

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME



PROCEDURES SPECIALES DU CONSEIL DES
DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE UNITED
NATIONS HUMAN RIGHTS COUNCIL

**Mandate of the Special Representative of the Secretary-General on Human Rights
and Transnational Corporations and Other Business Enterprises**

Téléphone: (41-22)- 917 92 99
Téléfax: (41-22)-917 90 10
Internet : www.ohchr.org/english/bodies/chr/special/index.htm
E-mail: lwendland@ohchr.org



Address:
Palais des Nations
CH-1211 GENEVE 10

**Mapping State obligations for corporate acts:
An examination of the UN Human Rights Treaty System**

Report No. 1:

**International Convention on the Elimination of
All Forms of Racial Discrimination**

Prepared for the Special Representative of the Secretary-General on Human
Rights and Transnational Corporations and Other Business Enterprises

With the support of

The Office of the United Nations High Commissioner for Human Rights

December 18, 2006

PREFACE

The following report is part of a series examining States' obligations in relation to corporate activity under each of the United Nations' seven core human rights treaties ("Treaties").¹ A final report will summarize the main findings from the seven treaty-specific reports, identify overall trends, and make recommendations as to how the treaty-based human rights machinery may be applied to further strengthen the promotion and protection of human rights in the context of corporate activity.

The reports map the scope and content of States Parties' responsibilities to regulate and adjudicate the actions of business enterprises under the Treaties and as clarified by the respective treaty bodies.² This mapping supports the work of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. The (then) United Nations Commission on Human Rights mandated the SRSG, *inter alia*, to:

"(b) elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation."³

The reports analyze a representative sample of primary materials associated with each treaty:⁴ the actual treaty provisions; General Comments or Recommendations by the Committees; Concluding Observations on States' periodic reports; and Opinions on Communications and Decisions under Early Warning Measures and Urgent Procedures.⁵

The reports are based on direct references by the treaty bodies to business enterprises, as well as references to State obligations regarding non-State actors more generally where they help identify patterns and measures relevant to business enterprises. But the reports do not document references to non-State actors that are unrelated to the mandate, such as armed groups, educational institutions, family members and religious leaders.

This comprehensive documentation of what is required of States Parties to the Treaties regarding corporate activity provides the SRSG with a major source of evidence on the basis to "elaborate on" the role of States, as per his mandate. Other sources include the

¹ ICERD; ICCPR; ICESCR; CEDAW; CAT; CRC; and ICRMW. A short summary of the International Convention on the Rights of Persons with Disabilities will supplement the reports. This Convention, adopted by the General Assembly in December 2006 but not yet entered into force, contains specific references to business.

² The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. They are created in line with the provisions of the treaty that they monitor.

³ Commission on Human Rights Resolution 2005/69, paragraph (b). The SRSG now reports to the UN Human Rights Council.

⁴ Only the report on the CMW includes sources not derived directly from the Committee. This was considered necessary due to the scarcity of primary sources from this newly established Committee.

⁵ The ICCPR, CAT, CERD, CEDAW and CMW all have associated individual complaints mechanisms. CEDAW and CAT also have procedures for urgent inquiries. CERD has an early warning procedure.

reports from expert legal seminars convened in support of the mandate,⁶ together with a variety of secondary legal literatures.

The decision to focus primary attention on the Treaties reflects the global importance of the United Nations' human rights treaty machinery. Due to time and resource constraints, other domains of human rights law, such as the regional human rights systems and international customary law, have not been included in this particular series, though they will be referenced briefly in the SRSG next report to the Human Rights Council. The same is true of other branches of international law that are relevant to the mandate, such as labor law and anti-corruption standards.

The views in this series do not necessarily represent those of the Office of the United Nations High Commissioner for Human Rights or the various treaty monitoring bodies.

The reports are numbered chronologically according to the date of adoption of each treaty.

⁶ Such as the report from the Brussels seminar on extraterritorial jurisdiction. Available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>; this site includes all reports and research papers prepared by or for the SRSG.

EXECUTIVE SUMMARY

As the first United Nations human rights convention States adopted, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is remarkably clear and unambiguous that State obligations to ensure human rights apply to activities of private as well as State actors. The Convention explicitly mentions private organizations and individuals. An analysis of the Committee on Racial Discrimination (CERD)'s Concluding Observations, General Recommendations, Opinions on Communications, and Decisions confirms the Convention's provisions that States have the obligation to regulate and adjudicate actions by private actors.⁷

While the Convention gives more weight to acts of private actors in the *public sphere* and to acts of *public actors*, over time the Committee increasingly has expanded the scope of ICERD to address a wide range of acts by private actors, including business, in the private sphere. The Committee generally refers to business by using broad terms, such as 'labor market', 'employment', or 'private sector', with the understanding that ICERD applies to acts by *any type* of businesses. Nonetheless, reference to specific types of business has increased over time, in particular to transnational corporations, the media, restaurants and cafés, and housing agencies.

Issues of particular concern to the Committee thus far have included the activities of transnational corporations (generally extractive companies) operating in indigenous peoples' traditional lands or territories, with a focus on displacement, inadequate consultation of indigenous peoples, and environmental pollution; discrimination on the basis of race, color, descent or national or ethnic origin against specific groups such as Roma, in relation to labor rights or accessing restaurants and other public places; and discriminatory treatment of non-citizens by private employers, particularly in relation to working conditions and recruitment. In respect to all of these concerns, the Committee consistently finds the State ultimately responsible for any discrimination caused by business enterprises.

States are required to take a wide range of measures to protect individuals or groups from private corporate acts that may violate the Convention. CERD makes it clear that *regulation* through legislative measures and policies is not sufficient per se. States should also *adjudicate* actions by private actors, that is, they must thoroughly investigate any claim of discrimination, prosecute the responsible individual or business, provide effective remedies (generally under criminal law), including the right to seek reparation. States must also *monitor* the human rights situation through an independent body – this may require, for example, conducting environmental impact assessments before any operating licenses are issued to extractive companies.⁸ In addition, States must *take special measures* to guarantee the rights of specific groups, such as Roma. For example, States must, among others, offer professional training to Roma so as to promote their employment in public and business enterprises.⁹

⁷ Opinions on Communications are sometimes called CERD "jurisprudence". This report follows the exact terminology used by the Committee, which does not officially use the term 'jurisprudence'.

⁸ See *Part III of this report, Business specific information, A. Transnational Corporations*.

⁹ See *Part II of this report, D. Special measures to ensure the rights of certain racial or ethnic groups or individuals*,

While States remain ultimately responsible for any failure to protect individuals from abuse by business enterprises, they are also requested to encourage *best practices*. For example, States are advised to offer incentives to business enterprises to recruit Roma, and to promote self-monitoring practices in the media. On one occasion the Committee suggested that business enterprises also have a role to play in the *promotion of human rights*: In the 2004 Concluding Observations on Suriname, CERD recommends that ‘large business ventures’ should, in agreement with the State and consultation with the peoples concerned, promote human rights in areas such as health care and education.¹⁰

CERD does not explicitly address the issue of State-owned enterprises (SOEs). Nonetheless, its Communications and Concluding Observations suggest that the State is responsible for ensuring they do not abuse human rights. If SOEs are considered State organs, the State obligation in this context is to respect human rights through all its organs. If SOEs are considered private businesses, then the State obligation to protect applies.

Neither the Convention nor the Committee shed much light on the issue of extra-territorial jurisdiction.

Over time, CERD has shown an ability to adapt to and address issues and actors significant to the contemporary context. CERD has not shied away from addressing discriminatory acts by business enterprises in various contexts. Given the increasing importance of business globally and its relevance to the effective implementation of the Convention, it seems likely that the Committee will, at the very least, continue to address issues pertaining to business’ activities.

¹⁰ See *Part III of this report, A. Transnational Corporations*.

TABLE OF CONTENTS

PREFACE	i
EXECUTIVE SUMMARY	iii
TABLE OF CONTENTS	v
ABBREVIATIONS	vi
INTRODUCTION	1
PART I - GENERAL NATURE AND SCOPE OF STATE OBLIGATIONS	2
<i>A. Reference and application to non-State actors</i>	2
<i>B. Scope and limitation</i>	2
<i>C. State responsibility for the acts of non-State actors</i>	4
PART II - MEASURES THAT STATES ARE REQUIRED TO TAKE	6
<i>A. General considerations</i>	6
<i>B. Regulatory and legislative measures</i>	6
<i>C. Adjudication measures</i>	7
<i>D. Special measures to ensure the rights of certain racial or ethnic groups or individuals</i>	12
PART III – BUSINESS SPECIFIC INFORMATION	14
<i>A. Transnational Corporations</i>	14
<i>B. Media</i>	16
<i>C. Private housing agencies</i>	17
<i>D. Transport, hotels, restaurants, and cafes</i>	17
<i>E. Loan market and private banks</i>	17
PART IV – SPECIFIC RIGHTS RELEVANT TO BUSINESS	18
PART V – STATE-OWNED ENTERPRISES	21
PART VI – EXTRA-TERRITORIAL JURISDICTION	22
PART VI: CONCLUSIONS AND TRENDS	23
<i>CERD’s public-private dichotomy</i>	23
<i>Attention to business enterprises</i>	24
<i>Measures recommended to States in relation to business</i>	24
<i>Issues which would benefit from further elaboration</i>	24
<i>ICERD, a living instrument</i>	25
ANNEX I - INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION	27
ANNEX II – STATUS OF RATIFICATION	39

ABBREVIATIONS

CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Committee against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women; Committee on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC	Convention on the Rights of the Child; Committee on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
NGOs	Non-governmental organizations
NHRI	National Human Rights Institution
OBEs	Other Business Enterprises
OHCHR	Office of the United Nations High Commissioner for Human Rights
SOEs	State owned enterprises
SRSG	Special Representative of the Secretary-General
TNCs	Transnational Corporations

INTRODUCTION

1. The present report outlines the nature of State obligations in relation to activities of business enterprises under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as elaborated by its treaty monitoring body, the Committee on Racial Discrimination (CERD).
2. The report examines measures that States are required to take to regulate and adjudicate non-State actors, particularly business enterprises. Direct or implied references to business by CERD come in two forms: they may address a particular human right, or they may address human rights challenges pertaining to a business sector or type.
3. CERD's General Recommendations, Communications, and Decisions under Early Warning Measures and Urgent Procedures were examined in their entirety. Examination of Concluding Observations was limited to its last 9 sessions, and further limited by looking in detail only at the Concluding Observations that contained the relevant search terms.
4. The search terms ranged from general terms such as "business", "company", "corporation", "protect" and "private" to more specific terms where the treaty body regularly mentioned a particular non-State actor relevant to this exercise. The main sources used for searching treaty documentation were the United Nations Treaty Bodies Database and the Human Rights Index of United Nations Documents, provided by the Faculty of Law – Institute of Public Law at the University of Bern.
5. For the purposes of this report, '*regulatory measures*' are legislative and similar measures designed to prevent abuse, including legislation proscribing abuse by non-State actors. '*Adjudicative measures*' include judicial or other measures to punish or remediate abuse, such as investigating, prosecuting and sanctioning offenders through judicial process.
6. The phrase '*non-State actors*' is understood as any actor that is not a State agent but may directly or indirectly violate human rights (as enshrined in the relevant Convention). The definition does not include persons or groups that require State protection, such as human rights defenders or victims of violations.
7. Information on *State owned enterprises* (SOEs) is included in a separate section. SOEs are understood as State owned or controlled businesses performing operations similar to non-State business enterprises. The category does not include non-State business enterprises performing government-like functions in privatization situations. Nor does it include government agencies and other forms of State agents, such as armed groups, State-run correction and detention centers or State-run educational institutions. The focus is solely on SOEs performing business operations similar to non-State business enterprises.
8. This report makes no attempt to explore the various legal definitions of government control over SOEs. The selection criterion is simply cases where the Committee itself expressly indicates that it is discussing a State owned business enterprise, or where it is implied that the State has a controlling interest in a business enterprise.

PART I - GENERAL NATURE AND SCOPE OF STATE OBLIGATIONS

A. Reference and application to non-State actors

9. The Convention aims at eliminating racial discrimination ‘in all its forms and manifestations’ and preventing and combating ‘racist doctrines and practices’ (Preamble). There is no indication that this aim relates only to State actions – indeed, private actors are explicitly mentioned in several provisions of the Convention.¹¹ As the first human rights convention adopted by States, ICERD is remarkably clear in stressing that State obligations apply to activities of *private actors* as well as of State actors.¹² ICCPR and ICESCR do not explicitly mention private actors.

10. Articles 2 and 4 clearly show the importance the Convention attaches to acts by private actors:

Article 2(1)d

Each State Party shall prohibit and bring to an end (...) racial discrimination by any *persons, group or organization*.

Article 4

States Parties condemn all propaganda and *all organizations* which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form (...)

11. The Committee in its General Recommendations, Opinions on Communications and Concluding Observations does not shy away from *naming specific private actors*. It explicitly mentions *private companies* (or other business enterprises), particularly in relation to the protection of specific groups, such as indigenous peoples or Roma. Mention of specific types of enterprises has also recently increased.¹³ Generally, the Committee still tends to use broad terms to refer to business enterprises, such as ‘labor market’, ‘employment’, or ‘media’.

B. Scope and limitation

Public life

Article 1(1)

In this Convention, the term ‘racial discrimination’ shall mean any distinction (...) which has the purpose of nullifying (...) the recognition, enjoyment or exercise of human rights (...) in the political, economic, social, cultural or any other *field of public life*.

¹¹ Articles 2, 4, and 5 ICERD.

¹² ICCPR and ICESCR do not mention non-State actors that may violate human rights explicitly. Compare the Covenants at: <http://www.ohchr.org/english/law/index.htm>

¹³ See for example *General Recommendations 23* on the rights of indigenous peoples, paragraph 3, and 27 on discrimination against Roma, paragraphs 28, 31, 35, 36-37, 39-40. *Concluding Observations* from 2000 to 2006 mention the following terms (the number in parenthesis refers to the number of Concluding Observations that mention a term: transnational enterprise (1), enterprise (1), companies (3), corporation (2), business (2), business ventures (2), factory owners (1), commercial activities (5), private sector (5), mining concession holders (1). Specific mentions can be found in Concluding Observations on individual States reports more so than in General Recommendations, which by definition should apply to a great diversity of contexts and situations. *Decisions under Early Warning Measures and Urgent Procedures* mention large scale mining operations, foreign companies, mining companies, mining activities, exploitation and infrastructure projects, multinational extractive industries, and energy developers. This list is not exhaustive, as specific data on other private business has not been gathered, e.g. on restaurants or the media.

12. It is unclear how much the mention of ‘public life’ in Article 1 limits the scope of application of the Convention. Indeed, references to public life have practically disappeared in Opinions on Communications and Concluding Observations, confirming the expansion of the Convention’s reach and application.

13. For example, whereas General Recommendation 14 specifies that Article 1 applies to all human rights in the political, economic, social and cultural fields without specifying a ‘public life’ limitation, other General Recommendations explicitly ask States to address racial discrimination in the *private sphere*. For example, CERD asks States to focus on the abuse of women domestic workers (General Recommendation 25 on gender related dimensions of racial discrimination), and to take measures to ensure non-discrimination and avoid segregation in housing, including by taking action against *private owners* or *housing agencies*.¹⁴

14. In its Opinions on Communications, the Committee has examined claims regarding racial discrimination in *private employment*,¹⁵ and stressed that States have obligations to adjudicate acts by *private banks*.¹⁶ In *Ahmad Najaati Sadic v. Denmark*, the Committee stressed that the Danish Criminal Code’s inclusion only of discriminatory acts that receive “broad publicity” or are “intended for wider dissemination” (Article 266 b) “does not appear to be fully in conformity with the requirements of Articles 4 and 6 of the Convention.”¹⁷

15. Thus, there is little doubt that the Committee considers States to have obligations to protect individuals from actions by private actors, be they business enterprises or others, in the public and private spheres. An examination of Communications also suggests no State has argued to the contrary.¹⁸

Territorial limitation

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction*.

¹⁴ See *Part III – business specific information, C. Private housing agencies*, p.17.

¹⁵ See for example Communication No. 1/1984, *A. Yilmaz Dogan v. the Netherlands*, and cases mentioned under *PART III – business specific information*, p.14

¹⁶ Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997.

¹⁷ The State party had found no violation in this particular case, although racial insults had been heard by at least 2 other people aside from the petitioner. Communication No.25/2002, *Ahmad Najaati Sadic v. Denmark*, CERD/C/62/D/25/2002, paragraph 6.8

¹⁸ See extracts of States’ argumentation presented to the Committee in Communications, nearly two thirds of which concern acts by private actors. For example, in Communication No.1/1984, a case of alleged discrimination by a private textile company against a foreign worker, the State rejects the accusation that it did not fulfil its obligation under Article 4 of the Convention on the basis of the merits of the petitioner’s arguments. In this case, the State does so by contesting the scope of its obligations in relation to prosecuting private actors. It does not, however, reject the petitioner’s arguments on reasons of process and admissibility (i.e. the very fact that the petitioner claimed the State failed to comply with its obligations to regulate and adjudicate the alleged racial act of a company). This way the State accepts that it has obligations under Article 4, including obligations in relation to private employers. Communication No.1/1984, *A. Yilmaz Dogan v. the Netherlands*, CERD/C/36/D/1/1984, paragraphs 4.2 to 4.4.

16. The territorial limitation set out in Article 3 applies to specific types of racial discrimination, namely racial segregation and apartheid. The Convention is silent as to whether any territorial limitation exists in relation to other forms of racial discrimination. One could thus conclude that the Convention does not preclude extra territorial jurisdiction. The Committee does not, however, provide any further guidance on either territorial limitations or extra territorial jurisdiction matters (see also PART VI).

C. State responsibility for the acts of non-State actors

Obligation to protect

17. States must not only abstain from supporting discrimination by non-State actors, they must also take positive measures, including but not limited to legislation, to protect individuals from, and bring to an end, racial discrimination by any non-State actors, as elaborated upon in Article 2(1):

Article 2(1):

(b) 'Each State party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (...)

(d) Each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.

18. Specific provisions apply to segregation and apartheid: the Convention provides in Article 3 that "States Parties (...) undertake to *prevent, prohibit and eradicate* all practices of segregation and apartheid in territories under their jurisdiction." This obligation is quite broad as, in the words of the Committee, it includes the "obligation to *eradicate the consequences of such practices* undertaken or tolerated by previous Governments in the State or imposed by forces outside the State."¹⁹

19. Accordingly, States have the obligation to monitor and redress any discrimination or segregation, even when caused independently from State actions or as 'an unintended by-product of the actions of private persons'.²⁰ Reference was made in General Recommendation 19 to residential patterns in cities that may result in segregation. Although the Committee does not mention acts by business enterprises in this respect and such case has not been raised in Communications, nothing legally would prevent the Committee to examine cases of racial discrimination resulting in segregation by private housing agencies, for instance.

Due diligence

20. Although CERD does not systematically refer to the 'due diligence' principle, it has in effect applied the principle in some cases to actions States should take in order to effectively protect vulnerable groups, in particular investigations and monitoring.

¹⁹ General Recommendation 19 on racial segregation and apartheid (Article 3), paragraph 2.

²⁰ General Recommendation 19 on racial segregation and apartheid (Article 3), paragraph 3.

21. Concerning investigations, CERD has stressed that when threats of racial violence are made, and especially when they are made in public and by a group, “it is incumbent upon the State to investigate with due diligence and expedition.”²¹

22. Regarding monitoring, CERD emphasizes that States should monitor actions by public and private actors that incite hatred or discriminate. Where racial segregation arises without any State initiative or direct involvement, but “as an unintended by-product of the actions of private persons”, States should “monitor all trends which can give rise to racial segregation”²² and work to eradicate the effects, regardless of whether the segregation was caused by a private or public actor.

23. According to CERD, gathering quantitative and qualitative data disaggregated by gender, racial or ethnic origin is crucial to help States monitor and assess factors affecting groups in need of protection.²³ General Recommendation 24 clarifies that this procedure should be based on clearly defined criteria and international standards rather than being at the States’ own discretion.²⁴ In a similar vein, States are required to “pay greater attention to the issue of multiple discrimination” faced by vulnerable groups, such as non citizens, to “report on any such practices, and take all necessary steps to address them”.²⁵ Reference to ‘multiple discrimination’ implies that States are required to assess discrimination from all avenues, including private actors.

24. One of the monitoring mechanisms that CERD recommends establishing is a national human rights institution (NHRI) to “review government policy towards protection against racial discrimination,” monitor legislative compliance with the provisions of the Convention, and follow up to the recommendations of the Committee.²⁶ NHRIs would arguably monitor compliance by both public and private actors.

25. In the context of resources exploitation on indigenous peoples’ traditional lands, CERD has recommended that independent monitoring mechanisms be set up “to conduct

²¹ In this instance, the Committee decided that the State party had failed to do so. Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, paragraph 6.6.

²² General Recommendation 19 on Article 3, paragraph 4.

²³ General Recommendation 4 on Article 1 of the Convention. See also General Recommendation 25 on gender related dimensions of racial discrimination, paragraph 6.

²⁴ In General Recommendation 29 on Article 1(1) of the Convention (descent), the Committee names a series of ‘well defined criteria’ that States should use to identify those descent based communities: “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;” Paragraph 1, Measures of a general nature.

²⁵ General Recommendation 30 on discrimination against non-citizens, paragraph 8.

²⁶ See General Recommendation 17 on the establishment of national institutions to facilitate the implementation of the Convention, paragraph 1; and General Recommendation No.28 on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, paragraphs 1 and 2.

environmental impact surveys before any operating licenses are issued, and to conduct health and safety checks on small-scale and industrial gold-mining.”²⁷

PART II - MEASURES THAT STATES ARE REQUIRED TO TAKE

A. General considerations

Article 9(1): “States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the *legislative, judicial, administrative or other measures* which they have adopted and which give effect to the provisions of this Convention.”

26. ICERD affirms that States are obliged to take ‘immediate and effective measures’ supporting ICERD provisions (Articles 2, 4, 7 and 9). The Committee has also underlined the importance of taking immediate, positive and effective measures.²⁸

27. While States Parties to the Convention are obliged to protect the enjoyment of the human rights mentioned under Article 5, the Committee seems to leave a certain *margin of appreciation* to States as to “the manner in which these obligations are translated into the legal orders of States parties”.²⁹ CERD acknowledges that States may decide to use either public or private institutions to ensure the rights outlined in Article 5, provided that States monitor the actions by private institutions and ensure that their activities do not aim at or result in creating or perpetuating racial discrimination.³⁰

B. Regulatory and legislative measures

28. States are requested to incorporate an explicit prohibition of discrimination in the *national constitution*, to *review and enact legislation* in order to outlaw all forms of discrimination, and to *have policies in place* to combat racial discrimination.³¹ In relation to Roma, CERD recommends that States adopt legislation prohibiting employment discrimination and all discriminatory labour market practices affecting members of Roma communities, protecting them from such practices.³²

29. Article 4 of the Convention outlines specific legislative measures that should be taken in relation to racial violence and incitement to racial hatred:

Article 4, ICERD:

“States (...) undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, (...) inter alia:

(a) Shall *declare an offence punishable by law* all dissemination of ideas, acts of violence and provision of assistance to racist activities;

(b) Shall *declare illegal and prohibit* organizations and also organized and all other propaganda activities, which promote and incite racial discrimination, and *shall recognize* participation in such organizations or activities as an offence punishable by law; (...)”

²⁷ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraph 15.

²⁸ See e.g. General Recommendation 5 on reporting by States parties (Article 7).

²⁹ General Recommendation 20 on Non-discriminatory implementation of rights and freedoms (Article 5), paragraph 1.

³⁰ General Recommendation 20 on Non-discriminatory implementation of rights and freedoms (Article 5), paragraph 5.

³¹ See Reporting Guidelines, paragraph 7 and General Recommendation 29 on Article 1(1) of the Convention (Descent), paragraphs 2 to 5.

³² General Recommendation 27 on discrimination against Roma, paragraph 27.

30. CERD in its General Recommendations 1, 7 and 25 sheds more light on the specific measures States are requested to take to give effect to Article 4(a) and (b): Article 4(a) requires States to *penalize four categories of misconduct*: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another color or ethnic origin; and (iv) incitement to such acts. Article 4 (a) also penalizes the *financing of racist activities*, which the Committee takes to include all the above mentioned categories of misconduct.

31. The Committee suggests other types of measures to States, such as:

- States should ensure their *legal framework in relation to prosecution* of cases of racial discrimination is compatible with the Convention. In case the existing legal framework for prosecuting such cases is inadequate, States have the obligation to “review [their] policy and procedures” in light of State obligations under Article 4 of the Convention.³³
- States should “*introduce in criminal law* the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment.”³⁴
- States should also *regulate the burden of proof* in civil proceedings involving discrimination based on race, color, descent, and national or ethnic origin. Once a plaintiff has established a prima facie case that s/he has been a victim of such discrimination, it should be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment.³⁵

32. The Convention does not specify whether the offence should be punishable under criminal or civil law, but there is an assumption that measures should be taken in criminal law at the very least.³⁶ For example, the Reporting Guidelines request States to “indicate what *specific penal internal legislation* designed to implement the provision of Article 4 (a) and (b) has been enacted”. An examination of Communications before CERD confirms that in domestic legal systems, charges are usually brought under domestic criminal law first, and in a few cases under civil law as well to obtain civil remedies.

33. It is clear that the types of measures recommended by CERD contemplate acts by both private and public actors, as reflected in its Opinions on Communications and Concluding Observations.

C. Adjudication measures

34. Legislative measures in themselves do not “represent full compliance with the obligations of States parties under the Convention.”³⁷ According to CERD, the obligation that criminal laws and other legal provisions prohibiting racial discrimination be

³³ Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, paragraph 6.8

³⁴ General Recommendation 30 on non-citizens, paragraph 22.

³⁵ See e.g. General Recommendation 30 on non-citizens, paragraph 24, and Concluding Observations on Zambia, CERD/C/ZMB/CO/16, paragraph 18.

³⁶ In this respect the Committee seems to imply in its Communications that States have to take measures in their criminal law system (see e.g. Communication No.34/2004, *Mohammed Hassan Gelle v. Denmark*, CERD/C/68/D/34/2004, paragraph 7.3).

³⁷ Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, paragraph 6.4

“effectively implemented by the competent national tribunals and other State institutions”³⁸ is implicit in Article 4 of the Convention, under which State parties ‘undertake to adopt immediate and positive measures’.

35. Therefore, States should ensure legislative measures are effectively enforced by adjudicating the above mentioned offences in State judicial institutions, providing effective protection and remedies (Article 6), and with due regard to the rights set forth in Article 5.

Obligation to investigate

36. The Committee has expressed the view that, to comply with Article 6 of the Convention, investigations should be ‘thorough’,³⁹ ‘proper’,⁴⁰ ‘impartial and effective’.⁴¹ While every complaint of discrimination need not result in a prosecution, each filing should be taken seriously and investigated properly.

37. All State organs with any responsibility in this respect, including the police, public prosecutors and courts, should make investigations.⁴² General Recommendation 13 emphasizes that law enforcement personnel should be trained in the principles and provisions of the Convention and in the Code of Conduct for Law Enforcement Officials, so they can effectively protect the rights of all persons.

38. The Committee has further clarified circumstances under which investigations are particularly important: “When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition.”⁴³

39. States must also investigate cases of *indirect discrimination* and find out ‘the real reasons behind a differential treatment’.⁴⁴ Indeed, “the definition of racial discrimination in Article 1 expressly extends beyond measures that are explicitly discriminatory, to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination.”⁴⁵ The Committee recognizes that these cases can be demonstrated circumstantially. In *A. Yilmaz Dogan v. the Netherlands*, the Committee stressed that the State has the obligation to examine “all

³⁸ Communication No.34/2004, *Mohammed Hassan Gelle v. Denmark*, CERD/C/68/D/34/2004, paragraph 7.3. This obligation is also affirmed in other articles such as Article 2(1)d and Article 6.

³⁹ General Recommendation 30 on non-citizens, paragraph 23.

⁴⁰ See for example Communication No.16/1999, *Kashif Ahmad v. Denmark*, CERD/C/56/D/16/1999, paragraph 9, and Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997.

⁴¹ Concluding Observations on Yemen, CERD/C/YEM/CO (2006), paragraph 14.

⁴² See Communication No.29/2003, *Dragan Durmic v. Serbia and Montenegro*, CERD/C/68/D/29/2003, paragraph 11.

⁴³ In this instance, the Committee decided that the State party had failed to do so. Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, paragraph 6.6.

⁴⁴ In this case, CERD found that the Danish state had failed to initiate “a proper investigation into the real reasons behind the bank’s loan policy” (which discriminated against foreign residents). Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997.

⁴⁵ Communication No.31/2003, *L. R. et al. v. Slovakia*, CERD/C/66/D/31/2003, paragraph 10.4.

circumstances of the case”, including allegations of racial discrimination.⁴⁶ A failure to do so may be contrary to the Convention’s provisions.

40. While States clearly have an obligation to monitor and investigate acts by business enterprises, there are some situations in which this duty can be applied more leniently. For example in *Emir Sefic v. Denmark*, the Committee found that the *specific circumstances* linked to a company’s objectives and status could reasonably justify differential treatment without amounting to discrimination. The petitioner, a Bosnian citizen, was refused liability insurance on the basis that he could not speak Danish. The Committee found that the reasons provided by the insurance company for the language requirement, including the ability to communicate with the customer, the lack of resources for a small company to employ persons speaking different languages, and the fact that it is a company operating primarily through telephone contact were “*reasonable and objective grounds for the requirement*” and would not have warranted further investigation.⁴⁷

Prosecution

41. States have a general duty to prosecute racial acts by both private and public actors. CERD, for example, recommends States “[e]nsure the prosecution of persons who commit crimes against members of descent-based communities (...)”.⁴⁸

42. However, the Committee acknowledges that under the ‘*expediency principle*,’ States have a certain degree of freedom in determining whether prosecution is in the public interest in a particular case. In *A. Yilmaz Dogan v. the Netherlands*, the Committee observed that the ‘*expediency principle*’ was “governed by considerations of public policy” and noted that “the Convention cannot be interpreted as challenging the *raison d’être* of that principle. In light of the guarantees laid down in the Convention, it should be applied in each case of alleged racial discrimination.”⁴⁹ Thus, States must in all cases take account of the prohibition of discrimination as they make decisions about whether to prosecute any private or public actor.

Can or should a legal person be held liable under national law?

43. CERD does not give clear guidance as to whether the State can or should prosecute legal persons, and if so under which circumstances. At a minimum, it seems evident that acts and policies by business enterprises should be investigated thoroughly, whether the owner of the company or an employee commits the racial act.⁵⁰ Whether business enterprises themselves, as legal persons, should be held liable, prosecuted and punished by their respective States is unclear. It is also uncertain whether the head or owner of an enterprise shall be held responsible for the behavior of one of his/her employees in case the

⁴⁶ Communication No.1/1984, *A. Yilmaz Dogan v. the Netherlands*, CERD/C/36/D/1/1984, paragraph 9.4.

⁴⁷ Communication No.32/2003, *Emir Sefic v. Denmark*, CERD/C/66/D/32/2003, paragraph 7.2.

⁴⁸ General Recommendation 29 on Article 1(1) of the Convention (Descent), paragraph 23.

⁴⁹ In this particular case, the Committee concluded that the prosecutor acted in accordance with these criteria. Communication No. 1/1984, *A. Yilmaz Dogan v. the Netherlands*, CERD/C/36/D/1/1984, paragraph 9.4. See also Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, paragraph 6.5 and 6.6.

⁵⁰ In Communication No.10, CERD notes that the State failed to investigate properly into the reasons of the bank loan’s policy, which discriminated against foreigners. It thus recommends to the State to make sure private banks’ loan policies do not discriminate against foreign residents in Denmark. Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997.

latter upholds a company's policy. CERD has not clarified queries or claims by the State or the respective petitioner in this regard, and Opinions on Communications are inconclusive, as illustrated by the following Communications:

In *B.J. v. Denmark*, a Danish citizen of Iranian origin is refused entry to a discotheque by the doorman on the grounds that he is foreigner - and this, according to discotheque's rules. CERD seemed satisfied that the doorman was fined a minimal sum for such act. The case is inconclusive: CERD narrows the case down to the adequacy of the remedy (the fine is deemed reasonable here) and the right to seek reparation. It does not touch upon broader issues of legal liability of the discotheque whose policy is undoubtedly discriminatory. On the other hand, in *Miroslav Lacko v. Slovakia*, CERD was satisfied that the State's condemnation under the Slovakian penal code (for the crime of instigation to racial hatred) of the *owner* of a restaurant that refused to serve Roma constituted "sanctions compatible with the obligations of the State party." Contrary to *B.J. v. Denmark*, in this case the owner of the restaurant was called to the scene after a waitress explained to Roma that the restaurant's policy was not to accept Roma. The waitress was not prosecuted.⁵¹

Effective remedies

44. The right to effective remedies is guaranteed by Article 6 of the Convention:

Article 6 ICERD

States Parties shall assure to everyone within their jurisdiction *effective protection and remedies*, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the *right to seek from such tribunals just and adequate reparation or satisfaction* for any damage suffered as a result of such discrimination.

45. Effective remedies must be granted in all circumstances. The Committee does not elaborate much upon the nature or conditions of such remedies, with the exception of the right to seek reparation (see below).

46. Opinions on Communications shed some light:

- States are obliged to offer remedies *within a reasonable time*, especially for cases that "were in the public domain from the outset and did not require complex investigation."⁵²
- The terms of Article 6 "do not impose upon States parties the duty to institute a mechanism of sequential remedies" in cases of alleged racial discrimination. Accordingly, while *judicial review* is compatible with the Convention, it is not required.⁵³
- Remedies may be found in *criminal and civil law suits*, the former being given more weight by the Committee. In Opinions on Communications, the Committee often dismissed State's arguments that domestic remedies had not been exhausted when the petitioner had not tried to bring a civil suit against the private offender, on the basis that civil suits were unlikely to succeed when criminal charges had been dismissed.

⁵¹ Communication No.17/1999, *B.J. v. Denmark*, CERD/C/56/D/17/1999. Communication No.11/1998, *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, paragraph 10.

⁵² Communication No.33/2003, *Kamal Quereshi v. Denmark*, CERD/C/66/D/33/2003, paragraph 6.4.

⁵³ See Communication No.1/1984, *A. Yilmaz Dogan v. the Netherlands*, CERD/C/36/D/1/1984, paragraph 9.4, and Communication No.27/2002, *Kamal Quereshi v. Denmark*, CERD/C/63/D/27/2002, paragraph 7.5.

47. When *indigenous peoples* have been deprived of their lands (or of territories traditionally owned or otherwise inhabited or used) without their free and informed consent, States shall provide effective remedies to those indigenous communities, primarily through the return of those lands and territories.⁵⁴ In this respect, States should ensure that indigenous peoples have equal access to the justice system by establishing adequate procedures, and defining clear and just criteria to resolve land claims by indigenous communities. They should do so within the domestic judicial system, while taking due account of relevant indigenous customary laws, and providing interpreters and bilingual counsel for court proceedings.⁵⁵

Right to reparation and satisfaction

48. The Committee continually reaffirms the right to seek reparation and satisfaction, as per Article 6 of the Convention.⁵⁶ There is no doubt that such reparation can and should be sought for damage caused by business enterprises.

49. The Committee has stressed that reparation may take several forms: First, if possible, States should take measures to ensure petitioners are restored to the same position they held before the act of racial discrimination took place.⁵⁷ General Recommendation 22 on refugees and displaced persons emphasizes that States should *restore property* to the original owners.⁵⁸ Indigenous peoples have a specific right to have *their lands and territories* that were taken without their informed consent restituted. When this is not possible for factual reasons, indigenous peoples should receive just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁵⁹

50. The most common form of reparation that the Committee recommends is ‘*adequate compensation*’. CERD considers that the right to reparation or satisfaction is not necessarily secured solely through punishment. It thus advises that the “courts and other competent authorities should consider awarding *financial compensation for damage, material or moral*, suffered by a victim, whenever appropriate.”⁶⁰ The Committee has also clarified the nature of the compensation: the State party should grant ‘*adequate, fair, prompt and just*’ compensation for the damage - *moral or material* - caused by violations of the Convention.⁶¹

⁵⁴ General Recommendation 23 on the rights of indigenous peoples, 1997, paragraph 5.

⁵⁵ Concluding Observations on Guatemala, CERD/C/GTM/CO/11 (2006), paragraph 14, and on Guyana, CERD/C/GUY/CO/14 (2006), paragraph 16.

⁵⁶ See for example Communication No.4/1991, *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, and No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997.

⁵⁷ See e.g. Communication No.31/2003, *L. R. et al. v. Slovakia*, CERD/C/66/D/31/2003, paragraph 12.

⁵⁸ In light of the neutral language of the Recommendation and the context (the recommendation was drafted in 1996, a post-conflict era for countries of former Yugoslavia and Rwanda, among others), it is safe to assume that States obligations are in relation to *any* illegal occupation of property by *private and public actors* alike.

⁵⁹ General Recommendation 23 on the rights of indigenous peoples, paragraph 5.

⁶⁰ General Recommendation 26 on Article 6, paragraph 2.

⁶¹ See Communications No.4/1991, 10/1997, 29/2003 and 34/2004, in which the Committee recommended reparation measures. See also *D. Special measures to ensure the rights of certain racial or ethnic groups or individuals*, p.12.

51. It is important to note, however, that the Committee has stressed in several Communications that *there is no absolute right to receive compensation* under ICERD.⁶² CERD observes in *B.J. v. Denmark*, for example, that “the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes.” While criminal sanction should be imposed on the perpetrator “under all circumstances”, the “victim is not necessarily entitled to compensation”.⁶³ The victim’s claim for compensation should nonetheless be considered by the State in all cases, “including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self esteem.”⁶⁴

52. The State shall also ensure that similar violations do not occur in the future, and provide *guarantees of non-repetition*. Communication *Mohammed Hassan Gelle v. Denmark* states that: “the State party should ensure that the existing legislation is effectively applied so that similar violations do not occur in the future”⁶⁵ Finally, CERD has not elaborated upon measures ensuring *satisfaction* of the plaintiff, although in *Ziad Ben Ahmed Habassi v. Denmark* it recommends Denmark to provide the applicant with “reparation or satisfaction commensurate with any damage he has suffered”.⁶⁶

53. It is thus clear that States must consider and investigate claims against business enterprises and offer effective remedies. These remedies should be provided under criminal law at the very least, though civil law remedies may be appropriate in some cases as well. States must also ensure the claimant is able to seek compensation for the damage done by a business enterprise.

D. Special measures to ensure the rights of certain racial or ethnic groups or individuals

54. Articles 1(4) and 2(2) provide for the obligation to take “*special measures*” to “*ensure*” or “*guarantee*” the full and equal enjoyment of human rights and fundamental freedoms of specific groups or individuals. Such obligation is key to the Convention and the Committee’s practice and arguably goes beyond the obligation to protect:

ICERD – key provisions:

Article 1(4): “*Special measures* taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to *ensure* such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

⁶² See Communication No.16/1999, *Kashif Ahmad v. Denmark*, CERD/C/56/D/16/1999 and No.17/1999, *B.J. v. Denmark*, CERD/C/56/D/17/1999.

⁶³ Communication No.17/1999, *B.J. v. Denmark*, CERD/C/56/D/17/1999, paragraph 4.10.

⁶⁴ Communication No.17/1999, *B.J. v. Denmark*, CERD/C/56/D/17/1999, paragraph 6.2.

⁶⁵ Communication No.34/2004, *Mohammed Hassan Gelle v. Denmark*, CERD/C/68/D/34/2004, paragraph 9. See also Communication No.31/2003, *L. R. et al v. Slovakia*, CERD/C/66/D/31/2003.

⁶⁶ Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997, paragraph 11.2.

Article 2(2): ‘States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, *special and concrete measures* to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of *guaranteeing* them the full and equal enjoyment of human rights and fundamental freedoms.’”

55. CERD elaborates in both General Recommendations and Concluding Observations what types of ‘special’ or ‘affirmative’ measures should be taken. Generally, States are required to “formulate and put into action a *national strategy* (...), *including special measures* in accordance with Articles 1 and 2 of the Convention, in order to eliminate discrimination.”⁶⁷

56. Most of CERD’s recommendations in this respect refer to the following groups: indigenous peoples, persons belonging to ethnic or linguistic groups, such as Roma or descent-based communities, and non-citizens.

57. CERD has expressed great concern that indigenous peoples have been and are still being discriminated against and deprived of their human rights. The Committee has stressed in particular that indigenous peoples have lost land and resources to “colonists, commercial companies, and State enterprises.”⁶⁸ In the Concluding Observations on Guatemala, CERD, concerned with the “inadequacy of public policies to eliminate racial discrimination”, recommends that the State party “undertake special measures as provided for in Article 2(2) of the Convention in favor of indigenous peoples and persons of African descent, who have historically been subjected to discrimination.”⁶⁹ CERD does not, however, specify what these measures could entail.

58. CERD is most explicit in respect to special measures ensuring Roma’s rights,⁷⁰ such as:

- *Adopt and implement effectively national strategies, programs or projects* to improve Roma’s status in relation to employment, housing or education, among others. In the Concluding Observations on Bosnia and Herzegovina, CERD recommends that the State “review the National Strategy for Roma to ensure that it identifies specific measures, establishes adequate budgetary allocations, and identifies the bodies responsible for its implementation”, and “implement effectively the Action Plan on Educational Needs of Roma and Other National Minorities”.⁷¹
- *Promote the employment* of Roma in public and business enterprises, such as by offering professional training to Roma to qualify such persons for jobs in the labor market.

⁶⁷ General Recommendation 29 on Article 1(1) of the Convention (Descent), paragraphs 2 to 5. Italic added.

⁶⁸ General Recommendation 23 on the rights of indigenous peoples, paragraph 3. In its Concluding Observations on Canada’ State report, the Committee viewed with concern the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their land. A/57/18(SUPP), 2001, paragraph 331.

⁶⁹ Concluding Observations on Guatemala, CERD/C/GTM/CO/11 (2006), paragraph 12.

⁷⁰ See General Recommendation 27 on discrimination against Roma.

⁷¹ Concluding Observations on Bosnia and Herzegovina, CERD/C/BIH/CO/6 (2006), paragraphs 15 and 22.

- *Encourage and facilitate access by Roma to the media, including newspapers and television and radio programs.*⁷²
- *Provide incentives to private employers for hiring Roma.*

PART III – BUSINESS SPECIFIC INFORMATION

59. CERD addresses issues related to a wide range of business enterprises, in particular transnational corporations, the media, housing agencies and restaurants/cafés. Numerous references by the Committee to general terms such as ‘employment’, ‘labor market’ or ‘private sector’ confirm that CERD does not limit its interpretation of the Convention to a selected number of businesses – on the contrary, CERD may examine actions by business enterprises in any field of activity. Claims raised in Communications for instance concern other types of enterprises/sectors than the ones analyzed in this section (i.e. textile, painting, construction and insurance).⁷³

A. Transnational Corporations

60. CERD has examined acts of transnational corporations (TNCs) in the context of exploitation by extractive or forestry companies of indigenous peoples’ lands or resources. The Committee prescribes quite detailed measures that States should take to fully protect indigenous peoples, remedy any damage, and regulate and adjudicate acts by TNCs. Even where the exploitation of resources, related environmental degradation and health problems, security issues or infringement of indigenous peoples’ rights are partly or fully caused by TNCs, the Committee still finds the State ultimately responsible under the Convention.

61. General Recommendation 23 on the rights of indigenous peoples, as well as recent Concluding Observations (see below examples), outline a series of measures that States must take to guarantee indigenous peoples’ rights in situations where their lands or resources are exploited by extractive companies:

- States should recognize and protect the rights of indigenous peoples to *own, develop, control and use their communal lands, territories and resources*. This includes measures to guarantee land ownership and titles,⁷⁴ legal acknowledgement and demarcation of their lands, the effective implementation of the national land register law so indigenous lands can be identified and demarcated, and protection against land deprivation and aggression.
- In this respect, States should adopt a *legislative framework* that clearly sets forth the broad principles governing exploitation of land, including the obligation to abide by strict *environmental standards and equitable revenue distribution*.⁷⁵

⁷² General Recommendation 27 on discrimination against Roma, paragraph 39.

⁷³ See Communication No.1/1984, *A. Yilmaz Dogan v. the Netherlands*, CERD/C/36/D/1/1984, Communication No.25/2002, *Ahmad Najaati Sadic v. Denmark*, CERD/C/62/D/25/2002, Communication No.28/2003, *The Documentation and Advisory Centre on Racial Discrimination v. Denmark*, CERD/C/63/D/28/2003, and Communication No.32/2003, *Emir Sefic v. Denmark*, CERD/C/66/D/32/2003.

⁷⁴ Indigenous land titles should be protected and given priority over the legal certainty afforded to governments and third parties. See Decision against Australia, Decision 2(54), A/54/18, paragraphs 6-7.

⁷⁵ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraph 15, and Concluding Observations on Nigeria, CERD/C/NGA/CO/18 (2005), paragraph 19.

- States must *seek the free and informed consent of indigenous communities* prior to granting any license to exploit the land or resources of indigenous peoples to a corporation.
- States are also responsible for *providing remedies, including compensation*, to indigenous peoples in case lands or resources are granted to corporations.
- States should set up an independent body to conduct *environmental impact surveys or assessments* before any operating licenses are issued, and conduct *health and safety checks* on small-scale and industrial gold mining.⁷⁶ CERD does not elaborate upon the actions required to follow up on such health and safety checks.

62. In recent Concluding Observations, the Committee has further emphasized that States are obliged to *prevent and remedy the consequences of environmental pollution* caused by mining activities (such as the dumping of mercury). Precautionary measures should be taken, and health care provided. No mention is made, however, of adjudicating acts by the mining companies responsible for the pollution – the weight here seems to be on the State’s obligations to repair any damage caused by TNCs:

In the **Concluding Observations on Guyana**⁷⁷, the Committee expresses concerns that indigenous peoples “are reportedly disproportionately affected by malaria and environmental pollution, in particular *mercury and bacterial contamination of rivers caused by mining activities* in areas inhabited by indigenous peoples. The Committee urges the State party to *ensure the availability of adequate medical treatment* in hinterland areas, in particular those inhabited by indigenous peoples, by increasing the number of skilled doctors and of adequate health facilities in these areas, by intensifying the training of health personnel from indigenous communities, and by allocating sufficient funds to that effect.”

63. In one case (the Concluding Observations on Suriname), CERD has recommended that States should *prevent and remedy indirect effects* caused by mining or forestry operations in indigenous areas. In particular, the Committee expressed concern at reports of growing sexual exploitation of children and the rape of girls belonging to indigenous and tribal peoples in regions where mining and forestry operations have developed. The Committee recommended that the State party take the necessary measures to ensure that those responsible are prosecuted. CERD also noted “the spread of STDs such as HIV/AIDS in connection with the expansion of mining and forestry operations”, and recommended that the State “set up a specific plan of action to combat HIV/AIDS in the interior, where mining and forestry companies operate.”⁷⁸

64. Finally, in the same Concluding Observations on Suriname, CERD recommended that the State should also require *‘large business ventures’ to contribute to the promotion of human rights*. The Committee, concerned over the lack of health and education facilities and utilities available to indigenous peoples, recommends to Suriname “the inclusion in agreements with large business ventures - in consultation with the peoples concerned - of

⁷⁶ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraph 15, and on Guayana, CERD/C/GUY/CO/14 (2006), paragraph 19.

⁷⁷ CERD/C/GUY/CO/14 (2006), paragraph 19.

⁷⁸ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraphs 16 and 17.

language specifying how those ventures will contribute to the promotion of human rights in areas such as education.”⁷⁹

65. According to CERD, such contribution by business enterprises should be made in agreement with the government and peoples concerned, but the ultimate responsibility and oversight seems to remain with the State (as a way of subcontracting activities, a type of public-private partnership). It is unclear whether States should systematically consider requiring or requesting business enterprises to contribute to the fulfilment of some human rights, as CERD’s later concluding observations do not mention such requirements.

B. Media

66. According to CERD, States should ensure that the media promote tolerance rather than incite discrimination and racial hatred. To this end, States must not only prevent any discriminatory acts from the media, but should also promote best practices among media professionals.

67. CERD has recommended that States ‘*act as appropriate*’ to eliminate within the media: any ideas of racial or ethnic superiority, of racial hatred and incitement to discrimination, and of violence against Roma or indigenous peoples. States should also *monitor* the media’s actions in this respect and ‘*take strict measures*’ against any incitement to discrimination or violence against descent-based communities or minority groups.⁸⁰ Some activities may need to be *prohibited*: in the Concluding Observations on Costa Rica⁸¹, the Committee welcomed “the adoption of a resolution by the Office of National Control of Propaganda prohibiting radio broadcast or transmission, or commercial product depicting bias against women, particularly black women.”

68. Beyond protection measures, States are recommended to “*encourage and facilitate access by Roma* to the media, including newspapers and television and radio programs.”⁸² CERD has also noted that States should ‘*encourage awareness* among professionals of all media *of the particular responsibility*’ they have to not disseminate prejudices and to avoid reporting incidents involving individual members of Roma communities in a way that blames such communities.⁸³ In a similar vein, CERD has recommended that States should *raise awareness* among media professionals of the nature and incidence of descent-based discrimination.⁸⁴

69. CERD has even recommended that States *encourage methods of self-monitoring* by the media, through a *code of conduct for media organizations*, in order to avoid racial,

⁷⁹ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraph 19.

⁸⁰ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 19. In relation to minority groups, see Concluding Observations on the Russian Federation, CERD/C/62/CO/7, paragraph 25.

⁸¹ A/57/18(SUPP), 2001, paragraph 70.

⁸² General Recommendation 27 on discrimination against Roma, 2000, paragraph 39.

⁸³ General Recommendation 27 on discrimination against Roma, 2000, paragraph 37.

⁸⁴ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 20.

discriminatory or biased language.⁸⁵ It remains to be seen whether CERD will eventually propose similar codes of conduct in relation to other types of companies.

C. Private housing agencies

70. States should take measures against discriminatory practices of private agencies and owners with regard to residence and access to adequate housing for members of affected communities.⁸⁶

71. In *F.A. v. Norway*, the Committee urged “the State party to take effective measures to ensure that housing agencies refrain from engaging in discriminatory practices and do not accept submissions from private landlords which would discriminate on racial grounds.” The Committee also recalled its concerns at the examination of Norway’s report that “persons seeking to rent or purchase apartments and houses were not adequately protected against racial discrimination on the part of the private sector.”⁸⁷ In its Concluding Observations on the Czech Republic, CERD also recommended States to “*devise measures to prevent evictions or mitigate their negative effects*, in particular on the most vulnerable groups”, such as Roma.⁸⁸

D. Transport, hotels, restaurants, and cafes

72. Article 5(f) guarantees non-discriminatory access to any place or service that is intended for the general public. Such places are often privately owned. CERD has stressed on numerous occasions that States should *prevent, eliminate and adequately punish* any discriminatory practices concerning the access of members of a particular community to all places and services intended for the use of the general public.⁸⁹ In *Miroslav Lacko v. Slovakia*, the Committee was satisfied that the State party condemned the owner of a restaurant that refused entry to Roma for crime of incitement to racial hatred.⁹⁰

E. Loan market and private banks

73. CERD has examined the policies and practices of banks in a few Communications (Concluding Observations and General Recommendations are silent on this topic). In *Ziad Ben Ahmed Habassi v. Denmark*, the Committee found that the State failed to investigate properly into the real reasons behind a bank’s loan policy, which refused loans to foreign residents in Denmark. In addition to recommending reparation be provided to the applicant,

⁸⁵ General Recommendation 27 on discrimination against Roma, 2000, paragraph 40. Similar recommendations were made in relation to political parties: In Communication No.22, the Committee recalls the Durban Program of Action which “encourages *political parties* to take concrete steps to promote equality, solidarity and non-discrimination in society, inter alia by developing *voluntary codes of conduct which include internal disciplinary measures for violations thereof*, so their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance.” Communication No.22/2002, *POEM and FASM v. Denmark*, CERD/C/62/D/22/2002, paragraph 7.

⁸⁶ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 39. In this Recommendation, the Committee does not elaborate upon what types of measures are needed.

⁸⁷ CERD found the claim inadmissible. Communication No.18/2000, *F.A. v. Norway*, CERD/C/58/D/18/2000, paragraph 8.

⁸⁸ Concluding Observations on the Czech Republic, CERD/C/63/CO/4 (2003), paragraph 13.

⁸⁹ See for example Communications No.11/1998, 17/1999, 20/2000, and 29/2003, and General Recommendation 27 on discrimination against Roma, paragraph 35.

⁹⁰ Communication No.11/1998, *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, paragraph 10.

the Committee made a general recommendation to the State to “take measures to counteract racial discrimination in the loan market”.⁹¹

PART IV – SPECIFIC RIGHTS RELEVANT TO BUSINESS

74. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of a wide range of human rights, as specified under Article 5 of the Convention (the right to effective remedies is guaranteed under Article 6). All rights mentioned under Article 5 should be guaranteed “without distinction as to race, color, or national or ethnic origin”. Importantly, the Committee has clarified that “the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list,”⁹² thereby implying that ICERD in effect applies to all rights which create obligations for the State, even if they are not listed in Article 5.

75. Some rights are more directly relevant to business enterprises than others, particularly: the labor rights of vulnerable populations; indigenous peoples’ right to lands and resources and free and informed consent in matters that affect them; the right to housing; and the right to access any public place. This section also mentions rights CERD refers to infrequently, but which may be relevant to business enterprises.

76. The **right to work and to free choice of employment**, Article 5(i), is systematically examined by CERD. As discrimination issues in the private sector are of primary concern to the Committee, States are urged to report on the employment situation in both public and private sectors.⁹³ In Communications, claims have been brought in relation to discriminatory recruitment processes, treatment at the workplace, and discriminatory dismissal.⁹⁴

77. Various recommendations were put forward by CERD regarding the right to work in the private sector:

- States should develop or refine legislation and specifically *prohibit all discriminatory practices* in employment and the labor market.⁹⁵ This includes monitoring language requirements, which may have a discriminatory effect on the availability of employment to members of some communities.⁹⁶
- States should *take measures against* private companies and other associations that investigate the descent background of applicants for employment.⁹⁷
- States are urged to take measures to eliminate discrimination against non-citizens in relation to *working conditions* and *work requirements*, including employment rules and

⁹¹ Communication No.10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, CERD/C/54/D/10/1997, paragraph 11.1. A similar case was examined in Communication No.23/2002, *K. R. C v. Denmark*, CERD/C/61/D/23/2002.

⁹² Indeed, Article 5 “does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights.” General Recommendation 20 on non-discriminatory implementation of rights and freedoms (Article 5), 1996, paragraph 1.

⁹³ Reporting Guidelines, Article 5(E), CERD/C/70/Rev.5.

⁹⁴ See CERD Communications 1/1984, 2/1989, 25/2002, and 28/2003.

⁹⁵ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 37.

⁹⁶ See e.g. Concluding Observations on Estonia, CERD/C/EST/CO/7 (2006), paragraph 16, which concerns Russian-speaking minorities.

⁹⁷ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 38.

practices with discriminatory purposes or effects.⁹⁸ In particular, the Committee stressed that States should afford and protect the labor rights of non-citizens who have entered an employment relationship in the same way as they do for citizens.⁹⁹

- *Legal safeguards* should be strengthened, and legislation governing work permits reviewed, to prevent breaches of the labor rights of foreign workers.¹⁰⁰ Concluding Observations on Ireland suggest that the government should envisage *issuing work permits directly to employees*, rather than to the employers.¹⁰¹
- States should “take effective measures to *prevent and redress* the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;”¹⁰²
- States should *take special measures to promote* the employment of members of affected communities in the public and private sectors:¹⁰³

In the **Concluding Observations on Estonia**¹⁰⁴, the Committee recommends that legislation prohibiting discrimination in employment and all discriminatory practices in the labor market be fully implemented in practice and that *further measures be taken* to reduce unemployment among members of the minority communities, inter alia by focusing on *professional training and providing high-quality and subsidized language training*, in particular to members of Russian-speaking minorities.

78. The **right to housing** has been a constant concern of the Committee. States are generally requested to ensure that housing agencies refrain from engaging in discriminatory practices. CERD also requests States parties to report on the “public and private, owner occupied or rented housing markets”, and on any “governmental action to prevent racial discrimination by those who rent or sell houses or apartments”.¹⁰⁵ Claims were brought in several Communications asserting private housing agencies had discriminated against a person from a minority ethnic background.

79. CERD has referred extensively to the **right of indigenous peoples to own, develop, control and use their communal lands, territories and resources** (as part of the right to property, Article 5(d)v). In this respect, States should make every effort to ensure that no decisions directly relating to indigenous peoples’ rights and interests are taken **without their prior informed consent** – Article 5(c).¹⁰⁶ Significantly, this implies certain practices

⁹⁸ General Recommendation 30 on non-citizens, paragraph 33.

⁹⁹ The Committee stressed in General Recommendation 30 on non-citizens that “all individuals are entitled to the enjoyment of labor and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”. Paragraph 35.

¹⁰⁰ Concluding Observations on Iceland, CERD/C/ISL/CO/18, paragraph 13.

¹⁰¹ Concluding Observations on Ireland, CERD/C/IRL/CO/2, paragraph 14.

¹⁰² General Recommendation 30 on non-citizens, paragraph 34.

¹⁰³ General Recommendation 29 on Article 1(1) of the Convention (descent), paragraph 36.

¹⁰⁴ Concluding Observations on Estonia, CERD/C/EST/CO/7 (2006), paragraph 16.

¹⁰⁵ Reporting Guidelines, Article 5(e)3, CERD/C/70/Rev.5.

¹⁰⁶ General Recommendation 23 on the rights of indigenous peoples, paragraph 4(d). The Committee has also referred to this right in relation to members of descent based communities or Roma, but it has been particularly strong on stating the obligations upon States in relation to indigenous peoples. See General Recommendation No.29 on Article 1(1) of the Convention (Descent) and General Recommendation 27 on discrimination against Roma.

aimed at safeguarding rights should be upheld when the State grants companies access to indigenous lands and territories for resources exploitation:

In the **Concluding Observations on Ecuador**¹⁰⁷, the Committee observes that “merely consulting [indigenous] communities prior to exploiting the [subsoil] resources [of the traditional lands of these communities] falls short of meeting the requirements set out in the Committee’s general recommendation 23 on the rights of indigenous peoples. The Committee therefore recommends that the *prior informed consent* of these communities be sought, and that the *equitable sharing of benefits* to be derived from such exploitation be ensured. Detailed information on *land titles* of indigenous communities, as well as on *remedies available to indigenous people claiming compensation* for the environmental depletion of their traditional lands, should be included in the State party’s next periodic report.”

80. The Committee has further stressed that indigenous peoples’ **right to health** (Article 5(e)iv) should be secured in cases of large-scale exploitation of resources by corporations. It has also voiced concern that indigenous peoples’ **cultural rights** (Article 5(e)vi) may be infringed by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral land.¹⁰⁸

81. The ICERD includes at Article 5(f) the **right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks**. Restricting access to such places has been used time and again to discriminate on the basis of race; thus it is no surprise that States drafting the Convention added a special provision on this issue. The Committee examined several cases of discrimination in access to such places, which, although “for use by the general public”, are generally privately owned. In *Miroslav Lacko v. Slovakia*, the Committee urges the State party to “*complete its legislation* in order to guarantee the right of access to public places in conformity with Article 5(f) of the Convention and to *sanction the refusal of access* to such places for reason of racial discrimination.”¹⁰⁹

82. The **right to effective remedies** is guaranteed by Article 6 of the Convention. Violations of Article 6 can be found without finding violations of any of the substantive articles.¹¹⁰ Most CERD Opinions on Communications, concluding observations (see those on Nigeria below), and general recommendations refer to the importance of effective remedies.¹¹¹ This right is often relevant to business. For example, CERD recommended to Bosnia and Herzegovina that it establish “an independent mechanism at State level to address discrimination in the hiring and promotion practices in the public and private employment/labor sectors”.¹¹²

83. To a lesser extent, the Committee has examined the **right to property** (Article 5(d)v), in particular in respect to refugees and internally displaced persons. In General Recommendation 22, the Committee emphasizes that all refugees and displaced persons

¹⁰⁷ CERD/C/62/CO/2 (2003), paragraph 16.

¹⁰⁸ See for example Decision against the United States of America, Decision 1(68), CERD/C/USA/DEC/1.

¹⁰⁹ Communication No.11/1998, *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, paragraph 11.

¹¹⁰ Communication No.29/2003, *Dragan Durmic v. Serbia and Montenegro*, CERD/C/68/D/29/2993, paragraph 9.6.

¹¹¹ See also Part II, C. *Adjudication measures*, p.7.

¹¹² Concluding Observations on Bosnia and Herzegovina, CERD/C/BIH/CO/6 (2006), paragraph 19.

have the *right to have restored to them property* of which they were deprived in the course of the conflict or displacement, and *to be compensated* appropriately for any such property that cannot be restored to them.¹¹³

84. Explicit mention is made in the Convention of the **right to security of person and protection** by the State against violence and bodily harm, “whether inflicted by government officials or by any individual group or institution” - Article 5(b). This may apply to security personnel employed by corporations, as referred to in the Concluding Observations on Nigeria:

In the **Concluding Observations on Nigeria**¹¹⁴, CERD expresses concern about “reports of assaults, use of excessive force, summary executions and other abuses against members of local communities by law enforcement officers as well as by security personnel employed by petroleum corporations (Articles 2 and 5)”. CERD urges the State party “to conduct full and impartial investigations of cases of alleged human rights violations by law enforcement officials and by private security personnel, institute proceedings against perpetrators and provide adequate redress to victims and/or their families.”

85. Finally, the Committee has noted that **freedom of expression** at times has to be balanced against the right to protection from racial discrimination,¹¹⁵ and sometimes accorded a lower level of protection in cases of racist and hate speech than in other instances.¹¹⁶ The Committee’s own General Recommendation 15 states “the prohibition of dissemination of racial superiority or hatred is compatible with the right to freedom of opinion and expression”.¹¹⁷ Although CERD has not referred to any act by business in this respect, there may be cases of racist speeches by a business enterprises’ staff or management that might require State intervention and adjudication.

PART V – STATE-OWNED ENTERPRISES

86. This section focuses on State-owned enterprises (SOEs). Whether SOEs are performing State or purely commercial functions, it appears that the State is responsible in either case for ensuring they do not abuse human rights. If, depending on particulars, SOEs are considered State organs, then the State obligation is to respect human rights; if they are considered private businesses, then the obligation to protect applies – including the findings in Part I-IV, above, with regard to business enterprises generally.

87. The Communications and Concluding Observations examined do not explicitly mention types of business enterprise, but express broad directions to protect vulnerable groups from racial discrimination and to redress any negative impact they may suffer from business activities. This is clear in the case of extractive companies operating in indigenous

¹¹³ General Recommendation 22 on Article 5 of the Convention on refugees and displaced persons, paragraph 2(c).

¹¹⁴ Concluding Observations on Nigeria, CERD/C/NGA/CO/18 (2006), paragraph 19.

¹¹⁵ See Reporting Guidelines, Article 5(D), CERD/C/70/Rev.5. This requirement seems particularly important in the context of statements made by members of *political parties*. See Communications No.27/2002, *Kamal Quereshi v. Denmark*, CERD/C/63/D/27/2002, paragraph 9, and No.33/2003, *Kamal Quereshi v. Denmark*, CERD/C/66/D/33/2003.

¹¹⁶ Communication No.30/2003, *The Jewish community of Oslo et al. v. Norway*, CERD/C/67/D/30/2003, paragraph 10.5.

¹¹⁷ General Recommendation 15, paragraph 4.

peoples' lands, for instance. In Concluding Observations on Guyana, CERD expresses concern over the ways “*scientific research and large scale mining*” on indigenous peoples' lands were authorised. It further notes its concerns that indigenous peoples “are reportedly disproportionately affected by malaria and environmental pollution caused by *mining activities* in areas inhabited by indigenous peoples.”¹¹⁸

88. Concluding observations on Nigeria use the terms ‘*petroleum corporations*’ and ‘*large-scale exploitation of natural resources*’.¹¹⁹ CERD does not specifically address the State owned enterprise involved, but it is clear that it deems the State obligation to protect the rights of the Ogoni people to apply equally to cases of exploitation by SOEs or private enterprises.¹²⁰ What seems most significant to CERD is that the State should protect indigenous peoples' rights in all circumstances – whether the impact is caused by a private enterprise or an SOE.

89. In relation to the media and the employment market, CERD often specifies whether the obligations apply to the public and/or private sectors. Usually, both are mentioned, confirming that the obligation to protect individuals or groups against racial discrimination applies equally in respect to SOEs and private enterprises. For example, in Concluding Observations on Mexico, CERD recommends that steps be taken to combat racial prejudice that leads to racial discrimination in both the public and private media.¹²¹ Depending on national law, a State owned media could be considered either public or private, but in both cases States are responsible for SOE violations of the Convention on their territory.

90. An additional question is whether States are responsible for SOE abuse overseas. As explained immediately below, CERD's treatment of the Convention's extraterritorial scope is unclear, and it is unknown as to whether a home State could be held responsible in this respect.

PART VI – EXTRA-TERRITORIAL JURISDICTION

91. The Convention and the Committee shed very little light on the issue of extra-territorial jurisdiction. First, the Convention seems to set a territorial limitation at Article 3 on the application of the Convention in relation to racial segregation and apartheid: States “undertake to prevent, prohibit and eradicate all practices of this nature *in territories under their jurisdiction.*” The present research did not uncover any specific clarification of Article 3, though a few remarks in General Recommendations allude to the possibility that States obligations go beyond their territories:

- General Recommendation 3 recalls that States have resolved “to build an international community free from all forms of racial segregation and racial discrimination” (ICERD

¹¹⁸ Concluding Observations on Guyana, CERD/C/GUY/CO/14 (2006), paragraphs 15 and 19.

¹¹⁹ Concluding Observations on Nigeria, CERD/C/NGA/CO/18 (2005), paragraph 19.

¹²⁰ The African Commission on Human and People's Rights explicitly addressed the fact that rights were being violated by a consortium of private *and* State owned oil companies and thereby found that Nigeria had failed to respect human rights (through the State-owned Oil Company) and protect human rights from acts by non-State oil companies. *Social and Economic Rights Action Committee and the Center for Economic and Social Rights v. Nigeria*, Communication 166/96, African Commission on Human and People's Rights, 27 May 2002, paragraph 66.

¹²¹ See Concluding Observations on Mexico, CERD/C/MEX/CO/15 (2006), paragraph 18.

Preamble). It encourages States to *report on their ‘diplomatic, economic and other relations with the racist regimes in southern Africa’*.¹²² Although the recommendation focuses solely on state activities, it stresses that States have obligations beyond their territories.

- General Recommendation 18 recommends the establishment of an *international tribunal with general jurisdiction* to prosecute crimes against humanity.¹²³ It is very likely that the Committee envisaged that both private and public actors should be prosecuted for such crimes.¹²⁴

92. None of these statements are truly decisive in clarifying whether a State has some form of obligation where parties connected to it breach the Convention in another territory. States are presumably not *prohibited* from exercising extra-territorial jurisdiction, but the existing statements by CERD do not suggest a *requirement* for them to do so.

PART VI: CONCLUSIONS AND TRENDS

Beyond the public-private dichotomy

93. What makes CERD distinct from other human rights bodies is the specific way it deals with public and private actors. By the very nature of the Convention, States have obligations to regulate and adjudicate the actions of *private* actors. Nevertheless, priority is given to acts of a *public* nature or acts that take place in the *public* sphere, and to private actors that perform a *public* role.

94. The Committee has stressed that the public sphere is, indeed, the central focus of the Convention, in line with Article 1(1) of the Convention.¹²⁵ Similarly, the Committee has emphasized that particular attention should be paid to *private actors that have an undeniable public role* and, therefore, arguably greater opportunities to target, stigmatize, stereotype or profile members of racial or ethnic groups – such as politicians, officials, members of political parties, or the media.¹²⁶ Apart from the media as well as internet and electronic networks, which have a widespread and public impact, this prioritization by the

¹²² General Recommendation 3 concerning reporting by States parties.

¹²³ General Recommendation 18 on the establishment of an international tribunal to prosecute crimes against humanity.

¹²⁴ The last paragraph of the General Recommendation’s preamble refers to violations taking place in the territory of former Yugoslavia, which had been committed by private and state actors.

¹²⁵ See Communications No. 33/2003 and 34/2004. See also *Part I of this report, B. Scope and limitation*.

¹²⁶ See General Recommendation 30 on non-citizens, paragraph 12, which urges States to “take resolute action to counter any tendency to target, stigmatise (...) members of ‘non-citizen’ population groups, especially by *politicians, officials, educators and the media, on the Internet and other electronic communications networks* and in society at large”. Reference is made to this Recommendation in Communication No.30/2003, where the Committee calls the State party’s attention to the hateful nature of comments made by a politician and “of the *particular seriousness* of such speech when made by *political figures*.” Communication No.30/2003, *The Jewish community of Oslo et al. v. Norway*, CERD/C/67/D/30/2003, paragraph 8. See also Communication No.22, in which the Committee recalls the Durban Programme of Action stressing “the *key role that politicians and political parties can play* in combating racism, racial discrimination, xenophobia and related intolerance.” Communication No.22/2002, *POEM and FASM v. Denmark*, CERD/C/62/D/22/2002, paragraph 7.

Committee at first glance seems to limit the possibility of identifying obligations in relation to business.¹²⁷

95. However, many Communications and Concluding Observations address claims of racially discriminatory acts by private actors, such as employers in the private sector, housing agencies, or transnational corporations, *which have no public role or whose acts were not committed in a public arena*. CERD has even stressed that Articles 4 and 6 do not require a racial act to be public and intended for wider dissemination in order to fall within the Convention's ambit.¹²⁸ Accordingly, the public/private distinction seems overall less important than the Committee's statements imply, and the Convention's scope has clearly expanded over time to an extent that any alleged racial act by a private actor may now fall within the scope of the Convention.

Attention to business enterprises

96. There is evidence that the Committee has paid increasing attention over time to the issue of State obligations in relation to private corporate acts. The number of business enterprises mentioned has increased as well, with particular attention being paid to TNCs, housing agencies, private employers, and restaurants.

Measures recommended to States in relation to business

97. States must take *legislative measures* to regulate acts by business enterprises, make sure they are enforced by *adjudicating* acts by private actors, provide *effective remedies* to victims of racial offences, and *monitor* to ensure that all such measures are implemented and vulnerable groups protected. Measures recommended to protect the *rights of specific groups* – be they as part of 'special measures' (Articles 1(4) and 2(2)) such as in relation to Roma, or measures under other Articles of the Convention regarding indigenous peoples – are particularly relevant to identifying State obligations in relation to corporate acts.

98. Beyond protective measures, CERD has been increasingly suggesting *promotional measures*: States should, for example, promote the employment of Roma in the private sector by offering incentives to enterprises, or encourage self-monitoring practices in the media or political parties. While States remain ultimately responsible for any failure to enforce the prohibition of racial discrimination by private actors, including business, *best practices* are encouraged.

Issues which would benefit from further elaboration

99. Through Opinions on Communications and Concluding Observations, particular light is shed on business acts in relation to *specific groups*, namely Roma and indigenous peoples, and by *specific business*, such as TNCs, housing agencies or restaurants. In the future CERD may have occasion to discuss the actions of other types of business and in relation to the protection of other groups.

¹²⁷ However, the Committee has systematically addressed issues of transnational corporations in the context of indigenous peoples' rights. A large scale business venture, with major impact on local communities or the country's economy or policies, may have functions similar to those of a public actor and hence responsibilities that CERD attaches to such role.

¹²⁸ Communication No.25/2002, *Ahmad Najaati Sadic v. Denmark*, CERD/C/62/D/25/2002, paragraph 6.8.

100. The affirmation of States' obligation to protect individuals from racially discriminatory acts by private actors means that States remain accountable under international human rights law for any failure to regulate and adjudicate such acts. While there is no doubt that States should adjudicate any racial act by business, it remains unclear whether States should *prosecute legal persons* (as opposed to the individual applying a company's policy), what the manner of doing so should be (see Part II, C. Adjudication Measures), and what if any implications these requirements may have with regard to *extra territorial jurisdiction*.

101. At a minimum, then, business enterprises must respect national law prohibiting racial discrimination. On one occasion, CERD also asked that they *contribute to the promotion of human rights in specific sectors*. In the 2004 Concluding Observations on Suriname, CERD recommended that 'large business ventures' should, in agreement with the State and consultation with the peoples concerned, promote human rights in areas such as health care and education.¹²⁹ Later concluding observations have not included such recommendations; therefore it is unclear whether the Committee broadly supports this idea. Thus, it is left to future observations or recommendations by CERD to clarify whether States should generally or systematically encourage business enterprises to contribute to the promotion of human rights.

ICERD, a living instrument

102. CERD has shown over time its ability to adapt to and address issues and actors relevant to the contemporary global context. Initially the Committee focused on apartheid and segregation issues. It then began addressing descent-based discrimination, and in the 1990s it turned to issues of ethnic discrimination (in the wake of the conflicts in Rwanda and in countries of former Yugoslavia, among others) and discrimination against Roma in Eastern Europe. Today, the Committee pays greater attention to the protection of indigenous peoples' rights in relation to resource exploitation by extractive companies.

103. CERD's willingness to examine such a wide range of issues may be explained by the Committee's view that the Convention is *flexible enough* to tackle *any contemporary issues*. In *Stephen Hagan v. Australia*, the Committee rejected the view that the Convention's reach extended only to issues present at the time of its drafting. It stressed that "the Convention, *as a living instrument*, must be interpreted and applied taking into account the circumstances of contemporary society."¹³⁰

¹²⁹ Concluding Observations on Suriname, CERD/C/64/CO/9 (2004), paragraph 19: "The Committee is disturbed at the continuing lack of health and education facilities and utilities available to indigenous and tribal peoples. It regrets that no special measures have been taken to secure their advancement (...). The Committee recommends (...) the inclusion in agreements with large business ventures - in consultation with the peoples concerned - of language specifying how those ventures will contribute to the promotion of human rights in areas such as education."

¹³⁰ Communication No.26/2002, *Stephen Hagan v. Australia*, CERD/C/62/D/26/2002, paragraph 7.3. A claim was made by an Australian national of Aboriginal origin that a sign entitled 'E.S. 'Nigger' Brown Stand' named in 1960 in the honor of a sports personality of white Anglo Saxon origin be removed from the grandstand of a sport ground, on the basis that it was offensive to Aboriginal people. While the Committee did not find violations of the Convention, it nonetheless decided to make a recommendation that the offending term be removed from the sign, on the basis that in contemporary society the term was found

104. In addition, CERD considers it crucial to reflect the actual development of international standards in its interpretation of the Convention, as reflected also by General Recommendation 30 regarding non-citizens. By outlining a wide range of obligations that State have in relation to non-citizens, General Recommendation 30 arguably transcends to a significant extent the limitations contained in Article 1(2).¹³¹

105. Given the increasing importance of business globally and its relevance to the effective implementation of the Convention, it seems likely the Committee will continue to address and elaborate on issues pertaining to the activities of business enterprises.

offending, even though it wasn't at the time. The Committee considered it "to be its duty to recall the *increased sensitivities* in respect of words such as the offending term appertaining today." *idem*.

¹³¹ Article 1(2) provides: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens".

ANNEX I - INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

entry into force 4 January 1969, in accordance with Article 19

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

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

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean 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.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, 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.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5.

(a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.
5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of

individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6.

(a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7.

(a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15

1 . Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2.

(a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

- (a) Signatures, ratifications and accessions under articles 17 and 18;
- (b) The date of entry into force of this Convention under article 19;
- (c) Communications and declarations received under articles 14, 20 and 23;
- (d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

ANNEX II – STATUS OF RATIFICATION

Last update: 6 December 2006
Entry into force: 4 January 1969, in accordance with Article 19
Registration: 12 March 1969, No. 9464
Status: Signatories: 5, Parties: 173
Text: United Nations, Treaty Series, vol. 660, p.195

Participant	Signature	Ratification, Accession (a), Succession (d)
Afghanistan	.	6 Jul 1983 a
Albania	.	11 May 1994 a
Algeria	9 Dec 1966	14 Feb 1972
Andorra	5 Aug 2002	22 Sep 2006
Antigua and Barbuda	.	25 Oct 1988 d
Argentina	13 Jul 1967	2 Oct 1968
Armenia	.	23 Jun 1993 a
Australia	13 Oct 1966	30 Sep 1975
Austria	22 Jul 1969	9 May 1972
Azerbaijan	.	16 Aug 1996 a
Bahamas	.	5 Aug 1975 d
Bahrain	.	27 Mar 1990 a
Bangladesh	.	11 Jun 1979 a
Barbados	.	8 Nov 1972 a
Belarus	7 Mar 1966	8 Apr 1969
Belgium	17 Aug 1967	7 Aug 1975
Belize	6 Sep 2000	14 Nov 2001
Benin	2 Feb 1967	30 Nov 2001
Bhutan	26 Mar 1973	.
Bolivia	7 Jun 1966	22 Sep 1970
Bosnia and Herzegovina	.	16 Jul 1993 d
Botswana	.	20 Feb 1974 a
Brazil	7 Mar 1966	27 Mar 1968
Bulgaria	1 Jun 1966	8 Aug 1966
Burkina Faso	.	18 Jul 1974 a
Burundi	1 Feb 1967	27 Oct 1977
Cambodia	12 Apr 1966	28 Nov 1983
Cameroon	12 Dec 1966	24 Jun 1971
Canada	24 Aug 1966	14 Oct 1970
Cape Verde	.	3 Oct 1979 a
Central African Republic	7 Mar 1966	16 Mar 1971
Chad	.	17 Aug 1977 a
Chile	3 Oct 1966	20 Oct 1971

China	.	29 Dec 1981 a
Colombia	23 Mar 1967	2 Sep 1981
Comoros	22 Sep 2000	27 Sep 2004
Congo	.	11 Jul 1988 a
Costa Rica	14 Mar 1966	16 Jan 1967
Côte d'Ivoire	.	4 Jan 1973 a
Croatia	.	12 Oct 1992 d
Cuba	7 Jun 1966	15 Feb 1972
Cyprus	12 Dec 1966	21 Apr 1967
Czech Republic	.	22 Feb 1993 d
Democratic Republic of the Congo	.	21 Apr 1976 a
Denmark	21 Jun 1966	9 Dec 1971
Dominican Republic	.	25 May 1983 a
Ecuador	.	22 Sep 1966 a
Egypt	28 Sep 1966	1 May 1967
El Salvador	.	30 Nov 1979 a
Equatorial Guinea	.	8 Oct 2002 a
Eritrea	.	31 Jul 2001 a
Estonia	.	21 Oct 1991 a
Ethiopia	.	23 Jun 1976 a
Fiji	.	11 Jan 1973 d
Finland	6 Oct 1966	14 Jul 1970
France	.	28 Jul 1971 a
Gabon	20 Sep 1966	29 Feb 1980
Gambia	.	29 Dec 1978 a
Georgia	.	2 Jun 1999 a
Germany	10 Feb 1967	16 May 1969
Ghana	8 Sep 1966	8 Sep 1966
Greece	7 Mar 1966	18 Jun 1970
Grenada	17 Dec 1981	.
Guatemala	8 Sep 1967	18 Jan 1983
Guinea	24 Mar 1966	14 Mar 1977
Guinea-Bissau	12 Sep 2000	.
Guyana	11 Dec 1968	15 Feb 1977
Haiti	30 Oct 1972	19 Dec 1972
Holy See	21 Nov 1966	1 May 1969
Honduras	.	10 Oct 2002 a
Hungary	15 Sep 1966	4 May 1967
Iceland	14 Nov 1966	13 Mar 1967
India	2 Mar 1967	3 Dec 1968
Indonesia	.	25 Jun 1999 a
Iran (Islamic Republic of)	8 Mar 1967	29 Aug 1968
Iraq	18 Feb 1969	14 Jan 1970
Ireland	21 Mar 1968	29 Dec 2000
Israel	7 Mar 1966	3 Jan 1979
Italy	13 Mar 1968	5 Jan 1976

Jamaica	14 Aug 1966	4 Jun 1971
Japan	.	15 Dec 1995 a
Jordan	.	30 May 1974 a
Kazakhstan	.	26 Aug 1998 a
Kenya	.	13 Sep 2001 a
Kuwait	.	15 Oct 1968 a
Kyrgyzstan	.	5 Sep 1997 a
Lao People's Democratic Republic	.	22 Feb 1974 a
Latvia	.	14 Apr 1992 a
Lebanon	.	12 Nov 1971 a
Lesotho	.	4 Nov 1971 a
Liberia	.	5 Nov 1976 a
Libyan Arab Jamahiriya	.	3 Jul 1968 a
Liechtenstein	.	1 Mar 2000 a
Lithuania	8 Jun 1998	10 Dec 1998
Luxembourg	12 Dec 1967	1 May 1978
Madagascar	18 Dec 1967	7 Feb 1969
Malawi	.	11 Jun 1996 a
Maldives	.	24 Apr 1984 a
Mali	.	16 Jul 1974 a
Malta	5 Sep 1968	27 May 1971
Mauritania	21 Dec 1966	13 Dec 1988
Mauritius	.	30 May 1972 a
Mexico	1 Nov 1966	20 Feb 1975
Monaco	.	27 Sep 1995 a
Mongolia	3 May 1966	6 Aug 1969
Montenegro	.	23 Oct 2006 d
Morocco	18 Sep 1967	18 Dec 1970
Mozambique	.	18 Apr 1983 a
Namibia	.	11 Nov 1982 a
Nauru	12 Nov 2001	.
Nepal	.	30 Jan 1971 a
Netherlands	24 Oct 1966	10 Dec 1971
New Zealand	25 Oct 1966	22 Nov 1972
Nicaragua	.	15 Feb 1978 a
Niger	14 Mar 1966	27 Apr 1967
Nigeria	.	16 Oct 1967 a
Norway	21 Nov 1966	6 Aug 1970
Oman	.	2 Jan 2003 a
Pakistan	19 Sep 1966	21 Sep 1966
Panama	8 Dec 1966	16 Aug 1967
Papua New Guinea	.	27 Jan 1982 a
Paraguay	13 Sep 2000	18 Aug 2003
Peru	22 Jul 1966	29 Sep 1971
Philippines	7 Mar 1966	15 Sep 1967
Poland	7 Mar 1966	5 Dec 1968

Portugal	.	24 Aug 1982 a
Qatar	.	22 Jul 1976 a
Republic of Korea	8 Aug 1978	5 Dec 1978
Republic of Moldova	.	26 Jan 1993 a
Romania	.	15 Sep 1970 a
Russian Federation	7 Mar 1966	4 Feb 1969
Rwanda	.	16 Apr 1975 a
Saint Lucia	.	14 Feb 1990 d
Saint Kitts and Nevis	.	13 October 2006 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	11 Dec 2001	12 Mar 2002
Sao Tome and Principe	6 Sep 2000	.
Saudi Arabia	.	23 Sep 1997 a
Senegal	22 Jul 1968	19 Apr 1972
Serbia	.	12 Mar 2001 d
Seychelles	.	7 Mar 1978 a
Sierra Leone	17 Nov 1966	2 Aug 1967
Slovakia	.	28 May 1993 d
Slovenia	.	6 Jul 1992 d
Solomon Islands	.	17 Mar 1982 d
Somalia	26 Jan 1967	26 Aug 1975
South Africa	3 Oct 1994	10 Dec 1998
Spain	.	13 Sep 1968 a
Sri Lanka	.	18 Feb 1982 a
Sudan	.	21 Mar 1977 a
Suriname	.	15 Mar 1984 d
Swaziland	.	7 Apr 1969 a
Sweden	5 May 1966	6 Dec 1971
Switzerland	.	29 Nov 1994 a
Syrian Arab Republic	.	21 Apr 1969 a
Tajikistan	.	11 Jan 1995 a
Thailand	.	28 Jan 2003 a
The Former Yugoslav Republic of Macedonia	.	18 Jan 1994 d
Timor-Leste	.	16 Apr 2003 a
Togo	.	1 Sep 1972 a
Tonga	.	16 Feb 1972 a
Trinidad and Tobago	9 Jun 1967	4 Oct 1973
Tunisia	12 Apr 1966	13 Jan 1967
Turkey	13 Oct 1972	16 Sep 2002
Turkmenistan	.	29 Sep 1994 a
Uganda	.	21 Nov 1980 a
Ukraine	7 Mar 1966	7 Mar 1969
United Arab Emirates	.	20 Jun 1974 a
United Kingdom of Great Britain and Northern Ireland	11 Oct 1966	7 Mar 1969

United Republic of Tanzania	.	27 Oct 1972 a
United States of America	28 Sep 1966	21 Oct 1994
Uruguay	21 Feb 1967	30 Aug 1968
Uzbekistan	.	28 Sep 1995 a
Venezuela	21 Apr 1967	10 Oct 1967
Viet Nam	.	9 Jun 1982 a
Yemen 13	.	18 Oct 1972 a
Zambia	11 Oct 1968	4 Feb 1972
Zimbabwe	.	13 May 1991 a