Confronting Racial Discrimination: A CERD Perspective

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Abstract

From the perspective of a member of the Committee on the Elimination of Racial Discrimination this article provides an overview of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. The article reviews the work of the Committee in endeavouring to fulfil a difficult mandate by ensuring that the Convention remains relevant, and also demonstrates how, through mechanisms such as its concluding observations and general recommendations, the Committee continually endeavours to address the contemporary meaning of racial discrimination as used in the Convention.

1. Introduction

Racial discrimination, race and ethnicity, indigenousness, caste, are in the news. Hardly a day passes without some or other reportage from near or far on an issue with a ‘race’ or ‘ethnic’ component, be it the Balkans or Darfur, concerning the Batwa or the Kurds, the Roma in almost any European country including the United Kingdom,¹ in ‘friendly’ football matches,² or in debates about immigration. The media and concerned non-governmental organisations (NGOs) have sensitised their publics to race questions, and also perhaps de-sensitised

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1 And not only Europe: see, for example, Concluding Observations on Brazil, Report of the Committee on the Elimination of Racial Discrimination, 15 October 2004, A/59/18 (‘2004 Report’) at para. 62.

them to atrocity, so that they may refuse to open the books, examine the photographs or make the arguments. In the face of the evident persistence of the phenomenon, international law has equipped the critic of racist practices with a panoply of human rights standards where the sense of moral outrage is transformed into a legal norm. Human rights provide us with a shared judgmental lexicon on which to mount a critique of oppressive and dehumanising practices, offering instead a vision of human flourishing.

Right from the beginning of the United Nations (UN), the brave new world of human rights was conditioned, in the UN Charter, by the notion of enjoyment of rights without distinction as to race, sex, language or religion, a mantra subsumed into the human rights canon from the Universal Declaration of Human Rights 1948 (UDHR) onwards, with varying degrees of elaboration through global and regional treaties and declarations, and national constitutions and laws. The underlying emphases in this canon are on equality as a governing principle in society and law, and on recognising that human beings come into the world with an inheritance of race, colour etc., which is entitled to respect—hence the list of ‘grounds’ on which discrimination is not to be permitted. The International Convention on the Elimination of All Forms of Racial Discrimination 1966 (‘the Convention’) is still foremost among global instruments on race, and its essential principle has a strong claim to the status of a peremptory norm of international law. It is the oldest of the major or ‘core’ UN human rights treaties, and was adopted by the General Assembly in 1965, following a Declaration on the same subject in 1963. The Committee on the Elimination of Racial Discrimination (‘Committee’ or ‘CERD’) is established by Article 8 of the Convention. There are now 170 States Parties, of which 45 have

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3 Articles 1(3), 13(1)(b), 55(c) and 76(c).
5 It may be queried why ‘religion’ is included in lists of prohibited grounds of discrimination, bearing in mind that individuals may voluntarily decide to change religion. However, apart from pragmatic grounds militating against discrimination on grounds of religion, the ‘voluntarist’ aspect of religion may be exaggerated in many, if not most, societies where a particular religious tradition prevails and is an aspect of inheritance. See discussions in Harvard Law School Program, Religion and State (Harvard Law School Human Rights Program, 2004); on voluntarism and self-invention in the field of culture, see Eagleton, The Idea of Culture (Oxford: Blackwell Publishers, 2000), especially Chapter 4.
6 660 UNTS 195.
7 In its 2002 Statement on Racial Discrimination and Measures to Combat Terrorism, the Committee on the Elimination of Racial Discrimination recalled, inter alia, that ‘the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted’, Report of the Committee on the Elimination of Racial Discrimination, 1 November 2002, A/57/18 (‘2002 Report’) at Chapter XI C.
8 GA Res. 2106 (XX), 21 December 1965.
9 UN Declaration on the Elimination of Racial Discrimination, proclaimed by GA Res. 1904 (XVIII), 20 November 1963.
made a declaration under Article 14 of the Convention allowing individuals to communicate their grievances formally to the Committee.\textsuperscript{10} It has been a long labour to convince some States that racial discrimination is primarily a domestic issue. The initial emphasis was on discrimination as foreign policy. Discrimination, it was thought, was integral to the colonial system, and by extension to the ‘internal colonialism’ of Apartheid South Africa and South-West Africa.\textsuperscript{11} States still come to Geneva asserting ethnic and racial homogeneity, or that there is no racial discrimination ‘at home’.\textsuperscript{12} The Committee is sceptical of such claims, and asks for disaggregated information on population composition.\textsuperscript{13} The number of States making these claims is fewer than before. CERD has played a distinctive role in alerting governments to the ubiquity of discrimination, acting under the obvious assumption that a problem cannot be addressed unless it is first recognised.\textsuperscript{14} This ubiquity does some damage to the ideal of the ‘elimination’ of discrimination flagged up in the title of the Convention.\textsuperscript{15}

The present article is offered as a short overview of developments in the ongoing implementation of the Convention from the perspective of a member of the Committee. The observations are personal to the author and do not purport to ‘represent’ the views of the Committee. The approach draws more on the recent practice of this Committee than on a history of implementation, though there is some reaching back to earlier phases in the life of the

\textsuperscript{10} Figures for States Parties are given in the Annual Report of the Committee to the General Assembly of the UN. Updated figures between Annual Reports may be found on the website of the UN High Commissioner for Human Rights under ‘human rights bodies’, available at: http://www.ohchr.org/english/bodies/index.htm.

\textsuperscript{11} Banton, \textit{International Action against Racial Discrimination} (Oxford: Clarendon Press, 1996), Chapter 4 (‘The Racial Convention’), and Chapter 5 (‘Laying the Foundations’). According to Banton, citing the then rapporteur of the Committee, the initial reports of the first 45 States Parties ‘had proclaimed in the most emphatic language that their territories were totally free of racial discrimination’ , while 28 ‘had declared that such discrimination was unthinkable or inconceivable in their territories’ (at 106).

\textsuperscript{12} See, for example, the responses of the Committee through its Concluding Observations to intimations by States of ‘no racial discrimination’ or ‘population homogeneity’ in relation to: Egypt, 2001 Report, supra n. 2 at para. 286; Trinidad and Tobago, ibid. at para. 348; Jamaica, 2002 Report, supra n. 6 at para. 131; Qatar, ibid. at para. 190; Yemen, ibid. at para. 460; Tunisia, Report of the Committee on the Elimination of Racial Discrimination, 23 October 2003, A/58/18 (‘2003 Report’) at para. 252; Korea, ibid. at para. 492; and, Libya, 2004 Report, supra n. 1 at para. 99.


\textsuperscript{15} Is elimination thus a ‘noble lie’? (Banton, supra n. 11 at 50). See also International Council on Human Rights Policy, \textit{The Persistence and Mutation of Racism} (Versoix, 2000).
Convention, including the drafting phases. The article undertakes explorations of concept and practice in interrelated areas: instrumental, spatial and conceptual. The instrumental element in the article is an appraisal of the work of the Committee in attempting to fulfil an ambitious and difficult mandate. The spatial aspects reflect on the complexity of racial discrimination: a hydra-headed and resilient phenomenon capable of adaptation and survival; and highlights both where racial discrimination is ‘found’ beneath the shiny surfaces of a rapidly globalising world and who counts as its victims. The position of the Convention on discrimination itself, on integration and multiculturalism, or, in broader terms, on where it is to be situated in relation to contemporary discourses of equality and diversity, is another theme.

2. The Committee on the Elimination of Racial Discrimination and its Procedures

The Committee is the ‘mechanism’ set up by the Convention to oversee its implementation. It is not the only mechanism in the field of ‘race’. There is now an armoury of ‘mechanisms’ devoted to addressing discrimination to complement the panoply of standards against racial discrimination, including at the UN level: the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the Working Group on the Effective Implementation of the Durban Declaration and Programme of Action; and the Working Group of Experts on Persons of African Descent. The 18-member Committee is composed of independent experts. A special

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17 Article 8 of the Convention, according to which the experts of the Committee are to be (Article 8(1)) ‘of high moral standing and acknowledged impartiality ... who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.’ Regarding the defence of this impartiality, General Recommendation IX states that the Committee is ‘alarmed by the tendency of States, organizations and groups to put pressure upon experts’; and strongly recommends that ‘they respect unreservedly the status of its members as independent experts’, Report of the Committee on the Elimination of Racial Discrimination, 23 August 1990. A/45/18 (‘1990 Report’) at Annex VII 2:1–3 IHRR 8 (1993).

18 Compendium of International and Regional Standards, supra n. 4.

19 In a regular paragraph in current practice, the Committee recommends that the reporting State Party takes into account the relevant parts of the Durban Declaration and Programme of Action and includes information on action plans to implement the Durban provisions at national level. See also General Recommendation XXVIII on the follow-up to the World Conference Against Racism, 2002 Report, supra n. 7 at Annex XI E: 10 IHRR 2 (2003).
meeting of the States Parties every two years elects nine members at a time. The members are nominated and lobbied for by their governments but, once elected, the member is answerable not to his or her government, but to the duty of securing implementation of the Convention.\textsuperscript{20} The membership has often included a significant number of experts with ‘official’, particularly foreign policy connections. Commentators suggest that the early perception of the Convention, as relating primarily to foreign rather than domestic affairs, has produced its effects on the composition of the Committee.\textsuperscript{21}

‘Mechanism’ is an interesting word which suggests that implementation works with the precision of a clock. It follows, or ought to follow, that CERD would be very strong on co-ordination with other bodies working in the same field.\textsuperscript{22} Co-ordination there is, but not perhaps as systematic as one might expect, not like the mechanism of a Geneva timepiece. The International Labour Organisation (ILO), the UN Educational, Scientific and Cultural Organisation (UNESCO), and the UN High Commissioner for Refugees (UNHCR) work in and around the Committee; there is frequent consultation with UN Special Rapporteurs on racial discrimination and other issues, and with the Sub-Commission on Promotion and Protection of Human Rights. Recent ‘thematic discussions’ have helped to extend the scope of co-ordination.

Knowledge of the workings of other institutions including treaty bodies is facilitated by the Secretariat. Meetings of Chairpersons and so-called

\textsuperscript{20} Rule 14 of the Committee’s rules of procedure provides that, following election or re-election to the Committee, a member makes the following declaration: ‘I solemnly declare that I will perform my duties and exercise my powers as a member of the Committee . . . honourably, faithfully, impartially and conscientiously’: Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies, 28 April 2003, HRI/GEN/3/Rev.1 at 69.

\textsuperscript{21} Van Boven remarks that the perception of ‘[the Convention] as foreign policy’ produced a situation where ‘many States parties . . . nominated active or retired diplomats, foreign ministry officials, former foreign ministers, and similar personalities to serve as members’, questioning whether such membership ‘is fully consistent with the terms of Article 8’, van Boven, ‘Discrimination and Human Rights Law: Combating Racism’, in Fredman (ed.),\textit{ Discrimination and Human Rights: the Case of Racism} (Oxford: Oxford University Press, 2001) 112 at 113. See also Banton, supra n. 11 at 309. While keeping in mind such criticisms, it may be argued that the presence of active or retired diplomats adds to the gravitas of the Committee, encouraging foreign ministries to take more notice of its recommendations. The ‘diplomats’ may also bring knowledge and experience to the workings of the system bearing in mind that the Convention is a ‘worldly’ text functioning in the framework of international relations with its own arcane mysteries and is not the product of a heaven of jurisprudential conceptions.

\textsuperscript{22} In accordance with Committee Decision 2(VI) of 1972, General Assembly Official Records, 27th session, Supplement No. 18, A/8718, chapter IX, section B, concerning co-operation with the ILO and UNESCO, both organisations are invited to attend the sessions of the Committee. In practice, the bodies with whom the Committee co-operates practically is a variable, and is recalled in Chapter 1 of the Committee’s annual report. Lately, co-operation has been strongest with the UNHCR. For a summary of the current situation, see the overview of the methods of work of the Committee in 2003 Report, supra n. 12 at Annex IV, complementing and amending the overview in the Report of the Committee on the Elimination of Racial Discrimination, 30 September 1996, A/51/18 (‘1996 Report’) at paras 587–627.
Inter-Committee meetings are of further assistance. But, as elsewhere, each body works primarily within its own mandate, and may take a narrow view of its own responsibilities. Disparate signals may possibly be sent out to governments. This is undesirable and may undermine the guidance function of the treaty bodies: complementarity is one thing, incoherence another.

CERD works principally by analysing and commenting on reports by States which are obliged, according to Article 9(1) of the Convention, to report ‘(a) within one year after the entry into force of the Convention for the State concerned; and (b) every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.’

Each dialogue with a State Party is followed by a set of concluding observations by the Committee which contain elements of praise, statements of concern and recommendations for further action. Where appropriate, the Committee will also recognise the difficulties States have had in implementing the Convention on account of sundry disasters, including man-made ones. The ‘dialogue’ is almost invariably exquisitely polite. The system utilises members of the Committee as country rapporteurs who take the responsibility of leading the dialogue with the reporting government on the Committee’s behalf.

23 The first meeting of chairpersons of treaty bodies was convened by the Secretary-General in August 1984 pursuant to GA Res. 38/117, 16 December 1983, A/RES/38/117. The first inter-committee meeting was held in 2002 on a recommendation of the chairpersons at their 13th meeting in 2001—the first inter-committee report is HRI/ICM/2002/3, 24 September 2002.

24 From its 38th session in 1990, Committee practice distinguishes ‘comprehensive reports’ from ‘updating reports’. 1990 Report, supra n. 17 at para. 29. A further refinement was adopted in 2001 giving greater flexibility to reporting States (‘the Bossuyt amendment’): ‘In cases where the period between the examination of the last periodic report and the scheduled date for the submission of the next periodic report is less than two years, the Committee may suggest in its concluding observations that the State party concerned, if it so wishes, submit the latter report jointly with the periodic report to be submitted at the following date fixed in accordance with Article 9 of the Convention’, 2001 Report, supra n. 2 at paras 477–8.

25 In the ‘overview’ of the methods of work of the Committee in 2001, a strong case was made that ‘in the interest of transparency the adoption of concluding observations in public meetings should continue’, 2001 Report, ibid. at para. 479. However, the ‘overview’ of 2003 recites that the ‘meetings of the Committee to adopt the concluding observations will be held in private’, 2003 Report, supra n. 12 at Annex IV. Discussion of concluding observations in closed sessions marks a return to the practice of the Committee which had existed until 1996, 1996 Report, supra n. 22 at para. 598.

26 Under the heading of ‘Factors and difficulties impeding the implementation of the Convention’. For recent examples, see 2001 Report, supra n. 2 at paras 43 (Argentina), 85–6 (Georgia), 208 (Sudan), 258 (Cyprus), 362 (Ukraine), 384 (USA) and 432 (Liberia); 2002 Report, supra n. 7 at paras 90 (Croatia), 211 (Moldova), 393 (Mali) and 457 (Yemen); 2003 Report, supra n. 12 at paras 21 (Cote D’Ivoire), 73 (Fiji), 105 (Ghana), 269 (Uganda), 330 (Bolivia), 355 (Cape Verde), 505 (Saint Vincent and the Grenadines) and 554 (Malawi); 2004 Report, supra n. 1 at paras 21 (Bahamas), 76 (Lebanon) and 118 (Nepal).

27 The mechanism was summarised in an annual report (1996 Report, supra n. 22 at para. 595):
before the session but will undoubtedly learn during and from the process. The Committee is sedentary: sitting down for sessions in Geneva, three weeks at a time, twice a year; country visits are not part of its regular *modus operandi*. Reports five years or more overdue may be subjected to the ‘review’ procedure, under which CERD may decide to examine a country situation in the absence of a report. The ‘threat’ of a review usually brings forth either a report or a reason for not submitting one. The procedure for review was at the outset based ‘upon the last reports submitted by the State party concerned and their consideration by the Committee’. Banton observed that a ‘residual difficulty concerns States parties which have failed to submit an initial report several years after accession. For example, Guyana, Liberia and Suriname, though they had acceded to the Convention in 1977, 1976, and 1984 respectively, had not submitted their initial reports by 1994, so there was no legal basis on which the Committee could conduct an examination.’ The reason for the caution was the provision in Article 9(2) that the Committee’s ‘suggestions and recommendations shall be based on the examination of the reports and information received from the States parties’, one implication of which could be to require the presentation of an initial report before any ‘review’. The Committee is, however, prepared to use its review procedure to address cases of non-submission of initial reports. The Committee made an imaginative move in 1996 when it decided that, in the absence of an initial report, ‘the Committee shall consider as an initial report all information submitted by the State Party to other organs of the United Nations or, in the absence of such material, reports and information prepared by organs of the United Nations’. The country examples used by Banton did not prove immune to the revamped procedure. The situation in Liberia was considered under the review procedure in 2001, in the absence of an initial report. In the case of Suriname, Decision 3(62) recites that the situation was considered ‘in 1997 under the review procedure (without a report)’, and that the Committee would review the situation in 2003; in the event Suriname submitted a report which was considered by the

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29 Banton, supra n. 11 at 151.
30 Emphasis added.
32 2001 Report, supra n. 2 at paras 429–43.
33 Ibid. at Chapter II A.
Committee in 2004.\(^\text{34}\) Guyana was dealt with under the early warning and urgent action procedure in 2003,\(^\text{35}\) and by a decision in 2004 which looked to an examination of the situation under the review procedure in 2005.\(^\text{36}\)

Additional to the main dialogues, CERD ‘summarises’ its views and practice on particular issues relating to racial discrimination in ‘general recommendations’, of which 30 have been issued in the life of the Committee, the latest of which (General Recommendation XXX)\(^\text{37}\) is on Convention issues as they affect ‘non-citizens’, a category that includes refugees and asylum-seekers, trafficked persons and stateless persons. Other recent general recommendations include those on gender-related aspects of racial discrimination,\(^\text{38}\) discrimination against Roma,\(^\text{39}\) and descent including caste.\(^\text{40}\) The Committee has travelled a long way since some members could state with apparent confidence that it had no mandate to interpret the Convention.\(^\text{41}\) The general recommendations cover a wide area of practical, exegetical and group-oriented themes, integrated into the work of the Committee as it interfaces with States Parties.

Besides the reporting procedure, the Convention sets out a complex system for addressing disputes in cases where ‘a State party considers that another State party is not giving effect to the provisions of this Convention’.\(^\text{42}\) The procedure has not been activated, though this has not prevented what have been called ‘disguised interstate disputes’ arising.\(^\text{43}\)

Article 14 of the Convention sets out a procedure for dealing with communications ‘from individuals or groups of individuals . . . claiming to be victims of a violation’ by a State Party of rights under the Convention. The understanding of who can make a communication under Article 14 has exercised the Committee in recent sessions. A State Party’s acceptance of this procedure is optional, and the number of declarations of acceptance is low (45) relative to the number of States Parties (170). This is despite constant urging of States by the Committee to consider making a declaration—a regular paragraph in

\(^{34}\) Concluding Observations in 2004 Report, supra n. 1 at paras 180–210.

\(^{35}\) Decision 2(62), 2003 Report, supra n. 12 at Chapter II A.

\(^{36}\) Decision 1(64), 2004 Report, supra n. 1 at Chapter V D. In the event, Guyana submitted a report to the Committee in 2005 (1 April 2005, CERD/C/472/Add.1) which is due for examination in 2006.

\(^{37}\) Ibid. at Annex VIII.


\(^{41}\) For early discussions concerning the competence of the Committee to interpret the Convention, see Banton, supra n. 11 at 102–4, 126 and 158–60.

\(^{42}\) Articles 11–13, Convention; the quotation is from Article 11(1).

concluding observations. Accordingly, individual communications under Article 14 have not occupied the Committee to the same extent as analogous procedures under for example the International Covenant on Civil and Political Rights 1966 (ICCPR). The case law is, in consequence, sparse, focusing on a limited number of States whose record in the field of human rights, including racial discrimination, is generally good. The number of cases may be greater in future, and thus give rise to more questions on the best use of limited sessional time, bearing in mind that the Committee still comes across country situations which evidence widespread violations of human rights standards and a lack of basic understanding of the concepts, structures and norms to address them.

The Committee has innovated an early warning and urgent action procedure (EW/UA) on patterns of oppression which may lead to greater violence, or even slide towards genocide, doing perhaps as much as can be expected from a body that meets only sessionally and which is not equipped with a standing army. Knowledge of this procedure among the NGO community appears

44 The ‘standard’ form of the recommendation is currently: ‘The Committee notes that the State party has not made the optional declaration provided for in Article 14 of the Convention, and recommends that it consider the possibility of making such a declaration.’

45 99 UNTS 171. Continuing the follow-up theme above, it may be observed that there has been no follow-up mechanism for the ‘suggestions and recommendations’ of the Committee in relation to Article 14 cases. This is in contradistinction to, for example, the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Discrimination against Women. However, in Ms L.R. v Slovakia (31/03), CERD/C/66/D/31/2003 (2005); 12 IHRR 675 (2005), where, having found violations of Articles 2(1)(a), Article 5(d)(iii) and 6 of the Convention, the Committee stated:

12. In accordance with Article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future...

13. The Committee wishes to receive, within ninety days, information from the government of the Slovak Republic about the measures to be taken to give effect to the Committee’s Opinion. The State party is requested also to give wide publicity to the...Opinion.


47 The procedure is based on a working paper on the prevention of discrimination, including early warning and urgent procedures adopted by the Committee at its 42nd session in 1993, Report of the Committee on the Elimination of Racial Discrimination, 15 September 1993, A/48/18 (‘1993 Report’) at Annex III. At its 65th session, the Committee established a working group on early warning and urgent action procedures, 2004 Report, supra n. 1 at Annex XII.

48 The Committee held a thematic discussion on prevention of genocide at its 66th session in 2005 (7 March 2005, CERD/C/SR.1683–84). A ‘Declaration on the Prevention of Genocide’ was adopted at the same session.
to be growing, with the Committee receiving many sharply argued and well-referenced requests to use it. States may argue that the procedure is too much of a loose cannon, and be inclined to challenge the application of the criteria used in deciding that there is a case to be made. A notable example in 2005 concerned the adoption by New Zealand of the Foreshore and Seabed Act which appeared to the Committee to contain discriminatory aspects against Maori and their customary law.\(^{49}\) In the course of exchanges with the Committee, the government of New Zealand denied both the substantive charge of discrimination and the grounds for invoking the early warning and urgent action procedure,\(^{50}\) including the claim by the applicants that there had been a pattern of escalating hatred and violence sufficient to invoke the procedure.\(^{51}\)

In the EW-UA procedure, there is perhaps an increasing impatience for ‘results’, and this is also true for ‘follow-up’. The Committee has recently added a ‘follow-up procedure’ to check through on implementation of its recommendations: a coordinator and an alternate\(^{52}\) were appointed by the Committee at its 65th session in 2004.\(^{53}\) Terms of reference have been drafted to


\(^{50}\) Elements in the substantial discussions between the Committee and the government appear in CERD/C/SR.1680, 25 February 2005.

\(^{51}\) The criteria for invoking the procedure are summarised in 2002 Report, supra n. 7 at para. 17. Under ‘early-warning’ they include:

- the lack of an adequate legislative basis for defining and criminalizing all forms of racial discrimination...inadequate implementation of enforcement mechanisms, including the lack of recourse procedures; the presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials; a significant pattern of racial discrimination evidenced in social and economic indicators; and significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities.

Under ‘urgent procedures’, the criteria ‘could include the presence of a serious, massive or persistent pattern of racial discrimination, or that the situation is serious and there is a risk of further racial discrimination.

\(^{52}\) The first coordinator is Committee member Kjaerum; the alternate is Committee member Amir.

\(^{53}\) The procedure is set out in short form as Rule 65.2. of the rules of procedure. Rule 65 now reads:

1. If the Committee decides to request an additional report or further information from a State party under the provisions of Article 9, paragraph 1, of the Convention, it may indicate the manner as well as the time within which such additional report or further information shall be supplied and shall transmit its decision to the Secretary-General for communication, within two weeks, to the State party concerned.

2. In order to further the implementation of the above paragraph, the Committee shall appoint a coordinator for a period of two years. In fulfilling his/her tasks, the coordinator shall cooperate with country rapporteurs.

2004 Report, supra n. 1 at Annex III.
amplify the meagre statement of responsibilities in the Rules of Procedure.\textsuperscript{54} In an already activated process, concluding observations on State reports will henceforth normally identify recommendations appropriate for early reporting back by governments.\textsuperscript{55} Both the EW-UA and follow-up are important additions to the methods of work of the Committee, bearing in mind that years may lapse between one State report and the next.

For the successful operation of all these procedures, NGOs may be of great assistance, though they are not a unified constituency and many have narrow agendas.\textsuperscript{56} The Committee has recently sought to be more ‘friendly’ to NGOs even if the basic dialogue is between the State and the Committee, notably by involving them in thematic discussions (for example, Roma, Descent, Non-Citizens). The efforts of civil society, national and international NGOs, are vital to the work of the Committee,\textsuperscript{57} since its ‘research capacity’, even with the assistance of a very able UN Secretariat, is limited.\textsuperscript{58} The Committee also recognises the contribution of ‘accredited national human rights institutions’, which are likely to figure more prominently in Committee work in the future.\textsuperscript{59}

3. The Structure and Contents of the Convention: A Synopsis

The structure of the Convention is relatively simple, consisting in its substantive articles of a definition of discrimination subject to limited exceptions; an
elaboration of key areas of State obligation; a rather open-ended account of areas of operation of the non-discrimination principle; and a harnessing to the elimination effort of cutting-edge legal remedies and educational programmes. The basic account of discrimination in Article 1 shows structural affinities with definitions in ILO and UNESCO Conventions,\(^60\) and refers to discrimination on five ‘grounds’: race, colour, descent, or national or ethnic origin.

‘Race’ as such is not defined in the Convention, while the term ‘racial discrimination’ is defined as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.\(^61\) From this, it is an obvious point that the umbrella term of the Convention is ‘racial discrimination’ not ‘race’. The meaning of ‘racial discrimination’ is *stipulated* by the Convention as concerning precisely the five ‘grounds’ set out in Article 1. It is not necessary to believe in ‘races’ or accept horizontal narratives of separation, or vertical narratives of hierarchy, in order to combat racial discrimination.\(^62\) This question can be troubling, and those working in the area of combating racial discrimination should ask it now and again, so as to be clear that their work does not inadvertently endorse the discourses of racial theory.\(^63\)

\(^60\) See ILO Discrimination (Employment and Occupation) Convention No. 111 1958, 363 UNTS 31; UNESCO Convention against Discrimination in Education 1960, 429 UNTS 93. The UN Declaration on the Elimination of All Forms of Racial Discrimination does not attempt a ‘definition’ of discrimination but simply states in Article 1 that discrimination on the ground of race, colour or ethnic origin is an offence to human dignity to be condemned as a denial and violation of human rights, as well as being ‘an obstacle to friendly and peaceful relations among nations and ... a fact capable of disturbing peace and security among peoples.’\(^61\) Article 1(1).

\(^62\) See remarks of the representative of Belgium at the adoption of the draft declaration and programme of action at the Durban World Conference against Racism, when, having cited elements of the ‘helpful’ definition of racial discrimination in the Convention, the representative added that EU Member States consider that the acceptance of any formulation implying the existence of separate human “races” could be interpreted as a retrograde step as it risks denying the unity of humanity. Nor is acceptance of such a formulation necessary in order to combat racial discrimination’, A/CONF.189/12 (Part II), Chapter VII at para. 4.

\(^63\) Race theory may not command the ‘scientific’ status it once did, but, according to the International Council on Human Rights Policy:

Racist theories are still widespread. Legally and illegally, particularly in the United States and in Europe, numerous racist internet websites spread propaganda cheaply and globally. Many proponents of such theories...tend to construct a pseudo-scientific version of history that justifies their claim to superiority. At the same time, they dehumanise those they believe are less equal. The group that is discriminated against is said to have genetic predispositions towards criminal tendencies, to be feckless sexually or financially, to be less successful academically, to be unemployed by choice and so on. In extreme cases, the victims are described as more animal-like than human.

International Council on Human Rights Policy, supra n. 15 at 3. For a review of ‘theory’ in this sphere, see Banton, *Racial Theories* (Cambridge: Cambridge University Press, 1987);
The Convention, unusually, condemns theories of racial superiority as well as racist practice.\textsuperscript{64}

Among the grounds, ‘descent’ is the widest, and the Committee has dealt with at least one aspect of it in addressing caste and related forms of social stratification.\textsuperscript{65} Banton has written on the potentially increased importance of paying attention to colour as a ground of discrimination in the light of globalisation and the ‘mixing’ of populations,\textsuperscript{66} and the present author has noted important evidence of this form of discrimination in a number of recent cases, including Brazil.\textsuperscript{67} The ground of ‘national origin’ generated considerable discussion in the drafting of the Convention, but has not unduly troubled the Committee in practice.\textsuperscript{68}

‘Limitation clauses’ in Article 1 relating to citizenship,\textsuperscript{69} and Convention provisions on ‘special measures’ are reflected on further below. On the limitation in regard to ‘public life’, the US interprets the provision in a restrictive sense, and so does not accept any obligation under this Convention to enact legislation or take other measures . . . with respect to private conduct except as mandated by the Constitution and laws of the United States.\textsuperscript{70} However, the Convention does not simply address discriminatory action by State authorities, but in Article 2 also requires the State Party to prohibit and bring to an end ‘racial discrimination by any persons, group or organization’, as well as addressing policies and other practices, ‘which have the effect of creating or perpetuating

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64 Para. 6 of the Preamble and Article 4, Convention. Neither ILO Convention 111 nor the UNESCO Convention against Discrimination in Education explicitly condemn racist theory. A more explicit and ‘philosophical’ approach to racist theory is set out in the UNESCO Declaration on Race and Racial Prejudice (1978), Compendium of International and Regional Standards, supra n. 4 at 169–73.\textsuperscript{64}

65 For an instructive review of the ‘grounds’ of discrimination, see the background paper, The Definitions of Racial Discrimination, prepared by former Committee member and Chairman Diaconu, for the World Conference against Racism, 26 February 1999, E/CN.4/1999/WG.1/ BP.10.\textsuperscript{65}

66 Banton, ‘Colour as a Ground of Discrimination’, in Ghaney-Hercock and Xanthaki (eds), Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry (Leiden/Boston: Martinus Nijhoff, 2005) 237.\textsuperscript{66}

67 Combined 14th to 17th Periodic Reports of Brazil, CERD/C/431/Add.8; 11 March 2004, CERD/ C/SR.1632 and 1633.\textsuperscript{67}

68 See Diop v France (2/89), CERD/C/39/D/2/1989 (1991) at para. 6; 2 IHRR 353 (1994); and B.M.S v Australia (8/96), CERD/C/54/D/8/1996 (1999); 6 IHRR 1018 (1999); and Diaconu, supra n. 65 especially at paras 17 and 36.\textsuperscript{68}


70 Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E/14 at 102.\textsuperscript{70}
\end{footnotesize}
racial discrimination wherever it exists.\textsuperscript{71} CERD has addressed the public/private distinction in the spheres of general recommendations and concluding observations, commenting that, to the extent that ‘private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.’\textsuperscript{72} In line with this reasoning, the Committee’s concluding observations on the US express concern about:

the position of the State party with regard to its obligation under Article 2 . . . to bring to an end all racial discrimination by any person, group or organization, that the prohibition and punishment of purely private conduct lie beyond the scope of governmental regulation, even in situations where the personal freedom is exercised in a discriminatory manner. The Committee recommends that the State party review its legislation so as to render liable to criminal sanctions the largest possible sphere of private conduct which is discriminatory on racial or ethnic grounds.\textsuperscript{73}

Article 3 condemns segregation and Apartheid. The Committee has observed that the relevance of the Article transcends the ending of Apartheid in South Africa and extends to conditions of even unintended segregation in sectors such as housing and education.\textsuperscript{74} The Article bears the imprint of the era in which it was drafted, but the Committee has endeavoured to ensure that it has continuing relevance. In any case, whatever the fate of ‘apartheid’, segregation is a broader term, not tied to a specific political system.

Article 4 takes a strict line in freedom of expression requiring States, \textit{inter alia}, to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred and ‘declare illegal and prohibit [racist]
organizations. Some ‘Western’ States, amongst others, have made reservations to Article 4 in order to protect freedom of expression, despite the so-called ‘due regard’ clause in Article 4. The Committee does not regard untrammelled freedom of expression as essential to the ‘marketplace of ideas’. It has had interesting dialogues on this issue, including that with the US where there was no concordance of views between the Committee and the reporting State. The Convention is arguably more restrictive on this issue than other human rights instruments, but the Committee has robustly defended the ‘philosophy’ of the Convention and many members regard Article 4 as its most important single article, which is cast in strongly preventive or pro-active mode. The rationale may be understood by reflecting on such phenomena as the discourses of dehumanisation that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that may flourish if unchecked against vulnerable minorities. Vulnerable groups well appreciate that the lines between thought, public discourse and oppressive action can be very thin. There are elements of such understanding in the Committee’s recent practice under Article 14.

Article 5 provides a non-exhaustive list of human rights to which the non-discrimination principle applies, and notably includes economic, social and cultural as well as civil and political rights. In current practice, a full range of human rights engages the Committee, and it devotes a considerable amount of attention to economic, social and cultural rights, as well as civil and political rights, so that some or other question of economic and social rights is included in most of the concluding observations. There is support for the view that

75 Obligations in Article 4 are to be exercised ‘with due regard to the principles embodied in the Universal Declaration of Human Rights’.


77 Compare Article 20 of the International Covenant on Civil and Political Rights. See also statements by members of the Committee in the examination of the eighth and ninth periodic reports of Denmark, 1990 Report, supra n. 17 at para. 56, and the reflections on Article 4 by the European Court of Human Rights in Jersild v Denmark A 298 (1994); (1995) 19 E H R R 1.

78 See in particular General Recommendation XV which, inter alia, recites the Committee’s conviction that ‘the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression’, 1993 Report, supra n. 47 at Annex VIII; 1–3 IHRR 11 (1993).

79 See the Summary Records of the Committee thematic discussion on prevention of genocide, supra n. 48.

80 For a critique of the Committee in this respect, see Felice, ‘The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights’, (2002) 24 Human Rights Quarterly 205. For an instructive illustration of current Committee practice, presenting a rather different picture to that offered by Felice, see for example the 2004 concluding observations on Slovakia, 2004 Report, supra n. 1 at paras 385–9, which include recommendations on, inter alia, rights to education, employment, health and housing.

81 Felice is particularly critical of the recommendations of the Committee in the field of economic and social rights, finding them ‘uniformly unsubstantial’ (ibid. at 223). On the
the unclosed nature of the list of rights in Article 5, coupled with the promise of the Convention to eliminate ‘all forms’ of racial discrimination, means that Article 5, both alone and in conjunction with Article 2, addresses the enjoyment of all rights regardless of source. Further, while the Convention lists rights it does not define them—thus opening out their interpretation to developments in the human rights canon. This is an important point especially in areas where there have been fresh elaborations of rights such as minority and indigenous rights—developments which also implicate the Committee’s stance on special measures. Accordingly, the Committee has utilised fresh and developing standards in its recommendations and observations.

Article 6 addresses the issue of remedies for discrimination, a source of regular concern for the Committee, and has stimulated another virtually ‘standard paragraph’ in concluding observations.

Article 7, the last of the substantive articles, and sometimes a little neglected, addresses the question of anti-racist and pro-tolerance education, a ‘safeguard’, in the present writer’s view, every bit as important as other methods of combating racial discrimination.

4. Discrimination and Equality

The principle of non-discrimination is fundamental to the human rights enterprise—part of its architecture. It is a way of getting to equality in the enjoyment of human rights by addressing negative practices denying equality. The Convention is replete with references to equality: the Preamble refers to ‘the dignity and equality inherent in all human beings’, and that human beings

other hand, the demand for more specific recommendations to governments does not always sit well with the function of the Committee in the context of constructive dialogue with governments, nor with respect to the obligation on governments to design their own implementation strategies.


83 For example, in drafting General Recommendation XXIII on indigenous peoples, members appear to have been influenced by, inter alia, the draft UN Declaration on the Rights of Indigenous Peoples, and developments in Latin America. See the comments of Committee member Wolfrum, 5 August 1997, CERD/C/SR.1235 at para. 93; and van Boven, supra n. 21 at 118–20.


85 See for example in relation to Belarus, 2004 Report, supra n. 1 at para. 268; and, in relation to Kazakhstan, ibid. at para. 296.

are born free and equal in dignity and rights, are equal before the law and entitled to equal protection of the law.87 The basic notion of discrimination is denial of human rights on an equal footing. Substantive articles repeat the concepts in the Preamble, adding references to the enjoyment of human rights on an equal footing,88 to equal pay for equal work,89 and the right to equal participation in cultural activities.90 Thus, various forms of equality are intimated and the text need not be reduced to a single conceptual scheme, although the Convention overall reaches beyond formal equality towards equality in fact. On the core notion of discrimination, General Recommendation XIV observes that ‘differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate’.91 The term ‘discrimination’ itself does not signify uniformity if there are differences in situation between one person or group and another. Like cases are to be treated alike, and unlike cases according to the extent of the ‘unlikeness’. A contemporary version of this principle appears in the European Court of Human Rights’ judgment in Thlimmenos v Greece:

The right...not to be discriminated against is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification...The right not to be discriminated against...is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.92

This nuance may be lost in appraising discrimination, but is essential to retain in responding to critics who argue the tendency of the equality principle to carry with it notions of homogeneity, essentiality, or reproduction of cultural sameness or ‘cultural cloning’. General Recommendation XXIV93 on Article 1 does not go against this nuanced principle of equality in its demand for uniform application of criteria to determine the existence of ethnic groups on the territory of the State, thus avoiding ‘differing treatment’ for various population groups. The recommendation is not a demand that in terms of policy and resources all groups be treated the same regardless of circumstances. It is instead a plea for uniformity of approach to existence criteria for groups,

88 Article 1(1).
89 Article 5(e)(i).
90 Article 5(e)(vi).
91 1993 Report, supra n. 47 at 155.
93 1999 Report, supra n. 13 at Annex V.
in the context of Committee requests for demographic information, who otherwise might be arbitrarily excluded by government fiat from the operation of the principle of non-discrimination.

The Convention is not limited to purposive or intentional discrimination, but includes discrimination ‘in effect’ as well as aim. On the basis of a field study, Toivanen makes a point on the often irrelevance of direct/intentional discrimination to the lives of the subjects of the study:

They did not seem to think so much about their problems in terms of being victims of racism by other people. It was much more that their daily lives were negatively affected by the administrative regulations, restrictive rules and laws that they felt were the source of structural discrimination.

While the point about the importance of ‘structures’ of discrimination is valid, interpersonal discrimination may logically be linked with structural discrimination and be an outcome of it. On the other hand, taking a purely ‘intentionalist’ model of discrimination eviscerates the basic concept, and the ‘effects’ aspect of discrimination frequently engages the Committee whether dealing with disparities in the administration of justice including arrests, sentencing and the death row phenomenon, or disparities in education, employment, life expectancy and health. It may be felt that the ‘effects discrimination’ is difficult to gauge, but sometimes disparities of treatment will be glaringly obvious and demand a response.

There is also room for special measures to be taken without infringing the non-discrimination principle, provided the measures do not lead to the maintenance of separate rights for the different racial groups and they are not continued after the objectives for which they were taken have been achieved. This last requirement may be misunderstood in the context of minority rights, the recognition and respect for which will demand more than temporary

94 The travaux préparatoires make clear that the context of the draft (introduced by Committee member Diaconu) is one of ‘demographic information’ rather than substantive treatment. The text was introduced to the Committee in such terms in 1998, see 13 August 1998, CERD/C/SR.1281 at para. 27.


96 In the light of statements by the US on the permissive nature of special measures under the Convention, the relevant concluding observation of the Committee ‘notes with concern the position taken by the State party that the provisions of the Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The Committee emphasizes that the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the Convention’, 2001 Report supra n. 2 at para. 399 (emphasis added).
measures. The same is true for indigenous rights. In the drafting of the Convention, a number of States expressed reservations concerning the inclusion of special measures, claiming, inter alia, that they would perpetuate separation from the wider community, and would open the door to all sorts of ‘legal manoeuvring to justify various kinds of racial discrimination.’ The notion of special measures now sits more comfortably in the general discourse of human rights. The integrationist thrust of Convention provisions is mitigated by recognition in Committee practice of the legitimate interests and rights of ethnic groups of many varieties, in line with contemporary thinking. Indigenous groups and minorities enjoy their own rights in international law which stand independently of the case for special measures, though some State policies for such groups may be brought within this framework. The Committee does not necessarily distinguish cases of ‘recognition of specific minority/indigenous rights’ from ‘special measures’, but recommendations to States Parties concerning indigenous groups may be made within and without the special measures paradigm. In some cases the Committee’s call for special measures links indigenous and other groups in a common recommendation. Concluding observations concerning caste generally have a stronger flavour of special measures or affirmative action. The provisions, and limitations, on special measures show clearly the aetiology of the Convention in struggles against segregation and Apartheid. There are difficult issues here, which the Committee has not thus far addressed in a general recommendation.

5. Victims of Discrimination

If the various ‘grounds’ of discrimination in Article 1 do not immediately translate themselves into recognisable varieties of community vulnerable to discrimination, the practice of the Committee has served to put a human face to the

100 See also Article 2(1)(e) on integrationist multi-racial organisations and movements.
102 See for example the concluding observations on Bangladesh, 2001 Report, supra n. 2 at para. 66. For a more wide-ranging set of recommendations, including many not confined to a ‘special measures’ or ‘affirmative action’ framework, see concluding observations on Canada, 2002 Report, supra n. 7 at paras 315–43.
104 For example the concluding observations on India, 1996 Report, supra n. 22 at paras 339–73; and on Nepal, 2000 Report, supra n. 38 at paras 289–306.
targets of discriminatory practices. The work of the Committee provides the reader with a vivid account of the ‘others’ of the contemporary imagination. In practice, the Article 1 grounds are not always picked out by the Committee when commenting on discrimination, but it seems clear that all of them have been, in one way or another, implicated in practice. In this respect the thrust of the Convention towards the elimination of ‘all forms’ of racial discrimination suggests that an expansive reading of its scope is not unreasonable. There are overlaps among the Article 1 descriptors, and the travaux suggest that not every descriptor was clearly understood as marking out a sharply defined conceptual space or class of victim. Diaconu accounts for the Article 1 travaux by suggesting that ‘the definition was composed by adding as many concepts as possible, in order to avoid any lacunae’. Further, while globalisation has a role in making victims of some groups, it is Janus-faced, and may also empower—especially as one considers that globalised human rights are part of the equation. Whatever victim-inducing effects may be attributed to such contemporary processes, it is worth noting that victims of racial discrimination may emerge from long-standing and traditional enmities and practices, historical inequities, and even because of millennial systems which continue to produce dehumanising effects. In general, while more elevated claims may be made on behalf of particular groups for self-determination, it seems clear that lifting the burden of basic discrimination enables groups and persons to stand taller and express their authenticity. The present article addresses tensions arising from principle and practice in the realms of equality, integration and multiculturalism, but it is equally important not to forget the potential of an energising synergy between the discourses of equality and non-discrimination, and the discourses of diversity.

The Committee tends to take it as read that national, ethnic, linguistic and religious minorities or cultural groups of various kinds come within the frame of Article 1, with the caveat in the case of religion that Committee practice searches for an ‘ethnic’, or other, connection or ‘intersectionality’ between race and religion. Drawing lines between ethnic/national origin and religion is not a simple classification exercise, and, for example, in the case of some indigenous peoples, it may be superfluous to distinguish culture from religion. It is perhaps possible to distinguish a ‘religious minority’ from a ‘minority religion’, with the former term implying some ethnic or cultural connection. The Committee has broadly observed such a distinction, keeping out of ‘purely’ religious questions. In the case of Iran, it addressed discrimination faced

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105 Supra n. 65 at para. 17.
106 See the 2005 concluding observations on Ireland, 14 April 2005, CERD/C/IRL/CO/2 at para. 18. Religion is not itself a prohibited ground of discrimination in the Convention.
by ‘certain minorities, including the Bahai’s’, observing that ‘certain provisions of the State Party’s legislation appear to be discriminatory on both ethnic and religious grounds’. The Committee accordingly recommended that Iran permit ‘students of different origins to register in universities without being compelled to state their religion.’\textsuperscript{108} Despite the Committee’s inclusion of a reference to ‘ethnic’ as well as ‘religious’ grounds of discrimination, the government of the Islamic Republic of Iran took the opportunity to state that the observations of the Committee ‘dealt with an issue which is totally beyond the mandate entrusted to it by the Convention’,\textsuperscript{109} deeply regretting such \textit{ultra vires} activity.\textsuperscript{110}

There the matter rests, though the Committee may in future need to engage in specifically focused work on the religion/race intersection, especially in light of phenomena of Islamophobia (a term used by the Committee, for example in connection with the Netherlands),\textsuperscript{111} anti-Semitism and Christianophobia.

While language, education and other ‘identity’ rights specifically set out in designated instruments on minority rights such as the UN Declaration on the Rights of Persons Belonging to Minorities are of frequent concern to the Committee,\textsuperscript{112} minorities continue to suffer a full range of oppressive practices. The Committee has been greatly exercised by discrimination against the Roma, issuing a general recommendation on this group in 2000.\textsuperscript{113} Among many deprivations recorded or alleged, the question of so-called ‘special schools’ has arisen more than once: specifically, the practice of placing Roma pupils in schools or special remedial classes for mentally handicapped children. Principles such as avoiding segregation while keeping open the possibility of mother-tongue education are recalled by the Committee, and among ‘remedies’ suggested are recruitment of more Roma teachers, and ‘sensitization of teachers and other education professionals to the social fabric and world views of Roma children’.\textsuperscript{114} This suggests a variant on Toivanen’s point that the roots of the discrimination lie in divergent cultural assumptions concerning the role of education in the larger and smaller community, and the nature of the educational structures—\textsuperscript{115} a matter that has come more clearly to the Advisory Committee under the Council of Europe’s Framework Convention for

\textsuperscript{108} 2003 Report, supra n. 12 at para. 428.
\textsuperscript{109} Presumably the Government of Iran was not convinced by the Committee’s listing of the ‘ethnic’ dimension in the case of the Bahai.
\textsuperscript{110} Comments of States Parties on the decisions and concluding observations adopted by the Committee and replies by the Committee, 2003 Report, supra n. 12 at Annex VII.
\textsuperscript{111} 2004 Report, supra n. 1 at para. 150. See also the concluding observations on Spain, ibid. para. 169.
\textsuperscript{112} See the helpful summary of current issues in Prouvez, ‘Minorities and Indigenous Peoples’ Protection: Practice of UN Treaty Bodies in 2003’; (2003/4) 3 \textit{European Yearbook of Minority Issues} 481. The author is the current Secretary of the Committee.
\textsuperscript{113} General Recommendation XXVII, supra n. 39.
\textsuperscript{114} Concluding observations on Hungary, 2003 Report, supra n. 12 at para. 386.
\textsuperscript{115} See Toivanen, supra n. 95.
the Protection of National Minorities. In the wider world of the Roma there is some unease with the limits of the non-discrimination principle in addressing their case; hence the move by some Roma groups to declare themselves a non-territorial nation. Perhaps the point about discrimination is that, by and large, it works by expecting others to reform their behaviour and it thus may be seen by a community as a passive principle; whereas the nation/self-determination line is associated with a more active ‘politics of recognition’.  

Discrimination against indigenous peoples also frequently engages the Committee, which issued a General Recommendation XXIII on indigenous peoples in 1997. The Committee frequently invites States that have not done so to ratify ILO Convention 169. While the number of States Parties to that Convention may be limited, the text is a contemporary benchmark of indigenous rights, avoiding the troublesome language of self-determination but giving a great deal to the peoples if faithfully implemented. On occasions, the Committee has set out an expansive interpretation of indigenous rights, perhaps beyond the confines of ILO Convention 169. Paragraph 4 of General Recommendation XXIII calls on States Parties to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without informed consent. Paragraph 5 of General Recommendation XXIII also refers to the principle of ‘informed consent’, though in an ex-post-facto way: as in remedies where indigenous peoples have been deprived of their lands and territories ‘traditionally owned or otherwise inhabited or used without their free and informed consent’. The subject occasioned considerable discussion in the drafting process. The Recommendation as adopted clearly distinguishes between a ‘general’ right of effective participation in public life and a narrower principle insisting on informed consent when ‘decisions’ directly relating to the rights and interests of indigenous peoples are concerned. ‘Informed consent’ was expressly preferred to ‘informed participation’ and ‘active participation’ or ‘active consultation’. In concrete cases, the

120 Supra n. 107.
122 See comments by Committee members Wolfrum, 5 August 1997, CERD/C/SR.1235 at paras 67 and 74–5, and Aboul-Nasr, ibid. at para. 72.
123 Ibid. at para. 60 (Wolfrum, referring to a proposal by Diaconu).
124 Suggestions of Committee member Shahi, ibid. at para. 73.
Committee has not always rigorously insisted on the principle of informed consent, even in cases where there was a clear opportunity to follow this principle and where General Recommendation XXIII is recalled by the Committee. In other cases, the principle is expressly accorded prominence. In relation to indigenous rights, CERD has intimated that a ‘hands-off’, or ‘neutral’ or ‘laissez-faire’ policy is not enough.

Some States appear to have a limited comprehension of the contemporary demands of indigenous rights and may require, at least, encouragement from the Committee to examine their basic structures. On the other hand, the indigenous ‘card’ can, in the view of the Committee, be played too easily, so that enthusiasm for indigenous rights will not be allowed to override all other human rights considerations. In the case of Fiji, the Committee urged in relation to measures for the indigenous Fijian community that they should be ‘necessary in a democratic society, respect the principle of fairness, and... grounded in a realistic appraisal of the situation of indigenous Fijians as well

125 For example in its 2004 concluding observations on Suriname, concerning forestry and mining concessions, the Committee, while noting the State Party’s assertion that ‘there are mechanisms guaranteeing that indigenous and tribal peoples are notified and consulted before any forestry and or mining concessions within their lands are awarded,’ expressed concern that ‘consultation of that kind is rare.’ Accordingly, the Committee invited the authorities ‘to check that the established mechanisms for notifying and consulting the indigenous and tribal peoples are working, and recommends that the State party strive to reach agreements with the peoples concerned, as far as possible, before awarding any concessions’, 2004 Report, supra n. 1 at para. 192. While General Recommendation XXIII is recalled in para. 202 of the observations, we may note the absence of a principle of informed consent in the above and in other elements of these observations, especially paras 188–202.

126 In concluding observations on the US, a paragraph expressed concern, inter alia, about information on plans for expansion of mining and nuclear waste storage on Western Shoshone ancestral land. The Committee drew the attention of the State Party ‘to general recommendation XXIII on indigenous peoples which stresses the importance of securing the “informed consent” of indigenous communities and calls... for recognition and compensation for loss’, 2001 Report, supra n. 2 at para. 400. See also the 2005 concluding observations on Australia, supra n. 55 at para. 11: ‘The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests’. The recommendation was directly related to the abolition of the elected Aboriginal and Torres Strait Islander Commission.

127 See, for example, the element of critique in concluding observations on Suriname: ‘The Committee notes that the authorities appear to limit themselves to not hampering the exercise by the various ethnic groups and their members of their cultural rights. The Committee recommends that the State party should respect and promote the indigenous and tribal peoples’ cultures, languages and distinctive ways of life’, 2004 Report, supra n. 1 at para. 201.

as other communities.'\textsuperscript{129} The equality framework of the Convention can co-exist with recognition of diverse cultural systems, though the Committee is concerned when the cherishing of cultural diversity shades into inferior and discriminatory treatment of particular groups. In the framework of self-determination, a right which many indigenous groups claim, the Committee has linked this with enjoyment of human rights and full respect for the rights of all peoples within a State.\textsuperscript{130}

A third focus of discrimination is that practised against immigrants/asylum-seekers, or indeed against sundry non-citizens and people in movement. A consequence of globalisation in general is that movement of persons across frontiers is on the increase. Counter-terrorism measures may also hit asylum-seekers and other immigrants hard,\textsuperscript{131} and the Committee has urged States to respect fundamental rights when combating terrorism.\textsuperscript{132} The most recent stance of the Committee is evidenced in General Recommendation XXX\textsuperscript{133} which addresses issues such as hate speech and racial violence, access to citizenship, administration of justice, expulsion and deportation, and economic, social and cultural rights. The recommendation underlines that any limiting features of the Convention in Article 1 must not undermine human rights in general including the principle of equality.\textsuperscript{134} The 'people in movement' scenario includes, of course, trafficked persons, especially women and girls. Trafficking has, in many cases, an intrinsic dimension of racial discrimination.\textsuperscript{135}

Descent-based discrimination has also engaged the Committee and such engagement is likely to continue.\textsuperscript{136} In terms of Article 1, the essence of the Committee's approach to caste groups is to call up 'descent' rather than

\begin{itemize}
\item 2003 Report, supra n. 12 at para. 84.
\item General Recommendation XXI on the right to self-determination, supra n. 101.
\item For Committee comments, see concluding observations on Canada, 2002 Report, supra n. 7 at para. 338; New Zealand, ibid. at para. 427; Russian Federation, 2003 Report, supra n. 12 at para. 192; Norway, ibid. at para. 473; the UK, ibid. at para. 536; Sweden, 2004 Report, supra n. 1 at para. 225; and Kazakhstan, ibid. at para. 294.
\item Statement on racial discrimination and measures to combat terrorism, supra n. 7.
\item In particular, according to para. 2 of the Recommendation, Article 1, paragraph 2 [of the Convention] must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.'
\item Recent concluding observations on trafficking include, in 2004: 2004 Report, supra n. 1 at para. 244 (Argentina); ibid. at para. 265 (Belarus); ibid. at para. 293 (Kazakhstan); and, in 2005: 14 April 2005, CERD/C/AZE/CO/4 at para. 11 (Azerbaijan).
\end{itemize}
‘race’, although there have been ‘race’ inflections in Dalit interventions at the UN, and a slippage of categories in much historical and contemporary writing on caste. Besides race and history narratives, and the processes of self-identification and self-description they imply, the exogamous ascription or fixing of caste attributes onto populations recalls ascriptive processes attaching to ‘race’, ‘colour’ or ‘ethnicity’ based allegedly on immutable characteristics or incorrigible ‘otherness’. In other words, caste or analogous forms of social stratification may have a race-like quality on a par with the other descriptors in Article 1 and are appropriately brought within its frame. ‘Descent’ was suggested by India in the Third Committee and approved without much debate. The drafting record does not clarify relevant distinctions, though it appears that ‘descent’ was in part intended to cover confusions over ‘national origin’—‘nationality’ was another contested term. While coverage of caste seems to have been implicit in the drafting of Article 1(1), a clearer affirmation that caste is within the purview of the Convention results from the Indian intervention in the drafting of what became Articles 1(4) and 2(2). The representative of India pointed out that Article 1(4) ‘had been included in the draft Convention in order to provide for special and temporary measures to help certain groups of people...who, though of the same racial stock and ethnic origin as their fellow citizens, had for centuries been relegated by the caste system to a miserable and downtrodden condition. ‘Descent’ was omitted from the list

138 See the multiple references to the intersection of ‘race’ and ‘caste’ in Bayly, Caste, Society and Politics in India (Cambridge: Cambridge University Press, 1999).
141 ‘Descent’ is not unique in the canon of human rights. Article 1(1)(b) of ILO Convention 169 on Indigenous and Tribal Peoples covers indigenous status on the grounds, inter alia, of ‘descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization’ (emphasis added).
142 Key interventions of India were made in meetings 1299 and 1306 of the Third Committee of the General Assembly, see A/C.3/SR.1299 and A/C.3/SR.1306.
143 A/C.3/SR.1299 at para. 29. The basic document containing the drafting suggestion of India is A/C.3/L.1216. In A/C.3/SR.1306, the representative of Ghana commented on the draft Article 1 that ‘notions of ancestry and previous nationality...seemed to him adequately represented by “descent” and “place of origin” in the Indian proposal’ (para. 12).
145 A/C.3/SR.1306 at para. 25. See also A/C.3/SR.1303 at para. 20. According to Bayly, supra n. 138 at 105–6, the term ‘caste’ derives from the Latin castus (chaste), mutated to casta in Spanish and Portuguese with a usage applied to zoology and botany, later used to describe Amerindian clans and lineages—that is, by ‘bloodline-conscious Iberian settlers to people
of prohibited grounds in Article 5: the not-always-illuminating *travaux* reveal that the representative of Czechoslovakia proposed to insert the term into Article 5 to promote consistency with Article 1, but was almost immediately persuaded by the representative of Austria to withdraw the proposal. No further explanation appears from the summary records.\(^{146}\)

Following a vivid thematic discussion in 2002,\(^{147}\) General Recommendation XXIX emerged, encouraging States to recognise the problem and address it in law and practice. According to the Recommendation, descent-based communities are those

who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality.\(^{148}\)

The General Recommendation followed the debacle (for Dalits and others) at the Durban World Conference when the caste issue was talked out by vigorous diplomacy by India. The Committee had independent reasons to go ahead and explore the issue: to understand better a key term in the Convention; to understand better the contemporary scope of such discrimination; and, to respond to the victims who impressed the Committee so greatly. There are issues here: the target of the General Recommendation is not or should not be the caste system itself, but discrimination\(^{149}\) although the distinction is a thin one. In the author’s view, powerful victim perspectives greatly influenced the Committee. The claims of culture are weakened when there is massive disaffection and dissent, and group ‘membership’ is heavily contested. The UN continues to grapple with the question of ‘descent’, post-2002,\(^{149}\) as does
the Committee.\footnote{Concluding observations on Mali, 2002 Report, supra n. 7 at paras 391–411; Senegal, ibid. at paras 435–50; the UK, 2003 Report, supra n. 12 at paras 520–50; Nepal, 2004 Report, supra n. 1 at paras 116–40; Madagascar, ibid. at paras 304–27; and, Mauritania, ibid. at paras 328–57.}

India contests the application of the Convention to matters of caste,\footnote{Consolidated 10th to 14th periodic report of India, CERD/C/299/Add.3 (1996) at paras 6 and 7.} as does Japan to the inclusion of the Buraku in the concluding observations of the Committee, though in more limited terms.\footnote{For the concluding observations, see 2001 Report, supra n. 2 at paras 159–85, and particularly para. 166: ‘the Committee, contrary to the State party, considers that the term “descent” has its own meaning, and is not to be confused with race or ethnic or national origin’. The response of Japan is in 2001 Report, ibid. at Annex VII, stating simply that ‘the Government does not share the Committee’s interpretation of “descent”, while recalling measures to resolve discrimination against Burakumin (para. 3).’}

Questions of ‘gender, race and discrimination’ are part of the regular discourse of the Committee. In General Recommendation XXV on gender-related dimensions of racial discrimination, the Committee invited States to analyse the relation or intersectionality between race and gender by considering the form and manifestation of racial discrimination; the circumstances in which discrimination occurs; the consequences of such discrimination; and the availability of remedies and complaint mechanisms.\footnote{The Committee welcomed Sweden’s Action Plan to Combat Racism, Xenophobia, Homophobia and Discrimination—a rare mention of a sexual orientation issue, 2004 Report, supra n. 1 at para. 213.}

Gender issues surface regularly in Committee practice, impelled in part by General Recommendation XXV. Recent sessions have addressed gender on a regular basis, notably in the areas of trafficking of women and girls,\footnote{See recent examples from concluding observations, above, n. 140.} HIV/AIDS,\footnote{See concluding observations on Uganda, 2003 Report, supra n. 12 at paras 263–86; Suriname, 2004 Report, supra n. 1 at paras 180–210.} discrimination against Roma women,\footnote{See concluding observations on Czech Republic, 2003 Report, supra n. 12 at paras 373–93; Slovakia, 2004 Report, supra n. 1 at paras 378–95.} transmission of nationality through the male line\footnote{See concluding observations on Bahamas, 2004 Report, supra n. 1 at paras 18–45; Lebanon, ibid. at paras 46–72; Mauritania, ibid. at paras 328–57; and Madagascar, ibid. at paras 304–27.} as well as customs and practices of certain groups.\footnote{See concluding observations on Nepal, ibid. at 116–40; Mauritania, ibid. at paras 328–57; and Suriname, ibid. at paras 180–210.}

The general recommendations on Roma and descent/caste are particularly strong on gender issues. As with the case of discrimination on grounds of religion, there should in principle be an element of ‘intersectionality’—discrimination on grounds of race, colour, etc., as well as gender—to engage the Convention. This is evident in most cases, though the element of ‘intersectionality’ in cases where the Committee has questioned provisions on transmission of nationality is not always immediately obvious.
The Committee on occasion receives notice of social or cultural practices which members regard as running counter to human rights. These usually have something to do with rights of women, such as marriage customs,\(^{159}\) forms of caste-based prostitution,\(^{160}\) and even female genital mutilation.\(^{161}\) Condemning a practice does not obviate the need for caution and contextuality in making recommendations to a reporting State. The Committee ought to be careful in cases of an oppressed community that it does not give a government administration a further weapon in its armoury—the piece of paper ‘from the UN’ declaring disapproval of such practices and recommending stern action. The dialogue so prized by the Committee needs to be carried on within States, and community-focused action should be carried out with their effective participation. Faced with such issues, the Committee has, for example, recommended information and awareness-raising measures designed for relevant population groups,\(^{162}\) and may adopt the expedient of referring in general terms to General Recommendation XXV,\(^{163}\) which includes a reference to ‘discrimination against women in private spheres of life.’\(^{164}\)

6. Concluding Reflections

The flow of events constantly throws out new questions for, or indeed at, the Committee, a consequence of the great span of States which have ratified the Convention and the urgency of many privations suffered or alleged. The Committee has more than once expressed a view that the Convention must be responsive to changing circumstances. Concerning an allegation of hate speech in *Hagan v Australia*, the Committee considered that ‘the Convention, as a living instrument, must be interpreted and applied taking into [account] the circumstance of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.’\(^{165}\)

The introduction to this paper identified three main areas for discussion. The first, *instrumental* aspect, relates to Convention procedures. The main innovations are identified above, some of them incorporating the Committee’s response to broader moves to reform the treaty body system;\(^{166}\) others generated

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159 Concluding observations on Suriname, 2004 Report, supra n. 1 at para. 204.
160 Concluding observations on Nepal, ibid. at para. 131.
161 Concluding observations on Mauritania, ibid. at para. 346.
162 Concluding observations on Mauritania, ibid.
163 For example in concluding observations on Ghana, 2003 Report, supra n. 12 at para. 114.
164 Para. 2, General Recommendation XXV, supra n. 38. See also para. 1.
166 Amidst a plethora of documentation, see the second reform report of the UN Secretary-General, Strengthening of the United Nations: An Agenda for Further Change, 23 September 2002, A/57/387; and the comments in the report entitled In Larger
by the ‘internal’ need to develop a more efficient _modus operandi_. The treaty bodies do not have the attraction of the ‘big’ public, political argument that characterises megaphone diplomacy wherever practised. Nor do they ostensibly engage in abstract studies of a human rights norm or principle, though general debates and ‘thematic discussions’ are helpful for taking a broad view. They are also not—normally—the stuff of tabloid headlines. The work is slow and detailed; the bodies have no instant solutions or big guns but attempt to work constructively in a co-operative spirit. This is perhaps the most to be expected in a Westphalian state system where ‘Statist’ and ‘Enlightenment’ elements do not always run easily together. It may be suggested that the world of human rights does not always need impatience; most of the time it has a greater need for the patient building up of respect for rights, an edifice best constructed from the inside of a country or culture. Further instrumental elements in the Committee work concern ‘how to do’, and ‘what are the facts/what is the decision to be’ questions such as (a snapshot only): how to mark out and warn of the beginnings of a genocidal process; what to recommend in the way of legislation and education to a country with limited resources; whether alleged acts of discrimination have occurred in fact; the appropriate or potentially most effective remedy in the circumstances for a violation of rights; whether to recognise if civil conflict has irreparably damaged the State’s capacity to respond to international non-discrimination standards, etc. All these are difficult enough practical determinations to make, even if accompanying interpretative platforms are agreed.

The _spatial_ aspects of discrimination are amply illustrated by the above account of contemporary victims of discrimination. Racist practice constantly ingests new sources of nourishment. Populations migrate and are constrained to interact; politicians warn of immigrants flooding in; hate speech proliferates on the Internet and may be implicated in genocidal processes; identity politics and principles are misunderstood as implicating hierarchy rather than respect for difference; indigenous peoples make resource claims even if this is simply clinging on to what they have had for centuries or millennia. New sources of anxiety will undoubtedly arise.

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In terms of concepts, this article illustrates what may be termed the interpretative function in the narrower sense. The text of the Convention is complex; the elements do not all sit easily together. The contexts of discrimination outlined above illustrate how the Committee has ‘unpacked’ some of those ‘forms’ of discrimination implied in the title of the Convention, if not ‘all forms of racial discrimination’. The ‘grounds’ of discrimination have been given a thorough airing in Committee practice, even if they give rise to only provisional interpretations. The basic notion of discrimination is expressed with tolerable clarity in the Convention, though it still has the power to perplex. Restrictive clauses such as the limitations concerning distinctions between citizens and non-citizens have not been allowed to restrict the scope of the Convention’s principles. Readings often depend on which elements in the text the Committee’s exegetical process prefers to stress.

Interpretation of the Convention has also a broader sense, more than the unpacking of specific terms, but conditioning and interacting with the textual exegesis. There are ‘big’ conceptual questions which ultimately concern the human rights project, its provenance and its global ambitions.

Implicit in much discussion in Committee is the question of the vision of the Convention. In particular, to what extent can the Convention’s discourse of equality be ‘married’ with the recent (in terms of more recent human rights instruments) discourse on diversity? The question may arise in the context of recommendations on bilingual language education, on Roma or indigenous rights compared to those of the ‘general’ or majority population, on the treatment in cultural terms to be accorded to immigrants, on the wearing of ‘Islamic’ headscarves, and many other cases. It can be framed as a debate on integration and assimilation, on equality and special measures, on non-discrimination and minority rights, or—fashionably—as an exploration of the ‘ism’ of ‘multiculturalism’.169 The Committee tends, de minimis, to insist on the reality of demographic multiculturalism in countries coming before it. From this multiculturalism of the demos, the further question is: what follows in terms of policy and practice? Internationally, the anti-multiculturalist stance can stem from either a ‘right’ (nationalist) or ‘left’ (social equality without too much attention to cultural diversity) perspective if ‘right’ and ‘left’ still have meaning. In all this, there is buried a point about equality: is the equality principle about ‘undifferentiated’ individuals, or does it embrace individuals in their cultural context—the difference between a ‘homogenising’ universalism and a ‘differentiated’ universalism. The discourses of equality and diversity can be synthesised, even through such banal phrases as ‘all different; all equal’; ‘equality within

169 The Committee discussed the issue of multiculturalism at its 66th session in 2005. At the time of writing, the summary records are available only in part: see CERD/C/SR/1701, 29 March 2005.
diversity’; ‘diversity within equality’, or other imaginative permutations. How these translate into practical programmes is another question, but the temptation to stress incompatibilities should be avoided, especially in a project as unfinished as human rights. While the Convention is *ex facie* an integrationist document, integration should not be interpreted as assimilation, especially against the will and the power of vulnerable populations involved who revere and respect their own cultures and religions. Too much militancy in advocating a simplistic or reductionist concept of human rights can transform it from a welcoming project to a belligerent demonstration of the alleged superiority of the cosmopolitan over the local. The ‘vision’ question continues to trouble and perplex, and there appears to be no unanimity of view among Committee members. The ‘philosophy’ of the Convention will of necessity continue to reveal itself on a case-by-case basis.

In the human rights canon, principles of equality and non-discrimination will continue to have a privileged place and a continuing life, while fated to be unfulfilled and contested as always. This should not be a case for despair, though it is cause for reflection on how human communities relate in this finite world to the ‘others’ of their imagination and experience. Racism, and even race theory, has lingering attractions for some, but there is wide awareness of its flaws and the social danger it brings in its wake. The Committee, with others, has played a part in deepening the understanding of racial discrimination, which, if it cannot be ‘eliminated’, can be ‘combated’ and ‘confronted’ in its subtly mutating forms.

170 Supra n. 63.