ELIMINATION OF RACIAL DISCRIMINATION

Research Article

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Claims Concerning Racial Discrimination: Jurisdictional Approaches of the International Court of Justice

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Abstract: Recent years have demonstrated an increase in cases that were brought before the ICJ by way of jurisdictional clauses of treaties, and never before has the Court experienced such a considerable influx of human rights-related claims. In particular, cases concerning racial discrimination, which first appeared in the Court's docket in 2008, take up today a substantial part of its agenda: three out of fourteen cases currently pending before the ICJ concern issues of application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), while the fourth one was resolved just in 2021. The article describes the problems the Court encountered in striking the proper balance between various legal and political considerations when interpreting the jurisdictional clause of Article 22 of CERD and questions whether the ICJ has succeeded in doing so.

Keywords: human rights law; International Court of Justice; jurisdiction; International Convention on the Elimination of All Forms of Racial Discrimination; ICJ Statute

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Contents

I. Introduction

An increasing number of applications are brought before the International Court of Justice ("the ICJ" or "the Court") by way of jurisdictional clauses of multilateral treaties (Zimmermann *et al.*, 2019, p. 748; Abraham, 2016, p. 299). For instance, vast majority of the cases currently under consideration by the Court were filed on this jurisdictional basis. However, over the last years states have been reluctant to conclude new treaties containing jurisdictional clauses (Thirlway, 2016, p. 44; Akande, 2016, p. 320), and only about one tenth of them have been invoked before the Court. When it comes to human rights-related treaties, this trend is even more visible: Judge J. Crawford (2017) noted that only five of the main multilateral human rights treaties currently contain a jurisdictional clause, enabling recourse to the Court.

This has led to the emergence of the "Cinderella's shoe" phenomenon (an illustrative metaphor used by Judge C. Greenwood (2011)), which describes situations when in the absence of other legal grounds States resorted to treaties that were not completely relevant to the matter in question, trying to pass the dispute — as Judge B. Simma put it[1] — "through the eye of a needle" of a jurisdictional clause. What makes this practice possible is the fact that such clauses are often formulated

[1] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, I.C.J. Reports 2003, p. 326, Separate Opinion of Judge Simma.

very broadly (Thirlway, 2016, p. 42) and do not define clear contours of future disagreements (Zimmermann *et al.*, 2019, p. 742).

In this context, this paper focuses on the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which also contains a jurisdictional clause recognizing the jurisdiction of the ICJ. As is shown in this article, CERD has at times been used as a vehicle to seize the Court of political rather than legal "battles." However, the abovementioned trend of framing a multifaceted dispute within the terms of a specific treaty ratified by both relevant Parties has not been opposed by the Court, but rather recognized by it, as was also shown by its case-law on the application and interpretation of CERD.

According to CERD (which entered into force in 1969 and has now 182 Parties), racial discrimination is "any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms". It is correctly observed that in addition to CERD, discrimination on racial grounds is also "contrary to customary international law" (Shaw, 2017, p. 222).

Since the first time the Convention came under the Court's scrutiny in 2008, several States have referred discrimination-related applications to the ICJ, leading to the development of the Court's approaches to issues of racial discrimination and even — to a certain extent — to the emergence of the jurisprudence of the Court on matters of application and interpretation of CERD. Two cases have "dissolved" at the preliminary objections stage, the third one — not without questions as to the impeccability of the Court's reasoning — has proceeded to the merits. So far, these judgments have shed light on the terms of CERD regarding certain procedural aspects of the functioning of the dispute resolution mechanism enshrined therein, as well as its scope *ratione materiae*. This article analyzes each of such judgments in a chronological order to enable the reader to trace the development of the Court's approaches, including — as argued by the authors — certain inconsistencies and imminent consequences thereof.

II. *Georgia v. Russia* Case (Preliminary Objections)

For the first time racial discrimination claims were brought to the ICJ in 2008 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. The parties to the dispute submitted to the Court completely opposite ways of interpretation of Article 22 of CERD, which provides: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[2]

The "procedures expressly provided" for in CERD entail the mechanism specified in Articles 11–13 of the Convention. According to paragraph 1 of Article 11 "if a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee [on the Elimination of Racial Discrimination]," which is a control mechanism of the Convention specifically established for this purpose according to Article 8 of CERD. The Committee then transmits the communication to the State Party concerned, which within three months submits to the Committee "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State." A State Party may address the matter to the Committee again if it is not adjusted within six months after the initial communication by way of bilateral negotiations or any other procedure open to the States in question (paragraph 2 Article 11). Then, according to paragraph 1 (a) Article 12 the Chairman appoints an *ad hoc* Conciliation Commission which offers its good offices to the States concerned in order to reach an amicable solution. The Commission's report containing its findings on all questions of fact relevant to the issue as well as its recommendations for the amicable solution of the dispute is submitted to the Chairman of the Committee (paragraph 1 Article 13), which is then communicated to the

[2] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

relevant States. Within three months these States inform the Chairman of the Committee whether or not they accept the recommendations contained in the report (paragraph 2 Article 13).

According to the interpretation of the jurisdictional clause of Article 22 of CERD proposed by the Russian Federation, two cumulative conditions had to be satisfied before Georgia could apply to the ICJ: an attempt to conduct meaningful negotiations and resort to the special procedures established by the Convention.[3] Georgia, on the contrary, advanced an interpretation of Article 22 of CERD that did not imply any preconditions for access to the ICJ, meaning that the exhaustion of the dispute resolution methods indicated therein prior to filing an application was unnecessary.[4]

In the order on provisional measures the Court established its *prima facie* jurisdiction to settle the dispute,[5] agreeing with the applicant that the "plain meaning" of Article 22 of CERD does not imply that formal negotiations under CERD or recourse to the procedure referred to in Article 22 of the Convention constitute preconditions for applying to the Court.[6] This position was criticized by some judges who expressed the view that the order misinterpreted Article 22 of the Convention due to its failure to recognize the existence of preconditions that must be met before a Party has the right to apply to the ICJ.[7]

Establishment of the jurisdiction of the Court at the provisional measures stage, however, does not prejudge the question of whether or not the Court has the jurisdiction to decide the case on the merits.[8] Thus,

[3] Preliminary objections of the Russian Federation, vol. 1, 1 December 2009, p. 80.

[4] Written statement of Georgia on preliminary objections, vol. 1, 1 April 2010, p. 93.

[5] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 388, para. 117.

[6] *Ibid.*, para. 114.

[7] *Ibid.*, Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, p. 404.

[8] *Ibid.*, p. 397, para. 148; *see also AngloIranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment, I.C.J. Reports 1952, pp. 102–103; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 249, para. 90.

upon a more detailed analysis of the circumstances of the case and the wording of Article 22 of CERD, the Court, in its decision on preliminary objections[9] concluded that it lacked the jurisdiction to consider Georgia's application. In doing so, the ICJ based its reasoning on the general rule of treaty interpretation (Jardón, 2013, p. 130).[10] More specifically, the Court applied the principle of effectiveness, according to which the interpreted provisions of the treaty (in this case: "[a]ny dispute [...] which is not settled [...]") should be given force and meaning. The ICJ referred to the order of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case,[11] which confirmed that "in case of doubt" the provisions of the special agreement by which the dispute is referred to the Court should be interpreted in such a way that enables them to "have appropriate effects" if this does not distort their meaning.

The Court decided that the interpretation of Article 22 of the Convention proposed by Georgia (suggesting that the mere fact that the dispute had not been resolved through negotiations or the procedure established by CERD was sufficient for referring it to the Court) rendered ineffective the key phrase of this provision.[12] The Court also emphasized that the indication of two methods of dispute resolution in Article 22 (negotiations and the special procedures under CERD) would otherwise not make any sense and would not lead to any consequences in violation of the principle that treaty terms should be given due effect.[13]

In support of its position, the Court turned to the French text of Article 22 of the Convention. The grammatical structure used therein ("*[t]out différend... qui n'aura pas* été *réglé par voie de négociation ou*

[9] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011, p. 70.

[10] *Ibid.*, para. 122.

[11] *Free Zones of Upper Savoy and the District of Gex,* Order of 19 August 1929, PCIJ, Series A, No. 22, p. 13.

[12] *Ibid.*, note 12, p. 125–126, para. 133.

[13] *Ibid.*, p. 126, para. 134 ("Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible").

au moyen des procédures expressément prévues par la convention") presupposes the performance of one action (an attempt to resolve the dispute using the methods indicated in the article) before another future action (application to the Court). Based on the analysis of Court's own case-law concerning jurisdictional clauses similar to Article 22 of CERD, the Court concluded that they were unequivocally interpreted as containing preconditions for the referral of a case to the ICJ. Accordingly, the Court found that the ordinary meaning of this provision implies conditions that must be met before the dispute is brought before it.

The Parties actively used arguments based on the *travaux préparatoires* and the circumstances of conclusion of CERD. Although the Court took the position that the meaning of Article 22 was already clearly established on the basis of its text, it nonetheless decided to analyze these subsidiary sources to confirm its conclusions. The Court noted that due to insufficient information on the discussions during the drafting of the phrase "dispute [...] which is not settled" the usefulness of the preparatory work in shedding light on the meaning of Article 22 of CERD was rather limited. Although this analysis did not reveal any evidence in favor of the Court's position on the ordinary meaning of the text, the Court also detected no facts that would clearly contradict it.[14]

Some judges expressed disagreement with this interpretation, maintaining that the drafters of CERD "chose, deliberately or not, the wording least capable of being interpreted" as establishing a precondition requiring a preliminary attempt to hold negotiations.[15] In their opinion, the desire to establish such a condition could have been evidenced by the use of the wording "a dispute which cannot be settled" (instead of "which is not settled"). It is also worth noting that the Court did not support the "radically human rightist" views voiced by Judge A.A. Cançado Trindade,[16] who in his 84-pages dissenting

[14] *Ibid.*, p. 130.

[15] *Ibid.*, note 12, *Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja*, p. 148.

[16] *Ibid.*, *Dissenting opinion of Judge Cançado Trindade*, p. 239, 300, 305 ("Under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection; the ICJ, in the *cas d'espèce*, lodged with it on the basis of the CERD Convention, applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction").

opinion advocated for a special interpretation of human rights treaties in view of their specific object and purpose, even if this would imply evolutionary interpretation which would not take into account the intentions of States Parties at the time of the conclusion of CERD.[17] This approach would mean the application of softer criteria and a lower threshold for establishing consent to the jurisdiction of the ICJ (namely lack in Article 22 of CERD of any preconditions for the institution of proceedings before the Court).

Thus, applying the principle of effective interpretation of the treaty to the circumstances of this particular case, the Court concluded that Georgia had not negotiated with the Russian Federation on issues concerning CERD. When considering the first preliminary objection of the Russian Federation (on the absence of a dispute between the Parties), the Court established that a dispute between Georgia and the Russian Federation on issues of the Convention arose only after the events that occurred on the night of 7–8 August 2008.[18] Due to the fact that Georgia filed its application to the Court already on 12 August 2008 and made no attempt to conduct negotiations concerning the alleged violations of the provisions of CERD by Russia in this short period of time (9–12 August),[19] the ICJ upheld Russia's second preliminary objection.

In view of Georgia's failure to meet one of the conditions set out in Article 22 of CERD, the Court considered it superfluous to consider whether these conditions were alternative or cumulative. The Court's

[17] *Ibid.*, p. 307 ("Moreover, the reasoning of the Court appears to me as a static one, attempting to project into our days what the Court's majority *imagines* were the intentions of the draftsmen of the Convention (or of some of them) almost half a century ago, on the basis of a textual or grammatical argument. The Court notes that, 'at the time' when the CERD Convention 'was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States' (para. 147). The Court then attempts to extract consequences therefrom, so as to advance today, in 2011, a reasoning that freezes or ossifies international law in the present domain of protection of the human person, that hinders its progressive development, and, understandably, that limits its own jurisdiction!").

[18] *Ibid.*, p. 135, para. 167.

[19] *Ibid.*, p. 135, para. 168, p. 139, para. 182 ("[...] the facts in the record show that, between 9 August and 12 August 2008, Georgia did not attempt to negotiate CERDrelated matters with the Russian Federation").

"silence" on such an important issue was criticized by some judges.[20] President H. Owada, judges B. Simma, R. Abraham, J. Donoghue and judge *ad hoc* G. Gaja in their dissenting opinion[21] criticized the "excessive formalism" of the ICJ and provided arguments in favor of the absence of preconditions in Article 22 of CERD as such. Otherwise, in their opinion, such conditions could only be alternative, since the amendment introduced by the delegations of Ghana, the Philippines and Mauritania during the 1367th meeting of the Third Committee of the UN General Assembly (which added the wording "or by the procedures expressly provided for in this Convention" after the phrase "[a]ny dispute… which is not settled by negotiation") was presented as "self-explanatory." In the opinion of some jurists, it was easily accepted, because it did not imply the introduction of significant changes in the text, which in turn indicated a lack of intention on the part of the drafters of CERD to establish additional restrictions on access to the Court.

This position is challenged by other international lawyers who note that it does not take into account the discussions held at the initial stage of CERD drafting. They confirm the reluctance of a number of States to establish the jurisdiction of the Court in matters related to the interpretation or application of CERD, along with the support by other States of direct and unimpeded access to the ICJ. According to Professor A. Zimmermann (2013, pp. 9–10) the adopted wording of Article 22 of CERD represented a compromise between these two positions. Moreover, at an early stage in the development of the text of CERD, the importance of the conventional mechanism for the consideration of interstate complaints was emphasized, and the original version of the jurisdictional clause provided that "any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of Article 13, paragraph 1, bring the case before the International Court of Justice, after the report provided for in Article 13, paragraph 3, has been drawn up."[22]

[20] *Ibid*., *Dissenting opinion of Judge Cançado Trindade*, p. 290, para. 116.

[21] *Ibid*., *Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja*, p. 157.

[22] *See* UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities

III. *Ukraine v. Russia* Case (Preliminary Objections)

The question of the nature of the procedural conditions contained in Article 22 of CERD arose in the practice of the Court again, namely in the case concerning the *application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation)*. This case will be examined through the prism of CERD, while the ICSFT part of the judgment is outside the scope of this study.

Learning from Georgia's experience and the Court's position expressed in its 2011 judgment on the need to hold negotiations before filing the application, Ukraine initiated negotiations with the Russian side. During the proceedings the Russian Federation characterized Ukraine's attempt to negotiate as bad faith, since it did not indicate a genuine desire to resolve the dispute.[23] Furthermore, Ukraine lodged an application with the ICJ without a prior referral to the dispute resolution mechanism of CERD, which was challenged in one of Russia's preliminary objections to the existence of the Court's jurisdiction.

Russia reiterated its argument that the word "or" in Article 22 implied cumulative rather than alternative procedural conditions. In Russia's view, a contrary interpretation would deprive this wording (referring to two different preconditions) of its meaning and legal consequences (relying on the well-established principle of effectiveness, "*effet utile*"). The Respondent also argued that the conciliation under the auspices of the CERD Committee could not be equaled to negotiations, since it presupposed the involvement of a third party, and therefore could not

(1964). *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, UN Doc. E/CN.4/873, E/CN.4/Sub. 2/24i, New York: United Nations. P. 57.

[23] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Verbatim record 2019/9, Preliminary Objections, Oral Proceedings, Public sitting held on 3 June 2019, Statement of the Agent of the Russian Federation Mr. G. Lukiyantsev, p. 47. Available at: https://www.icj-cij.org/public/files/case-related/166/166-20190603-ORA-01-00-BI.pdf [Accessed 07.05.2022].

replace direct negotiations between States, but rather complemented them.[24]

When indicating provisional measures (which were very limited as compared to those requested by the Applicant), the Court distanced itself from pronouncing on the nature of the preconditions contained in Article 22 of CERD (cumulative or alternative).[25] Later, at the preliminary objections stage the ICJ indicated that this issue had to be determined by way of applying customary international law rules concerning the interpretation of treaties, as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.[26] The Court specified that the word "or" in the relevant part of Article 22 of CERD — given its structure as a negative clause — could have either a disjunctive or a conjunctive meaning (thus suggesting an alternative or cumulative nature of the conditions, respectively).[27] This statement was questioned by some scholars (Orakhelashvili, 2021, p. 63[28]), and thus merits some further explanations. By way of this conclusion the Court seems to have responded to the arguments advanced by the Russian Federation that the position of the word "or" after a negation ("not") affords it a cumulative meaning. During the oral hearings professor A. Pellet provided an easy but illustrative example for this, "'I do not like apples or oranges' means

[24] *Ibid.*, Statement of the Counsel of the Russian Federation Mr. A. Pellet, p. 58.

[25] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 104, p. 126, para. 60.

[26] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 8 November 2019, p. 598, para. 106; *see also Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 116, para. 33.

[27] *Ibid.*, p. 598, para. 107.

[28] "It is not clear, moreover, why should it matter whether Article 22 is drafted in the affirmative or negative manner, because what the Court denotes as drafting certain terms of the conferral or conditions of jurisdiction on 'affirmative' terms would require drafting on 'negative' terms the other parts of Article 22 that in their current version look as though they were drafted 'affirmatively'."

'I do not like apples and I do not like oranges'."[29] However, while not excluding the interpretation proposed by the Respondent, the Court (in merely one paragraph[30]) considered both cumulative and alternative meanings of the preconditions as possible.

Judge P. Tomka regarded this textual analysis as incomplete, deeming that the Court had to make a choice of the correct interpretation of the phrase "not... or" (rather than just the word "or"). Citing De Morgan's first law of formal propositional logic ("the negation of a disjunction is equal to the conjunction of the negation of the alternates"), Judge P. Tomka advanced the position that "only when negotiation and the procedures have not led to the resolution of a dispute, is the condition met in accordance with the ordinary meaning of the terms of Article 22." Thus, in his view, the logical reading of the text of Article 22 required the preconditions to be cumulative.

Characterizing the wording of Article 22 CERD as inconclusive, the Court went on to consider its context, ruling that negotiations and procedures specifically provided for in the Convention served as two ways to achieve the same goal, namely the settlement of a dispute by agreement of the parties (in the Court's opinion, this was implied from mentioning in Articles 11–13 of CERD of an "amicable solution" and the need for States to notify of their agreement with the Conciliation Commission's recommendations). On this basis the Court in fact equated the CERD dispute resolution mechanism with bilateral negotiations, noting that the cumulative nature of the conditions would require States first to attempt to resolve the dispute through negotiations, and in case of their ineffectiveness, refer it to the CERD Committee "for *further* negotiation, *again* in order to reach an agreed solution."[31] Referring to the context of Article 22 of CERD, the Court concluded that it would be unreasonable to require States that have already failed to reach an agreed settlement of the dispute through negotiations to participate in an "additional" round of negotiations under Articles 11–13 of CERD.[32]

[29] *Ibid*., note 27, p. 57, para. 14.
[30] *Ibid*., note 29, p. 598, para. 107.
[31] *Ibid*., p. 599, para. 110.
[32] *Ibid*.

This conflation by the Court of the distinct modes of dispute settlement (negotiation and conciliation) was criticized by some judges.[33]

Having analyzed the context of Article 22 of CERD, the Court turned to the examination of the object and purpose of the Convention. It specifically drew attention to Articles 2 (1) (providing that States undertake to pursue a policy of elimination of all forms of racial discrimination "without delay" in all possible ways), 4 and 7 (prescribing that States undertake to eradicate incitement to racial discrimination and combat prejudices leading to racial discrimination by taking "immediate and positive" / "immediate and effective" measures), as well as the preamble (emphasizing the determination of States to take all necessary measures to eliminate racial discrimination "speedily"). The Court concluded that these provisions indicated the desire of the participating States to "effectively and promptly" eradicate all forms of racial discrimination, and the achievement of such goals, in its opinion, would be difficult if the preconditions provided for in Article 22 of CERD were considered cumulative.[34]

Despite the heavy reliance by the Parties on the *travaux préparatoires* of the Convention in their arguments, the Court — in contrast to its position in *Georgia v. Russia* — refused to refer to it even for the sake of confirmation of its position. Instead, it deemed the alternative nature of the procedural preconditions to be "sufficiently clear" from the interpretation of the ordinary meaning and context of Article 22 of CERD, as well as from the object and purpose of the Convention.[35] Judge P. Tomka characterized it as a departure from the Court's previous practice, and even "a "spectacular" turn-around",[36] while Judge L. Skotnikov explained this "surprising refusal" by the fact that the preparatory documents could cast a shadow on the Court's conclusions.[37] It is indeed highly unlikely that the CERD drafters included the mechanism in Articles 11 to 13 of CERD, regarding it as a secondary option (reference to Court being the preferred choice)

[33] *Ibid., Dissenting Opinion of Judge ad hoc Skotnikov*, p. 669, para. 13.
[34] *Ibid.*, note 29, p. 600, para. 111.
[35] *Ibid.*, p. 600, para. 112.
[36] *Ibid.*, *Separate Opinion of Judge Tomka*, p. 622, para. 27.
[37] *Ibid., Dissenting Opinion of Judge ad hoc Skotnikov*, p. 669, para. 13.

applicable only to States which do not accept the jurisdiction of the Court by way of reservations to Article 22.[38]

This judgment may have far-reaching consequences, some of which have recently materialized. Firstly, due to the Court's inclination towards a more "lightened" approach to the requirements concerning the need to exhaust conventional dispute settlement mechanisms, it is possible to predict the use of CERD (and, perhaps, other international treaties with similarly worded jurisdictional clauses) by an increasing number of States as a means to seize the Court with disputes that are only marginally (if at all) related to the Convention's scope (Koskenniemi, 2017, pp. 287–288). The example of Georgia and Ukraine has been followed by Qatar, whose complaint against the UAE in June 2018 concerning the application of CERD was eventually dismissed by the ICJ (see Section IV), as well as by Armenia and Azerbaijan, which instituted proceedings against each other in September 2021 (see Section VI).

Secondly, the judgment raises a more conceptual and theoretical question of the relationship between the jurisdiction of the ICJ and the competence of treaty-established dispute resolution mechanisms. During the oral hearings in the *Ukraine v. Russia* case the Russian Federation warned that defining the conditions contained in Article 22 of CERD as alternative would lead to the marginalization — or, in other words, the downplaying — of the CERD monitoring system, including the Convention Committee.[39] This could not have been the goal of the "founding fathers" of CERD, who, in contrast, showed a preference towards conciliation as a means for resolving human rights issues rather than judicial proceedings (in particular, the representative of the Philippines, Mr. Ingles).[40] They intended the Committee to be the main "guardian" of the Convention's integrity,[41] and its priority role also follows from Article 20 of CERD, which prohibits reservations inhibiting the operation of any of the bodies established by the Convention. During the hearings Russia also emphasized that a "low

[38] *Ibid.*, *Separate Opinion of Judge Tomka*, p. 622, para. 26.

[39] *Ibid.,* note 26, p. 48.

[40] *Ibid.*

[41] *Ibid.,* note 27, p. 60.

threshold" for seizing the ICJ would encourage States to use Article 22 of CERD as a vehicle to bring to the Court "political battles" unrelated to genuine issues of racial discrimination without a prior assessment of the alleged acts in national legal systems and in the Committee.[42]

However, had a "two-step procedure" been upheld by the Court, it would have enabled the ICJ to use the conclusions of the Committee on several aspects. First, the ICJ generally attributes weight to the interpretation given by such an "independent body [...] established specifically to supervise the application" of a treaty.[43] Second, the ICJ could have benefited from the Committee's findings regarding the complete factual picture of the dispute, instead of dealing with a wide range of factual issues on its own. This task has proven to be difficult — especially in human rights cases — as is evidenced by the Court's judgment on preliminary objections: in particular, it did not decide on a number of jurisdictional points concerning the scope of CERD, leaving them for the merits phase (see Section V below), apparently due to its unwillingness to "untangle" the knot of Parties' conflicting interpretations of CERD due to their links to the complex facts of the case. Third, extrajudicial dispute resolution mechanisms tend to be more flexible and less time- and resource-consuming than the Court procedures, and the latter should not be unrealistically estimated as the only "speedy" way to resolve a dispute.[44]

In this regard, it is alarming that some international lawyers[45] provided a rationale for the lack of *any* preconditions, let alone their cumulative character, in Article 22 of CERD: they seem to believe that the purpose of its wording could not have been purely "formalistic," namely, "to require a State to go through *futile* (*emphasis added*)

[42] *Ibid.,* note 26, p. 48.

[43] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 664, para. 66; *see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 179–180, paras. 109–110; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, *Separate Opinion of Judge Higgins*, p. 213, para. 26.

[44] *Ibid*., note 29, *Separate Opinion of Judge Tomka*, p. 620, para. 21.

[45] *Ibid*., note 12, *Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja*, p. 156, 159.

procedures solely for the purpose of delaying or impeding its access to the Court." This argument raises two points — the alleged ineffectiveness of the CERD Committee and the need for a speedy resolution of the dispute. As regards the timing, the procedures of the ICJ surely cannot be described as swift: Ukraine's application was filed in April 2017, whereas the ruling of the ICJ solely on jurisdictional matters was announced in November 2019. Due to the COVID-19 pandemic the stage of written proceedings on the merits was prolongated, and the judgment will not be rendered anytime soon.

The effectiveness of the CERD Committee should also be considered in view of the latest developments. Qatar's referral of its controversies with the UAE and Saudi Arabia to the CERD Committee (details are provided below) became the first time when the inter-State communications procedure was triggered. This example was later followed by Palestine's communication against Israel, which indicates the growing relevance of the CERD Committee in the context of inter-State disputes. Admittedly, the Committee was faced with the need to establish all proper mechanisms for such cases and obtain the necessary resources (organizational, financial, *etc.*), which was also aggravated by the unexpected COVID-19 pandemic outbreak. Nevertheless, similar difficulties appear in the framework of any newly-established procedure or organ and are resolved in due course. Therefore, this should not be interpreted as an infallible proof of the ineffectiveness of the CERD Committee procedures. It is thus incorrect to state that in the case of *Ukraine v. Russia* it would have been "excessive formalism"[46] to require Ukraine to refer first to the CERD Committee: on the contrary, had Ukraine done so with a genuine will to resolve the issue (which regretfully was not observed from the Applicant's behavior during its bilateral negotiations with Russia[47]), this could have produced positive

[46] The principle of legal certainty requires that no exceptions to the general rule of prior involvement of the CERD Committee are made, as opposed to what is suggested by Judge P. Tomka ("[W]hile maintaining my interpretation of Article 22 of the Convention, I did not vote against the Court's jurisdiction under the CERD. To insist, in the circumstances of the present case, on the prior referral of the dispute to the Committee would have been an exercise in excessive formalism"). *Ibid.*, note 29, *Separate Opinion of Judge Tomka*, p. 623, para. 30.

[47] *Ibid.*, note 27, p. 63 ("Un simulacre de discussion ne vaut pas négociation").

results out-of-court or at least would have enabled the referral of the dispute to the ICJ in a more structured and complete form (in terms of establishing facts, determining the position of the Committee on the interpretation of CERD, *etc*.).

Thus, the characterization of the procedures established by treaty procedures as "futile" and serving the sole goal of delaying or preventing access to the ICJ seems unjustified. Such a view indeed underestimates "the usefulness of other means of peaceful settlement of disputes and the role of other bodies."[48] Moreover, in accordance with the well-established principle of effectiveness the interpreted provisions of the treaty must be given power and a meaning, in this case — to "preserve the effectiveness of Articles 11 to 13 of CERD and the Conciliation Commissions foreseen thereunder."[49] The CERD dispute settlement procedure — carefully balanced and deliberated — is formed by all its elements, none of which shall be omitted (Orakhelashvili, 2021, p. 61). Thus, by declining the above arguments the Court in fact deprived the Committee of its role as a guardian of the Convention's integrity[50] in contradiction with the will of its "founding fathers."[51]

IV. *Qatar v. UAE* Case (Preliminary Objections)

On 5 June 2017, the United Arab Emirates (the UAE) announced measures which were directed against Qatari citizens and companies (a ban on entering the UAE, a requirement to leave the country, a closure of airspace and seaports, *etc*.), starting the so-called "Qatar blockade" which lasted 3.5 years. Following Georgia's and Ukraine's example, Qatar decided to bring its controversies with the UAE to

[48] *Ibid*., note 29, *Separate Opinion of Judge Tomka*, p. 620, para. 21.

[49] *Ibid*., p. 621, para. 24.

[50] *Ibid*., note 27, p. 65.

[51] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Verbatim record 2019/11, Preliminary Objections, Oral Proceedings, Public sitting held on 6 June 2019, Statement of the Counsel of the Russian Federation Mr. A. Pellet, p. 42. Available at: https://www.icj-cij.org/public/files/case-related/166/166-20190606-ORA-01-00-BI.pdf [Accessed 07.05.2022].

the international level by using the most relevant (in Doha's view) "jurisdictional hook," namely CERD. The simultaneous engagement by the Applicant of the CERD Committee and the ICJ makes this case especially interesting. Due to the curious intertwinement of the two procedural tracks this Section will attempt to present the facts in a chronological rather than a thematic order. The authors request the reader's tolerance of the many dates included in this Section, which is, however, unavoidable for getting the full understanding of the whole picture.

As a first step on 8 March 2018 Qatar lodged a communication[52] under Article 11 of the Convention with the CERD Committee, which became the first instance of it being engaged in an inter-State dispute. Qatar invoked Articles 2, 4, 5 and 6 of CERD, complaining that the UAE unlawfully targeted citizens of Qatar based on their nationality. Already on 11 June 2018, Qatar filed an application with the ICJ against the UAE concerning alleged violations of CERD, simultaneously requesting the indication of provisional measures.

The oral proceedings at the ICJ on provisional measures requested by Qatar took place on 27–29 June 2018. In the Order of 23 July 2018 the Court recognized its *prima facie* jurisdiction and indicated provisional measures, albeit not those requested by the Applicant and of a rather limited character (family reunification, educational rights and access to justice).[53] The Court also called upon both Parties not to aggravate the dispute further. The ICJ, however, abstained from answering the key jurisdictional question raised by the Respondent, namely, whether one of the grounds of discrimination prohibited under Article 1 of CERD — "national origin" — presupposed a differentiated treatment based on the "current nationality" of a person, the key difference between these terms being the perpetual character of the former and temporary character of the latter. Thus, the legal consequences of the General recommendation

[52] Simultaneously an analogous communication was lodged by Qatar against the Kingdom of Saudi Arabia, which will however not be covered in this study due to lack of connection to the ICJ proceedings.

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

No. XXX (2004) on discrimination against non-citizens (relied on by Qatar) on the scope of CERD remained unclear.

Judges P. Tomka, G. Gaja and K. Gevorgian in a joint declaration criticized the conclusion of the Court concerning its *prima facie* jurisdiction due to the fact that "[n]ationality is not listed in Article 1, paragraph 1, among the bases of discrimination to which CERD applies."[54] They also called in question the CERD Committee's position expressed in the General recommendation No. XXX (2004) due to the lack of a proper reasoning.[55] Similar views were voiced by Judges J. Crawford[56] and N. Salam.[57]

Turning to the CERD Committee in compliance with Article 11 (1) of the Convention, the Committee transmitted Qatar's communication to the UAE. On 7 August 2018 the UAE sent its reply to the communication submitted by Qatar in March, rebutting all accusations contained therein. It also raised the issue of concurrent proceedings at the ICJ, maintaining that the CERD Committee could be seized of the dispute only after the ending of the process in the Hague.

As the matter was not adjusted to the satisfaction of the States parties involved,[58] on 29 October 2018 Qatar referred the matter again to the Committee in accordance with Article 11 (2) of the Convention. By a decision dated 14 December 2018 the Committee requested the concerned States to supply any relevant information on issues of its competence[59] to consider the communication or admissibility of the latter, including the exhaustion of all available domestic remedies. In its

[54] *Ibid*., *Joint declaration of Judges Tomka, Gaja and Gevorgian*, p. 436, paras. 3–4.

[55] *Ibid*., p. 436, para. 5.

[56] *Ibid*., *Dissenting opinion of Judge Crawford*, p. 475, para. 1.

[57] *Ibid*., *Dissenting opinion of Judge Salam*, p. 481, para. 2.

[58] OHCHR (2019). *Information Note on inter-state communications*. Available at: https://www.ohchr.org/Documents/HRBodies/CERD/Pressnote29_08.docx [Accessed 07.05.2022].

[59] While the Committee itself uses the term "jurisdiction," it would be correct to refer to its "competence" to examine a State's communication. For a theoretical discussion on issues of "jurisdiction" and "competence" *see* Vylegzhanin and Zinchenko (2018, pp. 9–12); *see also*: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary objections, Judgment of 4 February 2021, para. 100.

additional submissions of 29 November 2018 and 14 January 2019 the UAE clarified its position regarding these questions. The UAE reiterated its arguments raised in the ICJ proceedings, in particular regarding the scope of CERD (namely that it did not cover a "differentiated treatment based on current nationality"). Further exchanges of positions followed on 14 February 2019 (comments of the Applicant) and 19 March 2019 (submission of the Respondent).

The "legal battle" of the two Gulf States at the ICJ also continued. A rare development for the Court's practice followed on 22 March 2019: the UAE also submitted a request for the indication of provisional measures, aimed *inter alia* at forcing Qatar to withdraw its communication submitted to the CERD Committee. In addition, on 29 April 2019 the UAE filed preliminary objections challenging the jurisdiction of the Court and the admissibility of Qatar's application.

On 3 May 2019, the CERD Committee held its proceedings on the issues of competence and admissibility that were attended by one representative from each disputing State (without voting rights, according to Article 11 (5) of CERD and the "Rules of procedure regarding the hearings carried out pursuant to Article 11 of CERD", adopted on 29 April 2019[60]).

The oral proceedings at the ICJ on provisional measures took place on 7–9 May 2019, leading to the Court's Order of 14 June 2019 dismissing UAE's request.[61] Despite the Respondent's arguments concerning the *electa una via* rule, the Court refrained from clarifying its position on the nature of the preconditions contained in Article 22 of CERD.

Meanwhile on 27 August 2019, the CERD Committee rendered its decision on Qatar's inter-State communication ruling that "it ha[d] jurisdiction to examine the exceptions of inadmissibility raised by the

[60] Committee on the Elimination of Racial Discrimination (2019). *Decision on the jurisdiction of the Committee over the inter-State communication submitted by Qatar against the UAE*, 27 August 2019, United Nations, CERD/C/99/3, p. 11, note 47. Available at: https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-99-3.pdf [Accessed 07.05.2022].

[61] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019, p. 361.

Respondent State."[62] On that same date it also issued a decision on the admissibility of this communication, rejecting "the exceptions raised by the Respondent State."[63] The Committee (prior to the ICJ judgment on preliminary objections in *Ukraine v. Russia*) regarded the conditions contained in Article 22 of CERD to be alternative, albeit with a rather shaky reasoning. First, it based its conclusion on the position of the ICJ expressed at the provisional measures stage of the *Georgia v. Russia* case in 2008 (concerning the lack of any preconditions in Article 22 of CERD), which was later overruled by the Court itself in 2011 (as indicated above). In 2019, the Committee could not have been unaware of these developments. Moreover, of all available sources the CERD Committee chose to refer to the dissenting opinion of Judge A.A. Cançado Trindade (whose view on the absence of procedural preconditions was also not supported by the majority of the judges).[64] With all due respect to the honorable Judge, such a reference is rather regretful, since it upholds a particular "human rightist" approach, favoring special methods of interpretation of human rights treaties to the detriment of the cornerstone international law principle of State consent (Kozhevnikov and Sharmanazashvili, 1971, p. 34). The CERD Committee also arrived at a conclusion that its competence *ratione materiae* included "differences of treatment based on nationality."[65] Whether and to what extend this position was influenced by the provisional measures order of the ICJ (where it recognized its *prima facie* jurisdiction despite the extensive arguments of the UAE concerning the limited scope of CERD) can only be speculated about.

As a result, according to Article 12 (1) of CERD, the Chairperson of the CERD Committee was tasked with appointing the members of an *ad hoc* Conciliation Commission which was supposed to provide good

[62] *Ibid*., note 63, p. 11, para. 60.

[63] Committee on the Elimination of Racial Discrimination (2019). *Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE*, 27 August 2019, United Nations, CERD/C/99/4, p. 14, para. 64. Available at: https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-99-4.pdf [Accessed 07.05.2022].

[64] *Ibid*., p. 12, para. 50.

[65] *Ibid*., p. 13, para. 63.

offices to the disputing States in order to reach an amicable solution.[66] They were appointed following consultations with the relevant States in February 2020. However, due to the outbreak of the COVID-19 pandemic[67] the activities of the *ad hoc* Conciliation Commission were frozen in March 2020, in particular in connection with the uncertainty around the holding of online meetings on sensitive matters raised in the inter-State communication. As regards the ICJ, the oral proceedings on the preliminary objections raised by Qatar were held on 31 August — 7 September 2020.

A new development that had a substantial impact upon the situation arose on 5 January 2021 — Qatar and its neighbors concluded the Al Ula Agreement, which ended the blockade. Thus, on 11 January 2021 Qatar transmitted to the CERD Committee its request to suspend the proceedings, to which the UAE consented on 27 January 2021.

Apparently, a similar note was not transmitted to the ICJ, which continued the consideration of the case and rendered its judgment on preliminary objections on 4 February 2021. The Court found that the dispute fell outside of the scope *ratione materiae* of CERD, denying its jurisdiction to entertain Qatar's application of 11 June 2018. Unlike in the *Ukraine v. Russia* case, the Court devoted 13 pages of its judgment to issues of jurisdiction *ratione materiae* (dealing with the correct interpretation of the term "national origin" on nearly 10 pages).[68] Relying mainly upon the analysis of the text of the treaty,[69] the Court concluded that measures based on the current nationality of persons did not fall within the scope of CERD. As in *Georgia v. Russia* (and in contrast with its position in *Ukraine v. Russia*) the Court again referred to the *travaux préparatoires* due to the Parties' heavy reliance on

[66] *Ibid*., p. 14, para. 65.

[67] OHCHR (2021). Decision of the *ad hoc* Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication *Qatar v. the United Arab Emirates*, 15 March 2021. Available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf [Accessed 07.05.2022].

[68] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary objections, Judgment of 4 February 2021, pp. 23–36.

[69] *Ibid*., p. 26, para. 81.

various preparatory documents, albeit it deemed its conclusion based on the primary means of treaty interpretation as sufficient. The Court also explicitly referred to the CERD Committee's decisions of 27 August 2019, which it "carefully considered," while reaching its own conclusion on the issue of discrimination based on nationality. Some judges and scholars criticized the summary character of this conclusion and the lack of an "inclusive dialogue" where the ICJ would at least address the CERD Committee's arguments and show "where it went wrong."[70]

Finally, on 5 March 2021 the two *ad hoc* Conciliation Commissions established in accordance with CERD (one for each of Qatar's communications[71]) held a joint online meeting and took note of Qatar's request for suspension and the consent of the respondents. They also invited any of the States parties concerned to inform the *ad hoc* Conciliation Commission, if necessary, of their wish to resume the consideration of the matter before the *ad hoc* Conciliation Commissions or to provide any relevant information (with a one-year limit from the adoption of the Al Ula Declaration). They also decided to remain seized of the matter.[72]

It is relevant to note that neither the Court, nor the CERD Committee, nor the *ad hoc* Conciliation Commission had a final say in the dispute between Qatar and the UAE — eventually it was the Parties who negotiated a settlement before any of the international bodies could reach a tangible result. One can only speculate as to the precise impact of each of these procedures on the outcome of the dispute.

However, the various exchanges of the Parties that took place not only before the Court, but also before the CERD Committee, are likely to have contributed to the settlement. Admittedly, the global COVID-19 pandemic has had an adverse impact on all international organizations and bodies. The CERD Committee was particularly affected due to the novelty of inter-State communications procedures (and the

[70] *Ibid*., *Dissenting opinion of Judge Bhandari* (p. 8, para. 24); Ulfstein, G., (2021). Who is the Final Interpreter in Human Rights: the ICJ v. CERD? *EJIL: Talk!*, 22 February 2021. Available at: https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/ [Accessed 07.05.2022].

[71] Qatar also lodged a communication against the Kingdom of Saudi Arabia.

[72] *Ibid*., note 70.

organizational and financial issues arising therefrom[73]), which it was unable to speedily adapt to the new environment. This fact, however, shall not be interpreted adversely for the Committee's role on the international arena. Given the broad interpretation by the Committee of the scope of its mandate (as compared to the ICJ which eventually declined to hear Qatar's application), its potential to contributing to friendly settlements in inter-State cases remains to be seen: another communication (*Palestine v. Israel*) is currently pending. The *ad hoc* Conciliation Commission was appointed by the Committee (due to a lack of agreement of the Parties to the dispute) in December 2021[74] and held two online preparatory meetings on 19 January and 10 February 2022.[75]

V. *Ukraine v. Russia* Case (Pending on the Merits)

As follows from the above, the only CERD-related case currently in the Court's docket remains the application of Ukraine against Russia, which advanced to the merits stage of the proceedings. In this regard some of the Court's conclusions at the preliminary objections stage have had an important impact on the shaping of the case on the merits and deserve attention.

In particular, 38 pages of the preliminary objections raised by the Russian Federation were devoted to the issue of the ICJ jurisdiction *ratione materiae* under CERD.[76] Avoiding an in-depth analysis of the evidence (which would have been improper at such an early stage of the proceedings), the Russian Federation demonstrated that the alleged

[73] *Ibid.*

[74] Committee on the Elimination of Racial Discrimination (2021). *Summary record of the 2865th meeting, 105th session*. Geneva, 3 December 2021, para. 5. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSR.2865&Lang=en [Accessed 07.05.2022].

[75] OHCHR (2022). *State of Palestine against Israel: UN Committee sets up ad hoc Conciliation Commission*. Available at: https://www.ohchr.org/en/press-releases/2022/02/state-palestine-against-israel-un-committee-sets-ad-hoc-conciliation [Accessed 07.05.2022].

[76] Preliminary objections submitted by the Russian Federation, 12 September 2018, p. 144-182, paras. 302–359.

violations presented by the Applicant did not fall within the provisions of CERD. *Inter alia*, Russia maintained that CERD did not cover the difference of treatment between citizens and non-citizens, as well as the rights of national minorities to representative institutions and education in the native language. The respondent also challenged Ukraine's definition of "ethnic groups" encompassing political self-identification and political opinions, which would run counter to the provisions of CERD and lead to an unreasonable result of splitting Ukrainians and Crimean Tatars in Crimea into sub-categories (depending on their political views on the current status of the peninsula).

The judgment is, however, utterly succinct on the issue of jurisdiction *ratione materiae*, which fits on 1 page in just 4 paragraphs (as opposed to a whole section devoted to this topic in its subsequent judgment in *Qatar v. UAE*, see above).[77] The Court applied a rather plain approach, stating simply that Ukrainians and Crimean Tatars (no matter by reference to which criteria they are defined by Ukraine) are "ethnic groups protected under CERD" and that rights and obligations are "broadly formulated." This led the Court to conclude that the measures mentioned in Ukraine's application (whether or not they actually constitute racial discrimination) "fall within" CERD provisions. This stands in a noticeable contrast to the Court's findings at the provisional measures stage, where it concluded[78] that "on the basis of the *evidence* presented before the Court by the Parties, it appears that *some* of the acts complained of by Ukraine fulfill this condition of plausibility" (emphasis added[79]). In other words, not all of Ukraine's claims were regarded by the Court as plausible, which led it to indicate provisional measures that concerned exclusively two aspects: the functioning of Crimean Tatar representative institutions and the situation regarding the education in the Ukrainian language.

Admittedly, the ICJ is generally not bound by its findings at the provisional measures stage (as vividly demonstrated by the *Georgia v. Russia* case mentioned above). However, the Court could have at

[77] *Ibid.*, note 29, p. 595, paras. 94–97.
[78] *Ibid.*, note 28, p. 104, 135, para. 83.
[79] *Ibid.*, note 29, *Dissenting opinion of Judge ad hoc Skotnikov*, p. 667.

least given more explanations to its findings and addressed questions of interpreting the scope of CERD posed by the Parties which could have been considered without a heavy reliance on the facts and evidence. Several judges[80] have expressed similar criticism. Judge L. Skotnikov characterized the Court's conclusions as "summarily reached" and departing from the previous case-law, enabling the ICJ to establish its jurisdiction *ratione materiae* on the basis of "a connection, no matter how remote or artificial, between [the applicant's] factual allegations and the treaty it invokes." Judge P. Tomka, in agreeing with some of the Respondent's arguments on the scope of CERD (for instance, that the Convention did not encompass an absolute right to education in a native language), also regretted that the Court's "determination of its jurisdiction *ratione materiae* [was] not much more detailed" and did not specify precisely which of Ukraine's claims fell within the scope of CERD. Judge J. Donoghue also noted the Court's general approach of determining "the scope of treaty provisions in relation to the acts alleged by the applicant in order to uphold or reject an objection to its jurisdiction *ratione materiae*," which was not done in the case at hand, making the situation "more complicated" since "the claims at issue proceed[ed] to the merits." However, according to Judge J. Donoghue's important remark, this "does not mean that the Court has accepted the interpretations of that treaty advanced by the Applicant" — this issue has rather been postponed to the merits stage of the proceedings.

As a consequence of this approach, the part of the case concerning CERD in its entirety proceeded to the merits, and the Court at this stage will have to handle issues that are jurisdictional in nature but were elegantly avoided by it at the relevant time. Therefore, it is expected that Russia will again address — albeit with a more extensive reference to evidence — similar arguments as it put forward during the preliminary objections stage concerning the definition of an ethnic group under CERD and the scope of the Convention (in particular, whether it encompasses ethnic minorities' right to their own representative institutions and to

[80] *Ibid.*, note 29, *Dissenting opinion of Judge ad hoc Skotnikov*, *Separate opinion of Judge Tomka*, *Separate opinion of Judge Donoghue.*

education in a native language, as well as a "right to return to one's country").

Another consideration which will have bearing on the future proceedings on the merits — especially in terms of evidence and a required standard of proof — is the high degree of Ukraine's accusations (regarding Russia's "systematic policy of racial discrimination," "cultural erasure of the Crimean Tatar and Ukrainian communities in Crimea," *etc*.). It is certain that statements and reports of various organizations (including non-governmental) relied on by Ukraine are insufficient to prove such serious allegations due to low standards of proof applied in such documents, as well as the fact that they concern few individual cases, without providing reliable statistics and comparison of treatment of other ethnic groups. However, the ICJ referred to some reports of this kind (albeit at the provisional measures phase[81]). Due to a lack of credible first-hand information in foreign media, non-governmental organizations' reports and similar sources — given their conformity to a certain general political agenda — it is not surprising that some of the judges may have various misconceptions regarding the real situation in Crimea. For example, Judge J. Crawford believed that "other groups in Crimea representing the Crimean Tatars do not appear to have the same status or level of acceptance as the *Mejlis*,"[82] drawing his conclusion from the observations of the OHCHR — which has in fact never been on the peninsula despite the Russian Federation's "willingness to consider all requests to visit Crimea."[83]

The Respondent will also have to rebut such allegations and misconceptions by credible first-hand information. To help the Judges get out of this one-sided informational vacuum, the Agent of the Russian Federation and relevant experts have themselves conducted visits to Crimea to personally meet the representatives of the Ukrainian and Crimean Tatar communities and civil society organizations, as well as to visit various educational institutions, cultural and religious sites. Such

[81] *Ibid*., note 28, p. 138, para. 97.

[82] *Ibid*., note 28, *Declaration of Judge Crawford*.

[83] Third Committee of the UN General Assembly (2019). *Summary record of the 45th meeting, 74th session*, 14 November 2019, A/C.3/74/SR.45, Statement of the Russian Federation (M. Kuzmin), para. 64.

first-hand evidence should be assigned high legal value as compared to reports and testimony based on hearsay and stemming from sources that have little knowledge of the current situation in Crimea.

On a side-note, this issue raises a general problem concerning practical difficulties encountered by the Court in establishing facts when considering cases on the basis of jurisdictional clauses of specialized treaties — such as CERD and other human rights instruments, which merits a short comment. The case-law of the ICJ demonstrates the insufficient use of existing mechanisms for a comprehensive fact-finding process, especially in the context of human rights treaties, which are increasingly referred to as a basis for the Court's jurisdiction. Legal literature has long referred to the problem of the insufficient "infrastructure" within the Court in order to conduct comprehensive fact-finding *in situ* (Zimmermann *et al.*, 2019, p. 752).

One of such mechanisms that has received undeservedly little attention in the practice of the ICJ involves field visits by the judges. Such a visit was conducted only once in the history of the Court, however, it could become an effective tool for the judges to gain more accurate information about the situation (for example, concerning human rights) in a given area, which cannot be fully achieved by studying only written evidence. Admittedly, there are difficulties in terms of organizing such visits, taking into account the required resources (mostly financial), as well as the need for political will and cooperation of the Parties to the dispute. In the case at hand the Court's visit to Crimea — useful as it could have been — was probably not an option due to various considerations predominantly of a political character.

However, the rare use of on-site visits in the context of an increase in cases stemming from jurisdictional clauses of human rights treaties may lead to the Court's reliance on information about facts "established" by third parties (for example, other tribunals, non-governmental organizations) without the possibility of their verification or control over the selection of persons who collect and analyze evidence, their methodology and procedures, *etc.* Such a situation would be highly controversial. Thus, in order for the judges to have first-hand information, as well as to be able to acquire an impartial view of the situation in a certain territory, its historical, cultural and other features,

it seems necessary to extend the practice of field visits by judges, at least in the most "factually-heavy" cases.

VI. *Armenia v. Azerbaijan* and *Azerbaijan v. Armenia* Cases

On 16 September 2021, Armenia instituted proceedings against Azerbaijan, claiming violations of CERD due to the "State-sponsored policy of Armenian hatred," "systemic discrimination, mass killings, torture and other abuse" of "individuals of Armenian ethnic or national origin."[84] Azerbaijan's application against Armenia followed on 23 September 2021, also referring to the "policy of ethnic cleansing and systematic violations of CERD directed against Azerbaijanis" conducted by Armenia.[85] Special emphasis in both applications is put on the armed conflict of September — November 2020 in Nagorno-Karabakh region, although the period covered by them seems to be "decades" long.[86]

Both disputing Parties also requested the Court to indicate provisional measures pending its judgment on the merits. The phrasing of the jurisdictional aspects by the Parties in their applications is worth noting. Both Armenia and Azerbaijan challenged the jurisdiction of the Court to hear the other's application. Needless to say, that, given the Court's position (explicitly cited in both applications) on the alternative character of the preconditions contained in Article 22 of CERD, both States deemed it unnecessary and "futile" to refer the matter to the CERD Committee and seized the ICJ instead.

As regards the "failure of negotiations" requirement, Armenia in its application refers to the letter sent by its Minister of Foreign Affairs

[84] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Application instituting proceedings and request for the indication of provisional measures, 16 September 2021. Available at: https://www.icj-cij.org/public/files/case-related/180/180-20210916-APP-01-00-EN.pdf [Accessed 07.05.2022].

[85] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Application instituting proceedings, 23 September 2021, p. 1, para. 2. Available at: https://www.icj-cij.org/public/files/case-related/181/181-20210923-APP-01-00-EN.pdf [Accessed 07.05.2022].

[86] *Ibid.*, note 87, p. 1, para. 3, p. 41, para. 99; note 88, p. 34, para. 56, p. 64, para. 93.

to his Azerbaijani counterpart on 11 November 2020 (the following day after the end of hostilities on 10 November 2020 and the signing of the Trilateral Statement[87]), "expressly referring" to CERD and inviting Azerbaijan to negotiate.[88] In a letter dated 8 December 2020 Azerbaijan denied Armenia's allegations and raised claims against Yerevan concerning violations of CERD.[89] Both Parties refer to the following exchange of "over 40 notes" and several rounds of negotiations between December 2020 and September 2021.[90] Rejecting Armenia's jurisdictional argument on the fulfillment of the negotiations requirement, Azerbaijan claimed that the first substantive meeting between the Parties was held only in mid-July 2021 (all previous negotiations being devoted to "procedural modalities") and that Armenia — unlike Baku — did not genuinely attempt to negotiate and consider the Respondent's proposals.

Simultaneously in its own application against Armenia Azerbaijan characterized the negotiations requirement as fulfilled due to the fact that Baku pursued the negotiation of its claims "as far as possible." Azerbaijan also explicitly stated that it would be "futile" to continue negotiations or to resort to the CERD procedures due to "Armenia's intransigence." Armenia conceded that the negotiations requirement for the failure of negotiations was met, while deflecting the blame onto Azerbaijan due to its lack of intention to genuinely negotiate and its use of "delaying tactics."

On 7 December 2021, the ICJ delivered two Orders indicating provisional measures to protect certain rights claimed both by Armenia and (to a lesser extent) Azerbaijan, as well as ordering the Parties to

[87] Kremlin: Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation, 10 November 2020. Available at: http://en.kremlin.ru/events/president/news/64384 [Accessed 07.05.2022].

[88] *Ibid*., note 87, p. 1, para. 14.

[89] *Ibid*., note 88, p. 14, para. 23.

[90] *Ibid*., note 88, p. 14, paras. 24–26 ("Azerbaijan and Armenia have exchanged over 40 notes and conducted eight rounds of negotiations"); note 87, p. 5, para. 19 ("Armenia has exchanged more than 40 pieces of correspondence with Azerbaijan, and participated in seven rounds of meetings").

refrain from any action which might aggravate or extend the dispute.[91] As regards *prima facie* jurisdiction, the Court seemingly avoided the argument on the short duration of substantive negotiations, plainly stating in both Orders that the Parties' positions "remained unchanged" and that their negotiations had "reached an impasse." It is, however, difficult to imagine that the broad variety of issues and mutual accusations raised by Armenia and Azerbaijan (discrimination, campaign of ethnic cleansing, destruction of cultural heritage and environment, war crimes, campaign of hate speech and disinformation, restriction of activity of non-governmental organizations, *etc.*), which piled up over the last decades, could be comprehensively discussed in seven (or eight as stated by Azerbaijan) meetings in ten months, let alone via a virtual platform (due to the COVID-19 pandemic). Even in *Ukraine v. Russia* the Parties were involved in diplomatic correspondence and a series of talks over two and half years. It is also telling that the first application ever lodged by either of these post-Soviet republics with the ICJ was based on CERD, which may be the consequence of the Court's lenient position on the preconditions contained in Article 22 of CERD.

VII. Conclusion

This paper highlights the main points of the ICJ reasoning and — to a limited extent so far — discussions at the CERD Committee concerning inter-State applications containing allegations of racial discrimination. The cautious conclusion is that established international jurisprudence related to CERD is already a reality, with some of the major issues being resolved. This path has not been easy for the Court, and the fact that the ICJ recognized its *prima facie* jurisdiction in *Georgia v. Russia*

[91] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order dated 7 December 2021, Request for the indication of provisional measures. Available at: https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf [Accessed 07.05.2022]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Order dated 7 December 2021, Request for the indication of provisional measures. Available at: https://www.icj-cij.org/public/files/case-related/181/181-20211207-ORD-01-00-EN.pdf [Accessed 07.05.2022].

and *Qatar v. UAE* when indicating provisional measures, and then reverted its reasoning at the preliminary objections stage also shows the complexity of the topic at hand. A number of questions still remains unresolved, enabling the Court to continue its path of developing the relevant jurisprudence. It is against this backdrop that this paper attempts to summarize the main problems and inconsistencies that arose in the Court's CERD-related practice that also need to be kept in mind for the future.

The case-law analyzed in this article vividly demonstrates that in interpreting jurisdictional clauses the ICJ relies mainly on textual interpretation. The Court applied the general rule enshrined in the 1969 Vienna Convention on the Law of Treaties, devoting its prior attention to the context in which the relevant terms are used, moving further into the intricacies of the questions concerning the object and purpose of the treaty in order to examine its terms against this backdrop.

However, there is some inconsistency in the practice of the ICJ in CERD-related disputes. In *Georgia v. Russia* and *Qatar v. UAE* the Court — in addition to the textual interpretation (which it deemed sufficient) of Articles 22 and 1 of CERD, respectively, — turned to the working documents of the Convention in order to confirm their consistency with the conclusion drawn on the basis of the textual analysis. However, in *Ukraine v. Russia* the Court limited itself to analyzing the wording of Article 22, its context and the object and purpose of CERD, refraining from referring to the *travaux préparatoires* that were also widely quoted by the Parties despite the fact that the Court itself recognized the ambiguity of the wording of this provision. Such an approach seems inconsistent.

It appears that in *Ukraine v. Russia* the Court's laconic analysis of the controversial provision of Article 22 of CERD was insufficient, since both Parties to the dispute had strong arguments in favor of different interpretation (none of which, as the Court itself admitted, was excluded by the very wording of the Article). Greater clarity and transparency of the Court's reasoning on such an ambiguous issue — rather than avoiding a deep analysis that could admittedly reveal possible inconsistencies and contradictions — would have been beneficial.

It should, however, be welcomed that the legal uncertainty generated by the Court's "silence" in earlier disputes regarding the conditions for filing a CERD-related claim with the ICJ can now be considered exhausted. As a result, the Court, on the one hand, did not lower the threshold for submitting applications to it, recognizing the existence of preconditions in Article 22 of CERD — contrary to the arguments of some jurists (including judges of the ICJ), who relied on the "special nature" of the Convention as a treaty in the field of human rights protection. Thus, the Court provided some barriers to direct access to the Peace Palace, using the principle of effectiveness.

On the other hand, the Court showed certain leniency, since it did not consider these conditions cumulative, thereby easing the way to the Hague for racial discrimination-related claims. It seems to be an omission that the Court paid insufficient attention to the practical, legal and political consequences of this decision, which pushed the role of a special conventional monitoring body — the CERD Committee — into the background. Such a lowered threshold which excludes the need to exhaust the conventional dispute settlement mechanisms may lead to the use of CERD (and other international treaties with similar jurisdictional clauses) by an increasing number of States to refer disputes to the Court, which may be only indirectly related to the scope of the Convention. It may also result in the marginalization of the CERD monitoring system, including the Convention Committee, as well as in the potential further fragmentation of international law in the long term.

In this context some international lawyers (as well as States in their submissions before the ICJ) have characterized the CERD procedures as "futile." Albeit not legally binding, the potential of the CERD dispute settlement mechanism in inter-State cases remains to be seen, given the fact that another application is currently pending before the CERD Committee (*Palestine v. Israel*), which it considered as falling within its competence[92] and admissible.[93]

[92] Committee on the Elimination of Racial Discrimination (2019). *Inter-State communication submitted by the State of Palestine against Israel: decision on jurisdictio*n, 12 December 2019, CERD/C/100/5.

[93] Committee on the Elimination of Racial Discrimination (2021). *Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel*, 30 April 2021, CERD/C/103/R.6.

Moreover, the Court's variative approach is also noticeable from the way it dealt with preliminary objections concerning its jurisdiction *ratione materiae* in *Ukraine v. Russia* and *Qatar v. UAE*. While the latter case was dismissed after a detailed analysis by the Court of the notions in question ("national origin" and "nationality"), it left open similar important issues concerning the scope of CERD, shifting them to the merits phase of the proceedings between Kiev and Moscow.

In view of the fundamental role of the principle of consent to the jurisdiction of the ICJ, it is of utmost importance to ensure a balanced and cautious approach of the Court to these issues, including in view of the potential abuse of jurisdictional clauses of treaties by States in order to submit disputes of a political nature that are only remotely related to the object and purpose of the treaty in question (Odermatt, 2018, p. 234). One should not fall into the trap of excessively "human-rightist" approaches that deny the importance of State consent in relation to jurisdictional issues as "outdated and unfounded."[94]

As a final suggestion, the Court might be more cautious not to mix up political considerations and legal arguments in order to avoid stretching CERD beyond its initial purpose and encouraging the misuse of its provisions to bring purely political battles to the ICJ. In this context it should be reminded that, as the Court itself stated in *Qatar v. UAE* case, CERD "was clearly not intended to cover every instance of differentiation between persons" but to "condemn [...] any attempt to legitimize racial discrimination by invoking the superiority of one social group over another."[95]

It is also true that States themselves — if they are genuinely willing to resolve certain sensitive disputes — should refrain from "recruiting the Court for lawfare" and burdening it with "fragments of wider, intractable conflicts." (Fontanelli, 2021b). Such a strategy may not only erode the Court's reputation and credibility as dispute settler, but also already influences the willingness of States to accept the Court's jurisdiction as well as to include compromissory clauses when drafting new treaties (Fontanelli, 2021a, p. 35, 39).

[94] *Ibid*., note 29, *Separate opinion of Judge Cançado Trindade*, p. 626, para. 4.
[95] *Ibid*., note 71, p. 28, para. 87.

The Court has on various occasions refused to use jurisdictional clauses of treaties as a "trap," which could force States to undergo the exercise of international judicial functions (Zimmermann *et al*., 2019, p. 742) contrary to the principle of State consent to the jurisdiction of the ICJ. However, State and non-State actors challenge the directions of the case-law and jurisprudence of the ICJ (Madsen, Cebulak, and Wiebusch, 2018, p. 195), in particular as regards some aspects of the interpretation and application of CERD. It is to be hoped that a cautious approach of the ICJ aimed at strengthening this fundamental principle will prevail in the international jurisprudence and remain untouched by purely political considerations.[96]

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[96] *See*, for example, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures, Order of 16 March 2022, Declaration of Judge Bennouna ("I voted in favour of the Order indicating provisional measures in this case because I felt compelled by this tragic situation [...]. However, I am not convinced that the Convention on the Prevention and Punishment of the Crime of Genocide [...] was conceived, and subsequently adopted, in 1948, to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force").

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