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ADJUDICATING RACIAL DISCRIMINATION CLAIMS: ISSUES OF JURISDICTION AND ADMISSIBILITY IN *UKRAINE V RUSSIA*

INTRODUCTION. *Over the past decade, the International Court of Justice has been requested to adjudicate on claims under 1965 Convention against Racial Discrimination (CERD). While adjudication under treaty compromissory clauses is not uncommon, the Court's jurisdiction under CERD is subject to conditions that are not replicated under other multilateral treaties. Therefore, the Court's use of compromissory clause under CERD raises complex issues of treaty interpretation as well as of the Court's compliance with consensually established limits of its own authority.*

MATERIALS AND METHODS. *The article proceeds to examine the Court's application of jurisdictional clause under Article 22 CERD in the case of Ukraine v Russia from the positivist legal perspective. It assesses the Court's use of treaty interpretation methods relating to the text and context of Article 22, as well as CERD's object and purpose. After assessing the Court's analysis of its jurisdiction, the article proceeds to examine the Court's use of the rule on exhaustion of local remedies which is one the condition of the admissibility of claims in cases relating to treatment of individual and their groups.*

RESEARCH RESULTS. *The article demonstrates that the Court's interpretation of Article 22 CERD does not accurately identify the meaning of this provision, especially the meaning of the word "or" contained in it. As a consequence, the Court ends up asserting jurisdiction in the case before the Committee established under CERD has dealt with it. Moreover, the Court concludes that the victims of alleged racial discrimination do not have to exhaust local remedies. This conclusion places the Court at odds with previous jurisprudence of all major international tribunals.*

DISCUSSION AND CONCLUSIONS. *It becomes clear that the Court has asserted jurisdiction over the case even though CERD provisions did not confer that jurisdiction to it, and that local remedies were not exhausted anyway. As this face forms one rather small part of overall Russia-Ukraine relations, a temptation could obviously arise to justify the Court's flawed legal reasoning by considerations of ethics, politics, ideology or justice. However, positivist legal reasoning requires maintaining that the Court operates on the basis of State consent, and any neglect for that fact risks negative consequences for the overall efficiency of international adjudication.*

KEYWORDS: *Interpretation of international treaties, International Court of Justice, ICJ jurisdiction, Article 36 of the ICJ Statute, compromissory clauses, admissibility of claims, exhaustion of local remedies*

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РАССМОТРЕНИЕ ИСКОВ О РАСОВОЙ ДИСКРИМИНАЦИИ: ВОПРОСЫ ЮРИСДИКЦИИ И ПРИЕМЛЕМОСТИ В ДЕЛЕ «УКРАИНА ПРОТИВ РОССИИ»

ВВЕДЕНИЕ. *За последнее десятилетие на рассмотрение Международного Суда ООН поступал ряд жалоб в соответствии с положениями Международной конвенции о ликвидации всех форм расовой дискриминации (МКЛРД) 1965 года. Хотя вынесение решений в соответствии с юрисдикционными клаузулами международных договоров не является редкостью для Международного Суда, его юрисдикция в соответствии с МКЛРД ограничена условиями, не имеющими аналогов в других многосторонних договорах. В этой связи применение Судом юрисдикционной клаузулы МКЛРД поднимает сложные вопросы толкования данного договора, а также соблюдения Судом рамок своих полномочий, установленных на основе согласия сторон.*

МАТЕРИАЛЫ И МЕТОДЫ. *В статье с точки зрения правового позитивизма рассматривается применение Международным Судом ООН в деле «Украина против России» статьи 22 МКЛРД, содержащей юрисдикционную клаузулу. Дается оценка использованию Судом методов толкования договоров, касающихся текста статьи 22, ее контекста, а также объекта и целей МКЛРД. После оценки проведенного Судом анализа оснований для установления юрисдикции в статье рассматривается применение Судом правила об исчерпании внутригосударственных средств правовой защиты, которое является одним из условий приемлемости жалоб, касающихся прав частных лиц и их групп.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *В статье демонстрируется, что толкование Судом статьи 22 МКЛРД неверно определяет значение данного положения, в особенности содержащегося в нем слова “или". Вследствие этого Суд пришел к выводу о наличии юрисдикции рассматривать дело до его передачи в Комитет по ликвидации расовой дискриминации. Кроме того, Международный Суд счел, что жертвам предполагаемой расовой дискриминации не требовалось исчерпать внутригосударственные средства правовой защиты. Данная позиция Суда противоречит практике всех основных международных судебных инстанций.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Со всей очевидностью, Суд установил наличие у него юрисдикции в отношении данного дела вопреки тому, что положения МКЛРД не наделяли его ею, а также, несмотря на то, что внутригосударственные средства правовой защиты не были исчерпаны. Поскольку рассматриваемый процесс представляет собой сравнительно незначительную часть общих российско-украинских отношений, может возникнуть соблазн оправдать ошибочную правовую аргументацию Суда соображениями этики, политики, идеологии или справедливости. Однако с точки зрения правового позитивизма неоспоримо то, что Суд действует на основе согласия государства, а любое пренебрежение данным фактом чревато негативными последствиями для общей эф-*

фективности судебного урегулирования международных споров.

КЛЮЧЕВЫЕ СЛОВА: *толкование международных договоров, Международный Суд ООН, юрисдикция Международного Суда ООН, компетенция Международного Суда ООН, ст. 36 Статута Международного Суда ООН, юрисдикционная клаузула международного договора, приемлемость требований, исчерпание внутригосударственных средств правовой защиты*

ДЛЯ ЦИТИРОВАНИЯ: Орахелашвили А. 2021. Рассмотрение исков о расовой дискриминации: вопросы юрисдикции и приемлемости в деле «Украина против России» . – *Московский журнал международного права.* № 1. С. 57–69. DOI: https://doi.org/10.24833/0869-0049-2021-1-57-69

Автор заявляет об отсутствии конфликта интересов.

1. Introduction

In the Judgment issued on 8 November 2019, the International Court of Justice has decided that it has jurisdiction to adjudicate in the dispute between Ukraine and Russia related to certain issues arising out of the Russian-Ukrainian conflict which has been ongoing since 2014. This concerns claims alleging racial discrimination practised by Russia against Tatar and Ukrainian minorities in Crimea, and financing terrorist activities. Developments around Russia-Ukraine relations over the past few years have obviously raised multiple international legal issues with regard to territorial sovereignty of States, self-determination of peoples, intervention into a State's domestic affairs or internal conflicts, and so on. Political and strategic dimension of this situation draws on the power equilibrium within the region and far beyond it, and generates political and ideological controversies that obviously influence many minds in assessing this situation. But issues involved in the case at hand are also undeniably narrower than the whole range of relations between Russia and Ukraine, and resolving those narrower legal issues in any State's favour would not make any cardinal difference in terms of the adjustment of wider relations between them or to political stakes that those relations involve. Political stakes involved with this adjudication are, thus, relatively minor. Even those who tend to see international law as a periphery of politics would gain no obvious benefit from deflecting the analytical focus from the legal reasoning required to assess correctness of the Court's application of treaty provisions that confer and delimit its jurisdiction in this case.

Jurisdictional clauses Ukraine invoked in this case are enshrined in two multilateral treaties: 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT) and 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The point this contribution will make is that Court's assertion of jurisdiction under CERD is flawed and exceeds the extent of jurisdiction that has been conferred to it under this Convention.

This contribution will focus only on those aspects of the Court's judgment that deal with claims under CERD. The Court's assertion of jurisdiction under ICSFT does not seem to be controversial, so it will not be examined here at any length. Therefore, section of this contribution 2 will examine contested issues regarding the Court's use of the jurisdictional clause under Article 22 CERD. This is a compromissory clause that is hardly ever replicated in other multilateral treaties, notably in terms of preconditions listed therein regarding the resort to the ICJ[1]. Another peculiar issue is that there is not much literature on compromissory clauses that confer jurisdiction to the ICJ under Article 36(1) of its Statute[2]. Even in literature regarding racial discrimination matters under CERD, analysis of the ICJ jurisdiction under Article 22 is almost absent. This is not surprising, because there has not been much judicial practice regarding CERD till about a decade ago. Hence,

[1] On law and practice regarding compromissory clauses see [Charney1987; Noyes 1994; Thirlway 2011; Orakhelashvili 2007; Orakhelashvili 2008: 440-464].

[2] As for CERD litigation itself, there is not much literature on it. Suffice it to say that the latest editions of two leading textbooks on international dispute settlement do not address this matter [Merrils 2018; Tanaka 2018]; nor is it discussed in *Jurisdiction of Specific International Tribunals* [Amerasinghe 2009]. There is a brief discussion in: [Zimmermann 2013].

there will be no literature review in this contribution. Section 3 will focus on the Court's use of the rule on exhaustion of local remedies. Section 4 will assess and suggest some conclusions from both legal and policy perspectives. It should be reiterated that this contribution is neither a comprehensive analysis of the Court's jurisdiction, nor the analysis of the Court's judgment as a whole, but merely an analysis and assessment of that part of the Court's reasoning which relates to its jurisdiction under Article 22 CERD and admissibility of CERD claims.

2. Interpretation and Application of Jurisdictional Clauses

Article 24 ICSFT provides that

'Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.'

Basing the Court's jurisdiction on this clause has been a relatively straightforward matter. The Court has observed that, as a consequence of a number of exchanges of notes and four meetings, 'Little progress was made by the Parties during their negotiations. … [and] that the dispute could not be settled through negotiation in what has to be regarded as a reasonable time[3]'. With regard to arbitration, the Court stated that 'Negotiations concerning the organization of the arbitration were subsequently held until a period of six months expired', yet no agreement was reached[4].

Article 22 CERD provides that

'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'.

The use of dispute settlement means antecedent to ICJ adjudication under Article 24 ICSFT depends on the voluntary agreement between parties to a dispute, and any State-party can unilaterally, through express objection or protraction in practice that is, prevent these antecedent means from being used. Conditions antecedent to adjudication under CERD involve, however, a gradual institutionalisation of dispute settlement process that does not entirely depend on the agreement between parties to a dispute. This way, it should be emphasised again, Article 22 CERD is a unique jurisdictional clause not replicated in any other multilateral treaty that confers jurisdiction to the Court under Article 36(1) of its Statute.

The way CERD's dispute settlement architecture envisages it, initially parties to a dispute must negotiate with each other; then they have to use procedure of the CERD Committee which does not yield binding result, yet substantially differs from negotiations, because it operates through third-party deliberation, investigation and assessment of the parties' claims. Negotiations are antecedent to the use of that procedure, but still they are part of the process through which the CERD Committee procedure is used (Article 11(2)). The latter procedure can be used after the matter has been brought before the Committee, as Article 11(2) CERD determines, 'If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them'. Finally, adjudication before the ICJ is complementary and subsidiary to all the aforementioned.

With regard to ICSFT, Ukraine and Russia were unable to agree on arbitration. With regard to CERD, it was the respondent who chose not to have resort to the CERD Committee (as would have been the case, for instance, if Ukraine had not attempted to negotiate arbitration possibilities under ICSFT with Russia and then expected the Court to hold that this was not worth doing because Russia would not agree to arbitration). Still, with regard to Article 22 CERD, the Court said in *Ukraine v Russia* that 'Since the dispute between the Parties was not referred to the CERD

[3] International Court of Justice: 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). Judgment of 8 November 2019 (hereinafter Ukraine v Russia). Para. 70. URL: https://www.icj-cij.org/public/files/case-related/166/166-20191108-JUD-01-00-EN.pdf (accessed 22.12.2020).

[4] Ukraine v Russia. Para. 76.

Committee, the Court will only examine whether the Parties attempted to negotiate a settlement to their dispute[5]'.

It will be recalled that Article 22 CERD was invoked and dealt with in an earlier case of *Georgia v Russia* [Okowa 2011; Lucak 2012; Parlett 2012; Szewczyk 2011]. An empirical difference between *Georgia v Russia* and *Ukraine v Russia* is that in the latter case Ukraine genuinely undertook attempts to negotiate with Russia regarding CERD matters. Having declined jurisdiction in *Georgia v Russia*, the Court has observed that 'Georgia did not claim that, prior to the seisin of the Court, it used or attempted to use the other mode of dispute resolution contained at Article 22, namely the procedures expressly provided for in CERD.' As the negotiation requirement was not satisfied anyway, the Court considered that it did not need to examine whether the two preconditions are cumulative or alternative. As neither requirement contained in Article 22 was satisfied, jurisdiction of the Court was not established, and the preliminary objection of the Russian Federation was upheld accordingly[6]. What the Court thus did in *Georgia v Russia* was to follow the requirement of judicial economy, as a purely procedural way of dealing with the point that the issue raised before the Court and disputed between the litigating parties as to the requirement to resort to the CERD Committee need not be dealt with or resolved in that particular case, because it would not affect the outcome of that case anyway. The Court merely decided that the parties' claims regarding the CERD Committee needed not be adjudicated then and there[7].

However, as a matter of pragmatic common sense, it is entirely understandable why Ukraine should have seen this as a window of opportunity to persuade the Court to assert jurisdiction in the case it brought against Russia[8]. Ukraine could indeed afford taking the position it took, because it had in fact attempted to negotiate with Russia, and was not willing to go to the CERD Committee. However, the problem here is not Ukraine's litigation strategy but the Court's rather perfunctory analysis of the CERD framework, which is not about *in casu* preferences of litigating parties, but about a complex and sequential arrangement of the carefully designed procedure, each element of which is an integral part of the entire CERD arrangement and serves its overall rationale just as any other part of CERD does. What Ukraine also had to do, according to Article 11 CERD, is not

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[5] Ukraine v Russia. Para. 113.

[6] International Court of Justice: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation). Judgment of 1 April 2011 (hereinafter Georgia v Russia). Paras. 183-184. URL: https://www.icj-cij.org/en/multimedia/56e93a6288fa3fe1450a78e1(accessed 22.12.2020). The Court relied on this finding in the 2018 provisional measures order in *Qatar v UAE,* suggesting that 'Although the Parties disagree as to whether negotiations and recourse to the procedures referred to in Article 22 of CERD constitute alternative or cumulative preconditions to be fulfilled before the seisin of the Court, the Court is of the view that it need not make a pronouncement on the issue at this stage of the proceedings'. The interim proceedings context involved in the latter case, not requiring any conclusive jurisdictional findings to be made, led the Court to state that 'Nor does it consider it necessary, for the present purposes, to decide whether any *electa una via* principle or *lis pendens* exception are applicable in the present situation'. International Court of Justice: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates). Order. July 23, 2018. Para. 39. URL: https://www.icj-cij.org/public/files/case-related/172/172-20180723-ORD-01-00-EN.pdf (accessed 22.12.2020).
See also: Ukraine v Russia. Para. 106. On negotiations in relation to ICJ adjudication see generally K. Wellens [Wellens 2019].

[7] Otherwise, it would be unclear why the Court disagreed with the applicant's contention that 'all that is needed is that, as a matter of fact, the dispute had not been resolved (through negotiations or through the procedures established by CERD)'. See: Georgia v Russia. Paras. 125-126. Had the Court accepted that submission, it would have come closer to what Ukraine was submitting in Ukraine v Russia, namely that a dispute that has not been resolved because, or even though, it has not been submitted to the relevant procedure, is still one that is ready and mature for being adjudicated by the Court itself.

[8] Submissions of Ukraine included the argument that 'The CERD Committee procedures referred to in Article 22 are voluntary, providing that a State 'may bring the matter to the attention of the Committee'. See Case concerning 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. Memorial submitted by Ukraine. June 12, 2018 (hereinafter Memorial). Para 650. URL: https://www.icj-cij.org/public/files/case-related/166/166-20180612-WRI-01-00-EN.pdf (accessed 22.12.2020). However, the issue of whether CERD procedures are voluntary to be used as such is not the same as whether they have to be used before another procedure foreseen under the Convention will be used. Ukraine's another suggestion was that 'The Russian Federation has argued that after spending more than two years pursuing bilateral negotiation to the point of futility, Ukraine was ***further*** required to engage Russia in the CERD Committee's voluntary conciliation procedures. Russia's position is contrary to the ordinary meaning of Article 22 and would thwart the object and purpose of the CERD'. See: Memorial. Para. 648 (emphasis original). However, it might also be queried why, over that period of two years when negotiations did not yield any result, it did not occur to Ukraine that the CERD Committee procedures could as well be used.

just to attempt negotiation with Russia, but do so in parallel with going to the CERD Committee.

The Court has professed to be interpreting Article 22 CERD in line with Article 31 1969 Vienna Convention on the Law of Treaties, which provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' It therefore remains to examine how accurately the Court's approach and outcome it endorses reflects interpretative requirements enshrined in that clause.

To begin with, Article 22 CERD furnishes a single and integrated arrangement, presenting with the graduated sequence of four different means of dispute settlement (negotiation, CERD procedures, adjudication and other means of dispute settlement, conceivably arbitration, mediation or other). The adherence to this factor by the Court was displayed in the earlier case of *Georgia v Russia,* where the Court had noted that 'To the extent that the procedural requirements of Article 22 [CERD] may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element[9]'.

Thus, if the two pre-adjudication means are preconditions to the involvement of the Court, they have to be used before the Court is involved in the relevant case. However, the Court states in *Ukraine v Russia* that both negotiation and CERD Committee procedure are two means to achieve the same objective to settle a dispute by agreement, and they both rest on the States parties' willingness to seek an agreed settlement of their dispute[10]. The Court further observes that 'should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. In the view of the Court, the context of Article 22 rather indicates that it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage in an additional set of negotiations in accordance with the modalities set out in Articles 11 to 13 of CERD[11]'.

The Court seems to be speaking in terms of expediency and fairness. But how is a third-party conciliation procedure the same as "an additional set of negotiations"? It is, moreover, not obvious why the requirement to resort to one negotiation or conciliatory procedure after another is, as such, an unfair or unreasonable interpretative outcome, i.e. one that drafters of the treaty could not reasonably intend or the meaning of the treaty text could not reasonably entertain. Moreover, Article 11 CERD, being precisely part of the context with regard to the meaning of Article 22, envisages the seizure of the CERD machinery precisely after negotiations between States-parties have proved to be unsuccessful. There is nothing extraordinary in the Convention envisaging the resort to a third party-led procedure after the failure of bilateral negotiations to achieve an agreed solution of the dispute that could not be achieved through antecedent negotiations, and Article 11 and 13 CERD do just that. Conciliation proceedings conducted with the third-party involvement could well be a natural outcome to deal with the dispute that parties were not able to resolve on their own. The Court has put up a rather preconceived view of fairness and expediency, without addressing whether, why, or to what extent alternative outcomes would be unfair or inexpedient.

The Court's approach that conciliation via CERD procedures cannot be expected to be engaged in just because negotiations did not prove to be effective is problematic. As the Russian Federation has explained to the Court, 'conciliation under the auspices of the CERD Committee cannot be regarded as a kind of negotiation, since, unlike negotiation, it entails third-party intervention[12]', which point the Court chose not to address. Negotiations under Article 11 and Article 22 CERD mean the same thing, namely a preliminary stage to be gone through before the Convention's mediation or adjudication machinery is set in motion. If Article 22 is interpreted in its context, then it should be observed that Article 11 requires that if negotiations yield no result, the CERD Committee shall be entrusted with resolution of the relevant dispute. Otherwise, the CERD Committee shall in principle be entitled to decline dealing

[9] Georgia v Russia. Para. 130.

[10] Ukraine v Russia. Para.110.

[11] Ibidem.

[12] Ukraine v Russia. Para.99.

with the relevant case, just as the Court would have to do so when determining whether it has jurisdiction under Article 22.

However, the Court tries to justify its approach by claiming that:

'the conjunction 'or' appearing between 'negotiation' and the 'procedures expressly provided for in this Convention' is part of a clause which is introduced by the word 'not', and thus formulated in the negative. While the conjunction 'or' should generally be interpreted disjunctively if it appears as part of an affirmative clause, the same view cannot necessarily be taken when the same conjunction is part of a negative clause. Article 22 is an example of the latter. It follows that, in the relevant part of Article 22 of CERD, the conjunction 'or' may have either disjunctive or conjunctive meaning. The Court therefore is of the view that while the word 'or' may be interpreted disjunctively and envisage alternative procedural preconditions, this is not the only possible interpretation based on the text of Article 22[13]'.

The Court seems here to suggest that the meaning of the text of Article 22 is inconclusive. The Court has not concluded that the disjunctive meaning of 'or' is one to which the treaty text requires us to adopt. Instead, and through a rather brief analysis in a single paragraph, all the Court has shown is that such disjunctive meaning is one of the possible meanings of 'or': it might mean one thing but it might as well mean another thing.

The Court has left it there. But is the ordinary and plain meaning of Article 22 really so inconclusive? The primary meaning of 'or' in English is to 'link alternatives[14]', which naturally requires that wherever 'or' is used in a legal text it should be read as meaning 'either … or'. Article 22 uses words 'not settled by' and hence the alternative involved here is about the settlement of a dispute by one of those two modes, not about choice of parties which of those modes to use. Whether the Court has jurisdiction over a dispute turns not on what parties have preferred but on whether the dispute is settled at the time the Court is about to get involved with it. A dispute 'not settled by' either of the two pre-adjudication modes of dispute settlement is the same as one settled by neither of those modes. Consequently, under Article 22 the Court has jurisdiction over any dispute which the parties have not settled *either* through negotiation *or* through submitting the matter to the CERD Committee. Conversely, if Article 22 were to confer discretion on one of the parties to determine whether resort to one of the pre-adjudication processes is useful or worthwhile, i.e. if 'not settled by' meant 'not settled by … because not so desired by the applicant State', such discretion would apply to both modes of settlement and would entitle the applicant State to go directly to the Court without the use *either* of negotiation *or* of CERD Committee procedure, and an absurd result would obtain that the Court has jurisdiction over a dispute even though neither of the two pre-adjudication modes of dispute settlement has been used. It simply stands to no reason that one of those two modes should be mandatory and another optional; Article 22 does not entertain any such idea not least because, as shown above, it simply does not speak about choices made by parties at all[15].

A further problem with the Court's overall approach is that the text of Article 22 cannot be realistically described as a 'negative' clause in its entirety. What Article 22 does is to state on 'affirmative' terms when the Court's jurisdiction exists, and then to specify, on 'negative' terms, that certain things should not have occurred if the Court is to exercise its 'affirmatively' conferred jurisdiction. It is not clear, moreover, why should it matter whether Article 22 is drafted in the affirmative or negative manner, because what the Court denotes as drafting certain terms of the conferral or conditions of jurisdiction on 'affirmative' terms would require drafting on 'negative' terms the other parts of Article 22 that in their current version look as though they were drafted 'affirmatively'. If the authors of CERD had conveyed the idea embodied in Article 22 by using 'affirmative' and 'negative' languages in a reverse manner, they might have expressed it along the following or similar lines:

'Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is [or can be] settled by negotiation or by the procedures expressly provided for in this Convention, shall not, at the request of any of the parties to the dispute [i.e. without their common agreement], be referred to the International Court of Justice for decision, whether or not the disputants agree to another mode of settlement'.

[13] Ukraine v Russia. Para.107.

[14] *Compact Oxford English Dictionary.* 2nd ed. Ed. by J. A. Simpson and E. S. C. Weiner. Oxford: Oxford University Press. 2012. P. 712.

[15] And, as shown below, other CERD provisions also attest to the limits on parties' discretion in this context.

The use of words 'which is [or can be]' is deliberate here, because otherwise the 'affirmative' version of Article 22 text would refer to means that States-parties could use but they decide not to use them. That would, quite simply, make both negotiation and CERD procedures optional. If a State-party can choose not to use one of the methods of dispute settlement, why can it not choose not to use both of those methods? Could not the points raised in the above-cited passages of the Ukraine's Memorial be simply extended to both those methods of settlements, especially when negotiation prospects are rather dim at the outset[16]? But such conclusion would have required from the Court to dismiss the respondent's preliminary objection to jurisdiction in *Georgia v Russia*.

If the idea conveyed through the Court's above 'negative' reading of Article 22 were to be conveyed through an 'affirmative' one, this would have to involve the wholesale alteration of its entire text, so that adjudication on conditions envisaged under Article 22 becomes adjudication excluded in the absence of those conditions being met. Therefore, distinguishing between the affirmative and negative nature of particular wordings hardly makes any sense or dispenses with the conditions antecedent to adjudication. States-parties could have expressed it either way, and the meaning of 'or' in Article 22 would be the same in both cases. Substituting 'negative' reading of Article 22 by its 'affirmative' reading does not alter the fact that the meaning 'or' means 'either … or', and that the failure to use either of those two pre-adjudication means of dispute settlement forecloses the applicant State's access to the Court.

Article 31(1) 1969 Vienna Convention requires that Article 22 has to be read in context with other provisions of CERD, which affirmatively require the use of the CERD Committee procedure even more than they require engaging in negotiations. It is simply not a contextually plausible reading of Article 22 to suggest that a dispute 'which is not settled by negotiation … [even if it could possibly be settled] by the procedures expressly provided for in this Convention' is free to be taken directly to the ICJ. Why, then, do other CERD provisions, such as Article 11, require the use of CERD Committee procedure precisely after, and further to the failure of, negotiations? Indeed, the CERD text in Article 11 is clear that negotiations are antecedent to mediation within the CERD framework which in its turn obviously becomes antecedent to adjudication before the ICJ. There is no provision of free ride to States-parties in any of these clauses, but a clearly and carefully prescribed sequence of procedures that they can use.

The above outcome with regard to the ordinary meaning of Article 22 is corroborated by the object and purpose of CERD, which has to be taken into account according to Article 31(1) 1969 Vienna Convention. The Court's use of the 'object and purpose' criterion is not free of problems. To begin with, the Court did not use 'object and purpose' merely to confirm the disjunctive meaning of 'or' that the treaty text mandates us to adopt. Instead, the Court used 'object and purpose' in a more proactive way to select between two different and contested meanings of 'or', both of which could, according to the Court, be sustained by the treaty text. But did CERD's object and purpose provide any added value in favour of the Court's preferred 'disjunctive' reading of 'or'?

The Court said that Article 2 CERD requires States parties to eliminate racial discrimination 'without delay'; Articles 4 and 7 require that immediate and effective measures are adopted against racial discrimination; and the preamble to CERD pledges that States parties shall eliminate racial discrimination 'speedily'. As all those provisions aim to eradicate all forms of racial discrimination effectively and promptly, the Court has thought that 'the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative[17]'. But this reasoning involves confusion between substantive and procedural aspects of the CERD framework. Articles 2, 4 and 7 CERD are about substantive obligations, whose performance by States-parties has to be assessed through applicable dispute settlement procedures. Just because States have to do certain things 'speedily', the Court does not acquire automatic or semi-automatic jurisdiction to assess their conduct, especially if a stage antecedent to its own involvement is expressly mentioned in the Convention's text[18]. The resort to the CERD Committee may be just as suitable to secure 'speedy'

[16] This would also be more consistent with *Nicaragua*, see the text accompanying fn. 21 below.

[17] Ukraine v Russia. Para.111.

[18] Thus, for better or worse, Judge Skotnikov's point in paragraph 13 of his dissent that 'despite the appearance of the word 'speedily' in the preamble of CERD, there is no indication from the context of Article 22 that the States parties intended dispute resolution under CERD, rather than the performance of the primary obligation to eliminate racism, to be as quick as possible' may well be right.

implementation of CERD as would be resort to the ICJ. Therefore, the Court's thesis involves confusion between two separate issues of how States should treat groups protected under CERD and when international organs have jurisdiction to assess that treatment. This hardly does any genuine service to the Convention's object and purpose. Moreover, it is not clear how the CERD's object and purpose can be served if specialised procedures expressly provided for in the Convention are ditched in favour of ICJ litigation that is at least as costly, lengthy and complex as the procedure before the CERD Committee. After all, the treaty interpretation point here is about the object and purpose of CERD as a discrete instrument, and thus about its entire framework and architecture, about the conditions on which CERD enables the resolution of racial discrimination disputes. It is not about more general and transcendent purposes to secure global justice by adjudicating on all racial discrimination disputes arising out of crises in various parts of the world.

Having conducted a thorough and persuasive analysis of jurisdictional clause under Article 22, Judge Tomka agreed that the two conditions antecedent to adjudication under this provision are cumulative, but explained his vote with the Court's majority by suggesting that relations between the litigating parties was too strained to make resolution through the CERD committee any realistic. Admitting that Ukraine's application was premature, Judge Tomka thought Ukraine could remedy this defect by making a fresh application[19]. However such fresh application could be made only after the procedure run by third party would be exhausted, i.e. after a procedure qualitatively different from face-to-face negotiations would have been used. The Court seems to assume *a priori* that a Convention organ would inevitably fail in its task in this particular case. But most problematically, the Court itself has not formulated, and could never be able to formulate, any transparent criteria as to when the required threshold is reached. The Court has instead provided with a blanket conclusion that the CERD Committee procedure can be omitted not when it is or would be ineffective, but when the applicant State chooses not to use it. This is an outcome which is general and meant to apply to all disputes under CERD, not case-specific and driven by specificities of this particular Ukraine-Russia dispute. This can have further institutional implications for the United Nations system, essentially emasculating the CERD Committee's potential to deal with matters the Convention has entrusted it to deal with. Any State could now evade the use of CERD Committee, or conceivably even go to the ICJ halfway through that Committee's procedure.

The approach preferred in *Ukraine v Russia* also compromises the overall coherence of the ICJ's jurisprudence on the interpretation of compromissory clauses. For, if the Court can dispense with one of Article 22 pre-adjudication requirements, then it can dispense with both those requirements, and there is nothing to stop the Court from doing that with regard to both those requirements. After all this is what the Court did in 1984 in *Nicaragua v US* with regard to negotiations,[20] where any chance of negotiations between the Reagan administration and Sandinista government of Nicaragua was practically nil. One may observe that the same possibility was not any greater between Georgia and Russia around the period from 2008 to 2011, while the Court still adhered robustly to the requirement of negotiation and dismissed the case. The only way to consider that outcome as legitimate was to entertain a presupposition that Georgia's application would still not go through because they had not resorted to another, institutional, way of dispute settlement that CERD includes but the FCN Treaty between US and Nicaragua did not include. With its loose and overly flexible approach in *Ukraine v Russia*, the Court casts doubt not only on its adherence to the letter and spirit of CERD but also on the overall coherence of its jurisprudence.

3. Exhaustion of local remedies

The local remedies rule is widely regarded to be part of general international law and a precondition to resort to any international tribunal by a State in cases involving the treatment of individuals and their groups by another State. Constituent instruments of some international tribunals contain express reference to the local remedies rule, but every tribunal is expected to respect this requirement unless it has

[19] Separate Opinion of Judge Tomka. Ukraine v Russia. Para.30.

[20] International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Judgment. November 26, 1984. Para. 83. URL: https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf (accessed 22.12.2020); the Nicaragua-US FCN clause referred to 'dispute not satisfactorily settled by diplomacy'.

been expressly waived by its constituent instrument. The use of the local remedies rule has been discussed in jurisprudence repeatedly, but CERD has also proposed its own approach on this. Article 11(3) CERD provides that

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

Obviously, this clause is not about proceedings before the ICJ, but at least it shows what the appropriate approach would be with regard to CERD violations and disputes arising under it.

The Court in *Ukraine v Russia* decided that the admissibility of Ukraine's claims was not affected by the failure of the relevant individuals protected by CERD to exhaust domestic remedies. The Court's overall reasoning about the local remedies rule is rather counter-factual, nebulous and perfunctory. The Court suggests that 'Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case[21]'.

This finding is evidently counter-factual, because Ukraine has itself requested, both with regard to alleged violations of ICSFT and CERD, that Russia must 'Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens[22]'. It is unclear how Ukraine was not standing up to protect the rights of one or more of its nationals. The distinction drawn by the Court is one without difference, even more so as reparation is demanded by Ukraine for individuals, not for the injury suffered by the State of Ukraine as such[23].

In *Elettronica Sicula,* the Court clarified that, in order to avoid resorting to local remedies, a State must demonstrate that the injury it claims is not just a breach of an international obligation in force between the applicant State and the respondent State, but is caused to the State as such and directly. The crucial test is whether a State acts for the redress of injury to its national or to that State as such[24]. In *Avena* this element of the local remedies rule has received a somewhat relaxed treatment, owing to the special nature of interdependence of State and individual rights in the context of consular protection of Mexican citizens in the USA, which is an inherently public and sovereign task even as it relates to the rights of individuals. The State was directly injured and hence local remedies did not have to be exhausted.[25] However, *Ukraine v Russia* has not exposed any evidence showing how State rights were inherently engaged, as opposed to (or compared with) Mexico's consular prerogatives in *Avena*. The dispute under CERD was inherently and solely about individuals and their groups being discriminated against.

Moreover, the fact that individuals or their groups suffer from a 'pattern' of State activity does not *per se* legitimate any exception from the local remedies rule. The Court's decision to dis-apply the local remedies rule just because the applicant State frames its claim in a particular manner (for instance by describing respondent's action as 'pattern') is entirely unprecedented in international jurisprudence. There is nothing inherent in 'the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea' that it could not be reversed by Russian authorities should the affected individuals raise these matters before the Russian judiciary or other competent organs. Whether or not this outcome would actually materialise could only be speculated, but that does not – ever – do away with the requirement to exhaust local remedies in the absence of evidence that discrimination matters were raised

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[21] Ukraine v Russia. Para.130.

[22] Ibid. Para.107.

[23] Ukraine demanded that Russia must 'make full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea'. See Ukraine v Russia. Para.18.

[24] International Court of Justice : Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy). Judgment. July 20, 1989. Paras. 42-43. URL: https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf (accessed 22.12.2020).

[25] International Court of Justice : Avena and Other Mexican Nationals (Mexico v. United States of America). Judgment. March 31, 2004. Para. 40.URL: https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf (accessed 22.12.2020). See, on this case : [Orakhelashvili 2005]; and for discussion of various uses on the local remedies rule: [Orakhelashvili 2018].

and were not properly dealt with within the Russian legal system.

If the local remedies rule is to be dis-applied, an international tribunal has to identify the problem with remedies in the respondent State's legal system (as opposed to the type of alleged violations meant to be redressed through the use of those local remedies). The only plausible ground on which the applicability of the local remedies rule could be dispensed with is that the pursuit of remedies in question is impracticable in the particular case, for instance because the relevant remedies are not available, or the affected individuals cannot afford the cost of it,[26] or the procedures are unnecessarily prolonged, or because the violations involved in the case are perpetrated as part of the relevant State's administrative practice.[27]

The European Court of Human Rights has discussed in its practice the connection between administrative practice and the local remedies rule. However, the European Court proposed a more nuanced approach in *Georgia v Russia*:

'the question of the application of the rule of exhaustion of domestic remedies and compliance with it are so closely related to that of the existence of an administrative practice that they must be considered jointly during an examination of the merits of the case[28]'.

Grand Chamber of the Strasbourg Court ended up dismissing the local remedies objection at the merits stage[29]. An outcome similar to that might have been possible to reach at the merits stage of the Ukraine-Russia case before the ICJ, if this Court were to identify evidence to be examined at the relevant stage of its proceedings, namely evidence that would demonstrate that Russian policies and practices made the use of local remedies impracticable. By contrast, the Court merely bases its approach on what Ukraine is claiming with regard to Russian conduct. And in the tactical sense, the distinction the ICJ proposes in the above-quoted passage of its judgment[30] seems to be aimed precisely at deflecting the focus from the overall context of Russian activities in Crimea, so that then they do not have to join the local remedies objection to the merits, or conduct the detailed analysis of Russian judicial or administrative remedies at the preliminary objections stage. More specifically, the Court would have been expected to demonstrate whether and how the pattern of Russian treatment of minorities in Crimea amounts to administrative practice on which the respondent State's judiciary simply cannot be expected to dispense justice; or whether, to answer the query raised by Article 11(3) CERD, remedies are unreasonably prolonged. That would have required a greater rigour to be used in the reasoning and more detailed evidence to be adduced with regard to the local remedies' situation specifically. What instead obtains from the Court's approach is a mere assertion not validated in any international tribunal's existing jurisprudence. The problem is corroborated by the contrast between the ECtHR's careful and detailed analysis of this problem and the ICJ's rather short and nebulous treatment of it. Whether on the account of general international law criteria, or CERD-specific criteria, or those under other human rights treaties, the Court's approach is flawed.

In the admissibility decision in a later case of *Ukraine v Russia (Re Crimea),* rendered by ECHR's Grand Chamber[31], the European Court has rejected

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[26] Inter-American Court of Human Rights: Exceptions to the Exhaustion of Domestic Remedies. Advisory Opinion. August 10, 1990. URL: https://www.corteidh.or.cr/docs/opiniones/seriea_11_ing.pdf (accessed 22.12.2020).

[27] European Court of Human Rights: Akdivar v Turkey. Application No. 21893/93. September 16, 1996. Paras. 67-68. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58062%22]} (accessed: 22.12.2020).

[28] European Court of Human Rights: Georgia v Russia. Decision. Application no. 13255/07. June 30, 2009. Para. 50. URL: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-93425&filename=001-93425.pdf&TID=rengtkgtcd (accessed 22.12.2020). See also European Court of Human Rights: Georgia v Russia (II). Decision. Application No. 38263/08. December 13, 2011. Para. 93. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-108097%22]} (accessed 22.12.2020). Earlier in *Greece v UK* (Application No. 176/56 and Application No. 299/57), the European Commission disapplied the local remedies rule only after ascertaining that claims against UK related to administrative practice. See European Court of Human Rights: Greece v UK. Decision. Application No. 176/56. May 7, 1956. URL: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-142534&filename=001-142534.pdf (accessed 22.12.2020); Greece v UK (II). Decision. Application No. 299/57. July 8, 1959. URL: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-75361&filename=001-75361.pdf (accessed 22.12.2020).

[29] European Court of Human Rights: Georgia v Russia. Judgment. Application No. 13255/07. July 3, 2014. Para. 159 (identifying practical problems preventing individuals to access those local remedies). URL: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5c530a824 (accessed 22.12.2020).

[30] See above n.21.

[31] European Court of Human Rights: Ukraine v Russia (Re Crimea). Applications No. 20958/14 and No. 38334/18 Decision. January 14, 2021. Paras. 363-368. URL: https://www.refworld.org/pdfid/60016bb84.pdf (accessed 17.01.2021).

the respondent State's objection as to exhaustion of local remedies because, according to the Court, Ukraine's claims related to administrative practice. Unlike *Georgia v Russia,* the Court has not joined the local remedies objection to the merits but rejected it at the preliminary objections stage. The equalising factor is, however, that claims found admissible in *Re Crimea* are qualified by the administrative practice requirement. Ukraine can prevail at the merits stage if it demonstrates not just that violations of the European Convention have been committed, but also that they have been committed as part of administrative practice. The practical effect of this decision is the same as that in *Georgia v Russia* above. However, there is no such equalising factor in the case pending before the ICJ, and Ukraine needs to simply prove that CERD violations have been committed, whatever those putative violations' scale or context or whether they pertain to any administrative practice or some 'pattern' the meaning of which has never been clarified.

4. Conclusion

It is the bottom-line in international adjudication that the International Court, which is a court of law, has to properly apply the law that governs its activities, above all the law that governs its own jurisdiction and admissibility of cases submitted to it. With regard to CERD, the Court prioritises one dispute settlement method over another in a blanket and *a priori* manner. The Court's Judgment does not coherently pursue or complete the task of identifying the meaning of relevant CERD provisions, and leaves some of CERD provisions without proper consideration. The Court's assertion of jurisdiction over Russia under this treaty violates the Court's Statute, namely its Article 36, because the conditions on which the respondent State has consented to the Court's jurisdiction have not been fulfilled. Moreover, declining jurisdiction under CERD would not mean that the dispute between Ukraine and Russia would inevitably remain unsettled. The Court would still have been able to adjudicate the case on the basis of ICSFT, and the outcome would not have been anywhere near to denying justice to the applicant State.

It would be fully within the rights of the respondent State to regard the part of the judgment related to CERD as *ultra vires* and refuse to obey the Court's determinations on the merits of the case as far as alleged violations of CERD are concerned. For, the Court asserted jurisdiction where none of it had been conferred to it under CERD. However, Russia has through its Foreign Ministry already indicated that it has no intention to take that route and is going to participate and present substantive counter-arguments to the Ukrainian case at the merits stage of the proceedings[32]. But not every State involved in any future litigation – possibly launched by applicant States encouraged by the Court's rather loose treatment of the matters of jurisdiction and admissibility – could be expected to be that constructive and receptive when presented with such plainly *ultra vires* findings. Implications would then follow in terms of participation of States in hearings of cases on merits, compliance with the judgements rendered, denunciation of instruments containing jurisdictional clauses wherever possible, and overall propensity of States to give consent to the Court's jurisdiction.

One might also try to justify the Court's decision along the lines suggested by Martti Koskenniemi, namely that 'few international lawyers think of their craft as the application of pre-existing formal rules or great objectives. What rules are applied, and how, which interpretative principles are used and whether to invoke the rule of exception - including many other techniques - all point to pragmatic weighing of conflicting considerations in particular cases. What is sought is something practical, perhaps the 'fairness' of the outcome' [Koskenniemi 2011]. Such 'fairness' could have ethical, political or ideological connotations, whether so articulated expressly or not. Justifying or defending legally flawed judicial decisions rendered against the background of political and ideological divisions that major crises and conflicts invariably entail, or advocating the relaxation of legal rigour, would almost inevitably be seen as an approval of a judicial organ being driven by political and ideological considerations, along with legal ones, or taking sides in political controversies, whether or not that is in fact the case or could be substantiated by evidence. For, what else would inform one's perception of fairness in cases involving major crises and political divisions? Positivist international lawyers, whether there are few or many of us, would object that the international legal system is not a system of

[32] Ministry of Foreign Affairs of the Russian Federation: Press release on judgment of the International Court of Justice regarding Russia's preliminary objections to jurisdiction in the case "Ukraine v. Russian Federation". November 9, 2019. URL: http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3892148 (accessed 29.11.2020).

values and interests, but a system of agreed rules and instruments that contain those rules. That is a fact that no theory could deny and no politics could upset. There will no doubt be those who will consider the Court's decision as fair or sensible, on political, ideological or other possible grounds. But that also opens the possibility of the Court being accused of having manipulated the content of applicable legal instrument out of some considerations of fairness by weighing conflicting considerations, rather than giving effect to the intention of States-parties to CERD as appears from the latter's text. Whether the adoption of that approach by a court whose terms of reference and jurisdiction owe their existence entirely to the consent of States could be regarded as fair or sensible is something to be wondered about by all of us, far beyond the circle of Koskenniemi's 'few'.

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