

The Committee on the Elimination of Racial Discrimination

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I. Origins, New Challenges

The Committee on the Elimination of Racial Discrimination (CERD) was established in 1970; it has the function to monitor States Parties' implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).¹ The Convention provides for four functions of the Committee: to examine States Parties' reports (article 9); to consider inter-State communications (arts 11–13); to consider individual communications (article 14); and to assist other UN bodies in their review of petitions from inhabitants of Trust and Non-Self Governing Territories and of reports of those territories (article 15). The Committee has further developed a mechanism on early warning and urgent procedure.

CERD was the first special organ to implement a human rights treaty. As such it was able to pave the way for all following human rights treaty bodies, such as the Human Rights Committee under the

¹ UNTS Vol. 660 No. 9646; as to the drafting history of the Convention see E. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", *ICLQ* 15 (1966), 996 et seq.; N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd edition, 1980; M. Banton, *International Action Against Racial Discrimination*, 1996, 50 et seq.; K.J.Partsch, "Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights", *Tex.Int'lL.J.* 14 (1979), 191 et seq.

International Covenant on Civil and Political Rights. As of 1999 the Convention had been ratified by 159 States.

One reason for starting the process for the drafting of what later became the International Convention on the Elimination of All Forms of Racial Discrimination were manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature.² When the Convention was adopted there was neither a common perception about the definition of racial discrimination nor about the reasons for this phenomenon. This is, to a certain extent, still the case amongst States Parties to the Convention and even among the members of the Committee. However, this does not impede the functioning of the Committee.

The different approaches at the time of the drafting of the Convention are, to a certain extent, reflected in its Preamble. Reference is made to the condemnation of colonialism and the practices of segregation. It is stressed that the Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (A/RES/1514(XV)) had affirmed the necessity of bringing them to a speedy and unconditional end. Hence, the objective of the Convention is connected with the process of decolonization. This, however, is only one facet.

The Preamble further states that the doctrine of superiority based on racial differentiation is, apart from being dangerous, scientifically false, morally condemnable and socially unjust. This is directed against ideologies such as Nazism and Fascism in their historical and modern forms as well as against comparable modern ideologies based upon or using racism for the promotion of their political objectives. This aspect has lost nothing of its validity. The Preamble further states that racial discrimination is "an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples". Developments in the recent years have proven this to be correct to an extent probably not anticipated when the Convention was drafted. By referring to the potential of racial discrimination as a threat to peace and security a connection to Article 39 of the United Nations Charter has been established, although it has not yet been explicitly used as such by the Security Council. The most important reason for the elimination of racial discrimination is somewhat hidden in the Preamble, namely that

² Schwelb, see note 1, 997; M. Banton, "Effective Implementation of the UN Racial Convention", *New Community* 20 (1994), 475; Banton, see note 1, 54.

racial discrimination is a violation of human dignity. This puts the Convention within the context of other human rights instruments, in particular, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights. This latter aspect deserves to be highlighted in the work of the Committee as well as in the reports submitted by States Parties. Occasionally a tendency exists to emphasize the protection of certain ethnic groups and the discussion between the Committee and the States Parties then sometimes becomes limited to the question as to whether such groups exist or are distinct compared to the dominant population as to criteria referred to in article 1 para.1 of the Convention or not.

The reason for its final approval and its comparatively quick entry into force was that the Convention was perceived by many States Parties as a mechanism directed against apartheid and comparable policies.³ Although the system of apartheid has been dismantled, the Convention has nothing lost of its relevance for reasons already addressed at the time when the Convention was drafted and reflected in the Preamble. Evidence to that extent are the conflicts which have amounted to genocide in the recent years. Another reason why the Convention soon gained wide acceptance may have been that already the United Nations Charter formulates the rule of non-discrimination as a directly binding principle.⁴

In spite of the attempts which have been made to abolish policies and practices based upon or promoting xenophobic and racist motivations and to counter theories based upon or endorsing such practices, these theories, policies and practices are still in existence or even gaining ground again or taking new forms or both. A serious new form of racism is reflected in the so-called policy of "ethnic cleansing".

For the reason that the manifestation of racism and xenophobia is gaining ground the international community has renewed its efforts to combat racism, racial discrimination, xenophobia and related forms of intolerance. The World Conference on Human Rights has called for the

³ See in this respect Lerner, see note 1, 40 et seq.; as to the new developments see A/RES/49/146 of 23 December 1994, Third Decade to Combat Racism and Racial Discrimination.

⁴ The International Court of Justice has stated that: "to establish ... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter", ICJ Reports 1971, para. 131.

elimination of racism and racial discrimination as a primary objective for the international community.⁵ The General Assembly of the United Nations has proclaimed a Third Decade to Combat Racism and Racial Discrimination, from 1993 to 2003.⁶ It has adopted a programme to achieve measurable results in reducing and eliminating discrimination through specific national and international actions.⁷ The Commission on Human Rights has decided to appoint a Special Rapporteur on contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance.⁸ Subsequently the Commission made the mandate of the Special Rapporteur more explicit by requesting him to examine incidents of contemporary forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism, and related intolerance.⁹ The reason for

⁵ A/CONF. 157/24 (Part I), Chapter III.

⁶ A/RES/48/91 of 20 December 1993.

⁷ A/RES/49/146 of 7 February 1995, Annex. The proclamation of the First Decade on Action to Combat Racism and Racial Discrimination coincided with the 25th anniversary of the Universal Declaration of Human Rights (A/RES/2919 (XVII) of 15 November 1972). In launching the First Decade, the General Assembly defined the goals to be the promotion of human rights and fundamental freedoms for all, without distinction of any kind on grounds of race, colour, descent or national or ethnic origin, especially by eradication of racial prejudice, racism and racial discrimination. In A/RES/38/14 of 22 November 1983 the General Assembly approved the Programme of Action for the Second Decade.

⁸ CHR Resolution 1993/20 of 2 March 1993.

⁹ CHR Resolution 1994/64 of 9 March 1994; see also report of the Special Rapporteur Doc.E/CN.4/1995/78, para.3. In his report A/49/677 to the General Assembly the Special Rapporteur defined the terms of his mandate as follows: "Racism is a product of human history, a persistent phenomenon that recurs in different forms as societies develop, economically and socially and even scientifically and technologically and in international relations. In its specific sense, racism denotes a theory, which purports to be scientific, but is in reality pseudo-scientific, of the immutable natural (or biological) inequality of human races, which leads to contempt, hatred, exclusion and persecution or even extermination" (6/7). Defining "racial discrimination" the Special Rapporteur refers to article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (8). "Xenophobia is defined as a rejection of outsiders... Xenophobia is fed by such theories and movements as "national preference", "ethnic cleansing", by exclusions and by a desire on the part of communities to turn inward and reserve society's benefits in order to share them with people of the same culture or the same level of development."(9). "Negrophobia is the

this action is the “growing magnitude of the phenomena of racism, racial discrimination, xenophobia and related intolerance in segments of many societies and the consequences for migrant workers.” Finally, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has suggested that a world conference should be held against racism, racial and ethnic discrimination, xenophobia and other contemporary forms of intolerance.¹⁰

In general more effective and sustained measures at the national and international level are necessary to fight all forms of racism and racial discrimination. CERD is just one element within this struggle. It has to adjust its working methods to the new challenges; first steps have been taken to that extent.¹¹

II. Composition

CERD is composed of eighteen independent experts who serve in their personal capacity.¹² The composition of the Committee reflects the principle of equitable geographical distribution and the representation of different forms of civilization as well as of principal legal systems. When the Committee first assembled, five of its members were nationals belonging to the Asian group, four were from Africa, two from Latin America, five from Eastern Europe and two from Western Europe. Since then the understanding has developed that four of the members should come from Asia, four from Africa, three from Latin America, three from Eastern Europe and four from Western Europe. However, since this distribution is not mandatory the distribution of seats may vary if there is disagreement in the regional groups about whom to present. Such disagreement or lack of co-ordination has resulted in the last sessions in a shift in the membership of the Committee

fear and rejection of Blacks... The African slave trade and colonization have helped to forge racial stereotypes... ” (9). “anti-Semitism ... can be considered to be one of the root causes of racial and religious hatred...” (10).

¹⁰ Recommendation 1994/2.

¹¹ See report of CERD to the General Assembly Doc.A/48/14, 126–127; Report of the Secretary-General, *Efforts made by the United Nations Bodies to prevent and combat Racism, Racial Discrimination, Xenophobia and related Intolerance*, Doc.E/CN.4/Sub.2/1994/12 of 25 July 1994.

¹² Article 8 para.1 of the Convention.

to the disadvantage of the African group. At present, since the elections in 1998, only one of the experts comes from Africa, which thus is highly underrepresented, four from Asia, four from Latin America, which is over represented, three from Eastern Europe and six from Western Europe and Others, which is clearly over represented.

The experts have different professional backgrounds; some are active or retired diplomats, others are civil servants and others are professors. Over the years the share of experts with a professional academic background has increased. This plurality of experience and in particular the fact that the Committee is not only composed of lawyers has always been regarded as a positive factor of the Committee.

Experts serve in their personal capacity, a principle which is reiterated in the solemn declaration each expert has to make after his or her election or re-election. Nevertheless, the independence of experts has turned out to be a problematic issue in the past¹³ and it still is. Since it is a prerogative of States Parties to nominate experts for election they exercise a certain influence upon the composition of the Committee. This reflects that the Committee is not a court, but a body combating racial discrimination by political rather than by legal means although the experts have to make the same declaration as required of the judges of the ICJ. At the 49th Session the question of the independence of experts was brought up from a particular point of view. Several experts challenged the until then prevailing practice of the Committee that experts should not participate in the discussion of their home State's reports although this possibility would give an advantage to States Parties whose nationals serve as experts. It has been argued that under the terms of the Convention the members of the Committee are chosen not only for their impartiality but also in consideration of geographical distribution and the representation of different forms of civilization and the principal legal systems. This, however, does not mean that experts may act as agents of their States when discussing their reports or even take part in formulating the respective Concluding Observations. This

¹³ See the examples given by Banton, see note 1, 100–101; K.J. Partsch, "The Committee on the Elimination of Racial Discrimination", in: P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, 1992, 339, (340/341) — The Committee has refused two proposals that experts unable to attend Committee sessions be allowed to send alternates and it has refused to recognize a State Party's notification that an expert had resigned. The Committee held that experts serving in their personal capacity must personally submit their resignations.

issue, which touches upon the self-understanding of the Committee and the role of experts, was further discussed in the Committee at its 50th Session. The Rapporteur of the Committee, Mr. Chigovera, submitted a draft amendment to the Rules of Procedure of the Committee according to which "as a general rule" experts would not participate in the deliberation of the reports of the State Party of which they are nationals. This draft met with the objection of several of the experts although the majority endorsed it.

Apart from that the question of independence of experts occasionally is invoked when an expert relies on sources, particularly from non-governmental organizations, which others regard as one-sided.

III. The Notion of the Term Discrimination and the Practise of the Committee

All international human rights instruments dealing with the protection of human rights either on the universal or the regional level contain a provision prohibiting racial discrimination. Compared to the Convention they either cover specific aspects only or are of a more general nature.

The first international treaty to deal with one particular aspect of racial discrimination is the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. According to its article II genocide means specific acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. However, there are very few occasions in which the Genocide Convention has been invoked on the international or national level, so far. This will change with the intensification of the jurisprudence of the International Criminal Tribunals for the prosecution of the crimes committed in former Yugoslavia and Rwanda and the actual establishment of the International Criminal Court.¹⁴ Since discrimination in respect of employment and occupation is common, the ILO already in its Declaration of Philadelphia affirmed in 1944 that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. This principle was trans-

¹⁴ A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq.

formed into an international treaty by ILO Convention No. 111- Concerning Discrimination in Respect of Employment and Occupation of 15 June 1960. It prohibits any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Convention against Discrimination in Education adopted on 14 December 1960 by the General Conference of UNESCO follows the approach adopted by the ILO Convention No. 111 and prohibits any discrimination based on race, colour, sex, language, economic condition or birth which has the purpose or effect of nullifying or impairing equality of treatment in education. Further specific aspects of racial discrimination are dealt with in the International Convention on the Suppression and Punishment of the Crime of Apartheid, and in the International Convention against Apartheid in Sports. Finally, the prohibition of racial discrimination is enshrined in article 3 of the Convention relating to the Status of Stateless Persons, 1954; article 3 of the Convention relating to the Status of Refugees, 1950; article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 2 of the Convention on the Rights of the Child, 1989; and in article 85, para. 4, of the Additional Protocol (Protocol I) to the Geneva Conventions of 12 August 1949 on the Protection of Victims of International Armed Conflicts, 1977.

The two Human Rights Covenants of 1966 follow a more general approach. They copied the catalogue of the Universal Declaration verbatim; States Parties to the Covenants undertake to guarantee that the rights enunciated in the Covenants will be exercised without discrimination of any kind as to race, colour, sex, language etc.

The Convention goes beyond the realm of most other human rights treaties since it not only obliges States Parties to refrain from racial discrimination (article 2 para.1 lit.(a),(b), article 3, article 5 lit.(a),(b),(c),(d) of the Convention) but also to take positive steps on the legislative and administrative level to ensure that the society will develop in a manner that it is free from racial discrimination or related practices. This is not always correctly perceived by States Parties when submitting their reports. It is not enough to indicate that racial discrimination is prohibited by law or even by the Constitution. They have further to indicate that individuals from various ethnic groups in fact enjoy the same rights and equally participate in the economic, social and cultural development of a State Party, that there is no incitement to racial discrimination

and that individuals or groups are protected against racial discrimination by society.

The core provision of the Convention is article 1 para.1 defining the notion of racial discrimination; paras 2 and 3 of the same article define cases when the Convention does not apply. Para. 4 deals with temporary measures and in that respect overlaps with article 2 para. 2, of the Convention. The Committee has so far not made an attempt to further specify what is meant by the notion of race as referred to in article 1 para.1, of the Convention (“... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin...”).¹⁵ In general, it was felt that there was no need to do so since the terms of reference in article 1 para.1, of the Convention are broad enough to cover all situations the Convention attempts to eliminate. In particular the Committee can resort to descent or national or ethnic origin. However, occasionally States Parties questioned whether the Convention was applicable to them at all or whether it was appropriate to refer to a particular group as falling under the scope of the Convention. For example, Mr. Lamptey asserted that Zairians were all of the same stock and there existed no racial or ethnic differences in that State Party.¹⁶ This approach was rejected by the majority of the Committee which looked upon ethnic diversity as a means of enriching cultural life. Developments in 1998 drastically proved how wrong it was to accept the approach advanced by the government of Zaire that the population of this country was ethnically homogenous. The same approach has been taken by the representative of Burundi at the 50th, by Mexico at the 49th Session, for example, and by other States Parties particularly from Latin America and Asia. They all alleged that their population was mixed and that one could not speak of differences as of race. In particular the representative of Burundi held that the differentiation between Hutus and Tutsi was introduced by the colonial powers and did not reflect the realities of life. When India stated in its report¹⁷ that the caste system did not fall under the jurisdiction of CERD, the majority of experts argued that since one became member of a caste by birth this was a matter of descent and therefore fell under article 1 para.1, of the Convention. Iraq has at the 50th Session objected to questions con-

¹⁵ Banton, see note 1, 76 et seq. makes an attempt to give some sociological clarification to the notion of race.

¹⁶ See Banton, see note 1, 251.

¹⁷ CERD/C/299/Add. 3.

cerning the Arabs living in the marshes since they were Arabs and belonged to the majority of the population.

The Committee has in its majority never accepted such statements. It has referred to the broad wording of article 1 para.1 of the Convention and its General Recommendation VIII (1990) according to which individuals are generally identified as being members of a particular racial or ethnic group by way of self-identification.¹⁸ Thus they do not depend upon objective criteria. A group may also be identified as such by the dominant population in a country although it does not regard itself as being ethnically or racially different. Apart from that reference has been made in this context by the Committee to linguistic differences or to the affiliation to a distinct religion serving as indicators for the existence of particular groups.

States Parties claiming ethnic conformity or denying the existence of particular ethnic groups often do so in order not to endanger a national policy of integration. Such integration may often take the form of enforced assimilation to a dominant group or groups which would violate the objective of the Convention.

As far as indigenous peoples are concerned many States of Latin America now rediscover the cultural heritage of their indigenous populations. CERD has frequently emphasized that it is particularly concerned with their status and prospect of development. At its 51st Session (August 1997) the Committee has adopted a General Recommendation on Indigenous Peoples adding new elements concerning their protection. Its operative part reads:

“... The Committee calls in particular upon States parties to:

- a. recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b. ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- c. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d. ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no deci-

¹⁸ HRI/GEN/1/Rev.2, 1996, 92.

sions directly relating to their rights and interests are taken without their informed consent;

- e. ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

The Committee especially calls upon States Parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The Committee further calls upon States Parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.”

Although religious discrimination does not fall under the purview of the Convention, CERD has dealt with it arguing that a particular religion may be an essential element in forming a particular ethnic group. This, however, is a very sensitive issue on which the opinions of the experts differ. Whereas the often discriminatory treatment of Muslims in European countries is frequently referred to the same experts object to questions concerning the status of Christians in Muslim States. There exists however some justification for the different approaches. Muslims in Europe are by their majority immigrants or descendents of immigrants whereas Christians in Iraq, Egypt etc. have always been nationals of these States.

As already stated the Convention prohibits not only intentional but also unintentional discrimination. CERD adopted a General Recommendation to emphasize this point.¹⁹ According to it a distinction is contrary to the Convention if it either has the purpose or the effect of impairing particular rights and freedoms. CERD stated that a differentiation of treatment would not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of

¹⁹ General Recommendation XIV (1993), HRI/GEN/1/Rev.2, 1996, 95.

the Convention, were legitimate or fell within the scope of article 1 para.4, of the Convention.

The Committee has frequently dealt with the treatment of non-citizens although according to article 1 para.2 of the Convention it does not apply to "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens. However, the Committee has held that a State Party may not discriminate against any particular nationality. Experts have questioned in this context the special treatment citizens from a European State receive in other European States and the special treatment given in some Gulf States to citizens from other Arab countries. More generally the Committee is concerned with the non-application of civil, economic, social and cultural rights to non-citizens although such application is provided for in international human rights instruments.²⁰ In General Recommendation XI (1993) CERD has emphasized that at least the reporting obligation applies to non-citizens.²¹ It has further emphasized that article 1 para.2 of the Convention must not detract from rights and freedoms granted to non-citizens in other international instruments. In spite of this interpretation article 1 para. 2 of the Convention limits the possibilities of the Committee to react efficiently against xenophobic tendencies and policies. CERD still has to develop a working method concerning the elimination of xenophobia and related phenomena.

IV. States Parties Obligations

According to article 1 para.1 of the Convention only those discriminations are prohibited which impair the enjoyment of human rights in a field of public life. The Committee had a long discussion on this issue. It finally agreed that political, economic, social and cultural spheres of life are always to be considered to come within the scope of public life. A privatization of schools, for example, would not exempt them from the reach of the Convention.²² Nevertheless, more work is to be done on this. For example, as far as the right to housing is concerned (article 5 lit.(e)(iii) of the Convention) does this mean that every landlord is under an obligation to accept any potential tenant regardless of race or

²⁰ R. Wolfrum, "International Law on Migration Reconsidered Under the Challenge of New Population Movements", *GYIL* 38 (1995), 191 et seq.

²¹ HRI/GEN/1/Rev.2, 1996, 94.

²² Banton, see note 1, 195.

ethnic or national origin? The majority of the Committee may argue into this direction, the implementation of such interpretation will however meet the resistance of some States Parties.

According to para.1, four types of acts may be considered discriminatory, namely distinctions, exclusions, restrictions or preferences. They shall be considered as discriminatory in the meaning of the Convention if they are based on race, or colour, or descent, or national origin, or ethnic origin.²³ Further, such acts must have the purpose of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms or have such an effect.

Under the Convention States Parties have various obligations. Such obligations differ widely as to their content. Generally speaking States Parties are under an obligation to eliminate racial discrimination as defined by the Convention. This requires the State Party to undertake four different actions, to pursue a policy of non-discrimination²⁴ and to undertake repressive, remedial or educational action.

Except for particular issues the Convention does not specify how this objective is to be achieved. However, States Parties are under an obligation to exhaust all their possibilities to achieve this objective, including the enactment of specific legislation. For that reason the Committee endorses the enactment of a specific racial discrimination act although such an act is not mandatory under the Convention. Whether a State Party implements the Convention through public law or private law will very much depend upon the national legal system. However, the implementation of article 4 of the Convention requires specific legislative action namely the issuing of criminal law. Often experts inquire whether the Convention has been incorporated into national law and may be invoked before national courts. Such question may be misleading. The incorporation of the Convention into domestic law does not suffice to meet the obligations under article 4 of the Convention. In consequence, the Committee has always rejected the approach of some States Parties that such incorporation would render the adoption of the required criminal law rules unnecessary. Further the question concerning the incorporation of the Convention does not adequately reflect that different means that exist of how to ensure the effective application

²³ For the drafting history see Lerner, see note 1, 28 et seq.

²⁴ Occasionally one expert insists that such policy should find its manifestation in a public document. However, such obligation has no foundation in the Convention.

of the Convention in national law as required by international treaty law. The verbal incorporation of an international agreement into national law is but one of the means available.

According to article 2 of the Convention States Parties are under an obligation to condemn racial discrimination and to pursue a policy of eliminating racial discrimination in all its forms. Article 2 para.1 lit.(a)–(e), of the Convention contains further specification to this end. Article 3 of the Convention provides that 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. The Committee drafted a General Recommendation in 1995 to advise States Parties that the scope of article 3 of the Convention was not restricted to measures directed against apartheid and that segregation could arise from State policy as well as other sources. Further, the General Recommendation emphasizes that article 3 of the Convention covers the action of segregation as well as the condition of being segregated.²⁵ Article 4 obliges States Parties to penalize certain forms of racial discrimination. In saying that certain acts shall be punishable, the Convention requires sanctions under criminal law. Actions under other articles of the Convention can be dealt with under other branches of law.²⁶ CERD has always focused on this obligation; it has also emphasized that article 4 of the Convention restricts the freedom of expression and association.²⁷ The question is whether States Parties may invoke the protection of the freedom of expression and association to avoid the implementation of the Convention²⁸ or whether States Parties must strike a balance between these freedoms and their duties under the Convention.²⁹ This is a matter of controversy in CERD.

²⁵ Banton, see note 1, 201/202.

²⁶ R. Wolfrum, "Das Verbot der Rassendiskriminierung im Spannungsfeld zwischen dem Schutz individueller Freiheitsrechte und der Verpflichtung des einzelnen im Allgemeininteresse", in: E. Denninger et al. (eds), *Festschrift Peter Schneider*, 1990, 515.

²⁷ K.J. Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination", in: S. Collier (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, 1992, 24; Banton, see note 1, 202 et seq.

²⁸ UN Study, *Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination*, CERD/2, 1986.

²⁹ Partsch, see note 27, 24.

Article 5 of the Convention lists the human rights to be guaranteed without discrimination. Almost all of these rights are covered by the two Covenants, hence the jurisdictional competences of the three treaty bodies overlap. Although CERD may deal with the enjoyment of civil and political rights as well as economic, social and cultural rights, it is restricted in this respect since it may do so only under the aspect of intentional or *de facto* discrimination. However, in this regard it has to play an important role particularly as far as the implementation of economic and social rights against a private counterpart are concerned. The rights to work, to free choice of employment etc. (article 5 lit.(e)(i) of the Convention), for example, are amongst the most important economic rights. They require enforcement against private as well as public employers. Article 5 lit.(e)(iii) of the Convention provides that any resident in a country shall enjoy any right to housing without discrimination as to race or ethnic origin. The implementation of these rights raises as already mentioned problems in practice. Although States Parties often provide for guarantees against dismissal of work on racial motives there is less protection, if any at all, against the denial of housing or work by private landlords or employers.

In the practice of the Committee the border line between criticizing discriminatory practices or the human rights situation in a given State Party is not always fully respected. Some members have taken the opportunity to inquire about the implementation of human rights standards in general. In 1996 CERD adopted a General Recommendation interpreting its functions under article 5 of the Convention.³⁰

Article 6 obliges States Parties to establish a judicial system which effectively protects against any act of racial discrimination. This provision serves as a basis for CERD to discuss the judicial system of States Parties. This is, however, justifiable. An effective protection against racial discrimination requires the availability of judicial recourse. In respect of non-dominant groups it further requires that they may address the judges in their language or, at least, that the State Party provides for interpretation. The Committee equally inquires as to whether judges receive a particular training in respect of such groups. Finally, in dealing with an individual complaint from the Netherlands the Committee has indicated that the obligations under the Convention may have an impact upon the criminal procedure of States Parties. In effect the Committee did not accept that prosecution might exercise its discretionary power in a manner that in practice would condone racist offences which

³⁰ See above.

the State Party is obliged to prosecute under article 4 of the Convention.³¹

Finally, article 7 of the Convention requires States Parties to adopt measures in the field of teaching, education, culture and information which combat racial prejudices and promote understanding and tolerance. The reports of States Parties on that aspect are very often without substance. In this respect a methodology of CERD still needs to be developed. To elaborate an approach to this end may be CERD's contribution for the Third Decade. In its 14th periodic report³² Iceland has provided for some rather unprecedented information concerning the implementation of article 7 of the Convention. The measures taken range from the wide publication of international human rights treaties, particularly in schools, over the training of immigrant children in their mother tongue to courses and programs in schools designed to increase tolerance and understanding for foreigners.

Unlike both Covenants, the Convention emphasizes the duties of States Parties rather than the rights of individuals or groups.³³ Nevertheless, article 14 of the Convention clearly indicates that individuals or groups enjoy rights under the Convention; otherwise the individual complaint procedure established by the Convention would be meaningless.

Apart from those obligations referred to so far States Parties are in accordance with article 9 of the Convention under the obligation to regularly report on the implementation of the Convention. The basic duty on reporting is expressed in article 9 para.1 of the Convention. The wording of this provision contains just the bare minimum on the content of reports; it is different from the one in other human rights treaties which were adopted later. The Convention additionally encourages States Parties also to report about "factors and difficulties affecting the degree of fulfillment of obligations". According to the International Covenant on Civil and Political Rights it is an obligation to provide for such information. However, in practice these differences in the reporting obligations have little impact.³⁴ The intensity of the monitoring ef-

³¹ Case 4/1991, L.K. v. The Netherlands.

³² CERD/C299/Add.4, 29 April 1996.

³³ Partsch, see note 13, 341.

³⁴ V. Dimitrijevic, "The monitoring of human rights and the prevention of human rights violations through reporting procedures", in: A. Bloed, L. Leicht, M. Nowak, A. Ross (eds), *Monitoring Human Rights in Europe*, 1993, 1 et seq., (12).

fect of reports depends nearly entirely upon depth of the oral exchange of views. The quality of the dialogue between the State Party concerned again is a matter of the preparedness of the State Party to engage in such a dialogue, the preparedness of the Committee for the particular State Party and the time available for the dialogue.

V. Reporting System

The Committee concentrates to a higher degree than other treaty bodies on the assessment of periodic reports of States Parties. Since 1996 it has dealt with more than ten reports per session. Other treaty bodies such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights only consider five each. Nevertheless, the time spent on each report is not much less than in these two bodies, namely two meetings, occasionally one meeting and a half. This means that most of its time the Committee is engaged in a dialogue with States Parties or in formulating Concluding Observations. The Committee can only do so since it has very few individual complaints to deal with,³⁵ and refrains from engaging itself in other activities such as the preparation of the Third Decade. Equally, very little time is devoted to the drafting of General Recommendations. Finally, no time at all is spent on the preparation for future sessions. This is all left to the country Rapporteurs. In fact, to assess so many reports in a three week session relies very much upon the introduction of the country Rapporteur system. It has enabled the Committee to make an indepth study³⁶ which again establishes the basis for the dialogue with the State Party concerned. However, the 50th Session has shown that dealing with more than 10 periodic reports exceeds the possibilities of the Committee and, in particular, the quality of the dialogue with the State Parties. Apart from that too little time is left for dealing with reports under the urgent procedure.

³⁵ At the 50th Session not even half a meeting was spent on individual complaints, the time used for that purpose at the 53rd Session was only marginally longer.

³⁶ Reports of Country Rapporteurs take between 30 minutes to one hour or more. Attempts have been made to restrict the length of the statements of Country Rapporteurs particularly by those who question the merits of such reports.

In dealing with the reports submitted by States Parties, CERD had to address several issues over the years and, by gradually deciding upon them, further developed and refined the reporting system. These issues included the question whether a State Party should be present when its own report is discussed; how to deal with overdue reports; the content of reports; the appointment of country Rapporteurs; the information which may be used by the experts when considering the reports of States Parties and the question whether CERD should formulate Concluding Observations after having finished the examination of a report. These issues are not just of a technical nature. The Committee's approach in addressing them and thereby further developing the reporting system reflects and reveals changes in CERD's perception about the objectives pursued through the reporting system.

The Convention and the Rules of Procedure give little indication about the procedure to be followed by CERD in examining reports. Over the years CERD has developed the following practice:³⁷ The examination of reports usually begins with an introductory statement by the representative of the reporting State. This introduction is followed by the presentation of the country Rapporteur of the Committee and the questions asked or suggestions and opinions voiced by the experts. After the experts have completed their observations and questioning, the State's representative is once again invited to take the floor. This may be followed by another round of questions and remarks from the experts and a reply from the representative of the State Party concerned. The examination of each report is concluded by the Concluding Observations which are formulated in the absence of the representative of the reporting State although in public meeting. The development of this procedure was undertaken gradually. Some of its important elements met with resistance and it was only possible to introduce them after considerable debate.

The decision to allow representatives of States Parties to be present when their reports are discussed was only taken upon recommendation of the General Assembly.³⁸ Only this decision has made it possible to establish a constructive dialogue between the experts and the represen-

³⁷ See in this respect the revised guidelines on reporting adopted by CERD on 9 April 1980, Doc.A/35/18 (1980) Annex IV as well as the consolidated guidelines for the initial part of the reports of States Parties as suggested by the Chairpersons of the Treaty Bodies Doc.A/45/636, at 18.

³⁸ A/RES/2783 (XXVI) of 6 December 1971; Rule 64; for details see Partsch, see note 13, 354 et seq.

tatives of States Parties. Hence, it has to be regarded as one of the most important innovations concerning the working methods of the Committee. In drafting its Rules of Procedure the Human Rights Committee included a similar provision for having States' parties representatives attend its meetings.

The introduction of the system of country Rapporteurs, already referred to, which was decided upon in 1988 represents another major change in the procedure of CERD. Proposals for appointing country Rapporteurs were first advanced in 1974 and repeated at a closed meeting in 1986.³⁹ CERD's annual report for 1988 in paras. 21 and 24 lit.(b) described the responsibilities of a country Rapporteur as being to prepare "a thorough study and evaluation of each State report, to prepare a comprehensive list of questions to put to the representatives of the reporting State and to lead the discussion in the Committee". Later, the Chairpersons meeting recommended⁴⁰ that treaty bodies should consider the appointment of Rapporteurs.

CERD reviewed its country Rapporteur system as it stood in 1989. Its annual report, at paras. 24 and 26 lit.(d), indicated that the introduction of the system had been successful.⁴¹

The country Rapporteur procedure has facilitated a division of labour between members of the Committee. Apart from that, under the new procedure the Committee has often experienced commentaries of a quality that was rarely achieved under the previous procedure.

The Convention does not give clear guidance as to how CERD may react either to reports which do not meet the reporting requirements of the Convention or the Guidelines, or when a State Party has been found to have not fully met its obligations concerning the implementation of the Convention. The Committee has changed its policy in this respect over the years.

First of all the Convention does not specify which information the experts may use to assess the reports. Over a long period, CERD did not accept information provided by non-governmental organizations or by the mass media. This policy, however, has been changed following the example of other human rights treaty bodies.⁴²

³⁹ CERD/SR. 771.

⁴⁰ Doc.A/44/98, 17 para. 57 and 24 para. 91.

⁴¹ All but three experts have in the past acted as country Rapporteurs.

⁴² Human Rights Committee (ed.), *Manual on Human Rights Reporting*, 1991, 121.

As to the reaction to reports following its examination, the Convention does not provide the Committee with the power to reject a report. It may only "request further information" (article 9 para.1) and may make "suggestions and general recommendations" (article 9 para. 2).

In accordance with its Rules of Procedure, CERD evaluates each State's report with respect to the formal reporting guidelines, taking into account that State's previous reports. The members seek to determine: whether the information requested in earlier reports has been delivered, whether information missing in previous reports is included in the report under consideration, whether questions initially incompletely answered have now been responded to fully and whether new developments in the reporting country give rise to a need for additional information.

During its early years the Committee would conclude its examination of reports by qualifying them as satisfactory or unsatisfactory without indicating whether unsatisfactory reports lacked sufficient information or whether the reporting State had failed to comply with its substantive obligations under the Convention. In 1972, the Committee amended its Rules of Procedure⁴³ in order to distinguish more clearly the two phases of its evaluation.

In its recent practice CERD has asked for additional information also in cases where it felt that a State Party had not fully discharged the obligations under the Convention, thus closing again the distinction between the two stages of examining reports. In this respect, requesting further information was regarded as a kind of verdict concerning the situation in the given State Party.

Another means for CERD to express its opinion upon the situation in a given State Party are Concluding Observations. The Committee at its 39th Session (March 1991) decided that the adoption of the country Rapporteur procedure enabled it to go further⁴⁴ towards the adoption of a common statement embodying a collective opinion. Since 1992 the procedure for drafting these observations is that the country Rapporteur is asked to circulate a draft within the Committee, to take account of the comments of colleagues, and then to present at a later session a draft that could be adopted by consensus. However, the possibility of a

⁴³ Rule 67.

⁴⁴ The previous system was criticized in the Alston Report (Doc.A/44/668, para. 134).

vote is not excluded. Initially the discussion of the Concluding Observations was undertaken in a private meeting. Since 1996 they have been discussed in public meeting. This has had the effect that experts refrained from participating in the deliberation of the Concluding Observations on those States Parties they are nationals of. This effect was intended by changing the rules on the deliberation of the Concluding Observations.

Some of the Concluding Observations adopted since then have made reference to particular General Recommendations of the Committee and at a later stage it inquired why the State Party concerned had not responded thereto. This raises the question as to the status of General Recommendations. They are not binding upon States Parties since the Committee lacks legislative power. However, they are binding the experts amongst themselves as to the interpretation and application of the Convention. As such they give an indication to States Parties how the Committee will look upon certain aspects of the Convention.

In recent years all human rights treaty bodies have encountered the problem that States parties do not meet their reporting requirements.⁴⁵ This endangers the monitoring functions of the human rights treaty bodies. CERD decided at its 39th Session (March 1991) to review the implementation of the Convention in those States Parties whose periodic reports were excessively overdue. The annual report for that year states that in the case of reports excessively overdue, the Committee "agreed that this review would be based upon the last reports submitted by the State Party concerned and their consideration by the Committee". So far, the practice of CERD has turned out to be quite successful. In some cases the States Parties concerned have taken the opportunity to submit their report. Apart from that an increasing number of States Parties have participated in the review and have thus resumed the dialogue with the Committee.

⁴⁵ See Report of the Secretary-General, *Improving the Operation of the Human Rights Treaty Bodies*, HRI/MC/1996/2, 10 et seq. and the report by P. Alston, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, Doc.E/CN.4/1997/74, 7 March 1997, para. 48 et seq. The figures given on CERD and in particular the conclusions drawn from such figures do not meet with reality. According to Alston it would take CERD 24.3 years to deal with all outstanding reports. However, if States Parties resume the dialogue after, for example, ten years, they submit five reports in one. Nevertheless the backlog of reports is significant.

At its 47th Session the General Assembly in 1992 recommended that other treaty bodies should adopt measures similar to the practice of CERD to proceed with the examination of the situation in States Parties whose reports were long overdue, on the basis of existing information. It was further recommended that each treaty body should follow, as a last resort and to the extent appropriate, the practice of scheduling for consideration the situation in States Parties that have consistently failed to report or whose reports are long overdue. This recommendation was based upon the consideration that a persistent and long-term failure to report should not result in the State Party concerned being immune from supervision, while others which have reported are subject to careful monitoring.⁴⁶

Assessing the reporting system it has to be stated that it has undergone significant changes. In introducing such changes CERD has altered the objective of the reporting system. At the beginning when representatives of States Parties were not allowed to orally present the reports the Committee was not in a position to engage in a dialogue with the respective State Party. It could only collect some information and on this basis make General Recommendations to the General Assembly concerning the elimination of racial discrimination. Hence, in this early period the reporting system only rudimentarily provided for means to monitor the implementation of the Convention, higher emphasis being placed upon CERD as an expert body intended to provide the General Assembly with information that would enable the latter to discuss the elimination of racial discrimination. This element of the reporting system has receded into the background, as reflected by the fact that the topic "elimination of racial discrimination" no longer plays a prominent role in the deliberations of the General Assembly. Instead, by involving representatives of the reporting States, allowing CERD to use information other than that provided by the reporting State Party and by formulating "Concluding Observations" the Committee focuses more heavily upon the monitoring of the situation in the States Parties. Nevertheless, CERD does not work and is not intended to work as a court. Quite frequently experts point out that they are primarily interested in establishing and upholding a dialogue with the States Parties. This is why considerable effort is undertaken to convince States Parties whose reports are overdue to resume cooperation with the Committee. Asking for further information has to be seen from this point of view. It is to be understood as the desire from the side of the Committee to en-

⁴⁶ A/RES/47/111 of 16 December 1992.

hance and intensify the dialogue with those States Parties which face problems in the full implementation of the Convention.

VI. Inter-State Complaints

The practice of States Parties concerning inter-State complaints is unsatisfactory.⁴⁷ When dealing with the reports of some States Parties bordering former Yugoslavia, the respective representatives have been asked by members of the Committee why no attempt had been made to initiate a procedure under article 11. Equally the representative of Iraq was recommended to consider this procedure when he claimed that northern Iraq was under the influence of foreign powers and hence he could not report about the implementation of the Convention in this area. The same approach was taken *vis-à-vis* Mexico when it complained about the discrimination of Mexicans in the United States. The answer was evasive. Obviously there is a reluctance to resort to such procedure although it has been used under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since States did not hesitate, recently, in cases of grave and persistent violations of human rights to involve the Security Council, the reluctance to use the inter-State complaint procedure cannot result from an excessive respect for the sovereignty of the States concerned. It may be rather the feeling that a quasi-judicial procedure is hardly suited to provide a solution in cases where political decisions are called for. Apart from that the procedure of article 11 of the Convention does not enshrine any enforcement mechanism; it may seem questionable to invoke a lengthy procedure the result of which may only be a recommendation for the amicable solution of the dispute (article 13 of the Convention).

VII. Individual Complaints

Within the United Nations human rights system three treaty-based procedures exist providing for the possibility for individuals to submit petitions directly to the respective supervisory committees. These are the optional article 14 of the Convention, the Optional Protocol to the

⁴⁷ Previous article 9 reports have contained various forms of disguised inter-state disputes, see T. Buergenthal, "Implementing the UN-Racial Convention", *Tex.Int'lL.J.* 12 (1977), 202 et seq.

International Covenant on Civil and Political Rights and the optional article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The two former procedures require the specific acceptance of ten States and the latter of five States to become effective. Receiving these acceptances took much longer for article 14 of the Convention than for the Protocol. As at 10 July 1998 25 of the 159 States Parties to the Convention have made the declaration envisaged in article 14 recognizing the competence of the Committee to receive and consider communications from individuals who claim that the government has not provided them with the required protection. Although optional article 14 entered into force in 1982, only nine communications have so far reached the Committee.

Article 14 of the Convention differs from the Protocol and the Convention against Torture in that it provides that groups of individuals as well as individuals may present communications to the Committee. So far, no group action has been received. All the three procedures require the alleged victim to present to the Committee *prima facie* evidence of personal involvement which excludes the procedure being used as *actio popularis*.⁴⁸

Examining such individual complaints should constitute an important part of the work of human rights treaty bodies. This, however, will only be the case if more States Parties accept the respective procedure and the information on the availability of such procedure is disseminated widely in the States Parties. For example, Ecuador, Peru, the Russian Federation and Uruguay have made the Declaration recognizing the competence of CERD under article 14 of the Convention. However, no communication has been transmitted yet from any of these States Parties. So far, individual complaints came from the Netherlands, Denmark, Australia, Finland and Sweden. This does not reflect the human rights situation prevailing in these States. The limited acceptance of this procedure and the insufficient information about its availability may be the reasons why the procedure has not been used more frequently. Several members of the Committee routinely encourage States Parties to adhere to this procedure.

The Committee simply has a limited practice with respect to individual complaints. It applies in most cases a two-stages procedure, first

⁴⁸ However, the Human Rights Committee did agree to consider communications submitted "on behalf" of alleged victims by others, even without formal mandate or power of attorney, when it appeared that the victim was "unable to submit the communication himself".

establishing admissibility and thereafter considering the merits. This makes the procedure a slow one, cases are pending for too long which may be considered to be a denial of justice. In two cases the Committee has asked the States Party concerned to report about the admissibility as well as on the merits (Australia and Sweden). States Parties and some of the experts are reluctant to accept such a procedure since they consider (wrongly) that the decision to have a case admitted already carries some verdict.

VIII. Preventive Action, Including Early Warning and Urgent Procedure

CERD at its 43rd Session adopted a paper on preventive action, including early warning and urgent procedures as a guide for its future work concerning possible measures to prevent and more effectively respond to violations of the Convention.⁴⁹ Under the same title a permanent item was included in the agenda of the Committee's future sessions. Successive annual reports of the Committee to the Secretary-General of the United Nations summarize the working paper.⁵⁰

Similar steps have been taken and implemented by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. However, as far as conceptuality and the implementation of such procedure are concerned, CERD has developed the most systematic and far-reaching practice.⁵¹

Like the other human rights treaty bodies the Committee was particularly induced to establish such a procedure by the events in former Yugoslavia and in the Great Lakes region of Central Africa. The members of the Committee felt that the regular monitoring of the human rights situation in States Parties through the reporting system had

⁴⁹ This was encouraged by the General Assembly with the Agenda for Peace-A/RES/47/120 of 18 December 1992.

⁵⁰ Doc.A/49/18, para. 19; Doc.A/50/18, para. 22; Doc.A/51/18, para. 26. For further details see Banton, see note 1, 161 et seq.

⁵¹ M. O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies*, 1996, 103 et seq.; Banton, see note 1, 161 et seq.

proven to be inadequate to prevent the occurrence or recurrence of such man-made disasters.^{52 53}

Preventive actions of CERD shall include early warning measures to address existing structural problems which might escalate into conflicts. Such a situation calling for early warning exists, in the view of the Committee, *inter alia* when the national implementation procedures are inadequate or there exists the pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials. To formulate such early warning CERD will have to make full use of its sources of information and of its expert capacity to assess them.

The criterion for initiating an urgent procedure, according to the decision of CERD, is the presence of a pattern of massive or persistent racial discrimination. In nearly all cases dealt with by the Committee, so far, one expert took the initiative and made a reasoned suggestion to have a particular situation dealt with under this procedure. In all cases such a suggestion was accepted after a brief discussion.

The reactions in its preventive function and in response to problems requiring immediate attention are similar although under the early

⁵² T. van Boven, "Prevention, Early-Warning and Urgent Procedures: A New Approach by the Committee on the Elimination of Racial Discrimination", in: E. Denters, N.Schrijver (eds), *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, 1998,165 et seq.

⁵³ When in 1993 the Committee adopted its prevention, early-warning and urgent procedure its Chairman justified such decision in its covering letter to the annual report to the Secretary-General of the United Nations in the following terms: "The forms of racial discrimination which in the 1960s were regarded as most abhorrent were those of discrimination by whites against blacks. Racial discrimination was frequently described as caused by the dissemination of doctrines of racial superiority by the institutions of colonial rule and by policies of racist regimes. The international community could counter these abuses by political means and in this way racial discrimination could be eliminated." The letter continued to say: "In 1993 we contemplate the success of policies initiated in the 1960s. The struggle against colonial rule and racist regimes has been successful even if the consequences of apartheid will continue to give trouble for a long time. New challenges started to emerge at the end of the 1980s with the disintegration of some of the larger political structures, particularly in eastern Europe, and the weakening of some structures in other regions ... racial or ethnic conflicts are appearing in areas previously characterized by tolerance..." (Report of the Committee on the Elimination of Racial Discrimination, 1993, Doc.A/48/18, 6).

warning procedure CERD will first exhaust its advisory functions *vis-à-vis* the respective State Party. The Committee may address its concern, along with recommendations for action, to all or any of the following: the State Party concerned; the Special Rapporteur established under a Commission on Human Rights resolution; the Secretary-General; and all other human rights bodies. The information addressed to the Secretary-General may in the case of urgent procedures include a recommendation to bring the matter to the attention of the Security Council. In the case of urgent procedures CERD may designate a Special Rapporteur.

As already indicated the attempt to improve the functions of the Committee, as far as its response to serious, massive or persistent patterns of racial discrimination is concerned or the upcoming threat thereof, was very much influenced by the situation in the former Yugoslavia. In consequence Bosnia Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) belonged to the States Parties that were placed under the early-warning procedure. Others were or still are Rwanda and Burundi, Papua New Guinea, with regard to the serious violations of human rights in Bougainville, Mexico with regard to the ethnic conflict involving the indigenous population of the Chiapas, the Russian Federation concerning the massive loss of life in the Republic of Chechnya and Liberia, Afghanistan as well as Zaire/the Democratic Republic of Congo concerning the situation brought about by civil war. Other cases dealt with under this procedure were States Parties where serious incidents caused concern in the Committee as to the implementation of the Convention and where it feared the aggravation of the situation. These incidents included the massacre committed by an Israeli settler against Palestinian worshippers, the racist terrorist acts against Jews in Buenos Aires in 1994 and in London 1994, the clashes that took place in Cyprus in 1996 and the terrorist attacks in Algeria in 1994 and 1995.

The actions taken by the Committee differed widely depending on the extent to which the respective State Party was willing to cooperate with the Committee. In the case of the Federal Republic of Yugoslavia (Serbia and Montenegro) an intensive dialogue commenced at an early stage which resulted in sending a good offices mission of three experts (Mrs H. Ahmadu, Mr. I. Reshetov and Mr. R. Wolftrum) to Belgrade and the Kosovo to promote a dialogue between the Albanians in Kosovo and the Government of the State Party. The dialogue broke off due to the decision of the meeting of States Parties to exclude the Federal Republic of Yugoslavia (Serbia and Montenegro) from its delibera-

tions.⁵⁴ In spite of that unofficial contacts have been maintained between members of the Committee and the representative of the Federal Republic of Yugoslavia with a view to resuming the dialogue. Croatia invited one member of the Committee (Mr. M. Yutzis) to give technical advice as to the drafting of the report.

The response of Israel was less cooperative. The Permanent Representative of Israel informed the United Nations of the establishment by the government of a Commission of Inquiry and agreed, while questioning the competence of the Committee, to transmit a copy of the findings to the Committee. However, it refused to submit a special report that the Committee had asked for. It has finally submitted the reports (7th, 8th and 9th in one) at the 52nd Session (in March 1998). In the introduction of the report the delegation of Israel questioned whether Israel was receiving fair and equal treatment.

Representatives of Rwanda, Burundi and Algeria took the opportunity to address the Committee whereas no reaction was received from Afghanistan, Papua New Guinea, Liberia and the Democratic Republic of Congo when they were informed that the Committee intended to deal with the situation under its early warning and urgent procedure and were asked to provide for information. The Russian Federation has provided the required information in its periodic report and, in particular, in the dialogue following the submission of such report.

Considering the experience of the Committee with this new procedure, so far, the overall assessment is positive.⁵⁵ The focus of this procedure should be less on such States in the situation of a civil war⁵⁶ but rather on States Parties where tension is building up or might build up or where civil war has ended and the State Party concerned needs all assistance for restructuring its legal, judicial and administrative system.

⁵⁴ See the letter of the Chargé d'affaires of the Permanent Mission of the Federal Republic of Yugoslavia in Geneva of 15 February 1995 as reproduced in the Report of the Committee on the Elimination of Racial Discrimination, 1995 (Doc.A/50/18, para. 227). See also the reply of the Chairman of 6 March 1995 (in the same report at para. 227).

⁵⁵ Different Alston, see note 44, para.79.

⁵⁶ Here, in fact, the principle of the division of labour should apply as suggested by Alston, see note 44, para. 79. This, however, requires that the Security Council or a regional organization has become active. This cannot be taken for granted. In the cases of inactivity it is the function of the human rights treaty bodies engaged in such procedure to induce activities of international organizations engaged in the preservation of peace and security.

IX. Relation with the General Assembly, the Secretariat and Other Human Rights Bodies

CERD is an autonomous body established under the Convention which is linked to the UN System. It submits its reports to the General Assembly through the Secretary-General. However, interest in the work of the Committee in the General Assembly, notably its Third Committee, is limited. The secretarial services for CERD are provided by the Secretariat. The funding formally provided for by States Parties now comes from the UN budget; the respective amendment of the Convention has not yet entered into force.

Though the Committee has appointed experts as liaison officers to be informed about the activities of other human rights bodies its connection to such bodies is limited. An improved coordination amongst the treaty bodies, at least, would render the functioning of such bodies more effective. Such coordination can only be achieved with the assistance of the Secretariat, which at the moment does not fulfill this function. Receiving information about activities of other human rights bodies, particularly, the Commission on Human Rights, UNHCR or other treaty bodies depends totally upon the initiative of each single expert. Additionally, there is little interest from the other human rights bodies to cooperate more closely. For example, the Commission on Human Rights has appointed a Special Rapporteur on contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance. Although his tasks overlap with the ones of the Committee and although he reports about States which are reporting to the Committee he does not make use of the material accumulated by CERD over decades. Given the limited resources for the protection of human rights such duplication of efforts seems unacceptable.

X. Conclusions

The international efforts against racism, racial discrimination, xenophobia and other related forms of intolerance have, so far, not been successful. Although the struggle against apartheid has led to a positive result, new forms of racism, racial discrimination and ethnical prejudice or prosecution have emerged. The international bodies engaged in the struggle against all these forms of intolerance and violence based there-

upon, in particular the Committee, nevertheless have to continue and even have to strengthen their efforts.

Only through these efforts will a public awareness be created as well as a conviction within the world community that the mentioned forms of intolerance and racial discrimination are intolerable violations of the human dignity and constitute an international crime.

However, the possibilities of the Committee to effectively eradicate racial discrimination are limited. The reporting system has its merits although it is lacking enforcement mechanisms. Its effect rests in enforcing States Parties to self-assess the human rights situation in the given country. Such effects could be strengthened if the reports were made public and became the object of a national discussion. This can be achieved through publishing national reports either before submitting them to CERD and inviting comments which would be communicated to the Committee, or after the dialogue together with the Concluding Observations. Another option would be the discussion of the report in Parliament. Any of these approaches would initiate a public discussion which again would fertilize the next dialogue with the Committee. CERD should strongly encourage States Parties to pursue such a policy.⁵⁷

CERD's possibilities are limited in cases where ethnic conflicts become violent. In cases such as Rwanda or former Yugoslavia, where ethnic tensions have resulted in an armed conflict, CERD has only limited possibilities to ameliorate the situation, apart from calling for international awareness and intervention. The latter functions, however, should not be underestimated. International awareness concentrates on specific conflicts and for a limited period only, thereafter conflicts are neglected. This is, for example, true in respect of the civil war in Sudan, equally no attention was paid in the international media to the ongoing violations of human rights in Bougainville. Hence the international community made no or very little effort to ameliorate the situation and to put pressure on the States concerned. In this respect CERD could and should provide for a more balanced approach and a sharpened awareness of the international community concerning systematic and grave violations of the Convention otherwise neglected.

In respect of cases taken up under the prevention, early-warning and urgent procedure CERD has a twofold function. It should warn States Parties about the building up of ethnic tensions and inform United Na-

⁵⁷ Emphasized in the Alston report Doc.A/44/668, 36 et seq.

tions bodies accordingly. After the ending of a conflict the Committee should play an active role in assisting the reorganisation of the respective State. The necessity of this approach was clearly felt in the Committee when it discussed Bosnia Herzegovina after the conclusion of the Dayton Accord. It was the prevailing view in the Committee — clearly expressed in the Concluding Observations — that the Dayton Accord had not been prepared adequately and that in particular the rules on elections might lead to the confirmation of the facts established by ethnic cleansing. This approach was also expressed in respect of Rwanda where the Committee indicated its readiness to assist in the restructuring of the country so as to avoid the repetition of the previous ethnic conflicts. This approach was clearly inspired by the positive role the Venice Commission has played and still plays concerning the drafting of constitutional laws of eastern European States. In this regard the Committee still has to define its role more clearly which States Parties will have to accept and to utilize.