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Andreas Zimmermann & Felix Boos

Bringing States to Justice for Crimes Against Humanity

- *The Compromissory Clause in the ILC Draft Convention on Crimes against Humanity* -

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Bringing States to Justice for Crimes Against Humanity
- The Compromissory Clause in the ILC Draft Convention on
Crimes against Humanity -

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The article is under editorial consideration for publication in the Journal of International Criminal Justice Special Issue on Crimes against Humanity.

Abstract:

Draft Art. 15 CCAH attempts to strike a balance between State autonomy and robust judicial supervision. It largely follows Article 22 CERD conditioning the jurisdiction of the ICJ on prior negotiations. Hence, the substance of the clause is interpreted in light of the Court's recent case law, especially Georgia v. Russia. Besides, several issues regarding the scope ratione temporis of the compromissory clause are discussed. The article advances several proposals to further improve the current draft, addressing the missing explicit reference to State responsibility, as well as the relationship between the Court and a possible treaty body, It also proposes to recalibrate the interplay of a requirement of prior negotiations respectively the seizing of a future treaty body on the one hand and provisional measures to be indicated by the Court on the other.

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1. Introduction

During diplomatic negotiations leading to the possible adoption of multilateral treaties, such as the now envisaged Convention on Crimes against Humanity ('CAH') the part on final clauses normally tends to be treated with some form of benevolent negligence.³ This not the least includes possible compromissory clauses to be eventually included in such treaties with the exception of reluctant, sovereignty-focused States that want to make sure that, in case they become parties to such treaty, if at all, they are not subject to any form of mandatory third-party settlement mechanism.

Yet, years later, such compromissory clauses, as well as their interpretation, might almost by a sudden become relevant, the Bosnian and Croatian Genocide cases brought before the International Court of Justice ('ICJ') under Article IX of the Genocide Convention, adopted more than 40 years earlier, the 2008 ICJ case Georgia v. Russia under Article 22 of the 1965 Convention for the Elimination of All Forms of Racial Discrimination ('CERD'), as well as the 2009 case of Belgium v. Senegal under Article 30 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') all being particularly pertinent and quite recent examples at hand.

It is thus laudable that the International Law Commission ('ILC') generally, and its Special Rapporteur in particular, took care of drafting a quite elaborate compromissory clause as part of the proposed CAH. The draft compromissory clause nevertheless raises a number of open questions which will henceforth be analyzed.

2. Content of the Current Draft Article 15 CAHC

The current draft Article 15 CAHC, as adopted by the ILC as part of the overall draft, first stresses in draft Article 15(1) CAHC the particular relevance of negotiations to settle disputes arising under the future convention. It then provides in its paragraph 2 for the ICJ's jurisdiction over any dispute arising between contracting parties concerning the interpretation or application of the treaty unless they jointly agree to submit the dispute to arbitration. A crucial point is then the opting-out clause contained in Article 15(3) CAHC which enables States to become contracting parties without being subject to the ICJ's jurisdiction, and without even the need to enter a reservation to that effect. The current version of draft Article 15 CAHC, as adopted by the ILC, therefore reads:

³ A striking example confirming the both, political and legal, relevance of final clauses concerning possible amendments to a multilateral treaty is the process leading to the Kampala amendment to the Rome Statute of the ICC concerning the crime of aggression, on this see A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *Journal of International Criminal Justice* (2012) 209–227.

Article 15 - Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.
3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

3. Genesis of Draft Article 15 CCAH

International treaty practice provides a whole variety of compromissory clauses.⁴ The two conventions that codified ‘true’ international crimes so far⁵ and that contain such clauses, namely the Genocide Convention and the Apartheid Convention, should serve as a starting point for a compromissory clause in the future CCAH. Article IX Genocide Convention contains what might be referred to as a ‘one-tier system’, providing for recourse to the ICJ in case of a dispute arising under the Convention without any prior mandatory resort to negotiations or any mandatory previous attempt to settle the dispute by way of an arbitration.

The 1973 Apartheid Convention, as the second convention after the Genocide Convention outlawing a true international crime, in its Article XII, has, *mutatis mutandis*, adopted the very same two-tier model as previously Article 22 CERD did, yet does not provide for the possibility of a unilateral seisin of the Court.⁶

Notwithstanding the close substantive relationship of the future CCAH with the Genocide and the Apartheid Conventions, the ILC’s Special Rapporteur’s initial proposal of the dispute settlement provision was modelled on Article 66 UN Convention against Corruption which had adopted the ‘three-tier model’ of suppression conventions and human rights treaties,⁷ and which beforehand

⁴ United Nations, *Final Clauses of Multilateral Treaties: Handbook* (United Nations Publication 2003), at 88-94.

⁵ On the distinction between ‘true’ international crimes and treaty-based crimes, see *European Journal of International Law* (2003) 1 (international criminal *stricto sensu*, or so-called core crimes vs. crimes of international concern, or treaty crimes); K. Ambos and A. Timmermann, ‘Terrorism and customary international law’, in B. Saul (ed.), *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2014) 20, at 23 (international core crimes and treaty-based crimes) and fn. 19 (with further references).

⁶ A. Zimmermann, ‘Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice’, 12 *Law and Practice of International Courts and Tribunals* (2013) 5, at 14, fn. 37. See also the declarations by Argentina and Mozambique that interpret Article XII Apartheid Convention as requiring the consent of both parties as well as the ‘reservation’ by Nepal to Article XII.

⁷ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, §§ 259-60.

had already been adopted in Article 35 UN Convention against Transnational Organized Crime, as well as in Article 15 of its Protocol to Prevent, Suppress and Punish Trafficking in Persons.⁸ Accordingly, the Special Rapporteur's first draft had provided as follows:

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiation.
2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States, be submitted to arbitration. If, six months after the date of the request for arbitration, those States are unable to agree on the organization of the arbitration, any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State may, at the time of signature, ratification, acceptance or approval of or accession to the present draft articles, declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.
4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

This choice of the 'three-tier model' seems to have been based on two reasons. First, as the Special Rapporteur's Third Report put it such a 'multi-step dispute settlement process of negotiation, arbitration and judicial settlement is often used in *treaties addressing crimes in national law*.'⁹ He further pointed out that this multi-step 'process provides a channel for inter-State negotiation "in the shadow" of a possible resort to arbitration or judicial settlement.'¹⁰ Second, the Conventions against Corruption and Transnational Organized Crimes had obtained almost universal acceptance with only 40 or so States having opted out of mandatory dispute settlement.¹¹

It is certainly correct that the prospect of eventually being taken to arbitration or the ICJ provides an incentive for States to take negotiations seriously. On the other hand, the first argument of the Special Rapporteur is worthy of critique given that, as the draft preamble to the envisaged CCAH itself confirms, crimes against humanity constitute part of the set of core crime under international law, 'shock the conscience of humanity', and are one of the 'most serious crimes of concern to the

⁸ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 260.

⁹ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, §§ 247 and 263 (emphasis added).

¹⁰ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 247.

¹¹ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 261.

international community' as a whole.¹² Corruption and transnational organized crime in turn, while certainly worthy of a coordinated international response, simply do not stand on the same moral and normative level. As a matter of fact, ever since the coming about of international criminal law, crimes against humanity constitute the very archetype of 'true' international crimes providing for proper international criminal responsibility of the individual and corresponding international enforcement thereof.

Because of such inherent international criminal nature of crimes against humanity the most natural model for the dispute settlement provision in the ILC's draft CCAH would have been Article IX Genocide Convention or at least Article XII Apartheid Convention, rather than two criminal law instruments dealing with treaty-based crimes. This is even more puzzling since the Special Rapporteur's Third Report itself had recognized earlier that 'a crime against humanity by its nature is quite different from a crime of corruption.'¹³ Yet, the Special Rapporteur gave no reason why neither the Genocide nor the Apartheid Conventions did serve as primary model.¹⁴

Such critique was also uttered by at least some other members of the ILC. According to Ms. Escobar Hernández, draft Article 17 CCAH (as it then still was) demonstrates the flaws of a 'copy-and-paste' approach that extends models established by transnational criminal law instruments to the fundamentally different context of crimes against humanity.¹⁵ Moreover, several members preferred a more robust system of judicial supervision modelled after Article IX Genocide Convention, or other possibilities such as a choice between arbitral and judicial settlement, or, by way of compromise, mandatory arbitration if States did not consent to the jurisdiction of the ICJ.¹⁶ Others questioned the need to make an unsuccessful attempt to arbitrate a procedural precondition for the ICJ having jurisdiction, and pointed to Article XII Apartheid Convention as an appropriate model.¹⁷ A second concern was draft Article 17(3) CCAH, allowing States to opt out of the otherwise mandatory dispute settlement mechanism. They argued that such a provision would undermine the effectiveness of any future CCAH and, in any event, considered that it was not proper for the ILC itself to propose such a provision.¹⁸

¹² *Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading*, UN Doc. A/CN.4/L.892, 26 May 2017, preambular paras. 1 and 4.

¹³ *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 83.

¹⁴ *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017, p. 3 (Escobar Hernández).

¹⁵ *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017, p. 6 (Escobar Hernández).

¹⁶ *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017, p. 6 (Escobar Hernández) and p. 11 (Jalloh); *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017, p. 6 (Galvão Teles).

¹⁷ *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017, p. 3 (Ruda Santolaria) and p. 5 (Wood); *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017, p. 6 (Vázquez-Bermúdez).

¹⁸ *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017, p. 6 (Escobar Hernández) and p. 11 (Jalloh); cf. *Provisional summary record of the 3349th meeting*, UN Doc. A/CN.4/SR.3349, 2

Other features of the proposed draft article drew criticism as well. According to *Mr. Reinisch*, the requirement to settle disputes ‘within a reasonable time’ would prevent effective dispute settlement as States could always insist that a reasonable time had not yet elapsed¹⁹. *Mr. Tladi* in turn called to consider better options such as Article 22 CERD and Section 30 of the Convention on the Privileges and Immunities of the United Nations.²⁰

Other members viewed the Special Rapporteur’s proposal more positively, however, pointing to the importance of negotiations in inter-State dispute settlement and the well-established trinity of negotiations, arbitration and judicial settlement.²¹ The opting out provision was justified since it aimed at the widest participation of States and since existing international rules already governed the peaceful resolution of disputes.²²

Finally, *Mr. Kolodkin* recommended that the Commission’s commentary to draft Article 17 should mention that negotiations to settle the dispute, as well as negotiations to organize an arbitration must be genuine and must be undertaken in good faith.²³ Furthermore, since the Special Rapporteur had recognized that draft Article 4 implied an obligation for States not to commit crimes against humanity, a reference to State responsibility should be added to the jurisdictional clause similar to the wording of Article IX Genocide Convention.²⁴

As can be seen from what is now draft Article 15 CCAH the ILC’s Drafting Committee changed the initial draft considerably. It decided to not amend draft Article 15(1) as such a provision was by now common in many treaties, including the UN Convention against Corruption.²⁵

With regard to draft Article 15(2) and the issue of arbitration, the Drafting Committee did however not retain the Special Rapporteur’s proposal as the pre-eminence of arbitration was considered

June 2017, p. 10 (Park); *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017, p. 3 (Ouazzani Chahdi).

¹⁹ *Provisional summary record of the 3350th meeting*, UN Doc. A/CN.4/SR.3350, 31 May 2017, p. 8 (Reinisch); *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017, p. 5 (Wood), p. 6 (Galvão Teles).

²⁰ *Provisional summary record of the 3348th meeting*, UN Doc. A/CN.4/SR.3348, 31 May 2017, p. 11 (Tladi).

²¹ *Provisional summary record of the 3349th meeting*, UN Doc. A/CN.4/SR.3349, 2 June 2017, p. 12 (Nguyen); *Provisional summary record of the 3351st meeting*, UN Doc. A/CN.4/SR.3351, 12 June 2017, p. 4 (Kolodkin), p. 12 (Šturma).

²² *Provisional summary record of the 3351st meeting*, UN Doc. A/CN.4/SR.3351, 12 June 2017, p. 8 (Hmoud); *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017, p. 12 (Huang); *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017, p. 6 (Vázquez-Bermúdez).

²³ *Provisional summary record of the 3351st meeting*, UN Doc. A/CN.4/SR.3351, 12 June 2017, p. 4 (Kolodkin).

²⁴ *Provisional summary record of the 3351st meeting*, UN Doc. A/CN.4/SR.3351, 12 June 2017, p. 4 (Kolodkin), p. 12 (Šturma); *Provisional summary record of the 3352nd meeting*, UN Doc. A/CN.4/SR.3352, 31 May 2017, p. 5 (Wood); cf. *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017, p. 3 (Ouazzani Chahdi).

²⁵ *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017, p. 6.

‘inappropriate in the context of crimes against humanity.’²⁶ Rather, the Drafting Committee decided to adopt Article 22 CERD as the appropriate model, although without reference to a treaty monitoring body since the issue of setting up a treaty body as part of the envisaged CCAH was to be left to States to decide as part of a future diplomatic conference. Moreover, draft Article 15(2) and Article 22 CERD differ in that Article 22 CERD precludes recourse to the ICJ provided ‘the disputants agree to another mode of settlement’, whereas according to draft Article 15(2) this consequence only follows if ‘States agree to submit the dispute to arbitration’.

The opting-out clause, following, as mentioned, the model of the UN Convention against Corruption, but also of the International Convention for the Protection of All Persons from Enforced Disappearance (‘CED’)²⁷, was retained since it was thought that it might provide the basis for a compromise to allow for exceptions to mandatory dispute settlement while at the same time paving the way for outlawing reservations to substantive rules of the future treaty.²⁸

Without further explanation, the Drafting Committee also deleted the phrase ‘within a reasonable time’. Despite numerous suggestions to include a reference to State responsibility, the Chairman of the Drafting Committee provided no reasons why such a phrase was finally not included.

4. Analysis of Draft Article 15 CCAH

a) Article 15(1): The Obligation to Negotiate

Draft Article 15(1) CCAH, which is based on Article 66(1) UN Convention against Corruption,²⁹ is ‘to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.’³⁰ It ought to be also noted that Article 15(1) contains a positive obligation to reach a negotiated solution; hence the lack of such negotiations does not only constitute a jurisdictional hurdle before a dispute arising under the Convention may be brought before the ICJ. Rather, not endeavouring to do so amounts to a separate violation of Article 15(1) CCAH itself. Furthermore, in line with the ICJ’s holding in the *North Sea Continental Shelf* cases, the parties are obliged to enter into meaningful negotiations with a view to arriving at an agreement and the corresponding demand that a party’s position must be open to change during the negotiations.³¹

²⁶ *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017, p. 6.

²⁷ *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017, p. 6.

²⁸ *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017, p. 6.

²⁹ *Report of the International Law Commission*, UN Doc. A/72/10, 2017, p. 116.

³⁰ *Report of the International Law Commission*, UN Doc. A/72/10, 2017, p. 117 (quoting verbatim the *travaux préparatoires* of the comparable provision of the Conventions against Transnational Organized Crime and its supplementary protocol, internal quotation marks omitted). See *Official Records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/33, 17-28 July 2000, para. 34.

³¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, judgment of 20 February 1969, ICJ Reports (1969) 3, at 47, para. 85.

Besides, the obligation to negotiate contained in draft Article 15(1) is not subject to the opting-out mechanism provided for in draft Article 15(3) as currently drafted, which provides that States may only opt out of mandatory judicial settlement.³²

b) Article 15(2): The Dispute Requirement

Draft Article 15(2) CCAH contains, *first*, the common requirement that a dispute has arisen concerning the interpretation or application of what will be the future CCAH. This formula reflects the long-standing jurisprudence of the ICJ as to the notion of ‘dispute’. It ought to be noted, however, that the Court has recently, and namely in *Georgia v. Russia* and even more so in the various *Marshall Islands* cases significantly accentuated the requirements for a ‘dispute’ to come into existence, requiring that the respondent State ‘was aware, or could not have been unaware, that its views were “positively opposed” by the applicant’.³³ Hence, if indeed draft Article 15(2) CCAH were to be adopted as it currently stands, this cannot be understood but as a tacit approval of such a tightened understanding of the notion of ‘dispute’, and be it only for purposes of the future CCAH. This will put up a quite significant hurdle for a case eventually being brought under the future Convention.

c) Article 15(2): The Requirement to Settle the Dispute by Negotiations

The separate positive obligation to try to settle disputes arising under the Convention (primarily) through negotiations under draft Article 15(1) may provide an argument for future respondent States that the procedural, negotiation-related requirement contained in draft Article 15(2) CCAH needs to be interpreted even more strictly than what the ICJ required in *Georgia v. Russia*. Indeed, given that the ILC’s Commentary understands the phrase ‘shall endeavour to settle disputes (...) through negotiations’ contained in draft Article 15(1) CCAH as a broad obligation to use various means of peaceful dispute settlement, including conciliation, mediation and recourse to regional bodies, the procedural requirements under draft Article 15(2) CCAH might then be understood in the very same way. That would then in effect require State parties not only to genuinely negotiate in good faith, but to eventually also exhaust other possible avenues of (non-binding) third-party dispute settlement before they might then bring such dispute before the Court.

In any case, given that draft Article 15(2) is modelled on Article 22 CERD, any future applicant trying to bring a case under Article 15 CCAH must surmount the main procedural hurdle to show that such a dispute ‘is not settled through negotiation’³⁴, as understood in the recent case law of the ICJ,

³² Cf. *Third report on crimes against humanity*, UN Doc. A/CN.4/704, 23 January 2017, § 259.

³³ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, judgment of 5 October 2016, at para. 41.

³⁴ See generally K. Wellens, *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis* (Surrey: Ashgate, 2014) chapter 3.

especially in *Georgia v. Russia*, and as further confirmed by the Court in its later jurisprudence.³⁵ Such reliance on the Court's jurisprudence is further warranted by the fact that the ILC's Commentary cites the relevant case law, including the judgment on preliminary objections in *Georgia v. Russia*.³⁶ Thus, if indeed States were to retain this formula 'is not settled', they must be presumed to have been aware of this jurisprudence. Accordingly, *Georgia v. Russia* and subsequent jurisprudence would then constitute the controlling line of authority for draft Article 15(2) CCAH. As will be recalled, in *Georgia v. Russia*, the Court had held that the 'terms of Article 22 of CERD, namely "[a]ny dispute ... which is not settled by negotiation or by the procedures expressly provided for in this Convention", establish preconditions to be fulfilled before the seisin of the Court.³⁷ The Court based itself mainly on the ordinary meaning of the phrase, arguing that the phrase would be rendered superfluous if it were to be interpreted as meaning merely that the dispute had not been resolved as a *matter of fact* regardless of whether negotiations had been undertaken or not.³⁸ As the Court pointed out, 'if, as a matter of fact, a dispute had been settled, it is no longer a dispute.'³⁹ Such a reading would render the phrase in question meaningless, contrary to the rule that words shall be construed to have appropriate effect.⁴⁰ Accordingly, the phrase 'which is not settled by negotiation' in the Court's view indicates an affirmative duty to negotiate in order to seize the Court.⁴¹ Although the Court considered that recourse to supplementary means of interpretation were not mandatory, it further observed that the drafting history 'do[es] not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation.'⁴² In that regard it also particularly worth noting that the French version of the ILC text has retained the formula 'qui n'aura pas été réglé' which just like the French text of CERD, by using the *futur antérieur*, implies that an attempt to negotiate has been made.⁴³ It

³⁵ *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)*, order of 19 April 2017, at para. 43; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 445-46, para. 57.

³⁶ *Report of the International Law Commission*, UN Doc. A/72/10, 2017, p. 117, para. 3.

³⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 128, para. 141; *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)*, order of 19 April 2017, at para. 59.

³⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 126, para. 133.

³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 128, paras. 133-4.

⁴⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 126, para. 134.

⁴¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 126, para. 134.

⁴² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 130, para. 147.

⁴³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 126, para. 135.

might be advisable, however, in order to dispel any further doubts on the matter to even consider using the formula ‘*has not been settled by negotiations*’ instead of ‘*is not settled*’ in the English version of what is currently draft Article 15(2) CCAH which version would then be more in line with the just mentioned French text of Article 22 CERD/draft Article 15(2) CCAH.

Regarding the further issue of the very notion of negotiations, the ICJ had noted in its jurisprudence that negotiations are not mere protests or the exchange of opposing views and that in this regard the two conditions – ‘negotiations’ and ‘dispute’ – are distinct.⁴⁴ Consequently, negotiations require, at a minimum, ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.’⁴⁵ While this does not imply an obligation to reach an agreement, parties must pursue negotiations with a view of resolving the dispute.⁴⁶ The precondition of negotiations is therefore only fulfilled if negotiations have failed, or have become futile or deadlocked.⁴⁷ The Court also found that negotiations can take place in multilateral fora, but must in any case relate to the subject-matter of the treaty whose compromissory clause is invoked.⁴⁸ Once again, by incorporating *mutatis mutandis* the wording of Article 22 CERD, the future CCAH would thereby also incorporate this very concept of negotiations, as developed by the ICJ’s jurisprudence.

d) Scope Ratione Temporis of Draft Article 15 CCAH

aa) Possible Retroactive Effect of the Substantive Obligations Arising Under the Future CCAH

The question as to the scope *ratione temporis* of draft Article 15 CCAH (and hence the issue of a possible retroactive effect of the clause) is not purely of a theoretical nature. Unfortunately, already as of today, crimes against humanity occur in many of today’s most tragic and brutal conflicts, regimes or crises, such as, to provide but a few examples, the conflict in Syria, the Rohingya crisis, or the widespread violation of fundamental human rights in the DPRK while, obviously, the future CCAH, if adopted, will only enter into force once the quorum to be agreed will have been reached.

As *mutatis mutandis* confirmed by the ICJ’s 2015 merits judgment in the *Croatian Genocide* case, the Court’s jurisdiction *ratione temporis* to be eventually exercised under draft Article 15(2) CCAH will be ‘limited to disputes between the Contracting Parties regarding the interpretation, application or

⁴⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 132, para. 157.

⁴⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 132, para. 157.

⁴⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 132, para. 158.

⁴⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 133, para. 159.

⁴⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 133, paras. 160-61.

fulfilment of the substantive provisions of the [Genocide] Convention⁴⁹. Accordingly, the temporal scope of Article 15(2) CCAH is necessarily linked to the temporal scope of the substantive provisions of the future convention.⁵⁰ This therefore raises the issue of any possible retroactive effect of those provisions.

As is well known, Article 28 VCLT, reflecting customary international law on the matter,⁵¹ establishes a presumption of non-retroactivity of treaties, providing that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'

With regard to the Genocide Convention, the ICJ considered that the said convention is not retroactive for lack of such intent to be found in either the text of the Convention or in its negotiating history.⁵² It further specifically confirmed this result as far as the obligation to prevent and punish acts of genocide are concerned.⁵³ Given the presumption against retroactivity reflected in Article 28 VCLT, as well as confirmed by the ICJ's jurisprudence in the *Croatian Genocide* case, negotiating States would thus have to include in the draft CCAH a clear and unequivocal indication of their will to provide for the Convention's retroactive effect (if they want to provide for such effect at the first place) with the ensuing effect of then also providing for the Court's retroactive *ratione temporis* jurisdiction. If on the other hand one assumes that the ILC draft Convention will be adopted without such indication, it will neither bind contracting parties in relation to facts prior to its entry into force, nor accordingly provide for the Court's retroactive jurisdiction. This however raises the question of whether not at least some of the obligations arising under the future CCAH are of a continuous character.

bb) The Future CCAH and the Issue of Continuous Violations

In the *Croatian Genocide* case, the ICJ held that 'the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.'⁵⁴ That included, in the Court's view, the obligation to punish acts of genocide. The same position had also already been taken by the Court in *Belgium v. Senegal*, where the Court held that the obligations to criminalize acts of torture, to establish

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3, at 49, para. 93.

⁵⁰ *Ibid.*

⁵¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 457, para. 99.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3, at 51, para. 99.

⁵³ *Ibid.*, at paras. 93-98; cf. also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 457, paras. 99-100.

⁵⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3, at 51, para. 100.

jurisdiction over such acts, and to prosecute such acts do not apply retroactively either.⁵⁵ By the same token, the Court seems to have thereby also excluded the possibility of the non-fulfillment of these obligations amounting to continuous (treaty) violations within the meaning of Article 14(2) ILC Article on the Responsibility of States for Internationally Wrongful Acts, which provides that '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with that international obligation'.

On the other hand one cannot but note Article 3(2)(b) of the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which excludes the Committee on Economic, Social and Cultural Rights' competence *ratione temporis* in relation to individual complaints for 'facts that (...) occurred prior to the entry into force of the present Protocol for the State Party concerned *unless those facts continued after that date*⁵⁶ and thereby presupposes that at least some of such violations do indeed possess such character. As a matter of fact, it was the Inter-American Court of Human Rights which had already interpreted forced or involuntary disappearance as a continuing wrongful act, *i.e.* one which continues for as long as the person concerned is unaccounted for.⁵⁷ It is also for this very reason, and in order to exclude any 'retroactive' jurisdiction of the Committee on Enforced Disappearances, established under the CED, provides in its Article 35(1) CED that '[t]he Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.'

Provided the future CCAH will not, in the envisaged compromissory clause, contain a formula *mutatis mutandis* identical to Article 35(1) CED at least with regard to those crimes against humanity that could, just like the crime of enforced disappearance, be considered possessing a continuous character, it could give rise to cases being brought concerning crimes having started prior to the entry into force with regard to the States concerned and allegedly possessing such a continuous character.

Somewhat similar issues as to such an 'indirect retroactive effect' of certain substantive obligations (with the ensuing effect of accordingly then also broadening the Court's jurisdiction *ratione temporis* under draft Article 15 CCAH) might also arise concerning the refusal, by a State party, to investigate crimes against humanity under draft Article 8 CCAH which mandates a criminal investigation 'whenever there is reasonable ground to believe that acts constituting crimes against humanity *have been* or are being committed in any territory under its jurisdiction'⁵⁸ even if such

⁵⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 457, paras. 99-100.

⁵⁶ Emphasis added. Cf. also *I.D.G. v. Spain*, Comm. No. 2/2014, 13 October 2015, UN Doc. E/C.12/55/D/2/2014, § 9.3.

⁵⁷ *Blake v. Guatemala*, 1998 IACtHR Series C, No. 36, at para. 67; cf. also ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', II(2) *Yearbook of the International Law Commission* (2002) 31, at 60, para. 4.

⁵⁸ Emphasis added. A similar wording appears in Draft Art. 12(1)(a).

crimes were not of a continuous character.⁵⁹ This contrasts with Article IV Genocide Convention which solely mandates that '[p]ersons committing genocide (...) shall be punished' rather than do so with regard to '[p]ersons *having committed or committing* genocide'.⁶⁰ The present perfect tense is used when an action has been completed at some indefinite time in the past or indicates that an action continues from the past to the present.⁶¹ By using the present perfect tense ('have been committed'), draft Article 8 CCAH could thus be perceived as evidence of an intention to rebut the presumption against retroactivity similar to the words 'irrespective of the date of their commission' contained in Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. As will be recalled, the ICJ specifically relied on Article 1 of said Convention in the *Croatian Genocide* case to support its finding that nothing in the Genocide Convention revealed an intention of States to apply the obligation to punish retroactively.⁶²

As a matter of fact the ECtHR, in its *Šilih* jurisprudence⁶³, has held that its temporal jurisdiction extends to facts that occur prior to the critical date of ratification when it comes to the procedural obligation arising under Article 2 ECHR to investigate violations of the right to life ('procedural limb') which in the Court's view is to be considered a separate obligation, detachable from the violation of right to life as such.⁶⁴ In doing so, the Court relied on the case law of the Inter-American Court, and on the position taken by the Human Rights Committee, that have both assumed temporal jurisdiction over procedural complaints relating to deaths that had taken place outside their temporal jurisdiction.⁶⁵ The Court however limited this jurisdictional stretch when stating that its temporal jurisdiction over procedural complaints is not open-ended; rather it requires 'a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.'⁶⁶

On the whole, it might thus be advisable, and be it only as a matter of caution, to include a clause similar to Article 35 CED in the future CCAH if States wanted to avoid that the Court's jurisdiction under draft Article 15 CCAH could possibly extend to consequences of facts that have taken place prior to the relevant date at which the CCAH will enter into force.

⁵⁹ It is questionable whether a similar conclusion might also apply to other procedural obligations such as the ones arising under draft Arts 9(1), 11(1) and 14(1) since these provisions apply solely to 'offences covered by the present draft articles', such offences not having occurred prior to the entry into force as per Art. 28 VCLT.

⁶⁰ Emphasis added.

⁶¹ B. Garner, *Garner's Modern English Usage* (4th edn., Oxford: Oxford University Press), at 896-897.

⁶² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3, at 50, para. 96.

⁶³ Cf. generally E. Bjorge, 'Right for the Wrong Reasons: *Silih v Slovenia* and Jurisdiction *Ratione Temporis* in the European Court of Human Rights', 83 *British Yearbook of International Law* (2013) 115, at 132.

⁶⁴ *Šilih v. Slovenia* [GC], App. 71463/01, judgment of 9 April 2009, § 159.

⁶⁵ *Šilih v. Slovenia* [GC], App. 71463/01, judgment of 9 April 2009, §§ 111-118 and 160.

⁶⁶ *Šilih v. Slovenia* [GC], App. 71463/01, judgment of 9 April 2009, § 163.

cc) The Future CCAH and the Issue of Standing

A different, yet closely related *third* question concerns the issue whether a future contracting party of the CCAH might bring a case against another contracting party thereof for alleged violations of the future CCAH that occurred *prior to the former* becoming a party of the Convention, but *after the latter* had done so. This is a question of standing or legal interest, *i.e.* the right to invoke the responsibility of a State.⁶⁷

The current draft preamble to the future CCAH, by recognizing that crimes against humanity ‘threaten the peace, security and well-being of the world’, and by affirming that crimes against humanity ‘are (...) of concern to the international community as a whole’ confirms that the obligations to be enshrined in the future CCAH are of an *erga omnes partes* character within the meaning of Article 48(1)(a) of the ILC Articles on State Responsibility.

As pointed out by the Court in *Belgium v. Senegal*, States that claim violations of such obligations *erga omnes partes* act in the common interest of all States parties.⁶⁸ This implies that States acting in that common interest of States parties act as a ‘procedural trustee’ of all State parties. If that were indeed the case, it must be considered irrelevant whether the case is brought by a State party that was itself already bound by the treaty at the relevant time (*i.e.* the time the alleged treaty violation took place), or whether instead it only became a State party at some later stage. Rather it would suffice that the *respondent State* was bound by the CCAH at such time, and that the applicant State is bound by it by the time the case is brought before the ICJ.

The Court itself has so far left the question open in *Belgium v. Senegal*⁶⁹, as well as in its *Croatia Genocide* judgment.⁷⁰ It ought to be noted, however, that, as early as 1961, a strikingly similar issue arose in *Austria v. Italy* as far as the ECHR was concerned before the (then) European Commission of Human Rights in 1961, which surprisingly neither Belgium nor Croatia had referred to in their respective pleadings. In said proceedings Italy (as respondent) had ratified the ECHR in 1955 while Austria (as applicant) had only done so in 1958. Austria then claimed that Italy had violated rights under Article 6 ECHR between 1955 and 1958.⁷¹

In those proceedings Italy challenged the Commission’s jurisdiction *ratione temporis*, arguing that Italy had no obligations under the ECHR towards Austria until Austria’s accession.⁷² The Commission however rejected that challenge finding that it had jurisdiction to entertain Austria’s application,

⁶⁷ See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 449, para. 68 (quoting *Barcelona Traction*) and *South West Africa (Liberia v. South Africa)*, judgment of 18 July 1966, ICJ Reports (1966) 6.

⁶⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 449, paras. 68.

⁶⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, ICJ Reports (2015) 3, at 58, para. 119.

⁷⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 458, paras. 103-105.

⁷¹ *Austria v. Italy*, App. 788/60, decision of 11 January 1961, 4 Yearbook (1961) 116, at 136.

⁷² *Austria v. Italy*, App. 788/60, decision of 11 January 1961, 4 Yearbook (1961) 116, at 132.

including all acts and domestic proceedings prior to Austria's ratification of the ECHR.⁷³ It doing so it argued that the ECHR establishes a common public order rather than a mere bundle of reciprocal rights.⁷⁴ When invoking the responsibility of another contracting party of the ECHR, the European Commission of Human Rights found, States do not exercise a right of action to enforce their own rights, but rather allege a violation of the 'public order of Europe'.⁷⁵

Admittedly, it might be argued that such a conclusion must be based on an express statement in a treaty enshrining *erga omnes* obligations, and may not simply follow from a mere implied reading of such instrument.⁷⁶ However, the Court's reasoning in *Belgium v. Senegal*, its reliance on the common interest as well as on its prior, by now famous, *Barcelona Traction dictum* indicate that it might follow the European Commission of Human Rights' position in *Austria v. Italy*. As a matter of fact, in *Belgium v. Senegal* the Court quite broadly formulated that '[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.'⁷⁷ It is submitted that this consideration would then equally apply to the future CCAH unless negotiating States were to include in the draft treaty a clause stating otherwise.

e) Further Open Questions Arising Under Draft Article 15 CCAH

aa) Missing Reference to State Responsibility

As several members of the ILC pointed out during the work on the future CCAH, a reference to the 'responsibility of a State for crimes against humanity' should be added to draft Article 15(2) CCAH in line with Article IX Genocide Convention. Admittedly, Article XII Apartheid Convention, which regulates a specific crime against humanity, contains no such 'unusual feature', to quote the judgment in the *Bosnian Genocide* case.⁷⁸ However, the lack of such phrase will invite respondent States with an argument not to follow the *Bosnian Genocide* case with regard to the future CCAH.

It is true that in the *Bosnian Genocide* case, the Court decided that the Genocide Convention's 'obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.'⁷⁹ According to the Court, this follows from the express categorization of genocide as a 'crime under international'. Second, '[i]t would be paradoxical if States were thus under an

⁷³ *Austria v. Italy*, App. 788/60, decision of 11 January 1961, 4 Yearbook (1961) 116, at 134-136.

⁷⁴ *Austria v. Italy*, App. 788/60, decision of 11 January 1961, 4 Yearbook (1961) 116, at 138.

⁷⁵ *Austria v. Italy*, App. 788/60, decision of 11 January 1961, 4 Yearbook (1961) 116, at 140.

⁷⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, separate opinion of Judge Skotnikov, ICJ Reports (2012) 422, at 484, paras. 17-20.

⁷⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports (2012) 422, at 450, para. 69.

⁷⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, ICJ Reports (2007) 43, at 114, para. 169.

⁷⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, ICJ Reports (2007) 43, at 113, para. 166.

obligation to prevent [under Article III Genocide Convention], so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs'.⁸⁰ The clause 'including responsibility of a State for genocide' was thus described by the Court as an 'unusual feature' in dispute settlement provisions. Yet, although Article IX Genocide Convention is an essentially jurisdictional provision, the State responsibility clause, in the Court's opinion, at least confirmed the Court's *argumentum a fortiori* outlined above.⁸¹

While the ILC's commentary to draft Article 4 CCAH (containing the obligation to prevent crimes against humanity) relies on the *Bosnian Genocide* judgment to argue that States may not commit crimes against humanity through their own organs,⁸² the missing 'unusual feature' might at least cast doubt on extending the *Bosnian Genocide* case analysis to a future CCAH. Even though the State responsibility clause was not the controlling factor in the Court's analysis of the Genocide Convention, future judges and counsel might at least use a missing State responsibility clause in draft Article 15 CCAH as a vehicle for distinguishing the *Bosnian Genocide* case. This is confirmed by the pleadings in the provisional measures phase in *Ukraine v. Russia*, where the Russian Federation *inter alia* argued that since the relevant compromissory clause, *i.e.* Article 24 ICSFT, did not, unlike Article IX Genocide Convention, contain a reference to State responsibility, such responsibility was not covered by the substantive provisions of the respective treaty.⁸³

Hence, to remove any doubt it ought to be considered to include a similar State responsibility clause in draft Article 15(2) CCAH, or to, in the alternative, add a substantive provision to this effect after draft Article 4.

bb) Negotiations Requirement and Provisional Measures

If the negotiations requirement, as currently contained in draft Article 15 (2) CCAH, is retained a future applicant will have to show that it has attempted to settle the dispute arising under the future CCAH by way of negotiations prior to bring the case before the ICJ in line with the Court's negotiation jurisprudence since *Georgia v. Russia*. This also limits the possibility to have the Court adopt provisional measures if the future CCAH constitutes the sole relevant jurisdictional basis in a given situation. This might induce States to negotiate longer in order to satisfy the Court that it has at least *prima facie* jurisdiction.

In the context of alleged systematic and widespread attacks on civilians, this may have dire consequences for the affected populations. In such situations, it is sensible to enable the Court to

⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, ICJ Reports (2007) 43, at 113, para. 166.

⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, ICJ Reports (2007) 43, at 113, para. 166 and at 114, para. 168.

⁸² *Report of the International Law Commission*, UN Doc. A/72/10, 2017, p. 49.

⁸³ CR 2017/2, pp. 38-39 (Zimmermann); CR 2017/4, p. 44 (Zimmermann).

proscribe provisional measures without requiring States to first undertake lengthy negotiations. At the same time, negotiations retain their value as a procedural precondition for the merits phase. If that were possible, this would enhance the effectiveness of provisional measures since the negotiations required to enter the merits phase might be informed by the provisional measures possibly previously adopted by the Court.

Besides, the indication, by the Court, of provisional measures against a State allegedly committing crimes against humanity, which presupposes that these allegations are plausible,⁸⁴ might constitute a genuine incentive to settle the dispute already by way of negotiations.

Accordingly, an additional paragraph 2bis might be added to the current draft Article 15 CCAH which would dispense with the requirement of negotiations before *provisional measures* can be requested, while retaining at the same time negotiations as a procedural hurdle to enter the *merits phase*. Or to put it otherwise, and contrary to the Court's jurisprudence in *Ukraine v. Russia* and *Georgia v. Russia*,⁸⁵ such additional paragraph 2bis would imply that the requirement of negotiations needs to be satisfied at the time of the Court's decision on preliminary objections, but not yet at the time when the application is filed.

cc) Opting Out Clause (Draft Article 15(3) and 15(4))

The ILC justified the said opting out provisions for two reasons: for one, such provisions are common in treaties, and, besides, it might allow for a *quid pro quo* in the sense that a possible prohibition on reservations to substantive provisions might be more acceptable to States if they can opt out of judicial dispute settlement.⁸⁶ It ought to be noted, however, that even without such a compromise, the impact of the opting out provision is quite limited since the ICJ has held on several occasions that reservations to dispute settlement provisions are compatible with the object and purpose of a treaty even when it comes to human rights treaties, reservations to Article IX Genocide Convention being a particular relevant case in point.⁸⁷

dd) Relationship with a Possible Treaty Body

The ILC has left it deliberately open whether the future CCAH should provide for the creation of a treaty body akin to those known other universal human rights treaties. If such treaty body was

⁸⁴ *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)*, order of 19 April 2017, at para. 63.

⁸⁵ *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)*, order of 19 April 2017, at para. 59; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 128, para. 141.

⁸⁶ *Provisional summary record of the 3366th meeting*, UN Doc. A/CN.4/SR.3366, 3 July 2017, p. 6.

⁸⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, ICJ Reports (2006) 6, at 32, para. 67. See also *Legality of Use of Force (Yugoslavia v. Spain)*, order of 2 June 1999, ICJ Reports (1999) 761, at 772, paras. 32-33 and *Legality of Use of Force (Yugoslavia v. United States of America)*, order of 2 June 1999, ICJ Reports (1999) 916, at 924, paras. 24-25.

provided for, it would raise the question of the interrelationship between the procedures before the treaty body to be set up on the one hand, and the seisin of the Court – an issue that has already been argued in quite some detail with regard to Article 22 CERD in the *Georgia v. Russia* case, and now again in the *Ukraine v. Russia* case. In order to strengthen such treaty body, it might then be advisable to make the possibility of seisin the Court depending of having previously made use of such treaty body mechanism in line with the wording of Article 22 CERD. This should not, however, set aside the possibility of requesting provisional measures without having previously exhausted such treaty-based dispute settlement mechanism.

If that was done it should be also made clear whether the exhaustion of negotiations and of such interstate complaint mechanism is cumulative or alternative in nature, given that this issue has *mutatis mutandis* arisen twice with regard to Article 22 CERD.⁸⁸

5. Conclusion

In light of the foregoing considerations we therefore propose to redraft Article 15(2) CCAH and add a new paragraph 2bis as follows:

Article 15 - Settlement of disputes

(...)

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles, *including the responsibility of a State for crimes against humanity, that has not been settled [neither] through negotiation [nor by the procedures expressly provided for in this Convention]* shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

2bis. Notwithstanding paragraphs 1 and 2 of this draft article, provisional measures may be requested in accordance with the Statute of the International Court of Justice without the need for [neither] prior negotiations [nor for the use of the procedures expressly provided for in this Convention].

(...)

When drafting the future CCAH generally, and its Article 15 in particular, the Chairman of the ILC thought it to be the Commission's 'responsibility to do what it could to ensure that the future

⁸⁸ *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)*, order of 19 April 2017, at para. 60; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, judgment of 1 April 2011, ICJ Reports (2011) 70, at 140, para. 183 and the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports (2011) 142, at 155-157. See also A. Zimmermann, 'Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice', 12 *Law and Practice of International Courts and Tribunals* (2013) 5, at 9-11.

convention was ratified by as many States as possible', but was afraid that 'in the current climate, it could not be taken for granted that that would happen', given that '[i]n recent years, there had been a marked slowdown in the conclusion and ratification of multilateral treaties', and that States might have become even more sensitive not the least when it comes to third-party settlement of disputes.⁸⁹

It is against that background that the ILC came up with a somewhat less ambitious compromissory clause as one would have expected, and which besides, as shown, raises a couple of other, somewhat more technical issues. It remains to be seen whether, for one, States are willing to at least accept such clause, or whether they rather opt for an even lower higher jurisdictional threshold whereby the Court could only be seised by common agreement. Unfortunately, current developments might indicate that only a limited number of States are not only willing to draft a compromissory clause that would effectively allow the ICJ to bring States to justice for crimes against humanity, but also to later themselves eventually accept such clause.

⁸⁹ *Provisional summary record of the 3353rd meeting*, UN Doc. A/CN.4/SR.3353, 2 June 2017, pp. 13-14.

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