶³ See generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1B General Agreement on Trade in Services, 1869 U.N.T.S. 183 at n.1 [hereinafter GATS] ("The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment").

For example, the Human Rights Committee held that such discrimination against foreigners by France in *Gueye v. France* was not proportionate.²⁶⁴ Rather, discrimination between citizens and aliens has certain carve out exceptions and perhaps a slightly lower threshold of legitimacy. They are still subjected to the proportionality test and can fail.

What this analysis separating the two forms of nationality discrimination identifies is that the CERD treats the two forms differently. The CERD does not cover discrimination between citizens and aliens at all, while instead only covering only discrimination among nationalities. Individuals who have been discriminated against as foreign aliens compared to citizens of the state would need to invoke the ICCPR or other instrument for protection, rather than the CERD. However, distinctions among nationalities are covered and would need to be justified under the CERD, in addition to the other human rights instruments already mentioned.

What appears to be critical, in line with the reasoning of the CERD Committee in General Recommendation No. 30, is whether the discrimination is aimed at disadvantaging a person based solely on facts out of his or her control such, as place of birth or descent, and facts central to one's identity, such a culture and nationality, with no other rational or scientific basis for this prejudice. One could imagine a wide array of measures discriminating against foreigners or among foreign nationalities. Some of these measures might pass scrutiny provided they are based on legitimate reasons rather than prejudicial ones. But surely they are subject to scrutiny and that scrutiny might be different if the hypothetical measures banned those rights for all foreigners or only for certain nationalities. Moving forward, this author suggests that states should consider the distinction between the two forms of discrimination and reflect on whether differentiations made between foreign individuals entirely on the basis of their nationality alone are justifiable.

²⁶⁴ *Gueye et al. v. Fr.*, U.N. Hum. Rts. Comm., Communication No. 196/1985, ¶ 9.5, U.N. Doc. CCPR/C/35/D/196/1985 (1989).