Towards an ‘Amicable Solution’ in the Universal Human Rights System

David Keane 2021-04-28T09:00:30

The 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) is the first of the core UN human rights treaties. It has 182 States parties and is nearing universal acceptance. Articles 11-13 ICERD provide for inter-State communications before the Committee on the Elimination of Racial Discrimination (CERD), the only *compulsory* inter-State communications mechanism in the UN human rights system. Article 11(1) ICERD reads: ‘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.’ There is no requirement of direct “victimhood”, thus, a public interest inter-State communication is possible. Once the steps in Article 11 ICERD are completed, Article 12 ICERD provides for the appointment by CERD of an *ad hoc* Conciliation Commission comprising five persons, ‘who may or may not be members of the Committee’. The Commission’s good offices shall be made available to the states concerned with a view to an ‘amicable solution’ of the matter. Article 13 ICERD tasks the Commission with preparing a report embodying its findings on all questions of fact and containing such recommendations as it may think proper for the amicable solution of the dispute.

In practice, Article 11 ICERD lay dormant for over 50 years before its activation in March-April 2018 in three inter-State communications, *Qatar v Kingdom of Saudi Arabia*, *Qatar v United Arab Emirates* and *Palestine v Israel*. *Qatar v Kingdom of Saudi Arabia* and *Qatar v UAE* were submitted on the same day and involve broadly the same facts and issues related to the “blockade” of Qatar by its neighbours. *Palestine v Israel,* submitted the following month, alleges violations of ICERD committed in the Occupied Palestinian Territory.

Drafting History in the Context of other UN Human Rights Treaties

ICERD’s inter-State provisions were modelled on a 1954 Commission on Human Rights draft of the later International Covenant on Civil and Political Rights, which set out a compulsory inter-State communications mechanism before the Human Rights Committee and, if no solution were reached, referral to the International Court of Justice (ICJ). From 1954-66, the measures of implementation of what would become the 1966 *International Covenant on Civil and Political Rights* (ICCPR) were substantially revised in the Third Committee of the UN General Assembly. The system of inter-State communications within the ICPPR was made optional, requiring a declaration from both state parties recognising the competence of the Committee to receive such communications. The clause vesting jurisdiction in the ICJ was removed. However, the ICERD’s draft provisions did not undergo the same revisions in the Third Committee. As a result, and as set out in the 1954 draft Covenant,

ICERD provides a compulsory inter-State communications mechanism before CERD (Articles 11-13) and jurisdiction of the ICJ (Article 22).

As described by Jean-Pierre Cot, conciliation is a flexible but relatively formal method for addressing inter-State disputes. In 1927, the *Institut de Droit International* defined the mechanism: 'Conciliation was to be implemented by a conciliation commission, normally composed of five persons, including conciliators appointed by each party.' As Cot highlights, the "classical model" of conciliation is a non-compulsory procedure with the decision to resort to conciliation that of the parties. However, its development within a multilateral treaty framework has seen the introduction of an element of obligation, and "compulsory conciliation" is called for in a number of conventions. The 1954 draft ICCPR did not provide for a conciliation body, rather tasking the Human Rights Committee with a 'friendly solution of the matter'. Instead, ICERD drew this element from the 1960 *UNESCO Convention against Discrimination in Education* and its 1962 Protocol. The 1962 UNESCO Protocol instituted a Conciliation and Good Offices Commission 'responsible for seeking the amicable settlement of disputes', which could be seised by one state party without requiring the consent of the other.

Articles 11-13 ICERD are a hybrid of the 1954 draft Covenant and 1962 UNESCO Protocol, combining a UN treaty body and a conciliation body. Once the steps are completed before CERD under Article 11 ICERD, the Chairman of the Committee 'shall' appoint an *ad hoc* Conciliation Commission under Article 12 ICERD. It is constituted automatically upon completion of Article 11 ICERD, and is as a result compulsory in the obligatory resort to conciliation, in line with the UNESCO model. It is comprised of five persons in accordance with the "classical model". This UN treaty body-conciliation body hybrid approach would be emulated in two other UN human rights treaties, the *1966 ICCPR* and the 1984 *Convention Against Torture* (CAT). Interestingly, the UN human rights treaties adopted after these instruments would not provide for a conciliation body. The *ad hoc* Conciliation Commission of Article 42 ICCPR is not obligatory, appointed 'with the prior consent of the States Parties concerned'. It requires what could be termed a "double opt-in" from both States parties, firstly to the inter-State communications procedure and then to conciliation. CAT requires an "opt-in" from both States parties to the inter-State communications procedure but from there, conciliation appears to be discretionary on the part of the Committee Against Torture. Article 21 CAT reads: 'the Committee may, when appropriate, set up an *ad hoc* conciliation commission' and thus lies somewhere between the *compulsory* Article 12 ICERD and the *consensual* Article 42 ICCPR.

A Second inter-State Avenue: Article 22 ICERD

In addition to the aforementioned inter-State communications before the CERD, Article 22 ICERD provides for the referral of disputes between States parties to the ICJ. This judicial remedy is the most reserved provision in the treaty, having been the subject of 25 reservations in total. Inter-State cases alleging violations of ICERD arose first before the ICJ under Article 22 ICERD, and there have been three to date – *Georgia v Russian Federation* (2008), *Ukraine v Russian Federation* (2017) and *Qatar v United Arab Emirates* (2018). Article 22 ICERD has no counterpart in regional human rights treaties.

Under ICERD, a State may attempt to reach an amicable solution before CERD under Articles 11-13 ICERD and then, if the dispute has not been settled, refer the matter to the ICJ under Article 22 ICERD. However this scenario has yet to occur for a number of reasons. First, the ICJ ruled in *Ukraine v Russian Federation* that 'negotiation' is sufficient to satisfy the preconditions of Article 22 ICERD, meaning there is no requirement to go through the Articles 11-13 ICERD mechanism before seising the Court. An inter-State dispute under ICERD may come to be decided by the Court only, as is the case in *Ukraine v Russian Federation*, now at the merits stage. Second, the large number of reservations to Article 22 ICERD means that Articles 11-13 ICERD, where engaged, may be the beginning and end of the matter. In the context of *Qatar v Kingdom of Saudi Arabia* and *Palestine v Israel*, it is noteworthy that Saudi Arabia and Israel respectively have a reservation to Article 22 ICERD and the dispute is before CERD only. Third, a State may engage both mechanisms in parallel, seen in *Qatar v United Arab Emirates*, where the possibility of a judicial solution has now ended with the upholding of the UAE's first preliminary objection by the Court in its February 2021 judgment, while the communication continues before CERD. In sum, the 'amicable solution' of Articles 12-13 ICERD must be capable of having an autonomous and final meaning.

CERD Decisions on Jurisdiction and Admissibility

On 27 August 2019, CERD found in *Qatar v Kingdom of Saudi Arabia* and in *Qatar v United Arab Emirates* that it had jurisdiction and declared the communications admissible, the first inter-State decisions ever reached by a UN human rights treaty body. On 12 December 2019, CERD found in *Palestine v Israel* that it had jurisdiction, and the communication is now at the admissibility stage before CERD. Further developments were then delayed by the pandemic, until this month (see below). CERD's decisions would see the determination of certain procedural aspects of Article 11 ICERD, and the Committee issued new Rules of Procedure governing the Article 11 hearings which are not public yet. The differing roles of CERD under Article 11 ICERD and the *ad hoc* Conciliation Commission under Articles 12-13 ICERD were affirmed. In *Qatar v UAE*, the Committee found an issue raised by the UAE 'cannot be dealt with separately from the merits of the communication', meaning it was an issue for the Commission – CERD deals with preliminary issues under Article 11 ICERD, while the Commission deals with the merits under Articles 12-13 ICERD. The Commission remains under the aegis of CERD, which appoints it and closes the mechanism with the communication of the Commission report.

A number of substantive points were reached in the aforementioned decisions. These include – a different standard for exhaustion of domestic remedies for inter-State as opposed to individual communications (CERD, *Qatar v UAE*, Admissibility, paras. 37-41); the existence of parallel proceedings in *Qatar v UAE* before the ICJ did not preclude examination of the communication by CERD (paras. 42-52); and discrimination based on "nationality" is within the scope of Article 1(1) ICERD, under the definitional ground 'national…origin' (CERD, *Qatar v Kingdom of Saudi Arabia*, Admissibility, paras 10-19 and *Qatar v UAE*, Admissibility, paras 53-63). It may be noted on this last point that the ICJ would later reach the opposite conclusion in its February 2021 judgment (ICJ, *Qatar v UAE*, para. 105). A strong feature of the

decision in *Palestine v Israel* is the weight accorded to decisions of the regional human rights bodies, judicial and non-judicial, affirming human rights treaties benefit from a 'collective enforcement' (CERD, *Palestine v Israel*, Jurisdiction, paras. 3.24-3.30).

Ad Hoc Conciliation Commissions – Appointed and Suspended

An *ad hoc* Conciliation Commission in *Qatar v Saudi Arabia* and in *Qatar v United Arab Emirates* was appointed under Article 12 ICERD, as described by CERD in its annual report (para. 45). Last week, on 23 April 2021, CERD announced that following the *Al Ula Agreement* concluded on 5 January 2021 between Qatar and its neighbours, including the respondents, Qatar had requested the suspension of the proceedings. The *ad hoc* Conciliation Commissions have decided as a result to suspend the proceedings and to invite any of the States parties concerned to inform within one year of the adoption of the Al Ula Declaration whether it wishes to resume the consideration of the matter. Until then, both Conciliation Commissions remain seised of the matter (affirmed in decisions in *Qatar v Kingdom of Saudi Arabia* at para 5, and in *Qatar v UAE* at para. 5). Even if ultimately discontinued, the appointment of the *ad hoc* Conciliation Commissions provides an interesting precedent. Only four out of ten of the Commission members are also CERD members, underlining the differentiated character and role of the Commissions. One member of the *Qatar v UAE* Commission is a former judge and vice-president of the ICJ, which would have the potential to bring much-needed dialogue between the bodies.

Conclusion

Already in the drafting of ICERD, the limits of conciliation were noted. Waldron-Ramsey (Tanzania) commented in the Third Committee: 'Conciliation… was not particularly appropriate to the subject of the Convention.' (para 41). More positively, in *Palestine v Israel*, CERD observed: 'The Committee considers that given that the inter-State mechanism has been designed to be a conciliatory procedure, it should be practical, constructive and effective. Therefore, it considers that a formalistic approach cannot be adopted in this regard.' (para. 3.41). In an inter-State context, with a potentially large number of alleged victims, this could involve structural remedies such as reviewing legislation or policy. An amicable solution could display a combination of State-specific, bilateral, regional and international remedies by way of recommendations. According to Article 12(1)(a) ICERD, a solution must be reached 'on the basis of respect for this Convention'. Article 13 ICERD is silent on the issue of a finding of a breach of the Convention, but it would appear unnecessarily restrictive if a Commission were to consider itself unable to pronounce on this.

Articles 11-13 ICERD have the same limits as all inter-State human rights mechanisms and will probably never be widely used. But it has particular significance as a near-universal and compulsory contentious human rights jurisdiction. Strategically, it may be useful in addressing human rights situations where no alternative regional human rights mechanism exists, which has been the case in the three inter-State communications to date. In addition, there is the

potential for Articles 11-13 ICERD to contribute to the wider understanding of friendly settlements in human rights cases. CERD has expressly looked to the regional human rights bodies in its decision-making under Article 11 ICERD, and these may do the same to inform the understanding of non-judicial remedies in inter-State human rights cases. The amicable solution of Articles 12-13 ICERD has the potential for creative, structural remedies, providing a *sui generis* understanding of conciliation in the context of human rights.
