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Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?

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ABSTRACT

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) contains the inter-State communication procedure within which the Committee on the Elimination of Racial Discrimination (CERD) received the following three communications in 2018: *Qatar v Saudi Arabia*, *Qatar v the United Arab Emirates*, and *Palestine v Israel*. In these cases, CERD characterized this procedure as relating to collective enforcement, analogous to the inter-State application procedure within the order/regime of the European Court of Human Rights (ECtHR). However, unlike the European Convention on Human Rights (ECHR), ICERD does not refer to 'collective enforcement', but merely contains ad hoc conciliation, that is a bilateral means for reaching a mutually agreed solution to a dispute. This article aims, rather critically, to assess whether, and to which extent, it is justified to view the CERD ad hoc conciliation procedure as a means of collective enforcement.

1. INTRODUCTION

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[1] contains the inter-State communication procedure by which any state party is entitled to lodge a communication to the Committee on the Elimination of Racial Discrimination (CERD) to allege the non-compliance with ICERD provisions on the part of another state party.[2] Although this procedure had never been activated, CERD recently received three communications: namely, *Qatar v Saudi Arabia*,[3] *Qatar v the United Arab Emirates (UAE)*,[4] and *Palestine v*

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1 International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195.

2 Relevant information on inter-State communication under ICERD is available at <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx> last accessed 9 July 2021.

3 Inter-State communication submitted by Qatar against the Kingdom of Saudi Arabia (8 March 2018), ICERD-ISC-2018/1.

4 Inter-State communication submitted by Qatar against the United Arab Emirates (8 March 2018), ICERD-ISC-2018/2.

Israel,[5] for the first time within the context of the UN-related human rights treaty bodies/institutions.

In general, the inter-State mechanisms established under various human rights treaties perform two functions.[6] Namely, to protect the *subjective/individual* interests of states parties concerning the protection of their nationals, including the interests and rights of states in relation to diplomatic protection. This being considered a 'private' dispute settlement function, given that it pertains to the subjective/individual rights and interests of a state, it is exemplified by the requirement that domestic remedies be exhausted before having recourse to the inter-State procedure.[7] The other function being to protect the *collective* interests of states parties in the protection of human rights, irrespective of the nationality of those affected. A variety of expressions have been used to describe the latter, including *actio popularis*,[8] public interest litigation,[9] and the compliance control mechanism.[10]

Although, in principle, the above two functions complement one another,[11] for the most part, the emphasis has been placed on the *latter* function. In fact, the inter-State application procedure of the European Court of Human Rights (ECtHR), established by Article 33[12] of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR),[13] has been thought as concerning the *latter* function as a 'collective enforcement' mechanism,[14] rather than the former

5 Inter-State communication submitted by the State of Palestine against Israel (23 April 2018), ICERD-ISC-2018/3.

6 Two functions correspond to those which are *private* and *public*, respectively. cf I Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Martinus Nijhoff 2018) at 5.

7 eg ICERD art 11(3): 'The Committee shall deal with a matter . . . after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law'.

8 S Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10(2) Human Rights Quarterly 249, at 256–57; G Ulfstein, 'Human Rights, State Complaints' (2011) *Max Planck Encyclopedia of Public International Law*, para 10, <https://

9 G Ulfstein and I Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' EJIL Talk! (24 January 2020), <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> last accessed 9 July 2021.

10 I Risini, 'The Inter-State Application under the European Convention on Human Rights: More Than Diplomatic Protection' in N Weiß and J-M Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) 69, at 70.

11 Risini (n 6), at 66.

12 ECHR art 33: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.

13 The Convention entered into force on 3 September 1953, 213 UNTS 222. There have been 29 cases of inter-State applications, the list of which is available at <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> last accessed 9 July 2021.

14 S Prebensen, 'Inter-State Complaints under Treaty Provisions – The Experience under the European Convention on Human Rights' in G Alfredsson and others (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (2nd Revised edn, Martinus Nijhoff 2009) 441, at 445.

function.[15] In *Austria v Italy*, the European Commission of Human Rights stated that:

> [t]he High Contracting Parties have empowered any one of their number to bring before the Commission any alleged breach of the Convention, regardless of whether the victims of the alleged breach are *nationals* of the applicant State or whether the alleged breach otherwise particularly affects the interests of the applicant State; . . . a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24 [present Article 33], is not to be regarded as exercising a right of action for the purpose of enforcing *its own rights*, but rather as bringing before the Commission an alleged violation of *the public order of Europe* (emphasis added).[16]

By analogy to ECtHR jurisprudence, CERD characterized its own inter-State mechanism as one of 'collective enforcement' in the sense that any state party to the ICERD is entitled to activate that procedure against another state party even without a bilateral treaty relation with the latter state. However, even if several similarities exist between the respective mechanisms of the two legal orders, they differ in significant aspects. *First*, while the preamble of ECHR expressly refers to 'collective enforcement',[17] ICERD does not. *Second*, unlike the ECtHR *qua* a permanent *court*, the main aspect of the CERD inter-State mechanism pertains to ad hoc *conciliation*, namely, a typically *bilateral* means for reaching an *agreed* solution to a dispute by way of balancing the *particular nexus* of interests between the two states parties involved. In sum, it is not clear why and how ad hoc conciliation can amount to 'collective enforcement'.

To explore whether and, if so, how ad hoc conciliation might amount to collective enforcement, this article clarifies the fundamental rights–obligations correlation under ICERD (in Section 2) and the bilateral and reciprocal nature of the CERD inter-State communication procedure (in Section 3). Then, it analyses, rather critically, how the ad hoc conciliation procedure may have amounted to a collective enforcement mechanism in actual cases: namely, *Qatar v Saudi Arabia* and *Qatar v UAE* (in Section 4), and *Palestine v Israel* (in Section 5).

2. THE RIGHTS–OBGLIGATIONS CORRELATION UNDER ICERD

Indisputably, the key notion founding the scope for *collective enforcement* within human rights treaties is the notion of an obligation *erga omnes partes*. In its recent

15 According to Risini, '[t]he inter-State application [under ECHR] was intended as mechanism of compliance control of the obligations undertaken under the ECHR. It was not conceived as a dispute settlement mechanism'. Risini (n 10), at 70.

16 Decision of the Commission as to the Admissibility of Application No 788/60, lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy, 11 January 1961, at 19–20.

17 ECHR Preamble: 'Being resolved . . . to take the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration' (emphasis added). This expression has been adopted also in subsequent Protocols.

cases, the International Court of Justice (ICJ) has gradually clarified the rights–obligation correlation arising from obligations *erga omnes partes* under ICERD.

A. The Barcelona Tractions Formulation of Obligations *Erga Omnes*

In the *Barcelona Tractions* case, the ICJ referred to the notion of obligation *erga omnes* for the first time in its history. It acknowledged it as 'the obligations of a State towards the international community as a whole' and made clear that, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.[18] In the next paragraph of the Judgment, the ICJ referred to the prohibition of racial discrimination as an example of an obligation *erga omnes*.[19] There is no doubt that the ICJ considered ICERD, already signed in 1966, as an example of treaties embracing obligations *erga omnes partes*. Even though the ICJ did not mention any particular *right/s* of States corresponding to *obligations erga omnes*, this has been gradually clarified in subsequent cases.

B. The ICERD Formulation of Correlation

Until now, three cases concerning the interpretation or application of ICERD have been submitted to the ICJ pursuant to Article 22 of ICERD.[20] In *Georgia v Russia*, the ICJ clarified the rights–obligations correlation under ICERD as follows:

> States parties to [I]CERD [Georgia] have the *right* to demand compliance by a State party [Russia] with specific obligations incumbent upon it under Articles 2 and 5 of the Convention . . .. There is a *correlation* between respect for individual rights, the obligations of States parties [Russia] under [I]CERD and the *right* of States parties [Georgia] to seek compliance therewith . . . (emphasis added).[21]

The second sentence from the above passage may be seen as the *ICERD formulation* by which the ICJ confirms the *right* of States Parties to ICERD, including

18 *The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)*, Second Phase, Judgment, 5 February 1970, [1970] ICJ Rep 3, at 32, para 33.

19 ibid, at 32, para 34. The ICJ stated that: '[s]uch obligations [*erga omnes*] derive, for example, in contemporary international law, from . . . the principles and rules concerning the basic rights of the human person, including protection from slavery and *racial discrimination*. Some of the corresponding rights of protection have entered into the body of general international law . . .; others are conferred by international instruments of a universal or quasi-universal character' (emphasis added).

20 ICERD art 22: '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'.

21 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures, Order, 15 October 2008, [2008] ICJ Rep 353, at 391–92, para 126.

Georgia. This formulation—subsequently, also adopted in *Ukraine v Russia*[22] and *Qatar v UAE*[23]—seems to be established ICJ jurisprudence. It is, however, subject to two interpretations in light of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[24] *First*, it can be interpreted as referring to the right of a state whose *nationals* are victims of racial discrimination. According to this interpretation, this State is identified as an *injured* State or a *directly affected* State in the meaning of ARSIWA Article 42(b)(i).[25] *Secondly*, this formulation can be interpreted also as referring to the right of any State Party to ICERD, including that of a *non-injured* state or a 'State other than an injured State' in the sense of ARSIWA Article 48(1)(a).[26] Literally interpreted, both interpretations comply with the ICERD formulation. Considering, however, the relevant context, namely, that all three Applicants (Georgia,[27] Ukraine[28] and Qatar[29]) claimed to have suffered material damage to their *own nationals*, the former interpretation seems more persuasive.

C. The Genocide Formulation of Correlation

In a subsequent case, on the other hand, the ICJ adopted the *latter* interpretation of the ICERD formulation. In the *Rohingya Genocide* case,[30] the ICJ, by analogy to the ICERD formulation, elucidated the rights–obligations correlation under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention):[31]

> there is a *correlation* between the rights of members of groups [the Rohingya] protected under the Genocide Convention, the *obligations* incumbent on

22 *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, 19 April 2017, [2017] ICJ Rep 104, at 135, para 81.

23 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Provisional Measures, Order, 23 July 2018, [2018] ICJ Rep 406, at 426, para 51.

24 International Law Commission, Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission 2001*, vol II (Part Two), at 26–143. The UN General Assembly *took note* of the articles in A/RES/56/83 (12 December 2001).

25 ARSIWA art 42(b)(i): 'A State is entitled as *an injured State* to invoke the responsibility of another State if the obligation breached is owed to a group of States including that State, or the international community as a whole, and the breach of the obligation specially affects that State' (emphasis added).

26 ARSIWA art 48(1)(a): '*[a]ny State other than an injured State* is entitled to invoke the responsibility of another State ... if ... the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group' (emphasis added).

27 Georgia attempted to protect the rights of 'the remaining ethnic *Georgian populations* of South Ossetia and Abkhazia' (emphasis added). Order, 15 October 2008, (n 21), at 390, para 122.

28 Ukraine attempted to protect the rights of 'the Crimean Tatar and ethnic *Ukrainian population*' (emphasis added). Order, 19 April 2017, (n 22), at 136, para 91.

29 The ICJ noted that 'the measures adopted by the UAE on 5 June 2017 appear to have targeted *only Qataris* and not other non-citizens residing in the UAE' (emphasis added). Order, 23 July 2018, (n 23), at 427, para 54.

30 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Provisional Measures, Order, 23 January 2020, <https://www.icj-cij.org/en/case/178> last accessed 9 July 2021.

31 Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

> States parties [Myanmar] thereto, and the *right* of *any State party* [The Gambia] to seek compliance therewith by another State party [Myanmar] (emphasis added).[32]

Although the *Genocide formulation* contained in the above passage seems the same as the ICERD formulation,[33] it actually contains an innovative perception of the correlation in relation to obligations *erga omnes partes*. *First*, given that in this case, The Gambia is a non-injured state (or a State other than an injured state) in the sense of Article 48(1)(a) of ARSIWA,[34] the Genocide formulation signifies that any State Party to the Genocide Convention, whether injured or not, holds its own *right* correlative to an obligation *erga omnes partes*.[35] *Secondly*, since the Genocide formulation precisely follows the ICERD formulation, the outcome from applying the former must necessarily also be reached when applying the latter: namely, under ICERD, any contracting Party, whether injured or not, holds its own *right* to seek compliance with obligations *erga omnes partes* under ICERD by any other State Party.

To conclude provisionally, this new formulation of the rights–obligations correlation under ICERD necessitates a reconceptualization of the legal aspects of the inter-State communication procedure. On the one hand, there is no need to rely on the theory of diplomatic protection, since, based on the new formulation, the recourse by a State Party to the inter-State communication procedure for protecting the rights of its nationals may be construed as attempting the *collective* protection of human rights, irrespective of the nationality of those affected. On the other hand, even if inter-State procedure should be identified as means of *collective* enforcement, this can be construed as purporting to protect the *individual right* of each state party to seek the compliance of any other state party with obligations *erga omnes partes*. Insofar as the recourse to the *collective* enforcement mechanism can be understood as an exercise of each state's *individual* right, the *individual v collective* dichotomy is not meaningful in the characterization of inter-State communication procedure. However, this must be ascertained by the analysis of the procedure itself of the inter-State mechanism under ICERD.

32 Order, 23 January 2020 (n 30), para 52.

33 When referring to the correlation under the Genocide Convention, the ICJ quoted three cases relating to ICERD. ibid. As a minor change, the expression of 'respect for individual rights' (in the ICERD formulation) was replaced by 'the rights of members of groups' (in the Genocide formulation).

34 This is admitted by the ICJ: 'any State party to the Genocide Convention, and *not only a specially affected State*, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end' (emphasis added). Order, 23 January 2020 (n 30), para 41.

35 The recognition of *rights*, corresponding to obligations *erga omnes partes*, goes beyond both the Court's jurisprudence and the position of the ILC with regard to ARSIWA art 48. This topic, beyond also the scope of the present article, will be analysed in a different occasion.

3. IMPLEMENTATION MECHANISM OF ICERD

A. A Set of Procedures under ICERD

ICERD and the Rules of Procedure (RoP) of CERD[36] establish a set of implementation mechanisms. *First*, within the reporting mechanism (ICERD Article 9; RoP XV, Rules 63–68), states parties submit to the United Nations (UN) Secretary-General, for consideration by CERD, a report on the legislative, judicial, or other measures which they have adopted and which give effect to the provisions of ICERD (Article 9(1)). CERD may make suggestions and general recommendations based on the examination of the reports and information received from states parties (Article 9(2)). *Second* and *third*, ICERD contains the inter-State communication procedure (ICERD Article 11; RoP XVI, Rules 69–71) and the conciliation procedure (ICERD Articles 12–13; RoP XVII, Rules 72–79), details of which are listed below. *Fourth*, ICERD provides the procedure of communications from individuals and groups of individuals (ICERD Article 14; RoP XVIII, Rules 80–97),[37] based on the optional declaration of states parties to accept the competence of CERD to that effect. *Fifth*, ICERD provides the basis of the contentious jurisdiction of the ICJ (ICERD Article 22). Except the fifth, all of the other procedures are managed and controlled by CERD. Considering the multiple functions accorded to CERD, its precise nature remains uncertain, ie whether it is a judicial or quasi-judicial organ.[38]

B. Inter-State communication procedure (Article 11)

On the inter-State communication procedure, Article 11 of ICERD provides that:

1. 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 . . .
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.
3. The Committee shall *deal with* a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged (emphasis added).

This procedure comprises two rounds: *first*, a state party submits to CERD a communication on a matter, which is expected to be adjusted by bilateral negotiations or

36 As the implementation body under ICERD (art 8), CERD is entitled to adopt the Rules of procedure (ICERD art 10(1)). CERD/C/35/Rev.3 (1986), <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F35%2FRev.3&Lang=en> last accessed 9 July 2021.

37 ICERD art 14(1): 'A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention'.

38 W Vandenhole, *The Procedures before the UN Human Rights Treaty Bodies: Divergence or Convergence?* (Intersentia 2004) at 18.

any other procedure. If unsuccessful, *second*, the same state has the right to refer the matter again to CERD which is then empowered to *deal with* the matter. While, on the face of it, this appears to possess the hallmarks of a dispute settlement procedure,[39] it is more accurate to view it as an initial, small step in the direction of dispute resolution. *First*, Article 11(1) refers only to *matter* to be *adjusted*, and CERD is empowered merely to *deal with* it. *Secondly*, CERD Rule 69 clearly provides that CERD 'shall not consider its substance' and that 'any action . . . by the Committee in respect of the communication shall in no way be construed as an expression of its views on the substance of the communication'. It is clear that CERD is detached from the *substance* of a matter and, thus, its function appears to be strictly limited to facilitating the exchange of communications between the relevant states under Article 11 of ICERD.[40] *Thirdly*, any state party is entitled, under Article 11(1), to submit a communication against any other states parties. Thus, as is correctly characterized by CERD itself, the inter-State procedure under Articles 11-13 is 'an automatic inter-State complaint mechanism'.[41]

C. Conciliation under the Auspices of CERD (Articles 12–13)

Article 12(1)(a) of ICERD empowers CERD to establish an ad hoc conciliation commission,[42] whose outcome is provided by Article 13 as follows:

1. . . . the Commission . . . shall prepare and submit to the Chairman of the Committee [CERD] a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the *amicable solution* of the dispute.
2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the *dispute*. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.
3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention (emphasis added).

This conciliation has the following characteristics. *First*, this is a *dispute settlement* procedure different to the inter-State communication procedure under Article 11. *Secondly*, this procedure is carried out under the auspices of CERD. However, its

39 eg the three cases submitted, namely, 'State of Qatar vs. Kingdom of Saudi Arabia', 'State of Qatar vs. United Arab Emirates', and 'State of Palestine vs. State of Israel', are listed identically to inter-State litigation and arbitration cases.

40 It is observed that, under ICERD art 11, CERD has 'no other function than to connect the disputing parties with each other'. See Cimiotta, 'Parallel Proceedings before the International Court of Justice and the Committee on the Elimination of Racial Discrimination' (2020) 19 The Law and Practice of International Courts and Tribunals 388, at 400.

41 CERD/C/100/5 (12 December 2019), para 3.38. An *automatic* inter-State complaint mechanism is contrasted with a facultative complaint mechanism set up in other human rights treaties.

42 ICERD art 12(1)(a): ' . . . the Chairman [of CERD] *shall appoint* an ad hoc Conciliation Commission . . . comprising five persons . . . ' (emphasis added).

involvement is still indirect, since it offers merely 'good offices' to the disputing parties.[43] *Thirdly*, this pertains to *compulsory* conciliation, since CERD establishes a conciliation commission without further consent of the states parties concerned. *Fourth*, the conciliation report is *not* binding, as it remains open to the Parties whether to accept it.[44] In total, the CERD conciliation is a *compulsory* albeit *non-binding conciliation*, identical, in this sense, to conciliation under Annex V to the United Nations Convention on the Law of the Sea (UNCLOS),[45] as resorted to in the *Timor Sea* case.[46]

D. Integration of the Two Procedures (Articles 11–13)

Formally, the inter-State communication (Article 11) and the conciliation (Articles 12–13) procedures are distinct under the CERD RoP, since its Part II—devoted to the rules relating to the function of the Committee—is divided into two sections: namely, Section XVI (inter-State communications under Article 11) and Section XVII (ad hoc conciliation commission under Articles 12 and 13). Thus, strictly speaking, the procedures under Articles 11–13 of ICERD should be characterized respectively as 'a process of investigation and [of] conciliation'.[47] On the other hand, the two procedures are closely connected and substantially integrated. *First*, both the inter-State mechanism under Article 11 and conciliation under Articles 12–13 are designed to be carried out under the auspices of CERD. *Secondly*, a 'dispute' to be settled through conciliation is supposed to arise from a 'matter' referred during inter-State communications.[48] *Thirdly*, according to CERD, the conciliation procedure constitutes 'the next steps of the mentioned interstate communications'.[49] In fact,

43 ICERD art 12(1)(a): 'good offices [of CERD] shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention'.

44 CERD RoP 78(2): 'The States parties to the dispute, shall ... inform the Chairman of the Committee [CERD] *whether or not they accept the recommendations* contained in the report of the [Conciliation] Commission' (emphasis added).

45 United Nations Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

46 *In the Matter of the Marine Boundary between Timor-Leste and Australia (Timor Sea conciliation)*, PCA, Case no 2016-10, before a Conciliation Commission constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, the Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, <https://pcacases.com/web/view/132> last accessed 9 July 2021. See also, D Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement' (2020) 31(1) European Journal of International Law 321, at 323.

47 G McDougall, 'Inter-State Communication Submitted by the State of Palestine against State of Israel (U.N. Comm'n on the Elimination of Racial Discrimination)' (2020) 59(6) International Legal Materials 922, at 922.

48 David Keane, 'ICERD and Palestine's Inter-State Complaint' EJIL Talk! (30 April 2018), <https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/> last accessed 9 July 2021. On this point, CERD RoP 72 provides that: '[a]fter the Committee [CERD] has obtained and collated all the information it thinks necessary as regards a dispute *that has arisen under article 11, paragraph 2, of the Convention*, the Chairman shall notify the States parties to the dispute .... ' (emphasis added). A *matter*, originally referred to in a communication (ICERD art 11), may transmute into a *dispute* to be settled through the conciliation procedure (ICERD art 12).

49 CERD, Information Note on Inter-state communications (29 August 2019); CERD, Information Note on Inter-state communications (13 December 2019), <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx> last accessed 9 July 2021.

while inter-State communication constitutes the *preliminary* phase devoted to the jurisdiction and admissibility issue, conciliation is regarded as the *merits* phase. *Fourthly*, CERD takes the two procedures as integrated, when it refers *en masse* to the procedures under Articles 11–13 of ICERD.[50] To conclude, the procedures under Articles 11–13 of ICERD, as a whole, ought to be regarded as an 'inter-State dispute procedure'[51] and 'a complex system for addressing disputes'.[52]

E. Nature of the CERD Inter-State Procedure

Indisputably, the CERD inter-State mechanism, as a whole, concerns 'relatively gentle methods' of dispute settlement.[53] In recent cases, the ICJ was required to characterize it more precisely, in the context of the interpretation of ICERD Article 22. As a ground for founding ICJ jurisdiction, Article 22 provides that any dispute 'which is *not settled* by negotiation *or* by the procedures expressly provided for in this Convention shall be referred to the ICJ' (emphasis added). The question was whether the requirement that the two ICERD procedures—namely, negotiation and the CERD inter-State procedure—be exhausted is cumulative. The Joint Dissenting Opinion in *Georgia v Russia* regarded the two procedural preconditions as alternative.[54] Subsequently, in *Ukraine v Russia*, the ICJ took the same approach on the ground that the two procedures have the same objective of reaching an *agreed settlement* of dispute, namely, that:

> The references to the 'amicable solution' of the dispute and to the States' communication of acceptance of the Conciliation Commission's recommendations indicate ... that the objective of the CERD Committee procedure [under Articles 11-13 of ICERD] is for the States concerned t*o reach an agreed settlement of their dispute*. ... '[N]egotiation' and the 'procedures expressly provided for in [the] Convention [ICERD]' are two means to achieve *the same objective*, namely to settle a dispute *by agreement* (emphasis added).[55]

Here, the ICJ admits the coincidence of objectives in the two procedures. However, it ignored several key elements of the latter procedure. Unlike negotiation, the CERD inter-State procedure presupposes the intervention of CERD, both at the

50 CERD/C/100/5 (12 December 2019), paras 3.39–3.41. In *Qatar v UAE*, the UAE expressed a similar view that ICERD arts 11–13, in total, provide a process of conciliation. CERD/C/99/3 (27 August 2019), para 41.

51 P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016), at 55.

52 P. Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5(2) Human Rights Law Review 239, at 246.

53 Leckie (n 8), at 265.

54 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, 1 April 2011, [2011] ICJ Rep 70, at 145, para 12, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja.

55 *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, 8 November 2019, [2019] ICJ Rep 558, at 599–600, paras 109–110.

communication phase (Article 11)[56] and the conciliation phase (Articles 12–13).[57] Furthermore, unlike negotiations under Article 22, applicable to 'two or more States Parties', the CERD inter-State communication under Article 11 is open only to two parties, since Article 11 refers to 'a State Party' and 'another State Party' (Article 11(1)), suggesting the participation of only two states in that procedure.[58] Considering the sequence of the two procedures, the two parties in the communication phase will subsequently become the parties in the conciliation phase. Setting aside the above nuance, the ICJ correctly elucidated the nature of the CERD inter-State procedure, by identifying its objective as leading the parties towards reaching an 'amicable solution'.[59] By analogy to UNCLOS conciliation, the 'amicable solution' under ICERD is to be understood as an *agreed* settlement of dispute,[60] as was correctly pointed out by the ICJ.

In sum, the CERD inter-State procedure under Articles 11–13 of ICERD is essentially a *bilateral* means of dispute settlement, with the objective of parties reaching an *agreed* solution to their dispute.[61] Therefore, the focus is placed on bilateral dispute settlement, rather than on the protection of the 'public order' of ICERD.[62] This gives rise to the question as to whether and, if so, how the CERD inter-State mechanism can amount to a means of 'collective enforcement'.[63] This question may be addressed by having regard to the CERD's reasoning, as expressed in actual cases.

4. *QATAR V SAUDI ARABIA* AND *QATAR V UAE*

A. Process of the Qatari Communications

Qatar submitted two communications to CERD against Saudi Arabia and the UAE (8 March 2018),[64] transmitted to them (7 May 2018). The two responding states replied by Note Verbales to the Qatari communication (7 September 2018). In its

56 In general, human rights treaties allow states parties to lodge their complaints first to other parties. In contrast, ICERD, exceptionally, directs states to forward their communications directly to CERD. See Ulfstein, (n 8), para 17.

57 D Keane, 'The Same Thing? Negotiation and Articles 11-13 of the CERD Convention in Ukraine v Russian Federation', EJIL Talk! (28 November 2019), <https://www.ejiltalk.org/the-same-thing-negotiation-and-articles-11-13-of-the-cerd-convention-in-ukraine-v-russian-federation/> last accessed 9 July 2021.

58 ibid.

59 ICERD refers to 'amicable solution of the matter' (ICERD art 12(1)(a)) and 'amicable solution of the dispute' (ICERD art 13(1)).

60 Under UNCLOS, 'amicable settlement' means dispute settlement by agreement between the disputing parties. A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Hart Publishing 2017), at 2320 (art 5 of Annex V by Shotaro Hamamoto). art 5 of Annex V to UNCLOS (entitled 'Amicable settlement') provides that: 'The [conciliation] commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute'.

61 Cimiotta states that 'the settlement of the dispute [under Articles 11-13] depends on a *mutual understanding* between the contesting States' (emphasis added). See Cimiotta (n 40), at 401.

62 It is correctly observed that in the CERD inter-State procedure 'the focus is on a friendly solution, not on expressing any opinion on violations [of ICERD]'. See Ulfstein (n 8), para 22.

63 It is noteworthy that, during the drafting of ICERD, the representative of Tanzania noted 'how complaints regarding human rights could be settled by conciliation'. See Thornberry (n 51), at 64–65 (footnote 287).

64 As the CERD's decision in *Qatar v UAE* covers all the issues discussed in *Qatar v Saudi Arabia*, the present article mainly analyses the former.

Decision (14 December 2018), CERD, being aware that the matter had not been adjusted to the satisfaction of all parties, decided to request the two responding states, *inter alia*, to inform CERD whether they had supplied information on issues of jurisdiction and admissibility.[65] In its Decisions (27 August 2019) relating to the UAE[66] and Saudi Arabia,[67] respectively, CERD affirmed its jurisdiction, and declared the communications admissible. Pursuant to Article 12(1)(a) of ICERD, the CERD's Chairperson is currently in the process of appointing the members of an ad hoc Conciliation Commission.

B. Jurisdiction of CERD

In its first communication, Qatar alleged a number of breaches of ICERD provisions by the UAE. In response, the UAE raised two points. *First*, in the exceptions to CERD jurisdiction, the UAE argued that ICERD does not prohibit differentiated treatment on the basis of nationality[68] and, since the Qatari communication refers only to nationality-based treatment,[69] that it 'does not fall within the scope of article 11 of the Convention'.[70] *Secondly*, the UAE also argued that the good offices procedure under Articles 11–13 presupposes that the situation to be reviewed is still in effect and, as there is no evidence of any ongoing violation, CERD lacks jurisdiction.[71]

Even though its reasoning is not entirely clear, CERD seems to have concluded that the exception to jurisdiction concerning nationality-based treatment, should be examined with the admissibility issue.[72] Subsequently, in its examination of admissibility, CERD stated that the allegation of a violation of Article 1(3) arising from discrimination based on nationality does not fall outside the scope of competence *ratione materiae*.[73] As to the exception pertaining to the ongoing effect of measures, CERD concluded that this should be examined at the merits phase, namely, within the context of the conciliation procedure.[74]

65 Decision regarding inter-state communication State of Qatar versus Kingdom of Saudi Arabia (14 December 2018); Decision regarding inter-state communication State of Qatar versus United Arab Emirates (14 December 2018), <https://www.ohchr.org/Documents/HRBodies/CERD/NV_QatarSA_14Dec2018.pdf> last accessed 9 July 2021.

66 Decision on the jurisdiction of the Committee in respect of the inter-State communication submitted by Qatar against the United Arab Emirates (CERD/C/99/3); Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates (CERD/C/99/4, advance unedited version).

67 Jurisdiction of the Inter-state communication submitted by Qatar against the Kingdom of Saudi Arabia (CERD/C/99/5, advance unedited version); Admissibility of the Inter-state communication submitted by Qatar against the Kingdom of Saudi Arabia (CERD/C/99/6, advance unedited version).

68 CERD/C/99/3 (27 August 2019), para 34.

69 ibid, para 36.

70 ibid, para 29.

71 ibid, para 41.

72 ibid, para 57; CERD/C/99/5 (27 August 2019), para 52.

73 CERD/C/99/4 (27 August 2019), para 63; CERD/C/99/6 (27 August 2019), para 19. It must be noted that, contrary to the interpretation of the CERD, the ICJ interpreted the term 'national origin' in art 1(1) of the ICERD as not encompassing current nationality and, consequently, concluded the lack of its jurisdiction *ratione materiae*. *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 88.

74 CERD/C/99/3 (27 August 2019), para 59.

C. Admissibility of Communications

In the exceptions to the admissibility of the Qatari communication, the UAE *first* argued that Qatar failed to demonstrate that the domestic remedies available to citizens of Qatar had been exhausted.[75] Qatar counter-argued that the exhaustion of domestic remedies is not required where the respondent state's measures constitute 'a systematic, generalized policy and practice' of violations of ICERD.[76] *Second*, the UAE further argued that Qatar, by submitting a dispute to the ICJ, had created a *lis pendens* situation whereby two parallel proceedings, bearing on the same dispute and involving the same parties, are progressing simultaneously.[77]

As to the *first* exception, CERD stated that a multitude of factual elements, relating to domestic remedies, can only be verified at the merits phase, and, additionally, that 'exhaustion of domestic remedies is not a requirement where "generalized policy and practice" has been authorized'.[78] CERD concluded that it will examine the first exception at the conciliation phase. On the other hand, CERD rejected the *second* exception by stating that the ICJ procedure and the CERD procedure are mutually alternative means under Article 22 of ICERD. Furthermore, it concluded that the principle of *lis pendens* is not applicable to the relationship between CERD, which is an expert monitoring body entitled to adopt non-binding recommendations, and the ICJ, which is a judicial body empowered to issue a binding judgment.[79] Lastly, CERD requested its Chairperson to appoint the members of an ad hoc Conciliation Commission, in accordance with Article 12(1).[80]

Shortly after the CERD decision (27 August 2019), a similar understanding was expressed by the ICJ in *Ukraine v Russia* (8 November 2019), which stated that:

> [I]n filing its Application under Article 22 of [I]CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of [I]CERD, *the alleged pattern of conduct* of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. ... the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case (emphasis added).[81]

75 ibid, paras 30 and 51; CERD/C/99/4 (27 August 2019), paras 7–17. Exhaustion of domestic remedies is the admissibility requirement, provided by ICERD art 11(3).

76 CERD/C/99/4 (27 August 2019), para 25.

77 ibid, para 18.

78 ibid, para 40. In contrast, CERD in *Qatar v Saudi Arabia* rejected the same exception to admissibility on the ground that it was outside the deadline. CERD/C/99/6 (27 August 2019), para 20.

79 CERD/C/99/4 (27 August 2019), para 49.

80 ibid, paras 64–65.

81 Judgment, 8 November 2019 (n 55), at 606, para 130. By relying on ECtHR jurisprudence, Ukraine argued that: 'the rule of exhaustion of local remedies "does not apply where the applicant State complains of a practice as such ... but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice" (*Georgia v. Russia (II)*, Application No. 38263/08, Decision on Admissibility of 13 December 2011, para. 85)'. ibid, p 605, para 128.

The ICJ observed that, if there is 'pattern of conduct' of the respondent state in breach of obligations under ICERD, the exhaustion of local remedies is not required. In this respect, one witnesses a cross-fertilization between legal regimes/orders on the criterion for excluding the application of the local remedies rule: namely, 'administrative practice' (ECtHR),[82] 'generalized policy and practice' (CERD),[83] and 'pattern of conduct' (ICJ). This inter-regime convergence in the application of human rights treaties may be regarded as a process of clarifying the exception to the local remedies rule, which has been broadly described by the ILC in its Draft Articles on Diplomatic Protection.[84]

5. *PALESTINE V ISRAEL*

A. Background to, and Process of, the Palestine Communication

Israel ratified ICERD on 3 January 1979, attaching a reservation to Article 22,[85] but not to Articles 11–13.[86] Palestine ('the State of Palestine' within ICERD) acceded to ICERD on 2 April 2014, which entered into force for Palestine on 2 May 2015.[87] In response to this accession, Israel submitted a communication to the UN Secretary-General, on 16 May 2014, stating that:

> 'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid convention both under general international law and the terms of bilateral Israeli-Palestinian agreements. The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' *a party* to the Convention and regards the Palestinian request for accession as being without legal validity and *without effect upon Israel's treaty relations under the Convention* (emphasis added).[88]

82 In *Georgia v Russia (I)*, ECtHR stated that: 'according to its case-law in inter-State cases, the rule [on exhaustion of domestic remedies] does not apply "where *an administrative practice*, namely, a repetition of acts incompatible with the Convention, and official tolerance by the State, has been shown to exist and is of such a nature as to make proceedings futile or ineffective"' (emphasis added). *Georgia v Russia (I)*, Application no 13255/07, Judgment (Merits), 3 July 2014, para 125.

83 CERD/C/99/4 (27 August 2019), para 40.

84 The ILC's Draft articles on Diplomatic Protection, art 15 (Exceptions to the local remedies rule) provides that: 'Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'. Report of the ILC Fifty-eighth session (1 May–9 June and 3 July–11 August 2006), General Assembly, Official Records, Sixty-first session, Supplement No 10 (A/61/10) 13, at 20.

85 Reservation of Israel, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#EndDec> last accessed 9 July 2021.

86 CERD/C/100/3 (12 December 2019), para 2.2.

87 The accession of Palestine was admitted in accordance with ICERD arts 17(1) and 18(1). ICERD art 17(1): 'This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies . . .'. ICERD art 18(1): 'This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention'. Since Palestine was a member of UNESCO, ICERD was opened to accession on the part of Palestine. CERD/C/100/4 (12 December 2019), para 2.12.

88 UN Doc C.N.293.2014.TREATIES-IV.2 (Depository Notification) (16 May 2014), <https://treaties.un.org/doc/Publication/CN/2014/CN.293.2014-Eng.pdf> last accessed 9 July 2021. Israel, not recognizing Palestine as a state, designated the latter as 'the Palestinian entity' in this procedure.

Against this backdrop, a communication was submitted to CERD by Palestine against Israel (23 April 2018), claiming that Israel violated Articles 2, 3 and 5 of ICERD with regard to Palestinian citizens living in the Occupied Palestinian Territory (OPT), including East Jerusalem.[89] The communication was transmitted to Israel (7 May 2018), which replied by Notes Verbales (3 and 30 August, 23 September, and 19 and 23 October 2018). After a further exchange of opinions, CERD adopted the Decision (14 December 2018) to make the same request as that issued to Saudi Arabia and the UAE.[90] In its Decision (12 December 2019), CERD affirmed its jurisdiction, leaving, however, untouched the issue of the admissibility of the communication.[91] At the time of writing, CERD was undergoing the examination of admissibility, pursuant to Article 11(3) of ICERD.

B. Parties' Positions on the Jurisdiction of CERD

Israel raised exceptions to the jurisdiction of CERD and the admissibility of the Palestine communication, in which it reiterated its position: namely, it has never recognized Palestine as a state; it objected to the accession of Palestine to ICERD;[92] it has no bilateral treaty relation with Palestine within the context of ICERD;[93] and, consequently, the inter-State communication mechanism, requiring a treaty relation to exist between the concerned parties, cannot be activated by Palestine against Israel.[94]

Against the position of Israel, Palestine argued that ICERD does not impose any other requirement for triggering the inter-State mechanism than that provided in Article 11, namely that '[a] State party considers that another State party is not giving effect to the provisions of the Convention'.[95] Furthermore, Palestine emphasized the particular nature of obligation under ICERD which justifies the activation of a collective enforcement mechanism.

It is noteworthy that Palestine, during the procedure, changed its position on the ground of its standing, assuming the relevant rules of the law of state responsibility. *First*, initially, Palestine observed that:

89 CERD/C/100/3 (12 December 2019), paras 1.2 and 2.6.

90 Decision regarding inter-state communication State of Palestine versus State of Israel (14 December 2018), <https://www.ohchr.org/Documents/HRBodies/CERD/NV_Palestine_Israel14Dec2018.pdf> last accessed 9 July 2021.

91 Decision, Inter-State communication submitted by the State of Palestine against Israel (CERD/C/100/5, advance unedited version). Decision was adopted with 10 votes in favour, 3 votes against, and 2 abstentions.

92 CERD/C/100/3 (12 December 2019), para 4.3.

93 ibid, paras 4.4–4.5.

94 ibid, para 9.15; CERD/C/100/4 (12 December 2019), paras 3.5–3.7. In addition to the treaty relations issue, CERD was faced with the issue of whether ICERD is applicable extraterritorially to the OPT. ICERD art 3 provides that 'States Parties . . . undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction*' (emphasis added). See, Shadi Sakran, 'Observations on Palestine's Inter-State Communication Against Israel under the CERD' (2019) 23(9) ASIL Insights, <https://www.asil.org/insights/volume/23/issue/9/observations-palestines-inter-state-communication-against-israel-under> last accessed 9 July 2021.

95 CERD/C/100/5 (12 December 2019), para 2.16.

> The present communication refers to violations committed in the OPT. However, the Applicant [Palestine] reserves its right to submit a supplementary communication regarding the violations against ethnic Palestinians living in "Israel proper". The issue of standing does not arise, as the victims of the violations are *nationals* of the State of Palestine, and the State of Palestine is therefore *the injured State*, in compliance with article 42 [of ARSIWA]' (emphasis added).[96]

It is clear that Palestine, identifying itself as an injured state, sought to approach the inter-State mechanism as a means of diplomatic protection for protecting the rights of its nationals. However, this understanding gives rise to the question as to whether this means is applicable, notwithstanding the alleged lack of bilateral treaty relations between Palestine and Israel. *Secondly*, during the procedure, Palestine's position was gradually modified to overcome the above issue, namely, that:

> [ICERD], as a human rights treaty, has *erga omnes* character, and excludes the possibility of a State party to unilaterally exclude bilateral treaty relations vis-à-vis another State party. ... Accordingly, the obligation of the Respondent [Israel] not to violate the Convention to the detriment of the OPT population exists vis-à-vis all other contracting parties, including, but not limited to, the Applicant [Palestine]. Bringing an inter-state communication to the Committee *merely triggers the procedure* foreseen in Articles 11-13 of the Convention and enables the Committee to consider the matter, but is at the same time meant *to enforce the rights of all contracting parties* (emphasis added).[97]

While this new position of Palestine focuses on the obligation *erga omnes partes* under ICERD, it is not crystal clear whether Palestine identified itself as a specially affected state (Article 42(b)(i)) or a non-injured state (Article 48) in the sense of ARSIWA.[98] *Thirdly*, at a later stage, Palestine clarified its position as follows:

> Given the *erga omnes* and *jus cogens* character of the Convention [ICERD], any violation by the Respondent State constitutes a violation of the Convention in relation to all other contracting parties, as all contracting parties of the Convention have *a legally protected interest* under the rules of State responsibility.[99] As confirmed by the wording and drafting history of the Convention, the procedure under Article 11 is *not exclusively of a bilateral character*, but

96 CERD/C/100/3 (12 December 2019), para 2.8.

97 ibid, para 5.10.

98 As Palestine refers to 'the rights of all contracting parties', corresponding to obligations *erga omnes partes* under ICERD, this position seems to be based on ARSIWA art 42(b)(i), rather than art 48, since the

99 ARSIWA art 48 is cited here. It is correct to refer to 'legally protected interest' as corresponding to obligations *erga omnes partes*.

aims at bringing before the Committee violations of the *universal public order* enshrined in the Convention (emphasis added).[100]

Palestine's new position on its standing is a mixture of legal authorities. On the one hand, it is explicitly grounded on ARSIWA Article 48(1)(a), which entitles 'any State other than an injured State' to invoke responsibility of any other state party, for the violation of obligations *erga omnes partes*. This means that Palestine identified itself as a non-injured state under ICERD. On the other hand, its position is grounded also on the notion of 'universal public order', which originates in ECtHR jurisprudence referring to the 'public order of Europe'.[101]

Interestingly, the aforementioned two positions of Palestine correspond to two different perceptions of the CERD inter-State procedure. In the *first* position, on the one hand, Palestine identifies itself as an injured state within the meaning of ARSIWA Article 42, and characterizes the CERD procedure as a means of diplomatic protection. In the *second* position, on the other hand, Palestine identifies itself as a non-injured state under ARSIWA Article 48, and characterizes the CERD procedure as a collective enforcement mechanism. Lastly, by resorting to the *latter*, Palestine sought to overcome the alleged lack of a bilateral 'treaty relation' between itself and Israel.

C. Decision of CERD on Jurisdiction

CERD divided the jurisdictional issue into three subsidiary issues.[102] *First*, after having affirmed that Palestine is 'a State party' to ICERD,[103] CERD dealt with the issue as to whether a treaty relation can generally be excluded in multilateral treaties. CERD affirmed that, as a general principle, treaty relations based on *consent* may be excluded by a state party through its unilateral statement in relation to an entity it does not recognize.[104] It states, however, that, when a treaty has a particular character, it may depart from that general principle.[105] *Secondly*, CERD dealt with the issue as to whether treaty relations can be excluded especially in human rights treaties. After having affirmed the *erga omnes* character of the obligations under ICERD,[106] CERD referred to European and American human rights jurisprudence and the ICCPR General Comment No. 24,[107] summarized by CERD as follows:

100 CERD/C/100/4 (12 December 2019), para 2.22.

101 See, (n 16).

102 As the fourth issue, raised by Israel in relation to the applicability of the sixth periodic report of Syria, is not directly relevant to the issue under discussion, it is omitted here.

103 CERD/C/100/5 (12 December 2019), para 3.09.

104 ibid, paras 3.12–3.13.

105 ibid, para 3.13.

106 ibid, para 3.25.

107 International Covenant on Civil and Political Rights, Human Rights Committee, General Comment 24 on Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under art 41 of the Covenant, CCPR/C/21/Rev. 1/Add.6.

> the objective or non-synallagmatic nature of the substantive obligations contained in the European and American Convention of Human Rights has as a result, that any State party may trigger the collective enforcement machinery created by the respective treaty, *independently from the existence of correlative obligations between the concerned parties* (emphasis added).[108]

This part, significantly important to the CERD's reasoning, means that, even in the absence of treaty relations between the concerned parties, the collective enforcement machinery can be activated by any state party and, in this sense, that some rules of treaty law may not be applicable to human rights treaties.[109] Applying this finding to ICERD, CERD concluded that:

> . . . given the nature of racial discrimination and, consequently, of the obligations contained in the Convention which are subject to *a collective guarantee and enforcement*, a State party cannot bar another State party, through a unilateral action, from *triggering an enforcement mechanism* created by the Convention, to the extent that such mechanism is essential to guarantee the equal enjoyment of the rights of individuals or groups set forth in the Convention (emphasis added).[110]

Thirdly, with regard to the issue whether that mechanism is *essential* or not to guarantee the rights under ICERD, CERD examined the 'unique nature' of the CERD inter-State mechanism in the following three ways. *First*, CERD characterized it as an 'automatic inter-State complaint mechanism', unlike the 'facultative' mechanisms in other treaties, suggesting 'a stronger desire of the drafters' to set up 'protective measures to ensure that the provisions of [ICERD] are adequately observed and complied with by all States parties'.[111] *Secondly*, CERD characterizes the mechanism as 'conciliatory' and non-adversarial, which should be 'practical, constructive and effective'.[112] *Thirdly*, CERD characterized it as 'complement[ing]' the reporting procedure (ICERD Article 9), and categorized the obligations under both procedures (namely, Articles 9 and 11–13) into the 'same family', with the common purpose of ensuring the effective prohibition of racial discrimination for the *common good* of the whole international community.[113] For these reasons, CERD concluded that: 'it has jurisdiction to examine the inter-state complaint at hand *without prejudice of the existence or not of treaty relations* between the Applicant and the Respondent' (emphasis added).[114]

As is clear here, CERD affirmed its jurisdiction to entertain the merits jurisdiction, without answering to the question whether a treaty relation exists between Palestine and Israel. In the event, CERD summed up its reasons underlying its conclusion as follows:

108 CERD/C/100/5 (12 December 2019), para 3.33.
109 ibid, para 3.34.
110 ibid, para 3.37.
111 ibid, para 3.38.
112 ibid, para 3.41.
113 ibid, para 3.43.
114 ibid, para 3.44.

a. Some provisions of general international law do not apply to human rights treaties due to the non-synallagmatic character of their obligations which are implemented collectively;
b. The *erga omnes* nature of the core provisions of the Convention;
c. The jurisprudence of [Human Rights Courts and] the position taken by the Human Rights Committee in its general comment No. 24, confirm that any State party to a human rights treaty *may trigger the collective enforcement machinery* created by it, *independently from the existence of correlative obligations* between the concerned parties;
d. The Convention is a human rights treaty which contains non-synallagmatic obligations of *collective guarantee*, and is based on *superior common values*;
e. Within the category of human rights treaties, the Convention is of a *particular* character, taking into account that racial discrimination has been universally recognized as a scourge which must be combated by all available and pragmatic means, and as a matter of the highest priority for the international community as a whole, *without consideration to bilateral issues between States parties*.
f. The unique conciliatory nature of the automatic mechanism under articles 11 to 13 of the Convention signals that it should be implemented in a manner that is practical, constructive and effective (emphasis added).[115]

D. Analysis of the CERD's decision

The CERD's decision was utterly criticized by Israel.[116] The USA, as well, criticized the decision on the ground of absence of treaty relations between Palestine and Israel.[117] In *Palestine v Israel*, two key questions were posed to CERD. The *first* was whether Palestine and Israel were in a bilateral treaty relation under ICERD. The *second* was whether the CERD inter-State mechanism possesses the special nature of a collective enforcement mechanism, identical to that of ECtHR. While avoiding the *former* question, CERD affirmatively answered the *latter*, in affirming its jurisdiction in the event.

(i) Substantive Question: Existence of Treaty Relations

As to the *former* question, five members of CERD criticized the CERD's reasoning and concluded that, due to the lack of a bilateral treaty relation between the two parties, there can be no jurisdictional *consent* of Israel.[118] However, the CERD's reasoning is not negated by this point. Since Israel attached no reservation to ICERD Articles 11–13, *consent* indisputably exists on the part of Israel to the CERD inter-

115 ibid, para 3.50.

116 Israel observed that it 'deeply regrets the Committee's erroneous decision, which is not based on solid legal grounds, and is clearly selective and biased against Israel'. Permanent Mission of Israel to the United Nation in Geneva, 'Israel Regrets CERD's Decision Regarding Jurisdiction in An Inter-State Complaint Against It', 12 December 2019, <https://cloud.inforu.co.il/umail/?page=webview&show=body&message=%2CcTM5gjN0QzM> last accessed 9 July 2021.

117 Expressing 'profound disappointment' with CERD's decision, the US ambassador stated that '[t]he Committee's disregard for treaty law raises serious questions about the legitimacy of this process'. US Mission to the United Nations and Other International Organizations in Geneva, 'Statement On The Decision Of The Committee On The Elimination Of Racial Discrimination Regarding Jurisdiction Over An Inter-State Communication Against Israel', 6 January 2020, <https://geneva.usmission.gov/2020/01/06/statement-on-the-decision-of-cerd-regarding-jurisdiction-over-an-inter-state-communication-against-israel/> last accessed 9 July 2021.

118 Individual opinion of the following Committee members: Marc Bossuyt, Rita Izák-Ndiaye, Keiko Ko, Yanduan Li and María Teresa Verdugo Moreno (dissenting), para 5.

State mechanism per se, which, if interpreted literally, is applicable between Israel and any other 'State Party' including Palestine.[119] This interpretation, if accepted, would set aside the application of a customary norm of treaty relations. In other words, the applicability of the CERD inter-State procedure depends *not* on customary norms (of treaty law), but on the interpretation of ICERD Articles 11–13. Consequently, the essential question, as posed by CERD, was whether, as a matter of treaty interpretation, the CERD inter-State mechanism may be characterized as a 'collective enforcement mechanism'.[120]

(ii) Procedural Question: Characterization of the CERD Inter-State Mechanism

As to the *latter* question, the CERD pointed out three characteristics of the CERD inter-State mechanism: namely, (i) it being an *automatic* complaint mechanism; (ii) its conciliatory nature, namely its practical, constructive, and effective nature; and (iii) it being complementary to the reporting procedure. Even when combined, the above characteristics are, by no means, sufficient for the CERD mechanism to amount to a 'collective enforcement machinery'. *First*, the compulsory or automatic jurisdiction of CERD conciliation is no different to that of UNCLOS compulsory conciliation. Insofar as the latter is simply a *bilateral* means of dispute settlement for reaching an *agreed* solution to a dispute, based on the balance of *bilateral* interests,[121] the same could be said for the former. *Secondly*, it is true that the conciliation procedure should be 'practical, constructive and effective'.[122] However, considering its objective to lead the parties to an 'amicable solution', it is doubtful that CERD conciliation serves as a *collective* enforcement mechanism purported to protect the *objective* order ('superior common values') within ICERD.[123] *Thirdly*, it is even more questionable whether the CERD inter-State procedure merely *complements* the reporting procedure. While the former is designed to settle *bilateral* disputes, the latter seeks to facilitate 'dialogue' between a state party and CERD.[124] As dispute settlement and supervision are two different procedures, it is simply inappropriate to categorize the two into the 'same family'. It should also be recalled that the ICJ, when interpreting ICERD Article 22, characterized the CERD inter-State mechanism (Articles 11–13) as an alternative to negotiations between states parties.

119 CERD/C/100/5 (12 December 2019), paras 3.39–3.40. Following this understanding, ICERD Article 11(1) may be interpreted as follows: '[i]f a State Party [Palestine] considers that another State Party [Israel] is not giving effect to the provisions of this Convention [ICERD], it [Palestine] may bring the matter to the attention of the Committee . . .'.

120 CERD stated that: 'a State party cannot bar another State party, through a unilateral action, from triggering an enforcement mechanism created by the Convention, *to the extent that such mechanism is essential* to guarantee the equal enjoyment of the rights of individuals or groups set forth in the Convention' (emphasis added). CERD/C/100/5 (12 December 2019), para 3.37.

121 As to the method of balancing the bilateral economic interests in the UNCLOS conciliation case between Timor Leste and Australia, see Tamada (n 46), at 339.

122 CERD/C/100/5 (12 December 2019), paras 3.41 and 3.50(f).

123 On this point, Israel argued that the ICERD references to 'amicable solution of the dispute' and to 'parties to the dispute' cannot be implemented in the absence of recognition or established treaty relations between two parties. CERD/C/100/3 (12 December 2019), para 4.7.

124 It is stated that '[t]he general approach of the CERD in the reporting procedure is one of *dialogue* rather than of confrontation' (emphasis added). See Vandenhole *supra* note 38, at 84.

To summarize, although CERD focused on several aspects of the CERD inter-State mechanism to affirm its jurisdiction, it intentionally put aside its fundamental nature of an ad hoc conciliation procedure: namely, a bilateral means for reaching an *agreed* solution to a dispute between *two parties*, by balancing the *bilateral* interests between the parties concerned. Consequently, it is beyond doubt that this procedure can, by no means, be characterized as one of 'collective enforcement'. As witnessed in the foregoing, in the absence of a procedural characteristic that may amount to 'collective enforcement', there can be no ground for affirming the CERD's jurisdiction.

6. CONCLUSIONS

A. Transforming ad hoc Conciliation into the Collective Enforcement Machinery

The foregoing analysis reveals that CERD characterized the CERD inter-State mechanism as pertaining to collective enforcement, identical to the inter-State application procedure of the ECtHR. This characterization was indispensable to CERD efforts to circumvent the issue of the alleged absence of bilateral treaty relations between Palestine and Israel, and, in the event, to affirm its jurisdiction for conciliation. Viewed within the broader context of the 'constitutionalization of international law',[125] the CERD's decision on jurisdiction may be positively evaluated as promoting collective enforcement under ICERD.[126]

However, insofar as the CERD's reasoning relies mainly on the transformation of an ad hoc conciliation procedure into one of collective enforcement, it cannot escape criticism. In particular, it must be recalled that the CERD inter-State procedure, composed of the inter-State communication procedure (ICERD Article 11) and the ad hoc conciliation procedure (ICERD Articles 12–13), is designed as a *bilateral* means for reaching an *agreed* solution to *bilateral* disputes between *two* states parties, by balancing their *bilateral* interests. Evidently, this procedure does not contain any multilateral or collective element, comparable to collective enforcement. In preventing this criticism, CERD ought to have clarified more carefully the constitutive elements of the notion of collective enforcement and, furthermore, to have explained how the CERD inter-State procedure can be characterized as such.

B. Next Steps of the CERD Inter-State Cases

In relation to *Qatar v Saudi Arabia* and *Qatar v UAE*, CERD will shortly enter the merits phase, namely, conciliation. On the other hand, CERD has to deal with the admissibility issue in *Palestine v Israel*. Following existing precedent on the issue of domestic remedies, it is unlikely that CERD will require Palestine to prove the

125 B-O Bryde, 'Institution Building in the UN-Human Rights-System – the Committee on the Elimination of Racial Discrimination (CERD)' in H Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum, Vol. I* (Martinus Nijhoff 2012) 333, at 342.

126 It is observed, eg that the CERD decision 'highlights the possibility of new pathways for human rights enforcement'. See McDougall (n 47), at 924.

exhaustion of domestic remedies in Israel,[127] consequently, it is likely that Palestine will proceed smoothly to the conciliation phase. However, it is most likely that Israel will entirely reject the conciliation procedure itself.[128] Should this be case, the absence of Israel will make it impossible for the conciliation commission to issue a recommendation, given that its purpose is to lead the parties to reach an *agreed* solution to their dispute. Should, nonetheless, the commission issue a recommendation, not based on the agreement of the parties, Israel will simply ignore it, since such recommendation would not be legally binding.

Normally, the exhaustion of the CERD inter-State procedure would entitle Palestine to submit a dispute to the ICJ, pursuant to ICERD Article 22. However, in this case, there remain hurdles for establishing the ICJ's jurisdiction. *First*, as Palestine is not a state party to the ICJ Statute,[129] it would have to rely on Article 35(2) of the ICJ Statute to seek access to the ICJ.[130] *Secondly*, crucially, as Israel attaches a reservation to Article 22 of ICERD, the ICJ will inevitably have to deny its jurisdiction.[131] As a result, ad hoc conciliation within the CERD inter-State procedure seems to be the last opportunity for Palestine to seek redress for alleged breaches of ICERD obligations on the part of Israel.[132] In this sense, this conciliation procedure is a litmus test for whether and, if so, to what extent conciliation under ICERD can serve as a 'collective enforcement' mechanism.

127 Quoting the precedents of the European Commission on Human Rights and the African Commission on Human Rights, Palestine argued that in the cases of 'a legislative or administrative practice' of 'systematic violations' of ICERD, the exhaustion of domestic remedies is not required. CERD/C/100/4 (12 December 2019), para 2.26.

128 Considering Israel's absence in the hearing at the jurisdiction phase (CERD/C/100/5, para 3.2), it is likely that Israel will be absent also at the admissibility phase and the merits (conciliation) phase.

129 art 35(1) of the ICJ Statute: '[t]he Court shall be open to the states parties to the present Statute'.

130 art 35(2) of the ICJ Statute: '[t]he conditions under which the Court shall be open to *other states* shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council . . .' (emphasis added). Consequently, there remain two hurdles for Palestine, namely, that it must be a 'state' and that conditions laid down by the UN Security Council must allow for this to happen.

131 In the *Armed Activities* case, the ICJ denied its jurisdiction under ICERD by applying the reservation of Rwanda attached to ICERD art 22. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, [2006] ICJ Rep 6, at 33–35, paras 71–79.

132 J Eiken, 'Breaking new ground? The CERD Committee's decision on jurisdiction in the inter-State communications procedure between Palestine and Israel' EJIL Talk! (29 January 2020), <https://www.ejiltalk.org/breaking-new-ground-the-cerd-committees-decision-on-jurisdiction-in-the-inter-state-communications-procedure-between-palestine-and-israel/> last accessed 9 July 2021.