CHAPTER 2

Assessing the Contribution of the International Convention on the Elimination of All Forms of Racial Discrimination to Global Racial Equality

David Keane

Introduction

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted on 21 December 1965, is the first of the nine core United Nations (UN) human rights treaties. Its Preamble expresses a resolve 'to build an international community free from all forms of racial segregation and racial discrimination'. In that light, it reaffirms that:

> ... [D]iscrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State.

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The Preamble thus captures the inter-State character of the treaty 'among nations', as well as its intra-State character 'within one and the same State'. The principles of the Convention are widely accepted as representing conduct prohibited by customary international law. In order to achieve its principles, the treaty would establish the first UN treaty body, the Committee on the Elimination of Racial Discrimination (CERD), which began its work in January 1970 once the treaty had entered into force.

This chapter assesses the contribution of ICERD to global racial equality. The treaty has 182 States Parties, and a truly global picture cannot be provided in a single chapter. Instead, some of the treaty's achievements are emphasised, while also identifying certain weaknesses and gaps. Section one examines the significance of ICERD's emergence as the first of the core UN human rights treaties. It underlines its status as a pioneering treaty, opening the door to the realisation of a UN human rights treaty system, while also discussing how this has had a continuing impact on certain of ICERD's monitoring provisions. Section two reflects on the treaty's status as a global, but not universal, treaty. All of those States that are *not* a party to the treaty are identified, and prospects for universal ratification considered. Section three looks at a major weakness in the operation of the treaty since its adoption: the failure of the majority of States Parties to make the Article 14 declaration allowing for individual communications. To what extent States Parties may be encouraged to allow for this important mechanism is considered. Section four offers a brief thematic study, outlining the contribution and response of the treaty in light of the recent 'Black Lives Matter' movement. The international nature of the movement emphasises the importance of ICERD as a global legal standard on the elimination of racial discrimination. In conclusion, the chapter reflects on ICERD's critical mandate amid growing awareness of the essential nature of its object and purpose.

1. The First UN Human Rights Treaty

The study of human 'races' dates to antiquity (Cavalli-Sforza et al. 2012: 16). However, the beginning of African colonisation and the 'discovery' of America and the sea route to India by Europeans caused a 'considerable increase in race and colour prejudice' (Comas 1958: 9). Race prejudice developed into a regular doctrinal system during the eighteenth and nineteenth centuries. In the twentieth century, when the UN was built 'on the ashes of the most destructive war in history', it focused its attention on racial discrimination, with the understanding that ideas of racial superiority had been in some way responsible for the Holocaust and other atrocities (Schabas 2017: 181). As Schabas highlights, 'the root of the problem was more visceral and it could not be blamed on the Nazis alone', with manifestations including 'the scourge of slavery and the slave trade, by then abolished but of recent and enduring memory, and colonialism very much a reality as the UN addressed the corrupted mandate system it

had been bequeathed by the League of Nations' (Schabas 2017: 181). Thornberry adds that early UN action on racial discrimination was also motivated by 'the affront to humanity represented by apartheid' built on 'centuries of racial theorising' (Thornberry 2017: 1).

The UN combined statements of principle with practical methodologies to express a new ethic of global racial equality. The elimination of racial discrimination is a founding principle of the UN, with Article 1(3) of the UN Charter 1945 describing one of the four purposes of the organisation as: 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. The UN General Assembly (UNGA) would express concern about racial discrimination from its earliest sessions, declaring in a 1946 resolution on Persecution and Discrimination that it is 'in the higher interests of humanity to put an immediate end to … racial persecution and discrimination' (UNGA, 1946). Article 2 of the Universal Declaration of Human Rights 1948 (UDHR) affirmed that, 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion.' The 1950s–60s was a period of rapid change for the UN, that saw its membership grow significantly with decolonisation and the emergence of newly independent nations in Africa and Asia. The first non-Western European UN Secretary-General, U Thant of what was then Burma, was appointed in 1961, symbolising the growing presence of these nations in the organisation. In his memoirs, Thant highlighted: 'the outstanding difference that distinguished me from all other Secretaries General of the League of Nations or of the United Nations lay in the fact that I was the first non-European to occupy that post' (Thant 1978: 36).

This period also saw a key evolution in international human rights law, with the shift from non-binding, declaratory rights listed in the UDHR, to a legally binding system of international human rights treaties and their monitoring bodies. The intention had been firstly to create an 'International Bill of Rights' composed of a declaration, a convention and measures of implementation, that applied to civil, political, economic, social and cultural rights. Following on from the adoption of a 'declaration' in the UDHR 1948, differences arising from the Cold War saw a split in the proposed 'convention' so that in 1954, the Commission on Human Rights set out a draft Covenant on Civil and Political Rights and a draft Covenant on Economic, Social and Cultural Rights (UN Economic and Social Council 1954). It included as 'measures of implementation' the first proposed UN treaty body, the Human Rights Committee, but applied only to civil and political rights (Schwelb 1968: 838–9). The realisation of these instruments would continue to take time due to differences between the Eastern and Western blocs, with substantial revisions to the proposed drafts in the Third Committee from 1954 to 1966 (Schabas 2019: LXIII). The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted on 16 December 1966.

By contrast, the movement towards an international treaty on racial discrimination began much later than the 'International Bill of Rights', originating in the winter of 1959–60 as a series of UN resolutions in response to a global outbreak of antisemitic propaganda known as the 'Swastika epidemic' (Keane 2007: 371). It developed much more quickly with the support of the newly emergent African and Asian nations for whom the elimination of racial discrimination was a priority; their focus was colonialism and apartheid. It followed the same pattern of declaration, convention and measures of implementation. In 1963, the UN Declaration on the Elimination of Racial Discrimination was proclaimed. On 21 December 1965, ICERD was adopted as a convention, with built-in measures of implementation via the first UN treaty body, CERD. It fell to Secretary General U Thant to usher in ICERD and a new age of UN human rights treaties and their monitoring bodies. He stated to the General Assembly:

> In the Charter, the peoples of the United Nations proclaimed their determination to reaffirm faith in human rights and in the dignity and worth of the human person. The Convention which the General Assembly has just adopted represents a significant step towards the achievement of that goal. Not only does it call for an end to racial discrimination in all its forms; it goes on to the next, and very necessary, step of establishing the international machinery which is essential to achieve that aim. (UNGA 1965 PV.1406, para. 138)

As Thant highlighted above, it is the 'international machinery' that distinguished ICERD from what the UN had achieved up to that date in the realm of human rights. CERD monitors the treaty through State reports (Article 9); inter-State communications (Articles 11–13); individual communications (optional, Article 14); and a compromissory clause allowing for dispute resolution before the International Court of Justice (ICJ) (Article 22). CERD would evolve its practice in relation to issuing concluding observations, general recommendations, early warning measures and urgent procedures, all based around the reporting procedure in Article 9. ICERD as the first UN human rights treaty had no exact precedent for its measures of implementation, but it did draw on related instruments and documents, including the European Convention on Human Rights (ECHR) 1950, the draft of the Covenants 1954 and treaties on discrimination of the International Labour Organisation and the United Nations Educational, Scientific and Cultural Organisation. It would in turn provide a precedent and template for all of the future 'core' UN human rights treaties, of which there are nine in total today. It ensured also that final obstacles in relation to realising the ICCPR and the ICESCR would be overcome.

While all the UN human rights treaties have certain common features, each remains distinctive. For example, ICESCR was drafted without a treaty body. The Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) were drafted

without an individual and inter-State communications provision. The ICCPR and ICESCR were drafted without a compromissory clause allowing for dispute resolution before the ICJ. These differences have been elided over time through optional protocols and more streamlined drafting of later treaties, so that today the UN treaty bodies broadly utilise the same supervisory mechanisms. They all have a treaty body. They all receive State reports, and issue concluding observations and general recommendations or comments. They all have an optional individual communications provision, which States Parties must opt in to in order to allow individuals to petition the committees. Most have an optional inter-State communications provision to the relevant treaty body (CEDAW still does not). Some have a compromissory clause allowing for dispute resolution before the ICJ, although no treaty has added such a clause via an optional protocol.

ICERD retains distinctive features within the UN human rights treaty system. To a certain extent, it benefitted from its early status as a pioneering treaty and was drafted with the full range of supervisory mechanisms in its Parts II and III, meaning there was never a need for an optional protocol. In fact, the text has remained unchanged since 1965. Importantly, it has a unique feature in that its inter-State communications mechanism under Articles 11–13 is compulsory. This is a legacy of the 1954 draft of the Covenants from which ICERD drew, which provided for compulsory inter-State communications as well as a compromissory clause allowing for referral to the ICJ. For the ICCPR, the revision process in the Third Committee changed the inter-State communications mechanism from compulsory to optional, and removed the compromissory clause allowing for referral to the ICJ. No such revision occurred in the Third Committee for ICERD. This was deliberate, in that a broad grouping of States felt justified in affording to CERD stronger powers than what would be granted to the Human Rights Committee under the ICCPR. As a result, under Article 11, any State Party to ICERD can bring an inter-State communication against another State Party. In all other UN treaties where inter-State communications provisions are found, they are optional, meaning States Parties must make an extra declaration recognising the competence of the committee to receive such communications. The result of this in practice is that to date, CERD is the only treaty body that has received inter-State communications, three in total: *Qatar v Kingdom of Saudi Arabia* (2018), *Qatar v United Arab Emirates* (2018) and *Palestine v Israel* (2018). In *Palestine v Israel*, CERD stressed the 'collective enforcement' character of the inter-State communications mechanism as it relates to all States Parties, and not only to the individual disputants (Eiken & Keane 2022).

The distinctiveness of its provisions should, however, not be overstated, and today CERD broadly engages in the same work as all the UN treaty bodies. This means that it suffers from the same common weaknesses, including that its recommendations—whether issued through concluding observations, general recommendations, early warning measures and urgent procedures, inter-State communications or individual communications—are not *stricto*

sensu legally binding. In this way, the UN treaty bodies differ from regional human rights courts in particular, which issue legally binding judgments. As a result, individual decisions, interpretations or recommendations of CERD are open to challenge by States Parties, which may not implement a decision, or apply an interpretation or recommendation. Nevertheless, the treaty has proven effective at ensuring its provisions are implemented through its network of non-binding recommendations. In addition, such recommendations may often refer to international standards that have a customary status. As Thornberry summarises: '[t]he complex of mechanisms has … been pivotal in the development of an expansive network of standards that contributes to the formation of customary law even if specific decision-making procedures do not possess a legally "binding" quality' (Thornberry 2016: 65).

Beyond the narrow and not always helpful dialectic of binding and non-binding, CERD sees the treaty as a living instrument that responds to victims of racial discrimination. CERD builds a 'dialogue' with States Parties over periodic reports, in which it also integrates information from NGOs and civil society, as the optimal means of ensuring compliance over time. This can involve recognition of new categories of rights-holders and innovation in monitoring, reflective of increased NGO and civil society participation in the Committee's work (IMADR 2011). CERD has, in turn, served to provide a 'legal cutting edge to defend their rights' (IMADR 2011: Preface (by Thornberry 2016)). This may be seen in particular in its range of general recommendations (GRs) which may identify groups that require a specific focus under the treaty, such as indigenous peoples (GR 23), the Roma (GR 27), caste groups (GR 29) or people of African descent (GR 34), or engage with themes that impact all States Parties, such as special measures (GR 32) or combatting racist hate speech (GR 35). CERD will reference its general recommendations in the State reporting process and guide States Parties towards legal responses and other remedies in relation to Convention groups and themes, in line with their Article 2 ICERD obligation 'to pursue by all appropriate means and without delay a policy of eliminating racial discrimination'.

2. From a Global to a Universal Treaty

ICERD is subject to signature, ratification and accession under Articles 17–18. To date it has 182 States Parties and, in terms of ratifications, is nearing universal acceptance. There are just 15 States that have not ratified the treaty. Three of these have signed but not ratified ('Signatories') and twelve of have neither signed nor ratified ('No Action'). These are:

- Bhutan, Nauru and Palau ('Signatories')
- Brunei, Democratic People's Republic of Korea (DPRK, or North Korea), Malaysia, Myanmar, South Sudan, and the Pacific Island nations of the

Cook Islands, Kiribati, Micronesia, Niue, Samoa, Tuvalu and Vanuatu ('No Action').

In 2019, Angola (which had been a signatory), and Dominica and the Marshall Islands ratified the treaty. Dominica's ratification meant that ICERD covers the entire Caribbean region. Of the remaining States outside the treaty, we may assume that the three signatories will ratify, although it should be noted this is not an obligation (Bradley 2012: 208). Similarly, the remaining Pacific Island nations will in all likelihood ratify the treaty at some point. In general, objections among Pacific Island nations to ratifying human rights treaties are based on capacity, in that their small size and remoteness means that such nations cannot easily meet the costs of ratification, including reporting obligations. Olowu among others has criticised this position, arguing that the 'fiscal constraints justification misses the essence of the UN human rights treaty system' (Olowu 2006: 165). A recent initiative by the Committee on the Rights of the Child, which in March 2020 conducted an extraordinary 84th session in Samoa, sends a signal that the UN treaty bodies are willing to assist the Pacific nations in meeting their reporting obligations (OHCHR 2020). This may encourage ratifications of remaining treaties, including ICERD, by Pacific Island nations.

DPRK or North Korea has signed and ratified several human rights treaties, including the CRC, CEDAW, CRPD, ICCPR and ICESCR. Overall, the human rights situation in DPRK is extremely concerning. A recent report of the UN Special Rapporteur on the situation of human rights in DPRK found 'no sign of improvement in the human rights situation, nor progress in advancing accountability and justice for human rights violations' (HRC 2020: 3). The Special Rapporteur has encouraged the Government of DPRK to engage with the international human rights mechanisms. ICERD is not specified, but its ratification ought to form part of this process of engagement.

South Sudan became independent from Sudan on 9 July 2011. Prior to the referendum on independence, the territory had formed part of the Republic of Sudan, which ratified ICERD in 1977. Thus, the peoples of South Sudan had the protection of the Convention from 1977 to 2011. In that period, CERD offered Concluding Observations in 1987, 1994, 1995 and 2001. In 1987, for example, CERD commended the Sudanese report which described how the country was 'overcoming the after-effects of a repressive regime and embarking on the reinstatement of human rights' (CERD 1987: para. 487). CERD also understood that 'the most important problem facing the Government was the crisis between the north and the south, which was jeopardizing the full application of the Convention' (CERD 1987: para. 492). Thus, CERD recognised from an early point that the peoples of South Sudan required a particular focus under the Convention. It would appear essential that the newly independent nation would ratify the treaty and affirm the provisions that applied for 35 years prior to independence.

The Pacific Island nations, DPRK and South Sudan have not expressed any formal opposition to ICERD or its provisions. The situation changes in

Southeast Asia, where such opposition has been voiced. In Malaysia, there were widespread demonstrations following an announcement before the UNGA that the government would 'ratify all remaining core UN instruments related to the protection of human rights', including ICERD (Tew 2020: 218). The announcement was made in September 2018, then retracted in November 2018, but the demonstrations went ahead as a 'celebration' of the retraction in December 2018. This remains the only global example of a specific anti-ICERD demonstration. The opposition centred on Articles 1(4) and 2(2), the provisions governing special measures or affirmative action (Sendut 2018). While ICERD allows for such measures under Article 1(4), the provision reads also that these cannot lead to 'the maintenance of separate rights for different racial groups and … shall not be continued after the objectives for which they were taken have been achieved'. Opponents of ICERD ratification in Malaysia argue that this clause is incompatible with Article 153 of the Federal Constitution of Malaysia 1957, which enshrines the 'special position of the Malays and natives of any of the states of Sabah and Sarawak'. The perception was that Malaysia's ratification of ICERD would warrant either the immediate repeal of Article 153, or set an expiry date on the special position of these groups. However, this position is not accurate. Article 153 appears to be compatible with Articles 1(4) and 2(2) ICERD, which allows for special measures for certain groups (Sendut 2018). A CERD member visiting Malaysia at the time described the controversy as a 'misunderstanding' (Pillai 2018).

In June 2021, a comprehensive report was published by Professor Datuk Dr Denison Jayasooria with the assistance of the UN in Malaysia, on the question of understanding ICERD in the context of the Federal Constitution, human rights and Malaysian society (Jayasooria 2021). Importantly, the report noted the examples of the United States, India and South Africa, all of which have ratified ICERD while implementing affirmative action policies of varying forms for Convention groups. The South African example was considered particularly salient since, like Malaysia, it involved such measures in favour of an historically disadvantaged majority, rather than a minority. The report affirmed that '[t]he South African Government and CERD do not see the South African special measures for the majority of the Black community as discriminatory, and CERD is not pressuring South Africa to repeal these special measures' (Jayasooria 2021: 60). The report concluded that it is necessary for the national political leadership to review ICERD ratification, consult all parties concerned and explore the evidence in an open and objective way (Jayasooria 2021: 61).

Myanmar, like Malaysia, participated in the drafting process for ICERD. In 1965, in the Third Committee, U Myat Thun (Burma) stated: 'Burma, with its centuries-old tradition of religious, cultural and social tolerance, was opposed to all forms of racial discrimination anywhere' (UNGA 1963: para. 38). Burma voted on many other provisions of the draft treaty, but it clearly did not consider it to be of relevance to its own domestic minority groups. On 15 December 1965, when the Third Committee unanimously adopted the text

of the draft ICERD, U Vum Ko Hau (Burma) stated: 'his delegation wished, on the occasion of the unanimous adoption of the draft Convention, to reaffirm that racial prejudice and national and religious intolerance were, by tradition, non-existent in Burma' (UNGA 1965 SR.1374: para. 46). This was not an unusual position, with many other States seeing the draft treaty in a similar light—as an internationalist statement that did not have internal relevance. As Lady Gaitskell (United Kingdom) commented at the same meeting: 'to judge from the [Third] Committee's discussions, the world suffered greatly from racial discrimination, but no particular country seemed to have it' (UNGA 1965 SR.1374: para. 61). On 21 December 1965, when ICERD was adopted by the General Assembly sitting in plenary by 106 votes to none, Burma was among the States voting in favour (UNGA 1965 PV.1406: para. 60).

Today's Myanmar is a state 'where multi-National races collectively reside', according to Article 3 of its 2008 Constitution. The military regime has constructed eight major ethnic groups, broken down further into 135 'national races'. Although widely cited, the latter number has never been formally announced or explained (Cheesman 2017: 8). What is apparent is that the number is arbitrary and does not correspond to 135 identified national races, but is considered instead to be the number that naturally exist, some of which are yet to be recognised. Importantly, 'national race' membership has become the key criterion for membership in the country's political community (Cheesman 2017: 1). It defines those who 'belong' in Myanmar; all others, including the Rohingya, regardless of how many generations they have lived in Myanmar, are considered outsiders or immigrants. In September 2018, the Human Rights Council published the report of its Independent International Fact-Finding Mission on Myanmar (IIFFMM 2018), accusing Myanmar of 'the gravest crimes under international law', and recommending that named senior generals of the Myanmar military be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes (IIFFMM 2018: para. 100). The lack of 'national race' status of the Rohingya dramatically increased their vulnerability, which contributed to the extreme scale and intensity of the violence that has resulted against them (IIFFMM 2018: para. 81).

The Fact-Finding Mission proposes an accountability process that is transformative, victim-centred, comprehensive and inclusive. The process is aimed at contributing to three fundamental shifts: breaking the climate of impunity; ensuring that all State institutions, including the security forces, are answerable to the people; and promoting a concept of the State and the nation of Myanmar that is inclusive, based on equality and respect for the human rights of all (IIFFMM 2018: para. 99). The first two 'fundamental shifts' are to some extent in motion. Three weeks after the Mission report, the Prosecutor of the International Criminal Court (ICC) launched preliminary investigations into the alleged deportation of 70,000 Rohingya Muslims from Myanmar to Bangladesh as a possible crime against humanity (ICC Pre-Trial Chamber I, 2018). In 2019, The Gambia instituted proceedings before the ICJ alleging violations of

the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention') through 'acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group' (*The Gambia v. Myanmar*, 2019), which has progressed to the merits phase. It is difficult to gauge at this point whether these mechanisms will be successful, but their initiation is a step towards combatting impunity.

The third is a longer-term fundamental shift aimed at addressing the 'root causes' of Myanmar's recurrent problems. It recognises that gross human rights violations and abuses committed in Kachin, Rakhine and Shan states 'stem from deep fractures in society and structural problems that have been apparent and unaddressed for decades … reflective of the situation in Myanmar as a whole' (IIFFMM 2018: para. 100). Pederson argues that while mechanisms of international justice play an important role, 'little attention is paid to the causes of the crimes or identifying sustainable solutions' (Pedersen 2019: 13). The best long-term hope lies 'within a reformed state committed to democratic values and a broader, more tolerant and inclusive sense of ethnicity' (ibid.: 12). It is noteworthy that the two international human rights treaties that would support such a longer-term reform, ICERD in terms of ethnic, minority and indigenous peoples' rights, and the ICCPR in terms of civil and political rights, have not been ratified by Myanmar.

3. Individual Communications

The individual communications system under ICERD is optional, as it is under all of the UN human rights treaties. Under Article 14(1):

> A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.

The emergence of an individual communications system was an innovation in ICERD as the first UN human rights treaty. ICERD would draw on the ECHR as a template for its provision on individual communications. The right of individual petition under ex-Article 25 ECHR was optional at the time, so that Schwelb would comment in a 1966 piece that 'the optional character is a common feature of the two instruments' (Schwelb 1966: 1042). The differences between the instruments was also recognised at the drafting stage. Lowrey (Australia) pointed out that the ECHR was a regional instrument relating to a group of relatively homogenous countries, while the draft ICERD was universal with a much wider field of application, meaning the Third Committee 'was entering a field where it must walk warily' (UNGA 1965 SR.1357: para. 3).

Capotorti (Italy) by contrast emphasised the cautious nature of the ICERD provision in its use of the word 'communication', and that it was 'in no way comparable' to the ECHR which could refer a case to the European Court of Human Rights (UNGA 1965 SR.1357: para. 30). Nevertheless, as Combal (France) summarised, the right of individual petition 'was a familiar concept, but it had never been recognised in a universally applicable international text' (UNGA 1965 SR.1357: para. 22).

There remains a gap between the regional and international human rights systems in terms of the compulsory character of individual communications. The Inter-American Commission on Human Rights has an automatic right to hear individual petitions under the American Convention on Human Rights 1969 (Shelton 2015). The African Commission on Human Rights has an automatic right of individual petition under the African Charter on Human and Peoples Rights (Gumedze 2003). Access to the regional human rights courts under the Inter-American and African systems is, however, more restricted (Vargas 1983–4; de Silva 2019). Protocol No 11 (1998) of the ECHR grants compulsory jurisdiction of the European Court of Human Rights over individual applications or cases. Hence, all three regional human rights systems provide a means of automatic access for individuals to a regional human rights body.

At the international level, while all the UN human rights treaties have an individual communications system, it remains optional, and not all States Parties to the treaties have ratified the relevant optional article or protocol. Smith points out the important fact that 'the world's most populous countries, China, India, Indonesia and the United States of America generally do not accept individual communication mechanisms for treaties to which they are party' (Smith 2015: 184). The failure of States Parties to opt in to the individual communications system is particularly pronounced under ICERD. To date, 59 States Parties have made the requisite declaration under Article 14, a notably low number given the treaty dates from 1965 and has always had the procedure (Thornberry 2016: 69). The absence of the world's most populous countries means an international individual remedy for racial discrimination is not available to the majority of the world's population. Unlike ICERD itself, Article 14 cannot be considered properly global in effect, although there is potential for it to become so. Thornberry writes of 'heart-searching' on the part of the Committee as to why more States Parties have not opted in, believing that '[p]art of the answer may lie in the unpalatability of a finding of racial discrimination' (Thornberry 2016: 69). Recommendations from the Committee to States Parties to accept the procedure appear to have had limited effect (ibid.: 56). Thornberry also points out that of the 59 States Parties that have made the declaration, communications have emanated from fewer than a quarter of these. The total of CERD individual communications remains about 60.

There are clearly wider issues with the individual communications system under the UN human rights treaties. Only the Human Rights Committee under

the ICCPR has a substantive jurisprudence, receiving thousands of individual complaints (Gerber & Gory 2014: 405). The figures then drop significantly for the other UN treaty bodies. This is partly explained for some treaties by the delay in having such a procedure in the first place, for instance, ICESCR, CEDAW and the CRC were drafted without an individual communications procedure, and adopted a relevant protocol decades later. But this does not explain the low take-up under ICERD and other treaties. It is apparent that individual communications 'are not especially popular with States, or even individual complainants' (Smith 2015: 178). A 2018 *Universal Rights Group* (URG) report found that 34% of States that have accepted one or more communications procedure have *never* been the subject of an individual complaint, with the majority of these from Africa and Asia. The report found in its year of review that 19% of all treaty body petition cases concluded were from just one state: Denmark (URG 2018: 22). UN treaty bodies may also lack capacity to deal with large numbers of individual communications, should these arise—to a certain extent they rely on an under-used system. These weaknesses are well known, with a number of initiatives proposed for strengthening the UN treaty body system. A 2006 concept paper from then High Commissioner Louise Arbour setting out a 'unified standing treaty body' proved divisive, and is no longer being pursued (UN High Commissioner 2006; O'Flaherty and O'Brien 2007). While treaty body strengthening will continue, we may assume that this will not involve dissolving the treaty bodies into a single body or any other reform that would require amendment of treaty provisions. In that sense, an optional individual communications system under each UN human rights treaty will remain.

There are therefore a number of weaknesses to be addressed that apply to CERD, as well as the other UN treaty bodies, including: (i) the low rate of acceptance by States Parties; (ii) the low rate of take-up of the mechanism by individuals (and groups) in States which have made the requisite declaration or ratification; (iii) State Party compliance with recommendations in individual communications; and (iv) greater treaty body capacity to examine individual communications. For CERD, the starting point must be the low number of States Parties to the Article 14 declaration. It could launch a 'thematic discussion' to explore the reasons behind States Parties' reluctance to recognise the competence of the Committee to receive individual communications. However, the Committee may be hesitant to do this. As one CERD member put it in the context of the ratification controversy in Malaysia, '[i]t would be difficult to promote ICERD to a non-signatory state … It would backfire, and seem as though the UN is imposing something (forcefully)' (Pillai 2018). The same considerations may be seen to apply *mutatis mutandis* to States Parties and Article 14. Hence, CERD may wish to restrict itself to encouraging States to opt in under Article 14 in the reporting process, but may not wish to take further steps in that regard.

The Committee could also consider a general recommendation on Article 14 that encourages each State Party to make the declaration under Article 14 in its

preamble, stressing the importance of the individual remedy to the object and purpose of the treaty. It could then set out how States Parties that have made the declaration may ensure individuals and groups are aware of, and have access to, the remedy. It could reflect on the status of its recommendations in individual communications, and their effective implementation. There is a model for such an initiative in the Human Rights Committee's General Comment 33 (2008) on the obligations of States Parties under the Optional Protocol to the ICCPR (CCPR 2008). The General Comment notes in the context of the ICCPR that a majority of States Parties have become a party to the Protocol, which is 'organically related to the Covenant' (CCPR 2008: para. 2). It continues:

> while the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions. (CCPR 2008: para. 11)

At present, Article 14 individual communications have not been a relative success under ICERD, and heart-searching on the part of the Committee is perhaps not enough given the essential role individual communications can play in the elimination of racial discrimination. The absence of a clear majority of ICERD States Parties from Article 14, including all of its most populous States, is undermining the global ethic of the treaty.

4. A Thematic Exploration of CERD Mechanisms: 'Black Lives Matter'

The issuance of concluding observations in response to State reports is arguably the 'single most important activity of human rights treaty bodies' (O'Flaherty 2006: 29). In that light, CERD's examination of State reports under Article 9 'remains the centrepiece of its work' (Thornberry 2016: 45). General recommendations, of which there are currently 36, are directed at all States Parties and are often issued as a response to themes or patterns that arise in the State reporting procedure. From 1993, CERD has also adopted early warning measures and urgent procedures as part of its regular agenda (CERD 1993 and 2007). These are not optional and may be issued in relation to any State Party. In addition, these are not tied to the reporting cycle and can be issued at any time. They are aimed at preventing existing situations escalating into conflicts, and to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.

In 2020, 'Black Lives Matter' further underlined the significance of the treaty's object and purpose and the importance of CERD's mandate. In June 2020, an 'urgent debate' in the Human Rights Council discussed 'racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protests' (OHCHR 2020). We may consider the extent to which CERD has understood and responded to information and patterns of police brutality in the United States. The United States signed ICERD in 1966 but did not ratify until 21 October 1994. It submitted its first report in 2001, when CERD also adopted its first concluding observations. These read in an early passage: 'The Committee notes with concern the incidents of police violence and brutality, including cases of deaths as a result of excessive use of force by law enforcement officials, which particularly affect minority groups' (CERD 2001b: para. 394). At the next reporting cycle in 2008, CERD found:

> While recognising the efforts made by the State Party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the US-Mexico border. (CERD 2008: para. 25)

It recommended that 'the State Party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities' (ibid.). In its most recent concluding observations, issued in 2014, the Committee again 'reiterates its previous concern at the brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities' (CERD 2014: para. 17).

Importantly, CERD has intervened twice in relation to the United States under its early warning measures and urgent procedures. In 2017, it issued a Decision 'recalling the horrific events in Charlottesville of 11–12 August 2017 leading to the death of Ms. Heather Heyer', as well as expressing alarm at 'racist demonstrations, with overtly racist slogans, chants and salutes by individuals belonging to groups of white nationalists, neo-Nazis, and the Ku Klux Klan, promoting white supremacy and inciting racial discrimination and hatred' (CERD 2017). The Decision recalled its previous concluding observations and called on the United States to fully respect its international obligations arising from ICERD. In June 2020, it issued a Statement in which it expressed alarm at 'the horrific killing of George Floyd in Minneapolis on 25 May 2020', as well as 'the recurrence of killings of unarmed African Americans by police officers and individuals over the years' (CERD 2020a). In the Statement, CERD remains 'convinced that systemic and structural discrimination permeates State institutions and disproportionately promotes racial disparities against African Americans', as well as 'noting the announcement of police reforms by

the local authorities in Minneapolis, as well as similar announcements by other local governments to redirect policing budget to social services' (CERD 2020a). The Statement again calls on the United States to fully respect its international obligations arising from ICERD. It urges the Government of the United States 'to publicly recognize the existence of structural racial discrimination in the society, as well as to unequivocally and unconditionally reject and condemn racially motivated killings of African Americans and other minorities' (CERD 2020a).

In 2001, CERD issued General Recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, applicable to all States Parties. It read:

> States Parties should pay the greatest attention to the following possible indicators of racial discrimination: The number and percentage of persons belonging to the groups referred to in the last paragraph of the preamble who are victims of aggression or other offences, especially when they are committed by police officers. (CERD 2001a: para. 1(a))

In November 2020, CERD issued its most recent GR 36 on preventing and combatting racial profiling by law enforcement officials (CERD 2020b). The initial draft of GR 36, circulated for comments by States Parties, civil society and others, referred only to preventing and combating racial profiling, to which 'by law enforcement officials' was subsequently added (Keane 2020). GR 36 refers to CERD's 'extensive practice in combatting racial profiling by law enforcement officials', noting how racial profiling 'has been a historic feature of policing in countries such as the US and Brazil' (CERD 2020: para. 4). It is the first general recommendation or comment to put law enforcement officials in its title, marking a specific focus by a human rights body on the police. In the initial draft of GR 36, Section D was called 'Dialogue with Communities'. In their observations on the draft, the Group of Independent Eminent Experts on the Implementation of the Durban Declaration and Programme of Action suggested renaming it to 'Community Policing'. This is a subtle change, but one that captures the idea that policing should not be a two-way interaction but rather controlled by the people that are policed (Keane 2020).

In sum, CERD has long signalled its deep concern with the issues raised by 'Black Lives Matter' in the United States. All three of its concluding observations to the United States from 2001 onwards express condemnation of police killings in relation to racial and ethnic minorities in the strongest terms, referring also in all three to 'police brutality'. In addition, it has deployed its early warning measures and urgent action procedures twice against the United States, following events in Charlottesville in 2017 and then Minneapolis in 2020. These operate outside the reporting schedule and signal the Committee's deep concern. As noted, the United States has not made the relevant declaration under Article 14, and no individual communication may be taken against

the United States in relation to police killings. An inter-State communication under Articles 11–13 is possible, and one United States commentator has suggested just such an action (Ukabiala 2020). However, the difficulty lies in finding a State Party willing to do this. The absence of a contentious jurisdiction for individuals and groups under ICERD in most States Parties remains the treaty's biggest accountability gap.

CERD's recommendations relevant to the issues touched on by 'Black Lives Matter' are prescient and significant. They also highlight the weaknesses of the UN treaty body system—despite repeated expressions of concern, there is little indication of specific action on the part of the United States in response to CERD's recommendations. Concluding observations give support and strength to domestic and international NGOs and civil society that may battle the injustices of police brutality and killings. CERD provides a voice for this struggle at the UN and communicates directly to the State Party that such practices are a violation of international human rights standards and its obligations under the treaty. CERD's recommendations in this and related areas deserve closer attention and implementation by States Parties, signalling as they do the voices of those most affected by racial discrimination.

Conclusion

ICERD is the only global treaty in the area of racial discrimination, and is of immense symbolic and legal significance. It has a strong range of mechanisms by UN standards, benefitting from its status as the first, pioneering human rights treaty. These are best considered as interlocking and mutually supportive, involving State reports, concluding observations, inter-State communications and disputes, individual communications, early warning measures and urgent action procedures. No State should be outside the protections afforded by the treaty, given that its provisions largely have a customary status. It is important that it moves from a global treaty with 182 States Parties, to a universal treaty, which may require a greater focus on the small number of States that have yet to ratify. For example, Myanmar's absence from the treaty means a gap in international knowledge of patterns of racial discrimination that may contribute to the gross violations of group rights that have occurred there. Similarly, the low number of States Parties that accept an individual's right to communicate to CERD under Article 14 is out of sync with a contemporary world that increasingly understands the urgency felt by individuals and groups to eliminate racial discrimination. Individual communications provide examples of how a failure to implement treaty provisions is lived by individuals and groups. The majority of States Parties in their absence from the Article 14 procedure are undermining the global ethic of the elimination of racial discrimination.

In recent years, ICERD has gained in prominence. Inter-State cases have underlined that racial discrimination is international, between States, as well

as national, within States. The national and international reaction to George Floyd's killing has emphasised the importance of ICERD's object and purpose. It is apparent that CERD has a mandate for radical change within the parameters of the treaty. Its recommendations are not always immediately effective and lack the character of a court judgment. But they also drive legislative change, ensuring an administrative focus on Convention groups as well as effective redress for violations. This is a continuous process of dialogue, decisions and recommendations, rooted in the binding provisions of the treaty. The growing voices for change from Convention groups will become increasingly difficult for States Parties to ignore. ICERD assures those voices that their calls are rooted in international legal standards, while CERD's mandate is to translate those standards into meaningful recommendations that advance towards global racial equality.

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