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SPECIAL CHARACTER OF HUMAN RIGHTS OBLIGATIONS AND THE JURISDICTION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION IN THE *PALESTINE V. ISRAEL* CASE[1]

Abstract: *Among UN human rights treaty bodies that have the competence to examine inter-state communications, only the Committee on the Elimination of Racial Discrimination (CERD) has had the possibility to develop its case law in this regard (as of 2020). One of these cases – submitted by the State of Palestine against Israel – resulted in a controversy arising from the respondent state's declaration excluding any treaty relations between Palestine and Israel, the latter considering the former "a non-recognized entity." The present paper analyses the CERD's decision of 12 December 2019 in which the Committee found that it had jurisdiction to hear the inter-state communication. The author argues that while invocation of the "special character" of human rights obligations constitutes a powerful argument in judicial discourse, this should not lead to (re)opening debates on self-contained regimes and alienating human rights treaties from the norms and principles of general international law. At the same time, there are also valid reasons to perceive the obligations enshrined in the ICERD as being of a specific and erga omnes character.*

Keywords: Committee on the Elimination of Racial Discrimination, human rights, International Convention on the Elimination of All Forms of Racial Discrimination, inter-state complaints jurisdiction, obligations *erga omnes*

INTRODUCTION

It was not until 2018 that the Committee on the Elimination of Racial Discrimination (the Committee or the CERD) – the treaty body established under the Interna-

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[1] This article is a tribute to Prof. Janusz Symonides (1938-2020), whose expertise and scholarly excellence in public international law, including the international protection of human rights, was truly inspirational.

tional Convention on the Elimination of All Forms of Racial Discrimination (ICERD or the Convention)[2] – was seized with its first inter-state communications under Art. 11 ICERD. Two of them were lodged by Qatar (against Saudi Arabia and the United Arab Emirates), and one by Palestine against Israel.[3] These communications ended a long period of reluctance on the part of states to engage in the inter-state conciliatory procedures provided in UN human rights treaties. It is noteworthy that although the competence to receive and examine inter-state communications was entrusted to seven out of ten UN treaty bodies (committees),[4] it is only in case of CERD that this competence is automatic, i.e. it does not require a prior declaration of a state-party recognizing such a competence of a given committee.

Whereas in all three of the above-mentioned inter-state cases the CERD decided that it had jurisdiction, the communication submitted by the State of Palestine against Israel raised a problematic issue, notably: Did the Israeli declaration of 2014 refusing to enter into any treaty relations with Palestine (which acceded to ICERD that year) effectively exclude the possibility of invoking Art. 11 of the Convention between both parties? Thus an interesting question of treaty law emerged and was addressed by the CERD in its decision concerning jurisdiction, adopted on 12 Dec. 2019, with 10 votes in favour, 3 votes against, and 2 abstentions. The CERD's decision referred, *inter alia*, to the nature of human rights obligations enshrined in the Convention, as well as to the object and purpose of the inter-state procedures provided in Arts. 11-13 ICERD. The Committee's decision – as well as the dissenting opinion attached to it – contribute to the discussion concerning the special features of human rights treaties in general, and of ICERD in particular.

1. WHY ARE HUMAN RIGHTS TREATIES REGARDED AS "SPECIAL"?

For many years the issue of the peculiarity of human rights obligations was a subject of doctrinal interest, with some scholars focusing on the special features of human

[2] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

[3] *See* the Report of the CERD of its 99th and 100th sessions, Consideration of communications received under art. 11 of the Convention, pp. 15-16, available at: https://bit.ly/3akPDSG (accessed 30 May 2021).

[4] *See* Art. 41 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Art. 10 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), A/RES/63/117; Art. 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 112; Art. 12 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014), A/RES/66/138; Art. 76 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (signed 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3; and Art. 32 of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), 2716 UNTS 3.

rights obligations themselves,[5] while others expounded on the special character of human rights treaties in international law.[6] There is an obvious connection between the specificity of human rights obligations and the international treaties that enshrine them. While the former might also be derived from non-treaty sources of international law, such as international custom or general principles of law, it is however indisputable that treaties remain the principal normative source of international human rights law. In any event, it would be hard to deny that it is the character of human rights obligations that influenced the debate on the character of human rights treaties. The authors dealing with the subject have reflected on the possible justifications for the view that human rights treaties are "special" as compared with other treaties, in particular those on the protection of the human person in a larger sense.[7] The general question also concerned the nature of the relationship between conventional human rights law and general principles of treaty law;[8] in other words: How are human rights treaties "different" or "atypical" when juxtaposed with classical international law treaties, and what are the potential consequences of these differences?

There have been several factors nourishing the debate on the character of human rights treaties: the pronouncements of regional human rights courts on the objective character of human rights obligations, which have been considered as created "over and above a network of mutual, bilateral undertakings"[9]; the concept of obligations *erga omnes* developed in the case law of the International Court of Justice (ICJ);[10] and finally the discussion on whether the regime of reservations to international treaties (as elaborated by the International Law Commission) is adequate in the case of human rights conventions.[11] The above list is not exhaustive; nevertheless one of the key problems was rightly identified as that concerning reciprocity in the context of human rights treaties.[12]

[5] *See e.g.* C. Mik, *On the Specific Character of State Obligations in the Field of Human Rights*, XX Polish Yearbook of International Law 113 (1993).

[6] *See* E.W. Vierdag, *Some remarks about special features of human rights treaties*, 25 Netherlands Yearbook of International Law 119 (1994) and M. Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11(3) European Journal of Human Rights 489 (2000). *See also* J. Klabbers, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in: I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, Springer, Dordrecht: 2014, pp. 149-182.

[7] Vierdag, *supra* note 6, p. 122.

[8] Craven, *supra* note 6, pp. 489 *et seq*.

[9] *See* the judgment of the European Court of Human Rights (ECtHR), *Case of Ireland v. United Kingdom* (App. No. 5310/71), 18 January 1978, para. 239. This concept was followed by the Inter-American Court of Human Rights (IACtHR) in *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, IACHR Series A no 2, IHRL 3398 (IACHR 1982).

[10] *See* ICJ, *Barcelona Traction, Light and Power Case (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34. *See also* C. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge: 2009; Mik, *supra* note 5, pp. 129-132; and W. Czapliński, *Concepts of Jus Cogens and Obligations Erga Omnes in International Law in the Light of Recent Developments*, XXIII Polish Yearbook of International Law 87 (1997).

[11] *See* Vierdag, *supra* note 6, pp. 130-134, Craven, *supra* note 6, pp. 495-496.

[12] Craven, *supra* note 6, pp. 504-513.

While summarizing this debate in a concise fashion would be problematic, suffice it to say that international legal scholarship generally admits that some features of human rights obligations justify their specific nature, which is also reflected in the character of human rights conventions. This assumption is correct, even though there is no "standard definition" of a human rights treaty nor are all human rights obligations of exactly the same character, irrespective of their contents. M. Craven identified three possible approaches to the problem of what constitutes the specific "identity" of a human rights treaty: a formalist one (treaties are still founded upon a series of bilateral relationships between the parties, and the claim of non-reciprocity of obligations stemming from human rights treaties is largely misconceived in the legal sense); a purposeful (teleological) one (human rights treaties are different in that they defend the legal interests of individuals or groups rather than states – a vision which departs from the contractual paradigm and sometimes considers human rights treaties as a series of unilateral commitments of states); and a cognitivist one (human rights as carriers of collective values – this approach assumes that states undertake obligations not in relation to each other but to all other participating states as a collective).[13] The author admits however that the international practice seems to meld the above concepts together, and none of them is fully explanatory.[14]

If we try to look at these problems from today's perspective, the discussion on the special character of human rights treaties seems far from concluded, as proven in the position of the state parties to the dispute commented on below. There are however two preliminary remarks on that subject which the present author wishes to make prior to discussing the decision of the CERD in the Palestinian-Israeli case. The first remark is that, objectively speaking, human rights treaties may be considered as distinguishable or "special" in the sense that the international obligations enshrined therein are supposed to protect and promote individual rights and freedoms recognized as superior values of mankind and the international community as such. This is so even if we take into consideration that only a small fraction of human rights obligations could be considered as being of an *erga omnes* character.

The second remark is of a more systemic nature. While the peculiarity of human rights treaties justifies certain nuanced approaches to the application of general rules of treaty law (with the rules on reservations constituting a major example), one should however avoid creating an impression that the treaties under consideration are each a separate kind "of its own" or – even worse – that they could be considered as forming self-contained regimes.[15] It is submitted that the effectiveness of the international protection of human rights depends to a large extent on whether human rights treaties continue to be considered as part and parcel of general international law. Such an ap-

[13] *Ibidem*, pp. 513-517.

[14] *Ibidem*, p. 516.

[15] Here I refer to the concept elaborated on by B. Simma and discussed ever since in international legal scholarship with regard to some regimes of state responsibility. *See* B. Simma, *Self-contained regimes*, 16 Netherlands Yearbook of International Law 111 (1985); B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) European Journal of International Law 483 (2006).

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proach not only does not preclude, but in fact *assumes* a duty to interpret human rights treaties in the light of their object and purpose,[16] as was the task of the CERD in the inter-state proceedings discussed below.

2. THE *MODUS OPERANDI* AND NATURE OF INTER-STATE PROCEDURE(S) IN ARTS. 11-13 ICERD

Let us first recall that the inter-state procedure under ICERD consists of several steps. The first one is to bring a communication to the attention of the Committee if the applicant state considers that the respondent state is not giving effect to a provision of the Convention. Pursuant to Art. 11(1) ICERD, such a communication needs to be transmitted to the state party concerned, with the view of obtaining (within three months) written explanations or statements clarifying the matter and possible remedies that may have been taken by the respondent state. At this stage the CERD fulfils the role of an intermediary and/or facilitator in the dialogue between both states.

The next phase may be initiated when "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."[17] In such circumstances each of the parties has the right to "refer the matter again to the Committee," which in fact turns the role of the CERD from that of a facilitator of dialogue to that of a body in charge of establishing a Conciliatory Commission.

The inter-state procedure implies that the CERD itself determines whether it has jurisdiction to proceed with the case and ascertains whether "all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law."[18] But the role of the CERD *in pleno* is actually restricted to pronouncing on issues of jurisdiction and admissibility, as well as "obtaining and collating all the information it deems necessary," since further steps in the procedure are vested with the Chairperson of the Committee. The Chair is supposed to appoint an *ad hoc* Conciliation Commission, with the unanimous consent of the parties to the dispute, comprising five persons who may or may not be members of the Committee. The task of the Commission is to make available its good offices with "a view to an amicable solution of the matter on the basis of respect for the Convention."

The only situation when the CERD *in pleno* needs to intervene at this stage is when state parties to the dispute fail to reach agreement on all or part of the composition of an *ad hoc* Conciliation Commission appointed by the Chairperson. In such circum-

[16] *See* Art. 31(1) of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[17] *See* Art. 11(2) ICERD.

[18] *Ibidem*, Art. 11(3).

stances the CERD elects the members of the Commission who were not agreed upon by the State parties from among its own members, by a two-thirds majority vote. The Commission elects its own Chairperson and adopts its own rules of procedure. The final report embodying its findings, including recommendations for amicable solutions of the matter, is submitted to the Chairperson of the CERD. State parties to the dispute are expected to inform the Chairperson whether or not they accept the recommendations contained in the report of the Conciliatory Commission. In the final step – which is purely technical in nature – the report of the Conciliation Commission and the declarations of the state parties concerned are communicated to other state parties of ICERD, pursuant to its Art. 13(3).

It follows that the inter-state procedure may have at least two phases: the one involving the exchange of communications and possible negotiations; and the other consisting of an attempt to resolve an inter-state dispute through conciliation by an *ad hoc* commission composed under the authority of the Chairperson of the CERD, with the agreement of both parties. Two such commissions were established so far on the basis of Art. 12(1)(a) ICERD, in the cases *Qatar v. Saudi Arabia* and *Qatar v. United Arab Emirates*.[19] Prior to the set-up of the commissions, in both cases the CERD decided that it had jurisdiction to examine them and rejected the exceptions raised by the respondent state as regards the admissibility of the communications.[20]

It should also be mentioned that Art. 22 ICERD includes a compromissory clause which allows a referral of any dispute between two or more States Parties to the International Court of Justice if the dispute is "not settled by negotiation or by the procedures expressly provided for in the Convention" and "unless the disputants agree to another mode of settlement." The ICJ had an opportunity to interpret Art. 22 ICERD in the *Georgia v. Russian Federation* case.[21] Let us note that the compromissory clause does

[19] Both were established during the 99th session of the CERD in 2019 and the members of the commissions were appointed by the Chair of the CERD in February 2020. The commission in the case *Qatar v. Saudi Arabia* is composed of: Marc Bossuyt (Belgium), Chinsung Chung (Republic of Korea), Makane Moïse Mbengue (Senegal), Monica Pinto (Argentina) and Verene Alberta Shepherd (Jamaica). The members of the other commission – in *Qatar v. United Arab Emirates* – are: Sarah Cleveland (United States), Chiara Giorgetti (Italy), Bernardo Sepúlveda-Amor (Mexico), Maya Sahli-Fadel (Algeria) and Yeung Kam John Yeung Sik Yuen (Mauritius). Both commissions are of a mixed character, i.e. they include both sitting members of CERD and non-members. On 15 March 2021 both commissions decided to suspend the proceedings concerning the inter-state communications submitted by Qatar at the latter's request, and invited any of the state parties concerned to inform the commissions whether they wish to resume the consideration of the matter. Given the improvement of bilateral relations between Qatar and the two respondent states (United Arab Emirates and Saudi Arabia) at the beginning of 2021, a possible course of action is a withdrawal of the communications, which would result in a discontinuation of the proceedings.

[20] *See* decisions of the CERD on the jurisdiction and admissibility of the inter-state communications: *Qatar v. United Arab Emirates*, CERD/C/99/3 and CERD/C/99/4 and *Qatar v. Saudi Arabia*, CERD/C/99/5 and CERD/C/96. All these decisions were adopted on 27 August 2019.

[21] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment (Preliminary Objections), 1 April 2011, ICJ Rep 2011, p. 70.

not require that the inter-state procedures of Arts. 11-13 ICERD are exhausted prior to submitting the case to the ICJ; however, the Court expressed the view that there must have been at least a "genuine attempt" on the part of at least one of the disputing parties to engage in discussions with view to resolving a dispute.[22] Interestingly, the pending procedure under Art. 11 ICERD initiated by the communication of *Qatar v. United Arab Emirates* (submitted to the CERD on 8 March 2018) was not considered as an impediment by the ICJ to examine the case between the same state parties under Art. 22 ICERD (on 11 June 2018), at least as to the preliminary objections. In its judgment the ICJ decided however that it did not have jurisdiction *ratione materiae* to entertain the application filed by Qatar.[23]

The nature of the inter-state procedures provided in Arts. 11-13 ICERD requires an additional comment. It could appear that due to its conciliatory character, the procedure is supposed to end up in recommendations for the amicable solution of the matter, rather than explicitly pronouncing on the state responsibility of the respondent state for the alleged violations of ICERD. However, we must keep in mind that the whole procedure is triggered by "a consideration" of one state party that another state party "is not giving effect to the provisions of the Convention." This elegant expression is actually tantamount to saying or submitting that "a state party has violated or is violating the provisions of the treaty." Once such an allegation was made, it could reasonably be expected that the Conciliation Commission set up under Art. 12 ICERD would address it, especially given that under Art. 13 it is tasked with preparing the report after having *fully* considered the matter. In other words, "submitting recommendations (…) proper for the amicable solution of the dispute" implies prior examination of the allegations and pronouncing on whether a violation of ICERD indeed occurred. If it did, it could be assumed that the Commission's recommendations would be guided by the rules of international state responsibility, as embodied in the ILC Articles on State Responsibility for Internationally Wrongful Acts.[24] But even if the Commission does not

[22] *Ibidem*, para. 157.

[23] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Judgment (Preliminary Objections), 4 February 2021. The ICJ found that the term "national origin" in Art. 1 ICERD (definition of "racial discrimination") does not encompass current nationality, hence the dispute falls outside the scope of ICERD. This conclusion may have far-reaching consequences for the interpretation of the term "racial discrimination" for the purposes of ICERD, especially that the CERD Committee expressed a different view in its general recommendation no. 30 on discrimination against non-citizens (para. 4) and in the decision on the admissibility of the inter-state communication submitted by Qatar (CERD/C/99/4). The ICJ noted that it "has carefully considered the position taken by the CERD Committee (…) on the issue of discrimination based on nationality. By applying, as it is required to do (…) the relevant customary rules on treaty interpretation, it came to the conclusions indicated in paragraph 88 above (…)" (para. 101). The position of the ICJ may – or may not – influence the interpretation of Art. 1 ICERD by the CERD Committee. It will be also interesting to see if and how it affects the recommendations of the conciliation commissions set up under Art. 12 ICERD.

[24] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

find any breach of ICERD, it would still be empowered to offer such recommendations "as it may think proper" in accordance with Art. 13(1) ICERD.

The differences between the inter-state procedures under Arts. 11-13 ICERD and the individual communications procedure under its Art. 14 are substantial, since not only do both types of procedures involve different kinds of applicants, but also the latter requires that the competence of the Committee to receive and consider communications from individuals or a group of individuals be recognized by the respondent states. The difference also consists in the CERD's role, since in case of communications submitted under Art. 14 the competence to examine them lies with the plenary Committee, whereas in inter-state cases the plenary CERD pronounces on issues of jurisdiction and admissibility, but then the dispute is handed over to a conciliation commission appointed by the CERD Chairperson. Thus the plenary CERD is actually not empowered to express itself on the merits of inter-state communications.

3. THE *PALESTINE V. ISRAEL* CASE AND THE CERD'S DECISION OF 12 DECEMBER 2019

Palestine submitted its communication under Art. 11 ICERD on 28 April 2018, thereby initiating the first phase of the inter-state procedure (exchange of positions). While the full text of Palestine's communication was not made available by the CERD on its website until April 2021,[25] nevertheless the summary of the complaint, the position of the respondent state, and the Committee's decisions, including the one on the jurisdiction, were published in the course of the proceedings as three separate documents.[26] In a nutshell, the applicant claimed that Israel violated several provisions of ICERD with regard to Palestinians living in the Occupied Palestinian Territory, including East Jerusalem.

The submission of the communication by Palestine in 2018 came very shortly after the first ever inter-state complaints to a UN treaty body were lodged by Qatar.[27] Roughly at the same time the situation in Palestine was brought by its government to the attention of the Prosecutor of the International Criminal Court.[28] The year 2018 must

[25] *See* https://bit.ly/3ydXfjf (accessed 30 May 2021).

[26] *See* CERD, *Inter-state communication submitted by the State of Palestine against Israel*, doc. CERD/C/100/3, CERD/C/100/4 and CERD/C/100/5, all dated 12 December 2019.

[27] *See* fn 7 above.

[28] On 1 January 2015 the State of Palestine made a valid declaration under Art. 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court and acceded to the Rome Statute on 2 January 2015. The referral (invoking Articles 13(a) and 14 of the Statute) was dated 15 May 2018 and registered on 22 May 2018 (available at: https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf, accessed 30 May 2021). It was followed by a preliminary examination by the Prosecutor, who requested Pre-Trial Chamber I for a jurisdictional ruling. The Pre-Trial Chamber I delivered its decision on 5 February 2021 and found, by a majority, that the ICC's jurisdiction extends to the territories occupied by Israel since 1967 (Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's

have been quite busy for Palestinian foreign and legal services, since on 28 September 2018 another legal action was undertaken: the Palestinian government filed with the International Court of Justice an application instituting proceedings against the United States, invoking violations of the Vienna Convention on Diplomatic Relations by the decision to relocate the US embassy to Jerusalem earlier that year.[29] Although these actions obviously are procedurally unrelated, nevertheless they demonstrate the determination of the State of Palestine to pursue avenues available to it under international law.

Since the role of the CERD in the first stage of inter-state proceedings is rather passive, the Committee's initial decisions were of purely procedural nature: it transmitted Palestine's communication to Israel on 4 May 2018, and invited both states to provide written explanations or statements within three months. Israel did so several times, stressing the view that the CERD lacks jurisdiction to examine the communication. Palestine referred the matter again to the Committee on 7 November 2018, thus triggering Art. 11(2) ICERD and opening a second phase of the inter-state procedure. By virtue of the decision of the CERD adopted on 14 December 2018, both parties were invited to supply "any relevant information on issues of jurisdiction of the Committee or admissibility of the communication, including the exhaustion of available domestic remedies," as well as to appoint one representative to take part in the proceedings in the Committee.[30] After another round of submissions from both parties, the CERD examined preliminary questions and conducted hearings during its 98th session from 23 April to 10 May 2019. However, adoption of the decision as to the jurisdiction was postponed for the 99th session of the Committee, and finally for the subsequent one held in December 2019.

The postponement might have been caused – at least partially – by the need to allow the applicant state to comment on a memorandum (dated 23 July 2019) submitted by the UN Office of Legal Affairs at the request of the Committee.[31] Neither seeking nor obtaining such advice would be particularly problematic if the reply was made available to both parties of the dispute at the same time. However, as it transpires from the documentation of the case, during its 99th session in August 2019 the CERD learned that the respondent had knowledge of the Office of Legal Affairs memorandum, as the latter was referred to in Israel's note verbal of 20 August 2019. This must have caused some consternation; anyhow the only fair response to the situation was to give Palestine an opportunity to submit additional comments on the basis of the memorandum,

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territorial jurisdiction in Palestine of 5 February 2021, No. ICC-01/18, available at: https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF, accessed 30 May 2021). On 3 March 2021 the Prosecutor of the ICC officially opened an investigation in to the "Situation in Palestine" case.

[29] *See Relocation of the United Nations Embassy to Jerusalem (Palestine v. United States)*, application filed with the Registry of the Court on 28 September 2018, available at: https://www.icj-cij.org/public/files/case-related/176/176-20180928-APP-01-00-EN.pdf (accessed 30 May 2021).

[30] *See* document CERD/C/100/3, para. 8.

[31] *See* the text of the memorandum: https://bit.ly/2Ugjvdj (accessed 30 May 2021).

especially bearing in mind that it was supportive of the Israeli position in the case under consideration.[32]

The crucial point of dispute between the parties – as regards the Committee's jurisdiction – was the question whether Israel's objection to Palestine's accession to the ICERD (dated 22 May 2014) resulted in the "lack of treaty obligations" between both states and precluded the CERD from examining Palestine's communication against Israel submitted on 23 April 2018. The text of the afore-mentioned objection of Israel as to Palestine's accession to ICERD was hardly available in the public domain, but it remains clear that it was deposited with the Secretary-General, circulated among state parties, and included a statement that Israel did not consider the State of Palestine to be a party to ICERD, as well as that the accession was "without effect on Israel's treaty relations under the Convention."[33]

Building on the objection it raised in 2014, Israel invoked the provisions of the VCLT, which envisage a situation when a treaty has not entered into force between certain parties to a multilateral treaty.[34] The respondent also relied on the legal principle that a state is only bound by a treaty to the extent it has agreed to be bound, as demonstrated in international case law[35] and the negotiating history of the VCLT. Israel's contentions were opposed by the State of Palestine, which indicated that there is no customary rule allowing a state party to unilaterally exclude bilateral treaty relations in multilateral treaty systems.[36] Furthermore, while Palestine agreed that a state party may declare that an accession of a non-recognized entity to a multilateral treaty does not serve as an argument proving the recognition of that entity by the refusing state, nevertheless such a declaration should not – in view of the State of Palestine – affect treaty relations between the parties to a multilateral treaty.[37]

The applicant state also insisted that bilateral treaty relations between state parties to ICERD cannot be excluded due to the *erga omnes* character of the prohibition of racial discrimination,[38] and moreover that Israel's objection of 2014 should be considered in the light of Art. 20(2) of ICERD, which prohibits reservations incompatible with the object and purpose of the treaty or those which would "inhibit the operation of any bodies established by the Convention." Actually the same provision of ICERD requires

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[32] *See* document CERD/C/100/5, paras 2.1-2.5.

[33] *Ibidem*, para. 4.3. *See also* the Palestine's reply "regretting" the position of Israel, deposited with the Secretary-General, available at: https://treaties.un.org/doc/Publication/CN/2014/CN.354.2014-Eng.pdf (accessed 30 May 2021).

[34] *See* document CERD/C/100/3, para. 4.4. Israel referred to Arts. 20(4)9b) and 76(2) VCLT.

[35] In the *S.S. Lotus case (France v. Turkey)*, the Permanent Court of International Justice noted that: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law (…)" (PCIJ Series A No 10, PCIJ judgment, 7 October 1927, p. 18).

[36] *See* document CERD/C/100/3, paras. 5.5 et seq.

[37] *Ibidem*, para. 5.9.

[38] *Ibidem*, paras. 5.10 et seq.

that a reservation shall be considered incompatible or inhibitive if at least two-thirds of the state parties of the Convention object to it, which was not the case.

Addressing the question of its own jurisdiction provided the CERD with an opportunity to pronounce on some crucial issues, such as the special character of human rights treaties or the features of the control and supervision mechanisms enshrined in the ICERD itself. The Committee's decision not only strengthened a tendency to consider human rights treaties as a "special genre" – as already argued by regional human rights courts for some time – but also promoted the viewpoint that the "superior common values" of such treaties justify certain departures from the general framework of treaty law. However before commenting on that matter, one should take a closer look at the CERD's arguments and the way of reasoning which led the Committee to the finding that it has jurisdiction to hear the inter-state communication brought by the State of Palestine. The summary of its reasons for this conclusion were as follows:

(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 the European Court of Human Rights and the Inter-American Court of Human Rights that brings a "breath of fresh air" to the "laissez faire" attitude of certain State parties, as well as 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 of bilateral issues between States parties;
(f) the unique conciliatory nature of the automatic mechanism under Arts. 11 to 13 of the Convention signals that it should be implemented in a manner that is practical, constructive and effective.[39]

Points (b) and (d) above do not raise much controversy. The concept of obligations *erga omnes*, i.e. obligations owed to the international community as a whole, was developed half-a-century ago by the International Court of Justice in the *Barcelona Traction* case[40] and since then it has earned its place and title in the theory of international legal obligations. The CERD recalled that at least four obligations of such character

[39] *See* document CERD/C/100/5, para. 3.50.

[40] *See* ICJ, *Barcelona Traction, Light and Power Case (Belgium v. Spain)*, Second Phase Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34.

were identified in the ICJ's case law (the prohibition of aggression, torture, genocide, and racial discrimination).[41] It is generally accepted that obligations of this kind can be inferred from norms which have a *jus cogens* character, even though the catalogue of these norms is not a matter of universal consensus. Nevertheless, the International Law Commission recognized that apart from the above-mentioned norms, the *jus cogens* character could be ascribed to the prohibition of slavery, crimes against humanity, and to the right to self-determination.[42] In any event, the legal character of the prohibition of racial discrimination – the pillar of the ICERD – is duly identified as a peremptory norm of international law.

Likewise, the assertion that ICERD is a human rights treaty which "goes beyond" a network of mutual, bilateral obligations is not particularly controversial. In this regard the Committee referred extensively to the practice of regional human rights bodies, and notably the European Commission and the European Court of Human Rights,[43] as well as the Inter-American Court of Human Rights.[44] The CERD relied also on the point of view of the Human Rights Committee (HRC) expressed in its General Comment no. 24 on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights.[45] In that General Comment the HRC insisted that human rights treaties "are not a web of inter-State exchanges of mutual obligations" and that "the principle of inter-State reciprocity has no place" between the state parties, save in the limited context of reservations to declarations on the HRC's competence under Art. 41 ICCPR (the facultative clause allowing the HRC to examine inter-state communications).[46]

The non-synallagmatic character of the obligations enshrined in human rights treaties, the principle of collective implementation of these treaties, as well as their own

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[41] *See* document CERD/C/100/5, para. 3.23.

[42] *Ibidem.*

[43] *See* in particular the *dictum* of the ECtHR in the *Case of Ireland v. United Kingdom*: "(…) Unlike international treaties of the classic kind, the [European] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'" (para. 239).

[44] *See* the advisory opinion OC-2/82 of the IACtHR, where it noted, *inter alia*, that: "Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of States. (…) In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction" (para. 29).

[45] *See* General Comment No. 24 of the Human Rights Committee on *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant,* document CCPR/C/21/Rev.1/Add.6, 11 November 1994. *See* also U. Linderfalk, *Reservations to Treaties and Norms of Jus Cogens – A Comment on Human Rights Committee General Comment No. 24*, in: I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, Springer, Dordrecht: 2014, pp. 213-234.

[46] *See* document CERD/C/100/5, para. 3.31.

mechanisms of supervision – in conjunction with the fact that they are "inspired by superior common values shared by the international community as a whole" – led the CERD to the conclusion that these treaties constitute a special category to which certain rules of treaty law are not applicable.[47] This statement had a direct effect on the issue of the Committee's jurisdiction to examine the Palestinian communication against Israel. The CERD did not deny the principle of general international treaty law which allows a state party to a multilateral treaty to exclude treaty relations with an entity it does not recognize. Instead, this principle was departed from – or rather bypassed – and considered as not affecting Israel's scope of obligations under the Convention, in either the material or procedural sense.

While it is not unexpected to learn from a human rights treaty body or a court that the character of human rights obligations justifies a specific approach or interpretation, it is however less common for human rights bodies to expressly deviate from a rule of general international law. More often than not human rights courts and treaty bodies tend to recall that public international law is the normative platform of the international human rights systems. Actually, the CERD's way of reasoning was based on arguments strictly related to international law, since it drew conclusions from the *erga omnes* status of the obligations prohibiting racial discrimination, and relied heavily on the well-established line of reasoning of regional human rights courts, insofar as they highlighted the atypical character of obligations enshrined in human rights treaties. Therefore it would be incorrect to claim that the Committee disregarded public international law as such. On the contrary, the CERD went to great effort to elaborate on how to tackle the dispute as to its jurisdiction, taking into account general treaty law. In effect the Committee decided that mutual treaty relations between two state parties are not a *sine qua non* condition to apply the inter-state procedure referred to in Arts. 11-13 ICERD, as long as both states are considered parties to the Convention.

Leaving aside for the moment the question of the nature of an inter-state procedure(s) (as interpreted by the CERD), there is another interesting paragraph in the Committee's decision which ascribes to the Convention a "particular character within the category of human rights treaties."[48] The Committee observed that:

> Bearing in mind its broadly recognized insidious and pervasive character, racial discrimination was the first violation of human rights to be taken care of by the international community, just after the international crime of genocide. The Convention was a first of a series of treaties codifying and expanding the scope of human rights law. The Committee also notes that in more recent times racial discrimination has been universally recognized as a scourge which must be combated by all available and appropriate means and as a matter of the highest priority for the international community. Thus, the Committee considers that it is undisputable that all State parties to the Convention act together against racial discrimination. In this regard, the Committee notes that the

[47] *Ibidem*, para. 3.34.

[48] *See* document CERD/C/100/5, para. 3.31.

claims brought forward in the present inter-state communication pertain to the interests of all States parties to the Convention.[49]

The above passage rightly reflects the origins of ICERD and the high place of combating racial discrimination in the international agenda. However, it can be presumed that the Committee referred to the "particular character" of ICERD within the catalogue of human rights treaties in a symbolic rather than legal sense. There is no doubt that the Convention paved the way for the subsequent core human rights treaties and that its obligations are subject to collective enforcement. But bearing all that in mind, there would be no rational justification to introduce a hierarchy of human rights treaties. Obviously, one could introduce some classifications or typologies, but legally speaking it would be incorrect to consider one of the ten core UN human rights treaties as a *primus inter pares*.

Another important pronouncement of the CERD in the decision as to its jurisdiction in the Palestinian-Israeli case concerned the uniqueness of the mechanism established under Arts. 11-13 of the Convention. Indeed, the inter-state complaint mechanism provided in ICERD is automatic and does not require any additional declaration on the part of state parties, in contrast to all the other inter-state mechanisms in the UN treaties.[50] According to the Committee this indicates that the drafters of ICERD were strongly committed "to set up protective measures to ensure that the provisions of the Convention are adequately observed and complied with by all State parties."[51] This was most likely the case, though it would be unfair to argue that the drafters of subsequent UN human rights treaties were less committed to achieve the aims of the treaties just because they introduced a facultative – rather than compulsory – inter-state complaint mechanism.

What is also of interest in the CERD's elaboration on the uniqueness of the inter-state mechanism is the reference to the exact wording of Art. 11 of the Convention, which entrusts the right to bring a matter to the Committee to "a State Party," without any preconditions as to the mutual relations between the state parties. Given that both Israel and the State of Palestine undisputedly had the status of parties to ICERD, the Committee "was not persuaded that general international law rules should be interpreted so as to add conditions which are not present in the Convention."[52] This argument sounds quite convincing, since it is undeniable that it is the status as a state party to ICERD which is decisive for the right to "bring the matter to the Committee," whereas the issue of the "existence" of bilateral relations between the parties, or the recognition of one state party *vis-à-vis* the other is a matter completely absent from the scope of Arts. 11- 13 ICERD.

The Committee promoted the idea that Arts. 11-13 ICERD should be implemented "in a manner that is practical, constructive and effective."[53] This echoes the principle

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[49] *Ibidem.*

[50] *See* footnote 4 above.

[51] *See* document CERD/C/100/5, para. 3.38.

[52] *Ibidem*, para. 3.40.

[53] *See* document CERD/C/100/5, para. 3.50(f).

of effectiveness present in the case law of the ECtHR, which has consistently held that the European Convention on Human Rights was intended to guarantee rights that are "practical and effective and not theoretical or illusory."[54] One could argue that the principle of effectiveness, understood in the above sense, should apply to both the material and the procedural obligations set forth in human rights treaties.

It should not go unnoticed that the Committee's decision of 12 December 2019 was not unanimous, and five CERD members decided to submit a joint individual opinion.[55] The dissenting members stressed the significance of consent in treaty relations; they also referred to the memorandum prepared by the UN Office of Legal Affairs, which expressed doubts as to the Committee's jurisdiction if the treaty relations between Israel and Palestine were "prevented" by the former's declaration submitted to the depositary of ICERD. The joint individual opinion expresses a view that "the Vienna Convention on the Law of Treaties applies to human rights treaties equally as to any other treaty. No provision of that Convention allows for any exception in case of human rights treaties."[56] While the first sentence is arguably correct, the second is debatable given the wording of Art. 60(5) VCLT, which excludes the possibility to terminate or suspend the operation of a treaty as a consequence of its breach if the latter concerned "provisions relating to the protection of the human person contained in treaties of a humanitarian character."[57]

CONCLUSIONS

Palestine's communication under Art. 11 ICERD gave rise to understandable attention and comments[58]. Notwithstanding the merits of the case, the dispute over the jurisdiction of the Committee provided it with an opportunity to recall the nature of obligations enshrined in the Convention as well as to reflect on the specific features and purpose of the inter-state complaint mechanism. One should generally appreciate the

[54] This well-known principle was developed in the judgment of ECtHR in the *Airey v. Ireland* (App. No. 6289/73), 9 October 1979, para. 24. The influence of a doctrine elaborated in the ECtHR on the case law of CERD was also identified with respect to considering ICERD as a "living instrument." *See* D. Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20 Human Rights Law Review 236 (2020).

[55] *See* an annex to the decision of CERD of 12 December of 2019, Individual opinion of the following Committee members: Marc Bossuyt, Rita Izák-Ndiaye, Keiko Ko, Yanduan Li and Maria Teresa Verdugo Moreno (dissenting).

[56] *Ibidem*, para. 10.

[57] *See* Art. 60(6) VCLT: "Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

[58] *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, as well as J. Eiken, *Breaking new ground? The CERD Committee's decision on the jurisdiction in the inter-State communications procedure between Palestine and Israel*, 29 January 2020, available at: https://bit.ly/3Adq1lK (both accessed 30 May 2021).

CERD's decision of 12 December 2019, while noting that it should not be construed as "detaching" the Convention from the general international treaty regime as such.

The requirement of consent remains – and should remain – a principal element in the concept of an international treaty (including those established for the purpose of protecting human rights). Also, the Vienna Convention on the Law of Treaties remains the primary codification of the rules of treaty law applicable to the ICERD. Nevertheless, in interpreting ICERD obligations, both material and procedural ones, the majority of the Committee members found it appropriate to "reach deeper," in the sense of drawing conclusions from the specific nature of the prohibition of racial discrimination as an obligation *erga omnes*, as well as from the purpose of the collective enforcement machinery established in Arts. 11-13 ICERD.