



**British Institute of
International and
Comparative Law**

Inter-state Complaints in International Human Rights Law

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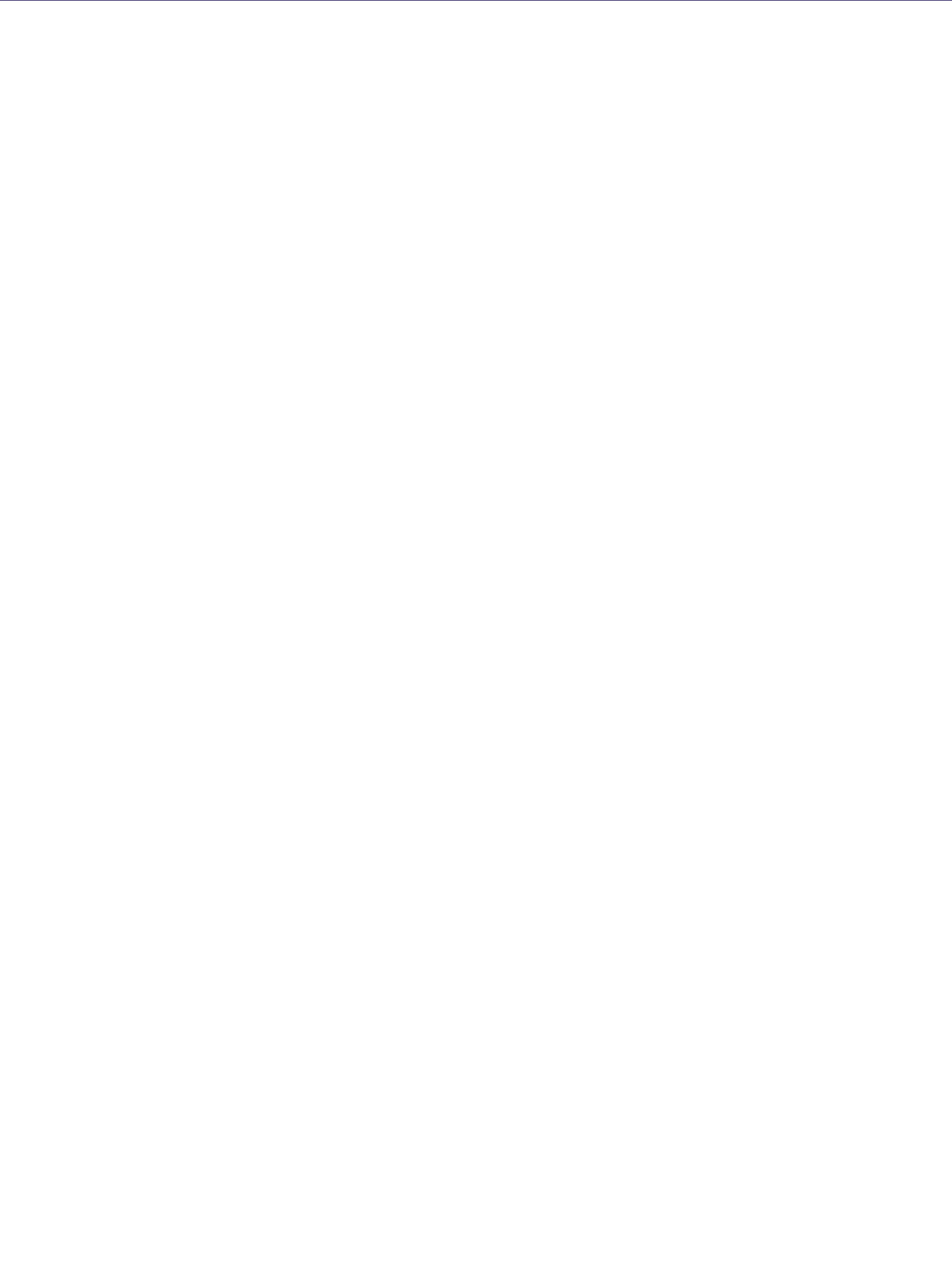


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Overview

The possibility to complain about human rights violations before supra-national bodies is an essential element towards the effective implementation of international human rights law. Beyond the possibility of individuals bringing complaints before United Nations ('UN') Treaty Bodies or regional human rights courts, various human rights treaties and regional human rights conventions establish inter-state complaint mechanisms.

Inter-State cases have not been the most utilized mechanism before regional human rights courts, but the case law of the European Court of Human Rights ('ECtHR') is relatively abundant. Within the UN system, the use of this mechanism is extremely limited. Despite having been envisaged in UN human rights treaties for decades, it was used for the first time only in 2018, when the Committee on the Elimination of Racial Discrimination ('CERD'),¹ the body of independent experts that monitors implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'),² received three inter-state communications – *State of Qatar v Kingdom of Saudi Arabia*,³ *State of Qatar v United Arab Emirates*,⁴ and *State of Palestine v State of Israel*.⁵ The latter case is now the most advanced international inter-state communication, with the two procedures initiated by Qatar having been suspended.⁶ These three communications provide an opportunity to reflect on the challenges and potential of inter-state communications, including procedural aspects, comparisons with the practice of the ECtHR and the reasons for their underutilisation under different frameworks.

The British Institute of International and Comparative Law ('BIICL') convened a webinar on "[Inter-State Complaints in International Human Rights Law](#)" on 4 October 2021. The webinar brought together a panel of experts to discuss the CERD communications, as well as the system of inter-state complaints more broadly. It discussed parallels with inter-state applications before the ECtHR and the challenges and opportunities of regional human rights bodies in this context. The present report provides a synthesis of some of the key discussions at the webinar.

This event was convened by [Dr Rosana Garcíandía](#), Research Fellow in Labour Exploitation and Human Rights, BIICL and [Dr Jean-Pierre Gauci](#), Arthur Watts Senior Research Fellow in Public International Law and Director of Teaching and Training, BIICL. It was part of the Arthur Watts Seminar Series in Public International Law sponsored by Volterra Fietta. The organisers wish to thank the speakers for their participation and for making this webinar a resounding success.

¹ Also referred to as 'the Committee'.

² 1965, 660 UNTS 195, entered into force on 4 January 1969.

³ CERD, *Admissibility of the Inter-State communication submitted by Qatar against the Kingdom of Saudi Arabia*, CERD-ISC 2018/1, 8 March 2018.

<<https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-99-6.pdf>> accessed on 28 February 2022.

⁴ CERD, *Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v. the United Arab Emirates*, CERD-ISC-2018/2, 8 March 2018

<https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf> accessed on 28 February 2022.

⁵ *Inter-State communication submitted by the State of Palestine against Israel*, CERD-ISC-2018/3, 23 April 2018 <<https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-100-3.pdf>> accessed on 28 February 2022.

⁶ 'State of Palestine against Israel: UN Committee sets up ad hoc Conciliation Commission' (OHCHR, 17 February 2022).

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28129&LangID=E>> accessed on 28 February 2022.

Introductory Remarks

Judge Tim Eicke, European Court of Human Rights

In his welcome address Judge Tim Eicke provided a background to the various types of inter-state complaint mechanisms, including the communications brought before them. Under the *European Convention on Human Rights* ('ECHR'), 28 cases have been brought before the ECtHR since 1956, when Greece brought the first inter-state case against the United Kingdom. 16 of those cases have been lodged since 2007, and seven of them since the beginning of 2020, indicating a significant increase in the last few years in the number of cases. Many of these applications are due to the conflict between Georgia and Russia, Ukraine and Russia, and Armenia and Azerbaijan.

More recent ECtHR cases also include:

- *Slovenia v Croatia*, in which there were allegations of arbitrary and unlawful conduct amounting to an administrative practice, by which the Croatian authorities were said to have prevented the Ljubljana Bank (a Slovenian bank) from enforcing and collecting debts of its Croatian debtors in Croatia;⁷
- *Latvia v Denmark*, which involved the extradition of a Latvian national to South Africa, who at the relevant time was detained in Denmark.⁸ This case was struck out after the dispute was settled following the return of the individual to Latvia; and
- the still-pending case of *Liechtenstein v Czech Republic*, which concerns the classification of Liechtenstein citizens as persons with German nationality for the purposes of the application of the so-called Beneš decrees in 1945 in the Czech Republic which, amongst other things, led to the confiscation of property belonging to all ethnic Germans and Hungarians after the Second World War.⁹

Under the *UN Convention on the Elimination of all forms of Racial Discrimination*, there have only been three applications lodged before the CERD – *Qatar v Saudi Arabia*, *Qatar v United Arab Emirates*, and *Palestine v Israel*.

There are also parallel or additional proceedings brought before other international fora, such as the following proceedings brought before the International Court of Justice ('ICJ'):

- *Georgia v Russia* in 2008 relating to Russia's breach of ICERD;¹⁰
- *Qatar v the United Arab Emirates* in 2018;¹¹ and

⁷ *Slovenia v Croatia*, no 54155/16 (ECtHR, 18 November 2020)

<<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-13063%22%5D%7D>> accessed on 28 February 2022.

⁸ *Latvia v Denmark*, App 9717/20 (ECtHR, 19 February 2020)

<<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203914%22%5D%7D>> accessed on 28 February 2022.

⁹ *Liechtenstein v Czech Republic*, App 35738/20 (ECtHR, 19 August 2020) <<https://www.icj-cij.org/en/case/123>> accessed on 28 February 2022.

¹⁰ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures Order) ICJ, 2008 <<https://www.icj-cij.org/public/files/case-related/140/14689.pdf>> accessed on 28 February 2022.

¹¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v The United Arab Emirates)* (Provisional Measures Order) ICJ, 2018 <<https://www.icj-cij.org/public/files/case-related/172/172-20180611-WRI-01-00-EN.pdf>> accessed on 28 February 2022.

- two applications brought in relation to the dispute between Armenia and Azerbaijan – *Armenia v Azerbaijan*¹² and *Azerbaijan v Armenia*¹³ - both in September 2021.

In addition to this, there are proceedings brought by *Ukraine v Russian Federation* under the *International Convention for the Suppression of the Financing of Terrorism* and ICERD, which the International Court of Justice declared admissible in its judgment on the 19th of November 2019.¹⁴

There are also proceedings brought by Ukraine against the Russian Federation before arbitral tribunals established under Annex VII of the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS') in relation to coastal State rights in the Black Sea, the Sea of Azov and the Kerch Strait, and the detention of Ukrainian naval vessels and servicemen.¹⁵

While the above cases may not be strictly classified as inter-state applications in the human rights mechanisms category, they all raise similar and/or related issues. This connection raises an interesting question about how much inter-relationship there is and how much one body should have regard to, and/or relate to, any decision made by another international body for dispute settlement in such parallel or additional proceedings.

A further consideration in this area are the practical difficulties which confront international bodies for the settlement of international disputes. One such difficulty is how the ECtHR and the CERD frequently have to act as first instance tribunals with all the necessary obligations and requirements to engage in fact finding. Additionally, the requirement for the exhaustion of domestic remedies is being disapplied because what is alleged is an administrative practice (authorised by the State), rather than an individual violation of the Convention.

¹² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures Order) ICJ, 2021 <<https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf>> accessed on 28 February 2022.

¹³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Provisional Measures Order) ICJ, 2021 <<https://www.icj-cij.org/public/files/case-related/181/181-20211207-ORD-01-00-EN.pdf>> accessed on 28 February 2022.

¹⁴ *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) ICJ Reports 2019 <<https://www.icj-cij.org/public/files/case-related/166/166-20191108-JUD-01-00-EN.pdf>> accessed on 28 February 2022.

¹⁵ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v The Russian Federation)* Case No. 2017-06 (Award Concerning the Preliminary Objections Of The Russian Federation) PCA, 21 February 2020 <<https://pcacases.com/web/sendAttach/9272>> accessed on the 28 February 2022.

1. Inter-state Communications under ICERD

Dr. David Keane, Dublin City University

Introduction

Dr. David Keane provided an overview of ICERD and its committee, the CERD. ICERD is one of the core human rights treaties, and it enjoys near universal acceptance, with 182 States Parties to the Convention. Articles 11 to 13 of ICERD provide for inter-state communications before the CERD, and the Convention also contains a complimentary clause under Article 22 allowing for referrals to the ICJ. There have been eight inter-state cases in total under this ICERD provision since the first case was submitted in 2008. However, the focus of this presentation was on inter-state communications under Articles 11 to 13.

ICERD's inter-state provisions were modelled on an early 1954 draft of the *International Covenant on Civil and Political Rights* ('ICCPR'). The draft ICCPR set out a compulsory inter-state communications mechanism for the proposed Human Rights Committee and referral to the ICJ if no solution was reached. From 1954 to 1966 these measures were substantially revised in the Third Committee of the General Assembly,¹⁶ which made the system of inter-state communications optional, requiring a declaration from both States Parties recognising the competence of the Human Rights Committee to receive such communications. The Third Committee also removed the clause testing the jurisdiction in the ICJ. ICERD's measures of implementation did not undergo the same revisions in the Third Committee, and as a consequence, ICERD provides a compulsory inter-state communications mechanism under Articles 11 to 13, which is unique in the UN Human Rights Treaties. All subsequent UN Human Rights Treaties which have this mechanism make it optional rather than compulsory, and some treaties do not have an inter-state communications mechanism at all, such as the *Convention on the Elimination of Discrimination Against Women* ('CEDAW').

Some scholars, such as Thomas Buergenthal, have attributed this difference between ICERD and ICCPR to Cold War paranoia, and the perception that ICERD, in its jurisdiction over racial discrimination, offered the Soviet Union and its allies a propaganda tool to be used against the West.¹⁷ However, at the time, even Western States such as France expressed the view that the ICERD system was established for both moral and legal reasons and was too stringent for application to the ICCPR. The CERD would later draw attention to the unique nature of the mechanisms established under Articles 11 to 13 which, as already noted, is unlike communication procedures in other human rights treaties.

Articles 11 to 13 mechanisms progress through a series of steps, which were analysed in Dr Keane's presentation looking first at Article 11 and the Committee; second, at Article 12 and the ad hoc Conciliation Commission; and finally at Article 13 and the amicable solution, which is the objective of the mechanism.

Communications under ICERD

Article 11(1) reads that '[i]f the State Party considers that another State Party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee'. Article 11 contains no requirement of direct victimhood which means that,

¹⁶ 'Social, Humanitarian & Cultural Issues (Third Committee)' (*General Assembly of the United Nations*) <<https://www.un.org/en/ga/third/>> accessed on 28 February 2022.

¹⁷ Thomas Buergenthal, 'The U.N. Human Rights Committee' (2001) Vol 5, Max Planck Yearbook of United Nations Law 341, 342.

similar to the ECHR, a public interest inter-state communication is possible. Under Article 11(1):

The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Under this first step, CERD acts purely as an intermediary and resolution can only come from the States Parties themselves. Then under Article 11(2) '[i]f the matter is not adjusted to the satisfaction of both parties... either State shall have the right to refer the matter again to the Committee.' Upon this second referral, CERD plays an adjudicating role in which hearings are held and decisions are reached on preliminary issues of jurisdiction and admissibility.

As noted, the mechanisms lay dormant for 50 years until 2018 when three inter-state communications were submitted to CERD under Article 11(1), the first before a UN treaty body.¹⁸

The triggering of the mechanism required the determination of certain procedural aspects. CERD's existing rules of procedure dated from 1986 and covered only the Article 11(1) aspect of the mechanisms.¹⁹ In 2019 CERD issued new rules of procedure regarding the hearings carried out pursuant to Articles 11(2) to 11(5).²⁰ They include, for example, directions that the States Parties concerned are to appoint one representative to take part in the oral proceedings before the Committee, and that the hearings of the Committee shall be held in private. The 2019 rules also affirmed that if the issues do not possess an exclusively preliminary character, they should be examined under Article 12. Thus, CERD deals with preliminary issues of jurisdiction and admissibility only, and the ad hoc Conciliation Commission determines issues related to the merits.

In December 2019 and April 2021, CERD reached decisions on jurisdiction and admissibility respectively in *Palestine v Israel*, and earlier in August 2019, CERD reached its decisions on jurisdiction and admissibility in the Qatar communications,²¹ which were the first such decisions ever taken by the Committee. While a number of substantive points were determined in the Qatar decisions, the below will briefly focus on the issue of national origin.

Saudi Arabia and the United Arab Emirates ('UAE') argued that Qatar's submission was based on an erroneous interpretation of Article 1(1), which defines racial discrimination on the basis of five grounds including the term 'national origin', but not the term 'nationality'. UAE submitted that '[t]he communication only refers to differentiated treatment based on nationality, a matter falling wholly outside the scope of the Convention.' Based on the text of Article 1(1) and the context of Articles 1(2) and 1(3), which framed the Convention's approach to nationality, as well as the practice of the Committee in its *General Recommendation no. 30 on Discrimination Against Non Citizens*,²² CERD found it exercised its competence *ratione materiae* when confronted with differences of treatment based on nationality.

The same point arose in preliminary objections before the ICJ in *Qatar v UAE*, in which Qatar requested that the Court recognise CERD's finding on the scope of *ratione materiae* of Article 1(1).²³ It argued that this would be consistent with the Court's own jurisprudence in the

¹⁸ As mentioned, these are *Qatar v Saudi Arabia*, *Qatar v UAE*, and *Palestine v Israel*.

¹⁹ CERD Rules of Procedure of the Meetings of the State Parties to the International Convention on the Elimination of All Forms of Racial Discrimination CERD/SP/2/Rev.1 (1987).

²⁰ CERD Rules of Procedure of the Committee on the Elimination of Racial Discrimination CERD/C/35/Rev.3 (2019).

²¹ The cases of *Qatar v Saudi Arabia* and *Qatar v UAE*.

²² UN Committee on the Elimination of Racial Discrimination (CERD), 'CERD General Recommendation XXX on Discrimination Against Non Citizens' 1 October 2002.

²³ *Application of the International Convention on the Elimination of All Forms of Racial*

Diallo case which supports that the Court is 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the [Human Rights] Committee'.²⁴ However, the Court's judgement upheld the first preliminary objection of the UAE. It viewed national origin as immutable and protected by the Convention, and nationality as mutable, discretionary, and purely legal, and therefore outside the scope of protection.²⁵ As Judge Bhandari pointed out in the dissenting opinion, the Court offered no compelling reason as to why it chose to depart from the reasoning in *Diallo*. The Court's judgment does not impact the progression of the Articles 11 to 13 mechanisms and the two views of national origin must co-exist.²⁶

Conciliation Commission

Once the steps under Article 11 of ICERD are complete, under article 12 the Chairperson of CERD shall appoint an ad hoc Conciliation Commission comprising of five persons who may or may not be members of the Committee. It is constituted automatically upon completion of Article 11. The Conciliation body, and the hybrid approach, is also emulated in two other UN Human Rights Treaties – the ICCPR and the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT'), which will be touched on later. However, these instruments and inter-state proceedings can be completed without recourse to the Conciliation body, hence the automatic character of conciliation within the Articles 11 to 13 mechanism is also unique to ICERD. UN Human Rights Treaties adopted after CAT do not provide for conciliation.

Article 12(1)(a) of ICERD provides for the appointment of an ad hoc Conciliation Commission with unanimous consent of the States Parties to the dispute. If they fail to reach agreement within three months, members of the Commission shall be elected by a two-thirds majority vote of the Committee from among its own members. The formula in Articles 12(1)(a) and (b) means that the potential composition of the Commission has a much wider ambit if appointed under Article 12(1)(a), as the scope of Commission members agreed by unanimous consent can be endless, including external appointment of non-members of CERD.

Article 12(2) provides two qualifications that apply to all Commission members. First, they shall not be nationals of the States Parties to the dispute or of a State not party to the Convention. The first qualification reflects concerns around impartiality, which was strong during the Cold War climate in which the Treaty was drafted. The second was designed, in the words of one delegate from the Third Committee, to avoid directly or indirectly giving non-parties to the Convention the right to pass judgement on compliance by the State's practice.

In the Qatar communications, two ad hoc Conciliation Commissions were appointed which contained a combination of CERD members and external members. This was achieved under Article 12(1)(a) with unanimous consent of the States Parties to the disputes. The Commission for *Qatar v Saudi Arabia* was composed of three CERD members and two external members. The Commission for *Qatar v UAE* was composed of one CERD member and four external members. One member from the *Qatar v UAE* Commission was a former Judge and Vice President of the ICJ.

Discrimination (Qatar v The United Arab Emirates) (Judgment) ICJ Reports 2021 [99] <<https://icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf>> accessed on 18 March 2022.

²⁴ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) ICJ Reports 2010 (II) [66] <<https://www.icj-cij.org/public/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>> accessed on 28 February 2022.

²⁵ *Qatar v The United Arab Emirates* (n 23) [105].

²⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v The United Arab Emirates)* (Dissenting Opinion of Judge Bhandari) ICJ Rep <<https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-03-EN.pdf>> accessed on 18 March 2022.

In March 2021, following a diplomatic agreement reached at Al Ula, Saudi Arabia,²⁷ the ad hoc Conciliation Commissions were suspended. Qatar had one year from the adoption of the agreement to inform the Committee about whether it wished to resume the communications. This timeline stemmed from the term on the Al Ula agreement and brought the deadline to the 4th of January 2022.²⁸ Until that time, the Commissions were to remain seized of the matter. The Qatar Commissions did not reach the stage of appointing a Chairperson and adopting a new procedure under Article 12(3), hence, to date, the mechanism has progressed only as far as Article 12(3) of the Convention.

The Amicable Solution

Lastly, Article 13 tasks the Commission with preparing a report embodying its findings from all questions of fact relevant to the issues between the parties, and containing such recommendations as may be proper to reach an amicable solution to the dispute. The report is then submitted to the Chairperson of the Committee. The non-binding character of the mechanism is emphasised in Article 13(2) in which the participants of the dispute inform the Chairperson whether or not they accept the recommendations in the report of the Commission.

At the drafting stage of ICERD, some scepticism was expressed in the Third Committee about whether a conciliation process with its amicable solution was suited to human rights treaties, such as ICERD. Mr. Waldron-Ramsey of Tanzania commented that conciliation was not particularly appropriate to the subject of the Convention, and that he did not see how complaints concerning human rights violations could be settled by conciliation.²⁹ Similarly, Mr. Pant of India observed that if the solution proposed was not binding, it could hardly be of any practical value, yet it would be difficult to make it binding.³⁰ Article 12(1)(a) adds some counterbalance to this, reading that the objective is an amicable solution of the matter on the basis of respect for the Convention. Hence, the Commission shall not aim at a solution at any price, but only at a solution which is based on respect for the Convention.

The conciliation provisions in the ICCPR and CAT outlines the following two pathways.

1. If the solution is reached, the reporting obligation is a pre-statement of the facts of the solution reached.
2. If the solution is not reached, the reporting obligations provide views on the possibilities of an amicable solution.

ICERD does not specify these two pathways in Article 13, but the understanding of conciliation from these related instruments implies that it is not confined to an agreed solution only. ICERD also envisages a solution not being reached, with recommendations moving the parties towards an amicable solution, which may be arrived at subsequent to the closing of the mechanism.

In *Palestine v Israel*, the majority commented:

'The Committee observes the mechanism's special nature which is conciliatory and opposite of adversarial. The Committee considers that given the inter-state

²⁷ CERD, *Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v the Kingdom of Saudi Arabia*, CERD-ISC 2018/1, 8 March 2018

<https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9382_E.pdf> accessed on 28 February 2022.

²⁸ The CERD website currently remains silent about the expiry of the one year period <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx>.

²⁹ U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1345th meeting, U.N. Doc. A/C.3/SR.1345 (17 November 1965), p.323, para. 41.

³⁰ U.N. General Assembly, 20th session, Official Records, Third Committee, Record of the 1346th meeting, U.N. Doc. A/C.3/SR.1346 (17 November 1965), p.331, para. 21. Annex 12.

mechanism has been designed to be a conciliatory procedure, it should be practical, constructive, and effective. Therefore, it considers a formalistic approach cannot be adopted in this regard'.³¹

An amicable solution in this context should be:

1. **Practical** - In an inter-state context, with a potentially large number of alleged victims, this could involve structural remedies such as reviewing legislation or policy.³²
2. **Constructive** - The fundamentally non-binding character of inter-state communications under Articles 11 to 13 cannot be ignored, and the Commission will draw on the submissions and hearings of both disputants. Its report could include recommendations for bilateral mechanisms for a joint body supported by both disputants.
3. **Effective** - Article 13 is silent on the issue of defining a breach. It would appear unnecessarily restrictive if the Commission considered itself unable to pronounce on this.

Finally, the Committee has cautioned against a formalistic approach. There is a potential for an imaginative solution, more imaginative than negotiation by judicial settlement, or other forms of the specific settlement of disputes made great. An amicable solution could display a combination of state-specific, bilateral, regional, and international remedies by way of recommendations providing a *suis generis* understanding of conciliation in the context of human rights.³³

As a final thought, a State may attempt to reach an amicable solution by conciliation under Articles 11 to 13, and then if the dispute has not been settled, refer the matter to the ICJ for a judicial remedy under Article 22. This is not possible for the three communications currently before the Committee since Saudi Arabia and Israel have the reservation to Article 22, and the judicial avenue is now closed in relation to the UAE.

Recent applications to the ICJ from Armenia and Azerbaijan indicate that if States can access the ICJ, they will in all likelihood bypass the Articles 11 to 13 mechanism, as four out of five of the Article 22 referrals have sought to do. Articles 11 to 13 will probably only be utilised for the receiving State as a reservation for Article 22. In sum, the amicable solution of Articles 12 to 13 must be capable of having an autonomous and final meaning.³⁴

³¹ *Inter-State communication submitted by the State of Palestine against Israel*, CERD-C-100-5, 23 April 2018, para 3.41. <<https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-100-5.pdf>> accessed on 28 February 2022.

³² Dr David Keane, 'Towards an 'Amicable Solution' in the Universal Human Rights System' (Voelkerrechtsblog, 28 April 2021) <<https://voelkerrechtsblog.org/towards-an-amicable-solution-in-the-universal-human-rights-system/>> accessed on 28 February 2022.

³³ *Ibid.*

³⁴ *Ibid.*

2. The Third CERD Communication – Palestine v Israel

Jan Eiken, University of Potsdam

Introduction

In his presentation, Jan Eiken focused on the third inter-state communication brought to the attention of the CERD - *Palestine v Israel*. This focus is not only because of the political implications of the case, but also because of the interesting legal questions surrounding jurisdiction and admissibility. Similar to the earlier decisions in the Qatar communications, the Committee decided on the questions of jurisdiction and admissibility separately.

Decision on Jurisdiction

The Committee found that it had jurisdiction concerning the *Palestine v Israel* communication in December 2019.³⁵ Five members of the Committee attached a dissenting opinion to this decision, which is a highly unusual event as there are rarely any dissenting opinions in the practice of the Committee. This remarkable decision deals with fundamental questions of treaty law as well as the question of the mechanism's character.

Palestine is a relatively new member to ICERD as it only acceded to the Convention in 2014. Following the accession of Palestine, Israel stated in a communication to the depository that it did not 'consider Palestine to be a party to the Convention and that the request for accession was "without effect on Israel's treaty relations under the Convention"'.³⁶

In relation to the communication before the Committee, Israel argued that it had excluded treaty relations with Palestine under ICERD. Accordingly, Israel claimed that the Committee should declare the communication inadmissible because it lacked jurisdiction to entertain the communication. The five dissenting Committee members followed this argument of Israel, but the Committee took a different path. The Committee essentially followed two lines of argument in order to establish its jurisdiction.

The first argument considered the possibility to exclude treaty relations under international law. The Committee recognised the general possibility to exclude treaty relations under a multilateral treaty, and this stands in line with what the International Law Commission (ILC) has advised in its *Guide to Practice on Reservations to Treaties*.³⁷ However, the Committee departs from this view when considering human rights treaties specifically. The Committee perceives ICERD as belonging to a specific category of treaties whose objective is the common good and to which certain rules of treaty law are not applicable. While not explicitly, the Committee seems to be convinced that the exclusion of bilateral treaty relations is impermissible with regards to human rights treaties such as ICERD.

The second line of reasoning is centred around whether the inter-state mechanism requires the existence of bilateral treaty relations between disputing parties. The Committee first notes that from the text of Article 11, no special relationship between the disputing States Parties is required, as the mere status of being a State Party is sufficient. The Committee then stresses the unique nature of the procedure and that ICERD is special because it is the only universal

³⁶ CERD, *Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel (Palestine v Israel)*, CERD/C/103/R.6, 20 May 2021 [65] <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_103_R-6_9416_E.pdf> accessed on 28 February 2022.

³⁷ ILC 'Guide to Practice on Reservations to Treaties' (2011) UN Doc A/66/10, para 75.

inter-state mechanism that is not optional, but compulsory. It is an automatic mechanism and, from accession, every State Party to ICERD is bound by that mechanism. Further, as per Article 20(2), the procedure may not be excluded by way of reservation. From this compulsory character the Committee infers the strong desire of the founders of ICERD to set up strong protective measures that should be practical, constructive, and effective. The possibility of one State Party to opt out of the procedure, at least with regard to another State Party, would, in the Committee's view, reduce the mechanism's effectiveness. As a result, the Committee found it had jurisdiction, despite the presence of the Israel's declaration that excluded treaty relations with Palestine.

This decision has been heavily criticised, however, Eiken argues, it can be justified. Admittedly, it is rather unorthodox, but the inter-state procedure is of a special character as it is largely independent from the cooperation of the States Parties involved. Therefore, it is not merely a bilateral conciliation procedure, but it can be perceived as an objective procedure for the supervision of the implementation of the rights guaranteed under ICERD.

Decision on Admissibility

On the 30th of April 2021, the Committee declared Palestine's communication to be admissible.³⁸ In that decision, the Committee was required to take a position on the question of the exhaustion of domestic remedies. Article 11(3) stipulates that the Committee has to ascertain whether all domestic remedies have been exhausted in the case. Prior to international proceedings, and as we know under general international law, the respondent State must be given the opportunity to remedy the alleged wrongful act through its own domestic legal system. Article 11(3) provides for an exception to that rule when the application of the remedies is unreasonably prolonged. The Committee has also established a second exception where a generalised policy and practice of racial discrimination has been authorised by the State. This stands in line with the jurisprudence of various human rights bodies as well as the ECtHR, which assumes an exception in the case of an administrative practice. Further, it stands in line with what the ICJ has assumed in inter-state cases.

With regard to the evidentiary threshold of such a generalised policy and practice, the Committee sees *prima facie* evidence as necessary, the mere allegation of a general policy and practice is not sufficient. Unlike the ECtHR, CERD does not examine the existence of a generalised policy and practice of racial discrimination in a systematic manner, its reasoning is simply too brief and too short. The Committee relies heavily and solely on its own concluding observations in 2019 on Israel under Article 9 of ICERD in order to assume the existence of a general policy and practice.³⁹ This raises the question of the evidentiary value of concluding observations, as they merely consist of concerns and recommendations, and they don't express definitive conclusions. However, the use of concluding observations is not uncommon in individual communications procedures. There is also a possible advantage in using these reports when examining local remedies, which was already highlighted during the drafting of the inter-state communications procedure of ICERD by the Third Committee.

In sum, the Committee's decision lacks sufficient reasoning, but it might very well have arrived at the correct conclusion. Upon examination of the material provided by the parties, the Committee could have reached a more sound and more convincing decision. The Committee further establishes an exception to the local remedies rule in inter-state cases when it is not a single incident of human rights violations, but rather a structural deficit or a pattern that is being complained of.

³⁸ *Palestine v Israel* (n 36).

³⁹ *Ibid* [64].

Next Steps

Upon the positive decisions on jurisdiction and admissibility, the procedure now moves to the next phase. In this phase the work of the Committee comes to term and the Chairperson of the Committee sets up a Conciliation Commission. The admissibility decision for *Palestine v Israel* was provided on the 30th of April 2021, and the States Parties were unable to agree on the Commission appointments by the three-month deadline at the end of July 2021. This meant that the Committee had to decide on the composition of the Commission during its last session in August 2021, however, it did not do this until February 2022.⁴⁰ This delay constitutes a breach of the Convention, as well as the Committee's Rules of Procedure.

This leads us to believe the Committee is not very prepared to handle inter-state communications, at least when they involve difficult legal questions. There are likely two explanations for this:

1. The procedure had not been used prior to 2018. It is likely that no one expected the procedure to be used and they were subsequently not prepared; and
2. Committee members are experts of high moral standing and acknowledge impartiality, but they are not required to be lawyers. Therefore, there may be some difficulties if members do not necessarily have a legal education and background and are required to decide highly complex questions of jurisdiction and admissibility.

Overall, the fact that the three ICERD communications have been decided positively by the Committee may encourage other States Parties to bring communications under Article 11 of ICERD. However, only the future outcome of this procedure will show whether the mechanism constitutes an effective tool for the settlement of inter-state disputes. The case of *Palestine v Israel* is perhaps the most unlikely to result in an amicable settlement. This puts the focus on the fact-finding and recommendation functions of the Commission. The future development of the procedure remains very interesting.

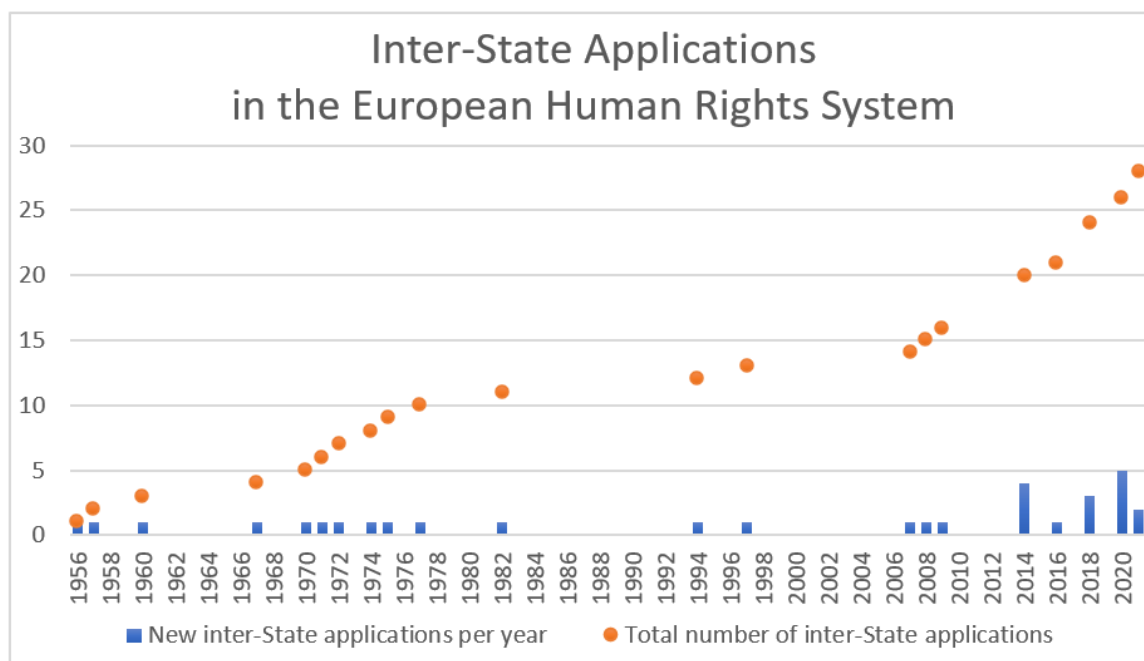
⁴⁰ OHCHR (n 6).

3. The European System

Dr. Isabella Risini, University Bochum and University of Augsburg

Introduction

Dr. Isabella Risini's presentation provided a general overview of inter-state applications under the European Convention on Human Rights. She focused on the new phenomenon of what she terms 'counter applications', which are applications by two High Contracting Parties against each other, such as the situation concerning Ukraine and Russia since the summer of 2021 before the ECtHR, as well as the cases of Armenia and Azerbaijan since the fall of 2020.



Source: https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf (Graph by J.Batura, 02/2022)

The above graph shows that there has been an increase in inter-state applications since 2014, starting with the *Georgia v Russia (I)*⁴¹ application which started right before the armed conflict broke out between the two countries. As of October 2021, there are 11 sets of inter-state cases pending before the Court, some of which bring together several inter-state applications in one proceeding. In 2020, the use of inter-state applications reached an all-time high of six applications in one year. The Court has never had to deal with a comparable number of inter-state cases at one time. Further, there are many potential inter-state applications which are not yet pending before the Court, for example, the situation in Turkey following the failed coup d'état.⁴² It is worthwhile considering why inter-state applications are not brought before the Court where a situation would call for such a reaction.

⁴¹ *Georgia v Russia*, no. 13255/07 (ECtHR, 30 June 2009)
[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%2213255/07%22\],%22documentcollectionid%22:\[%22DECISIONS%22\],%22itemid%22:\[%22001-93425%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2213255/07%22],%22documentcollectionid%22:[%22DECISIONS%22],%22itemid%22:[%22001-93425%22]}) accessed on 28 February 2022.

⁴² 'Turkey's failed coup attempt: All you need to know' (Al Jazeera, 15 Jul 2017)
<https://www.aljazeera.com/news/2017/7/15/turkeys-failed-coup-attempt-all-you-need-to-know>
 accessed on 28 February 2022.

Applications under the ECHR

Article 33 of the ECHR is the norm which provides for inter-state applications, and it is a rather simple norm. It states that '[a]ny 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.' The Court has broad jurisdiction, and it has compulsory jurisdiction. Unlike Article 22 of ICERD, which is the compromissory clause giving jurisdiction to the ICJ, Article 33 has not been reserved by any of the High Contracting Parties as it was the default mechanism under the old setup of the ECHR (prior to Protocol 11 and before the Commission was abolished and the single Court was installed). Unlike in the UN Treaty System, the Council of Europe system saw a number of inter-state applications from an early point in time, even prior to Protocol 11. There is no need for a legal interest (or victimhood) of the applicant State to bring such an inter-state application, and it can also be exercised in favour of non-nationals of the applicant State, such as *Austria v Italy*,⁴³ going beyond diplomatic protection.

Admissibility

The admissibility hurdles for inter-state applications are rather low, especially in comparison to the individual applications under Article 34 of the ECHR.

The two hurdles which must be overcome are the six-month rule (now four months⁴⁴) and the requirement to exhaust domestic remedies under Article 35(1). In view of the rather generous and necessary exceptions to the latter rule, often the Court finds itself in the role of a court of first instance with the duty of finding facts. In comparison to the cases based on Article 22 of CERD before the ICJ, Article 33 of the ECHR allows for fast reactions of States to situations of acute crisis. By contrast, under Art. 22 CERD, and according to the jurisprudence of the ICJ, a dispute and prior negotiations are required. This is why it took one year before Armenia's and Azerbaijan's applications reached the ICJ.⁴⁵

ECtHR Challenges

The ECtHR is a forum which is easily accessible. This easy access also brings challenges, and ensuing reform considerations are ongoing. The ECtHR is, in a way, the victim of its own success with inter-state applications, as well as individual ones. The challenges related to inter-state proceedings are manifold and concern, inter alia, the role of simultaneous proceedings in various international fora, the outcome regarding just satisfaction awards, and issues of fact-finding, as well as the potential of friendly settlements. This type of settlement could alleviate the burden of the ECtHR, which is not sufficiently funded to handle so many international cases involving such resource-heavy proceedings.

A further issue is the way that international humanitarian law affects the jurisdiction of the Court and the application of the ECHR, and how the Convention should be systematically integrated with international humanitarian law. These troubles were very clear in the *Georgia*

⁴³ ECHR, *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 (Austria v Italy)* 788/60, 1961 <<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115598&filename=AUSTRIA%20v.%20ITALY.pdf>> accessed on 28 February 2022.

⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 15, art 4.

⁴⁵ *The Republic of Armenia institutes proceedings against the Republic of Azerbaijan and requests the Court to indicate provisional measures* ICJ Press Release No. 2021/20 (16 September 2021) <<https://www.icj-cij.org/public/files/case-related/180/180-20210916-PRE-01-00-EN.pdf>> & *The Republic of Azerbaijan institutes proceedings against the Republic of Armenia and requests the Court to indicate provisional measures* ICJ Press Release No. 2021/21 (23 September 2021) <<https://www.icj-cij.org/public/files/case-related/181/181-20210923-PRE-01-00-EN.pdf>> both accessed on 18 March 2022.

*v Russia (II)*⁴⁶ judgement in 2021. Many commentators expressed their dissatisfaction with this judgement because the Grand Chamber saw itself as unable to look at the five-day hostilities from the angle of the right to life under Article 2 of the ECHR. A lot of this dissatisfaction comes from the fact that international humanitarian law has very few judicial enforcement structures.

Counter Applications

After her reflections on the scale of the challenges of the ECtHR with regards to inter-state cases as part of the overall function of the ECHR supervisory system, Dr Risini referred to counter applications as a relatively new phenomenon. The *Ukraine and The Netherlands v Russia*⁴⁷ case revolves around armed conflict between Ukraine and Russia in eastern Ukraine. The Netherlands complain about the downing of flight MH17 in the summer of 2014, as two-thirds of the victims in the plane were Dutch. Canada has sought to join these proceedings. In July 2021 Russia filed a counterapplication alleging Ukraine's responsibility for many of the allegations Ukraine and the Netherlands have raised.⁴⁸ Overall, there are nine Ukrainian inter-state applications against Russia.⁴⁹

There are also counter applications in the cases of *Armenia v Azerbaijan*, *Armenia v Turkey* and *Azerbaijan v Armenia*.⁵⁰ These concern the conflict in and around Nagorno-Karabakh which peaked again in late 2020. This was the first time in history that the ECtHR saw a counter application - a State that was a respondent bringing an application against the applicant. The Court has also issued interim measures in these proceedings concerning the right to life. It will be interesting to see how the ECtHR will deal with these counter applications. A joinder of the respective cases might be in the best interest of justice. The situation in Armenia and Azerbaijan is probably less difficult than in the Russian cases from a procedural angle, because the four-month rule may bar admissibility. However, the Court

⁴⁶ *European Court joins three inter-State cases concerning Eastern Ukraine (Ukraine and the Netherlands v. Russia)* ECHR Press Release 354 (2020) <<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6875827-9221606&filename=European%20Court%20joins%20three%20inter-State%20applications.pdf>> accessed on 28 February 2022.

⁴⁷ *New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17* ECHR Press Release 213 (2020) <<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6748208-9004448&filename=New%20inter-State%20application%20brought%20by%20the%20Netherlands%20against%20Russia%20.pdf>> accessed on 28 February 2022.

⁴⁸ *Inter-State application brought by Russia against Ukraine (Russia v Ukraine)* ECHR Press Release 240 (2021) <[file:///C:/Users/hanna/Downloads/Inter-State%20case%20brought%20by%20Russia%20against%20Ukraine%20\(1\).pdf](file:///C:/Users/hanna/Downloads/Inter-State%20case%20brought%20by%20Russia%20against%20Ukraine%20(1).pdf)> accessed on 18 March 2022.

⁴⁹ The latest development in this matter occurred on 1st March 2022 where the Court granted urgent interim measures. See *The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory (Ukraine v. Russia (X))* ECHR Press Release 068 (2022) <<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf>> accessed on 28 February 2022.

⁵⁰ *Receipt of applications in two inter-State cases related to the conflict in Nagorno-Karabakh (Azerbaijan v. Armenia (no. 47319/20) and Armenia v. Azerbaijan (no. 42521/20))* ECHR Press Release 046 (2021) <<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6927916-9310877&filename=Receipt%20of%20application%20forms%20in%20two%20inter-State%20cases%20related%20to%20Nagorno-Karabakh%20conflict.pdf> ; <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7022025-9472980&filename=Reception%20of%20the%20inter-State%20application%20Armenia%20v.%20Turkey%20%20.pdf>> accessed on 28 February 2022.

has some degree of flexibility in handling these admissibility requirements and, in light of the absence of the possibility of counter claims, it is an avenue to join these proceedings in this framework.

Finally, what similarities do ICERD proceedings under Article 22 and before the CERD have with ECtHR proceedings? As noted by Christopher Greenwood, conflicts which are brought before these fora usually have a much broader dimension than what the four corners of the respective Treaty covers, so they all have what he terms as "the Cinderella problem".⁵¹

⁵¹ Sir Christopher Greenwood, 'Challenges of International Litigation' Lauterpacht Centre for International Law (7 October 2011) at 30:31, available at <<http://itunes.apple.com/itunes-u/lcil-international-law-seminar/id472214191>>.

4. Other Inter-state Communication Procedures

Graham Coop, Volterra Fietta

Introduction

Graham Coop provided an overview of other mechanisms for inter-state communications procedures in international human rights law and why they have not been used.

Inter-state complaints under ICERD and the ECHR, while the most commonly used, are not the only inter-state procedures which exist in international human rights law. Much like ICERD, several other human rights treaties contain provisions that allow States Parties to complain about alleged violations by another State Party. The ECHR, on a similar note, is not the only regional human rights court that allows for inter-state complaints. Similar provisions also exist under the Inter-American and African systems of human rights. However, these other inter-state procedures are rarely, if ever, used in practice. When confronted with these procedures, States often choose alternatives that are considered politically and diplomatically safer. This presentation:

1. explored other inter-state procedures in international human rights law. This includes inter-state complaints procedures and other human rights treaties in other regional human rights systems, such as the Inter-American and African Court systems;
2. addressed why these procedures are not more commonly used and why States often prefer to resolve human rights issues through other means; and
3. identified some of the alternatives that States might prefer. These include Advisory Opinions in regional courts and the ICJ.

Inter-state Communications in other UN Treaty bodies

A State can allege the violation of human rights obligations by another State in two ways – through human rights treaty bodies and through human rights courts.

ICERD is not the only UN Convention that allows for inter-state complaints. There are other human rights treaties which also allow for such complaints. However, unlike ICERD, these procedures are not compulsory, but reciprocity based. Some of these are based upon Committees such as the CEDAW Committee, the CAT Committee, the Committee on Migrant Workers ('CMW') and the Committee on Enforced Disappearances ('CED'). Many of these set out a similar procedure to ICERD, this means that disputes between States Parties related to the interpretation or application of the relevant Convention must be resolved first by negotiation or, if this is unsuccessful, by arbitration. If the parties are unsuccessful in reaching an agreement on arbitration within six months, the States involved may then refer the dispute to the ICJ.

The ICCPR and the Committee on the Rights of the Child ('CRC') also have a similar procedure to ICERD by establishing an ad hoc Conciliation Commission. However, unlike ICERD, this procedure only applies to the resolution of disputes between States Parties which have made a declaration accepting the competence of the relevant Committee in this regard. Other treaties such as the CAT, CMW, CED and the Optional Protocol to the ICESCR contain simple provisions whereby the relevant Committee will itself consider complaints made by one State Party in relation to another, but only as long as the two States have declared that they accept the competence of the Committee. While there are a number of inter-state procedures dealing with human rights violations which are under treaties other than ICERD, none have ever been brought to date.

Regional human rights courts

A similar pattern is observed when looking at inter-state disputes in other regional human rights courts. The *American Convention on Human Rights* ('the American Convention') and the *African Charter on Human and Peoples' Rights* ('the African Charter') also provide a similar procedure to the inter-state complaints procedure at the ECHR, however, they are much less used in practice.

Article 45 of the American Convention allows for States Parties to present a communication to the Organisation of American States ('OAS') alleging that another State Party has committed a violation of a right conferred in the American Convention. However, unlike the ECHR, this depends on a declaration recognising the competence of the Commission to receive and examine such communications both by the State submitting a communication and the State subject to it.

To date, this procedure has only been used twice. The first instance was a communication from Nicaragua with respect to Costa Rica in 2006 alleging a breach of the rights of Nicaraguan immigrants in Costa Rica. The American Commission found this case to be inadmissible as Nicaragua had failed to prove the 'existence of a generalised practice of discrimination against the Nicaraguan migrant population in Costa Rica'.⁵² The second instance was a communication from Ecuador against Colombia in 2009 in relation to a military operation conducted by the Colombian army which resulted in extra-judicial killing of an Ecuadorian citizen.⁵³ This case was eventually resolved by an amicable settlement between the States concerned.

The African Charter also sets out the possibility of inter-state procedures under Article 47. The acceptance of inter-state communications is automatic under the African Charter and States may submit these both to the African Commission and the African Court. There have been only three instances of inter-state communication so far and all of them to the African Commission. First, the Democratic Republic of the Congo sent a communication in relation to Burundi, Rwanda and Uganda in 1999 in which the Commission found that there had been a violation of several provisions of the African Charter.⁵⁴ In 2013, Sudan sent a communication relating to South Sudan, which the Commission did not accept.⁵⁵ Finally, in 2019, Djibouti sent a communication regarding Eritrea and this is currently at the merits stage.⁵⁶

Challenges of Inter-state Communications

The procedural restraints on inter-state communications can make the use of these procedures even harder, leading States to look for alternatives. For example, unlike ICERD,

⁵² Inter-American Court of Human Rights, *Nicaragua v Costa Rica* (2007) No 11/07, para 305 <<https://www.cidh.oas.org/annualrep/2007eng/interstatecase.eng.htm>> accessed on 1 March 2022.

⁵³ Inter-American Court of Human Rights, *Franklin Guillermo Aisalla Molina v Ecuador-Colombia* (2010) No 112/10 <<https://www.oas.org/es/cidh/docs/anual/2013/docs-es/63.EC-COAR12779ES.pdf>> accessed on 1 March 2022.

⁵⁴ *Democratic Republic of Congo v Burundi, Rwanda, Uganda* (Decision) 227/99 African Commission, 1999 <https://www.achpr.org/public/Document/file/English/227_99_democratic_republic_of_congo_buru_ndi_rwanda_uganda.pdf> accessed on 28 February 2022.

⁵⁵ African Commission, '34th Activity Report of the African Commission on Human and Peoples' Rights' (2013), page 4, available at <<https://archives.au.int/bitstream/handle/123456789/6856/34TH%20ACTIVITY%20REPORT-E.pdf?sequence=1&isAllowed=y>> accessed on 28 February 2022.

⁵⁶ African Commission, '46th Activity Report of the African Commission on Human and Peoples' Rights' (2019), page 6, available at <https://www.achpr.org/public/Document/file/English/46th%20Activity%20Report%20ACHPR_%20ENG.PDF> accessed on 28 February 2022.

the ECHR and the African Charter, and many of the other inter-state procedures, are optional for States. This means that unless both or all States involved in a given dispute have declared they accept this procedure, it cannot be used. Given the political and diplomatic costs of becoming involved in such procedures, States are not always willing to accept them. Mr Coop suggested that the reasons why these procedures are not commonly used include that they are simply not the most suitable solution for States. There might be political and diplomatic concerns, making these procedures counter-productive. Often States would much rather resolve issues related to human rights in the political or diplomatic arena instead of openly and formally denouncing a State on matters that are sensitive, including allegations of human rights violations.

States tend to invoke inter-state procedures on human rights whenever there is an underlying interest in doing so. For example, Qatar's complaints under ICERD inhabited parallel proceedings between Qatar and the UAE at the ICJ. Another example are the proceedings under the ECHR between the 1950's and 1970's, in which States often had direct political interests.⁵⁷ This does not make the complaint any less legitimate from the human rights perspective, but nonetheless, we can see that the complaints are often being used as a tool to settle political differences.

The second substantive reason that the procedures are not commonly used is the fact the public exposure attached to formal proceedings can easily backfire on the complainant State. For example, an inter-state procedure regarding human rights can embitter the relationship between States involved. Conversely, if a friendly solution is reached, which is often the primary goal of bringing such proceedings in the first place, the complainant State might then become an object of general criticism for bargaining on human rights concerns. There is not much flexibility for States once these procedures are initiated and that often makes their costs and political diplomatic terms higher than predicted.

Where the States involved have not declared that they accept the procedure, the procedure cannot be used. In many cases, including CAT for example, barely one-third of States Parties have made a declaration that they accept the competence of the Committee, and this trend makes the chance of a successful inter-state complaint under these systems much dimmer. The Inter-American Court of Human Rights under the American Convention is in the same situation. The United States of America is part of the OAS but it has not accepted the jurisdiction of the Court. So if a State which is part of the American Convention wants to lodge a complaint under Article 45 concerning human rights violations against the U.S.A., it can't do so. It needs to look for alternative remedies, which became the preferred path for most States.

Hidden mechanisms for resolving inter-state disputes in international human rights law - Advisory Opinions

States may resort to more diplomatic ways to settle disputes within human rights law. Some alternatives may still be considered inter-state disputes, albeit under another name. This is often the case with Advisory Opinions in Human Rights Courts and at the ICJ. Latin American States, for example, have recently started to request Advisory Opinions from the Inter-American Commission in order to resolve human rights issues concerning other States Parties. This alternative has the advantage of bypassing the political and diplomatic concerns attached to the inter-state communications procedures. Where a State requests an Advisory

⁵⁷ See for instance Mikael Rask Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' Vol. 32, No. 1 (Winter 2007) Law & Social Inquiry 137.
<https://www.jstor.org/stable/pdf/4490555.pdf?refreqid=excelsior%3A982379e991dc31faed1d66bddfb3e918&ab_segments=&origin=> accessed on 28 February 2022.

Opinion from the Commission, there is no need to allege that another State is breaching the Convention *per se*.

Moreover, the procedure for Advisory Opinions under the Inter-American system is very straightforward. Under Article 64 of the American Convention, Parties need only state with precision the specific questions on which the opinion of the Court is being sought, as well as the provision to be interpreted, and its considerations in the name and addresses of the agent of the delegates. Mexico made two requests, one in 1997⁵⁸ and another in 2002,⁵⁹ and both were for Advisory Opinions concerning the rights of immigrants. Both of these requests could be linked to the U.S.A. and their treatment of Mexican immigrants in U.S.A. territory.

A similar situation occurred in 2014 when MERCOSUR requested an Advisory Opinion on the *Rights and Guarantees of Children in the Context of Migration and/or In Need of International Protection*.⁶⁰ That request could also be linked to the situation at the time in Central America and on the U.S.A. border. Colombia has also requested Advisory Opinions and in some cases, they could be linked to other issues involving Colombia, such as its ICJ dispute with Nicaragua or to the Venezuelan denunciation of the American Convention.⁶¹ These examples can still be considered as inter-state disputes in the sense that States seek to invoke them to indirectly settle potential disputes relating to other States Parties. In addition, in the case of the Inter-American Commission, it's an alternative to formal resolution of disputes with countries such as the U.S.A. who don't recognise the jurisdiction of the Inter-American Court.

Finally, Advisory Opinions in the ICJ can also be an option for addressing human rights issues without directly exposing a State. There are at least three instances of this:

1. The famous Israeli Wall opinion in 2004 where the ICJ was called on to clarify the legal consequences arising from the construction of the wall built by Israel in the occupied Palestinian Territory.⁶²
2. The 2017 request by the General Assembly for an opinion regarding the consequences under international law arising from the British administration of the Chagos Archipelago.⁶³
3. And most recently, Vanuatu's request to the General Assembly for an Advisory Opinion on Climate Protection.⁶⁴

However, Advisory Opinions at the ICJ may only be requested by authorised bodies such as the General Assembly and the Security Council. Other UN Organs and specialised agencies may also do so if legal questions arise within the scope of their activities. The General Assembly requires at least a certain majority, if not two-thirds, of votes to make such a

⁵⁸ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16, Inter-American Court of Human Rights Series A No 16 (1 October 1999).

⁵⁹ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003).

⁶⁰ *Rights and Guarantees of Children in the Context of Migration and/or In Need of International Protection*, Advisory Opinion OC-21, Inter-American Court of Human Rights Series A No 21 (19 August 2014).

⁶¹ 'Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform' (International Justice Resource Centre, 19 September 2012).

<<https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/>> accessed on 1 March 2022.

⁶² *Legal Consequences of the Construction of a Wall* (Advisory Opinion) ICJ Rep 2004.

⁶³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Rep 2019 <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>> accessed on 1 March 2022.

⁶⁴ 'Vanuatu asks International Court of Justice to weigh in on right to be protected from climate change' (ABC News, 25 September 2021) <<https://www.abc.net.au/news/2021-09-25/vanuatu-takes-climate-change-international-court-of-justice-un/100491806>> accessed on 1 March 2022.

request. There are significant, albeit different, political hurdles in the way of this mechanism too.

Conclusion

To conclude and summarise, there are several other inter-state procedures apart from those that exist under the ICERD and the ECHR. These include other UN treaty bodies with their own inter-state complaints procedures and other regional human rights systems such as the Inter-American and the African systems. However, these procedures are not commonly used and there are several reasons for this. Some are procedural, but the main reasons would be the political and diplomatic costs attached to these procedures. For these reasons, States often resort to other alternatives, some of which can be considered inter-state dispute resolution in disguise, such as Advisory Opinions.

Questions

The following questions from the audience were discussed by the Panel of Experts:

1. Why did the activation of the ICERD inter-state communication mechanism take 60 years, and why is it not more widely used?

Dr. David Keane: There is an interesting article on inter-state communications from the 1980's in the *Human Rights Quarterly* by Scott Leckie which reflects on this.⁶⁵ He argues that inter-state communications were not widely used, and that their optional character and the reciprocal nature also indicate that there is a limited number of States which can use the mechanism. Not every State Party can access the mechanism as both sides need to have opted in, so that limits the use of inter-state communications in other treaties. ICERD is compulsory, so the optional character of other treaties doesn't tell us why States chose not to use ICERD.

Earlier commentaries on ICERD talk about disguised inter-state complaints that were occurring under the reporting process, and there was a feeling that that the reporting mechanism was being used to criticise other States for not upholding the obligations of the treaty. An example of this was Syria in the 1980s, who was ultimately challenged by the Committee about whether it was in fact trying to take an inter-state communication against Israel or not. Syria elected not to take an inter-state communication under Article 11.⁶⁶

Manfred Novak's ICCPR Commentary talks about three inter-state communications being contemplated under the ICCPR which didn't go ahead. They got as far as enquiries being made with the Office of the High Commissioner, and the Committee challenged at least one State Party as to whether it was in fact trying to bring a communication under Article 9 or Article 11, but it ultimately never progressed.⁶⁷

Jan Eiken: There must be an underlying interest to lodge a complaint and States may not have considered there was one. When it comes to ICERD specifically, the Article 22 mechanism is probably much more appealing to States Parties because they can pursue a judicial procedure with the ICJ. Under Article 11 you only have a conciliation procedure that has never been used, and no one knows how it works or what the exact outcome will be, so that is less attractive for States Parties.

2. Regarding the attraction that has come to ICJ in cases such as *The Gambia v Myanmar*⁶⁸ or the potentially imminent filing of *The Netherlands v Syria*, citing the violation of treaty obligations of the torture conventions, how do the speakers see the use or the recourse to the ICJ in this type of situation vis-à-vis inter-state communication options that have been described in this session.

Dr. Isabella Risini: The ICJ has also been used in relation to the Yugoslavia crisis based on the *UN Convention on the Prevention and Punishment of the Crime of*

⁶⁵ Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (May 1988) Vol. 10, No. 2 *Human Rights Quarterly* 249.

⁶⁶ *Inter-State communication submitted by the State of Palestine against Israel*, CERD-C-100-4, 12 December 2019, [2.23] and [3.5] <<https://www.ohchr.org/Documents/HRBodies/CERD/CERD-C-100-4.pdf>> accessed on 1 March 2022. See also Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 36th Sess. (1981), Supp. No.18, at 54 [173] A/36/18(SUPP) p. 54.

⁶⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR commentary* (2nd rev. ed., Engel Publishers, 2005).

⁶⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) ICJ Reports 2020 <<https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> accessed on 1 March 2022.

Genocide ('the Genocide Convention'). It is an international court, you know what you will get. It takes a long time, but you have a judicial outcome with a binding judgment, this is very attractive to States. I think the same is true for the ECtHR, which has not only a Commission that produces a non-binding report, but also a judgment that is binding and final.

Judge Tim Eicke: It is interesting to reflect on the difference between Courts and non-traditional mechanisms, like the UN committees, and how much that plays a role in terms of, as Dr. Risini said, the argument that "you know what you will get". Additionally, you have to consider that some members of the CERD are not legally qualified and have to engage with difficult legal issues which some people may see as outside their competence. Furthermore, there is the key debate about whether a view taken by a committee under a UN Convention is in fact binding or is just a view, rather than a judgment.

- 3. Regarding the suspension of the communications involving Qatar, do they prove that traditional dispute resolution measures are ultimately more attractive to settle international disputes, or can it be argued that the CERD submission played an important role in facilitating the latter negotiations and that States are still encouraged to use the CERD procedure?**

Jan Eiken: I do not think so, this is really proof of the effectiveness of other channels of diplomatic negotiation and also the role of third States, in this case the U.S.A., in brokering an agreement between States Parties. This really has nothing to do with what occurred under ICERD.

Judge Tim Eicke: I assume there is an interaction of all these mechanisms, and one does sometimes wonder whether bringing litigation brings a State Party back to a negotiating table which didn't exist previously.

Graham Coop: If there are several formal procedures on course, some perhaps more formal and more binding than others, but ultimately an amicable settlement is reached, unless you were very closely involved in the behind-the-scenes negotiations, it is really impossible to say whether it was the more traditional procedures, or the less formal softer procedures, or the intervention of a significant third party (such as the United States), which is the most responsible for the amicable settlement.

- 4. If a State wishes to pursue a formal dispute, not just an Advisory Opinion, against another State under the ICCPR, where no regional body has jurisdiction, and the State against which they wish to bring a claim has not made a statement accepting the Human Rights Committee jurisdiction, what option do they have to settle the matter?**

Dr. Isabella Risini: Where States do not consent to the jurisdiction of international tribunals, there are no proceedings. It is also always required that the respondent State is at the table, and parallel proceedings in various fora might be one option to bring somebody back to the negotiation table.

- 5. Do other UN human rights treaties and regional human rights treaties require victimhood for activating a communication?**

Dr. David Keane: There are no victimhood requirements in any of the other treaties. The main mechanisms that allow one State Party to take communication against another State Party are: Article 41 ICCPR; Article 12, Third Optional Protocol CRC; and Article 21 CAT. There are no victimhood requirements in any of those three treaties, and it must be noted that these other mechanisms are all optional and not compulsory. It is also worth noting that with the CRC a State firstly ratifies the Convention, and then ratifies the

Optional Protocol, and then they make a declaration under the Optional Protocol to allow for inter-state communications mechanisms.

Graham Coop: The question of *locus standi* provides a very interesting argument about whether a State should need to prove an interest in justice in order to be able to bring the claim before that Court, or before a human rights body.

6. May the flexibility that the ECtHR is likely to show towards the admissibility of the counter-applications affect the foreseeability of the ECHR or human rights protection system, and what do you think is the role that legal scholars can play in this regard?

Dr. Isabella Risini: Regarding how the Court will handle the Russian application, it might run into the problem of the six-month rule, so the things that happened before are basically not within the *ratione temporis* jurisdiction of the Court anymore. In this case, there can be some flexibility because the substance of the claim is still before the Court as the Ukrainian and Dutch applications, as well as many individual applications, will have to be decided anyway. Foreseeability is important, but it's interesting to reflect for whom it is important for. I think it's important for applicant States that a proceeding is foreseeable, and that they can assess the risks of failure, as this is something that they want to avoid.

I would not overrate the role of international legal scholars, we are just people who comment, and think, and show possibilities. We are not subjects and we don't make international law.

7. Concerning the *Slovenia v Croatia* case, the ECtHR seems to have added some sort of new admissibility criterion on inter-state applications, claiming that States cannot act on behalf of subjects which are not included in the list of Article 34 allowing for individual applications. What are the procedural conditions in inter-state cases compared to individual applications?

Dr. Isabella Risini: I personally would have decided this case a bit differently, but I think it shouldn't be overrated. This is a very special case with a very special set of facts. The substance was already decided, and I think it is understandable that the Court did not want to go into the merits again. It looks like now there is a new admissibility requirement. However, I do not see that this is something that will have a big bearing on future cases, it is rather a question that is relevant for the relationship of individual and overlapping inter-state cases. I would not overrate this, and I would not think that there is a further admissibility requirement.

Regarding the difference between the admissibility requirements in individual cases and inter-state cases, the convention is quite clear on this. Article 35(1), which contains the six-months rule (now four-months), and the requirement to exhaust domestic remedies, applies both to individual and inter-state cases, while all other admissibility requirements only apply to individual applications. That means there is a certain privilege for inter-state applications, and rightly so.

Biography of Chair and Experts

Chair: Judge Tim Eicke

Judge at the ECtHR elected in respect of the United Kingdom, and Vice President of Section IV of the Court. His area of expertise covers human rights law, the law of the European Union, public international law as well as UK public and constitutional law.

Dr. David Keane

Assistant Professor in Law at Dublin City University. His research focuses on international human rights law and ICERD.

Jan Eiken

Research Assistant at the Chair of Public International Law at the University of Potsdam. Currently completing a PhD thesis with a focus on the inter-state communications procedure.

Dr. Isabella Risini

Visiting Professor at the Faculty of Law at the University of Augsburg and Senior Research Associate at the Ruhr-Universität Bochum, Dr. Risini completed her PhD on the inter-state application process under the European Convention on Human Rights.

Graham Coop

Partner at Volterra Fietta. Expert with extensive experience in international dispute resolution and public international law, including advising and representing governments and international organisations, as well as companies.

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