Indonesian Journal of International Law

Volume 19
Number 2 *Third World Approaches to International Law*

Article 2

1-31-2022

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Cover Page Footnote

The author would like to profusely thank Ms. Aaiysha Topiwala and Ms. Charvi Dev for proofreading the footnotes and bibliography. The author would also like to thank the editors and reviewers of the Indonesian Journal of International Law (IJIL) for their assistance. All errors in this paper are solely mine.

Indonesian Journal of International Law (2022), Vol. 19 No. 2, pp. 213-237
https://doi.org/10.17304/ijil.vol19.2.2

LACK OF 'WILL' OR 'OPTIONS': A STUDY ON THE INTERNATIONAL COURT OF JUSTICE'S TRYST WITH RACIAL DISCRIMINATION

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Abstract

The practice of racial discrimination is detrimental to the international community's interest. Therefore, efforts on a national and international level to curb racial discrimination must be undertaken. The International Convention on the Elimination of the Racial Discrimination (ICERD), 1969, is an example of an effort to curb the practice of racial discrimination. The mandate to interpret and settle disputes pertaining to racial discrimination falls on the Committee on the Elimination of Racial Discrimination (CERD). However, the CERD is endowed with functions and a limited mandate, and since 2010, States have been increasingly taking recourse to inter-state dispute settlement mechanisms, i.e., the International Court of Justice (ICJ) on racial discrimination. To date, the ICJ has confronted ICERD on four contentious cases. Most of the previous research on the ICERD vis-à-vis ICJ relates to the discrete cases; however, this paper comprehensively evaluates the contribution of ICJ in interpreting the ICERD (in contentious cases). Although racial discrimination is one of the most heinous crimes that shakes the conscience of humanity, it is observed that the ICJ has offered an inconsistent interpretation on ICERD, thus departing from ensuring 'legal certainty'. This study also assumes significance as it sketches the ICJ's attitude in dealing with human rights matters, transcending its purely traditional state-centric mandate.

Keywords *: CERD, human dignity, human rights, ICERD, International Court of Justice, Racial Discrimination.*

Submitted : 29 June 2021 | Revised : 2 September 2021 | Accepted : 11 December 2021

I. INTRODUCTION

Racial discrimination permeates every aspect of society[1]. Hardly a day goes by without news of racial discrimination and caste discrimination.[2] International and human rights laws are tools to understand and criticize these oppressive and dehumanizing acts.[3] The advent of human rights discourse kick-started with the establishment of the United Nations (UN)[4]. The UN Charter housed several provisions on the protection of human rights.[5] Subsequently,

[4] Corrie Gerald Haines, "The United Nations Challenge to Racial Discrimination in South Africa 1946–1950," *African Studies* 60, no.2 (2001): 185-204.

[5] Brunson MacChesney, "International Protection of Human Rights in the United Nations," *Nw. UL Rev* 47, (1952): 198; Saario, et al, "The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation," *Cal. W. Int'l LJ* 7, (1977): 591; Bertie G. Ramcharan, *The concept and*

the notion of enjoyment of right devoid of distinction in terms of race, religion, sex and language was reflected in the Universal Declaration of Human Rights, 1948 (UDHR)[6]. As observed by Professor Patrick Thornberry, "The underlying emphases in UDHR are on equality as a governing principle in society and law, and on recognizing that human beings come into the world with an inheritance of race, color etc., which is entitled to respect—hence the list of 'grounds' on which discrimination is not to be permitted."[7] The initial focus on the prohibition of racial discrimination was in the backdrop of colonialism and was not within the rubric of internal affairs of the States.[8]

One of the first human rights instruments prohibiting racial discrimination is the ICERD, which was adopted by the UNGA resolution in 1965 and entered into force in 1969.[9] Since the coming into force of ICERD, it has garnered almost universal support from the States.[10] The ICERD established several mechanisms to crack down on racial discrimination under the supervision of the CERD, which are reflected in Articles 11-13 and 22 of ICERD. Article 11 of the ICERD reads as:

> *"If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. 2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and the other State."*[11]

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present status of the international protection of human rights: forty years after the universal declaration (BRILL, 2021); Nigel S. Rodley, "The Evolution of United Nations' Charter-based Machinery for the Protection of Human Rights" in *Human Rights Protection,* (Brill Nijhoff, 2002): 187-196.

[6] United Nations General Assembly, Universal Declaration of Human Rights. Vol. 3381. Department of State, United States of America, 1949; Hersch Lauterpacht, "The universal declaration of human rights," *British Yearbook of International Law* 25, (1948): 354.

[7] Thornberry and Patrick, "Confronting racial discrimination: a CERD perspective," *Human Rights Law Review* 5, no.2 (2005): 240.

[8] CR Boxer, ed., *Race relations in the Portuguese colonial empire, 1415-1825* (United Kingdom: Clarendon Press, 1963); Robert Ross ed., *Racism and Colonialism: Essays on Ideology and Social Structure* (The Hague, Netherlands: Martinus Nijhoff Publisher, 1982), 227.

[9] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, (entered into force 4 January 1969) <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> visited on 25 November 2021.

[10] "As the data reveals, the CERD has gained wide acceptance with Signatories: 89. Parties: 182", accessed 15 November 2021, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en .

[11] *Ibid.*

Furthermore, Article 12 provides for establishing an *ad-hoc* conciliation commission, with five members for amicably settling disputes between the parties. Moreover, the Committee is competent to entertain individual or group complaints within its jurisdiction, but this is subject to a State party accepting the competence of the Committee to entertain the individual complaint.[12] Alongside the Committee, the ICERD provides for settling disputes through the ICJ, if not settled through the negotiation or Article 11 of the ICERD. Article 22 of ICERD reads as:

> *"Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."*[13]

Despite the built-in provision by the ICERD, States have seldom approached the ICJ.[14] However, the last few years have witnessed a plethora of cases in the docket of the ICJ on ICERD. One logical argument could be attributed to the soft sanctions provided by the CERD.[15] Despite States opting to approach the ICJ, it is observed that the language of the ICJ vis-à-vis ICERD is uneven and is eclipsed by the ICJ's structural limitations. At a macroscopic level, this phenomenon, which is conspicuous in the realm of human rights discourse, has impacted the interpretation of the ICERD.

This article is organized as follows. Section II contextualizes the ICJ's encounter with human rights jurisprudence in the backdrop of it being conceived as an institution exclusively to resolve inter-state disputes. Section III provides an overview of dispute settlement under the ICERD. Section IV provides a detailed exposition of the ICJ's tryst with ICERD and its critique. Section V provides the concluding remarks on the paper.

[12] *Ibid.*, Rüdiger Wolfrum, "The Committee on the Elimination of Racial Discrimination," *Max Planck Yearbook of United Nations Law Online* 3, no.1 (1999): 489-519.

[13] International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, 2106 (XX) (entered into force 4 January 1969), *See* note 9 above.

[14] This is apparent from the fact that in the entire history of the ICJ there have been only four contentious cases on CERD, most of which emerge post-2010, these cases are- *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 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); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan).*

[15] Dai Tamada, "Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?" *Journal of International Dispute Settlement* 12, no.3 (2021): 405-426; David Keane, "Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument," *Human Rights Law Review* 20, no.2 (2020): 236-268.

II. INTERNATIONAL COURT OF JUSTICE AND HUMAN RIGHTS

The ICJ, which was established during the era of the *SS Lotus,*[16] has started to respond to human rights cases. One can build a construct from the scattered pronouncement on human rights law. Although human rights are interpreted as an incidental issue in cases before the ICJ, it has garnered attention in recent years.[17] The incorporation of human rights issues directly under the purview of compromissory clause of human rights instruments and elections of judges to the ICJ previously holding positions in the human rights bodies[18] have ensured that States press the services of the ICJ on questions of human rights. Moreover, as succinctly put by the late Israeli diplomat Shabtai Rosenne, "The task of the ICJ is to further develop international law and not react to the existing law."[19] Having said this, the judicial function of the ICJ has its limits; the ICJ cannot go beyond the dispute submitted by the parties and jurisdiction is strictly based on consent.[20] As Dutch jurist Peter Kooijmans opines, "of course, the Court has no choice but to act within these parameters, but the way in which it carries out its function is dependent upon the conceptualisation of its task; the Statute is not a straitjacket which leaves no room for an imaginative interpretation."[21]

The ICJ has provided constructive exegesis of human rights laws with these structural limitations.[22] The Permanent Court of International Justice (PCIJ), the precursor to ICJ, kick-started the process of removing with the domestic jurisdiction barrier, which paved the way for subsequent developments in human rights.[23] Whether something is solely a question of

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[16] The reference to the SS Lotus judgement was made by Judge President Bedjaoui (Declaration) in the Legality of the Threat or Use of Nuclear Weapons (1996, Advisory Opinion). The Judge was of the opinion that the ICJ has come a long way from the 'Lotus' jurisprudence.

[17] Vera Gowlland-Debbas, "The ICJ and The Challenges of Human Rights Law in Andenæs," in *A Farewell to Fragmentation,* Mads Tønnesson, and Eirik Bjorge, eds. (United Kingdom: Cambridge University Press, 2015) https://bit.ly/3rgXrfN.

[18] Rosalyn Higgins, "Human rights in the International Court of Justice," *Leiden Journal of International Law* 20, no.4 (2007): 745-751.

[19] Shabtai Rosenne, "Sir Hersch Lauterpacht's Concept of the Task of the International Judge," *American Journal of International Law* 55, no.4 (1961): 825-862.

[20] Stanimir A. Alexandrov, "The compulsory jurisdiction of the international court of justice: how compulsory is it?" *Chinese journal of international* law 5, no.1 (2006): 29-38.

[21] He Judge Pieter Kooijmans, "The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy," *International & Comparative Law Quarterly* 56, no.4 (2007): 742.

[22] For a detailed exposition of ICJ and Human Rights, see Martin Scheinin,"The ICJ and the Individual," *International Community Law Review* 9, no.2 (2007): 123-137; Gentian Zyberi, *The Humanitarian Face of The International Court of Justice: its contribution to interpreting and developing international human rights and humanitarian law rules and principles* (Netherlands: Utrecht University, 2008); Zlata Drnas De Clément, "The Humanisation Of International Courts in International Law: New Actors, New Concepts-Continuing Dilemmas," (Brill Nijhoff, 2010): 397-408.

[23] World Courts, "Minority Schools in Albania Thirty-Fourth (Ordinary) Session. April 6th, 1935", accessed

domestic jurisdiction depends on the development of international relations. Subsequently, this resulted in Article 2(7) of the UN Charter, which reads as:

> *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter Vll."*[24]

With the advent of the UN Charter, it became apparent that the concept of human rights was 'internationalized', thereby insulating it from the domain of the States.[25] The realization of the human rights movement started to reflect in the multilateral treaties concluded post the 1950s, which espoused the need for protection of 'collective interest'[26], these developments trickled down to the opinions in the ICJ. The ICJ, in the context of 'The Genocide Convention', observed "…convention the contracting States do not have any interests of their own; they merely have, one and au, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[27]

This articulation manifested as '*erga omnes obligation'* in the subsequent cases before the ICJ.[28]Transcending the traditional 'bilateral approach', the

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2 December 2021, http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania.htm,"Treatment Of Polish Nationals And Other Persons Of Polish Origin Or Speech 1n The Danzig Territory, Twenty-Third Session. February 4th, 1932", accessed 2 December 2021, http://www.worldcourts.com/pcij/eng/decisions/1932.02.04_danzig.htm.

[24] United Nations Charter, 1945, United Nation, accessed 3 December 2021, https://www.un.org/en/about-us/un-charter.

[25] J. Samuel Barkin, "The evolution of the constitution of sovereignty and the emergence of human rights norms," *Millennium: Journal of International Studies* 27, no.2 (1998): 229-252.

[26] Federica Paddeu, "Multilateral disputes in bilateral settings: International Practice lags behind theory," *The Cambridge Law Journal* 76, no.1(2017): 1-4; Mathew Craven, "The Genocide Case, The law of treaties and State succession," *The British Yearbook of International Law* 68, no.1 (1998): 151; Fawcett and, J. E. S, "Twenty years after the Genocide convention," *Patterns of Prejudice* 2, no.6 (1968): 23-25.

[27] Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide Advisory Opinion of May 28th, 1951," International Court of Justice, https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf, accessed 10 December 2021,

[28] *Ibid*. Barcelona Traction, Light And Power Company, Limited (Belgium V. Spain), Second Phase, Judgment, ICJ Reports 1970, 32, at 33; Questions Relating To The Obligation To Prosecute Or Extradite (Belgium V. Senegal) Judgment Of 20 July 2012, Para 68, accessed 12th December 2021, Https://Www.Icj-Cij.Org/Public/Files/Case-Related/144/144-20120720-Jud-01-00-En.Pdf ; Case Concerning East Timor (Portugal V. Australia) 30th June 1995, Para 29, accessed 12 December 2021, Https://Www.Icj-Cij.Org/Public/Files/Case-Related/84/084-19950630-Jud-01-00-En.Pdf.

ICJ infused significance to the principles and rules concerning human dignity, including the protection of human persons that resonated in the ICJ in terms of *Right to Self-Determination* (RSD)[29], *Prohibition of Genocide*[30], *Torture*[31] and *diplomatic protection of nationals abroad*[32]. As highlighted by the ICJ in the *Case Concerning United States Diplomate and Consular Staff In Tehran*,

> *"…the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."*[33]

The human rights wave in the ICJ got its impetus through the parallel growth of concepts like customary international law[34], *jus cogens*[35] and human rights treaties. Furthermore, human rights defined as self-contained[36] found bases in general international law and influenced other branches of international law. One illustration of this is the impact of human rights in the regime of armed conflict, which in the words of Professor Vera Gowlland-Debbas, "…The contribution of the ICJ, is the application of human rights in armed conflict is innovative as it has been traditionally hermeneutically sealed off each other"[37], this stretched to the use of nuclear weapon, in terms of

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[29] Gentian Zyberi, "Self-determination through the lens of the International Court of Justice," *Netherlands International Law Review* 56, no.3 (2009): 429-453; Marco Longobardo, "Genocide, Obligations Erga Omnes, and The Responsibility to Protect: Remarks on a Complex Convergence," *The International Journal of Human Rights* 19, no.8 (2015): 1199-1212.

[30] Andrea Gattini, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment," *European Journal of International Law* 18, no.4 (2007): 695-713.

[31] Questions Relating To The Obligation To Prosecute Or Extradite (Belgium V. Senegal) Judgment of 20 July 2012, accessed 14 December 2021, https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf.

[32] Case Concerning Ahmadou Sadio Diallo (Republic Of Guinea V. Democratic Republic of The Congo) Judgment Of 30 November 2010, accessed 16 December 2021, https://www.icj-cij.org/public/files/case-related/103/103-20101130-JUD-01-00-EN.pdf.

[33] Case Concerning United States Diplomate And Consular Staff in Tehran (United States of America V. Iran) Judgment Of 24 May 1980, para 91, accessed 18 December 2021 https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf.

[34] For more on the approaches to customary international law refer to Anthea Elizabeth Roberts, "Traditional and modern approaches to customary international law: a reconciliation," *American Journal of international law* 95, no.4 (2001): 757-791.

[35] Atul Alexander, "Ulf Linderfalk: Understanding Jus Cogens in International Law and International Legal Discourse," *Liverpool Law Review* 41, no.3 (2020):391-394; Martha M Bradley, "Jus Cogens' Preferred Sister: Obligations Erga Omnes and the International Court of Justice–Fifty Years after the Barcelona Traction Case" in *Peremptory Norms of General International Law (Jus Cogens).* (Brill Nijhoff, 2021)193-226.

[36] Michael Runersten, *Defining 'Self-contained Regime'-A Case Study of the International Covenant on Civil and Political Rights* (Master Thesis, Lund University, 2008); Bruno Simma, "Self-contained regimes," *Netherlands Yearbook of International Law* 16 (1985): 111-136.

[37] Vera Gowlland-Debbas, "The ICJ and the challenges of human rights law in Andenæs," in *A Farewell to Fragmentation*, Mads Tønnesson, and Eirik Bjorge, eds. (United Kingdom: Cambridge University Press,

breaches of Article 6 of *International Covenant on Civil and Political Rights* (ICCPR), 1966, i.e. Right to Life. Thus, human rights are applied as an add-on to humanitarian law. Supplementing human rights to humanitarian law and acknowledging the extraterritorial application gives a sense that human rights in the sphere of ICJ has proliferated.[38]

The flashpoint, however, came in the backdrop of a series of cases on diplomatic protection. In the *LaGrand*[39] and the *Avena case*[40], the ICJ had a golden opportunity to ascribe human rights protection in the matter of Article 36(1) (a) (b) of the *Vienna Convention on Consular Relations* (VCCR), 1963[41] i.e., consular access, however, the ICJ fell short of declaring the same. Notwithstanding this, the ICJ eventually acknowledged the human rights protection in the *Diallo case*, wherein it observed: "Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights."[42] In the words of former Judge of ICJ Bruno Simma, " ..this case is, therefore, an interesting illustration of enforcement of human rights, through the channel of diplomatic protection."[43]

The rise in human rights consciousness in the domain of ICJ nevertheless failed to translate into tangible outcomes. In the cases of *Arrest Warrant*[44] and *Jurisdictional immunities*[45], the ICJ gravitated towards immunities over human rights violations; the passive positioning of the ICJ was denounced by

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2015), 124. https://bit.ly/3rgXrfN.

[38] Reference could be made to the 'wall opinion' case on the Interplay between Human Rights and Humanitarian Law, Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory Advisory Opinion of 9 July 2004" accessed 23 December 2021, https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

[39] LaGrand Case (Germany v. United States of America), 27 June 2001, <https://www.icj-cij.org/public/files/case-related/104/104-20010627-jud-01-00-en.pdf> visited on 27 December 2021.

[40] Case concerning Avena and other Mexican Nationals (Mexico v. United States of America), 31st March 2004, https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf

[41] Vienna Convention on Consular Relations 1963, accessed 26 December 2021, https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf .

[42] Preliminary Objection, Diallo Case (para 38), 31 March 2004, accessed 26 December 2021, https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf .

[43] Vera Gowland-Debbas, "The ICJ and The Challenges of Human Rights law in Andenæs," in *A Farewell to Fragmentation,* Mads Tønnesson, and Eirik Bjorge, eds. (United Kingdom: Cambridge University Press, 2015) https://bit.ly/3rgXrfN at 124.

[44] Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo V. Belgium) Judgment Of 14 February 2002, Para 54, < https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf > visited on 27 December 2021.

[45] Jurisdictional Immunities Of The State (Germany V. Italy: Greece Intervening) Judgment Of 3 February 2012, Para 78 <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> visited On 29 December 2021.

one of the Judges as "…State immunity is full of holes as Swiss cheese"[46]. The limitation of the ICJ in dealing with human rights is courtesy of the consensual nature of its jurisdiction. However, the ICJ can build on the human rights momentum gained. Contrary to its rich antecedent on human rights, the ICJ when confronted with four contentious cases involving the ICERD, appears to provide a very narrow interpretation. It would augur well if the ICJ consolidates a narrative of consistency on the reading of human rights and thereby juxtapose human rights into the unitary vision of international legal system into the sphere of ICERD.

III. DISPUTE SETTLEMENT MECHANISM UNDER ICERD

The implementation mechanism under ICERD is through the CERD and the Rule of Procedure (RoP) coupled with the contentious jurisdiction of the ICJ.[47] First, the available option to the States is the reporting mechanism wherein States submit reports to the UN and the Secretary-General on the measures it adopted to give effect to the provision of the ICERD based on the recommendations of CERD. Second, ICERD provides communication by individuals and groups of individuals; this is subject to an optional declaration made by the States.[48] The other three mechanisms are inter-state communication procedure, conciliation procedure and contentious jurisdiction of the ICJ. Although this paper's primary contention is to analyze the contentious jurisdiction of ICJ and its implication, a brief mapping of the inter-state communication and the conciliation procedure is highlighted to place the entire discussion in context.

A. INTER-STATE COMMUNICATION PROCEDURE

The inter-state complaint procedure is common to human rights treaties. Generally, it provides an option for the States to accept the committee's competence to receive communication. The inter-state communication procedure can be broken down into two stages. First, a State party communicates to the CERD on a matter relating to racial discrimination, followed by negotiations.[49] As professor Dia Tamada points out, the function

[46] Dissenting Opinion of Judge Yusuf in Jurisdictional Immunities Of The State (Germany V. Italy: Greece Intervening) Judgment of 3 February 2012, Para 26 < https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-05-EN.pdf> visited on 28 December 2021.

[47] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 21 December 1965, (entered into force on 4 January 1969), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en

[48] Dai Tamada, "Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?" *Journal of International Dispute Settlement* (2021): 411- 414.

[49] Leckie S., "The Inter-state complaint procedure in international human rights law: hopeful prospects or

of the CERD is strictly limited to the exchange of communication between the relevant State and its scope. It is confined to the matter and not adjusted to the satisfaction of the parties. Moreover, as Rule 69 provides, the CERD is not competent to provide views on the substance of the communication. Also, the CERD must ascertain whether all the domestic remedies are invoked and exhausted in the case according to international law.[50]

As Scott Leckie succinctly puts it, the reciprocal nature of the entire procedure limits the utilization of this mechanism. This is true as the first inter-state complaint was instituted only in 2018 when Palestinian diplomats filed an inter-state complaint against Israel for violating Art.2,3,5 of ICERD as an occupying power. Simultaneously the period also witnessed Qatar bringing claims against UAE and Saudi Arabia.[51]

B. CONCILIATION MECHANISM UNDER ICERD

The conciliation process is carried out under the aegis of the CERD, as it offers 'good office' to the parties in dispute. The ICERD talks about compulsory conciliation, but the conciliation report is non-binding; it is up to the parties to accept the same. The inter-state communication and conciliation are integrated because of their commonalities.[52] Both are regulated by the CERD; matters to be settled through conciliation arise from the matters to be referred to during the process of inter-state communication. Therefore, it can be inferred that inter-state communication can be regarded as a preliminary phase that probes into jurisdiction and admissibility, while the conciliation mechanism pertains to the merit. Despite the CERD providing a comprehensive framework for dispute settlement, it is non-binding, and State are often reluctant to participate in the process. For instance, following the decision of the CERD in the Palestine-Israel dispute on jurisdiction and admissibility, it is doubtful whether Israel would further take part in the conciliation procedure.[53] The 'soft' procedure in the CERD and its failure to amicably settle disputes

wishful thinking," *Hum. Rts. Q*, (1987): 263-265; Nowak, Manfred. "The Promotion and Protection of Human Rights by the United Nations," *Netherlands Quarterly of Human Rights* 6, no. 2 (1988): 23.

[50] Dai Tamada, "Inter-State Communication under ICERD: From ad hoc Conciliation to Collective Enforcement?" *Journal of International Dispute Settlement*(2021) : 412.

[51] Leckie S., "The inter-state complaint procedure in international human rights law: hopeful prospects or wishful thinking," *Hum. Rts. Q* 10, no. 2 (1987): 263-265.

[52] Jan Eiken and David Keane, Appointment of the Ad Hoc Conciliation Commissions under ICERD, 2021, available at https://www.ejiltalk.org/appointment-of-the-ad-hoc-conciliation-commissions-under-icerd/

[53] See Kaijun Pan, "Difference Between the ICJ and the CERD Committee: A Comment on the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) Case," *Chinese Journal of International Law* 21, no.1 (2022); David Keane, "Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument," *Human Rights Law Review* 20, no.2 (2020): 260-264.

between States have forced States to turn their eye to the ICJ.

IV. INTERNATIONAL COURT OF JUSTICE AND ICERD

Although cases on ICERD are yet to be adjudicated in the ICJ in the merit phase, the provisional measures and preliminary objection provides rich jurisprudence on the evaluation of ICERD.[54] The ICERD is one of the cornerstone human rights instruments, and the prohibition of racial discrimination is touted as a '*jus cogens* norm.[55] The interpretation of the ICERD presents a unique opportunity to augment the position of ICJ as a human rights court and therefore being truly universal, especially in the absence of a universal court on human rights.[56] As the ICJ Judge Antônio Augusto Cançado opines, "It is reassuring that States begin to rely on human rights treaties before this Court, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The international juridical conscience has at last awakened to the fulfillment of this need."[57] The fresh cases pertaining to human rights do not belie that the ICJ faces tensions in terms of 'sovereign' driven approach. Because of the torpid functioning of the human rights bodies concerning inter-state dispute mechanisms, it is not surprising that the doors of the ICJ are knocked.

A. PROCEDURAL REQUIREMENTS

The number of referrals made to the ICJ on ICERD stands at four, of which currently two cases are pending and two not adjudicated on the merits.[58] The

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[54] For a detailed study on the interaction between ICJ and ICERD see, Michał Balcerzak, "Uses and Underuses of the International Convention on the Elimination of All Forms of Racial Discrimination at the International Court of Justice," *Polish Yearbook of International Law*38, no.1 (2018):11-27.

[55] Michelle Foster and Timnah Rachel Baker, "Racial Discrimination In Nationality Laws: A Doctrinal Blind Spot Of International Law?" *Columbia Journal Of Race And Law* 11, no. 1 (2021): 128; Atul Alexander, "Ulf Linderfalk: Understanding Jus Cogens in International Law and International Legal Discourse," *Liverpool Law Review* 41 (2020): 391-394.

[56] Sandy Ghandhi, "Human Rights and the International Court of Justice The Ahmadou Sadio Diallo Case," 2011, *Human Rights Law Review* 11, no.3 (2011): 527.

[57] Separate Opinion Of Judge Cançado Trindade In Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates) Request For The Indication of Provisional Measures Order Of 23 July 2018, P.39 < https://www.icj-cij.org/public/files/case-related/172/172-20180723-ORD-01-00-EN.pdf> visited on 30 December 2021.

[58] This is apparent from the fact that in the entire history of the ICJ there has been only four contentious case on CERD, most of which emerge post 2010, these cases are- Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 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); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan).

available jurisprudence through these cases suffices to trigger multiple debates. One of the common factors to surface in these cases is the interpretation of the compromissory clause under the ICERD, i.e. Article 22, which reads as, "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[59]

As observed by Polish professor Michal Balcerzak in the context of Article 22 of ICERD, "One of the most pivotal questions which has arisen with respect to the above provision is whether the ICJ's jurisdiction is dependent on prior recourse to (and the exhaustion of) the 'negotiations or procedures' expressly provided for in ICERD, or whether the state-parties are at liberty to refer a case to the ICJ whenever such as a dispute is simply pending, as it has not been resolved by other means (such as negotiations or procedures under Arts. 11-13 of ICERD)."[60] The provision, in essence, does not clarify whether the State parties are required to engage in negotiation prior to seisin of the ICJ, or it is also obligatory to refer the dispute to the CERD under Article 11 of the ICERD. The uncertainty bordering Article 22 came up for discussion in all the cases pertaining to ICERD before the ICJ. In the first case of *Georgia v Russian Federation*[61], the claim by the applicant was that the Russian authorities acting through its Government and other entities exercising Governmental authority along with the forces from South Ossetia and Abkhazia regions of Georgia acted in violation of the ICERD from the period of 1990s to August 2008. As a result, Georgia requested provisional measure under Article 41 of the ICJ Statute; article 22 of ICERD inevitably came up for discussion. According to the ICJ, " …any dispute . . . which is not settled by negotiation or by the procedure expressly provided for in this Convention" does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court; whereas Article 22 suggests that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions

[59] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 21 December 1965, General Assembly resolution 2106 (XX) (entered into force 4 January 1969).

[60] Michal Balcerzak, "Review of Courts and Consociations: Human Rights Versus Power-Sharing by Christopher McCrudden & Brendan O'Leary," *Human Rights Quarterly* 36, no.4 (2014): 962-966.

[61] Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation), Request For The Indication Of Provisional Measures Order Of 15 October 2008, <https://www.icj-cij.org/public/files/case-related/140/140-20081015-ORD-01-00-EN.pdf> visited on 31 December 2021.

on issues that would fall under CERD."[62]

In the context of Article 22, it is evident that the issue pertains to the interpretation and application of ICERD. The minority opinion, however, disputed the view adopted by the majority accordingly; it was pointed out that "the Court then admits that the questions concerning CERD should have been raised between the Parties, referring specifically in this regard to the bilateral contacts between the Parties and certain representations made to the Security Council, even though nowhere in these has Georgia accused Russia of racial discrimination. Thus, in our opinion, the very substance of CERD was never debated between the Parties before the filing of a claim before the Court."[63] The minority view was further amplified in the preliminary objections, wherein the subject of 'negotiation' was deliberated at length. It was agreed that negotiation required a high threshold for making a 'genuine attempt' to engage in discussion with the other party. Albeit, arriving at a feasible solution through negotiation is not a prerequisite.

The subject matter of negotiation should also relate to the dispute in question. The high yardstick laid down in the case set a precedent in subsequent cases on ICERD. As observed in the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja, "The condition requiring an attempt to settle the dispute by negotiation must be understood and applied realistically and substantively, not in the unrealistic and formalistic manner applied by the Judgment."[64]

In the subsequent case of *Ukraine v Russia* and *Qatar v UAE* the ICJ affirmed the 'genuine attempt standard'. In the recent case involving *Armenia and Azerbaijan,*[65]wherein the dispute arose over the Nagorno-Karabakh region, the differences led the parties to approach the ICJ. According to the ICJ, "Regarding the precondition of negotiation contained in Article 22 of ICERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage

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[62] *Ibid* at para 114.

[63] Joint Dissenting Opinion Of Vice-President Al-Khasawneh And Judges Ranjeva, Shi, Koroma, Tomka, Bennouna And Skotnikov, in Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation), Request For The Indication Of Provisional Measures Order Of 15 October 2008, Para 11 <https://www.icj-cij.org/public/files/case-related/140/140-20081015-ORD-01-01-EN.pdf> visited on 1 January 2022.

[64] Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc G in Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections P.79,<https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-01-EN.pdf> visited on 3 January 2022.

[65] Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Armenia V. Azerbaijan) Provisional Measures, 7 December 2021, < https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf> visited on 2 January 2021.

in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. To meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question."[66] It can be inferred that the 'genuine attempt' standard did not block access to the court. In cases post *Georgia v Russian Federation*, the ICJ has broadened the scope of what constitutes a 'genuine attempt'.

The other question on which the ICJ has yet to reach an amicable consensus is the question of 'negotiation' referred to in Article 22 of ICERD, whether the negotiation and procedure provided under Article 22 of CERD should be cumulatively or alternatively interpreted. In the case of *Georgia v Russian Federation*,[67] the ICJ left open the question of 'cumulative approach' or 'alternative approach' while taking recourse to Article 22, in the words of ICJ, "…negotiations and the procedures expressly provided for in ICERD constitute preconditions to the exercise of its jurisdiction."[68] The approach of the ICJ was criticised in the separate opinion of the Judges, which sowed the seed for the subsequent change of attitude of the ICJ, "…cumulative or alternative, the conjunction 'or' indicates that the draftsmen of the CERD Convention considered 'negotiation' or 'the procedures expressly provided for in this Convention' as alternatives."[69] Also, the dissent pointed out that, "…If the text is understood in these terms, it becomes illogical to consider the two modes referred to in Article 22 as necessarily cumulative. Each mode ultimately depends on an understanding between the parties and their desire to seek a negotiated solution."[70] The ICJ subsequently embraced the reproval offered in the dissent. The ICJ, in the case of *Armenia v Azerbaijan,* observed that "…The Court has also held that the above-mentioned preconditions to its

[66] *Ibid* at Para 38.

[67] Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections Judgment Of 1 April 2011 < https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf> visited 1 January 2022.

[68] *Ibid* at para 183.

[69] Dissenting Opinion of Antônio Augusto Cançado Trindade in Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections Judgment Of 1 April 2011, Para 116, < https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-08-EN.pdf> visited on 3 January 2021.

[70] Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja in Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections Judgment Of 1 April 2011, para 43, < https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-01-EN.pdf> visited on 3 January 2022.

jurisdiction are alternative and not cumulative."[71] The ICJ took a very liberal stance, underscoring that mere negotiation would suffice and does not require specific recourse to the CERD to fulfil the requirement under Article 22. Essentially the discussion should not be conceived as a competition between the CERD and ICJ; this would ensure a wider platform for States to address their concern.

B. SUBSTANTIVE REQUIREMENT: NATIONALITY V NATIONAL ORIGIN

In cases before the ICJ on ICERD at the admissibility phase, the debate on nationality versus national origin took the limelight. The first case involving the Russian Federation was regarding the treatment of the ethnic Ukrainians and Crimean Tartars. However, it was only in the case of *Qatar v UAE* that the ICJ deliberated in-depth on nationality versus national origin. Qatar contended that UAE expelled all Qataris residents and visitors, as well as prohibiting the entry of all Qataris into its territory, providing them a timeframe of 14 days to leave its territory. The dispute is to be seen in the larger scheme of conflict between Qatar and the Gulf States, as opined by Tina Asgharian, "… Because Saudi Arabia, Bahrain and Egypt have made reservations to the ICJ's jurisdiction under the Article 22 of the Convention and could therefore not be brought before the Court on the matter of racial discrimination."[72] Qatar contended that by targeting Qataris based on their national origin, UAE had violated the fundamental human rights as listed in Article 5 of ICERD.

Further, Qatar asserted that by not condemning the acts of racial discrimination, postulated the assumption that the UAE perpetuated racial hatred against the Qataris. The UAE contended that the term 'national origin' in ICERD refers to 'ethnic origin' and does not encompass 'present nationality' as argued by Qatar.[73] The ICJ did not decide the issue pertaining to the 'interpretation of the convention' but was confined to jurisdiction. However, the trajectory taken by the ICJ was criticized by Judge Crawford in his dissent as, "…Prima facie at least, the UAE measures at issue here, deriving from the statement of 5 June 2017, target Qataris on account of their present nationality, not their national origin. This does not mean that the collective expulsion of persons of a certain nationality is lawful under international law; it is not. It is simply that the CERD does not apparently cover it, the only basis for

[71] Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Armenia V. Azerbaijan), 7 December 2021, at Para 31, https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf

[72] Asgharian, "The Meaning and Scope of 'National Origin' in the International Convention on the Elimination of All Forms of Racial Discrimination," *SSRN* (2020) DOI: http://dx.doi.org/10.2139/ssrn.3691607.

[73] *Ibid.*

jurisdiction relied on by Qatar."[74]

It is evident that the fulcrum of the dispute was premised in Article 1(1) of ICERD, which reads: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[75] The 'national origin' mentioned in Article 1(1) also subsumes 'nationality'. In the preliminary objection, the ICJ had the opportunity to provide its observation on the same. By making explicit reference to the *travaux preparatoires*, the ICJ observed, "The Court concludes that the *travaux préparatoires* as a whole confirm that the term 'national origin' in Article 1, paragraph 1, of the Convention does not include current nationality."[76] Also, the ICJ probed into the CERD, General Recommendation XXX regarding, "…differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[77] The ICJ believed that the 'national origin' doesn't encompass 'present nationality'. Finally, the ICJ made explicit references to jurisprudence from the human rights courts. However, this was considered the same, if not of little relevance. In the words of the ICJ, "While these legal instruments (American Convention on Human Rights, European Convention on Human Rights, African Charter on Human and Peoples' Rights) all refer to "national origin", their purpose is to ensure a wide scope of protection of human rights and fundamental freedoms", therefore according to the ICJ, the jurisprudence of the human rights bodies is of very little assistance.[78]

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[74] Dissenting Opinion Of Judge Crawford In Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates) Request For The Indication Of Provisional Measures Order Of 23 July 2018, p.475 < https://www.icj-cij.org/public/files/case-related/172/172-20180723-ORD-01-04-EN.pdf> visited on 4 January 2022.

[75] International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 21 December 1965, General Assembly resolution 2106 (XX), (entered into force 4 January 1969).

[76] Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates), Preliminary Objections, Paras 89-97 < https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf> visited on 4 January 2022.

[77] *Ibid* at paras 98-101.

[78] *Ibid* at Para 104.

C. CRITIQUE

While it is laudable that the ICJ has accommodated human rights discourse as a mainstream debate on the subject matter of prohibition of 'racial discrimination', the attitude of the ICJ appears to be fickle. Doubts linger as to whether negotiation or the procedure under Article 22 of ICERD should be exhausted before approaching the ICJ. Occasionally, the ICJ opted for a cumulative approach in interpreting the *compromissory* clause, and minority Judges seem to affirm the same[79]. The ICJ, while interpreting the human rights instrument like the ICERD, requires travelling an extra mile in buttressing an individual-centric approach rather than siding with a pure state-centric outlook; it is to be kept in mind that the principle of 'humanity' is applied while reading the *compromissory* clause of ICERD. As Judge Antônio Augusto Cançado Trindade notes, "the rights under the ICERD Convention are rights of individuals (accompanied by obligations of States), irrespective of the matter having been brought to the ICJ by a State party to the Convention. The State party exercises a collective guarantee under the CERD Convention, using its compromissory clause in Article 22, which is not amenable to interpretation, raising 'preconditions'. The compromissory clause in Article 22 is to be interpreted bearing in mind the object and purpose of the CERD Convention."[80]

Moreso, it is also observed that the ICJ had jumped the gun in explicating matters to be decided in merits in the preliminary objection phase[81], as seen in the case of *Qatar v UAE*, on clarifying the contents of Article 1(1) of the ICERD. Furthermore, the artificial distinction between national origin and nationality became an obstacle in the enforcement of ICERD; the dissenting opinion of Judge Bhandari differed from the majority in stating that national origin encompasses current nationality, according to the Judge, "Article 1, paragraph 2, in functional terms, establishes an exception to the broader principle contained in Article 1, paragraph 1, of ICERD by permitting a distinction to be drawn between citizens and non-citizens. However, this exception is limited by the object and purpose of the Convention, to eliminate

[79] Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation), Request For The Indication Of Provisional Measures Order Of 15 October 2008, < https://www.icj-cij.org/public/files/case-related/140/140-20081015-ORD-01-00-EN.pdf>

[80] Separate Opinion Of Judge Cançado Trindade In Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates) Request For The Indication Of Provisional Measures Order Of 23 July 2018, para 61, < https://www.icj-cij.org/public/files/case-related/172/172-20180723-ORD-01-02-EN.pdf> visited on 5 January 2022.

[81] Dissenting opinion of Judge Sebutinde in Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Qatar V. United Arab Emirates) Preliminary Objection, 4 February 2021, para 23, < https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-02-EN.pdf> visited on 6 January 2022.

racial discrimination in all its forms and manifestations."[82]

Moreover, the exclusion of 'current nationality' runs contrary to the object and purpose of ICERD and the spirit of the *travaux preparatoires*. It is also unclear why the ICJ skipped the progressive understanding provided by the CERD, as it is clear from its reasoning in the *Diallo jurisprudence* that there is no compelling reason to depart from the views of the CERD.[83] Meanwhile, some of the Judges have acknowledged the seminal nature of the ICERD; however, this is subject to the consent or jurisdiction of the parties appearing before the ICJ.[84]

As pointed out by Judge Abraham, the other visible trend is the shift in the concept of 'dispute'. According to the Judge- the ICJ seems to brush aside its previous understanding of 'dispute', instead of carrying out an extensive survey of the documents and evidence to determine the existence of dispute, rather than identifying dispute from a purely realistic and practical sense.[85] The ICJ could have taken into cognizance *the utility of Articles 31 and 32 of Vienna Convention on the Law of Treaties (VCLT)*, 1969[86] to add weightage to uphold the object and purpose of the ICERD, and thereby reading the treaty as a comprehensive package, thus conferring jurisdiction to the ICJ transcending the strict inter-state trend. The underpinning of CERD in the international legal platforms and its acceptance as a '*jus cogens* norms, i.e., norm from which there shall not be derogation, unlike customary international law, *jus cogens* is insulated from reservation or persistent objector. The *jus cogens* nature of the prohibition of racial discrimination has not materialized into ICJ overcoming its structural impediments.[87]

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[82] Dissenting Opinion Of Judge Bhandari, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), 2021, available at https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-03-EN.pdf

[83] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), p. 664, para. 66.

[84] Separate opinion of Judge Koroma in Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections Judgment Of 1 April 2011, para 7, < https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-04-EN.pdf> visited on 6 January 2022.

[85] Separate Opinion Of Judge Abraham, Case Concerning Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia V. Russian Federation) Preliminary Objections, available at https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-06-EN.pdf

[86] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 1155 UNTS 331 (entered into force 27 January 1980) accessed 7 January 2022, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[87] Carlo Focarelli1, "Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects," *Nordic Journal of International Law* 77, no.4 (2008):432.

V. CONCLUSION

It is a welcome sign that the ICJ is looking into intra-state complaints, yet this must be viewed with caution as the States deploy the ICERD to wage political battles in the ICJ. The ICJ had several opportunities to ramp up a human-centric interpretation in cases involving the ICERD. Nevertheless, the ICJ failed to make any substantial inroads. The ICJ's initial euphoria in embracing the human rights spirit, especially in regard to diplomatic protection, consular access, humanitarian law etc., slackened on the aspect of ICERD. This, as this research vividly depicts, is both on the procedural and substantive front. The cagey attitude of the ICJ on ICERD is largely self-inflicted and is overlayed by structural shortcomings in the functioning of the ICJ. Moreover, it's far-fetched to contemplate the ICJ altering its current interpretation, as it can result in 'judicial insecurity'; therefore, it can be anticipated that the position of the ICJ on ICERD is here to stay.

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