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USES AND UNDERUSES OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION AT THE INTERNATIONAL COURT OF JUSTICE

Abstract:

As many as three international disputes containing allegations of infringement of the International Convention on the Elimination of All Forms Racial Discrimination (ICERD) have been brought before the International Court of Justice (ICJ), thus contributing to the number of cases allowing the Court to pronounce itself on the international human rights law. Even though none of the cases invoking violations of ICERD has been (yet) adjudicated on the merits, they have already provided an opportunity to clarify (at least in part) the compromissory clause enshrined in Art. 22 of ICERD, as well as to tackle some other issues related to provisional measures ordered by the Court. This article discusses the ICJ's approaches to the application of ICERD in the three above-mentioned cases, while posing the question whether indeed the 1965 Convention can be useful as a tool for settling inter-state disputes. The author claims that ICERD and the broad definition of "racial discrimination" set out in its Art. 1 constitute cornerstones for the international protection of human rights, though the recourse to the procedures provided in Art. 22 of ICERD – vital as they are – should not necessarily be perceived as a better alternative to the inter-state procedures and the functions exercised by the UN Committee on the Elimination of Racial Discrimination (CERD).

Keywords: International Convention on the Elimination of All Forms of Racial Discrimination, International Court of Justice, Committee on the Elimination of Racial Discrimination, provisional measures, human rights

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INTRODUCTION

While international human rights law (IHRL) can indisputably be applied by the International Court of Justice (ICJ or the Court), whose role in the development of this area may be considered as substantial,¹ cases concerning human rights obligations do not enter the Court's docket very often. B. Simma offers the view that after several decades of "hesitation and restraint" towards human rights issues, the ICJ started to apply the IHRL in a more straightforward way since the *Nuclear Weapons* advisory opinion of 1996.² A. A. Cançado-Trindade perceives the 21st century (and in particular its second decade) as a "new era of international adjudication of human rights", which has been reflected in a more human rights-oriented jurisprudence and possibly illustrates certain shifts in the paradigms of international law.³ Irrespective of whether one adapts a more cautious or progressive approach towards the influence of IHRL on the Court's case-law or judicial reasoning, the fact remains that the 21st century has brought about more opportunities for the ICJ to engage in the interpretation and application of human rights law than ever before in the history of the World Court.

Arguably, some of the most notable examples from the last two decades include the *A.S. Diallo Case*⁴ as well as the ICJ's Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁵ The list of such cases is of course longer, as one should not overlook cases which explicitly or implicitly concerned, *inter alia*, genocide,⁶ the prohibition of torture (and implications

¹ See R. Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12(4) Chinese Journal of International Law 639 (2013), esp. at 645 *et seq.* See also the report of the International Law Association's Committee on *International Human Rights Law* (C. Cerna et al. (eds.)), 76 International Law Association reports of conferences 470 (2014), esp. at pp. 476-485.

² B. Simma, *Mainstreaming Human Rights: The Contribution of the ICJ*, 3(1) Journal of International Dispute Settlement 7 (2012), p. 18.

³ See Judge Cançado-Trindade's Separate Opinion to the Courts' Order on provisional measures in the *Qatar v. UAE* case, 23 July 2018 (one of the three proceedings at the ICJ where a violation of the ICERD was invoked), paras. 7-8, with references to the same Judge's earlier opinions appraising the ICJ's openness to the jurisprudence of international human rights courts and certain states' reliance of human rights treaties before the ICJ.

⁴ ICJ, *Case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment, 30 November 2010, ICJ Rep 2010, p. 639. Cf. remarks by S. Ghandhi, *Human Rights and the International Court of Justice. The Ahmadou Sadio Diallo Case*, 11(3) Human Rights Law Review 527 (2011), pp. 527 *et seq.*

⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 136.

⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, p. 43. From a purely normative perspective, the prohibition of genocide may be seen as not belonging to the IHRL's sphere, however it is obviously founded on humanitarian considerations which are common to the IHRL and international criminal law.

thereof),⁷ or consular protection exercised towards convicts sentenced to the death penalty.⁸ The “new” case-law concerning human rights does not imply however that the ICJ has begun to adjudge these cases in an overly progressive manner. The Court’s approaches to human rights issues are sometimes considered as disappointing, but its case-law does illustrate quite a complex picture of contemporary international law, which faces tensions between traditional and/or sovereignty-driven cautiousness vs. human rights-motivated activism. These tensions are in fact nothing new and tend to be reflected in different attitudes within the Bench itself. Another problem lies in the obvious limits to the ICJ’s jurisdiction and its insurmountable inter-state character, which in effect obstructs the chances for the ICJ to express itself on what B. Simma describes as “pure” human rights cases.⁹

Despite the greater visibility of human rights in the ICJ’s 21st century’s case-law, it is not common that states directly invoke a compromissory clause from human rights treaties. Apart from political considerations, this could be partly due to the simple fact that not all treaties of this kind expressly provide for such a possibility.¹⁰ Further, the clauses which may trigger the ICJ’s jurisdiction are sometimes excluded by state reservations, and moreover the primary system of dispute settlement and application of the UN human rights treaties is that of the UN treaty bodies, i.e. the committees.¹¹ Taking into consideration the fact that the inter-state complaint procedures at the UN treaty bodies have remained (until very recently) a dead letter, one should perhaps not be surprised that states are even less keen to submit their claims to the ICJ under the human rights treaties (thus increasing the risk to appear at the ICJ in other cases as a respondent). It could reasonably be argued that an honest and good faith-based commitment on the part of states to their treaty obligations should normally result in the states’ readiness to submit themselves to the judicial mechanisms of international dispute settlement. In other words, one should not view the submission of state-parties

⁷ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Rep 2012, p. 422.

⁸ ICJ, *LaGrand (Germany v. United States of America)*, Judgment, 31 March 2004, ICJ Rep 2001, p. 466; ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Rep 2004, p. 12. B. Simma observes that the ICJ’s reluctance to consider Art. 36(1) of the Vienna Convention on Consular Relations as the basis for a human right to consular assistance is at least partly due to the Court’s unwillingness to pronounce on the Advisory Opinion of the Inter-American Court of Human Rights (OC16-99), which had confirmed the existence of such a right (Simma, *supra* note 2, p. 14).

⁹ Simma, *supra* note 2, p. 16.

¹⁰ *E.g.* the jurisdiction of the ICJ is not foreseen in the International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966. Art. 44 of the ICCPR stipulates, however, that its provisions “(...) shall not prevent the States Parties of the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.”

¹¹ For more on the inter-actions between the ICJ and the UN treaty bodies, see N. Rodley, *The International Court of Justice and Human Rights Treaty Bodies*, in: J.A. Green, C.P.M. Waters (eds.), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi*, Brill Nijhoff, Leiden, Boston: 2015, pp. 11-33, esp. p. 20 *et seq.*

to dispute settlement procedures as “going the extra mile” but rather as part and parcel of a *bona fide* commitment to fulfil the aims of the treaty.

In fact, some core UN human right treaties allow for submitting a dispute to the ICJ. Apart from Art. 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹² relevant compromissory clauses are enshrined in Art. 29 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, Art. 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Art. 92 of the International Convention for the Protection of the Rights of Migrant Workers and Members of their Families of 1990, as well as Art. 42 of the International Convention for the Protection of All Persons from Enforced Disappearances of 2006.¹³ Interestingly, clauses allowing for the jurisdiction of the ICJ were also provided in three significant treaties relating to the recognition of women’s rights in the era preceding the UN treaty bodies system: Art. IX of the Convention on the Political Rights of Women of 1953; Art. 10 of the Convention on the Nationality of Married Women of 1957; and Art. 8 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962.¹⁴ While the first of the above Conventions provides for the possibility to refer a dispute to the ICJ “at the request of any one of the parties to the dispute”, the other two require that a referral be submitted by a *compromis* (i.e. by “all parties to the dispute”).

Over the recent decade referrals to the Court were made in as many as three instances involving application of the International Convention on the Elimination of All Forms of Racial Discrimination. Although the first of them (*Georgia v. Russian Federation*)¹⁵ was not adjudicated upon on the merits, and the other two (*Ukraine v. Russian Federation* and *Qatar v. United Arab Republic*)¹⁶ are currently pending, all these cases resulted in ICJ orders for provisional measures. It could thus be argued that they have already contributed to a better understanding of the procedural aspects of inter-state disputes based on the compromissory clause enshrined in Art. 22 of ICERD.

The cases referred to above merit attention also due to the nature of the claims submitted by the applicant states, in particular those raising allegations of discrimination

¹² 660 UNTS 195, no. 9464.

¹³ See respectively: 2131 UNTS 96, no. 20378; 1465 UNTS 112, no. 24841; 2220 UNTS 3, no. 39481 and 2716 UNTS 3, no. 48088. The compromissory clauses enshrined in these treaties and the important differences between them are discussed by A. Zimmermann in *Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice*, 12 *The Law & Practice of International Courts and Tribunals* 5 (2013), pp. 9-22.

¹⁴ See respectively: 193 UNTS 135, no. 2613; 309 UNTS 65, no. 4468; 521 UNTS 231, no. 7525.

¹⁵ See ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order on provisional measures, 15 October 2008, Judgment, 1 April 2011.

¹⁶ See ICJ, *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)*, Order on provisional measures, 19 April 2017, and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order on provisional measures, 23 July 2018.

based on “national or ethnic origin”. Furthermore, the cases may stimulate the debate on the utility of the UN human rights dispute settlement procedures. It remains to be seen whether the recent increase of interest in litigation based on ICERD proves to be a positive phenomenon and could contribute to strengthening of the procedural protection of the rights enshrined in this treaty. However, the three cases examined in this article have some potential to fuel the discussion on the uses – and potential misuses – of IHRL as such.

1. ICERD AND ITS PROCEDURES

The Convention was adopted and opened for signature and ratification by the General Assembly resolution 2106(XX) of 21 December 1965. It entered into force on 4 January 1969, following the deposition of the twenty-seventh ratification instrument. Preceded by the UN Declaration on the Elimination of All Forms of Racial Discrimination,¹⁷ as well as some more narrowly targeted anti-discrimination conventions,¹⁸ the 1965 Convention was in fact the first of the UN core human rights treaties, notwithstanding the importance and the human rights “spirit” of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.¹⁹ Understandably, the drafting of ICERD was to a large extent influenced by the struggles connected with de-colonialization and the suppression of segregation; however its teleological basis remains more complex, as it was also drafted with the intention to challenge the rise of anti-Semitism²⁰ and other forms of racial discrimination.²¹

The Convention unequivocally condemns all manifestations of racial discrimination,²² which encompass:

¹⁷ Resolution 1904(XVIII) of the UN General Assembly, adopted on 20 November 1963.

¹⁸ Cf. the Convention concerning Discrimination in respect of Employment and Occupation (ILO Convention no. 111), adopted on 25 June 1958, and the Convention against Discrimination in Education, adopted by UNESCO on 14 December 1960.

¹⁹ 78 UNTS 277.

²⁰ T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 (2) American Journal of International Law 283 (1985), pp. 283-284.

²¹ R. Wolfrum, *The Committee on the Elimination of Racial Discrimination*, 3 Max Planck Yearbook of United Nations Law 489 (1999), p. 490. See also M. Banton, *Extending the rule of law*, in: D. Keane, A. Waughray (eds.), *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination. A living instrument*, Manchester University Press, Manchester: 2017, pp. 35-50. For the analysis of *travaux préparatoires* set in a broad historical perspective, with reference to the concepts of “race” and colonialism, see P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination. A Commentary*, Oxford University Press, Oxford: 2016, pp. 5 *et seq.*

²² Cf. Art. 2(1) of the Convention: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among races (...). The Preamble to the Convention stipulates *inter alia* that (...) any doctrine of superiority based on racial discrimination is scientifically false, morally condemnable, socially unjust and dangerous, and (...) there is no justification for racial discrimination, in theory or in practice, anywhere (...).”

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Art. 1(1) of ICERD).

Although the prohibition of discrimination in the enjoyment of human rights was already anchored in Art. 1(3) of the UN Charter and Art. 2 of the Universal Declaration of Human Rights, the definition enshrined in Art. 1 of ICERD constituted a novelty and contained an added value. By referring to “national and ethnic origin” apart from race, colour and descent as the differentiating grounds of racial discrimination, the Convention offered quite a broad spectrum of protection. It resulted in developing standards regarding ethnic minorities and indigenous populations.

Over the last fifty years the Convention has remained a principal UN instrument aimed at suppressing racial discrimination. The ICERD standards have been an obvious point of reference for the World Conference for Human Rights in Vienna (in 1993), as well as the World Conferences against Racism, and in particular the one held in Durban in 2001.²³ Irrespective of some political controversies related to these conferences, the fact remains that the international community has confirmed the solid position of ICERD as a fundamental source of states’ obligations in the domain of the fight against racism, racial discrimination, xenophobia and related intolerance. Furthermore, ICERD remains a key point of reference in the activities of special procedures of the UN Human Rights Council, developed to study and react to incidents of racism and the situation of groups particularly vulnerable in this respect. Two key special procedures were created for this purpose: the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,²⁴ as well as the Working Group of Experts on People of African Descent.²⁵ Two other “post-Durban” bodies were also established.²⁶

The ICERD set up a treaty body, i.e. the Committee on the Elimination of Racial Discrimination (CERD), and entrusted it with the competences to consider state reports (Art. 9 of ICERD) as well as exercise other functions provided for in the treaty. The latter include the two supervisory mechanisms, i.e. the inter-state complaint procedure (Arts. 11-13 of ICERD) and the individual complaint procedure (Art. 14 of ICERD). The competence to receive and consider communications from individuals or groups of individuals was the first of its kind at the time of adoption of ICERD, even though

²³ See the Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted on 8 September 2001 (A/CONF.189/12), para. 77

²⁴ See resolutions no. 1993/20 and 1994/64 of the Commission on Human Rights, subsequently renewed.

²⁵ See resolution no. 2002/68 of the Commission of Human Rights, also subsequently renewed.

²⁶ The Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action (under the aforementioned resolution no. 2002/68) and the Eminent Group of Experts on the Implementation of the Durban Declaration and the Programme of Action (*see* para. 191(b) of the Durban Programme of Action and the resolution no. 56/266 of the UN General Assembly).

it might have brought back some memories of the right of petition introduced within the League of Nations to strengthen – not very successfully – the regime of protection of national minorities. In any event, the competence of CERD to receive and consider individual communications was made optional, in order not to obstruct the states' ratification of ICERD. Writing at the end of the 20th century, T. van Boven observed that Art. 14 was “one of the most under-utilized provisions of ICERD.”²⁷ This holds true nowadays as well, and moreover Arts. 11-13 of ICERD – which refer to inter-state complaints – have had even less practical effect.

Among the 179 state-parties to ICERD, the competence of the Committee to consider individual communications has been recognized by 58, and the total number of such complaints between 1984 (date of the tenth declaration required under Art. 14 of ICERD) and 2018 amounted to 62 and concerned 15 states.²⁸ The reasons why only about one-third of the state-parties to ICERD have recognized the competence of the Committee under this provision – and why so few complaints have been received – are manifold.²⁹ The attitudes of states towards the obligations enshrined in ICERD have not changed much between the 20th century and today, i.e. an acceptance of ICERD has been perceived by states as both a legal and political commitment, but submitting to the individual complaint procedure has regrettably not been seen as a natural (i.e. stemming from the *bona fide* principle) consequence of these commitments. T. van Boven observed – and this also holds true in the present-day – that many states regarded ICERD more in terms of a foreign policy instrument than a human rights document.³⁰ Lack of information about the individual complaint procedure might also be a factor. Moreover, a constant argument of European states for not recognizing the competence of CERD under Art. 14 is that the individual application mechanism to the European Court of Human Rights (ECtHR) constitutes a stronger and sufficient procedural guarantee against racial discrimination.³¹ While the judicial mechanism of control provided for in the European Convention of Human Rights (ECHR) can indeed be seen as moderately effective, the right to lodge an individual application with the ECtHR should not always be perceived as a better alternative to an individual communication under ICERD. In essence, the material scopes of the ECHR and ICERD do not fully overlap, so it may happen that a complaint under ECHR would be inadmissible *ratione materiae*, but not so when lodged under Art. 14 of ICERD. Furthermore, although an

²⁷ T. van Boven, *The Petition System under the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 Max Planck Yearbook of United Nations Law 271 (2000), p. 272.

²⁸ Report of the Committee on the Elimination of Racial Discrimination of its 93th, 94th and 95th sessions, presented to the General Assembly in 2018 (A/73/18), paras. 42-44. The CERD delivered final decisions on the merits in 35 cases, and found violations of the Convention in 19 of them. Six complaints are pending consideration as of the time of this writing.

²⁹ See Thornberry, *supra* note 21, p. 69. The author refers to, *inter alia*, the “unpalatability of a finding of racial discrimination, especially but not limited to States that were prominent in the anti-colonial and anti-apartheid struggles, the embers of which still burn” (*ibidem*).

³⁰ van Boven, *supra* note 27, p. 285.

³¹ *Ibidem*.

autonomous prohibition of discrimination (i.e. not linked exclusively to ECHR-based rights but all rights protected by domestic law) has been introduced to the European system through Protocol no. 12 to the ECHR, the latter has been ratified so far only by 20 out of the 47 state-parties.³²

The inter-state complaint procedure provided for in Arts. 11-13 of ICERD had never been used in practice until 2018, even though it is not optional, hence mostly political rather than legal reasons probably explain this “lack of interest”. The reluctance of states to engage in this kind of disputes was foreseen quite early on,³³ and not much has changed in this regard. It is an effect of political reality, since in legal terms the inter-state procedure could be regarded as of a purely conciliatory nature, referring to the traditionally known form of “good offices” as a means of resolving state disputes. The procedure can be initiated by any state-party invoking Art. 11(1) of ICERD, which stipulates:

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

The next step in an inter-state procedure is provided in Art. 11(2):

If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

If the Committee is seized of jurisdiction pursuant to Art. 11(2) of ICERD, the Chairperson of CERD appoints an *ad hoc* Conciliation Commission, consisting of five persons. The latter may or may not be members of CERD, but if parties to the dispute cannot reach a unanimous consent as to the composition of the Commission, the members not agreed upon by the State Parties to the dispute should be elected, by secret ballot, by a two-thirds majority vote of CERD among its own members.

Art. 12 of ICERD provides for the procedural arrangements concerning the Conciliation Commission, whose tasks are exercised under Arts. 12-13 of this Convention and consist in offering good offices to the parties of the dispute, with a view toward reaching an amicable solution of the matter on the basis of respect for ICERD (Art. 12(1)). Having fully considered the matter, the Conciliation Commission reports its finding to the Chairperson of ICERD and includes such recommendations as it

³² As of 1 March 2019, see the Chart of signatures and ratifications of Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at www.coe.int.

³³ S. Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?* 10 Human Rights Quarterly 249 (1988), p. 265.

deems proper for the amicable resolution of the dispute (Art. 13(1)). The parties to the dispute are free to accept or decline the recommendations contained in the report of the Conciliation Commission.

The inter-state dispute settlement procedures provided for in ICERD, as well as several other core UN human rights treaties,³⁴ were never initiated until 2018. Two such complaints were brought by Qatar on 8 March 2018: one against Saudi Arabia and one against the United Arab Emirates. The third complaint was submitted on 23 April 2018 by Palestine against Israel. All these complaints were based on Art. 11 of ICERD and are pending in the Committee on the Elimination of Racial Discrimination.³⁵

2. THE COMPROMISSORY CLAUSE IN ART. 22 OF ICERD – “NEGOTIATION” AS A PRECONDITION AND THE CONCEPT OF A “GENUINE ATTEMPT”

States-parties to ICERD have the possibility to refer a dispute with another state-party to the ICJ under Art. 22 of this Treaty, 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.

One of the most pivotal questions which has arisen with respect to the above provision is whether the ICJ’s jurisdiction is dependent on prior recourse to (and the exhaustion of) the “negotiations or procedures” expressly provided for in ICERD, or whether the state-parties are at liberty to refer a case to the ICJ whenever such as a dispute is simply pending, as it has not been resolved by other means (such as negotiations or procedures under Arts. 11-13 of ICERD). Moreover, if one adopts the former position, i.e. conditioning the ICJ’s jurisdiction upon prior recourse to “negotiation or procedures” provided in ICERD, it is further not entirely clear whether it suffices that the dispute at stake was a matter of negotiations between the parties prior to subject to seisin of the ICJ, or whether the applicant state is not only obliged to engage in negotiations, but also to refer the dispute to CERD under Art. 11 of ICERD. It must be borne in mind that the “procedures provided in the Convention” include at least two phases: the “soft” one under Art. 11(1), which consists of an exchange of positions between the parties with CERD acting as an intermediary, and a “more intense” one which requires

³⁴ See fn 14.

³⁵ See CERD information note on inter-state communications, delivered on 30 August 2018 in Geneva, available at: <https://bit.ly/2WasX1v>. For a comment on the complaint brought by Palestine against Israel, see D. Keane, *ICERD and Palestine’s Inter-State Complaint*, 30 April 2018, available at: <https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/> (both accessed 30 May 2019).

the establishment of an *ad hoc* Conciliation Commission and full-fledged proceedings aimed at “amicable solution of the matter.”

The prerequisite conditions which must be met to allow for the ICJ’s jurisdiction were partly explained in the first case concerning the application of ICERD, i.e. *Georgia v. Russian Federation*. The applicant government claimed that the Russian Federation – acting both through its own organs, agents and other persons and entities exercising governmental authority, as well as through South Ossetian and Abkhaz separatist forces and other agents – “has practised, sponsored and supported racial discrimination through attacks against, and mass expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia,”³⁶ in violation of obligations under several articles of ICERD and that it did so “during three distinct phases of its interventions in South Ossetia and Abkhazia” in the period from 1990 to August 2008.

Upon the request of Georgia and on the basis of Art. 41 of the ICJ Statute, the Court issued provisional measures (by eight votes to seven) and reminded the parties to the dispute of their duty to comply with the obligations under ICERD.³⁷ In their joint dissenting opinion the judges of the minority expressed doubts whether the potential dispute met the conditions of Art. 22 of ICERD, i.e. whether there had been a prior attempt to settle it “by negotiation or by the procedures expressly provided for in this Convention.”³⁸ With respect to the requirement of negotiations, the majority noted that Art. 22 of ICERD does not necessarily mean that “formal negotiations” had to be put in place, and that it suffices if the issues concerning the interpretation and application of ICERD have been raised between the parties in bilateral contacts. However, according to the view of the minority judges such negotiations had never taken place prior to the submission of Georgia’s claims to the ICJ, which resulted in their inadmissibility and precluded the jurisdiction of the Court.

The seed of doubt sown by the minority judges turned out to be a decisive argument in the Court’s judgment of 1 April 2011. After elaborating on the contents and interpretation of Art. 22 of ICERD, the Court confirmed that the latter includes preconditions which must be satisfied before resorting to the Court. As regards the meaning of the term “negotiations”, or – to put it more precisely – the nature and standard of the required negotiations, the ICJ observed that:

³⁶ The order of the ICJ in *Georgia v. Russian Federation*, 15 October 2008, para. 3.

³⁷ See the comment by M. Dubuy, *Application de la convention internationale sur l’élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires: un formalisme excessif au service du classicisme?*, 57 *Annuaire français de droit international* 183 (2011).

³⁸ The minority judges also raised the issue that there had been no dispute between both the parties concerning the interpretation or application of ICERD, neither prior nor after the outbreak of hostilities between the two states. According to the minority judges, the armed activities of the Russian Federation after 8 August 2008 could not in and of themselves constitute acts of racial discrimination in the sense of Art. 1 of ICERD unless it was proven that they were aimed at establishing a “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” (para. 9 of the dissenting opinion).

... negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of “negotiations” differs from the concept of “dispute”, and requires – at the very least – *a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute*.³⁹

The Court also pointed out that an attempt to negotiate does not require reaching an actual agreement; however in the case at hand there had in fact not been any genuine attempt to negotiate the substance of the Georgian claims. According to the Court:

... to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question. (para. 161 of the judgment)

Even though it was a matter of subjective individual consideration whether negotiations had taken place, and whether they had failed or become futile or deadlocked, the Court was not persuaded that such negotiations had been conducted and proved unsuccessful as of the date of submission of the Georgian claims before the Court (12 August 2008).⁴⁰ Thus, by ten votes to six the Court found that it had no jurisdiction to entertain the Georgian application.

The judgment in the *Georgia v. Russian Federation* case set a standard for negotiations required prior to seisin of the Court, notwithstanding sound and convincing reasons provided in dissenting opinions of the minority judges that the ICJ should have applied a less formalistic interpretation of the reference to “negotiations” in Art. 22 of ICERD (i.e. not construing this term as a formal “precondition”), given the ambiguous wording of that provision as well as the prior jurisprudence of the Court.⁴¹ The minority judges also rightly noted that the Court applied a very formalistic approach to the question of negotiations, especially due to the expectation that the latter will not only be attempted, but also must have “failed or become futile or deadlocked”, whereas in some previous cases the ICJ preferred to address the issue of negotiations by its own assessment whether negotiations had a chance of success or not.⁴²

The judges referred to the assessment of “negotiations” by the ICJ in the cases of *South West Africa* and the *Aerial Incident at Lockerbie*, however it should be noted that the treaty clauses providing for the jurisdiction of the Court in those cases used the phrases “any dispute (...) if it cannot be settled through negotiation” (Art. 7(2) of

³⁹ Cf. para.157 of the judgment in the case of *Georgia v. Russian Federation* (preliminary objections) (emphasis added).

⁴⁰ *Ibidem*, para. 182.

⁴¹ See the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja, paras. 14-38; and the dissenting opinion of Judge Cançado Trindade, paras. 88-118.

⁴² See the joint dissenting opinion, paras. 48-63.

the Mandate) and “any dispute (...) which cannot be settled through negotiation” (Art. 14(1) of the Montreal Convention for the Suppression of Unlawful Acts against the Civil Aviation). Even though these clauses are not identical with the one used in Art. 22 of ICERD (“which is not settled by negotiation”), they all seem indeed to imply a realistic assessment by the ICJ of whether the chances of resolving a dispute by negotiation were at all realistic.

Irrespective of the above, the “negotiations-as-a-precondition” standard and the “genuine attempt” requirement has been applied in proceedings concerning provisional measures requested by applicant governments in further cases concerning the application of ICERD, e.g. *Ukraine v. Russian Federation*, and *Qatar v. UAE*. In both of these cases the respondent governments pleaded the lack of jurisdiction of the Court under Art. 22 of ICERD and repeated the arguments as to the non-fulfilment of the preconditions enshrined in that provision. The Court, however, considered that the standard of a “genuine attempt” had been met in both these instances.⁴³ In the *Qatar v. UAE* case the Court found that the required standard was fulfilled inasmuch as the parties to the dispute had exchanged their positions concerning the dispute on several occasions in international fora, including at the 37th session of the UN Human Rights Council in February 2018. Moreover, a letter dated 25 April 2018 referring to the alleged violations of CERD arising from the measures taken by the UAE was sent by the Minister of Foreign Affairs of Qatar, who indicated a two-week deadline for entering into negotiations on the matter. The letter remained unanswered, which led the Court to the conclusion that the dispute between the parties had not been resolved by negotiations at the time of submitting the claims by Qatar under Art. 22 of ICERD.⁴⁴

It should be observed that although the standard of a “genuine attempt” at negotiation set in the *Georgia v. Russian Federation* case might indeed have been formalistic and capable of hindering access to the Court, the application of this standard in the subsequent cases did not result in an overly rigorous attitude to the substance of the requirement. In both cases attempts to negotiate had been undertaken and evidently failed, having regard to the positions and lack of will to settle the dispute in an out-of-court manner by the respondent governments. In essence, the “genuine attempt” standard can be considered as surmountable, which nonetheless does not remove doubts as to the effects of its application in the *Georgia v. Russian Federation* case.

A question not yet resolved by the ICJ in any of the three cases involving the application of ICERD is whether both “preconditions” laid down in Art. 22 of the Convention – i.e. “negotiations” and “procedures expressly provided for in this Convention” – should be fulfilled cumulatively or alternatively prior to referring a dispute to the ICJ. Let us recall that Art. 22 of ICERD uses the conjunction “or” in a negative clause (“which is not settled by negotiations or by the procedures (...).”). While some judges of the

⁴³ See the Orders of the Court of 19 April 2017 (*Ukraine v. Russian Federation*), para. 59 and of the 28 July 2018 (*Qatar v. UAE*), para. 40.

⁴⁴ *Ibidem*, para. 38.

ICJ have considered that the preconditions referred to in Art. 22 of ICERD are of an alternative character, opposite views have also been expressed both by the ICJ judges as well as in the doctrine.⁴⁵ For those supporting the view that the preconditions foreseen Art. 22 of ICERD are indeed mandatory because of the subsidiary nature of the ICJ's jurisdiction vis-à-vis the jurisdiction of CERD under Arts. 11-13 of the treaty, it would be logical to support the view that both negotiations and recourse to Art. 11 of ICERD ought to be attempted prior to referring the case to the ICJ.

However, even if one supports the view that under Art. 22 of ICERD state-parties must not go to the ICJ unless they were involved in searching for an amicable solution to the dispute, it remains an open question whether Art. 22 requires exhaustion of both the negotiation path and the procedures under Arts. 11-13 of ICERD. While it cannot be denied that Art. 22 of ICERD does refer to prior involvement in attempts to find an amicable solution, nevertheless the judges of the minority in the *Georgia v. Russia* case very convincingly argued that

the point of this text (i.e. reference to “negotiation” or “procedures” established expressly provided in ICERD) cannot be to require a State to go through futile procedures solely for the purpose of delaying or impeding its access to the Court. (...) Consequently, where a State has already tried, without success, to negotiate directly with another State against which it has grievances, it would be senseless to require it to follow the special procedures in Part II [of ICERD], unless a formalism inconsistent with the spirit of the text is to prevail. It would be even less sense to require a State which has unsuccessfully pursued the intricate procedure under Part II to undertake direct negotiations destined to fail before seisin of the Court.⁴⁶

In the two pending cases (*Ukraine v. Russian Federation* and *Qatar v. UAE*), the Court will probably not avoid addressing the above-outlined question of the cumulative or alternative character of preconditions to be fulfilled by the applicant state-party of ICERD prior to addressing the ICJ under Art. 22. It can be hoped that a more realistic and teleological interpretation prevails, which would not require states to go through both negotiations *and* the procedures under Arts. 11-13 of ICERD if doing so would be manifestly futile and only unnecessarily protract (or obstruct) the access to the ICJ. The idea of considering the ICJ as a serious forum to ensure the *effet utile* of ICERD has its strong supporters also within the Bench.⁴⁷ It remains to be seen whether this approach succeeds, but the whole debate about interpretation of Art. 22 of ICERD should not be considered as a competition between CERD and the ICJ. In a perfect world, states

⁴⁵ See Zimmermann, *supra* note 13, p. 9.

⁴⁶ See the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja, para. 43. The judges believe that this interpretation of Art. 22 is supported by *the travaux préparatoires* to Art. 22 of ICERD, since the draft text of the treaty referred only to “negotiations” and the procedures were added on a much later stage and the general understanding was that the draft contemplated just one means of non-judicial settlement of inter-state disputes, i.e. negotiations.

⁴⁷ See the dissenting opinions of Judge Cançado-Trindade to the ICJ Judgment of 1 April 2011 in the *Georgia v. Russia* case, esp. paras. 64-78 and 88-118 and to the ICJ Order for provisional measures in the *Qatar v. U.A.E.* case, paras. 62-67.

should have the widest choice possible to select the forum and procedure they find most fit to address their grievances under ICERD and to ensure that the rights and freedoms protected under this treaty are not rendered illusory and theoretical only due a doctrinal debate about the meaning and importance of the conjunction “or” in Art. 22 of the treaty. The rule of reason should be given a leading role in interpreting this provision.

3. AN ADMISSIBILITY ISSUE: “NATIONAL ORIGIN” VS. “NATIONALITY”

In all three cases submitted so far to the ICJ under Art. 22 of ICERD it has been claimed that the respondent state had committed acts of discrimination based on the criterion of “national or ethnic origin”. In the two cases against the Russian Federation, the applicant states referred to actions undertaken in respect of Georgians (first case), and ethnic Ukrainians and Crimean Tatars (second case), whereas the case brought against the UAE raised the issue of treatment of Qatari nationals. The ICJ has thus far never dismissed a case due to the fact that it referred to the situation of nationals of an applicant state rather those of a different “national origin”. It should be noted however that for some judges of the ICJ, the lack of an explicit reference to “nationality” among the criteria of prohibited discrimination under Art. 1 of ICERD speaks against the admissibility of claims referring to the treatment of an applicant’s nationals only.⁴⁸

The absence of an explicit reference to “nationality” in the text of Art. 1(1) of ICERD should be viewed in the context of Art. 1(2) of ICERD, which provides that “the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Interestingly, the next paragraph of Art. 1 of ICERD refers to “nationality” twice, stipulating that: “[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate any particular nationality.” Some authors have argued that the above provision uses the term “nationality” in the “politico-legal” sense, whereas some have been ready to admit that the first reference to this term means “citizenship”, and the second – “national origin”.⁴⁹ It appears that the latter understanding is much more convincing given the essence of this norm is aimed at preventing discrimination against a particular national group based on states’ powers to shape the regime of citizenship. Notwithstanding the above, the exclusion of discrimination based on nationality from the remit of ICERD is not as clear as it may seem. Distinguishing between citizens and non-citizens should not be equated with permission for the latter’s

⁴⁸ See the Joint Declaration of Judges Tomka, Gaja and Gevorgian to the ICJ Order for provisional measures in the *Qatar v. UAE* case, paras. 3-4, and the Dissenting Opinion of Judge Crawford to the same Order, para. 1.

⁴⁹ See Thornberry, *supra* note 21, p. 145.

discrimination within the meaning of Art. 1 of ICERD. Legally speaking, nationality is indeed not identical to “being of national origin”. Nevertheless, and as reflected in the *travaux préparatoires* of this provision, states were far from speaking with one voice on what they perceived “national origin” to be.

Furthermore, the General Recommendation of CERD no. 30 of 2005⁵⁰ implies in its paragraph 4 that differences in treatment based on citizenship or immigration 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.⁵¹ The minority judges in the *Qatar v. UAE* Order on provisional measures were not persuaded by this view.⁵² However, it is hard to deny that that discriminating between one group of foreigners and another group of foreigners in fact constitutes an act of discrimination based on national origin (prohibited under Art.1(1) of ICERD), and as such should be distinguished from differentiating between citizens and non-citizens (excluded from the scope of ICERD under the second paragraph of Art. 1(2) of the treaty). Along these lines, when assessing the legal situation of Qatari nationals who were expelled or at least obliged to leave the territory of the UAE, it seems necessary to compare the measures adopted towards them vis-à-vis the situation of other foreign nationals.

The Court’s finding of *prima facie* jurisdiction in the *Ukraine v. Russian Federation* and the *Qatar v. UAE* cases – being one of the bases for ordering provisional measures under Art. 41 of the Statute of the ICJ – could be regarded as a sign that the Court might lean towards a broader and more systemic interpretation of “national origin” as a grounds of prohibited discrimination. It would be regrettable if the criterion of citizenship dictated whether or not a person can benefit from the guarantees enshrined in ICERD, notwithstanding the states’ powers to apply “distinctions, exclusions, restrictions or preferences” to citizens vis-à-vis non-citizens under Art. 1(2) of the Convention.

The above considerations give rise to a more general reflection: while it is fully understandable that states stand up in defence of their nationals’ rights and for this purpose initiate international procedures based on ICERD provisions, a vigilant observer of international relations would have little difficulty in seeing the cases brought to the ICJ under Art. 22 of ICERD as reflections of broader political and legal conflicts between the applicant and respondent states. The question could reasonably be asked whether the proceedings at the ICJ are not just “side-effects” of the inability to tackle “actual” problems underpinning the political inter-state relations between the states. However, even if this might sometimes be the case it should not dissuade us from recognizing that states are fully entitled to address international bodies in defence of

⁵⁰ See General Recommendation No. 30 on discrimination against non-citizens, adopted on the sixty-fifth session of CERD, available at www.ohchr.org.

⁵¹ *Ibidem*.

⁵² See the Joint Declaration of Judges Tomka, Gaja and Gevorgian to the ICJ Order for provisional measures in the *Qatar v. UAE* case, para. 5.

human rights *and* their own interests at one and the same time.⁵³ It could hardly be expected that when adjudicating under ICERD the ICJ goes *ultra petita partium* and addresses issues not related to the Convention itself. Nonetheless, the Court faces a real opportunity to apply the provisions of a human rights treaty (in this case ICERD) which may bring judicial protection and relief to at least some of those affected by inter-state conflicts. To put it briefly, in cases under ICERD human rights *are* at stake, apart from other, possibly political, considerations.

The orders for provisional measures in the two pending cases could be regarded as very moderate. In the *Ukraine v. Russian Federation* case the Court merely indicated that the respondent state must refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*;⁵⁴ ensure the availability of education in the Ukrainian language; and refrain (as must the applicant state) from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.⁵⁵ In the *Qatar v. UAE* case the Court repeated the phrase about “refraining” and indicated that the UAE must ensure the reunification of separated Qatari families;⁵⁶ provide Qatari students with the opportunity to complete their education in the UAE or obtain their educational records; and allow access to tribunals and other judicial organs of the UAE to Qataris affected by the measures adopted by the UAE.⁵⁷ The contents of the orders for provisional measures were considerably less than what was requested, however, Art. 41 of the Statute of the ICJ gives the Court quite a wide latitude in establishing whether the circumstances really require such measures and whether it is “appropriate” to do so. Let us keep in mind that the issuance of provisional measures does not prejudice the outcome of the case at the Court, but at the same time does manifest that the ICJ found it had *prima facie* jurisdiction; that the rights claimed by the applicant were plausible; and further that there was a risk of irreparable prejudice and urgency.

⁵³ See A. Peters, “Vulnerability” versus “Plausibility”: Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, *Ukraine v. Russian Federation* Order of 19 April 2017, available at: <https://bit.ly/2JQUlLf> (accessed 30 May 2019).

⁵⁴ The highest executive-representative Crimean Tatar body, delegatized by the Russian Federation in 2016.

⁵⁵ See the operative part of the ICJ Order of 19 April 2017. See also the commentary by: T. Thienel, *Provisional Measures in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 1 Goettingen Journal of International Law 143 (2009).

⁵⁶ Judge Crawford noted in his dissenting opinion that at the time of adopting the Order by the Court many cases concerning family reunification might have already been resolved, although Qatar denied this (see the dissenting opinion of Judge Crawford to the Order of 19 April 2017, paras. 5-6). For more on this issue in a broader international legal context, see: W. Burek, *Family Reunification Regulations and Women: The Perspective of International Law*, 36 Polish Yearbook of International Law 83 (2016).

⁵⁷ See the operative part of the ICJ Order of 23 July 2018.

4. ARE THE ICERD DISPUTE SETTLEMENT PROCEDURES “UNDERUSED”?

Taking into consideration that the compromissory clause in Art. 22 of the Convention has been invoked only three times in the sixty years since the ICERD's entry into force, and that the competence of CERD to engage in the conciliation of inter-state disputes has never been availed of until 2018, it would be difficult to argue that states have shown much willingness to use the settlement dispute procedures they themselves created in 1965. Whereas the cases brought to the attention of the ICJ and CERD in recent years should probably not be considered as a breakthrough in reversing this trend, they could however stimulate discussion on the “under-usage” of the dispute settlement procedures provided for in the Convention.

As regards inter-state disputes, much effort has been put by the respondent states in the cases brought to the ICJ into arguing that “negotiations or the procedures provided in ICERD” must be exhausted prior to submitting a case under Art. 22 of the treaty. It is still not clear if states have to go through both negotiations *and* the procedures set out in Arts. 11-13 of ICERD to successfully bring a claim to the ICJ. Essentially, states should be allowed to make an educated choice as to which forum and legal remedy has the best chance to resolve the dispute and provide relief, for the benefit of those protected under ICERD. An obligation to go through a futile and time-consuming conciliatory procedure with a doomed-to-fail result does not best serve the idea of effective international justice. On the other hand, one could imagine that an inter-state dispute over the interpretation or application of ICERD might well be examined and resolved through CERD's good offices and conciliation procedures in accordance with the Convention provisions, without recourse to Art. 22 of ICERD.

The general answer to the question posed in the title of this section is thus in the affirmative. ICERD inter-state dispute settlement procedures – both the “internal” ones as well as the one allowing for seisin of the ICJ – are underused. The same could be observed about the individual complaint procedure under Art. 14 of ICERD, which – unlike the inter-state applications – usually refer to a situation occurring in the state-party of the claimant's origin or residence. It is unrealistic to expect a dramatic increase in the number of disputes involving ICERD “internal” procedures nor a significant increase in the number of cases brought to the ICJ under Art. 22 of ICERD. Nevertheless, the debate about resolving disputes involving ICERD provisions is about the effectiveness of procedural protection against racial discrimination. In a broader sense, it is about the utility and effectiveness of a human rights treaty's obligations as such. In this context, much remains to be done to ensure that the dispute settlement procedures provided for in ICERD are truly effective and that states show more openness to the jurisdiction of the ICJ under its Art. 22.