INTERNATIONAL COURT OF JUSTICE

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**INTERPRETATION AND APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

**(THE STATE OF QATAR *v.* THE UNITED ARAB EMIRATES)**

# MEMORIAL OF THE STATE OF QATAR

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VOLUME VI

25 APRIL 2019

## VOLUME VI

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# THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS

YUVAL SHANY

THE PROJECT ON PICT
INTERNATIONAL COURTS AND TRIBUNALS

This series has been developed in cooperation with the Project on International Courts and Tribunals

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto

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Published in the United States
by Oxford University Press Inc., New York

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First published 2003

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British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 0–19–925857–0

1 3 5 7 9 10 8 6 4 2

Typeset by Kolam
Printed in Great Britain
on acid-free paper by
T.J. International Ltd., Padstow, Cornwall

2nd Floor
JX
1990
Sh18
2003

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# 6

# Jurisdiction-Regulating Norms, Derived from Sources Other than Treaties, as Applied by International Courts and Tribunals

The previous Chapter examined a variety of existing jurisdiction-regulating treaty provisions and reviewed the manner of their application by international courts and tribunals. However, there have also been instances in which judicial bodies have applied jurisdiction-regulating norms derived from sources of international law, other than treaty law. These occasions normally involved situations where the constitutive instruments of the competing tribunals failed to address the question of jurisdictional overlap or where norms of general international law were applied to complement existing conventional provisions. Given the limited and inconclusive nature of conventional jurisdiction-regulating provisions, the precedents discussed below are of considerable importance. They have the potential of being applied in all dispute-settlement procedures either as default rules, in the absence of explicit regulation, or as a source of inspiration for the interpretation of jurisdiction-regulating treaty provisions, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[1]

The first section of this Chapter addresses the application of traditional jurisdiction-regulating rules by international courts and tribunals. These are choice of forum principles and the rules of *lis alibi pendens* and *res judicata*. Since the *electa una via* rule (which is found in some human rights instruments[2]) does not find any meaningful support in the international jurisprudence (in the absence of explicit treaty language)[3] it is not discussed here. The second section of this Chapter examines the possibility of applying

[1] Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' 1 *Yale Human Rights and Development LJ* (1998) 85, 102.

[2] See e.g. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, Art. 35(2) [ex-Art. 27(1)], ETS 5, 213 UNTS 221 [hereinafter 'European HR Convention']; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 Dec. 1984, Art. 22(5), GA Res. 39/46, 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51, at 197 (1984), 23 ILM (1984) 1027 [hereinafter 'CAT']; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, Art. 77(3), GA Res. 45/158, Annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990) (not yet in force) [hereinafter 'MWC'].

[3] See Dan Ciobanu, 'Litispendence between the International Court of Justice and the Political Organs of the United Nations' in 1 *The Future of the International Court of Justice* (Leo Gross, ed. 1976) 209, 231–2. However, the underlying rationale of the *electa una via* rule finds some support in the PCIJ case-law on the binding nature of exclusive jurisdiction agreements, which is discussed below.

general legal doctrines to situations involving jurisdictional competition. These doctrines include the theory of abuse of rights, the principle of comity, and some principles governing conflicting treaty obligations.

## 1. APPLICATION OF TRADITIONAL JURISDICTION-REGULATING RULES

### *A. Forum selection principles*

#### I. The PCIJ precedents

The question whether any limitations should be placed upon the right of international actors to engage in forum selection between alternative competent judicial bodies has only rarely been considered by international courts or tribunals. Still, a few cases in which the question did arise were heard before the PCIJ. Given the fact that none of the instruments governing the activities of the PCIJ specifically addressed forum selection, and since the PCIJ refrained from discussing whether conditions for the emergence of an international custom had been met, it would seem that the PCIJ decisions were founded on what it perceived to be inherent powers of an international court of general jurisdiction, or alternatively on general principles of law.

The first PCIJ case where the allocation of jurisdictions between the Court and a different international dispute-settlement procedure were examined was the *Mavrommatis* case, which involved a claim by Greece on behalf of one of its nationals, the owner of a concession in Palestine that was infringed by Great Britain, the mandatory power in the territory.[4] One of the issues discussed was the effect that a specific dispute-settlement arrangement under a Protocol to the Treaty of Lausanne had upon the Court's jurisdiction over one of the heads of claim. In particular, the question was whether the jurisdiction of the PCIJ, based upon a general compromissory clause found in the Mandate for Palestine, should give way to the special procedure of the Protocol, which provided that valuation of indemnities due to concession holders would be calculated by special experts.

The Court held that the Protocol constituted both *lex specialis* and *lex posteriori*, and that, as a result, its terms should override those of the Mandate to the extent that the two instruments are incompatible.[5] While the Court found no basis to attribute to the parties an intent to exclude, across the board, the Court's general jurisdiction under the Mandate, it held that such exclusion may be implied with relation to specific matters which had been referred under the Protocol to special procedures: 'In so far as the Protocol established in

[4] *The Mavrommatis Palestine Concessions* (*Greece v. GB*) 1924 PCIJ (Ser. A) No. 2.
[5] Ibid. at 31.

Article 5 a special jurisdiction for the assessment of indemnities, this special jurisdiction—provided that it operates under the conditions laid down—excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate'.[6]

Still, despite acknowledging an implied limitation on its competence, the Court exercised jurisdiction over the disputed head of claim. This was because the specific question referred to the Court by the parties had been of a preliminary nature, and could not have been presented before the alternative procedure.[7]

A second case in which similar issues arose was the *Chorzów Factory* case,[8] decided a few years after the *Mavrommatis* case. The case involved a German claim for indemnity against confiscation in Poland of property belonging to German companies, and the question was whether the Court should decline jurisdiction in favour of the Germano-Polish Mixed Arbitral Tribunal or the Upper Silesian Arbitration Tribunal, which were competent to review the legality of takings of property, in pursuance of claims presented by private German litigants. Poland argued, *inter alia*, that the Court should refrain from exercising its jurisdiction because the two arbitral bodies had been designated as specific procedures for recovering indemnities, which ought, in accordance with the *Mavrommatis* holding, to exclude the general jurisdiction of the Court.[9] Germany countered this with the argument that the contracting states never intended that the creation of arbitral tribunals for private party claims would exclude the jurisdiction of the PCIJ in inter-state cases.[10]

While the case really involved a *lis alibi pendens* claim and not just an ordinary forum-selection one (a related private claim was pending before the Mixed Arbitral Tribunal during proceedings before the PCIJ) the reasoning offered by the Court addressed the broad topic of the division of competences between competing fora. In rejecting the Polish motion, the Court held that: '[T]he Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice'.[11] In the circumstances of the case, the Court was of the opinion that Germany could not obtain adequate remedies through recourse to any alternative forum, and that, as a result, it would be impossible to attribute to the parties intent to designate the arbitral tribunals as exclusive jurisdictions.

[6] Ibid. at 32. [7] Ibid. at 32.

[8] *The Factory at Chorzów* (*Germany v. Poland*), 1927 PCIJ (Ser. A) No. 9 (claim for indemnity) (jurisdiction).

[9] *Chorzów Factory* 1927 PCIJ (Ser. C) No. 13-I, at 26–27 [oral pleadings by Mr. Sobolewski (Poland)].

[10] Ibid. at 69 [oral pleadings by Dr. Kaufmann (Germany)].

[11] *Chorzów Factory* 1927 PCIJ (Ser. A) No. 9, at 30.

It should be noted that although the two cases can be distinguished from each other (Greece was exercising diplomatic protection in *Mavrommatis*, while Germany seemed to be claiming its own independent rights in the *Chorzów Factory*) it looks as if the language used by the PCIJ in the *Chorzów Factory* case revealed greater reluctance on the part of the Court to decline jurisdiction. This can be perhaps explained by the fact that, as is shown below, the Court had in the meantime ruled that Mixed Arbitral Tribunals are not part of the international legal order, and that consequently they do not represent genuine jurisdictional alternatives to the PCIJ.[12]

The third PCIJ decision, which is the leading authority on the issue of the right to forum selection, was rendered in the *Rights of Minorities* case. Although the case dealt with competition between a judicial and a political organ, the language and logic of the Court's judgment would seem to apply to any case of jurisdictional competition.

This time the respondent state, Poland, objected to the Court's jurisdiction on the ground that the relevant treaty in force between the parties (Poland and Germany) granted primary jurisdiction over the dispute to the Council of the League of Nations.[13] This provision constituted, according to Poland, a manifestation of the will of the parties not to submit the dispute to judicial settlement in situations where a political alternative was available.

The Court rejected the Polish position and held that the treaty and the subsequent conduct of the parties had conferred consent-based jurisdiction upon the PCIJ. The Court further added the following seminal statement, addressing the circumstances under which the Court would decline consent-based jurisdiction: 'This principle [of consent as sufficient basis for jurisdiction] only becomes inoperative in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the *exclusive jurisdiction reserved to some other authority*' (emphasis added).[14]

This means that the court will normally exercise jurisdiction, unless a competing forum was invested with exclusive jurisdiction. Applying this standard, the Court held that the Council of the League had not been explicitly designated as an exclusive forum and that such exclusivity could not easily be presumed given the significant differences in the nature of the two competing procedures.[15] The Court also commented that in the light of the

[12] *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*), 1925 PCIJ (Ser. A) No. 6, at 20 (jurisdiction).

[13] *Rights of Minorities in Upper Silesia (Minority Schools)* (*Germany v. Poland*) 1928 PCIJ (Ser. C) No. 14-II, at 60–1 [oral pleadings by Mr. Mrozowski (Poland)].

[14] *Rights of Minorities*, 1928 PCIJ (Ser. A) No. 15, at 23.

[15] Ibid. at 23 ('... the jurisdiction possessed by the Council of the League of Nations [to hear individual and collective petitions under a certain minorities treaty] is entirely distinct from, and in no respect restricts, the Court's jurisdiction to hear and determine disputes between States'). But cf. *South-West Africa* (*Ethiopia v. SA*; *Liberia v. SA*) 1962 ICJ 319, 345 (Preliminary Objections) (although the disputes before the Court and the General Assembly may be regarded as different disputes, 'the questions at issue are identical').

disorganized division of labour between different international jurisdictions, overlaps in jurisdiction might occur from time to time, and that, unlike their municipal counterparts, international courts confronted with such concurrency should not *ex officio* consider whether the case before them properly belongs to another forum.[16] Another contention raised by Poland, that the Court was barred from hearing the case by virtue of a Resolution adopted by the Council of the League,[17] was also rejected by the PCIJ, by reason of the inconclusive nature of the Resolution.

Analysis of the three PCIJ cases on forum selection may lead to the following conclusions. According to the PCIJ, international judicial bodies invested with competence over a certain dispute may decline jurisdiction in favour of other international courts or tribunals only if three conditions are met: (a) it is sufficiently clear that an alternative forum enjoys jurisdiction over the same dispute; (b) the alternative forum has been designated as an exclusive forum (either explicitly or implicitly); and (c) one of the parties objected to retaining the proceedings before the first-seized forum. All three conditions seem to amount to a presumption in favour of retention of jurisdiction by the seized forum. It would also seem reasonable to deduce from the PCIJ case-law that the greater the difference between the nature of the competing procedures, the less inclined a seized forum would be to attribute to the parties an implicit intent to opt for exclusivity. Indeed, subsequent case-law of the PCIJ and the ICJ supports the proposition that courts or tribunals are reluctant to decline jurisdiction in situations of competition with 'non-equal' bodies (e.g. when one amenable dispute-settlement procedure is judicial and the other political, or when two judicial bodies operate within different legal orders).[18]

However, a word of caution should be added. First, the PCIJ cases are rather old 'precedents', which might be re-examined in light of changed circumstances and modern perceptions on the role of adjudication in dispute settlement (e.g. the view that some disputes are better addressed through non-contentious procedures). It also seems that the three decisions are not authoritative on the matter of international jurisdictional competition, since

[16] *Rights of Minorities*, 1928 PCIJ (Ser. A) No. 15, at 23.

[17] *Rights of Minorities*, 1928 PCIJ (Ser. C) No. 14-II, at 61, 78 [oral pleadings by Mr. Mrozowski (Poland)]; ibid. at 218–19 (counter-memorial of the Polish Government).

[18] *Interpretation of the Statute of Memel Territory* (*UK v. Lithuania*) 1932 PCIJ (Ser. A/B) No. 47, at 248–9 (since proceedings before the Court and the Council of the League were quite different, a 'unity of proceedings' principle, according to which all dispute-settlement proceedings should be handled by one institution only (a principle similar to the connexity rule) cannot be presumed, unless it had been shown that the parties clearly intended to introduce it); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, 1984 ICJ 392, 434–5 (although the Charter granted the Security Council *primary* responsibility in international peace and security matters, it was not granted *exclusive* responsibility, and the Court may exercise jurisdiction). But cf. *Anglo-Iranian Co.* (*UK v. Iran*) 1952 ICJ 93, 116, 134 (Jurisdiction) (Dissenting Opinion of Judge Alvarez) (in cases of threat to world peace the Security Council may assume exclusive jurisdiction over the dispute).

all the cases did not involve genuine competition between international judicial bodies (the body of experts under the Lausanne Protocol were to perform appraisal work and not a judicial task; the Germano-Polish arbitral tribunals essentially applied domestic law and did not belong to the international legal order; and the Council of the League was a political organ). Furthermore, the holdings in the *Chorzów Factory* and the *Mavrommatis* cases seem to have been made in *obiter dicta*. Consequently, contemporary international courts and tribunals might not feel bound to apply the forum-selection rules pronounced by the PCIJ. This might be particularly the case with courts and tribunals other than the PCIJ/ICJ that are subject to unique jurisdictional regimes designed to promote a specific set of policies, which might justify retention of their jurisdiction even when faced with what might seem to be a competing exclusive jurisdiction clause.[19]

## II. The *Klöckner* case

One ICSID case, *Klöckner v. Cameroon*, supports the contention that courts operating under specific treaty regimes might not always respect choice of forum agreements concluded by the parties. In this case, the arbitral tribunal refrained from giving effect to an arbitration clause referring certain investment disputes to ICC arbitration, in derogation from an earlier-in-time agreement between the parties that referred all investment-related questions to ICSID.[20] Although the Tribunal supported its decision to ignore the specific clause in its inconclusive language (which did not explicitly preclude the jurisdiction of ICSID) and on the principle of estoppel, it seems as if it was principally guided by general policy considerations. The relevant policy embraced by the Tribunal was that the parties should not be easily deprived of the protections afforded by ICSID to their rights and interests, and that they should be spared from being compelled to engage in 'piecemeal litigation' of their reciprocal legal claims.[21]

[19] Cf. Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Opinion of 1 Oct. 1999, paras. 54–64 available at <http://corteidh.or.cr/Serie_A_ing/Serie_A_16_ing.doc> (last visited on 20 Nov. 2002) (the interest of parties to the American human rights system in seeking legal guidance justifies the exercise of the Court's advisory jurisdiction despite the pendency of related proceedings before the ICJ).

[20] *Klöckner Industrie-Analgen GmbH v. Cameroon*, 2 ICSID Rep. 3, 13–14, 17–18 (1983).

[21] *Annulment Decision of the Ad Hoc Committee on the Arbitration Between Klöckner Industrie-Analgen GmbH and Cameroon*, 2 ICSID Rep. 95, 115 (1985) (Decision on Annulment); Christoph Schreuer, 'Commentary on the ICSID Convention', 12 *ICSID Rev., FILJ* (1997) 59, 166. Cf. Case ARB/94/2, *Tradex Hellas SA v. Albania*, Decision of 24 Sep. 1996, para. 192, available at <http://www.worldbank.org/icsid/cases/tradex/decision.pdf> (last visited on 14 Nov. 2002) (decision on jurisdiction) at para. 192 ('it is more plausible to the Tribunal to interpret the legislative intention of Art. 9 to the effect that after the coming into force of the 1993 law the submission of a foreign investment dispute to ICSID arbitration should cover also disputes that started earlier, rather than both the investor and Albania having possibly to engage

This somewhat controversial decision (one of the arbitrators dissented;[22] and the *ad hoc* review Committee expressed some doubts over its soundness[23]) finds some support, however, in the *dicta* of the PCIJ in the *Electricity Company of Sofia* case, where the Court suggested that there should be a presumption that new jurisdictional arrangements were not designed to restrict pre-existing ones.[24] Still, it stands in marked contrast to the *Mavrommatis* judgment, where a specific later-in-time jurisdictional agreement was deemed to exclude a general jurisdiction-conferring instrument.[25] Further, unlike the PCIJ Germano-Polish judgments, which could be distinguished from *Mavrommatis* on the basis that they did not involve genuine jurisdictional competition, the competing cases in *Klöckner* involved the same parties, the same issues, and tribunals of the same legal order. Thus the *Klöckner* case can be regarded as supportive of the view that idiosyncratic policies of specific international regimes might in practice override the application of 'ordinary' international law governing forum selection.

## III. The law of the sea cases

Adding to the confusion in this field of law are two decisions rendered in disputes brought to UNCLOS dispute-settlement bodies. In the *Southern Bluefin Tuna* case (2000), an arbitral tribunal resorted to a line of reasoning similar to that adopted by the PCIJ in the *Mavrommatis* case (without specifically relying thereupon)[26] and declined jurisdiction in favour of a more specific dispute-settlement arrangement.

The case involved a dispute over fishing practices between Australia and New Zealand on one hand, and Japan on the other hand, and was referred to

in two parallel arbitration procedures, under the UNCITRAL Rules [in accordance with the law which was in force before 1993] and under the ICSID Rules, regarding the same investment').

[22] *Klöckner*, 2 ICSID Rep. at 92–3.

[23] Ibid. at 115 (decision on annulment).

[24] *Electricity Co. of Sofia* 1939 PCIJ (Ser. A/B) No. 77, at 76 ('... the multiplicity of agreements accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain... There is, however, no justification for holding that in [concluding additional jurisdictional agreements, the parties] intended to weaken the obligations which they had previously entered into with a similar purpose'). See also Hugh Thirlway, 'The Proliferation of International Judicial Organs: Institutional and substantive questions—The International Court of Justice and other international courts' in *Proliferation of International Organizations* (Niels M. Blokker and Henry G. Schermers, eds., 2001) 251, 268.

[25] However, a subsequent ICSID tribunal had affirmed, *obiter dicta*, that a specific arbitration agreement between disputing parties would normally override a bilateral jurisdiction-conferring treaty, and that such a bilateral treaty would override a multilateral jurisdiction-conferring treaty. *Southern Pacific Properties (Middle East) Ltd. v. Egypt* 3 ICSID Rep. 131, 149–50 (1988).

[26] Japan, the respondent party, did however rely in its pleadings upon the *Mavrommatis* case. *Southern Bluefin Tuna* (*Australia* and *New Zealand v. Japan*), Memorial on Jurisdiction by Japan, 11 Feb. 2000, para. 122, available at <http://www.worldbank.org/icsid/bluefintuna/memorialonjurisdictionofjapan.PDF> (last visited on 12 Aug. 2002).

an arbitration tribunal constituted in pursuance to Article 287 of UNCLOS. Japan, however, objected to the jurisdiction of the tribunal, arguing that the dispute should not be addressed under UNCLOS, but rather in pursuance to specific dispute-settlement procedure provisions (of a diplomatic nature) found in a regional fisheries agreement in force between the parties. The tribunal, by a majority of four to one, accepted the Japanese position and held that, by virtue of Article 281, one should construe the specific dispute-settlement arrangements found in the regional agreement as an implicit agreement to override the general dispute-settlement provisions of UNCLOS.[27] This notwithstanding the fact that the specific agreement, concluded long after the text of UNCLOS had been finalized (but before its entry into force) did not explicitly exclude the application of Part XV of UNCLOS.

Thus, unlike their counterparts in *Klöckner*, the arbitrators in the *Southern Bluefin Tuna* case refused to apply an interpretative presumption in favour of the intent of the parties to preserve procedural protections under a general treaty regime (i.e. UNCLOS). In fact, it seems that the arbitral tribunal felt more obliged to uphold what it viewed as the real 'meeting of minds' of the parties than to promote the overarching goals of the UNCLOS treaty, which includes the mandatory settlement of almost all maritime disputes.[28]

It could be maintained that the *Southern Bluefin Tuna* decision has far-reaching implications. First, it resulted in the dismissal of the tribunal's entire jurisdiction over the case, despite significant differences in the scope of obligations of the parties under the competing instruments, to which the tribunal had alluded.[29] Although the tribunal explained its decision through the artificiality of maintaining that there were separate disputes under the two instruments,[30] one might wonder, in the light of decisions of the HRC[31] and other international tribunals[32] on competition involving the application of legal stand-

[27] *Southern Bluefin Tuna* (*Australia and New Zealand v. Japan*) Award of 4 Aug. 2000 (Jurisdiction and Admissibility) 39 ILM (2000) 1359, 1389–90.

[28] Ibid., at 1399 (Separate Opinion by Justice Keith); Alan E. Boyle, 'Settlement of Disputes Relating to the Law of the Sea and the Environment' in International Justice (Kalliopi Koufa, ed., 1997) 295, 305; Robert A. Jennings, 'A New Look at the Place of the Adjudication in International Relations Today' 1 *Collected Writings* (1998) 450, 460; Myron H. Nordquist *et al* (eds.) 5 *United Nations Convention on the Law of the Sea: A commentary* (1988) 5, 9–10; Bernard H. Oxman, 'Complementary Agreements and Compulsory Jurisdiction' 95 *AJIL* 277, 285–7. Oxman analyzes the two competing trends as a rivalry between alternative conceptions of UNCLOS as a substantive legal framework, containing compulsory jurisdiction as a cornerstone of a new legal order, or a procedural framework, leaving room for flexible political arrangements relating to specific issues. Ibid. at 279–81.

[29] *Southern Bluefin Tuna* (2000), 39 ILM at 1388.

[30] Ibid. at para. 54.

[31] Comm. 44/1990, *Casanovas v. France* UN GAOR, 49th Sess., Supp. 40, at 131, 133–4 (Report of the HRC, 1994); Human Rights Committee, General Comment 24 (52), para. 14, UN Doc. CCPR/C/21/Rev. 1/Add. 6 (1994).

[32] Cf. *Military and Paramilitary Activities*, 1986 ICJ at 93–4 (a reservation precluding the application of the UN Charter does not preclude the application of the same standards, as enshrined in custom). Applying this method of reasoning to the *Southern Bluefin Tuna* case, it is

ards originating from different sources of law, whether this reasoning is persuasive. This is particularly because an unambiguous adoption of the tribunal's line of reasoning might result in denial of jurisdiction in many cases where parallel, but not identical, specific legal regimes are available (e.g. in competition cases between the WTO and regional trade arrangements).

Further, while the tribunal may be right in holding that there were no indications that the parties intended to refer to the compulsory jurisdiction of UNCLOS judicial bodies disputes over their new sets of rights and obligations under the regional fisheries agreement, there was equally no indication that the parties intended to exclude through the conclusion of an additional agreement, designed to increase and not decrease the normative density of their relations, judicial review of their pre-existing general rights and obligations under UNCLOS.[33]

Finally, the outcome of the *Southern Bluefin Tuna* case is particularly troubling since the 'specific' procedures that blocked adjudication before UNCLOS judicial bodies were consent-based methods of dispute settlement (which are applicable in any international dispute, even in the absence of an agreement) that have previously failed to resolve the dispute at hand. Thus it is doubtful whether the *Klöckner* approach of reluctance to attribute to the parties willingness to waive significant procedural guarantees (applied in *Klöckner* with regard to competition between two adjudicative mechanisms, and controlling *a fortiori* competition between judicial and non-judicial procedures!) would not have been more appropriate. This proposition also finds support in the PCIJ case-law on the non-preclusive effect of jurisdictional agreements referring disputes to political settlement upon the jurisdiction of judicial bodies. Finally, it has been shown above that the decision might be viewed as incompatible with the spirit and language of Articles 281–2 of UNCLOS.[34]

At the same time, one might wonder if the approach adopted by ITLOS on a similar question in the recent *Mox Plant* case (2001) did not go too far in the other direction.[35] In that case it was alleged by the UK (the respondent) that UNCLOS procedures should give way to alternative procedures under an environmental treaty (OSPAR) which were already pending at the time, and to potential procedures under the Euratom or EC Treaties. However, the tribunal refused to decline jurisdiction and held that proceedings before the

the position of the present author that the tribunal could have held that while the regional fisheries agreement bars reliance upon it before external judicial bodies, there is nothing to preclude such bodies from applying the more or less parallel standards introduced in UNCLOS.

[33] However, technically speaking, the regional fisheries agreement is an earlier-in-time agreement, since it entered into force before UNCLOS.

[34] See *supra* Chapter 5. For additional criticism on the potential adverse effects of the *Southern Bluefin Tuna* award see Oxman, *supra* note 28, at 295–310. Oxman persusively argues that, taken at face value, the award might lead to the removal of numerous disputes from the scope of review of the UNCLOS dispute-settlement machinery.

[35] *Mox Plant* (*Ireland v. UK*) Order of 3 Dec. 2001, 41 ILM (2002) 405, 413.

various alternative fora did not involve the same legal issues. Furthermore, it suggested that even had the provisions under the non-UNCLOS instruments been similarly or identically phrased to their counterparts in UNCLOS, there would still have been no jurisdictional competition, by virtue of the diverging legal contexts and policy agendas of the different treaty regimes.[36] Hence the fact that alternative instruments designated dispute-settlement procedures other than UNCLOS procedures for certain law of the sea disputes was viewed as immaterial (despite the binding nature of these procedures).

The construction embraced by ITLOS implies that even an exclusive jurisdiction clause found in an instrument other than UNCLOS (such as the EC Treaty) regulating the same law of the sea issues addressed by UNCLOS would not have the effect of blocking the operation of the procedures of UNCLOS, because of differences in the nature of the dispute (unless the parties explicitly agree to block UNCLOS proceedings, in conformity with Article 281 of UNCLOS). Certainly, the tribunal, in contrast with the arbitral tribunal in the *Southern Bluefin Tuna* case, seemed to take the view that the exclusiveness of a non-UNCLOS instrument can never be presumed.[37] Unfortunately, this overly restrictive reading of what constitutes jurisdictional competition (perhaps motivated by a pro-'application of UNCLOS' bias on the part of ITLOS)[38] has the ordinary effect of upholding the jurisdiction of UNCLOS judicial bodies in a way which conflicts with common perceptions pertaining to the definition of competing procedures,[39] and in a manner that renders the text of Article 282 of UNCLOS (the residual jurisdiction clause), a cornerstone of Part XV of UNCLOS,[40] largely meaningless.[41] Indeed some ITLOS judges have expressed doubts, in their separate opinions, over the soundness of the tribunal's overly restrictive approach to jurisdictional competition.[42]

[36] Ibid. ('even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention . . . [T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*').

[37] This was specifically asserted in one of the Separate Opinions attached to the decision. *Mox Plant*, 41 ILM at 427 (Separate Opinion of Judge Wolfrum).

[38] See e.g. Oxman, *supra* note 28, at 288.

[39] See *supra* Chapter 1.

[40] See *supra* Chapter 5.

[41] This is because only agreements to refer disputes over UNCLOS provisions, *per se*, to alternative fora would override the jurisdictrion of UNCLOS dispute-settlement bodies. However, most of these agreements would already bar litigation before UNCLOS bodies, by virtue of Art. 281. *Mox Plant*, 41 ILM at 432 (Separate Opinion of Judge Jesus). But see ibid. at 427 (Separate Opinion of Judge Wolfrum), ibid. at 430 (Separate Opinion of Judge Treves).

[42] See Ibid., at 419, 423, 432 (Separate Opinions of Vice-President Nelson, Judge Anderson, and Judge Jesus).

In sum, it looks as if the case-law on the allocation of jurisdiction between competing international courts and tribunals is too sporadic and inconsistent to enable one to draw definitive conclusions of general applicability. An exception to this proposition is found in the willingness of international courts and tribunals to decline jurisdiction when faced with an *explicit* clause, entrusting a different forum with exclusive jurisdiction over the *same* dispute (a position which seems to be supported by all of the surveyed cases). Other than that, in the absence of clear guidance on the issue, it is only possible to assert that traditional forum-selection rules found in domestic legal systems (e.g. *forum non conveniens*) have not been incorporated into the practice of international courts and tribunals. Still, other general principles of law, which are reviewed below (e.g. abuse of right and comity) might offer additional relevant norms, which could help to address forum shopping between international judicial bodies.

### *B. Parallel proceedings*

#### I. The PCIJ cases

The question of litispendence has also been addressed only seldom by international courts and tribunals and the most notable allusion to it is found in a cursory remark made by the PCIJ in its decision on jurisdiction in the *Certain German Interests* case. In that case Germany brought proceedings before the Court against Poland on account of acts taken by the latter which amounted, in Germany's view, to illegal taking of property owned by German citizens. At the same time, a similar dispute over essentially the same facts was pending before the Germano-Polish Mixed Arbitral Tribunal. Consequently Poland objected to the jurisdiction of the Court on grounds of litispendence. In response the German government argued that there had been no precedent for applying the litispendence rule in international law,[43] and that in any case the traditional conditions for the application of the rule, as established under domestic law—same parties, same nature of dispute and same object of proceedings—had not been met in the case. This is because the proceedings against Poland before the Mixed Arbitral Tribunal were brought by individual litigants and not by the German state, and because the two sets of proceedings were based on different sources of law (the arbitration concerned alleged violation of private law rights, while the PCIJ proceedings involved the interpretation of an international treaty).[44]

[43] *Certain German Interests* 1925 PCIJ (Ser. C) No. 9-I, at 82 [oral pleadings by Mr. Kaufmann (Germany)] ('*Je ne veux pas discuter ici le point de savoir si et dans quel sens l'exceptio litis pendens est admissible en droit international. Je n'ai d'ailleurs trouvé dans la doctrine aucun passage qui traite ce problème*').

[44] Ibid. at 82–3 [oral pleadings by Mr. Kaufmann (Germany)].

The Court did not deem it necessary to make a general ruling on the applicability of litispendence in international law. Rather, it accepted the German position that even if, *arguendo*, the doctrine were to be relied upon, the conditions for its application had not been satisfied since the competing cases involved different parties and different legal issues.[45] The Court also expressed the view that the apparent differences between the nature of the Mixed Tribunal, which operated in the sphere of domestic private law, and the PCIJ, which operated in the international plane, could not create genuine jurisdictional competition.[46] As discussed below, this last holding is of particular significance to the present study since it renders courts and tribunals operating on a legal basis other than international law incapable of entering into genuine jurisdictional competition with courts and tribunals operating under international law proper.

In the *Chorzów Factory* case, which presented a similar set of facts to the *Certain German Interests* case, the Court dismissed the Polish objections to jurisdiction without invoking the *lis alibi pendens* rule.[47] Instead it alluded to the principle of estoppel by conduct as a bar against the Polish position. Still, the Court observed that the different remedies available at each of the two competing judicial bodies indicated a lack of genuine jurisdictional overlap.[48] In other words, it seems that the Court was of the view that, even had the *lis alibi pendens* rule been applicable, in principle, one or more of the conditions for its application (most notably, the 'same object') had not been fulfilled.

Despite the Court's willingness to examine the conditions for the application of the litispendence rule, the PCIJ (and the ICJ) have so far refrained from issuing a definite ruling on whether international law recognizes this rule. Thus, the case-law of the World Court neither supports nor repudiates the application of the *lis alibi pendens* rule in the relations between international courts and tribunals. This stands in contrast to the attitude adopted towards the theory of connexity (i.e. that related proceedings should be joined before one tribunal) which one PCIJ judge held to be inapplicable under international law,[49] and to the clear practice supporting the

[45] *Certain German Interests* 1925 PCIJ (Ser. A) No. 6, at 19–20.

[46] This decision seems to fall in line with the aforementioned *Rights of Minorities* case, where it was held that differences in nature between competing procedures would create a presumption against jurisdictional deference by a competent forum. *Rights of Minorities* 1928 PCIJ (Ser. A) No. 12, at 23. Cf. *Anglo-Iranian Oil* 1951 ICJ 89, 97 (Interim Measures) (Dissenting Opinions of Judges Winiarski and Pasha) ('these [Mixed Arbitral] Tribunals, as joint organs of the two States, differ both as to their character and as to their procedure from an international tribunal... and there is nothing to be learned from their precedents').

[47] *Chorzów Factory* 1927 PCIJ (Ser. C) No. 13-I, at 154–5 (Preliminary objections of the Polish Government); ibid. at 50 [oral pleadings by Mr. Politis (Poland)].

[48] *Chorzów Factory* 1927 PCIJ (Ser. A) No. 9, at 31–2. The Court also insinuated that the parties in the two competing proceedings could not be regarded as the same. Ibid. at 26.

[49] *SS Lotus* (*France v. Turkey*) 1927 PCIJ (Ser. A) No. 9, at 48 (Dissenting Opinion of Judge Weiss). But see *Holiday Inns SA, Occidental Petroleum Corporation et al. v. Government of*

inapplicability of the litispendence rule in the relations between the PCIJ/ICJ, on one hand, and the political organs of the League of Nations or the UN, on the other hand.[50]

## II. Jurisprudence of other international courts and tribunals

The jurisprudence of international courts and tribunals other than the PCIJ/ICJ concerning the application of the *lis alibi pendens* rule, in the absence of explicit treaty language, is inconclusive. Indeed, in a recent case before ITLOS, one judge, in a Separate Opinion, expressed the view that the legal status of the litispendence doctrine remains an open matter.[51]

However, some authorities demonstrate reluctance to recognize the *lis alibi pendens* rule. In the late 1990s a question of interpretation of the Vienna Convention on Consular Relations had arisen in two separate sets of proceedings before the ICJ[52] and was also referred for advisory opinion to the I/A CHR by Mexico (which was not party to any of the ICJ proceedings). The US urged the I/A CHR to refrain from taking the case, *inter alia* because of the pendency of similar proceedings before the ICJ. Although the traditional conditions for application of the *lis alibi pendens* rule had clearly not been met (most obviously, lack of identity of parties) the Court did not allude to this in its decision to hear the case. Instead it held that the parties to the I/A HR Convention have a 'general interest' that the Court will exercise its advisory functions and provide advice to states parties participating in the regime. This general interest cannot be restrained, according to the Court, by parallel contentious proceedings before the ICJ.[53] This line of reasoning

*Morocco* (unpublished report), discussed in Schreuer, *supra* note 21, at 172–3,179 (the general unity of the investment operation justifies the consolidating of all related claims before the ICSID tribunal).

[50] *United States Diplomatic and Consular Staff in Tehran* (*US v. Iran*) 1980 ICJ 3, 22 ('Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court'); *Military and Paramilitary Activities* 1984 ICJ at 435 ('The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events'). Jurisdictional concurrency was also permitted in the *Aegean Sea* dispute. *Aegean Sea Continental Shelf* (*Greece v. Turkey*) 1976 ICJ 3 (Interim Measures); SC Res. 395, UN SCOR 31st Sess., 1953rd mtg. at 15, UN Doc. S/INF/32 (1976).

[51] *Mox Plant*, 41 ILM 430–1 (Separate Opinion of Judge Treves) ('The existence and content of a customary law rule or of a general principle concerning the consequences of litispendence as well as considerations of economy of legal activity and of comity between courts and tribunals might be discussed in such situation [of multiple proceedings]').

[52] *Vienna Convention on Consular Relations (Breard)* (*Paraguay v. US*) 1998 ICJ 248 (Provisional Measures); *La Grand* (*Germany v. US*) 1999 ICJ 9 (Provisional Measures).

[53] *Consular Assistance*, *supra* note 19, at paras. 54–65.

would suggest that even had the *lis alibi pendens* rule been applicable, it ought to be balanced against the interests of the parties to the dispute and the overarching goals of the treaty regimes under which the competing judicial bodies operate.

In a few other cases, international courts and tribunals have rejected attempts to rely upon the *lis alibi pendens* rule in relation to proceedings conducted concurrently with domestic judicial fora. In several inter-war cases decided by international mixed arbitral tribunals, it was held that the *lis alibi pendens* rule could not preclude concurrent proceedings before judicial bodies of different 'quality'.[54] Thus, it can be maintained, in the light of these cases and the *dicta* found in the *Certain German Interests* and other PCIJ cases, that there is ample support in the international jurisprudence for the proposition that the *lis alibi pendens* rule should not preclude parallel proceedings before tribunals of different legal orders.[55]

This last proposition finds some additional support in a recent ITLOS case concerning the prompt release of a vessel. In the *Camouco* case (2000)[56] France, the respondent, invoked the *lis alibi pendens* rule and asked the Tribunal to decline jurisdiction on account of proceedings designed to release the same vessel that were already pending before domestic French courts.[57] The Tribunal rejected the French motion and held that it would be illogical to construe the relevant provisions of UNCLOS in a manner which would condition the ability of the Tribunal to issue effective remedies on the state of proceedings before national courts.

While the outcome of the case can serve as a reaffirmation of the principle that judicial bodies belonging to different legal orders cannot be deemed to compete with each other, the reasoning offered by the Tribunal suggests that the decisive factor in the decision was the interpretative weight given to the strict time limits under Article 292 of UNCLOS as an implicit bar against the application of the litispendence rule.

[54] *Caire (France) v. Mexico* 5 RIAA 516, 523–5 (1929); *The Santa Rosa Mining Co. (Ltd.) (UK) v. Mexico* 5 RIAA 252, 252 (1931). Two other such cases are *Backer v. Philippopli* (Bulgarian-Belgian Mixed Arbitral Commission) and *Battus v. Bulgaria* (Franco-Bulgarian Mixed Arbitral Commission), both surveyed in Jackson H. Ralston, *The Law and Procedure of International Tribunals* (1936) 24–6. Further, the PCIJ in *Certain German Interests* specifically stated that it could also not be deemed to be in competition with a Polish domestic tribunal. *Certain German Interests* 1925 PCIJ (Ser. A) No. 6, at 20.

[55] Giorgos Ténékidès, 'L'Exception de Litispendance devant les Organismes Internationaux' XXXVI *Revue Générale de Droit International Public* (3rd Ser., 1929) 502, 505–6; Mohieddien Mabrouk, *Les Exceptions De Procédure Devant Les Juridictions Internationales* (1966) 88.

[56] *Camouco* (*Panama v. France*) 39 ILM (2000) 666, 678.

[57] See *Camouco*, verbatim record of 27 Jan. 2000 [pleadings by Mr. Dobbel (France)] available at <http://www.itlos.org/case_documents/2001/document_en_118.pdf> (last visited on 10 Oct. 2000).

## III. The *Pyramids* case

Another case in which the relations between parallel proceedings before international and national judicial bodies were reviewed involved proceedings before an ICSID arbitral tribunal. In *SPP v. Egypt* (the *Pyramids* case) a motion requesting the tribunal to decline jurisdiction by reason of the pendency of domestic proceedings was rejected. Furthermore, the tribunal explicitly stated that it did not consider itself bound by a rule of litispendence: 'When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction'.[58]

Since the case involved competition between an international tribunal and a domestic court, the decision to reject the litispendence objection seems to be consistent with earlier case-law on the matter. However, there is nothing in the *dicta* of the tribunal to indicate that the tribunal limited its view to that particular category of jurisdictional competition only, and it could be cited in support of the view that international law does not recognize the *lis alibi pendens* rule at all.

It is interesting to note that an earlier ICSID Tribunal, which confronted a similar motion in circumstances analogous with the *Pyramids* case, did not rule out the potential applicability of the *lis alibi pendens* rule, but simply expressed the view that in the specific circumstances of the case before it the conditions for application of the rule had not been met.[59] Furthermore, a 1993 ICSID Model Clause prepared for use in arbitration agreements explicitly embraced the *lis alibi pendens* rule in the relations between ICSID and other alternative proceedings.[60]

Finally, it should be noted that the ECJ has on a few occasions applied a *lis pendens* rule (without reliance on any treaty language) with the purpose of precluding attempts to bring multiple proceedings before the ECJ.[61] However, one might argue that these cases are of limited relevance to the present research since they do not deal with competition between different courts or tribunals, but rather with regulation of the conduct of a single dispute before a single judicial body.[62] In these circumstances special considerations of judicial economy and the need to preserve a high level of harmonization within the specific legal subsystem may support a stricter rule against multiple proceedings.

[58] *Southern Pacific*, 3 ICSID Rep. at 129.
[59] *Benvenuti and Bonfat Srl. v. Congo* 1 ICSID Rep. 330, 340 (1980).
[60] ICSID Model Clauses, clause 12, 4 ICSID Rep. 357 (1993).
[61] See e.g. Cases 172, 226/83, *Hoogovens Groep v. Commission* [1985] ECR 2843, 2846; Cases 358/85, 51/86, *France v. Parliament* [1988] ECR 4846, 4849–50.
[62] K.P.E. Lasok, *The European Court of Justice: Practice and procedure* (2nd ed., 1994) 218–19.

In sum, it looks as if existing case-law on the question of *lis alibi pendens* is also too scarce and non-definitive to establish the existence of such a general rule or principle in international law, in the relations between two international courts and tribunals.[63] Nonetheless, as was demonstrated in Part II of this book, one can make a plausible case that *lis alibi pendens* may qualify as a general principle of law, recognized by most legal systems, at least with respect to intra-systematic jurisdictional competition. It is therefore arguable that, given the strong policy arguments in favour of a rule mitigating parallel litigation, including the need to avoid the risk of conflicting judgments over the same dispute, international courts and tribunals should apply the *lis alibi pendens* rule.[64] As is shown below, this conclusion is also supported by other general principles of law, such as the *abus de droit* doctrine.

While it is not clear whether the *lis alibi pendens* rule governs the relations between international judicial bodies, there does seem to be support for the proposition that no litispendence can take place in the relations between international courts and tribunals, on one hand, and other judicial bodies that do not belong to the international legal order proper, on the other hand.[65] This might imply that courts and tribunals which typically apply a body of law other than international law (e.g. ICSID, NAFTA Chapter 19 binational tribunals, and the International Chamber of Commerce) cannot compete with ordinary international judicial bodies applying, as a rule, international law. Such conclusion conforms to the definition of competing disputes, as disputes involving the same legal claims.[66] It is also consistent with the observation that one of the principal justifications for the application of jurisdiction-regulating rules in cases of jurisdictional competition is the promotion of systematic coherence on the normative level and the avoidance of conflicting judgments. Inconsistent decisions of different judicial bodies, grounded upon different legal bases, do not represent a significant threat to the integrity of international law, and it is therefore not critical to prevent them, from a systematic point of view (although the balance of conveniences of the parties might still support some regulation of concurrent proceedings). In contrast, it looks as if competition involving international courts and tribunals coming from different international subsystems should

[63] See Ciobanu, *supra* note 3, at 219, 225. The absence of a clear doctrine governing the matter was also noted by a 1929 Franco-Mexican Mixed Arbitral Tribunal, which had reviewed in *obiter dicta* the question of parallel proceedings between two international judicial bodies. *Caire* 5 RIAA at 523 ('*La pratique internationale en a fait déjà une expérience assez fréquente, qui forcera la doctrine de droit des gens à lui frayer un chemin au travers de la forêt encore vierge de ce domaine inexplorée du droit international*').

[64] For support see Megalos A. Caloyanni, 'L'Organisation de la Cour Permanente de Justice et son Avenir' 38 *Recueil des Cours* (1931) 651, 685.

[65] Salvatore Messina, 'Les Tribunaux Mixtes et les Rapports Interjuridictionnels en Egypte' 52 *Receuil des Cours* (1932) 363, 470–1; George Schwarzenberger, 1 *International Law* (3rd ed., 1957) 142.

[66] See *supra*, Chapter 1.

be viewed as competition between courts coming from the same legal (normative) order, with regard to which the litispendence rule ought to apply.

## *C.* Res judicata

### I. The legal status of the rule

*Res judicata* (or the principle of finality) has long been considered a well established rule of international law.[67] The legally binding nature of the rule can be attributed to the centuries-old practice of attributing a 'final and binding' effect to arbitral awards and other international judicial decisions and to the practice of recognizing the validity of judgments as manifested in numerous international instruments, including the constitutive instruments of most major international courts or tribunals.[68] Furthermore, one can identify a general tendency on the part of states to comply with judicial decisions (which has sometimes been described as a 'culture of compliance'),[69] or at least not to openly challenge them.[70] The existence of such widespread practice and concomitant sense of legal obligation has been noted in the writing of jurists[71] and in a number of judicial decisions.[72] All of these are strong indications that the two conditions required for conferring the status of an international custom upon the *res judicata* rule—extensive and consistent practice over time[73] and *opinio juris*—have been satisfied.

[67] *Trail Smelter* (*US v. Canada*) 3 RIAA 1907 (1941); *Commentaire sur le Projet de Convention sur la Procédure Arbitrale adopté par la Commission du Droit International à sa Cinquième Session* (ONU Secrétariat, 1955) 106; Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' 8 *African Journal of International and Comparative Law* (1996) 38–50; Schreuer, *supra* note 42, at 166–7.

[68] See *supra* Chapter 5, at note 182.

[69] Louis Henkin, *International Law: Politics and values* (1995) 49–51.

[70] There have been however a few notable instances of non-compliance. Stephen M. Schwebel, 'Relations Between the International Court of Justice and the United Nations' in *Justice in International Law* (1994) 14, 18.

[71] See e.g. Malcolm N. Shaw, *International Law* (4th ed. 1997) 80; Philippe Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes' in *The International Court of Justice: Its future role after fifty years* (A.S. Muller, D. Raic, and J.M. Thuránszky, eds., 1997) 83, 100–5.

[72] The principle of finality was reaffirmed by several decisions of the World Court. *Société Commerciale de Belgique* (*Belgium v. Greece*) 1939 PCIJ (Ser. A/B) No. 78, at 174; *Polish Postal Service in Danzig* 1925 PCIJ (Ser B.) No. 11, at 30; *Interpretation of Judgments Nos. 7 and 8 concerning the case of the Factory at Chorzów* (*Germany v. Poland*) 1927 PCIJ (Ser. A) No. 11, at 21; *Factory at Chorzów* 1927 PCIJ (Ser. A) No. 17, at 75 (Merits) (Dissenting Opinion of Judge Ehrlich). Similar commitment to the principle of finality can be found in numerous arbitration awards. *Trail Smelter* 3 RIAA, at 1950; *Orinoco Steamship Co.* (*US v. Venezuela*) 11 RIAA 227, 239 (1910); *Compagnie Générale de l'Orénoque* (*France v. Venezuela*) 10 RIAA 184, 276 (1905); *Pius Fund* (*US v. Mexico*) 9 RIAA 11, 12 (1902).

Additional support for the acceptance of the *res judicata* rule is found in the case-law of the European Court of Justice. Case C-281/89, *Italy v. Commission* [1991] ECR I-347, 363; Joined Cases 79 and 82/63, *Reynier v. Commission* [1964] ECR 259, 266.

[73] Oscar Schachter, *International Law in Theory and Practice* (1991) 12.

An alternative approach, advocated by some notable jurists, for establishing the legally binding status of the *res judicata* rule has been to characterize it as a general principle of law.[74] In fact, this possibility had been mentioned by the drafters of the PCIJ Statute, who gave the *res judicata* rule as an example of what may constitute a 'general principle of law' under Article 38 of the PCIJ Statute.[75] The review of national laws undertaken in Part II of this book confirms the ubiquitous nature of the principle of finality. Each of the surveyed legal systems applies the *res judicata* rule *vis-à-vis* judgments and arbitral awards rendered within the same system. In any event, either by virtue of custom or general principle of law, the *res judicata* rule should be regarded as a binding rule of law.

## II. Exceptions to the principle of finality

However, it is also well accepted that the principle of *res judicata* is not absolute and that there are instances in which a case decided by a court or tribunal can be reopened by the same or another judicial body. Bin Cheng in his seminal treatise on *General Principles of Law* listed seven potential grounds for annulling, revising, or setting aside a judgment of an international court or tribunal.[76] These are lack of competence, violation of the rule that no party should judge its own cause, violation of the right to be heard, fraud and corruption on the part of the tribunal, fraud on the part of the parties (or their witnesses),[77] manifest and essential error,[78] and fresh evidence.[79] Of these grounds, the sixth, manifest and essential error, seems to

[74] *Effect of Awards of the UN Administrative Tribunal* 1954 ICJ 47, 53; *Chorzów Factory* 1927 PCIJ (Ser. A) No. 13, at 27 (Interpretation) (Dissenting Opinion of Judge Anzilotti) ('It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "the general principles of law as recognized by civilized nations"... that case is assuredly the [case of *res judicata*]'; *Amco Asia, Pan American Development Ltd. v. Indonesia* 1 ICSID Rep. 543, 549 (1988) (resubmitted case); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 336; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (1999) 261.

[75] *Minutes of the Proceedings of the Advisory Committee of Jurists, with Annexes* (League of Nations, 1920) 335.

[76] Cheng, *supra* note 74, at 357–72; *Commentaire sur le Projet de Procédure Arbitrale*, *supra* note 67, at 107–11.

[77] *Leigh Valley Railroad Co. v. Germany* 8 RIAA 160, 190 (1933).

[78] *Drier v. Germany* 8 RIAA 127, 157–8 (1935); *Leigh Valley* 8 RIAA at 188; *Trail Smelter* 3 RIAA, at 1957.

[79] *Moore* (*US v. Mexico*) (1871), in John B. Moore, 2 *History and Digest of International Arbitrations to which the US has been a Party* (1898) 1357.

Revision of judgments on the grounds of the discovery of a new fact, unknown to the judicial body and to the party seeking revision at the time of judgment, is provided for in the constitutive instruments of most international courts and tribunals (usually on condition that no negligence on the part of the party seeking revision has taken place). See e.g. Statute of the International Court of Justice, 26 June 1945, Art. 61, XV UNCIO Doc. 355; The Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, Art. 55 in *The Hague Conventions and Declarations of 1899 and 1907* (James Brown Scott, ed., 2nd ed., 1915) 41; The Hague Conven-

be most controversial in legal writing and case-law, since unlike the other grounds, which primarily address procedural defects, it pertains to the merits of the judgment and amounts to a *de facto* right of appeal.[80] The lack of consensus as to the ability to reopen a judgment on the ground of material error of fact or law is reflected in the conspicuous absence of this stipulation from the lists of grounds for revision or setting aside of judgments found in the constitutive instruments of some international courts and tribunals.[81] As is shown below, attempts to reopen the merits of arbitral awards have been consistently resisted by the PCIJ and ICJ.[82] Therefore, it seems fair to argue that the sixth ground has failed to assume the level of consistency of practice and wide acceptability required in order to qualify as a customary norm of law, which constitutes an exception to the already established principle of finality. It is also apparent that under municipal law it is generally impossible to challenge the merits of an erroneous final judgment of a competent domestic court (except by way of an appeal) and that, similarly, most jurisdictions do not permit the review of alleged errors of fact or law found in foreign judgments or arbitral awards, of either domestic or foreign origin.[83] As a result, it can hardly be argued that recourse to the substantive review of judicial errors can be viewed as a general principle of law

## III. Case-law of the PCIJ and the ICJ

So far, the most prominent attempts to reopen disputes settled by one judicial body in proceedings initiated before another judicial or quasi-judicial forum have been three cases submitted to the PCIJ and the ICJ for judicial review. In effect, the Court was asked in these cases to relitigate issues already settled by arbitration. As a result these cases can be viewed, to a certain extent, as jurisdictional competition cases.

tion for the Pacific Settlement of International Disputes, 18 Oct. 1907, Art. 83 in *The Hague Convention*, ibid., at 41; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 Mar. 1965, Art. 51(1), 575 UNTS 159 [hereinafter 'ICSID Convention']; Protocol on the Statute of the Court of Justice of the European Economic Community, 17 Apr. 1957, Art. 41, 298 UNTS 147 [as amended by Council Decision 88/591, 1989 OJ (C 215) 1] [hereinafter 'EC Statute']; Rome Statute of the International Criminal Court, 17 July 1998, Art. 84(1), UN Doc. A/Conf.183/9, 37 ILM (1998) 999 [hereinafter 'ICC Statute'].

[80] *Trail Smelter* 3 RIAA, at 1957; *Commentaire sur le Projet de Procédure Arbitrale*, *supra* note 67, at 112.

[81] See e.g. North American Free Trade Agreement, 17 Dec. 1992, Art. 1904(13), 32 ILM (1993) 289 and 605 [herein after 'NAFTA']; ICSID Convention, Art. 52(1).

[82] See also Thirlway, *supra* note 24, at 273 (error of fact or law on the merits cannot serve as the basis of an award nullity motion).

[83] It is perhaps instructive that the 1958 New York Convention does not include substantive mistakes as a ground for refusal to recognize and enforce arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, Art. V, 330 UNTS 38 [hereinafter 'New York Convention']. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sep. 27, 1968, Art. 29, 1972 OJ (L 299) 32, 29 ILM (1990) 1413 [hereinafter 'Brussels Convention'].

In the *Société Belgique* case, the PCIJ was confronted with an attempt by Belgium to enforce an arbitral award rendered in favour of a Belgian corporation against Greece. Greece did not challenge the validity of the award but merely claimed that the award should be considered as part of its foreign debt (which could be repaid over a prolonged period of time). The Court commented that the arbitration clause between the Greek government and the Belgian company, in which the parties undertook that the award would be 'final and without appeal', barred the Court from reviewing it. As a result it could neither confirm nor annul the award, in part or in whole, under its existing mandate (which derives from a general agreement between Belgium and Greece to refer all their differences to the PCIJ).[84] In other words, the Court seemed to favour the view that when presented with an arbitral award, which the parties have explicitly designated as final and binding, it cannot re-examine the contents of the award without specific authorization from the parties.[85]

In his Hague Lectures, Michael Reisman was critical of part of the Court's decision and expressed the view that the Court was unjustified in rejecting the Greek position that it may seek postponement in the execution of the award, on grounds that it is inconsistent with the *res judicata* force of the award.[86] Indeed, the conflict over the method of execution of the award could have been regarded as a novel and distinct issue, separable from the dispute that had been the subject of the arbitration proceedings.

The first time the ICJ was directly confronted with an attempt to relitigate a case already settled by arbitration was in the *King of Spain* case,[87] which involved a challenge by Nicaragua to the validity of an arbitral award rendered in favour of Honduras over fifty years earlier. The Court rejected the challenge and held that Nicaragua was barred in the circumstances of the case from challenging an award whose validity it had recognized on several occasions.[88] However, the Court also held, *obiter dicta*, that even if there had not been estoppel by conduct, it would still have confirmed the award. According to the Court, since the award was not subject to an appeal it could not 'pronounce on whether the arbitrator's decision was right or wrong'.[89] Still, the Court held that it could decide whether the award was null and void, and it consequently examined the Nicaraguan claims that the

[84] *Société Belgique* 1939 PCIJ (Ser. A/B) No. 78, at 174.

[85] See W. Michael Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International arbitration and international adjudication' 258 *Recueil des Cours* (1996) 9, 244–5.

[86] *Société Belgique* 1939 PCIJ (Ser. A/B) No. 78, at 176; Reisman, *supra* note 270, at 247, 251–2.

[87] *Arbitral Award made by the King of Spain on 23 December 1906* (*Honduras v. Nicaragua*) 1960 ICJ 192.

[88] Ibid. at 213.

[89] Ibid. at 214. The Court also held that: '[t]he appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question'. Ibid. at 215–6.

arbitrator overstepped its authority and that there was an essential error in the award. Both contentions were rejected by the Court for lack of merit.

How can the position of the ICJ in the *King of Spain* case be explained in the light of the *Société Belgique* precedent, in which the PCIJ seemed to rule out the possibility of review of final awards? One possible explanation is the specific language used in the *compromis* between Nicaragua and Honduras, which authorized the Court to adjudicate the parties' 'disagreement with respect of the arbitral award'.[90] Such wording could suggest a waiver of some of the *res judicata* effects of the award. Another possible explanation is that the *Société Belgique* case, where no challenge against the validity of the award had been raised, cannot be regarded as a persuasive authority against the power of the Court to engage in supervision of arbitral decisions.

In any event, in the *King of Spain* the Court embraced a non-intrusive approach towards the award, acting as a court of cassation and not as a court of appeal *de novo*. This means that substantial parts of the arbitral process and the final award were altogether insulated from judicial review. Even when the Court reviewed the alleged grounds for nullity of the award it refrained from examining the arbitrator's discretion. This standard of review rendered the Court's perceived willingness to examine whether the award reveals an 'essential error' a largely meaningless gesture.

Reisman criticized the decision of the Court for failing to attribute sufficient *res judicata* weight to the award.[91] In his view, the Court should have refrained from re-examining challenges to the validity of the award, which had already been rejected by the arbitrator.[92] While Reisman seems to be right, in principle, since the *res judicata* rule can certainly encompass decisions on jurisdiction,[93] there is no reason to believe that the parties to arbitration cannot authorize the Court (or any other judicial body) to re-examine the validity of the award. As a result, if one were to construe the *compromis* in the *King of Spain* case as specific authorization to reopen a final award, the Court's approach seems to be justified. Under these conditions, the standard of review adopted by the Court seems to balance carefully the need to respect the agreement of the parties to submit to it differences concerning the validity of the award and the principle of finality.

The *1989 Arbitral Award* case[94] is perhaps the most important of the Court's decisions on the topic of successive proceedings. In that case, the

[90] *King of Spain* 1960 (I) ICJ Pleadings 28–9 (Annex 3) (Application instituting proceedings). But see Reisman, *supra* note 85, at 272 (argues that the *compromis* was too vague to constitute specific authorization).

[91] Reisman, *supra* note 85, at 285.

[92] Ibid. at 281–2. According to Reisman, the Court should not have reviewed this question anew, and instead it should have given decisive weight to the fact that the award settled this issue (though he concedes that this was an issue extrinsic to the award itself). Ibid. at 283.

[93] Cheng, *supra* note 74, at 353.

[94] *Arbitral Award of 31 July 1989* (*Guinea-Bissau v. Senegal*) 1991 ICJ 53.

jurisdiction of the ICJ to hear a challenge on the validity of the arbitral award was based on Article 36(2) of the Statute.[95] Still, the Court held that it may re-examine the award since the dispute before it, a dispute over the validity of the award, raised a separate issue from the original dispute referred to arbitration, a maritime delimitation dispute.[96]

Although the decision can be explained, in part, by the fact that the respondent state (Senegal) did not explicitly contest the Court's jurisdiction to review the validity of the award,[97] the reasoning employed by the ICJ seems to be of wide applicability, so as to enable it to review future challenges to any settled judicial decision, even without specific waiver of the effects of the *res judicata* rule (provided that the Court enjoys compulsory jurisdiction over the parties). As a result, one can assert that the *1989 Arbitral Award* case has in effect reversed the *dicta* of the PCIJ in the *Société Belgique* case.

On the question of the proper standard of judicial review, the ICJ adopted an approach generally similar to the one taken in the *King of Spain* case. The Court refused to explore a challenge made by Guinea-Bissau against the interpretation adopted by the arbitral tribunal regarding its powers under the arbitration *compromis*, and noted that it could not review *de novo* the decision of the arbitrators: 'By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction'.[98] It should be noted that some of the judges in the case appended to the judgment separate or dissenting opinions indicating willingness to engage in a more intrusive review of the arbitral award.[99]

[95] The fact that Guinea-Bissau, the applicant state, had made the optional clause declaration only 16 days before presenting the claim underlines the potential for abuse of the principle of finality if the Court were to adopt an excessively intrusive approach. Interestingly enough, Senegal could have, but failed to object to the Court's jurisdiction on the basis of its 1985 optional clause declaration that excluded from the jurisdiction of the Court disputes 'in regard to which the parties have agreed to have recourse to some other method of settlement'. Declaration of Senegal under Art. 36(2) of the ICJ Statute, 1984–85 ICJ YB 93–4 (1985). Arguably, this *electa una via* reservation could block adjudication of the merits of the dispute before the ICJ by virtue of the prior resort to arbitration.

[96] *1989 Arbitral Award* 1991 ICJ at 62.

[97] Ibid. at 80 (declaration by Judge Mbaye).

[98] Ibid. at 69.

[99] Ibid. at 77 (Declaration by Judge Tarassov); ibid. at 92 (Separate Opinion of Judge Lachs); ibid. at 106, 112–3 (Separate Opinion by Judge Shahabuddeen) (advocating a potentially more intrusive standard of review of decisions concerning the arbitral tribunal's competence—a showing of a compelling, clear and substantial error, as opposed to the standard set by the majority—manifest breach of competence); ibid. at 120, 124 (Joint Dissenting Opinion by Judges Aguilar Mawdsley and Ranjeva); ibid. at 131 (Dissenting Opinion of Judge Weeramantry). Reisman points out that two other majority judges also resorted, in effect, to appellate-style examination of the award. Reisman, *supra* note 85, at 355–6.

The case-law of the PCIJ/ICJ on the relationship between the court and arbitral awards is important to the present study. It establishes the proposition that an agreement to settle a dispute in a final and binding manner by way of arbitration will be respected, as a rule, by another tribunal. Indeed, the Court has regarded itself unable to re-adjudicate the merits of a case previously settled by way of arbitration (in the absence of specific authorization by the parties).[100] While the Court has tended to be show greater willingness to exercise jurisdiction in disputes over the validity of the award (which it now views as separate from the underlying conflict) it has construed its position as that of a court of cassation entrusted with limited powers of review, and not as an appellate instance with power to review the merits of the dispute *de novo*.[101] This outcome strongly endorses an international rule of *res judicata*, which prescribes that international courts and tribunals must give legal effect to decisions of other international tribunals. However, as mentioned above, this rule has a few exceptions and a competent court or tribunal may review some alleged grounds for the invalidity of a 'final' decision, provided that it will apply a non-intrusive standard of review.

In a similar manner, it is conceivable, on the basis of the *1989 Arbitral Award* ruling, that the ICJ might be willing to review the regularity of conduct of proceedings conducted in parallel to ICJ proceedings, even while they are still pending before the competing forum (e.g. a legal challenge against the competing forum's decision to exercise jurisdiction). Such a request for review of an interim decision would qualify under the *1989 Arbitral Award* as a question separate from the substantive dispute referred to arbitration, and thus not barred by rules designed to abate multiple litigation of the 'same matter'. Still, as a matter of judicial economy and comity it is arguable that this procedural path is extremely undesirable.[102]

## IV. Case-law of other international courts and tribunals

There have been only a few other cases in which permanent international courts and tribunals other than the ICJ addressed the issue of finality of decisions of competing judicial bodies. In one case, the EHR Commission reviewed a complaint that Article 6 of the European Human Rights Convention (the right to due process) had been violated by the EC Commission, after the same claim was dismissed by the ECJ. Instead of invoking Article

[100] See also Dietmar W. Prager, 'The Proliferation of International Judicial Organs: The role of the International Court of Justice' in *Proliferation of International Organizations* (Niels M. Blokker and Henry G. Schermers, eds., 2001) 279, 295.

[101] Cf. Case 589/1994, *Tomlin v. Jamaica* UN Doc. CCPR/C/57/D/589/1994, at para. 6.3 (Report of the HRC, 1996) (power of review of the Committee over domestic courts should be strictly construed).

[102] For instance, interlocutory motions might present themselves as unnecessary if the motioning party prevails on the merits of the case before the other judicial forum.

35(2) (ex-Article 27(1)(b)) of the European HR Convention (the *electa una via* clause), the Commission held that it does not have *ratione materiae* jurisdiction to examine a complaint after it has been addressed by the ECJ.[103] According to the Commission, acceptance on the part of the institutions of the EC of the standards of the European HR Convention imply that the ECJ has assumed the role of supervising the observance of these rights in cases subject to its jurisdiction. Thus states may execute judgments of the ECJ without examining their conformity with the Convention.[104] This decision could mean that the Commission was of the opinion that through agreement to authorize the ECJ to review compliance with human rights standards, the EC member states intended to invest ECJ judgments concerning these issues with a *res judicata* effect, which would bar their review on the merits by human rights mechanisms.[105]

In another case, the ECHR held that a state party is liable for damages to a private party for delays in implementing domestic and ECJ judgments.[106] This seems to reflect a recognition by the ECHR of the *res judicata* effect of relevant ECJ judgments. Still, it is interesting to note that one of the Judges, in a Dissenting Opinion, protested against the conferring of *res judicata* status on the ECJ judgment, arguing that differences in the nature of the ECJ and the ECHR, in the legal basis of their decisions and defects in the merits of the ECJ judgment, should have prevented reliance upon the latter decision.[107] However, the findings in Part II of this book justify treating the ECJ and the ECHR as courts belonging to the same legal system, and thus capable of producing *res judicata* effects *vis-à-vis* each other.

In contrast, in the *Pyramids* case an ICSID tribunal refused to adopt findings of fact reached by ICC arbitration in earlier litigation of the same dispute. Although this decision can be justified by the fact that the ICC award had been nullified by the domestic courts of the *situs*, the reason stated by the tribunal was that the ICSID rules of procedure require tribunals to make their own findings of fact and law.[108] Taken to its full logical extent, this rationale might imply that ICSID tribunals are barred from applying the *res judicata* rule. Such an illogical outcome is inconsistent with earlier ICSID case-law, which clearly showed willingness to apply the *res judicata* rule (*vis-à-vis* another ICSID award rendered in an earlier stage of the proceedings).[109]

[103] *Melchers & Co. v. Germany* App. 13258/87, 1990 YB Eur. Conv. on HR 138 (EHR Comm'n).

[104] Ibid. at 145–6.

[105] Although, technically speaking, the two sets of proceedings did not involve the same parties, one might argue that the interests of Germany and the EC Commission were essentially the same.

[106] *Hornsby v. Grèece* 24 EHRR 250 (1997).

[107] *Hornsby* (Just Satisfaction) 1998 (II) Eur. Ct. HR 727, 738 (Dissenting Opinion of Judge Valticos; joined by Judges Pettiti and Morenilla).

[108] *Southern Pacific* 3 ICSID Rep. at 162–3.

[109] *Amco Asia* 1 ICSID Rep. at 548–9, 552.

With regard to the scope of the *res judicata* rule, the case-law of the ECJ demonstrates a particularly broad conception of what constitutes a successive claim. In a number of decisions the Court has applied rules of preclusion in order to block the relitigation of settled issues,[110] even in situations not traditionally covered by the *res judicata* rule, such as related proceedings[111] (which do not strictly involve the 'same matter') and declarations of invalidity of EC measures in annulment cases, which have *erga omnes* effect and bind unrelated third parties (thus deviating from the 'same parties' standard).[112] However, as explained above, these precedents are of limited utility for the present work since they involve successive applications to the same judicial body (where consideration of legal economy, not found in litigation before different bodies with different jurisdictional structure, support the contention that parties should raise all of their related claims in one set of proceedings).

Further, other examples suggest a more restrictive approach. For example, an ICSID tribunal confronted with the situation where an ICSID *ad hoc* Committee had previously annulled an ICSID award rendered in an earlier stage of the same proceedings accorded limited *res judicata* effect to the decision of the Committee (recognizing the nullification of the first award, but refusing to follow the reasoning adopted by the Committee during relitigation).[113]

In sum, there is little doubt as to the validity of the *res judicata* rule in international law and the rule of finality should generally apply to the relations between different international courts and tribunals. However, in practice the application of the principle of finality by international courts and tribunals has been sporadic and somewhat inconsistent. Consequently the precise preclusive nature of decisions rendered by one competent forum on matters brought before competing judicial bodies (e.g. what level of review is permissible? which aspects of a decision can be reopened?) is not altogether clear.[114]

[110] Lasok, *supra* note 62, at 138–9.

[111] Where a party has tried to resubmit to the Court a claim previously rejected by it, through dressing it up in a different form (e.g. an action for damages instead of action for annulment) the Court applied a discretionary connexity rule, since it deemed the new set of proceedings to amount to a disguised attempt to circumvent a binding decision. See Case 59/65, *Schreckenberg v. Euratom Commission* [1966] ECR 543, 550; Lasok, *supra* note 62, at 219–20. The connexity rule has also been applied by the ECJ to block parallel related claims and claims which have been designed to circumvent a peremptory rule of admissibility (such as time-limits). Ibid., at 214–5.

[112] Lasok, *supra* note 62, at 220. At the same time, a finding of validity of a challenged measure does not bind third parties.

[113] *Amco Asia* 1 ICSID Rep. at 543. However, the position of the second-in-time ICSID arbitral tribunal could perhaps be explained by the unique position of ad hoc Committees in the institutional framework of ICSID: they act as courts of cassation and not as courts of appeal. Ibid. at 552. Hence, the merits of their judgments are of a different nature than those of ordinary judicial fora.

[114] The position of the WTO Dispute Settlement system on the scope and effect of the principle of finality is still unclear. John Jackson, *The World Trading System* (2nd ed., 1997) 126; Raj Bhala, 'The Myth about Stare Decisis and International Trade' 14 *American University International LR* (1999) 845, 878; William J. Davey, 'The WTO/GATT World Trading System: An overview' in I *Handbook of WTO/GATT Dispute Settlement* (Pierre Pescatore, ed., 1997)

In contrast, it seems well established that the decisions of domestic courts cannot constitute *res judicata vis-à-vis* international courts and tribunals that belong to a different legal order.[115]

The proven existence of an international law rule of *res judicata* means that it can be applied by international courts and tribunals even in the absence of express treaty language. This is unless the relevant constitutive instruments body indicates a clear intent to negate the application of the rule. Thus, for instance, it could be argued that the HRC, which is precluded under the ICCPR Optional Protocol only from reviewing communications pending simultaneously before other international courts or tribunals, should nevertheless apply the *res judicata* rule in relation to findings of fact and law made by competing binding procedures. On this view it is plausible that Article 5(2)(a) of the Optional Protocol (the *lis alibi pendens* clause) did not create a negative arrangement as to the application of the *res judicata* rule, but rather failed to address the question of finality. Hence, the *res judicata* rule may be relied upon to fill this *lacuna*. Although this outcome can be supported by policy arguments peculiar to the field of human rights,[116] the practice of the HRC has not followed this course, and no rule of preclusion had been applied with regard to previously settled matters.[117] While this practice might comport with the original intent of the drafters of the ICCPR,[118] it seems to conflict with the interpretative rule according to which international agreements should be read in line with the parties' other obligations under international law[119] (which include the principle of finality).

20 (although not formally binding upon future panels, DSB reports will in effect constitute stable precedents); Ernst-Ulrich Petersmann, 'International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An introduction' in *International Trade Law and the GATT/WTO Dispute Settlement System* (Ernst-Ulrich Petersmann, ed., 1997) 5, 84.

[115] *Certain German Interests* 1925 PCIJ (Ser. A) No. 6, at 20; *Amco Asia* 1 ICSID Rep. 389, 460 (1983) (jurisdiction) ('... an international arbitral tribunal enjoys the right to evaluate and examine [the legal position of the parties] without accepting any *res judicata* effect of a national court'); Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 52; Ciobanu, *supra* note 3, at 229; Henry Donnedieu de Vabres, 'Le Conflit des Lois de Compétence Judiciaire dans les Actions Personnelles' 26 *Recueil des Cours* (1929) 261. The separate existence of domestic and international legal proceedings is also confirmed by the exhaustion of local remedies rule, which permits international courts and tribunals to reopen cases already decided by their domestic counterparts.

[116] It could be maintained that in the field of human rights there is a special need to strengthen the authority of the various human rights judicial and quasi-judicial bodies. Scott Davidson, 'The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights' 4 *Canterbury LR* (1991) 337, 348. In that area of law there also seems to be a problem of judicial economy on a unique scale, given the overburdening of existing procedures.

[117] See *supra* Chapter 2, at n. 139.

[118] The *travaux préparatoires* of the ICCPR show that proposals to introduce stricter jurisdictional regulating standards (including a *res judicata* rule) were explicitly rejected. See *supra* Chapter 5.

[119] Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(c), 1155 UNTS 331 [hereinafter 'Vienna Convention'].

Of course, the principle of finality could only be applied in relation to final and binding decisions, namely, decisions rendered by fully-fledged judicial bodies (e.g. European or Inter-American Human Rights Courts). The recommendations of quasi-judicial bodies (e.g. the HRC and the African Human Rights Commission) can only be given due consideration. This is because to hold otherwise without explicit authorization would give non-binding recommendations a binding effect, against the wishes of the parties to the relevant constitutive instruments.

## 2. OTHER POTENTIAL RULES AND PRINCIPLES GOVERNING JURISDICTIONAL COMPETITION

Besides specific rules such as *lis alibi pendens* or *res judicata*, developed to address some of the particular problems associated with jurisdictional competition, general principles of international law may also assist in formulating the law governing situations of conflicting jurisdictions. Although such principles have only rarely been applied by international courts and tribunals with relation to jurisdictional questions, it is submitted that they have potential applicability in these circumstances: an assertion which may be deduced from the manner in which they have been applied in other areas of international law.

### *A. The theory of abuse of rights*

Perhaps the general principle most relevant to the present study is the 'abuse of rights' doctrine *(abus de droit)* which originated in civil law countries[120] but is now also found in many common law jurisdictions.[121] The doctrine has been relied upon on several occasions by the PCIJ[122] and the ICJ[123] and has

[120] New Civil Code (NBW), Arts. 1–2 (Netherlands); Civil Code, Art. 2 (Switzerland); Civil Code, Art. 1071 (Argentina); Cour d'Appel, Colmar, 2 May 1985, DP II 1856, at 9 (France); Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., 1999) 573 (Muslim law forbids any abuse of rights); Alexander Reus, 'Judicial Discretion: A comparative view of the doctrine of forum non conveniens in the United States, the United Kingdom, and Germany' 16 *Loy. LA Int'l & Comp. LJ* (1994) 455, 498–9. In addition, the principle of good faith has been embraced by the laws of many other countries. See e.g. BGB §. 242 (Germany); Contract Law (General Part), 1973, Art. 12 (Israel); Civil Code, Art. 18 (Turkey). See generally Saul Litvinoff, 'Good Faith' 71 *Tul. LR* (1997) 1645.

[121] Joseph M. Perillo, 'Abuse of Right: A pervasive legal concept' 27 *Pacific LR* (1995) 37; Michael Byers, 'Abuse of Rights: An old principle, a new age' 47 *Mcgill LJ* (2002) 389.

[122] *Certain German Interests* 1926 PCIJ (Ser. A) No. 7, at 30; *Free Zones of Upper Savoy and the District of Gex* (*France/Switzerland*) 1932 PCIJ (Ser. A/B) No. 46, at 167; *Oscar Chinn* (*UK/Belgium*) 1934 PCIJ (Ser. A/B) No. 63, at 86.

[123] *Corfu Channel* (*UK v. Albania*) 1949 ICJ 4, 46 (Individual Opinion of Judge Alvarez) ('...condemnation of the misuse of a right should be transported into international law'); *Competence of the General Assembly for the Admission of a State to the UN* 1950 ICJ 4, 15 (Dissenting Opinion of Judge Alvarez) ('it is necessary today to find a place for [the concept of

been affirmed by numerous arbitration proceedings.[124] It was also listed by Bin Cheng as one of the general principles of law recognized and applied by international courts and tribunals, which may derive from the principle of good faith (*bona fides*).[125]

Still, there are some lingering doubts as to the accuracy of the assertion that the theory reflects a general principle of law. At least one major legal system, English law, in the past explicitly repudiated the doctrine *en bloc*.[126] However, even English law has long accepted the idea that abuse of rights should be proscribed in specific situations, including the exercise of rights in the framework of the legal process.[127] Therefore one can assert, for the purposes of the present thesis, that all main systems apply or, at least are willing to recognize, some kind of 'abuse of rights' rule in relation to the exercise of rights during adjudication.

In addition there are repeated references in international treaties and case-law to the abuse of rights doctrine, most notably in Articles 294 and 300 of UNCLOS (the former explicitly authorizes a competent court or tribunal to dismiss abusive proceedings) and in the constitutive instruments of some major human rights complaint procedures.[128] One can also find ample support for the wide acceptability of the overarching principle of good faith, from which the abuse of rights theory has been developed (the most conspicuous of these authorities is Article 26 of the Vienna Convention on the Law of Treaties).[129] These indications lend an alternative basis of support to

abuse of rights in international law]'); *Fisheries* (*UK/Norway*) 1951 ICJ 116, 142. But see *Certain Norwegian Loans* (*France v. Norway*) 1957 ICJ 9, 94 (Dissenting Opinion of Judge Read) ('practically speaking, it is, I think, impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good faith or of abuse of law').

[124] See e.g. *Fur Sea Seal Arbitration* (*GB/US*) (1892) in Moore, 1 *History and Digest of International Arbitrations* (1898) 755, 889–90.

[125] Cheng, *supra* note 74, at 121; Byers, *supra* note 121, at 397; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' 20 *Australian YB of International Law* (1999) 191, 202–3 (the doctrine of abuse of rights is common to all major legal systems). See also *US: Import Prohibition of Certain Shrimp and Shrimp Products* 38 ILM (1999) 118, 165 (Report of the Appellate Body, 1998) ('The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights . . .').

[126] *Mayor of Bradford v. Pickles* [1895] AC 587, 601; *Allen v. Flood* [1898] AC 1, 46; W.V.H. Rogers *et al.*, *On Tort* (1984) 49.

[127] See Civil Procedure Rules, Rule 3.4(2)(b) (England); *The Atlantic Star* [1973] 2 All ER 175, 183 (HL, Opinion of Lord Morris of Borth-y-Gest). Two relevant torts under English law are abuse of process and malicious persecution. *Grainger v. Hill* 132 ER 769 (1838). See also *Lonrho plc v. Fayed (No. 5)* [1993] 1 WLR 1489, 1502 (CA); *Dallal v. Bank Mellat* [1986] 1 QB 441, 452.

[128] Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, Art. 3, UNGA Res. 2200 A (XXI), GAOR, 21st Sess., Supp. No. 16 (A/63/16) 52, UN Doc. A/CONF. 32/4; CAT, Art. 22(2); European HR Convention, Art. 35(3) [ex-Art. 27(2)].

[129] The principle of good faith was also reaffirmed by Charter of the United Nations, 26 June 1945, Art. 2(2), XV UNCIO Doc. 355 [hereinafter 'UN Charter']; Declaration on Principles of

the binding status of the abuse of right theory in international law.[130] Given the extensive practice of international bodies and the near consensus in the writing of jurists on the matter, the theory can probably be viewed as part and parcel of customary international law or as a general principle of law.

According to the abuse of rights theory, right-holders must exercise their rights while taking into account the rights and interests of those affected by their conduct. Hence, it is generally accepted that a right cannot be exercised (a) in a malicious manner, with the sole intent of causing injury to another; (b) in a 'fictitious' way: for a purpose utterly different than that for which the right was originally granted; or (c) in a wholly unreasonable manner, causing harm disproportionate to the right-holder's interests.[131]

In addition, several precedents have established that one set of rights cannot be exercised in disregard of another set of rights and obligations.[132] Therefore the theory calls for a proper balance to be struck between states'

International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970); Final Act of the Conference on Security and Co-Operation in Europe, 1 Aug. 1975, 14 ILM (1975) 1292.

There is also ample support for the principle in the case-law of the ICJ: *Nuclear Tests* (*Australia v. France*) 1974 ICJ 253, 268; *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 264; *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*) 1992 ICJ 240, 324 (Preliminary Objections) (Dissenting Opinion of Judge Oda) ('For Nauru to bring a claim now can only lead one to doubt its good faith'). One can also find reference to the principle of good faith and estoppel in GATT/WTO law: *Measures Affecting Imports of Softwood Lumber from Canada* (*Canada v. US*) GATT BISD (40th Supp.) at 358, 480–6 (1993); *US: Sections 301–310 of the Trade Act of 1974* WTO Doc. WT/DS152/R (1999) at p. 319 (Panel Report). See also the relevant case-law of the Iran—US Claims Tribunal: Case 56 *Amoco International Finance Corp. v. Iran* 15 Iran—US Cl. Trib. Rep. 189, 233 (1987); Case 39, *Philipps Petroleum Co. v. Iran* 21 Iran—US Cl. Trib. Rep. 79, 155 (1989); Case 43, *Oil Fields of Texas Inc. v. Iran* 1 Iran—US Cl. Trib. Rep. 347, 376 (1982) (Concurring Opinion of Judge Mosk); Case A/2, *Iran v. US* 1 Iran—US Cl. Trib. Rep. 101, 109 (1982) (Dissenting Opinion of Judges Kashani, Shafeiei, and Enayat); Case 7, *Tippets* et al. *v. TAMSEFTA* 6 Iran—US Cl. Trib. Rep. 219, 270 (1984) (Comments by Judge Shafeiei); Case 33, *Sea-Land Services Inc. v. Iran* 6 Iran—US Cl. Trib. Rep. 149, 209–16 (1984) (Dissenting and Concurring Opinion of Holtzman). See also Lord McNair, *The Law of Treaties* (1961) (1998 reprint) 550, 764; Shaw, *supra* note 71, at 81–2 (good faith is perhaps the most important general principle of international law).

[130] See e.g. Wolfgang Friedmann, 'General Course in Public International Law' 127 *Receuil des Cours* (1969) 37, 153; Byers, *supra* note 121, at 397. But see Adolfo M. De La Muela, 'Les Principes Directeurs des Règles de Compétence Territoriale des Tribunaux Internes en Matière de Litiges Comportant un Elément International' 135 *Recueil des Cours* (1973) 1, 39–40.

[131] Cheng, *supra* note 74, at 121–3. See *US: Standard for Reformulated and Conventional Gasoline and Like Products of National Origin* 35 ILM (1996) 603, 626 (Report of the AB) ('... while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions *must be applied reasonably*, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned') (emphasis added).

[132] *Reformulated Gasoline* 35 ILM at 626; *Import of Shrimp* 38 ILM at 164–5; *North Atlantic Coast Fisheries* (*GB/US*) 1 Hague Court Reports 141, 169–71 (1910); *Trail Smelter* 3 RIAA at 1965. Cf. Convention on the High Seas, 29 Apr. 1958, Art. 2, 450 UNTS 82.

rights and obligations.[133] Similarly, in cases involving discretionary exercise of rights, support can be found to the proposition that such discretion must be exercised in a good faith manner,[134] that is, in a way which is not arbitrary and does not entail undue hardship for other parties.[135]

### Application of the abuse of rights theory to forum selection and multiple proceedings

Since unilateral resort to adjudication certainly constitutes an exercise of a right, it seems that the abuse of rights doctrine should govern its operation. In cases of jurisdictional competition the abuse of right doctrine, if applicable, would not permit the referral of disputes to an international forum in violation of a binding instrument mandating that the case be adjudicated before a different forum (e.g. an exclusive or residual jurisdiction clause). The exercise of the right to initiate proceedings in breach of treaty obligations should therefore be considered abusive, and jurisdiction under these circumstances ought to be declined.[136] This conclusion conforms to the dicta of the PCIJ in the *Rights of Minorities* case, which suggests that the Court should decline jurisdiction once faced with a competing exclusive jurisdiction clause, and with the language of the *Southern Bluefin Tuna* arbitral tribunal's decision on jurisdiction, which suggests that proceedings brought in breach of an implicit exclusive jurisdictional clause might, in some circumstances, be regarded as abusive.[137]

Where no exclusive or residual jurisdiction clause has been breached, a more complex application of the doctrine might be required. If one perceives adjudication before a specific forum and not before other competent courts or tribunals to be excessively burdensome, without there being a legitimate interest justifying litigation before the selected forum, insistence by the applicant upon his or her unilateral choice of forum might be regarded as wholly unreasonable, and therefore an abuse of right. Such a balance of interests might clearly be in place when the same case is pending or has already been

[133] Cheng, *supra* note 74, at 130–2.

[134] *Fisheries* 1951 ICJ at 141–2; *Rights of Nationals of the United States of America in Morocco* (*France v. US*), 1952 ICJ 176, 212; *Admission to the UN* 1950 ICJ at 15 (Dissenting Opinion of Judge Alvarez). It had been argued that even the decision to invoke what is clearly a self-judging provision, must be exercised in good faith. Antonio Perez, 'WTO and UN Law: Institutional comity in national security' 23 *Yale J Int'l L* (1998) 301, 332.

[135] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* 1947–8 ICJ 57, 80 (Separate Opinion of Judge Azevedo); Cheng, *supra* note 74, at 133.

[136] Cf. *Marine International Nominees Establishment (MINE) v. Guinea* 4 ICSID Rep. 45, 51 (1986) (Supervisory Authority of the Office des Poursuites of Geneva) ('In resorting to ICSID arbitration proceedings, MINE waived the ability to request provisional measures against the Republic of Guinea in Switzerland. Therefore, MINE is committing a manifest abuse of the law in invoking these ICSID proceedings to attempt to obtain the maintenance of an attachment . . .').

[137] *Southern Bluefin Tuna* (2000) 39 ILM at 1391 (still, no such abuse had been found in the circumstances of the case).

decided by another tribunal.[138] In these circumstances, compelling the respondent party to litigate the same matter before another court or tribunal would certainly cause significant hardship. At the same time, the applicant does not seem to have a legitimate interest in multiple adjudication since he or she has already had (or will have) their 'day in court'. In other words, the abuse of rights doctrine can serve as an additional justification for the adoption of *lis alibi pendens* and *res judicata* (and also *electa una via*) rules, and perhaps even support a liberal construction of their scope of application, so to encompass closely related multiple proceedings, which are extremely onerous for one party and of relatively little utility to the other party.[139] It might also operate to restrict unjustified claim-splitting tactics.[140]

Finally, there is the need to confront difficult cases where it could be argued that a certain forum is more suitable to address certain disputes than another. Simply put, the question is whether the abuse of rights theory should justify the introduction of a *forum non conveniens* doctrine to international law. While adjudication before an inconvenient forum (e.g. one that is unduly distant or expensive) could be regarded as burdensome for an unwilling respondent, there seem to be mitigating factors that probably negate the application of the theory to most forum shopping situations. First, the fact that a respondent party has at some stage accepted the jurisdiction of the seized forum raises serious doubts about whether adjudication there is in fact excessively burdensome. In other words, the respondent might be estopped by virtue of acceptance of the forum's jurisdiction from arguing that it is exceptionally inconvenient. Secondly, it could reasonably be argued that the applicant has a legitimate interest in pursuing litigation where he or she may enjoy procedural, tactical, or other advantages. Thirdly, most international actors have greater capabilities than ordinary private litigants to conduct even 'inconvenient' litigation. Nonetheless, where it can be shown that the discretion of the applicant in selecting a forum has

[138] Trevor C. Hartley, 'Antisuit Injunctions and the Brussels Jurisdiction and Judgments Convention' 49 *ICLQ* (2000) 166, 167.

[139] Lowe, *supra* note 125, at 203–4. In a recent ICSID Additional Facility arbitration it was argued that resubmission of a case to arbitration after a previous arbitral panel declined jurisdiction is an abuse of process. The tribunal rejected the argument and held that since there were no indications that the applicant acted in bad faith, there was no abuse of process (but rather a procedural error). *Waste Management, Inc. v. Mexico*, Decision of 26 June 2002 (ICSID Additional Facility), available at <http://www.worldbank.org/icsid/cases/waste_united_eng.PDF> (last visited on 25 Nov. 2002).

The experience of English courts in this context is instructive. There is consistent case-law that has applied the doctrine of abuse of process to closely related proceedings, not encompassed by the *res judicata* rule. *Greenhalgh v. Mallard* [1947] 2 All ER 255, 259 (CA) (Evershed LJ); *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581, 590 (Lord Kilbrandon); *Dallal* [1986] 1 QB at 452 (Hobhouse J).

[140] See e.g. Comm. 830/1998, *Bethel v. Trinidad and Tobago* UN Doc. CCPR/C/65/D/830/1998, at para. 6.2 (Decision of the HRC, 1999) (respondent argued that splitting a human rights complaint between two international procedures is an abuse of process).

been exercised in an arbitrary or malicious manner, e.g. with the sole purpose of causing undue hardship to the respondent, the abuse of rights doctrine should probably enable the seized court or tribunal to decline jurisdiction.

Needless to say, the abuse of rights theory should also apply in respect of litigation tactics exercised by the respondent party to litigation. Where such a party objects to jurisdiction in conflicting-jurisdiction cases in a malicious or fictitious manner, or if the respondent argues that another forum is more appropriate after it had previously declined to resort to it, the theory would support the dismissal of such objections to jurisdiction. This is also the case when the objection is inconsistent with a valid treaty, conferring jurisdiction upon the seized forum.

### *B. Comity*

Another general legal principle, which might be applicable in cases of jurisdictional competition, is the principle of comity as applied to judicial matters.[141] According to this principle, which is found in the domestic conflict of laws norms of many countries (mostly from common law systems)[142] courts in one jurisdiction should show respect and demonstrate a degree of deference to the laws of other jurisdictions, including the decisions of judicial bodies operating in these jurisdictions. For instance, comity might justify the recognition of foreign judgments even in the absence of a formal judgment recognition treaty and may support reliance upon foreign court decisions as evidence of the law of their respective jurisdiction.[143] The same principle may also warrant other manifestations of courtesy towards foreign judicial bodies engaged in adjudicating issues also pending before domestic courts. Indeed, it was invoked in situations of multiple proceedings to justify restraint in the exercise of jurisdiction[144] and in the issuance of extraterritorial remedies, in order to minimize jurisdictional conflicts.[145]

[141] However, it should be noted that the term 'comity' has been used in various different contexts, including as a synonym for public or private international law. Brownlie, *supra* note 300, at 29.

[142] *Hilton v. Guyot* 159 US 113, 163–4 (1895); *The 'Abidin Daver'* [1984] AC 398, 412 (Lord Diplock); *Dallal* [1986] 1 QB at 461–2. But see Joined Cases 89, 104, 116, 117, and 125–129/85, *Ahlström Osakeytiö v. Commission* [1988] ECR 5193, 5244; Markus Lenenbach, 'Antisuit Injunctions in England, Germany and the United States: Their treatment under European civil procedure and the Hague Convention' 20 *Loy. LA Int'l & Comp. LJ* (1998) 257, 295.

[143] See e.g. *Hilton* 159 US at 163–4; *Ramsay v. Boeing Co.* 432 F. 2d 592 (5th Cir. 1970); Michael D. Ramsey, 'Escaping "International Comity" ' 83 *Iowa LR* (1998) 893, 901–2.

[144] See e.g. Brussels Convention, Art. 22.

[145] This is reflected by reluctance on the part of courts to issue anti-suit injunctions. *Laker Airways Ltd. v. Sabena* 731 F. 2d 909, 934 (1984); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 102 DLR (4th) 96, 125 (Supreme Court of Canada, 1993). Further, some common law courts have used the same rationale to defer jurisdiction where a foreign court was already seized. *Ronar Inc. v. Wallace* 649 F. Supp. 310, 318 (SDNY 1986).

There seems to be no compelling reasons to restrict the application of the principle of comity to jurisdictional interactions involving domestic courts only. On the contrary, the same considerations supporting the application of the doctrine that can be found at the domestic level (e.g. courtesy, reciprocity, need to co-ordinate multiple proceedings, and reluctance to facilitate evasion from applicable legal standards) apply, perhaps with greater force, in the international sphere, where courts and tribunals function under a common legal umbrella. Indeed, there have been a number of situations in which the doctrine was relied upon directly or indirectly by international institutions,[146] or at least its invocation was considered or advocated.[147] Principles of deference by international bodies to the jurisdiction of other bodies (including national courts) have also been introduced into some international agreements.[148]

## I. Application of comity to jurisdictional conflicts

Comity should arguably be acknowledged as a positive device in the promotion of the systematic nature of international law. It encourages greater inter-institutional harmony and creates a disincentive to abuse the availability of multiple fora.[149] Further, the principle can be said to create a framework for jurisdictional interaction that will enable courts and tribunals to apply rules originating in other judicial institutions.[150] This, in turn, will encourage cross-fertilization and may result in increased legitimacy of international judgments (through utilizing the authority of other international courts and tribunals)[151] and in the application of the 'best available' rule, reflecting not merely the narrow interests of the parties and the law-applying regime at hand but also those of the international community at large.[152] For example, a trade tribunal addressing a trade and human rights issue would arguably be better off if it could take into consideration relevant decisions of human rights bodies on the same matter, and if it could, for this purpose, stay proceedings until parallel proceedings already pending before the competing human rights body are brought to completion. Similarly, a court or tribunal exercising discretionary jurisdiction (e.g. the ICJ in the exercise of its

[146] See e.g. *infra* notes 157–8.

[147] See e.g. Perez, *supra* note 134, at 364–5.

[148] E.g. in the GATT Anti-dumping Code, GATT/WTO Panels are instructed to accord deference to determinations issued by national administrative agencies, where such measures comport with one of the permissible interpretations of the Code. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 15 Apr. 1994, Art. 17(6)(i), available at <http://www.wto.org/english/docs_e/legal_e/19-adp.pdf> (last visited on 15 Nov. 2002).

[149] Theodor Meron, 'Norm Making and Supervision in International Human Rights: Reflections on institutional order' 76 *AJIL* (1982) 754, 775; Perez, *supra* note 134, at 372.

[150] Cheng, *supra* note 74, at 341–2.

[151] Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 *Yale LJ* (1997) 273, 323, 325–6.

[152] Perez, *supra* note 134, at 364.

advisory functions) might be justified in deciding to defer jurisdiction in favour of another judicial body, which is better situated to address the particular dispute at hand and to take into consideration the various rights and interests of the parties before it.[153]

However, while a rule of comity is certainly desirable it is far from clear whether such rule can be regarded as part of existing international law. Although one ITLOS judge has recently raised *obiter dicta* the possibility of relying upon considerations of comity to regulate jurisdictional conflicts,[154] there seem to be little judicial practice and not enough international agreements to enable one to treat the principle as amply supported by customary or treaty law. There are only a few treaty arrangements that invest courts with the discretion to dismiss or stay a case in light of parallel international proceedings. The most notable of these arrangements is found in Article 47(3) of the ECJ Statute, and even there the rule only applies in the relations between the ECJ and the CFI.[155] A less prominent provision is found in Article 10(3) of the Statute of the Benelux Court of Justice, which authorizes the Court, when exercising its advisory functions, to stay proceedings in the face of parallel proceedings before another judicial body relating to the same legal issues.[156]

It is also difficult to identify a general international principle of comity in areas other than those governing the relations between international courts and tribunals. Even in the relations between the ICJ and the political organs of the UN, where some indications of inter-institutional comity exist,[157] the

[153] E.g. in cases involving private interests, it would be sensible if the ICJ deferred jurisdiction in favour of a forum which enables private litigants to appear before it. See ibid. at 376.

In the recent I/A HRC *Consular Assistance* case, the US had argued that the I/A HRC should have exercised comity towards the ICJ, which was better situated to interpret the Vienna Convention on Consular Relations, a general and not a human rights treaty. *Consular Assistance*, *supra* note 19 (excerpts from US Brief of 1 June 1998).

[154] See *Mox Plant*, 41 ILM at 431 (Separate Opinion of Judge Treves), ('... considerations of economy of legal activity and of *comity* between courts and tribunals might be discussed in such situation [of multiple proceedings]') (emphases added).

[155] EC Statute, Art. 47(3); Protocol on the Code of the Court of Justice of the European Coal and Steel Community, 20 Apr. 1951, Art. 47(3), 261 UNTS 140; Protocol on the Statute of the Court of Justice of the European Atomic Energy Community, 17 Apr. 1957, Art. 48(3), 298 UNTS 256.

[156] Treaty concerning the Establishment and the Statute of a Benelux Court of Justice, 31 Mar. 1965, Art. 10(3), 924 UNTS 1 ('... [The Court] may stay its own judgment until the jurisdiction before which the dispute has been brought takes a decision in the matter').

[157] The political organs of the League of Nations have refused on a few occasions (sometimes after seeking the advice of a commission of jurists) to entertain questions which were pending before international judicial bodies. 5 League of Nations OJ No. 4, at 524–5 (1924) (the Council should not interfere with a dispute pending before another judicial body or another jurisdiction that had been accepted by the parties); 8 League of Nations OJ No. 10, at 1145 (1927) (the Council should not interfere with a dispute pending before the Greco-German Mixed Arbitral Tribunal); Ciobanu, *supra* note 3, at 221; Ténékidès, *supra* note 55, at 506–22. There have also been a few occasions in which the Security Council was inclined not to address matters pending before the Court. UN SCOR, 6th Sess., 561st mtg., at 17 (1951) (the representative of India argued during the debate over the Anglo—Iranian crisis that 'it may not, therefore, be wise or

practice has been inconsistent,[158] and it is not clear whether any general rule can be deduced (and even if so, it is far from certain whether it would apply by analogy to the relations between different judicial bodies). There are also serious problems with recognizing comity as a general principle of law under Article 38(1)(c) of the ICJ Statute, derived from national legal systems. This is because some countries do not exercise comity towards foreign judgments and refuse to grant them any effect at all in the absence of a judgment recognition convention.[159] Similarly, while some countries exercise comity towards foreign judicial proceedings, most legal systems do not prohibit the conduct of cross-boundary parallel proceedings. Therefore, even if one can show that there is ubiquitous acceptance of some notion of comity by all legal systems (e.g. according some consideration to foreign decisions) such common notion seems to be weak in nature and cannot provide a comprehensive solution, or even a significant remedy, to the problem of conflicting jurisdictions.

## II. The *Pyramids* case

So far there has only been one major case where the doctrine of comity was explicitly invoked by an international tribunal. In *Southern Pacific v. Egypt* (the '*Pyramids*' case) an ICSID tribunal was seized with a dispute while

proper for us to pronounce on this question while the same question is *sub judice* before the ICJ'); Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996* (1997) 155.

This practice can be indicative of the political bodies' support of an international *sub judice* rule, or at least of a rule of institutional comity (i.e. discretionary denial or suspension of jurisdiction). Ciobanu, *supra*, at 222; Leo Gross, 'The International Court of Justice and the United Nations' in *Essays on International Law and Organization* (1984) 845, 852–3; Ténékidès, *supra*, at 526–7.

In the same vein, there have also been a few indications of comity exercised by the ICJ towards the Security Council. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* 1971 ICJ 12, 22–3 (the ICJ considered itself bound by the SC characterization of the situation); *Aegean Sea* 1976 ICJ at 13 (the involvement of the Security Council prompted the Court to refrain from issuing provisional measures, in implicit deference to the Council); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK)* 1992 ICJ 3 (Provisional Measures); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US)* 1992 ICJ 114 (Provisional Measures) (in both cases the Court gave effect to Security Council Resolution 748 (1992), which pre-empted the Court's authority to issue interim measures).

[158] The PCIJ has typically been disinclined to stay proceedings by reason of comity towards the political organs of the League of Nations. This can perhaps be explained by the text of the League's Covenant, which may be read as negating the invocation of political organs while judicial proceedings are pending (but not *vice versa*). League of Nations Covenant, Art. 15(1); Ténékidès, *supra* note 55, at 513.

There have also been some instances in which UN political organs have refused to exercise comity *vis-à-vis* the ICJ. E.g. the refusal of the UNGA in 1960 to adjourn discussion on the question of South West Africa, despite a *sub judice* petition made by South Africa; the issuance of Resolution 748 (1992) by the SC while proceedings in the *Lockerbie* case were pending. See Rosenne, *supra* note 157, at vol. 1, pp. 151–3; Ciobanu, *supra* note 3, at 223–4.

[159] See e.g. Sweden and Finland. J.J. Fawcett, 'General Report' in *Declining Jurisdiction in Private International Law* (J.J. Fawcett, ed., 1995) 1, 67.

related proceedings were already pending before the French Cour de Cassation. The arbitral tribunal held that international tribunals have an inherent power to exercise comity towards other tribunals engaged in parallel proceedings and suspended the proceedings: 'When the jurisdictions of two unrelated and independent tribunals extend to the same dispute... in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of *comity*, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal' (emphasis added).[160]

The decision to suspend proceedings rather than to decline jurisdiction altogether resonates well with an observation made earlier by the tribunal, according to which one of the problems of parallel proceedings might be that both competing fora would end up declining jurisdictions, leaving the applicant without an effective remedy ('negative conflict of jurisdictions').[161] Further, it is doubtful whether the tribunal could have refused to exercise jurisdiction, despite the agreement of the parties to invest ICSID with jurisdiction over the dispute, solely on the basis of the doctrine of comity.

At a subsequent stage of the proceedings, after the Court of Cassation had issued its decision (refusing to enforce a previous ICC award rendered between the same parties, by reason of lack of jurisdiction) Egypt argued that the ICSID tribunal should also decline jurisdiction over the case by virtue of the French Court decision. In response, the tribunal stated that it could not construe that decision as a bar to its exercise of jurisdiction since that would be inconsistent with the ICSID Convention, which provides that the tribunal should be the ultimate judge of its own competence.[162] However, it conceded that 'it should give *due consideration* to the pronouncements of other courts and tribunals which involve the same parties and subject-matter as the present dispute' (emphasis added).[163] In any event, the tribunal did not find the merits of the decision of the French Court of Cassation to be inconsistent with its assumption of jurisdiction over the case.

While the need to accord due consideration to the domestic court decision has not been explained by the tribunal, it would seem that the same comity rationale that supported the decision in the first jurisdictional phase also supported the decision reached in the second stage of the proceedings. In fact, the very purpose of staying the proceedings was to enable the tribunal to consider the position of the domestic court after it had been rendered. Hence, the two decisions seem to be compatible with each other.

[160] *Southern Pacific*, 3 ICSID Rep. at 129.
[161] Ibid. at 129. Cf. *Chorzów Factory* 1927 PCIJ (Ser. A) No. 9, at 30.
[162] ICSID Convention, Art. 41(1).
[163] *Southern Pacific*, 3 ICSID Rep. at 144. Cf. *Amco Asia*, 1 ICSID Rep. at 460 ('... the judgment of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal').

Although the *Pyramids* case dealt with competition between international and domestic tribunals, the ICSID tribunal has adopted a general line of reasoning, alluding to the need to preserve the international legal order, which would seem to apply, *a fortiori*, in cases involving jurisdictional conflicts between international judicial bodies. Further, the legal ground on which the tribunal based the application of the doctrine of comity—the *inherent powers* of a judicial body—could enable other courts and tribunals, at least those entrusted with some discretion as to the manner and timetable in which proceedings are to be conducted,[164] to adopt the same doctrine.[165] At the same time it is questionable whether courts and tribunals operating under strict procedures and deadlines, such as WTO DSB panels, could exercise comity in a similar manner, since they appear to lack sufficient discretion to stay proceedings.[166]

## III. Exercise of comity by other international courts and tribunals

One can find evidence of implicit application of comity considerations in other decisions of international bodies as well. In the *Melchers* case[167] the EHR Commission held that the law applied by EC institutions contains sufficient human rights protections, and that as a result the exercise of powers by the EC Commission, which is checked by the ECJ, is shielded from review by the Strasbourg bodies. This vote of confidence in the ability of the EC to protect human rights can be considered an exercise of comity by the Commission towards the ECJ (especially since it is questionable whether the conditions for regarding the ECJ judgment as *res judicata* have been met). A similar 'comity' approach has also recently been taken by the ECHR *vis-à-vis* the ICTY.[168]

In fact, every instance in which one court or tribunal relies on the decisions of other judicial or quasi-judicial bodies can be regarded as a grant of 'due consideration' to such decisions, and therefore extension of some degree of

[164] See e.g. Rules of the Court of Conciliation and Arbitration within the OSCE, 1 Feb. 1997, Art. 27(7); Statute of the International Tribunal for the Law of the Sea, Art. 27, Annex VI, UNCLOS; Rules of Procedure of the Court of Justice of the European Communities, Rule 31, 1974 OJ (L 350) 1, as revised in 1991 OJ (L 176) 7.

[165] Cf. the inherent powers of tribunals to apply the doctrine of non-justiciability. Collier and Lowe, *supra* note 74, at 13; Vera Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case' 88 AJIL (1994) 643, 649; Robert Y. Jennings, 'The International Court of Justice and the Judicial Settlement of Disputes' in 1 *Collected Writings* (1998) 433, 438–9.

[166] Under the procedure applied by the WTO DSU and NAFTA, arbitral panels must deliver judgments within a fixed period of time. Understanding on the Rules and Procedures Governing the Settlement of Disputes, 15 Apr. 1994, Arts. 12.8–12.9, 20.1, 33 ILM (1994) 1226 [hereinafter 'DSU']; NAFTA, Arts. 2016(2), 2017(1).

[167] *Melchers*, 1990 *YB Eur. Conv. on HR* at 138.

[168] *Naletilic v. Croatia* Decision of 4 May 2000 (ECHR), available through <http://hudoc.echr/coe.int/hudoc/default.asp?Language=en&Advanced=1> (last visited on 20 Nov. 2002).

comity. However, in contrast to these pro-comity precedents, a request for declining jurisdiction out of comity was implicitly rejected by the I/A CHR in the *Consular Assistance* case, where it was held that the legitimate interest of the states participating in the American human rights system to seek guidance from the Court justifies the exercise of the latter's discretionary advisory powers notwithstanding the pendency of proceedings on the same question (albeit between different parties) before the ICJ.[169]

In sum, greater exercise of comity by international courts and tribunals might mitigate, and at times even resolve, problems of competing jurisdictions. If parallel proceedings are already pending courts and tribunals should be allowed to stay proceedings and, where the exercise of jurisdiction is discretionary, perhaps even decline jurisdiction, in deference to the first-seized or more appropriate jurisdiction (assuming that the most appropriate jurisdiction can be identified). In cases where a judgment has been rendered by another judicial body, international courts and tribunals should, even if unable to apply the *res judicata* rule (for example, if the conditions for its application—the identity of parties and issues—are not fully met) give due consideration to the first-in-time decision, with a view to upholding it unless there are strong arguments to the contrary.[170] In all of these circumstances, the exercise of comity seems to be a desirable course to take, which adequately balances the need for consistency and coherence on one hand and the duty of international courts and tribunals to exercise their powers in an equitable and independent manner on the other hand.[171] However, desirable as it is, there does not seem to be sufficient authority under contemporary international law to require international courts and tribunals to employ the doctrine.

### *C. Conflicting treaty obligations*

Another approach to the question of conflicting jurisdictions is to analyze the phenomenon in accordance with the law of treaties, as specified in the Vienna Convention on the Law of Treaties.[172] While the Vienna Convention only regulates inter-state treaties, its principal rules are considered also to apply in circumstances involving non-state parties.[173] Under the proposed legal edi-

[169] *Consular Assistance, supra* note 19, at paras. 54–64.

[170] There is clear precedent under domestic law for such an approach. See e.g. *Dallal* [1986] 1 QB at 455–6, 461–2; Ramsey, *supra* note 143, at 900.

[171] Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' 31 *NYU J Int. L & Pol.* (1999) 697, 707; Meron, *supra* note 149, at 775.

[172] Rosenne, *supra* note 157, at vol. 2, p. 531. But see, Meron, *supra* note 149, at 758.

[173] Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 21 Mar. 1986, 25 ILM (1986) 543. The provisions of the 1986 Convention were based on the 1969 Vienna Convention. Catherine Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: The history of draft article 36bis' in *Essays on the Law of Treaties* (Jan Klabbers and René Lefeber, eds., 1998) 121, 122–3.

fice, acceptance of a forum's jurisdiction by state or non-state actors should be treated as any other treaty obligation, and jurisdictional conflicts, as any other conflict between treaty obligations.

But, before reconciling inconsistent treaty provisions, one must first assert that a genuine conflict exists. This will only be possible after all interpretative attempts to construe the two or more separate treaty obligations as compatible with each other have failed.[174]

Hence, to the extent that competing jurisdiction-regulating provisions specifically address the relations between them, the question of conflict does not arise and the express treaty language will prevail.[175] This is for example the case where an instrument providing for residual jurisdiction 'competes' with an exclusive jurisdiction clause, or where competition involves an instrument contains a 'saving clause' preserving the authority of pre-existing arrangements or an 'overriding clause' granting preferential status to obligations undertaken thereby.[176]

Similarly, where invocation of one provision does not necessarily imply a breach of the other jurisdictional provisions, there is no genuine conflict. This is for instance the case when two non-exclusive and non-residual jurisdictional provisions compete. Since resort by the parties to non-exclusive arrangements is always discretionary, a choice of one particular procedure does not violate the text or spirit of the other non-exclusive arrangement. In circumstances where non-flexible and flexible jurisdictional provisions compete (e.g. exclusive and non-exclusive jurisdiction clauses), the invocation of the non-flexible jurisdictional regime would not necessitate a breach of the flexible one, whereas the invocation of the flexible jurisdiction might be inconsistent with the non-flexible treaty obligation. In these circumstances the requirement of reconciling treaty obligations seems to justify granting preference to the first and more exacting arrangement.

In those unusual cases where true conflicts arise[177] one should try to accommodate them utilizing traditional rules for settling normative conflicts. The most important of these is found in Article 30(3) of the Vienna Convention, which provides that where different treaties to which the same two or more states are parties contain incompatible provisions, the provisions of the treaty concluded later in time shall prevail in the relations between these states

[174] Vienna Convention, Art. 31(3)(c) (Treaty interpretation shall take into account 'any relevant rules of international law applicable in the relations between the parties'); Sands, *supra* note 1, at 87. This proposition is supported by the *travaux préparatoires* of the Vienna Convention. *United Nations Conference on the Law of Treaties, Official Records*, 2nd Sess., 13th plenary mtg., 6 May 1969 (1970) p. 56 [statement by Mr Kearney (US)].

[175] Vienna Convention, Art. 30(2). See Anthony Aust, *Modern Treaty Law and Practice* (2000) 174–7; Arthur Watts, *The International Law Commission 1949–1998* (1999) 675–6.

[176] See e.g. EC Treaty, Art. 307 (ex-Art. 234); UN Charter, Art. 103.

[177] Cf. the Supreme Court of the US has defined a true jurisdictional conflict in very narrow terms so as to exclude situations where an act prohibited by one jurisdiction is not compelled by the other. *Hartford Fire Insurance Co. v. California* 509 US 764, 799 (1993).

parties. In other words, where two or more inconsistent treaty obligations, containing jurisdiction-regulating clauses, are in force between the same parties, the clause that came into effect later in the legal relations between the parties should, as a rule, govern.[178] This means, for example, that an *ad hoc* agreement to refer a specific dispute after it had arisen to a certain judicial body will generally override any earlier-in-time general jurisdiction provision.[179] Indeed, the PCIJ in the *Mavrommatis* case reached the conclusion that a specific jurisdiction-conferring instrument should pre-empt an earlier-in-time general jurisdiction-conferring instrument.[180] However, it can also be maintained that unless the language of the later instruments suggests otherwise, the parties intended to create only concurrent jurisdictions and that the exclusivity of the later-in-time arrangement should not necessarily be presumed (especially when there are clear advantages to the earlier-in-time arrangement).[181] Thus, it is not clear whether the conclusion of a new *compromis* creates an irreconcilable conflict with a pre-existing jurisdictional regime.

It should also be noted that it is not clear whether Article 30(3) was intended to negate the application of the traditional *lex specialis* rule[182] in all cases where the specific jurisdiction clause was concluded before the more general one. Still, a reasonable reading of the Vienna Convention seems to suggest that unless intent to preserve the validity of the specific and earlier undertaking had been shown, the later-in-time provision would prevail.[183]

Nevertheless, it is submitted that the application of the norms of the law of treaties *vis-à-vis* conflicting jurisdictional provisions is of limited value to the present study. True conflicts can be identified in two principal situations: when two exclusive jurisdiction clauses compete (positive conflict) and when

[178] For example, in the *Lockerbie* cases Libya argued that the Montreal Convention dispute settlement provisions are *lex specialis* and *lex posterior* with relation to the dispute settlement provisions found in the UN Charter. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya v. UK*) 1998 ICJ 9, 18 (Jurisdiction); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya v. US*) 1998 ICJ 115, 123 (Jurisdiction).

[179] Cf. Rosenne, *supra* note 157, at vol. 2, p. 156. For support see *Southern Pacific* 3 ICSID Rep. at 149–50; Schreuer, *supra* note 21, at 170.

[180] *Mavrommatis* 1924 PCIJ (Ser. A) No. 2, at 32. Cf. International Law Commission, *Summary Records of the 421st Meeting* [1957] *YB Int. L Comm.* 191 (statement by Sir Gerald Fitzmaurice) ('... if two States which were bound by their acceptance of the optional clause in the Statute of the International Court of Justice had concluded a special treaty stipulating that disputes on the specific matters dealt with in that treaty should be referred to arbitration, it might well be that the latter jurisdiction would prevail').

[181] *Klöckner v. Cameroon* 2 ICSID Rep. at 13–14, 17–18, 68–70. See also *Chorzów Factory* 1927 PCIJ (Ser. A) No. 8, at 30.

[182] Sinclair believes that the failure of the Vienna Convention to address this issue should not be construed as the abolition of the *lex specialis* rule, which remains 'widely supported in doctrine' and can be applied as a rule of interpretation. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) 96–98. See also Lowe, *supra* note 125, at 195.

[183] This is supported by the *travaux préparatoires* of the Convention. *UN Law of Treaties Conf., Off. Rec., supra* note 174, at 253 (1970) [statement made by Yasseen (Chairman of the Drafting Committee)]. See also McNair, *supra* note 129, at 218. But see Aust, *supra* note 175, at 183.

two residual jurisdiction clauses compete (negative conflict). Given the scarcity of exclusive and residual jurisdiction arrangements, however, the number of situations in which a conflict between two such arrangements will arise is bound to be very limited.[184] In almost all other cases the application of conventional provisions could arguably be reconciled with each other. To these jurisdictional interactions the Vienna Convention offers little guidance and the parties may, in effect, choose which jurisdiction to invoke (with the aforementioned exception of situations where the parties must prefer an inflexible jurisdictional clause over a flexible one).

As for the question of multiple proceedings, again, the paucity of treaty language on the subject renders the text of the Vienna Convention largely irrelevant. However, it can probably be contended that the invocation of a jurisdictional clause in the face of a co-existing or previous set of proceedings should be regarded as the exercise of a treaty right in bad faith, in breach of Article 26 of the Convention.

## 3. INTERIM CONCLUSIONS

What can one learn from the range of legal principles explored in this Chapter on the norms that presently govern jurisdictional competition between different international courts and tribunals? The answer to this question can best be presented in three parts, addressing respectively choice of forum, parallel proceedings, and successive litigation.

### *Choice of forum*

There has so far been no consistent practice that substantiates a general principle of law restricting choice of forum by parties to an international dispute in a meaningful manner. This proposition is confirmed both by the practice of the PCIJ, which has been reluctant to decline jurisdiction unless clear manifestation of an intent to invest exclusive jurisdiction with another forum had been shown, and by the absence of a general principle of law that can be derived from municipal law, supporting such a restrictive effect (as demonstrated by the widespread resort to forum shopping under domestic law). Further, given the legitimacy of forum selection as a manifestation of party autonomy, limitations on the power to choose cannot be derived from either general notions of abuse of rights (or good faith) or comity, since both principles permit reliance upon legitimate considerations.

However, there could be certain situations where a specific exercise of choice of forum was deemed illegal. This is arguably the case where proceedings were initiated in breach of a valid jurisdictional arrangement (e.g. one

[184] Even then, specific 'saving clauses' might defuse the conflict and sustain jurisdictional concurrency.

investing exclusive competence with a different judicial body). In these circumstances the act in question would be precluded both by the law of treaties and by the international theory of abuse of rights. As a result, the improperly seized court or tribunal should decline jurisdiction over the dispute,[185] an outcome supported by general policy considerations of legal certainty and promoting the goals of the exclusively designated forum.

Similarly, some extremely burdensome litigation tactics, which serve no legitimate purpose, can be deemed abusive and thus proscribed. However, there is no known precedent under international law for finding a specific act of forum shopping to fall under this category, and it is hard to imagine a case where this ground will be applied (except perhaps in the context of multiple proceedings).

*Parallel proceedings*

The question of parallel proceedings seems to be regulated only to some extent by current international law and there is insufficient judicial practice to warrant definitive conclusions. While judicial bodies, including the ICJ, have not ruled out the existence of a *lis pendens* rule, one ICSID tribunal explicitly rejected this possibility (although it did apply a rule of comity instead).

However, the assertion that one can find some recognition of the *lis alibi pendens* rule in every domestic law does appear plausible. As a result, this rule probably qualifies as a general principle of law. Further, it also seems that in the absence of strong legitimate interests which would justify the invocation of parallel proceedings, such conduct might be characterized as an abuse of right and thus prohibited by general international law.

Finally, it has been suggested that a principle of inter-institutional comity might be emerging, as demonstrated in the practice of several international courts and tribunals. The adoption of such a principle in the future might encourage courts and tribunals in parallel proceedings situations to use their discretion in order to stay, or even refuse jurisdiction in the face of proceedings already invoked before a competing forum.

*Successive proceedings*

The last, and perhaps most detailed regulated interaction between proceedings before different international courts and tribunals can be found in situations of successive proceedings. Here there is clear case-law which suggests that international law recognizes a binding rule of *res judicata* precluding the relitigation of settled disputes. The same conclusion may also be supported through application of the abuse of rights theory (relitigation

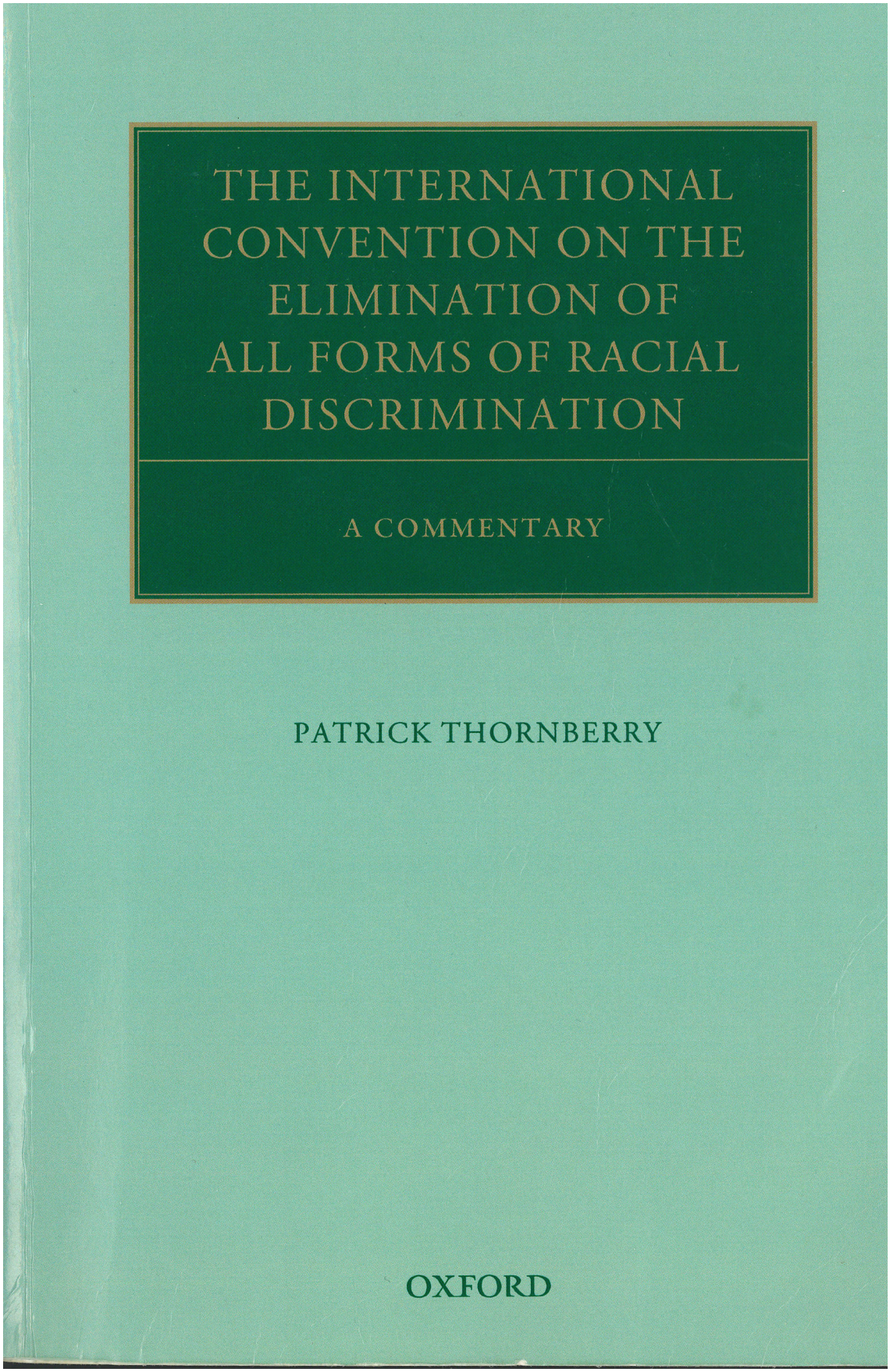
[185] Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdication of the International Court of Justice (1995)* 104–5.

serves no legitimate interest, and is also excessively burdensome for the unwilling respondent).

Even where the strict conditions for application of the *res judicata* rule (same parties and same issues) are not met, the principle of comity might, and arguably should, justify giving due consideration to the reasoning employed by the first-in-time jurisdiction, with a view to promoting the harmonization of international law. This might in effect create a presumption in favour of issue-estoppel and a *de facto* rule of *stare decisis*, which may be rebutted only by showing strong reasons of justice.

**Annex 150**

P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016)


THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
A COMMENTARY
PATRICK THORNBERRY
OXFORD

Annex 150

# The International Convention on the Elimination of All Forms of Racial Discrimination

*A Commentary*

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OXFORD
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United Kingdom

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First published 2016
First published in paperback 2018
Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 978–0–19–926533–6 (Hbk.)
ISBN 978–0–19–882740–5 (Pbk.)

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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# 6. Article 1

*Definition of Racial Discrimination*

The present chapter focuses on the definition of racial discrimination in paragraph 1 of Article 1. The limitations on the reach of the definition in paragraphs 2 and 3 are considered in the chapter immediately following; Article 1(4) is discussed together with paragraph 2 of Article 2 in Chapter 9 on special measures. The text of Article 1(1) is as follows:

> 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.

## A. Introduction

Equality and non-discrimination are intrinsic to the architecture of human rights law, hence the statement in Article 1 of the Universal Declaration of Human Rights (UDHR): 'All human beings are born free and equal in dignity and rights.' The principles of equality, and non-distinction on the grounds of 'birth, nationality, language, race or religion',[1] figured in the minorities system of the League, in addition to the specific clauses on positive minority protection. In the era of the United Nations, the focus on universal human rights initially resulted in a significant atrophy of 'positive' elements, reflecting tendencies to treat equality and non-discrimination as promoting simple uniformity of treatment. According to Capotorti, 'the concept of equality and non-discrimination implies a formal guarantee of uniform treatment for all individuals—who must be ensured the enjoyment of the same rights and accept the same obligations'.[2] Nuanced concepts of equality and discrimination pre- and post-date Capotorti's statement[3] in protean guises such as formal and substantive equality; equality before (or under) the law and equal protection of the law; equality of results; *de jure* and *de facto* equality and their analogues in the prohibitions of discrimination: direct and indirect discrimination; structural discrimination; positive action, affirmative action, etc.[4]

[1] Article 2 of the Polish Minorities Treaty 1919; see also Article 7 on equality before the law: P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), Appendix 1.

[2] F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (United Nations publication, Sales No. E.91.XIV.2), para. 241.

[3] In the minority rights regime of the League of Nations, see the Advisory opinions of the Permanent Court of International Justice in *Questions Relating to Settlers of German Origin in Poland*, PCIJ Ser. B, No. 6 (1923); *Minority Schools in Albania*, [1935] PCIJ, Ser. A/B, No. 64, comment on equality concepts in Chapter 2.

[4] A general view is provided in W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005).

The Charter of the United Nations and the UDHR incorporate basic equality and non-discrimination principles.[5] The UDHR expands the Charter 'grounds' of prohibited distinctions: 'race, sex, language, or religion', to 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status',[6] as well as providing for equality before the law and equal protection of the law.[7] Following the model of the Charter and the UDHR, virtually all general human rights instruments contain an equality or a non-discrimination clause,[8] or both.[9] The International Covenant on Civil and Political Rights (ICCPR), for example, includes a prohibition of discrimination,[10] a provision on the equal rights of men and women,[11] and a broad-based equality provision in Article 26 that demands 'equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; the provision on discrimination in Article 2(1) is limited to the rights 'recognized' in the Covenant, while the guarantee in Article 26 applies to human rights in general.[12] Grounds of discrimination appear in both 'open' and 'closed' lists, the former characterized by the inclusion of 'such as' before a list of grounds,[13] the latter confining discrimination to a single element such as 'sex' in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), or 'disability' in the Convention on the Rights of Persons with Disabilities (CRPD),[14] or a list of grounds as in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); lists are also capable of extension through including a prohibition of discrimination based on 'other status' additional to named grounds.[15]

The inclusion of equality and non-discrimination clauses also characterizes regional human rights instruments, including the African Charter on Human and Peoples' Rights,[16]

[5] In addition to the recital of prohibited grounds of discrimination in the sphere of human rights and fundamental freedoms, the preamble to the Charter pursues the equality theme in referring to 'the equal rights of men and women and of nations large and small', while operative articles recall 'the principle of equal rights and self-determination of peoples', Article 1(2), and 'the principle of the sovereign equality' of all Members of the United Nations, Article 2(1); equality principles are thus asserted to govern the relationships among sovereign States, peoples, and individuals.

[6] Article 2.

[7] Article 7.

[8] For a succinct list, see D. Moeckli, S. Shah, and S. Sivakumaran, *International Human Rights Law* (2nd edn, Oxford University Press, 2014), pp. 160–4 [henceforth *International Human Rights Law*].

[9] Exceptions in the UN system include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and the International Convention on the Protection of All Persons from Enforced Disappearance. The SIM Human Rights database, canvassing human rights instruments of the African Union, the Council of Europe, the Organization of American States, and the United Nations (accessed 6 November 2013) finds 168 references to 'discrimination', 71 to 'equality', and 108 to 'equal'.

[10] Article 2(1).

[11] Article 3.

[12] *Broeks v The Netherlands*, CCPR/C/29/D/172/1984 (1987); General Comment 18, HRI/GEN/1/Rev.9, 195, para. 12. For a list of 'rights' not independently guaranteed in the ICCPR but addressed by the Human Rights Committee, see S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights* (2nd edn, Oxford University Press, 2004), pp. 686–7.

[13] The phrase is found in both Article 2(1) and Article 26 of the ICCPR.

[14] Additionally, the preamble to the CRPD refers to multiple or aggravated forms of discrimination based on 'race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.

[15] Including Article 2(2) ICESCR, Article 2(1) ICCPR.

[16] Articles 2, 3, 18, and 28.

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the American Convention on Human Rights,[17] the Arab Charter on Human Rights,[18] the European Convention on Human Rights,[19] and its Protocol 12,[20] as well as finding inclusion in specialized instruments on, for example, the rights of minorities[21] and indigenous peoples.[22] The longest list of 'grounds' or 'conditions' of prohibited discrimination appears in the Inter-American Convention against All Forms of Discrimination and Intolerance[23] which lists twenty-two, along with 'any other condition';[24] the Convention's scope on the protected rights is also broad, extending to discrimination against 'one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States parties'.[25]

Definitions of discrimination are thinner on the ground than statements of principle. Article 1(1) of the International Labour Organization (ILO) Discrimination (Employment and Occupation) Convention 1958 (ILO Convention 111)[26] defined discrimination for the purposes of that Convention as:

> (a) 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;
> (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment . . . as may be determined by the Member concerned after consultation with representative employers' and workers' organizations . . .[27]

The range of grounds, the employment and the occupation context, and the omission of 'purpose' distinguish this definition from that of ICERD, but the broad affinity between the two conventions is obvious, not least in breaking down 'discrimination' into three sub-terms: 'distinction, exclusion or preference', and the emphasis on the *effects* of discrimination.[28] The same applies to the UNESCO Convention against Discrimination

[17] In addition to a 'standard' non-discrimination clause in Article 1 with a list of grounds, Article 24 provides that '[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.'

[18] Articles 11 and 12.

[19] Article 14 of the ECHR.

[20] Whereas Article 14 of the ECHR applies only in the context of the rights contained in the Convention, Protocol 12 includes a non-discrimination guarantee that is not so limited and applies to 'any right set forth by law'. The European Court of Human Rights has interpreted Article 14 as not requiring an independent violation of another right before the non-discrimination provision is engaged: it is sufficient that the case is 'within the ambit' of another right, *Rasmussen v Denmark*, App. No. 8777/79 (1984).

[21] UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, Articles 2, 3, and 4.

[22] The preamble and Articles 3, 4, 20, and 24 of ILO Convention 169 on the Rights of Indigenous and Tribal Peoples; the preamble, and Articles 2, 8, 9, 14, 15, 16, 17, 21, 22, 24, and 46 of the UN Declaration on the Rights of Indigenous Peoples.

[23] Article 1(1), OEA/Ser. P AG/RES. 2805 (XLIII-O/13) 5 June 2013.

[24] 'Discrimination may be based on: nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socio-economic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition': Article 1(1).

[25] *Ibid.*

[26] 362 UNTS 31.

[27] See also para. 2 of Article 1: 'Any distinction [etc.] in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'

[28] Present author's emphasis. Compare the distinctions/effects critique of the ICERD definition in T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *AJIL* 79 (1985), 283–318, at 291 [henceforth *Meaning and Reach*].

in Education,[29] Article 1, paragraph 1 of which reads (in part) that 'the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education'. This definition introduces the notion of 'purpose' into the argument and expands three sub-terms to four by adding 'limitation'. Later definitions build on the above and the example of ICERD. CEDAW defines discrimination against women along the lines of ICERD, but without listing 'preference' among the forms of discrimination, and without the limitation to 'public life'.[30] Article 2 of the CRPD similarly defines discrimination in its field of application, without limitation to 'public life', and introduces the notion of 'reasonable accommodation'.[31]

Even without benefit of a definition of discrimination in their constituent instruments, the concepts of equality and discrimination have been elaborated in the work of treaty monitoring bodies. The Human Rights Committee's General Comment (GC) 18[32] and GC 20 of the Committee on Economic, Social and Cultural Rights (CESCR)[33] set forth a complex matrix of concepts drawing on general developments in human rights practice. CESCR GC 20 employs the 'distinction, exclusion, restriction or preference' and the 'intention or effect' formulae, while differentiating between 'formal', 'substantive', 'direct', and 'indirect' discrimination; the term 'systemic discrimination' is also referred to, and discrimination is said to include 'incitement to discrimination and harassment'. Differential treatment on prohibited grounds is treated as discriminatory unless the justification for the differentiation is reasonable and objective.[34]

Among the grounds of discrimination in general instruments, 'race' is a standard inclusion.[35] Apart from ICERD, ethnicity or ethnic origin is infrequently listed as a ground of discrimination,[36] though it appears more consistently in instruments or specific provisions on minority rights,[37] including Article 27 of the ICCPR, and Article 30 of the Convention on the Rights of the Child (CRC),[38] as well as throughout the United Nations Declaration on Minorities (UNDM). The Framework Convention for the Protection of

[29] 1960.

[30] Article 1 of CEDAW. See below on the Inter-American Convention against Racism, etc.

[31] Article 2. 'Reasonable accommodation' is defined as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. See also Article 5.

[32] HRI/GEN/1/Rev.9 (Vol. I), pp. 195–8, para. 7.

[33] E/C.12/GC/20 (2009).

[34] *Ibid.*, para. 13. 'Reasonable and objective' is further broken down into concepts of legitimacy, compatibility with the Covenant, and proportionality between means and ends.

[35] The SIM human rights database logs thirty-eight references to 'race' in instruments of the UN, the African Union, the Council of Europe, and the OAS.

[36] Article 2 of the CRC refers to discrimination on the grounds, *inter alia*, of 'national, ethnic or social origin'.

[37] 'Ethnic' or 'ethnicity' is not referred to in the UDHR, nor in Articles 2 and 26 of the ICCPR on discrimination and equality; Article 2(2) of the ICESCR also omits the term. Among the regional instruments, the compendious Inter-American Convention against Intolerance and Discrimination omits 'ethnic', though any resulting gap will presumably be covered by its references to 'language' and 'cultural identity'. The European Convention on Human Rights (Article 14) forbids discrimination on any ground 'such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status': again 'ethnicity' will be covered by a multiplicity of terms, including 'association with a national minority'.

[38] And in Article 29 on education.

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National Minorities (FCNM), in addition to prohibiting discrimination (Article 4) 'based on belonging to a national minority', also seeks to protect (Article 5) 'persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity'. The UNDRIP asserts the falsity of doctrines of superiority, based on, *inter alia*, 'ethnic or cultural differences' in its preamble, while Article 8 refers to mechanisms of prevention and redress for 'propaganda designed to promote or incite racial or ethnic discrimination' directed against indigenous peoples.

With regard to the definition of racial discrimination specifically, the Declaration on the Elimination of All Forms of Racial Discrimination does not include a specific definition; McKean nonetheless concludes that references in its preamble to the UN Charter and the UDHR show that discrimination means 'the denial of equality of dignity and rights before the law'.[39] Article 1(1) of the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance defines racial discrimination as 'any distinction, exclusion, restriction or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States parties'.[40] Further, racial discrimination 'may be based on race, colour, lineage, or national or ethnic origin'; equality is addressed separately by Article 2 which provides that every human being 'is equal under the law and has a right to equal protection against racism, racial discrimination, and related forms of intolerance in any sphere of life, public or private'. The Convention also explains indirect discrimination, multiple or aggravated discrimination, racism, special measures, and intolerance.[41]

## B. *Travaux Préparatoires*

The Abram text of Article 1 defined racial discrimination for the purpose of the Convention as including 'any distinction, exclusion or preference made on the basis of race, colour, or ethnic origin, and in the case of States composed of different nationalities or persons of different national origin, discrimination based on such differences'.[42] Calvocoressi added 'limitation' to 'distinction, exclusion', etc.[43] The Abram reference to 'States composed of different nationalities' was the subject of a proposed amendment by Krishnaswami[44] but was retained in the sub-Commission's final draft. The Ivanov/Ketrzynski draft defined racial discrimination as 'any differentiation, ban on access, exclusion, preference or limitation based on race, colour, national or ethnic origin', supplying the important rider that the differentiation, etc, had 'the purpose or effect of nullifying or impairing equality in granting or practising human rights and fundamental freedoms in [the] political, economic, social, cultural, or any other field of public life'.[45] Racial discrimination was also declared as an 'offence to human dignity', and, *inter alia*, a

[39] W.A. McKean, *Equality and Discrimination under International Law* (Clarendon Press, 1983), p. 153 [henceforth *Equality and Discrimination*].
[40] Article 1(1), OEA/Ser.P.AG/RES.2805 (XLIII-O/13) 5 June 2013: see chapter 15.
[41] Article 1, paras 2–6.
[42] E/CN.4/Sub.2/L.308.
[43] E/CN.4/Sub.2/L.309.
[44] E/CN.4/Sub.2/L.310, para. 4.
[45] E/CN.4/Sub.2/L.314.

denial of the rules of international law and the principles of the Charter of the United Nations. This did not survive into the final Sub-Commission text,[46] though the 'purpose or effect' aspect of discrimination did survive.

Regarding the 'grounds' of discrimination, Capotorti took a consistent stance against the inclusion of 'nationality' or 'national origin';[47] other experts also had difficulties with these terms.[48] On 'national origin', Santa Cruz explained that the concept had been used in the Universal Declaration of Human Rights and 'represented a new concept introduced because certain countries were currently practising discrimination against national groups which were not necessarily ethnic groups'.[49] In a wide-ranging comment on ethnic and allied forms of discrimination, Abram explained the importance of the reference in his text to 'ethnic origin':

> Ethnic discrimination might well be directed towards obliterating the social and cultural differences which defined and gave life and significance to a particular ethnic group... Ethnic differences were absolutely dependent for survival on language, schools, publications and other cultural institutions often regarded as characteristic of a nationality. However well-treated in other respects a member of an ethnic group may be, if he were cut off from his tradition and culture, he would be the victim of discrimination and the right of his group to survive would be jeopardized.[50]

Regarding 'race', Saario took the view that although, 'as UNESCO had shown, there was no such thing as "race", the term... would have to be used in the... convention... "race", "colour" and "ethnic origin" all meant much the same thing'.[51] Abram considered that it was inaccurate to maintain that doctrines of racial differentiation were scientifically false.[52] In the event, a working group draft defined racial discrimination as:

> any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin (and in the case of States composed of different nationalities discrimination based on such difference) which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and freedoms in political, economic, social, cultural or any other field of public life set forth *inter alia* in the Universal Declaration of Human Rights.[53]

In discussions prompted by Ingles,[54] the phrase 'on an equal footing', suggested by Ketryzinski and supported by Ivanov,[55] was accepted for insertion after 'exercise': the reference in the Ivanov/Ketrzynski text to nullifying or impairing 'equality in granting or

[46] The language of 'peaceful and friendly relations' appears in the preamble to the Convention; see also Article 7.

[47] E/CN.4/SR.411, pp. 5–6. Saario, *ibid.*, rather optimistically stated that 'everyone understood what was meant by the term "national origin"'.

[48] Calvocoressi preferred 'nationality' to 'national origin'; Cuevas Cancino and Santa Cruz preferred 'national origin' to 'nationality': E/CN.4/Sub.2/SR.411, pp. 9–10.

[49] E/CN.4/Sub.2/SR/410, p. 9. For an account of the introduction of the term into the UDHR, see J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999), pp. 103–5 [henceforth *The Universal Declaration*].

[50] E/CN.4/Sub.2/SR.411, p. 5.

[51] E/CN.4/Sub.2/SR.411, p. 6.

[52] E/CN.4/Sub.2/SR.410, p. 11.

[53] E/CN.4/Sub.2/L.319.

[54] E/CN.4/Sub.2/SR.414, p. 7. In discussions, Capotorti stated that 'all the experts were agreed on mentioning the concept of equality of rights' in Article 1, E/CN.4/Sub.2/SR.414, p. 9. Not all were so convinced: for Santa Cruz, *ibid.*, the additional reference to equality appeared superfluous, since condemnation of discrimination 'necessarily included' condemnation of inequality.

[55] E/CN.4/Sub.2/SR.414, p. 8.

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practising human rights',[56] transmuted in a later text into 'equality of treatment or opportunity',[57] had been omitted from the working group draft.[58] A proposal included in an intervention by the representative of Israel to provide additional guarantees of the collective rights of nationalities and ethnic groups and communities was not accepted by the Sub-Commission.[59]

Before the Commission on Human Rights, there was early objection from Ecuador to dealing with 'the question of national minorities', which was 'very controversial . . . and would undoubtedly give rise to difficulties'.[60] A complex amendment to the second part of the Sub-Commission's text by the United Kingdom (UK) was withdrawn in favour of a Lebanese proposal to end the paragraph at 'public life'.[61] The UK objected to the *inter alia* formula as introducing an element of vagueness into the paragraph,[62] though some representatives defended the phrasing since it would refer to a broader range of instruments, including national constitutions and laws, beyond the Universal Declaration.[63] The reference to the Universal Declaration, together with 'inter alia' was deleted; in the result, according to Schwelb, 'the Convention as adopted is not restricted to rights set forth in the Universal Declaration',[64] but extends to other, unspecified rights. The phrase in parenthesis in the Sub-Commission's text was deleted,[65] partly because it might, in the view of some representatives, have given rise to ambiguous interpretations and created problems for multinational states or states encouraging immigration.[66] In the Commission on Human Rights, the advisability of including 'national or' was challenged on the basis that, while it had been recognized in the Universal Declaration, it would be confusing in a convention on racial discrimination; additionally, it had not been included in the Declaration on Racial Discrimination.[67] The words 'national or' in paragraph 1 were retained by ten votes to nine, with one abstention.

The Third Committee examined the following text of article 1, paragraph 1:

> In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [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. [In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]

[56] E/CN.4/Sub.2/L.314.

[57] Calvocoressi/Capotorti text, E/CN.4/Sub.2/L.318.

[58] E/CN.4/Sub.2/L.319.

[59] E/CN.4/Sub.2/SR.416, p. 8: 'The spiritual heritage and the cultural values of a group of persons of a particular ethnic origin are entitled to legal protection as such. No discrimination shall be permitted against them and other spiritual heritages and cultural values on the sole ground that they are those of persons of a particular race, colour or ethnic origin.'

[60] E/CN.4/SR.783, p. 10.

[61] E/CN.4/L.689 (amendment of the United Kingdom), recalled in the Report of the Commission on its Twentieth Session, E/CN.4/874, paras 74 and 75.

[62] E/CN.4/SR.784, p. 7.

[63] For statements supporting the retention of '*inter alia*' see interventions by the USSR, E/CN.4/SR.784, p. 8; India, *ibid.*; Ecuador, E/CN.4/SR.784, p. 9; and Canada, E/CN.4/SR./784, p. 10.

[64] E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', *ICLQ* 15 (1966), 996–1068, at 1004 [henceforth *The International Convention*]: see chapter 15.

[65] By 14 votes to 2, with 1 abstention: E/CN.4/874, para. 94.

[66] E/CN.4/874, para. 86. See, for example, remarks of the representatives of Canada, E/CN.4/SR.784, p. 10; United Kingdom, E/CN.4/SR.786, p. 4,

[67] E/CN.4/874, para. 85.

A complex series of amendments included proposals[68] for the restoration of the Sub-Commission's phrase in parenthesis relating to different nationalities, and their phraseology of '*inter alia* in the Universal Declaration of Human Rights'.[69] A new paragraph 2 was proposed, making it clear that 'national origin' did not mean nationality or citizenship, so that the Convention would therefore 'not be applicable to distinctions, exclusions, restrictions or preferences based on differences of nationality or citizenship'.[70] This was withdrawn in favour of a text sponsored by nine States that became the final text of Article 1, paragraphs 1, 2, and 3, wherein national origin was retained among the grounds of discrimination and restrictive conditions inserted with regard to non-citizens.[71]

A number of attempts were made to explain 'national origin'. Defending the retention of the term, the representative of Poland referred to a situation in which a politically organized nation had been included within a different State but 'continued to exist as a nation in the social and cultural senses even though it had no government of its own'; members of such a nation within a State might thus be discriminated against, 'not as members of a particular race or as individuals, but as members of a nation which existed in its former political form'.[72] The summary records recall the following explanation from the representative of the United States (US):

> National origin differed from nationality in that national origin related to the past—the previous nationality or geographical region of the individual or of his ancestors—while nationality related to present status. The use of the former term ... would make it clear that persons were protected against discrimination regardless of where they or their ancestors had come from. National origin differed from citizenship in that it related to non-citizens as well as citizens ... the laws of her country concerning racial discrimination applied to both. National origin was narrower in scope than ethnic origin; the latter was associated with racial and cultural characteristics and inclusion of a reference to it would not necessarily cover the case of persons residing in foreign countries where their national origins were not respected.[73]

The representative of Senegal, supporting the retention of 'national origin', explained the difficulty for some delegations of including it, namely that they 'feared that its use would confer on aliens living in a State equality of rights in areas, political or other, which under the laws of the State were reserved exclusively to nationals'. It would, however, 'offer protection to persons of foreign birth who had become nationals of their country of residence ... as well as foreign minorities within a State which might also be subjected to persecution'.[74] For a number of delegations, even if they did not all press their objections to a negative vote, the term 'national' denoted legal nationality or citizenship rather than ethnicity—issues of 'nationality', according to the representative of Cameroon, were different from racial discrimination where a person suffered from a situation 'for which he was in no way responsible, since he had not chosen his colour, race or origin ... nationality,

[68] A/6181, Report of the Third Committee of the General Assembly, 18 December 1965, paras 30–37.
[69] Proposed by Brazil, A/C.3/L.1209. See also a similar multi-State amendment, A/C.3/L.1226 and Corr. 1, A/6181, para. 35.
[70] Amendment of France and the United States, A/C.3/L.1212, the amendment was later withdrawn: A/6181, para. 37.
[71] A/C.3/L.1238. The sponsoring States were Ghana, India, Kuwait, Lebanon, Mauritius, Morocco, Nigeria, Poland, and Senegal.
[72] A/C.3/SR.1304, para. 5.
[73] A/C.3/SR.1304, para. 23.
[74] A/C.3/SR.1304, para. 16.

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on the other hand, did not imply that element of non-responsibility which made racial discrimination particularly odious'.[75] Jamaica argued that nationality was distinct from race and 'could itself be made the subject of a declaration'.[76] Notwithstanding the critical voices, the placing of 'national origin' among the prohibited grounds of discrimination in the Universal Declaration of Human Rights encouraged delegations to support its retention.[77]

'Descent' was not included as a ground of discrimination by the Sub-Commission or the Commission[78] but was suggested by India in the Third Committee.[79] The insertion was approved without much debate—the drafting record does not clarify relevant distinctions, though it appears that 'descent' was intended to cover confusions over 'national origin'.[80] Referring to the complex explanation given by the representative of the US regarding 'national origin', the representative of Ghana stated that it seemed to him to be adequately represented by 'descent' and 'place of origin' in the Indian proposal.[81]

The issue of 'public life' did not greatly trouble the drafters of the Convention, though the question of the reach of the Convention in other aspects concerned some Western governments. Hence the representative of Australia commented (in the context of draft Article 4) that Australia could not be expected to pass a special law criminalizing every person who utters a remark capable of being interpreted as advocating racial discrimination because 'to do so might well make martyrs out of people whose objectionable ideas would otherwise be rejected by reasoned argument, or more probably by ridicule'.[82] The text of Article 1 as a whole was adopted by eighty-nine votes to none, with eight abstentions.[83]

## C. Practice

### I. Reservations and Guidelines

The reservation by the US includes reference to Article 1:

> the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values . . . The United States understands that the identification of the rights protected under

[75] A/C.3/SR.1305, para. 9.
[76] *Ibid.*, para. 26.
[77] Remarks by the representative of the United Arab Republic, A/C.3/SR.1305, para. 44; Lebanon, A/C.3/SR.1307, para. 1.
[78] While neither 'descent' nor 'caste' are referred to in the UDHR, India had suggested 'caste' as a replacement for 'birth' in Article 2, but did not insist on the proposal: Morsink, *The Universal Declaration*, p. 115. The Convention's reference to 'descent' is not unique in the canon of human rights: among instruments discussed in the present work, ILO Convention 169 on Indigenous and Tribal Peoples, Article 1(1)(b) covers indigenous status on the grounds, *inter alia*, of '*descent* from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization'. (emphasis added)
[79] A/C.3/L.1216. The key interventions of India were made in meetings 1299 and 1306 of the Third Committee of the General Assembly.
[80] According to the representative of India, A/C.3/SR.1299, para. 29, the amendment 'was intended to meet the objections raised by many delegations to the words "national origin"'.
[81] A/C.3/SR.1306, para. 12.
[82] A/C.3/SR.1306, para. 5. See also the remarks on freedom of speech in the Third Committee by the UK, SR.1315, paras 1–3; The Netherlands, SR.1316, paras 3–4; Ireland, SR.1318, para. 56.
[83] A/6181, para. 41.

the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures... with respect to private conduct except as mandated by the Constitution and laws of the United States.[84]

The Guidelines of the Committee on the Elimination of Racial Discrimination (CERD-specific guidelines)[85] for Article 1 request basic information on whether the domestic law definition encompasses all the grounds in the Convention, on 'whether direct as well as indirect forms of discrimination' are included, and on the States Parties' understanding of 'public life'. The terms of the definition are not elaborated further. The common core document[86] and the CERD-specific Guidelines are more elaborate regarding demographic data. The first requests States to provide 'accurate information about the main demographic and ethnic characteristics of the country and its population', taking into account a list of indicators set out in an appendix.[87] A section on non-discrimination and equality does not make further reference to ethnicity but asks for information on 'specific vulnerable groups in the population', and on persons belonging to 'the most disadvantaged' groups.[88]

The CERD-specific guidelines explain further that the 'ethnic characteristics of the population, including those resulting from a mixing of cultures, are of particular importance to the Convention',[89] and that demographic indicators, if not provided in the core document, should be included in the CERD document, which includes the following advice:

> Many States consider that, when conducting a census, they should not draw attention to factors like race, lest this reinforce divisions they wish to overcome or affect rules concerning the protection of personal data. If progress in eliminating discrimination based on race, colour, descent, or national or ethnic origin... is to be monitored, some indication is needed in the CERD-specific document of the number of persons who could be treated less favourably on the basis of these characteristics. States that do not collect information on these characteristics in their censuses are therefore requested to provide information on mother tongues, languages commonly spoken, or other indicators of ethnic diversity, together with any information about race, colour, descent, or national or ethnic origins derived from social surveys. In the absence of quantitative information, a qualitative description of the ethnic characteristics of the population should be supplied. States are advised to develop appropriate methodologies for the collection of relevant information.[90]

Information is also requested on which groups are to be considered to be national or ethnic minorities or indigenous peoples in the State party, as well as recommending the identification of descent-based communities, non-citizens, and internally displaced persons.[91]

[84] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.
[85] CERD/C/2007/1.
[86] For further explanation of reporting documentation, see Chapter 4 of the present work.
[87] HRI/GEN/2/Rev.5, chapter I, Appendix 3, *ibid.*, p. 23, requests information from reporting States on, *inter alia*, population distribution 'by mother tongue, religion and ethnicity, in rural and urban areas'. Information, 'disaggregated by sex, age, and main population groups', is requested throughout the Appendix.
[88] *ibid.*, paras 50–8.
[89] CERD/C/2007/1, para. 10.
[90] *Ibid.*, p. 3, para. 11.
[91] *Ibid.*, p. 3, para. 12.

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## II. Data

Demographics and related issues have been taken up in a sequence of general recommendations, commencing with General Recommendation (GR) 2. When some States parties describe their societies in terms of ethnic etc homogeneity, and even where this claim is part of State ideology, CERD nonetheless presses for relevant data.[92] Less drastic claims admitting the existence of some groups but not others, or describing them in a manner that may obscure their ethnic identity, are also subject to interrogatories.[93] The Committee is equally sceptical of contentions that, although there is ethnic diversity, there is no practice of discrimination in the State party;[94] claims that matters of individual privacy or sundry legal obstacles prevent the collection of ethnic data do not prevent the Committee from pressing its points. While noting the explanations by Germany regarding legislative provisions 'preventing the State party from identifying ethnic groups in a census' or otherwise drawing a distinction between citizens on the grounds of ethnic or linguistic origin, the Committee went on to make its usual points on the need for data to be provided.[95] Inadequacies in data collection methodologies are highlighted in many CERD comments, as well as discrepancies between figures provided in the State reports and those provided by other sources (usually non-governmental organizations (NGOs)). This last issue has arisen with some regularity in statistical offerings for populations of Roma,[96] though it is not confined to their situation.[97]

The data should be 'disaggregated' according to categories that regularly include ethnic composition, ethnic or national origin or nationality, sex or gender, and language.[98] Data disaggregated by caste, religion,[99] and occupational sector,[100] urban and rural areas,[101] may also be requested for specific cases. Data requests are made in general terms or in relation to particular articles under the Convention—hate speech, access to employment, political participation, etc.

## III. Recognition

Discrimination under the Convention is not as such predicated on minority or indigenous status but extends more widely, as befits the 'universalist' inspiration behind the drafting project. Minorities and indigenous peoples have nonetheless gained important specifications of their individual and collective human rights since the adoption of the Convention

[92] Concluding observations on France, CERD/C/FRA/CO/17-19, para. 12.

[93] Concluding observations on Greece, CERD/C/GRC/CO/16-19, para. 9; and on Turkey, CERD/C/TUR/CO/3, para. 12.

[94] Concluding observations on The Philippines, CERD/C/PHL/CO/20, para. 13. The similar claim to the absence of discrimination by public authorities made by the Dominican Republic was dismissed, CERD/C/DOM/CO/12, para. 8, on the ground that 'no government is capable of knowing how each public official performs his or her functions'.

[95] CERD/C/DEU/CO/18, para. 14.

[96] Examples include Czech Republic, CERD/CZE/CO/7, para. 7, and Slovakia, CERD/C/SVK/CO/6-8, para. 7.

[97] Concluding observations on El Salvador combine a note on 'significant discrepancies' in ethnic statistics with a recommendation to improve census methodology, CERD/C/SLV/CO/14-15, para. 12.

[98] On disaggregation by gender, see GR 25, para. 6.

[99] Data on caste and religion were requested from Nepal, CERD/C/304/Add.107, para. 9.

[100] Uzbekistan, CERD/C/UZB/CO/5, para. 10.

[101] India, CERD/C/IND/CO/19, para. 9, data disaggregated by caste, tribe, gender, state/district, and rural/urban; Laos, CERD/C/LAO/CO/16-18, para. 19.

through instruments referred to throughout the present work, and the data called for by CERD may provide supporting evidence of ethnic complexity. In GR 24 on Article 1, the Committee applied the basic non-discrimination criterion to recognition, critiquing States 'that decide at their own discretion which groups constitute ethnic groups or indigenous peoples'.[102] The recommendation insists that certain criteria 'should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, language or culture different from the majority or from other groups within the population'.[103] Despite a degree of ambiguity in the Committee's formulation stemming from the use of 'uniformly', the recommendation does not represent a plea for uniformity of treatment of groups irrespective of circumstances but advances an argument for consistency in applying recognition criteria in light of the fact that 'there is an international standard concerning the specific rights of people belonging to such groups', in addition to the broader standards on equal rights and non-discrimination.[104] Bearing in mind the present extensive use by the Committee of 'minority', it may be noted that the term was removed from GR 24 on Article 1 during the drafting process and does not appear in the final version, which focuses on national or ethnic groups and indigenous peoples.[105] The post-war sensitivity to 'minority rights' as superseded by 'non-discrimination' may have asserted itself in this instance, even if the recommendation recycles general understandings of 'minority', without recalling the name.

With regard to the receipt of variable information regarding 'the ways in which individuals are identified as being members of a particular racial or ethnic group or groups', GR 8 opts for the principle of self-identification 'if no justification exists to the contrary'.[106] Like ILO 169, the recommendation does not treat self-identification as an absolute or final criterion. In the case of indigenous peoples, the criteria set out in ILO Convention 169, including historical continuity, territorial connection, and distinct social, economic, cultural, and political institutions, are relevant in addition to self-identification, regarded as 'a fundamental criterion for determining the groups to which the provisions of this Convention apply', though not the only criterion—a qualification going back to the time of the League of Nations also places emphasis on 'objective factors'.[107] Standard approaches to such factors stem from understandings of minority and indigenous peoples expressed in international instruments and critical literature. While there is no 'official' definition of minorities in major international instruments including the UNDM,[108] definitions abound

[102] Para. 3.

[103] GR 24, para. 2.

[104] *Ibid.*, para. 3.

[105] Comment in CERD/C/SR.1363/Add.1, paras 14 and 15. In its drafting phase, the general recommendation was referred to as a 'general recommendation on demographic information', CERD/C/SR.1371, paras 18–22.

[106] A/45/18, Annex VII 1. Further discussion in Chapter 9. Compare *Sandra Lovelace v Canada*, where the Human Rights Committee stated with regard to the facts of the case that persons who are born and brought up on a reserve 'who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority': CCR/C/13/D/24/1977 (1981), para. 14.

[107] According to the Permanent Court of International Justice, 'the question whether a person does or does not belong to a racial, linguistic or religious minority . . . is a question of fact and not solely one of intention': *Rights of Minorities in Upper Silesia (Minority Schools)* [1927] PCIJ Ser. A No 15, p. 32.

[108] See, however, the proposal for an Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993).

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among the commentariat,[109] and practical determinations are required of States. In the case of indigenous peoples, while the UNDRIP eschews definition in favour of a broad reading of self-determination, ILO Convention 169 provides a 'statement of coverage' of that instrument which, if not an *a priori* or universally applicable 'definition', serves some of the purposes of such.[110]

While the Committee's formulation of the self-identification principle explicitly addresses individuals, recommendations also affirm its applicability to groups. In the case of Botswana, where the State party expressed reluctance to recognize indigenous peoples on its territory, the Committee invited it 'to review its policy regarding indigenous peoples and, to that end, take into consideration the way in which the groups concerned perceive and define themselves'.[111] To Ukraine, in relation to a community 'of Ukrainian citizens, who consider themselves to be Ruthenians' the Committee recommended 'respect the right of persons and peoples to self-identification'.[112] The recognition and self-identification concepts applied by the Committee extend to 'naming names'—self-designation—on the basis that groups have a right to the dignity of their name as opposed to other names, possibly pejorative, imposed by those outside the group.[113] Hence the practice of requesting information on the acceptance by group members of particular group designations.

*De minimis*, States should, according to the Committee, recognize ethnic groups when the evidence of ethnicity adequately presents itself. In the case of Ireland, the Committee expressed concern at the State party's position on the Travellers—not recognized as an ethnic group—and encouraged concrete work towards such recognition, bearing in mind that recognition had important implications under the Convention.[114] With regard to ethnic or national minorities, Italy was urged to recognize Roma on an equal footing with 'historical' minorities;[115] Ecuador was subject to a similar recommendation.[116] Comments were made to Ukraine regarding the absence of official recognition of the

[109] The best known is probably that articulated by Capotorti, who defined a minority as: 'a[] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language': F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/384/Rev.1 (1979), para. 568. In a voluminous literature, see H. Hannum, 'The Concept and Definition of Minorities', in M. Weller (ed.), *Universal Minority Rights* (Oxford University Press, 2007), pp. 49–73; G. Pentassuglia, *Defining 'Minority' in International Law: A Critical Appraisal* (2nd edn, Juridica Lapponica, 2000). See also the listing of studies, etc, in the note by the UN Secretary-General, E/CN.4/Sub.2/1984/31.

[110] See Article 1 of the Convention, and discussion and sources cited in P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002), esp. pp. 33–60; J.J. Corntassel, 'Who is Indigenous? Peoplehood and Ethnonationalist Approaches to Rearticulating Indigenous Identity', in C. Erni (ed.), *The Concept of Indigenous Peoples in Asia* (IWGIA, 2008), pp. 51–74.

[111] CERD/C/BWA/CO/116, para. 9.

[112] CERD/C/UKR/CO/19-21, para. 19.

[113] GR 27, para. 3, recommends that States 'respect the wishes of Roma as to the designation they want to be given'; the Committee is cautious regarding exonyms.

[114] CERD/C/IRL/CO/2, para. 20; see also CERD/C/IRL/CO/3-4, para. 12. Irish Travellers have been so recognized in England: *O'Leary v Punch Retail*, Westminster County Court (29 August 2000); in the case of Northern Ireland, Irish Travellers are included under the Race Relations (Northern Ireland) Order 1997.

[115] CERD/C/ITA/CO/15, para. 12; CERD/C/ITA/CO/16-18, para. 3.

[116] CERD/C/ECU/CO/19, para. 11, a guarantee to the Roma of free association for peaceful purposes was regarded by the Committee as insufficient; legal recognition of the Roma people as an ethnic minority was urged; see also CERD/C/ECU/CO/20-22, para. 13.

Ruthenian minority, despite their distinct minority characteristics.[117] The recognition of indigenous peoples gains enhanced force from the principle of self-determination expressed in the UNDRIP, an instrument endorsed by the Committee. The Committee has insisted that if a group falls under a particular designation such as 'indigenous people', and there is a demand to be recognized as such, then they should be so recognized.[118] In the case of Laos, the Committee recommended that the State party 'recognize the rights of persons belonging to minorities and indigenous peoples as set out in international law, regardless of the name given to such groups in domestic law'.[119] In its recommendation to Denmark regarding recognition of 'the Thule Tribe' of Greenland, the Committee proposed that concrete measures be taken 'to ensure that the status of the Thule tribe reflects established international norms on indigenous peoples' identification'.[120] CERD's approach extends to support for demands by groups for recognition in State constitutions.[121] The Committee has congratulated States parties when recognition in line with international standards is forthcoming.[122]

The Committee's observations on recognition are largely directed towards determinations made by States in their assessments of demographic data, regarded by the Committee as required in order to concretize anti-discrimination programmes including special measures.[123]

For individuals, self-identification discourages the State from assigning them to categories in a deterministic manner that would subvert the objects and purposes of the Convention. Criticisms of the scope of self-definition have been articulated by groups, concerned by what they see as its undue extension to individuals who have little or no

[117] CERD/C/UKR/CO/18, para. 20; a later recommendation was made in the context of an objective 'to recognize all minorities which claim to exist in the State party': CERD/C/UKR/CO/19-21, para. 19.

[118] Concluding observations on Denmark, CERD/C/DNK/CO/18-19, para. 17: 'The Committee reiterates that, pursuant to its general recommendation No. 8 (1990) and other United Nations instruments, the State party is urged to pay particular attention to self-identification as a critical factor in the identification and conceptualization of a people as indigenous'; see also concluding observations on Laos, CERD/C/LAO/CO/15, para. 17.

[119] CERD/C/LAO/CO/15, para. 17.

[120] CERD/C/DNK/18-19, para. 17; CERD/C/DNK/CO/20-21, para. 21.In the particular case, regarding the Uummannaq or Thule tribe, international standards are not univocal: the ILO Tripartite Committee noted that the members of the group shared the same conditions as the rest of the people of Greenland—'conditions which do not distinguish the people of the Uummannaq community from other Greenlanders, but which do distinguish Greenlanders as a group from the inhabitants of Denmark and the Faroe Islands': Governing Body, 280th session, March 2001, Representation under Article 24 of the ILO Constitution, Denmark, GB.280/18/5, cited in *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention 169* (International Labour Organization, 2009), p. 13. See also EctHR, *Hinqitaq 53 and ors v Denmark*, App. No. 18584/04 (2006), discussed in T. Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospect', *IJMGR* 18 (2011), 1–37, 22–4.

[121] Notable examples include Australia, CERD/C/AUS/CO/15-17, para. 15, and Chile, where the Committee urged the State party, *inter alia*, to prioritize 'recognizing the rights of indigenous peoples in the Constitution as a first step towards arriving at a consensus-based settlement of their claims': CERD/C/CHL/CO/18-19, para. 12; also CERD/C/CHL/CO/15-18, para. 16. In the case of Ethiopia, the Committee noted with appreciation the recognition of minority groups in the Constitution: CERD/C/ETH/CO/6-7, para. 9.

[122] Concluding observations on Japan, CERD/C/JPN/CO/3-6, para 5. The scene had previously been set in Japan by the Sapporo District Court in *Kayano et al. v Hokkaido Expropriation Committee*, 27 March 1997, *ILM* 38, 397, where the Court recognized the minority status of the Ainu while calling, in light of international standards for increased protection as an indigenous group. For the formal recognition in 2008 of the Ainu as indigenous, see: <http://www.japantimes.co.jp/news/2008/06/07/national/diet-officially-declares-ainu-indigenous/#.VdH6mH2aKSp>.

[123] Discussed in Chapter 9.

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evident connection with the group in question.[124] For collectives, self-identification challenges State prerogatives to deflect the application of established rights. Challenges to the Committee's position have been forthcoming. Turkey stated that it 'did not adhere to the "self-identification" approach advocating the granting of minority status on the basis of the purely subjective perceptions or feelings of its members. Every State had the sovereign right to decide which groups of citizens it viewed as constituting minorities'.[125] The Committee in turn reiterated the relevance of GR 8, also expressing concern at the application of restrictive criteria to determine the existence of ethnic groups.[126]

## IV. Discrimination

'Discrimination' is a term that may be used in positive, neutral, or negative senses. The Latin *discriminare* means simply 'to distinguish between',[127] and there is a positive sense in referring to 'a person of discrimination': one who displays a fineness or subtlety of judgement in intellectual or material matters. While international instruments vary in their use of 'distinction' and 'discrimination',[128] ICERD incorporates 'distinction' into the concept of racial discrimination. The definition of discrimination in ICERD and elsewhere in international human rights is essentially negative: unjust or unfair discrimination against a person or group/category of persons.[129] Accordingly, GR 32 treats 'positive discrimination' as an oxymoron.[130] The injustice or detriment associated with discrimination is calibrated in terms of 'nullifying or impairing' the recognition, etc, 'on an equal footing' of human rights.

In order to find discrimination that affects individuals or groups under Article 1, it needs to be established that individuals or groups are subject to distinctions, etc. 'based on' race, colour, etc. 'Based on' sits well with intentional discrimination in signifying motivations or reasons for action, but less well with discrimination in effect or indirect discrimination; the reformulation of 'based on' to 'on the grounds of' in GR 14 softens the discrepancy only a little. Makkonen contends that the recognition of indirect discrimination in *L.R. v Slovakia* implies the rejection of the approach according to which discrimination 'must be linked to acts which . . . single out . . . members of a particular group'.[131] In other circumstances, when categorization as indirect discrimination was avoided, the Committee has insisted that groups should be 'singled out' in order to engage the prohibitions in the

[124] See discussion regarding the Sámi of Finland in Chapter 9 on special measures.

[125] CERD/C/SR.1915, para. 5. The Turkish view was the subject of comment from members of the Committee. In the view of Diaconu, CERD/C/SR/1915, para. 32, 'the State party was not obliged to officially recognize the country's different ethnic groups as national minorities', but recognition should proceed based on objective criteria, etc; see also remarks of Prosper, *ibid*, para. 43. See also CERD/C/TUR/CO/4-6, paras. 13 and 14, expressing the view that Turkey is not precluded from recognizing minorities not specified in the Treaty of Lausanne 1923. CERD questions distinctions between recognized and unrecognized groups in order to reveal whether they conceal discriminatory practice.

[126] CERD/C/TUR/CO/3, para. 12.

[127] *Concise Oxford English Dictionary* (11th edn, Oxford University Press 2004), p. 410.

[128] The SIM database lists 26 references to 'distinction', and 168 to 'discrimination': <http://sim.law.uu.nl/SIM/Library/HRinstruments.nsf/%28organization%29/$Searchform?SearchViews>.

[129] 'The word 'discriminate' taken alone is now commonly used in the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction': McKean, *Equality and Discrimination*, p. 10.

[130] This is the sense of GR 32, para. 12. See discussion in Chapter 9.

[131] T. Makkonen, *Equal in Fact, Unequal in Law* (Martinus Nijhoff, 2012), p.133 [henceforth *Equal in Fact, Unequal in Law*].

Convention,[132] a narrow approach to the 'targeting' of groups. The Committee's general understanding of discrimination is summarized in GR 32:

> On the core notion of discrimination, general recommendation No. 30 (2004) of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim' (para. 4). As a logical corollary of this principle, General Recommendation No. 14 (1993) observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate' (para. 2). The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.[133]

A separation should be made between 'differentiation' *simpliciter*, and (unfair) discrimination: the prevention of discrimination and the right to equality do not require identical treatment without regard to circumstances;[134] the nuanced understanding of equality since the time of the League of Nations has already been referred to here. The edifices of minority and indigenous rights and other categories of rights in international law rest upon nuances in the understanding of equality.[135] Objective and reasonable justifications for differential treatment may arise from appraisals of factual circumstances or by operation of law—the latter is evidenced by the acceptance under ICERD of rights applicable to members of specific groups or categories.[136] As an example of the former, in *Sefic v Denmark* the Committee decided that a requirement to speak Danish in order to purchase car

[132] In a case of abusive references to Muslims, 'no specific national or ethnic groups were directly targeted', and as with general references to foreigners, general references to Muslims 'do not single out a particular group of persons, contrary to Article 1 of the Convention': *P.S.N. v Denmark*, CERD/C/71/D/36/2006 (2007), paras 6.2 and 6.4.

[133] Para. 8.

[134] 'The prohibition of discrimination does not require identical treatment; in other words, not every differentiation amounts to a prohibited discrimination', K. Henrard, 'The Protection of Minorities through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies', *IJMGR* 14 (2007), 141–80, 149.

[135] 'But the principle of non-discrimination is not inconsistent with the recognition that particularly vulnerable categories of people may need to be singled out for protection ... and more specific norms have been developed to complement the general norms ... mong these categories are workers, refugees, women, prisoners and other detainees, indigenous peoples, children, disabled persons, and migrant workers': H. Hannum, 'The Concept and Definition of Minorities' in M. Weller (ed.), *Universal Minority Rights* (Oxford University Press, 2007), pp. 49–73, p. 50. With regard to an objection by Suriname that the land claims by indigenous and Afro-descendant peoples were effectively discriminatory, the Inter-American Court of Human Rights recalled the 'well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination ... In the context of ... indigenous and tribal peoples, this Court has already stated that that special measures are necessary in order to ensure their survival in accordance with their traditions and customs': *Saramaka People v Suriname*, IACtHR Ser. C No. 172 (2007), para. 103.

[136] In GR 31 on racial discrimination in the criminal justice system, para. 27 recommends that, prior to trial, States parties may give preference to non-judicial or parajudicial procedures for dealing with offences 'taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples'; in such cases, States are also advised, *ibid.*, para. 36, to give preference to alternatives to imprisonment' in light of ILO Convention 169 on Indigenous and Tribal Peoples.

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insurance was reasonable in the circumstances. CERD considered that the reasons advanced by the company concerned, 'including the ability to communicate with the customer, the lack of resources of 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.[137] In *L. G v Korea*, with regard to the mandatory testing of foreigners—except ethnic Koreans—for drugs and HIV/AIDS, the Committee noted that the policy did not 'appear to be justified on public health grounds or any other ground'.[138] Differentiation may also be legitimated through the operation of a specific treaty or legal regime such as the European Union.[139]

Lerner reads the *travaux* to the effect that the four categories of discriminatory action—'distinction, exclusion, restriction and preference'—were intended to cover all types of acts based on racial motivations,[140] which suggests that they should not be interpreted restrictively. 'Distinctions' between national and ethnic minorities are referred to above; social, educational, and other forms of 'exclusion' have attracted Committee comment,[141] and support has been expressed for 'inclusion'.[142] An archival search for 'restriction' turns up instances of governmental restrictions on NGOs but also restrictions on non-citizens in the labour market,[143] on freedom of movement,[144] and caste restrictions.[145] As regards 'preferences', GR 32 generalizes that discrimination 'is constituted not simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference", making it especially important that States parties distinguish "special measures" from prohibited "preferences"'.[146]

The application of legal preferences was discussed in *D.F. v Australia*, a case concerning changes in Australian legislation affecting, *inter alia*, eligibility for certain social security payments. The petitioner, a New Zealand citizen resident in Australia, lost special status on account of legislative amendments to rules that previously favoured New Zealand citizens and was required to apply for a permanent residence visa to access certain social security benefits. In rejecting the claim of racial discrimination, Australia argued that whereas New Zealand citizens had previously received preferential treatment, the withdrawal of such advantages could not constitute discrimination, as it merely placed New

[137] CERD/C/66/D/32/2003 (2005), para. 7.2.

[138] CERD/C/86/D/51/2012 (2015), para. 7.4, discussed further in Chapter 7.

[139] The European Court of Human Rights justified a difference in treatment as regards deportation for crime between EU citizens and others by referring to the European (EU) legal order, considering that 'such preferential treatment is based on an objective and reasonable justification, given that the Member States of the European Union form a special legal order, which has, in addition, established its own citizenship': *C. v Belgium*, App. No. 35/1995/541/627 (1996), para. 38; see also Human Rights Committee, *Shergill v Canada*, on the effects of reciprocal international social security agreements, CCPR/C/94/D/1506/2006 (2008). However, the mere existence of international agreements in such cases does not necessarily dispose of an issue of discrimination: *Karakurt v Austria*, CCPR/C/74/D/965/2000 (2002).

[140] N. Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff, 1991), pp. 48–9.

[141] Colombia, CERD/C/COL/CO/14, para. 18, on Afro-Colombians and indigenous peoples; Estonia, CERD/C/EST/CO/8-9, para. 17, widespread exclusion of Roma. Concluding observations on Nigeria link together 'social exclusion, segregation and mistreatment' with regard to allegations regarding the Osu: CERD/C/NGA/CO/18, para. 15.

[142] GR 27, para. 17: see discussion in chapter 10.

[143] Regarding Latvia, CERD/C/63/CO/8, para. 15.

[144] Israel, CERD/C/ISR/CO/13, para. 34.

[145] Nepal, CERD/C/64/CO/5, para. 12. See also GR 29, para. (a) and *passim*; GR 20, para. 2.

[146] Para. 7. See, for example, concluding observations on Fiji, CERD/C/62/CO/3, para. 26; Bosnia and Herzegovina, CERD/C/BIH/CO/6, para. 11; and Israel, CERD/C/ISR/CO/13, para. 17.

Zealand citizens 'on an equal footing with people of other nationalities'[147]—an argument criticized by the petitioner as one of 'equality by deprivation'.[148] In finding no discrimination on the ground of national origin, the Committee observed that the distinction which had been made in favour of New Zealand citizens no longer applied: the changed provisions 'did not result in the operation of a distinction, but rather in the removal of such a distinction which had placed the petitioner and all New Zealand citizens in a more favourable position compared to other non-citizens'.[149]

Discrimination under Article 1 is expressed in terms of its *purpose or effect*, and CERD has been critical of jurisdictions that insist that claims of discrimination must be accompanied by evidence of intention.[150] The Committee continues to refer to 'purpose or effect' in its recommendations to States parties.[151] In order to determine whether there is discrimination in effect, GR 14 states that the Committee 'will look to see whether [an] action has an unjustifiable disparate impact upon a group' distinguished by race, colour, etc.[152] Citations of 'disparate impact' include observations on the impact of mandatory sentencing of aboriginals in Australia,[153] the disparate impact of natural disasters on low-income African-Americans,[154] and of felon disenfranchisement laws on persons belonging to minorities in the US.[155]

While continuing to employ the terms 'intention' and 'effect', a parallel terminology of *direct and indirect discrimination* has emerged in practice. In *L.R. v. Slovakia*, it was recalled that 'the definition of racial discrimination ... expressly extends beyond measures which 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'.[156] Here, discrimination in effect is taken as equivalent to indirect discrimination, and discrimination in fact equated with discrimination in effect. Concluding observations on the US appear to erase distinctions between indirect and *de facto* discrimination, together deemed to occur 'where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons'.[157] In CERD practice, the essence of *de facto discrimination* (discrimination in fact) is the existence of discrimination in practice; analogously, *de facto* equality refers to equality in the enjoyment of human rights in practice. Committee statements on *de facto* discrimination suggest that the obligations under the Convention reach down into the social matrix, subject to the limitation to 'public life'. References to *de facto* discrimination have been particularly common in the context of immigration,[158] descent-based communities,[159] and Roma.[160]

[147] CERD/C/72/D/39/2006, (2008), para. 4.2.
[148] Para. 5.2.
[149] Para. 7.1.
[150] Concluding observations on the USA, CERD/C/USA/CO/6, para. 35; CERD/C/USA/CO/7-9, para. 5.
[151] For example in the post-9/11 statement on responses to terrorism, A/57/18, Chapter XI. C.
[152] GR 14, para. 2.
[153] CERD/C/AUS/CO/14, para. 20.
[154] CERD/C/USA/CO/6, para. 31.
[155] *Ibid.*, para. 27.
[156] CERD/C/66/D/31/2003, para. 10.4.
[157] CERD/C/USA/CO/6, para. 10.
[158] Concluding observations on Portugal, CERD/C/65/CO/7, para. 11.
[159] Concluding observations on Yemen, CERD/C/YEM/CO/16, para. 15.
[160] Among many examples, see concluding observations on Serbia, CERD/SRB/CO/1, para. 15. The Roma situations are frequently described as amounting to *de facto segregation*.

The amalgamation of terms has been the subject of comment. Frostell distinguishes between the purpose–effect axis and the direct–indirect axis, commenting that 'direct and indirect discrimination . . . might occur both in the presence and in the absence of a discriminatory purpose'.[161] De Schutter distinguishes between indirect discrimination: 'instances of conscious discrimination which hide behind the use of apparently neutral criteria', and 'disparate effect discrimination', rules/practices which 'although not calculated to produce such effect, impose a specific disadvantage on certain groups, or have a disproportionate impact' on them.[162] Irrespective of the provenance of the terminology,[163] the use of direct and indirect discrimination is strongly embedded in current human rights practice.[164] Definitions of these concepts in the human rights canon exhibit broad similarities with each other,[165] even if the terminology employed may wash over the distinctions appraised by De Schutter.[166]

CERD has not advanced a stand-alone definition of 'direct' and 'indirect' discrimination. Both terms appear as a heading in CERD's GR 32 on special measures but the explanation offered is couched in terms of 'purposive or intentional discrimination and discrimination in effect', suggesting that CERD has not drawn clean lines between the two pairings.[167] In assessing whether indirect discrimination is operative 'in fact and

[161] K. Frostell, 'Gender Difference and the Non-Discrimination Principle in the CCPR and the CEDAW', in L. Hannikainen and E. Nykanen (eds), *New Trends in Discrimination Law; International Perspectives* (Turku Law School, 1999), pp. 29–57, at p. 51. See also K. Henrard, Non-Discrimination and Full and Effective Equality', in M. Weller (ed.), *Universal Minority Rights* (Oxford University Press, 2007), pp. 75–147, at p. 113 and citations therein; D. Moeckli, 'Equality and non-Discrimination' in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law*, p. 166.

[162] O. De Schutter, *International Human Rights Law* (Cambridge University Press, 2010), pp. 625–6 [*International Human Rights Law*].

[163] Vandenhole cites Frostell for the statement that the use of 'direct' and 'indirect' discrimination stems from the European Community legal order, *Non-Discrimination and Equality*, p. 35, n. 149; for early expression of the principle, see *Sotgiu v Deutsche Bundespost*, Case 152/73 (12 February 1974), para. 31. In international law, the case of *Minority Schools in Albania* [1935] PCIJ, Ser. A/B, No. 64 expresses essential elements of indirect or 'effects' discrimination. More general treatments of discrimination law, if not specifically international law, may trace the development of disparate impact jurisprudence to the US Supreme Court case of *Griggs v Duke Power* (1971) 401 U.S. 424: S. Fredman, *Discrimination Law* (2nd edn, Clarendon Press, 2011), pp. 177–80. See recently *Texas Department of Housing and Community Affairs v The Inclusive Communities Project, Inc. et al.*, Case No 13/1371, US Court of Appeal for the Fifth Circuit, 25 June 2015. In the case law of the ECHR, see *D.H. v Czech Republic*, App No 57325/00 (2007), para. 184.

[164] The Committee on Economic, Social and Cultural Rights defines terms as follows (E/C.12/GC/20, para. 10): '(a) *Direct Discrimination* occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground . . . Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant); (b) *Indirect discrimination* refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of . . . rights as distinguished by prohibited grounds of discrimination.' For a critique of the CESCR formulation, see De Schutter, *International Human Rights Law*, p. 640. The Human Rights Committee has explicitly acknowledged indirect discrimination in a number of cases, while General Comment 18 prefers the 'purpose or effect' formula: *Althammer v Austria*, CCPR/C/78/D/998/2001 (2003); *Simunek et al. v Czech Republic*, CCPR/C/54/D/516/1992 (1995); *Diergaardt v Namibia*, CCPR/C/69/D/760/1997 (2000).

[165] In *D.H. v Czech Republic*, the Grand Chamber observed (para. 184) that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, although couched in neutral terms, discriminates against a group'. General Policy Recommendation No. 7 (2002) of the European Commission against Racism and Intolerance (ECRI) on national legislation to combat racism and racial discrimination offers a general view: <http://www.coe.int/dhgl/monitoring/ecri/activities/GPR/EN/Rec>.

[166] Compare the definition of indirect discrimination in the Inter-American Convention against Racism, Article 1(2), discussed in the conclusion to the present chapter.

[167] GR 32, para. 7.

effect', CERD stated that it 'must take account of the particular context and circumstances... as by definition indirect discrimination can only be demonstrated circumstantially'.[168] While the Committee has not provided States parties with elaborate guidance on the evidence to demonstrate the presence of indirect—or structural—discrimination, general group-based data are regularly called for,[169] as well as scrutiny of the overall circumstances of particularly vulnerable groups,[170] or in relation to specific policies.[171]

In its exploration of the facets of racial discrimination, the Committee has highlighted *structural discrimination* or *structural inequalities*, notably regarding the situations of Afro-descendants and indigenous peoples in the Americas.[172] The position regarding Afro-descendants is summarized in GR 34, adopted in 2011:

> Racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery, are evident in the situations of inequality affecting them and reflected, *inter alia*, in the following domains: their grouping, together with indigenous peoples, among the poorest of the poor; their low rate of participation and representation in political and institutional decision-making processes; additional difficulties they face in access to and completion and quality of education, which results in the transmission of poverty from generation to generation; inequality in access to the labour market; limited social recognition and valuation of their ethnic and cultural diversity; and a disproportionate presence in prison populations.[173]
>
> The Committee observes that overcoming the structural discrimination that affects people of African descent calls for the urgent adoption of special measures (affirmative action)...[174]

This extract highlights a multitude of epiphenomenal effects and takes the Committee close to a formal analysis of structural discrimination. The use of the term by the Committee frequently relates to discrimination as a product of historical processes that have marginalized populations from the institutions of the State and the enjoyment of basic rights.[175] The larger story in many cases, notably that of indigenous peoples, is that structures of State and society were crafted around models that offered little sense of

[168] *L.R. v Slovakia*, CERD/C/66/D/31/2003 (2005), para. 10.4.

[169] Concluding observations on Armenia, CERD/C/ARM/CO/5-6, para. 12.

[170] Concluding observations on The Netherlands, CERD/C/NLD/18, para. 6.

[171] Concluding observations on the Czech Republic, CERD/C/CZE/CO/7, para. 16, where CERD recommended a review of the 'methodological tools used to determine the cases in which children are to be enrolled in special schools so as to avoid indirect discrimination against Roma children on the basis of their cultural identity'.

[172] For example concluding observations on Colombia, CERD/C/COL/CO/14, para. 18; Peru, CERD/C/PER/CO/14-17, para. 10; Uruguay, CERD/C/URY/CO/16-20, paras 10–12, and the Bolivarian Republic of Venezuela, CERD/C/VEN/CO/18, para. 17. In the case of Uruguay, the Committee recommended (para. 12) vis-à-vis persons of African descent that the State party pursue 'efforts to introduce the ethno-racial dimension in all governmental plans, programmes and strategies relevant to the objective of combating and reversing structural discrimination; to allocate specific and sufficient budgets to them; and evaluate them periodically in order to improve their qualitative and quantitative results for the persons targeted'.

[173] CERD/C/GC/34, para. 6.

[174] *Ibid.*, para. 7. The term 'institutional discrimination' has, by contrast with structural discrimination, rarely been taken up: see concluding observations on Rwanda, CERD/C/304/Add.97, para. 6.

[175] Young, in a reformulation of discrimination as oppression, defining oppression as 'structural', the causes of which 'are embedded in unquestioned norms, habits and symbols, in the assumptions underlying institutional rules and the collective consequences following from those rules', referring also to 'often unconscious assumptions and reactions of well-meaning people in ordinary interactions... cultural stereotypes, and structural features of bureaucratic hierarchies': I.M. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), p. 41, cited in Bamforth *et al. Discrimination Law: Theory and Context*, p. 225.

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ownership or participation on the part of non-dominant populations; indigenous peoples may regard the development of compensatory legal and constitutional practice in this respect as an aspect of 'belated State-building'.[176] Structural discrimination is also seen to impact on non-citizen, immigrant populations.[177] As a descriptor, 'structural' has been preferred by the Committee to 'systemic', the latter being used more commonly to refer to 'systemic inadequacies' in social programmes.[178] 'Institutional discrimination', focusing on results of the actions of 'institutions' as opposed to broader 'structures', is not part of CERD's regular repertoire.[179] The cultural and economic embeddedness of discriminatory 'structures' in many States suggest that the measures required to address such discrimination within a State will require the deployment of the full resources of the Convention.

## V. Grounds of Discrimination

### *1. Race and colour*

Whereas the use of the term 'grounds' (of discrimination) is commonplace, Article 1 refers to discrimination 'based on' race, colour, etc. 'Grounds' of discrimination are, however, referred to in the preamble to the Convention, and GR 14 states the Committee's opinion that 'the words "based on" do not bear any meaning different from "on the grounds of" in preambular paragraph 7'.[180] The list of grounds in Article 1 is expressed as limited.

While the Committee is critical of racist epithets,[181] 'race as such has seldom been explicitly mentioned as a prohibited ground',[182] and where it is referred to, is usually placed in a list along with other grounds, together constituting 'racial discrimination'. The Committee has set itself against notions of 'pure blood' and 'mixed blood', concerned by the idea of racial superiority that such terminology may entail.[183] Concern was also expressed regarding language appearing in the report of the Dominican Republic referring to the 'racial purity' and 'genetic characteristics' of different ethnic groups.[184] In contrast

[176] E.I.A. Daes, *Discrimination against Indigenous Peoples: Explanatory Note concerning the Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1993/26/Add. 1, 19, para. 26.

[177] Concluding observations on Belgium, CERD/C/BEL/CO/16-19, para. 15, which also includes a reference to 'ethnic stratification'.

[178] 'Systemic' discrimination is understood by the Committee on Economic, Social and Cultural Rights as 'legal rules, policies, practices or predominant cultural attitudes in either the public or the private sector which create relative disadvantages for some groups, and privileges' for others: CESCR GC 20, para. 12, a definition of that is close to the present work's account of 'structural' discrimination.

[179] C. McCrudden, 'Institutional Discrimination', *Oxford Journal of Legal Studies* 2 (1982), 303–67; M. Bell, *Racism and Equality in the European Union* (Oxford University Press, 2008), p. 12 [henceforth *Racism and Equality*].

[180] GR 14, para. 1; also para. 11 of GR 35 on Combating Racist Hate Speech.

[181] *Hagan v Australia*, CERD/C/62/D/26/2002 (2003).

[182] W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005), p. 90 [henceforth *Non-Discrimination and Equality*], the comment predates recent lively discussions on 'race' referred to in the present chapter.

[183] Concluding observations on Republic of Korea, CERD/C/KOR/CO/14, para. 12. This followed a response by the State party to Committee questions, CERD/C/SR.1834, para. 11: inclusion in the State report 'had been intended to highlight the existence of significant social problems that the government wished to eradicate, rather than to condone notions of racial superiority'.

[184] CERD/C/DOM/CO/12, para. 8. The resulting critique by the Committee, *ibid.*, was mild: the use of such terms 'could lead to an erroneous interpretation of the State party's policies'. The subsequent report of the State party (2012) does not shed much light on the controversy; the language employed, 'while it could rightly be considered equivocal' is 'in no way or circumstance' the expression of a discriminatory policy': CERD/C/DOM/13-14, para. 205.

to its response to biological expressions of 'race', no equivalent expression of discomfort was advanced by the Committee in response to the statement by Cuba interpreting race as a social construct:

> The naturalistic biological aspect of race, which reduces the human person to a number of specific features, is of little ideological or functional use when it comes to placing individuals in categories in order to establish a social record of the phenomenon... all the racial classifications are to some degree arbitrary and vary considerably depending on the taxonomic principle on which they are built... the classifications with which people act and function in concrete contexts do not always coincide fully with the classifications which may result from the application of a given 'scientific' criterion. The notion of race is thus taken to be a social construct.[185]

Notwithstanding sensitivities as to concept and language, CERD insists that national legislation should address all the grounds of discrimination in Article 1, including race. Norway explained the absence of 'race' from its Anti-Discrimination Act:

> the Government has supported the view that the concept of race should not be used... The reason for this is that the concept of race is based on biological, hereditary characteristics, grounded in theories that have no justifiable scientific basis or content. Moreover, the concept has strong negative connotations... The Government therefore sees no need to use the term 'race' in the text of the statute.[186]

In response, the Committee expressed concern that the Act did not specifically cover discrimination on the ground of race and recommended that discrimination on this ground be adequately covered in existing legislation.[187] The following report of Norway included the further response:

> In the Anti-Discrimination Act, legislators wished to avoid using the term 'race' in the text of the statute, although it is used in international rules. It was pointed out that one important measure to combat racism is to eliminate the idea that people can be divided into different races. It was emphasised that discrimination based on perceptions of a person's race must be regarded as discrimination based on ethnicity within the meaning of the Anti-Discrimination Act.[188]

The Committee maintained its position in concluding observations of 2011 and 2015.[189] Similarly in the case of Germany, the Committee noted the absence of a definition of racial discrimination because of historical sensitivities as to the use of racial terminology in the law, and suggested to the State party that adopting the terminology of the Convention offered more complete legal cover than any alternatives.[190] In the case of Sweden, the concern was that the deletion of 'race' might 'lead to difficulties with the qualification and processing of complaints, hindering the access to justice' for victims. The Committee did

[185] CERD/C/CUB/14-18, paras 2–5, at para. 5.
[186] CERD/C/497/Add. 1, para. 10.
[187] CERD/C/NOR/CO/18 para. 15.
[188] CERD/C/NOR/19-20, para. 11.
[189] CERD/C/NOR/CO/19-20, para. 8; CERD/C/NOR/CO/21-22, para. 9. For discussions pertaining to the latter, see CERD/C/SR.2373 and 2374.
[190] CERD/C/DEU/CO/18, para. 15: 'While noting the State party's reservations with regard to the use of the term "race", the Committee is concerned that the State party's strong focus on xenophobia, anti-Semitism and right-wing extremism may lead to the neglect of other forms of racial discrimination... in this respect, the Committee also regrets the absence of a definition of racial discrimination in the State party's domestic legislation.'

not explicitly call for the reinstatement of 'race', preferring to request that Sweden disseminate information as to what constituted racial discrimination under Swedish law.[191]

As with race, CERD expresses a preference that discrimination on the ground of colour be prohibited in domestic legislation. Norway was thus enjoined to include the Article 1 grounds of racial discrimination in its Anti-Discrimination Act,[192] while the inclusion by Moldova of 'skin colour' as a ground of discrimination in a draft labour law was welcomed by the Committee.[193] Colour-based discrimination is occasionally singled out by CERD as the essential ground in a particular case.[194] The Committee itself has referred to 'black' people and communities in a wide range of countries,[195] and generally follows the terminology used in State reports unless there is evidence that the communities in question object to it.[196]

### 2. *Descent*

The opposition of some States, notably India, to applying the ground of 'descent' to the caste system played its part in stimulating explanations by the Committee of its approach to 'descent'. The *Concise Oxford English Dictionary* offers a definition of descent as (apart from descending from a height or descending on a person in order to rob!) referring to 'a person's origin or nationality' and 'transmission by inheritance'[197] A thesaurus offers related words such as ancestry, extraction, family tree, genealogy, heredity, lineage, origin, and parentage.[198] A Secretariat paper for CERD's thematic discussion of descent-based discrimination in 2002 observed that 'descent'

> generally means the fact of 'descending' or being descended from an ancestor or ancestral stock. It is also equivalent to 'lineage, race, stock'. In legal terminology, this term signifies 'transmission of property, title, or quality, by inheritance'. The term descent implies inheriting from one generation to another characteristics that are evaluated in society in a positive or negative way, that is the status determined by birth.[199]

The proliferation of synonyms suggests overlap with other terms in Article 1, especially where they include 'origin',[200] a feature of Article 1 that reinforces Diaconu's assertion that 'the definition was composed by adding as many concepts as possible, in order to avoid any *lacunae*'.[201] 'Descent' is potentially the widest basis for the prohibition of discrimination.

[191] CERD/C/SWE/CO/19-21, para. 6.
[192] CERD/C/NOR/CO/19-20, para. 8; CERD/C/NOR/CO/21-22, paras 9 and 10.
[193] CERD/C/MDA/CO/8-9, para. 13.
[194] Concluding observations of 2013 on the Dominican Republic, CERD/C/DOM/CO/13-14, contain multiple references—paras 7, 8, 9, 14, 15, 16, and 17—to discrimination against 'dark-skinned' persons of African descent, including an expression of concern regarding the ambiguous requirement of a '*buena presencia*' (good appearance) to obtain a skilled job.
[195] See, for example, concluding observations on Ecuador, CERD/C/ECU/CO/19, para. 10; Morocco, A/65/18, p. 93, para. 19; and Switzerland, CERD/C/CHE/CO/6, para. 17.
[196] For a complex of arguments regarding 'fair-skinned aboriginal people' under question as not being 'genuinely' aboriginal; see Federal Court of Australia, *Eatock v Bolt* [2011] FCA 1103.
[197] *Concise Oxford English Dictionary*, p. 387.
[198] *The New Collins Dictionary and Thesaurus* (Collins, 1987), p. 265.
[199] CERD/C/61/Misc.13, para. 6.
[200] See above on discussions in the *travaux* on confusions over 'national origin'.
[201] I. Diaconu, *The definitions of racial discrimination*, background paper for the World Conference against Racism, E/CN.4/1999/WG.1/BP.10 (1999), para. 17.

The Committee's major statement on descent-based discrimination was made in 2002 as GR 29 'on article 1, paragraph 1 of the Convention (Descent)';[202] the recommendation emerged after an extensive Committee discussion preceded by an afternoon of interventions by governments, UN experts, and NGOs.[203] GR 29 was adopted in the year following the Durban conference; the absence of reference to caste in the final document of the conference[204] is compensated for by its inclusion in GR 29. The preamble to GR 29 confirms 'the consistent view of the Committee that the term "descent" in Article 1, paragraph 1 . . . does not solely refer to "race" and has a meaning and application which complement the other prohibited grounds of discrimination', and strongly reaffirms 'that discrimination based on descent includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status' which nullify or impair their equal enjoyment of human rights. The text of the recommendation does not offer a complete definition of 'descent-based discrimination',[205] but encourages governments to adopt measures, including taking steps

> to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors, including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations of 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.

The emphasis is on discrimination against individuals locked in to a system from which they aspire to escape and which they find degrading, a system which involves 'a total lack of social mobility, for the status of an individual was determined by birth or social origin and could never change, regardless of personal merit'.[206] The description of this form of discrimination consists in a series of indicators or a 'cluster concept', in that no single element is a perfect indicator of the existence of such discrimination, but cumulatively they work together to assist governments to uncover the presence of descent-based discriminatory structures.

The preamble to the recommendation constructs a link between narrower conceptions of descent-based discrimination circulating around caste, and wider meanings by referring

[202] A/57/18, chapter XI. F. For general work at the United Nations, see Report of the Special Rapporteurs, Yokota and Chung, on discrimination based on work and descent: A/HRC/11/CRP.3, 18 May 2009, to which is annexed the *Draft Principles and Guidelines for the Effective Elimination of Discrimination Based on Work and Descent*.

[203] The thematic discussion took place on 9 August, CERD/C/SR.1531. There are no summary records for the proceedings on the previous day, on which twenty-three separate interventions (including five from African groups) were made by NGOs, one of which was a joint statement of thirty-two international NGOs; as well as interventions from four members of the Sub-Commission, and two governments, India and Nepal. A summary of the whole of the thematic discussion was made by the International Movement against all forms of Discrimination and Racism (IMADR). See also CERD/C/SR.1545, SR.1546 and SR.1547 for discussion of the draft general recommendation.

[204] The diplomacy of the government of India prevailed over determined efforts by Dalit groups in particular to insert a specific provision in the Durban Declaration and Programme of Action.

[205] CERD member Thornberry, CERD/CD/SR.1545, para. 43; Sicilianos, *ibid.*, para. 45.

[206] Remarks of CERD member de Gouttes, CERD/C/SR.1531, para. 40.

to persons of Asian and African descent, and indigenous and other forms of descent. The conception of descent-based discrimination in the recommendation is wider than caste, but includes it: the point is made in the preamble, and was individually endorsed by members of the Committee.[207] The language of invitation to States to recognize the operation of descent-based discrimination on their territory is further underlined by the preamble, which commends the efforts of those States which have taken measures against it: the overall tone of the recommendation is hortatory as much as critical.

The massive contestation of caste systems by Dalits and others, and the overwhelming evidence of caste oppression caught the attention of CERD members, while arguments in defence of the system under scrutiny were not overborne by the evidence presented to the Committee.[208] The recommendation incorporates a severe critique of a particular form of social and religious organization, even if the direct emphasis is on discrimination rather than the cultural system per se. The question of cultural intrusion may have troubled some members of the Committee but was addressed in the light of the evidence presented. If the question was whether the Committee was interfering in an unwarranted manner into historical, cultural, or religious systems, it might equally be asked whose culture was involved, and who spoke for that culture. The sense of belonging and meaning provided by a caste/descent group was greatly weakened when individuals and groups contested bother their 'membership' and the validity of their condition.[209] Some members of the Committee were less troubled by the possibility of intrusion and would have gone further than the recommendation.[210]

Discrimination based on descent has been addressed by the Committee in a variety of contexts including caste-based discrimination and discrimination based on African and, to a lesser extent, Asian descent, discussed below. Banton recalls the early case of Somalia,[211] where despite the reservations of the country rapporteur as to the applicability of the Convention,[212] and uncertainty among members as to how to characterize the conflict within the State,[213] the Committee 'expressed concern about the tragic circumstances prevailing in Somalia, which include conflicts based on descent'.[214] The descent frame has been considered appropriate to address forms of stratification in a widening range of

[207] See remarks of CERD member Pillai, CERD/C/SR.1531, paras 4–10; also Aboul-Nasr, *ibid.*, paras 2–3; Thornberry, *ibid.*, para. 13; Lindgren Alves, *ibid.*, para. 29; Yutzis, *ibid.*, para. 36; Diaconu, *ibid.*, para. 45.

[208] See generally, C. Bob, ' "Dalit Rights are Human Rights": Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue', *HRQ* 29 (2007), 167–93; A. Waughray, 'Caste Discrimination and Minority Rights: the Case of India's Dalits', *IJMGR* 17 (2010), 327–53.

[209] Thornberry, CERD/C/SR.1531, para. 12.

[210] CERD member Lindgren Alves proposed an amendment to the draft GR whereby the Committee would state its understanding that 'caste systems are totally contrary to the International Convention on the Elimination of All Forms of Racial Discrimination', CERD/C/SR.1545, paras 49 and 78. This was immediately rejected by Thiam, *ibid.*, para. 79, who argued that 'it did not adequately reflect the reality of the African caste system'.

[211] Banton, *International Action*, p. 151.

[212] CERD/C/SR.948, para. 58 (Aboul-Nasr).

[213] De Gouttes, *ibid.*, para. 64, believed that 'an ethnic element' was involved; Ferrero Costa, *ibid.*, para. 65, discerned 'an ethnic, even a tribal aspect to the conflict'.

[214] CERD/C/SR.949, para. 5. Divisions among groups in Somalia are sometimes described as based on a clan system; sources also refer to occupational and caste-based stratification of groups in a patron-client relationship with 'noble clans'. On the general conflict situation, see S. Samatar, *Somalia: A Nation in Turmoil* (Minority Rights Group, 1995); on caste relationships, see A. Stevens, *Discrimination based on Descent in Africa*, paper presented to the 2002 CERD thematic discussion on descent-based discrimination for the International Dalit Solidarity Network, pp. 5–6 (on file with author).

States. Questions of caste and analogous systems of social stratification have been raised by State reports including those of Bahrain,[215] Bangladesh,[216] Burkina Faso,[217] Chad,[218] Ethiopia, India, Japan,[219] Mali,[220] Madagascar,[221] Mauritania,[222] Nepal,[223] Nigeria,[224] Senegal,[225] Suriname,[226] the UK,[227] and Yemen.[228]

The views of the Committee on descent-based have been contested by States parties, notably India and Japan. In the examination of the report of India in 1996, CERD affirmed that descent 'does not solely refer to "race"',[229] concluding that the situation of India's Scheduled Castes and Scheduled Tribes fell within the purview of the Convention. India disagreed, arguing that '"race" in India is distinct from "caste"',[230] while nevertheless

[215] CERD/C/BHR/CO/7, para. 16: the descent reference to Shia groups in Bahrain does not stand out in that the grounds distinguishing them are multiple and stated to include 'tribal or national origin, descent, culture or language'.

[216] CERD/C/304/Add.118, para. 11.

[217] CERD/C/BFA/CO/12-19, para. 8, referring to a caste system 'in certain ethnic groups', for which the committee recommended, among other measures, 'special legislation'.

[218] CERD/C/TCD/CO/15, para. 15; CERD/C/TCD/CO/16-18, para. 12.

[219] CERD/C/304/Add.114, para. 8 explaining the Committee's view of the relevance of descent-based discrimination in the case of the Burakumin community; the issue was taken up again in discussions of subsequent reports of Japan to the Committee, CERD/C/JPN/CO/3-6, para. 8; CERD/C/JPN/CO/7-9, para. 22.

[220] CERD/C/61/CO/7, para. 16.

[221] CERD/C/65/CO/4, para. 17.

[222] CERD/C/65/CO/5, para. 15. The recommendations to Madagascar and Mauritania expressed the Committee's concern over discrimination against descendants of slaves.

[223] CERD/C/304/Add.107, para. 11: 'The Committee remains concerned at the existence of caste-based discrimination and the denial which this system imposes on some segments of the population of the enjoyment of the rights contained in the Convention.'

[224] CERD/C/NGA/CO/18, para. 15, referring to 'members of the Osu and other similar communities'.

[225] CERD/C/61/CO/9, para. 11; CERD/C/SEN/CO/16-18, para. 13.

[226] CERD/C/SUR/CO/13-15, paras. 15 and 16.

[227] CERD/C/63/CO/11, para. 25; CERD/C/GBR/CO/18-20, para. 30, where CERD recommended that the responsible government Ministry invoke the Equality Act to 'provide for "caste to be an aspect of race" in order to provide remedies to victims of this form of discrimination'. A. Waughray, 'Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law', *Modern Law Review* 72 (2009), 182–219; A Waughray, 'Capturing Caste in Law: Caste Discrimination and the Equality Act 2010', *Human Rights Law Review* 14 (2014), 359–79; M. Dhanda, A. Waughray, D. Mosse, and D. Keane, *Caste in Britain: Socio-Legal Review*, Equality and Human Rights Commission Research Report 91 (2014). See also *Chandhok and Another v Tirkey*, UKEAT/0190/14/KN, 2 December 2014, where, in a claim amended to include caste discrimination, a UK Employment Appeal Tribunal, following citation of, *inter alia*, the provisions of ICERD, refused to strike out the claim, finding that, although 'caste' was not an autonomous concept in the UK Equality Act, the facts surrounding the case suggested that 'ethnic origins' in the Act had a 'wide and flexible ambit' (including characteristics determined by 'descent'), so that caste could come within it. The case was returned to the Employment Tribunal in July 2015—at the time of writing, the judgment is reserved.

[228] CERD/C/YEM/CO/16, para. 15, focusing on 'descent-based, culturally distinct communities, among others, the Al-Akhdam'. The observations on the complexity of the population and to classes within it are contested in the later report of Yemen, CERD/C/YEM/17-18, paras 20–21.

[229] CERD/C/304/Add.13, para. 14. The position was forcefully expressed by many individual members of the Committee: 'If "descent" was the equivalent of "race", it would not have been necessary to include both concepts in the Convention' (Wolfrum, CERD/C/SR.1161, para. 20); 'The Committee's conceptions of "race" and "descent" clearly differed from those of the Government of India' (Van Boven, CERD/C/SR.1162, para.14); 'The fact that castes and tribes were based on descent brought them strictly within the Convention' (Chigovera, *ibid.*, para. 22). See also remarks of Aboul-Nasr, SR.1162, para. 27; de Gouttes, SR.1161, para. 32; Rechetov, SR.1161, para. 11.

[230] Consolidated tenth to fourteenth periodic reports of India, CERD/C/299/Add.3, para. 7: 'both castes and tribes are systems based on "descent"... It is obvious, however, that the use of the term "descent" in the Convention clearly refers to "race"... the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention.' See also CERD/C/SR.1161, para. 4; CERD/C/SR.1162, para. 36.

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indicating its willingness to provide information on these groups.[231] The position of India in this respect was maintained throughout its dialogue with CERD in 2007,[232] where the delegation recalled that the Committee

> was familiar with India's position on the caste issue... as an issue outside the purview of the definition of racial discrimination... The Indian Constitution directly addressed the issue of caste through clearly guaranteed rights and affirmative action, which aimed to ensure that disadvantaged castes were brought into mainstream society. The Constitution drew a distinction between caste, race and descent, considering them as separate concepts.[233]

Another delegate said that 'his government had no doubt that the ordinary meaning of the term "racial discrimination" did not include caste. It was firmly accepted that the Indian caste system was not racial in origin. Caste was an institution unique to India'.[234] Further, regarding the drafting of the Convention, the delegate stated that the government's 'primary concern during that time related to the use of the term "national origin"... the proposal to include the term "descent" had been based on concerns regarding discriminatory treatment against Indians in their own land while under colonial rule, and to persons of Indian descent in countries where they had settled in large numbers'.[235] It was also asserted that caste 'could not be considered as descent, which signified genealogically demonstrable characteristics'.[236] In the event, the Committee reiterated its unchanged position on the meaning of Article 1, reaffirming that discrimination based on caste is fully covered.[237] India maintained its views with equal firmness.[238]

In the case of Japan, the Committee similarly observed that '"descent" has its own meaning and is not to be confused with race or national or ethnic or national origin', recommending the State to ensure the protection of the rights 'of all groups, including the Burakumin community'.[239] Japan stated that it did not share the Committee's interpretation of 'descent',[240] while going on to outline measures taken 'with the aim of resolving

[231] Preliminary comments of the government of India on the concluding observations adopted by [CERD] on the tenth to fourteenth periodic reports of India presented during the forty-ninth session of the Committee, A/51/18, p.128, para. 3(a). One of the representatives of India offered a nuanced view in stating that, CERD/C/SR.1163, para. 3, the 'notion of "race" was not entirely foreign to that of "caste"; but... racial differences were secondary to cultural ones... race had never really been determinant for caste'. CERD/C/SR.1163, para. 3; also para. 4, *ibid.*

[232] CERD/C/SR.1796 and 1797.

[233] CERD/C/SR.1796, para. 3.

[234] *Ibid.*, para. 7.

[235] *Ibid.*, para. 8.

[236] *Ibid.*, para. 13.

[237] CERD/C/IND/CO/19, para. 8.

[238] A62/18, Annex X, Comments of States parties on the Concluding Observations adopted by the Committee.

[239] Concluding Observations on Japan, CERD/C/304/Add.114, para. 8. A number of submissions highlighted the plight of Burakumin, a community historically identified with work in certain 'unclean' trades. See E.A. Su-lan Reber, 'Buraku Mondai in Japan: historical and modern perspectives and directions for the future' *Harvard Human Rights Journal* 12 (1999), 299 ff; M. Kurokawa, 'Markers of the 'Invisible Race', in Y. Takezawa (ed.), *Racial Representations in Asia* (Kyoto University Press and Trans-Pacific Press, 2011), pp. 32–52 [henceforth *Racial Representations*]. In the 2010 dialogue with Japan, CERD member de Gouttes, CERD/C/SR.1987, para. 47, cited stakeholder submissions regarding Buraku under the UPR process that described them as 'descendants of outcast communities in the feudal era, whose occupations had been deemed to be "tainted" with death or ritual impurity. Although the Burakumin had been liberated when the feudal caste system had been abolished in 1871, their long history of taboos and myths had left a continuous legacy of social exclusion.'

[240] A/56/18, Annex VII. A, para. 2.

the problem of discrimination against the Burakumin'.[241] In later dialogues with Japan, there is little evidence of convergence between the position of Japan and that of the Committee on 'descent', the delegation of Japan observing, *inter alia*, that there were no physical features distinguishing Burakumin from other Japanese.[242] CERD has reiterated its position, stating that it was encouraged by steps taken by Japan 'in the spirit of the Convention' to eliminate discrimination against Burakumin.[243]

Building upon the numerous references in the 2001 Durban Declaration to 'Africans and people of African descent',[244] and a smaller number of references to 'Asians and people of Asian descent',[245] the Programme of Action (POA) devoted a chapter to the former category. The POA made recommendations in areas such as participation in 'all political, economic, social and cultural aspects of society and in the advancement and economic development of their countries',[246] on additional investment and capacity-building,[247] on affirmative action or positive action initiatives,[248] on access to education,[249] on public service,[250] the justice system,[251] and on 'religious prejudice and intolerance'.[252] Regarding an issue more commonly associated with indigenous peoples, the POA urged States 'to resolve problems of ownership of ancestral lands inhabited for generations by people of African descent and to promote the productive utilization of land and the comprehensive development of these communities, respecting their culture and their specific forms of decision-making'.[253]

Following General Assembly resolution 64/169 proclaiming 2011 as the International Year for People of African Descent, the Committee held a thematic discussion on discrimination against people of African descent in March 2011 and drafted GR 34 on 'racial discrimination against people of African descent' at its seventy-ninth session in 2011. The recommendation does not attempt a definition of such descendants but states simply that people of African descent 'are those referred to as such by [the Durban documentation] and who identify themselves as people of African descent'.[254] In addition to the general human rights, specific rights are picked out including rights to land, cultural

[241] *Ibid.*, para. 3.

[242] CERD/C/SR.1988, paras 39 and 45.

[243] CERD/C/JPN/CO/3-6, para. 8. Japan continues to maintain the view that the Burakumin are not included under 'descent', a matter of regret to the Committee: CERD/C/JPN/CO/7-9, para. 22. For a reflection on historical treatment of Burakumin as a 'race' see Y. Takezawa, 'Towards a New Approach to Race and Racial Representations: Perspectives from Asia', Takezawa (ed.), *Racial Representations in Asia*, pp. 7–19.

[244] Paras 32–35. Paragraph 33 also refers to the African diaspora.

[245] Paras 36–38. Further paragraphs—13 and 103—link together 'Africans and people of African descent', 'Asians and people of Asian descent' and indigenous peoples.

[246] POA, para. 4.

[247] *Ibid.*, paras 5–6.

[248] *Ibid.*, para. 5.

[249] *Ibid.*, para. 10.

[250] *Ibid.*, para. 11.

[251] *Ibid.*, para. 12.

[252] *Ibid.*, para. 14.

[253] *Ibid.*, para. 13. The groups and situations intimated here exist in a number of Latin American States: see, for example, R. Price (ed.), *Maroon Societies: Rebel Slave communities in the Americas* (Anchor Books, 1973); for a particular case, see E.-R. Kambel and F. MacKay, *The Rights of Indigenous Peoples and Maroons in Suriname* (IWGIA, 1999). More general treatments of African descent in the Americas include G.R. Andrews, *Afro-Latin America 1800–2000* (Oxford University Press, 2004); Minority Rights Group, *No Longer Invisible: Afro-Latin Americans Today* (Minority Rights Group, 1995).

[254] GR 34, para. 1.

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identity, protection of traditional knowledge, and prior consultation in decisions.[255] As noted, the recommendation emphasizes structural discrimination rooted in the infamous regime of slavery. The remit of the recommendation is global, though the imprint of the situation in the Americas looms large in the references to the slave trade, and the emphasis on property and land rights.

### *3. National or Ethnic Origin*

The fundamental ambiguity in 'national origin' and 'nationality' is that the terms refer not only to legal nationality or citizenship but also to a concept of community in a spectrum that includes ethnicity: 'national origin' and overlapping terms are discussed further in the next chapter. Schwelb reads the *travaux* to the effect that there was 'no clear agreement whether the term "national origin" was to be understood in the politico-legal or in the ethnographical sense'.[256] Schwelb concludes his review of the terminology with the statement that '[f]or the practical purposes of the interpretation of the Convention . . . the three terms "descent", "national origin" and "ethnic origin" among them cover distinctions both on the ground of *present or previous nationality* in the ethnographical sense and on the ground of *previous* nationality on the "politico-legal" sense of citizenship'.[257] Sharp distinctions along such lines may be blurred making it difficult to visualize to which facet of identity is being adverted.

Where national origin is referred to in appraising discrimination, it is most frequently coupled with 'ethnic origin', suggesting that its primary register of meaning is ethnicity and not legal citizenship.[258] Ethnic origin is often used generically but may be expressly linked to ethnic minorities or indigenous peoples in phrases such as 'minority ethnic origin';[259] it has also been used in connection with refugees, asylum-seekers, and other

[255] *Ibid.*, para. 4.

[256] Schwelb, *The International Convention*, 1006–7.

[257] Schwelb, *The International Convention*, 1007 (emphasis in the original). However, as noted in the present chapter, the Committee has sought to carve out a specific niche for discrimination based on 'descent', at least in the limited context of caste or caste-like systems. Diaconu disagrees with Schwelb's analysis of 'national origin' insofar as it suggests coverage of discrimination on the ground of a previous (legal) nationality: I. Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), p. 70.

[258] According to Lord Fraser of Tullybelton in the UK House of Lords: 'For a group to constitute an ethnic group . . . it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these . . . are essential; others are not essential but one or more of them . . . will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority . . .within a larger community': *Mandla v Dowell-Lee* [1983] 2 AC 548 (HL). As a definition, this is too demanding by international standards, especially in relation to elements 3 to 7, but also in respect of element 1, bearing in mind arguments as to the meaning of 'minority', which, according to the Human Rights Committee in General Comment 23, does not depend on being 'long-established'. The account may be more acceptable as a perfectionist conceptualisation where, as with CERD's account of descent-based discrimination, individual elements cumulatively identify the group in question but the issue of what constitutes 'indispensable' elements remains open.

[259] Moldova, CERD/C/MDA/CO/15, para. 21.

non-citizens.[260] 'National or ethnic origin' often function as a yoked pair of workhorses, employed whenever issues of colour ('visible minorities') are not the most prominent markers of discrimination. In practice, 'ethnic origin' is easily transmuted into 'ethnic minorities' and 'indigenous peoples', to the extent that discrimination against these communities may be treated as independent grounds in themselves.

### *4. Intersections*

The term 'intersectionality' stems from feminist jurisprudence, notably the work of Kimberlé Crenshaw who introduced the term to preparatory sessions of the Durban World Conference of 2001.[261] Gender[262] supplies the most commonly appraised element for the axes of discrimination that intersect with the named grounds in Article 1(1). GR 25 recognizes that racial discrimination 'does not always affect women and men equally or in the same way',[263] and that 'certain forms of racial discrimination may be directed towards women specifically because of their gender', and may have consequences that affect primarily or only women such as 'sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the forced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers . . . by their employers'.[264] There is a self-critical element in the recognition of the need for a more systematic Committee approach to evaluating and monitoring discrimination against women and to developing a more sharply focused methodology by giving particular consideration to '(a) the form and manifestation of racial discrimination; the circumstances in which racial discrimination occurs; (c) the consequences of racial discrimination; and (d) the availability and accessibility of remedies and complaint mechanisms for racial discrimination'.[265] Otto commends the approach of the Committee in opening the way 'to a deeper understanding of the structural dimensions of the intersection of race and gender discrimination and how they work together to intensify women's inequality'.[266]

While the scope of the recommendation is broad enough to address the human rights of men as well as women,[267] the text is focused on oppressive circumstances faced by

[260] In *L.G. v Korea*, the distinction between foreign English teachers who were ethnically Korean and those of non-Korean background was treated as one based on ethnic origin, CERD/C/86/D/51/2012 (2015), para. 7.4, discussion in Chapter 7.

[261] K.W. Crenshaw, 'Gender-related aspects of race discrimination', background paper for the Expert Meeting on Gender and Racial Discrimination, 21–24 November 2000, Zagreb, Croatia, EM/GRD/2000/W.P.1. Intersectional discrimination is understood, in for example, the case of black women, as reaching beyond the addition of two sources of discrimination, but as creating a 'qualitatively different, or synergistic' form of discrimination, so that 'the disadvantage experienced by black women is not the same as that experienced by white women or black men': Fredman, *Discrimination Law*, p. 140. *Inter alia*, the concept presents a case of heightened vulnerability of groups. Attempts to address intersectional discrimination at the level of domestic law have had mixed success, with some jurisdictions demanding that the discrimination be classified as either one 'ground' or another: see *De Graffenreid v General Motors* 413 F Supp142 (USA), with *Hassam v Jacobs NO and Others*, South Africa, cited in Fredman, *Discrimination Law*, p. 143; L'Heureux-Dube J, in *Egan v Canada* [1995], 2 SCR 513, p. 533.

[262] Or based on sex, concluding observations on Ecuador, CERD/C/ECU/CO/19, para. 13.

[263] GR 25, para. 1.

[264] *Ibid.*, para. 2. The interrelationship between the rights of women, and racism, racial discrimination, etc, is set out in para. 10 of the preamble to CEDAW.

[265] *Ibid.*, para. 5.

[266] D. Otto, 'Women's Rights', in Moeckli *et al.*, *International Human Rights Law*, p. 329.

[267] According to Committee member January-Bardill, speaking at the drafting phase of the recommendation, CERD/C/SR.1391, para. 29, 'it was important . . . to think about gender as not being restricted to issues

women. Otto supplements her commendation of the recommendation in adding that while the language of gender 'potentially enables the relational quality of the gender stereotypes, which usually privileges men and disadvantages women, to be acknowledged', the potential remains inchoate in the general recommendation.[268] Gender dimensions are prominent in other general recommendations including GR 29 on descent-based discrimination,[269] and GR 30 on discrimination against non-citizens.[270] In cases of gender/race-based discrimination, the Committee's preferred metaphor is 'double discrimination', though usage is not consistent. In the case of Portugal, the Committee concluded that the State party had the obligation to guarantee the right of everyone to equality in the enjoyment of human rights 'without discrimination on *the basis of gender*, race, colour or national or ethnic origin', explicitly adding gender to the list of grounds.[271]

For discrimination based on religion in conjunction with the grounds in the Convention, the Committee has generally preferred to employ 'intersectionality' instead of double/multiple discrimination.[272] Addressing the situation of groups whose identity is partly constructed in terms of religion has proved awkward for the Committee, notwithstanding the inclusion of freedom of thought, conscience and religion among the protected rights in Article 5. The Committee did not carry through the promise, referred to in its 2007 report to the UN General Assembly, of holding a thematic discussion to clarify its understanding of the relationship between racial and religious discrimination.[273] States parties have occasionally been critical, suggesting that CERD has strayed beyond its mandate when concluding observations address the situation of a particular religious group.[274] Practice remains ad hoc, and, besides the metaphor of intersectionality,[275] CERD employs compound terms such as 'ethno-religious' to bring discrimination more clearly within the purview of the Convention,[276] while in other cases, references have been made simply to, for example, discrimination against 'Muslims'.[277] The comparative liberality of references to religion

involving women . . . gender-related dimensions of racial discrimination could . . . be a useful tool . . . in examining why black men, who were subjected to immense racial discrimination, were the subject of criminalization. That was as much a gender issue as rape.'

[268] Otto, in Moeckli *et al.*, *International Human Rights Law*, p. 330; Otto, p. 329, also notes that the few examples of intersectional discrimination provided are concerned with violence against women, which is the case with GR 25 but does not represent the scope of current CERD practice on intersectionality addressed in the present work; see further Chapters 13, 14, and 15, Article 5.

[269] 'Multiple discrimination against women members of descent-based communities', A/57/18, chapter XI. F, section 2.

[270] The recommendation refers to 'multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers', A/59/18, chapter VIII, para. 8.

[271] CERD/C/PRT/CO/12-14, para. 18 (present author's emphasis); see also Iraq, CERD/C/IRQ/CO/15-21, para. 16.

[272] Reporting guidelines for Article 5(d)(vii) explicitly refer to the term.

[273] A/62/18, para. 538.

[274] Comments by the Islamic Republic of Iran on the concluding observations of the Committee, A/58/18, Annex VII.

[275] The usage has become almost standard: see, for example, concluding observations of 2011 in relation to Ireland, CERD/C/CO/34, para. 26; Serbia, CERD/SRB/CO/1, para. 18; and Yemen, CERD/C/YEM/CO/17-18, para. 18, Yemen maintains a reservation to the Article 5(d)(vii) on freedom of thought, conscience, and religion.

[276] Georgia, CERD/C/GEO/CO/3/Add.1, para. 18; Nigeria, CERD/C/NGA/CO/18, para. 14; Tanzania, CERD/C/TZA/CO/16, para. 20. See also para. 6 of GR 35.

[277] CERD/C/ITA/CO/16–18, para. 19.

in concluding observations contrasts with a narrower approach in the communications procedure under Article 14.[278]

## VI. Nullifying or Impairing... Human Rights and Fundamental Freedoms

Language on nullifying or impairing was present in the *travaux* from the Ivanov/Ketryzinski draft onwards. The pairing of terms appears to open up the prospectus of discrimination, which need not be aimed at or have only nullifying effect on the 'recognition, enjoyment or exercise' of rights and freedoms but only impair them, presumably to some meaningful degree. The notion of impairment brings to mind decisions of the Human Rights Committee on indigenous rights and freedoms whereby not every interference amounts to a breach;[279] on the other hand, Meron speculates whether the making of racial distinctions per se constitutes racial discrimination under ICERD, without the need to demonstrate human rights effects.[280]

The Convention is an 'open' convention in that the prohibition of racial discrimination is not confined to discrimination in relation to a circumscribed list of rights and freedoms—the long list of protected and guaranteed rights in Article 5 is prefaced by the word 'notably'. The wide scope of the definition is confirmed by the *travaux*. Textual anomalies such as the absence of any reference to civil rights in Article 1 (they are included in Article 5) do not appear to have greatly troubled CERD.[281] Practice does not confine the scope of the Convention to any particular class or classes of rights. GR 32 states simply that the list of human rights to which the principle of non-discrimination applies 'is not closed and extends to any field of human rights regulated by the public authorities' in the State party.[282]

The wide sweep of rights covered by the non-discrimination principle is particularly important in relation to bodies of 'ethnic' and related rights that were less developed, or undeveloped, when the Convention was adopted; elaboration of the gender dimensions of racial discrimination has also involved comprehension of the principles of the CEDAW and related standards.[283] According to GR 32, the interpretation of the Convention as a 'living instrument' makes it imperative to read the Convention in a context-sensitive manner, context that includes 'the range of universal human right standards on the principle of non-discrimination and special measures'. The reference to 'universal' does not diminish the ambit of rights to be considered in applying the Convention: minority and indigenous rights and other category rights also apply 'universally'—wherever minorities, indigenous peoples, and other groups are present. The Committee has addressed a full complement of collective rights in its endorsement of the principles of ILO Convention 169 on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples, up to and including self-determination.

[278] See Chapter 11 on Article 4.

[279] *Länsman v Finland*, CCPR/C/49/D/511/1992 (1993), para. 9; *Länsman et al. v Finland*, CCPR/C/58/D/671/1995 (1996), para. 10.

[280] Meron, *Meaning and Reach*, 291.

[281] Schwelb, *The International Convention*, 1005, observes that the *travaux* do not make it clear why civil rights were omitted or whether the omission was intentional, and suggests that it may have been an oversight in drafting, the definition having been drafted before the operative provisions had been worked out.

[282] Para. 9: see also Chapter 15.

[283] For a reflection on the background to GR 25, see *Gender Dimensions of Racial Discrimination* (Office of the UN High Commissioner for Human Rights, 2001), pp. 19–22.

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## VII. On an Equal Footing

In the drafting of the Convention, the phrase 'on an equal footing' was selected without much discussion, replacing a simple reference to 'equality' and a more complex suggestion on 'equality of treatment or opportunity'. References to equality are scattered throughout the text of the Convention, complementing the reference in Article1(1). The preamble refers to the 'dignity and equality' inherent in human beings, who are born 'free and equal' in dignity; equality before the law and equal protection of the law are also mentioned. Article 2(2) describes special measures as designed to guarantee 'the full and equal' enjoyment of human rights and fundamental freedoms, and warns that the measures should not extend to 'the maintenance of unequal or separate rights' after their objectives have been achieved. Article 5 refers to 'equality before the law', 'universal and equal suffrage', 'equal access to public service', 'equal pay for equal work', and 'equal participation in cultural activities'. Meron summarizes the combination of equality references in the Convention as indicating that the Convention 'promotes racial equality, not merely colour-neutral values' and not merely *de jure* but also *de facto* equality.[284] Makkonen reads 'equal footing' to supply the comparative element at the heart of discrimination, emphasizing that what is at stake is not identical treatment but equal treatment which allows for a measure of differential treatment.[285]

GR 14 on Article 1(1) refers to non-discrimination, together with equality before the law and equal protection of the law, as a basic principle in the protection of human rights: 'on an equal footing' is not referred to. GR 32 on special measures includes the banner headline that the objective of the measures is to advance 'effective equality', making the general statement that the concept of equality reflected in the Convention combines formal equality before the law with equal protection of the law, while *de facto* equality in the enjoyment and exercise of human rights is the aim to be achieved by the implementation of its principles.[286] The combination of phrases on equality in GR 32 implies that the Convention is concerned with objectives and outcomes as well as processes. The conclusion is fortified by the reference in Article 1 to 'the recognition, enjoyment or exercise' of human rights, phrasing that implies a commitment to substantive equality beyond the static legal geometry of formal equality.

The attention paid by CERD to the broader formulations of equality has meant that 'on an equal footing' is not overused in practice.[287] GR 32 nonetheless asserts that the principle of enjoyment of human rights on an equal footing 'is integral to the Convention's prohibition of discrimination'.[288] In *L.R. v Slovakia*, in a passage with appears to refer to Article 1, the concept was rephrased as 'on an equal basis'.[289] As applied in concluding observations, the phrase 'on an equal footing' has been drawn upon in sundry connections, including the importance of a good environment to ensure access to education and employment 'on an equal footing';[290] in recommendations to coordinate

[284] Meron, *Meaning and Reach*, 288.
[285] Makkonen, *Equal in Law, Unequal in Fact*, p. 131.
[286] Para. 6; see also Chapter 5.
[287] The precise phrase appears to be rarely used in international instruments—a search of the SIM human rights database found a reference in Article 13.4 of the European Social Charter.
[288] GR 32, para. 7.
[289] Para. 10.7.
[290] CERD/C/LTU/CO/3, para. 21.

federal and provincial programmes to ensure that rights in the Convention are enjoyed 'on an equal footing' throughout the territory of the State party;[291] and—part of the regular repertoire of CERD—to ensure that women can transmit nationality to spouses and children 'on an equal footing' with men.[292] While the interpretation of 'equal footing' is coloured by equality standards throughout the Convention, the phrase is not incompatible with the more expansive notions, in that the achievement of an equality platform strongly suggests positive action on the part of State authorities.

## VIII. Any Other Field of Public Life

Article 1 defines discrimination in relation to the 'political, economic, social, cultural or any other field of public life'. According to Banton, the reference to public life was inserted to remove from the scope of the Convention discrimination within private relations.[293] Banton recalls a discussion where the Committee 'appeared to agree' that the effect of the phrase 'was to define the political, economic, social and cultural fields of life as fields of public life and to say that, if any other similar fields were ever recognized, they too would come within the scope of the definition'.[294]

The reference to public life does not sit well with some provisions of the Convention.[295] 'Field' is used in the Convention to define the scope of a provision, without being tagged to 'public life': Article 2(2) refers to special measures in the social, economic, cultural, and other fields; Article 7 addresses the fields of teaching, education, culture, and information. 'Field' and 'public life' are absent from Article 5, which focuses on rights. As used in Article 1(1), the fields of public life are referred to in broad terms so that, according to Diaconu, 'all spheres of public life' are effectively covered by the definition:[296] If an area of discrimination is not caught by one of the named 'fields' it is presumably caught by the reference to 'any other field'. CEDAW employs 'field' in analogous terms, referring to the advancement of women in 'all fields' and particularly in the political, economic, and cultural fields.[297] Fields of activity referred to in international instruments cover a spectrum that includes 'administration of justice' and 'fields relevant to the treatment of persons deprived on their liberty';[298] 'social welfare, financial matters, family law and property rights';[299] 'science, arts and culture', and many others. The use of 'field' in human rights instruments to signify broad institutional and discursive spaces suggests that 'field of public life' should not be viewed narrowly. While the reference to 'public life' suggests a realm of 'private life' which the Convention does not touch, Article 5 protects a wide range of rights from discrimination and is not ostensibly confined to public life.[300]

[291] CERD/C/CAN/CO/19-20, para. 9.
[292] CERD/C/KWT/CO/15-20, para. 18.
[293] Banton, *International Action*, p. 195.
[294] Banton, *International Action*, p. 195.
[295] Schwelb, *The International Convention*, 1004–05.
[296] Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), p. 32.
[297] Article 3 of CEDAW, see also the preamble.
[298] Optional Protocol to the CAT, Article 5(2).
[299] CPED, Article 24.6.
[300] Including, according to Schwelb, *The International Convention*, 1005–6, 'the right to marriage and choice of spouse, the right to inherit, the right to freedom of thought and conscience as distinct from freedom of expression'.

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The *travaux* do not shed much light on the matter, though the sensitivities of some governments regarding the reach of the Convention will be recalled. A proposed general recommendation on public life was discussed by the Committee in 1993, eliciting views in favour of expanding the scope of the Convention towards private conduct, as well as more cautious approaches.[301] Members of the Committee were considerably exercised in the debate by the privatization of public life, and even the 'privatization of apartheid',[302] through exemptions of private bodies from anti-discrimination legislation. A majority agreed that the Convention was not confined to public life in any narrow sense, particularly taking Article 5 into account, and, even if Article 1 had been designed to limit the scope of the Convention, the Committee 'did not necessarily have to maintain that restricted scope'.[303] The failure to adopt a specific recommendation on public and private life has not inhibited the Committee from pronouncing on the issue. The body of CERD general recommendations on public and private life suggest that an expansive reading of Article 1(1) has become commonplace—'public life' was not even mentioned in an explanation of the paragraph in GR 14 on article 1(1).

## D. Comment

The Committee has referred to a responsibility to ensure coherence in the interpretation of a constituent instrument not notable for this particular virtue.[304] The search for coherence has focused on the definition of racial discrimination as it has on the *modus operandi* of the Committee and the normative details of the text. Interpretative movement over time is paralleled by movement outwards in geographical space to underscore the potential ubiquity of racial discrimination. The interpretative practice of the Committee on Article 1 has been less 'literal' than all but recent practice on Article 4, and includes innovative terminology on forms of discrimination not specifically accounted for in Article 1.[305]

Partly in response to State denials of racial discrimination, requests for data permeate the CERD archive.[306] The evaluation of certain forms of discrimination—effects or indirect discrimination and, *a fortiori*, structural or institutional discrimination—makes particularly strong demands on the provision of data. CERD's standard line is that effective national policies to implement the Convention are impossible without an adequate database.[307] In the face of advocacy by self-defining groups and multiple

[301] CERD/C/SR.969, paras 19–44.

[302] Comment by Banton, CERD/C/SR.969, para. 21.

[303] Wolfrum, *ibid.*, para. 35. van Boven, *ibid.*, paras 26–7, had noted that the intention in the drafting 'had been to preserve the right to invite or not to invite a certain person into one's home . . . or to allow private clubs to choose their own members . . . However, the concept of "public life" had been interpreted quite widely even during the drafting of the Convention [and] was becoming broader and broader.' See also Diaconu, *ibid.*, para. 29 for a broad view of the scope of the Convention.

[304] *Jewish Community of Oslo v Norway*, CERD/C/67/D/30/2003 (2005), para. 10.3—the observation referred to Article 4 but may be extended to the Convention as a whole.

[305] The Inter-American Convention on Racism, etc, makes explicit reference to forms of discrimination distilled over years of CERD practice, referring in its preamble to 'combating racial discrimination in all its individual, structural, and institutional manifestations'.

[306] States may still be in denial, or even 'firm denial' of the existence of racial discrimination: concluding observations on the Dominican Republic, CERD/C/DOM/CO/13-14, para. 7.

[307] 'No progress can be made in elimination of any problem can be made if there is widespread denial about the existence of that problem': Makkonen, *Equal in Fact, Unequal in Law*, p. 279.

other factors in group recognition, the data questions reflect an ideology of assumed population diversity and ride roughshod over claims of ethnic homogeneity or a local absence of racial discrimination. In cases where levels of racism are apparently low, a standard Committee response is that anti-discrimination measures are needed in order to forestall its emergence. Intimations that the elaboration of data categories stimulates processes of ethnogenesis, or divides nations, have been given short shrift. The determined approach of the Committee in this respect may not adequately account for the variety of situations under review, bearing in mind that categorizations construct as well as respond to situations. It is also the case that racially focused discrimination weighs less heavily on some societies than on others. Banton recalls that equality concepts should be applied, *mutatis mutandis*, to States as well as persons and groups: equality does not require identical treatment, and 'it is necessary to recognize that some States face much greater challenges than others with respect to racial discrimination'.[308]

While practice does not prioritize particular data-collection methodologies, CERD has commented on census deficiencies, suggesting additional or better questions.[309] The task is to find quantitative and qualitative approaches that respect principles of consent, anonymity, and privacy and, when ethnic questions are constitutionally forbidden, to search for creative means of presenting an accurate demographic picture. Data collection based on the voluntary principle and self-ascription is distinguishable from the imposition of categorizations: compulsory registration of ethnicity or religion in public documents such as identity cards and passports is objectionable.[310] Bell notes that, in some cases, data carry the risk of reinforcing negative stereotypes; if crime statistics show an over-representation of ethnic groups in the criminal justice system, this may reinforce prejudices about a 'supposed criminal proclivity'[311] and lead to under-reporting when individuals decline to identify their ethnic affiliation—he cites the Roma as a case in point.[312] The problem of 'naming names' is adverted to in GR 35 on racist hate speech: 'Media should avoid referring unnecessarily to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance.'[313]

The flexibility of the basic notion of 'discrimination' is a given in CERD practice—geared to unfair or unjust distinctions based on defined grounds; the concept does not demand uniform treatment irrespective of circumstances. Prominent markers referred to in GR 32 for appraising the permissibility of distinctions include the 'objectives and purposes of the Convention', their 'legitimate aim', 'proportionality', and whether there is any 'objective and reasonable justification' for differentiation.[314] Further, 'the principle of non-discrimination requires that the cultural characteristics of groups be taken into

[308] Banton, *International Action*, p. 316.

[309] As examples, Guatemala was recommended to 'continue to upgrade the methodology' to be used in a forthcoming census, CERD/C/GTM/CO/12-13, para. 6; Mauritania was recommended to carry out a more precise census, not limited to linguistic factors, CERD/C/65/CO/5, para. 9; Romania was recommended to improve its data collection methods, CERD/C/ROU/CO/16-19, para. 8.

[310] In the application of such principles in Northern Ireland, self-definition may have functioned in tension with the data demands of equality legislation: De Schutter, *International Human Rights Law*, pp. 678–80.

[311] M. Bell, *Racism and Equality*, p. 39.

[312] *Ibid.*

[313] GR 35, para. 40. See also para. 3 of GR 27 with regard to the Roma.

[314] See also *Advisory Opinion of the Inter-American Court of Human Rights on Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR Ser. A No. 4 (1984), para. 57.

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consideration'[315] in order to avoid discrimination through or in association with policies of integration or development,[316] or nation-building.[317] By extension, failure to treat differently persons whose situations are significantly different is inconsistent with the Convention: the corollary concept of an 'obligation to differentiate' also resonates with practice.[318] CERD has not unpacked all markers of acceptable differentiation, nor integrated them into a schematic model of review after the fashion of the European Court of Human Rights,[319] or analogous to that outlined by scholars such as Henrard,[320] though elements of such review surface naturally in various contexts, even in the absence of a rigid scheme. Judgements on the permissibility of distinctions are not rendered in terms of 'justifying' discrimination but in assessments as to whether or not discrimination has occurred in the first place.[321] Terms such as 'fair', 'positive', or 'arbitrary' discrimination have been greeted with puzzlement mixed with doubts as to their conformity with the Convention.[322] National usage may be at odds with Convention practice in that CERD treats discrimination as a legal conclusion on a human rights-denying practice, untrammelled by mollifying adjectives.

Assessing the presence of discrimination in the wider human rights framework implies that differentiation on the basis of, for example, minority or indigenous status is legitimate.

[315] Para. 8.

[316] Concluding observations on Namibia, CERD/C/NAM/CO/12, para. 24; Honduras, CERD/C/HND/CO/1-5, para. 7, where the Committee expressed a preference for 'identity-based development programmes'.

[317] CERD/C/BWA/CO/16, para. 9, where the Committee linked this principle to the reluctance of the State party to recognize the existence of indigenous peoples on its territory.

[318] The principle expressed by the European Court of Human Rights in *Thlimmenos v Greece* may be recalled: 'the right . . . not to be discriminated against in the enjoyment of . . . rights . . . is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification . . . The right not to be discriminated against . . . is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different': App No 34369/97, European Court of Human Rights, Judgment of the Grand Chamber, 6 April 2000, para. 44. See also the *Belgian Linguistics Case*, 1 YBECHR 832, para. 44. See also information submitted to CERD by Thailand, referring to a draft bill on discrimination (gender and sexual orientation), defining discrimination in part as 'an action or failure to act to differentiate among': CERD/C/THA/CO/1-3/Add.1, para. 4.

[319] 'The Court reiterates that a difference in treatment is discriminatory if "it has no reasonable and objective justification", that is, if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised': *D.H. and Others v Czech Republic*, para. 196; see also, *ibid.*, para. 175. Among other authorities, see *Larkos v Cyprus*, App No 29515/95, 30 EHRR 597, para. 29.

[320] K. Henrard, 'Non-Discrimination and Full and Effective Equality', in M. Weller (ed.), *Universal Minority Rights* (Oxford University Press, 2007), pp. 75–147, pp. 89–90 [henceforth *Non-Discrimination and Full and Effective Equality*]; the scheme asks (1) whether there is a differentiation that merits a justification test, or in other words is there a prima facie case of discrimination; (2) whether the differential treatment amounts to a prohibited discrimination or not: (1) is designated the review hurdle, and (2) the justification phase.

[321] The Inter-American Convention on Racism, while not elucidating direct discrimination, refers to the possibility of justifying indirect discrimination, where a 'provision, criterion or practice has some reasonable and legitimate justification under international human rights law', a formulation that opens out the Convention to other sources of principle. While referring to 'unjustifiable disparate impact', the Committee has not elaborated a dichotomous regime of justifications for intentional/effects, direct/indirect discrimination, though in principle justification possibilities are wider for the latter pairings in light of the fact that they may result from policies and practices with benign motivations. See also the helpful discussion: 'Justifying direct discrimination?' in Fredman, *Discrimination Law*, pp. 196–202.

[322] See remarks of Aboul-Nasr, Sicilianos, and Thornberry in discussions on the report of South Africa: CERD/C/SR.1367, paras 14, 25, and 27; regarding 'fair' discrimination, Aboul-Nasr (para. 14) asked: 'Surely discrimination could never be fair, whatever form it took?' regarding Chilean legislation on 'arbitrary discrimination', see CERD/C/CHL/CO/19-21, para. 9.

Even in this case, the non-discrimination principle has a role in appraising the treatment accorded to some groups compared with others, and the corresponding detriments. The Committee has interrogated distinctions made in domestic legislation between 'national minorities' and 'ethnic groups'.[323] Such patterns of distinction may be particularly complex in view of the widespread adoption of the term 'national minority' by European international instruments and domestic law. In the case of Austria, concern was expressed regarding the distinction between autochthonous minorities and other minority groups, as well as differentiation on the basis of historical settlement areas—distinctions that might lead to 'unjustified differential treatment'.[324] The categorization by a State of groups as autochthonous or national minorities has been accepted by the Committee as a legitimate exercise of sovereignty, but may raise concerns that distinctions between the rights recognised for some groups and not others are exaggerated and potentially discriminatory.

Because of the inclusion of 'discrimination in effect' in Article 1(1), the Committee has not been required to struggle to accommodate extended meanings in its interpretative practice: 'indirect' discrimination flows naturally from the 'purpose or effect' provision in the definition.[325] Equally, the Committee has taken the Convention to support 'positive action' as flowing from the reading of discrimination as linked to real world circumstances of individuals and groups, from insistence on the effective implementation in practice of obligations, including the action-oriented demands made by Article 2(1)(d), the express provisions on special measures, and the obligation to criminalize certain forms of conduct in Article 4.

Regarding the grounds of discrimination, CERD has also not been compelled to theorize the conceptual matrix that holds them together, whether as immutable or innate characteristics, characteristics over which there is no choice or control, marginalization, relative disadvantage, historical disadvantage, etc. While the grounds may present a logic in terms of characteristics, choice, marginalization, and oppression, they are better understood as a foreseeable product of the history and context of the Convention project—despite lengthy arguments over inclusions and exclusions, the emergence of a core of closely related grounds was a predictable consequence of the drafting process. The list of individual grounds suggests the overlapping or *pari materia* nature of the elements in Article 1(1) and their rough equality of importance. There has been little effort to distinguish between the different grounds in Article 1 to judge whether some are more amenable to 'differentiation' than others, nor to postulate a 'hierarchy' among them.[326] The definition refers to action 'based on' prohibited grounds: it does not descend into detail on how to assess the processes of deliberation of perpetrators, or the causes of action, though it has made clear that race/ethnicity need not be their sole ground. In practice it appears to be enough that the 'ground' makes a significant or not negligible contribution

[323] Examples include observations on Lithuania, CERD/C/LTU/CO/3, para. 9; and Slovenia, CERD/C/62/CO/9, para. 7.

[324] CERD/C/AUT/CO/17, para. 10.

[325] While the pairing of 'purpose or effect' suggests an obvious contrast, discrimination in 'effect' taken alone, as in ILO Convention 111, could logically include purposive and non-purposive action.

[326] The formulation of a hierarchy of standards of review from 'rationality review' to 'strict scrutiny' has not governed the implementation of the Convention: the diverse grounds are subsumed under 'racial discrimination'; De Schutter, *International Human Rights Law*, pp. 611–12, offers a succinct discussion of issues.

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to the prohibited action, bearing in mind that discriminatory actions may result from a complex of factors, not all of which are legally relevant.[327]

Among the grounds, 'race' has given rise to practical difficulties with States parties and is potentially a poisoned chalice. In a broad reading of the *travaux*, Keane comments on 'the near unquestioning acceptance of the term by the delegates who drafted ICERD at all levels'.[328] The opportunity to side-step the race question provided by the configuration of the definition means that the Committee has not devoted much attention to unpacking race. The notion of a 'ground' as referring to reasons for discrimination does not commit to acceptance of the reality of imagined 'races', existing in the minds of those who discriminate.[329] Taken all together, the elements of ICERD do not, however, provide the strongest basis for such a repudiation. The preamble refers to 'racial barriers', and to 'understanding between races'; Articles 1(4) and 2(2) refer to rights 'for different racial groups'; Article 2(1) refers to promoting understanding 'among all races' and restates opposition to 'racial barriers'; while Article 7 refers to promoting friendship 'among... racial... groups'. References to race throughout the Convention should not necessarily be taken as an endorsement of a theory of separate human races. The text ranges itself against those who believe in races, or act as if they entertained such a belief. While the Convention is explicitly directed against 'racial superiority' rather than 'racial differentiation', its thoroughgoing condemnation of racist doctrines serves to discredit the notion of race itself.

Norway's 'disclaimer' regarding the use of 'race', discussed earlier, is echoed elsewhere. CESCR GC 20 states that the 'use of the term "race" in the Covenant or the present General Comment does not imply the acceptance of theories which attempt to determine the existence of separate human races'.[330] EU Directive 2000/43 forbidding discrimination on the grounds of 'racial or ethnic origin', the preamble to which declares that the European Union rejects theories which attempt to determine the existence of separate human races, so that the use of the term 'racial origin' in the Directive 'does not imply an acceptance of such theories'.[331] As to whether CERD should present a similar disclaimer, avoiding mention of race is not guaranteed to lighten the task of combating racist activity. CERD has been principally concerned by the legal and practical lacunae potentially caused by omitting race from domestic legislation and substituting it with references to ethnicity, where racial perceptions are addressed only indirectly, or by focusing on

[327] Arguments are characteristically put forward in cases of 'direct' discrimination. In UK law, *see R. v Birmingham City Council ex parte Equal opportunities Commission* [1989] AC 1155 (House of Lords); *James v Eastleigh BC* [1990] 2 AC 751 (House of Lords)—the 'but for' test; *R (on the application* of *E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15.

[328] *Caste-Based Discrimination in International Law*, p. 178.

[329] See comments on discrimination on account of 'actual or perceived ethnicity' in *Timishev v Russia*, [2007] 44 EHRR 37, para. 56.

[330] Para. 19.

[331] Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. The European Parliament decided in 1996 that the term 'race' 'should... be avoided in all official texts': resolution on the communication from the omission on racism, xenophobia and anti-Semitism, cited in Bell, *Racism and Equality*, p. 13, n. 50. GR 7 of the European Commission against Racism and Intolerance (ECRI) includes a footnote 1 to the effect that ECRI rejects theories based on the existence of different races but uses the term 'in order to ensure that those who are generally and erroneously perceived as belonging to "another race" are not excluded' from legislative protection: <http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp>.

'extremism' which may or may not signify a racial/ethnic content. The treatment of race as a social construct rather than a biological substratum does not appreciably weaken its power to generate discrimination.[332]

Recommendations to incorporate into domestic law all the grounds of discrimination in Article 1(1) apply also to 'colour'. While discrimination on the ground of colour is to be legislated against, the Committee has criticized the use of the term 'visible minorities' in legislation, on the ground that it could imply that 'whiteness' is the standard of 'normality' in the State concerned.[333] Albinism is a troubling contemporary issue that challenges the scope of 'colour' discrimination, and descent-based discrimination. While in this case 'colour' is not a proxy for race/ethnicity, people living with albinism, and suffering from stigma, social exclusion, and discrimination face 'a similar experience to... vulnerable racial minorities' because of their different skin colour.[334]

The listing of national and ethnic origin among the grounds has, despite the ambiguities attaching to 'national', facilitated the shift in focus from race and colour to ethnicity, and ethnic minorities in particular—Vandenhole observes that CERD treats discrimination against minorities as a specific theme, 'regardless of which prohibited grounds are involved'.[335] Nonetheless, the substantive Convention basis for this ethnicization of discrimination is extensive: 'ethnic origin' is referred to in the preamble and Articles 1, 4, and 5, while Article 7 refers to 'ethnical groups', to which it may be recalled that the dominant application of 'national origin' in the Convention relates to ethnicity rather than citizenship. In light of the practical emphasis on self-identification, the focus on ethnicity need not imply a reification of cultures, and works against cultural determinism, where persons are assigned membership irrespective of their consent.[336] As noted earlier,[337] translated into the vocabulary of racism, ICERD is significantly and even predominantly concerned with cultural or difference racism: 'racial discrimination' subsumes and transcends 'race'.

GR 29 endeavours to give shape to 'descent' as a ground of discrimination. The *travaux* refer to the claim that descent was intended to cover uncertainties over 'national origin'—a proposition restated by India in opposing the application of ICERD to caste-based discrimination. While this suggests a connection between 'nationality' in the ethnic/cultural sense and descent, this does not rule out a distinct space for 'descent' among the

[332] According to CERD member Kut in discussing a report of Sweden, CERD/C/SR.2251, para. 6: 'Although the concept of race was a social construct, that was precisely why it should form part of the legal framework to combat racism.'

[333] Concluding observations on Canada, CERD/CAN/CO/18, para. 13; CERD/C/SR.1790, para. 50 (Thornberry). The term is used on the nineteenth and twentieth report of Canada in relation to South Asians, Chinese, and Blacks: CERD/C/CAN/19-20, para. 22, and explained and defended, *ibid.*, in paras 41–43.

[334] UN Independent Expert on Minority issues, cited in *Persons with Albinism, Report of the Office of the High Commissioner for Human Rights*, A/HRC/24/57, 12 September 2013, para. 81. Other paragraphs of the report reflect on the relationship between albinism and disability (para. 78), and persons with albinism as a distinct group requiring specific attention (para. 83). See also African Commission on Human and Peoples' Rights, *Resolution on the Prevention of Attacks and Discrimination against Persons with Albinism*, 5 November 2013: <http://www.achpr.org/sessions/54th/resolutions/263/>. In March 2015, the Human Rights Council appointed an independent expert on the enjoyment of human rights by persons with albinism: A/HRC/RES/28/6.

[335] Vandenhole, *Non-Discrimination and Equality*, p. 95.

[336] In this last respect, CERD aligns the Convention with the principle of non-compulsion expressed in Article 3 of the UNDM and the Council of Europe's Framework Convention on the Protection of National Minorities, respectively.

[337] Chapter 5.

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grounds. The formulation adopted by the Committee in GR 29 on descent-based discrimination includes the notion of inheritance, which places 'descent' in line with other grounds. The caste examples offered by India in the drafting of the Convention under the rubric of 'special measures' do not save caste from the application of the Convention: it is an unsustainable reading of ICERD that such groups are covered by provisions on special measures but are not within the definition in Article 1(1). The problem of caste in ICERD illustrates the more general problem of including the incorrigible variety of local institutions under a cosmopolitan rubric in the face of claims by States parties that cultures, institutions, or countries are 'unique'. In some cases, CERD has linked 'caste' with the situation of certain ethnic groups;[338] this should not be taken as a lack of confidence in the usefulness of the criterion of 'descent' but as recognizing a reality that the incidence of caste/descent-based discrimination may be local or intra-communal as well as national.

The listing of grounds in Article 1(1) has not unduly inhibited the discovery of fresh permutations of racial discrimination, bearing in mind the varying degrees of racialization of physical and cultural characteristics in contemporary societies.[339] Questions of minority and indigenous languages have been extensively addressed by the Committee, particularly in connection with Articles 5 and 7. The accounting of language as an independent ground of discrimination may be described as flowing from the ground of ethnic origin,[340] while gender has effectively been added to the list of grounds in a crystallization of the 'intersection' metaphor.[341] Among possible intersections, disability and sexual orientation have engaged the attention of the Committee only to a minor extent, a situation that is liable to change.[342] The intersectionality concept is objected to by the Holy See, highlighting in particular its use in relation to gender.[343]

[338] Concluding observations on Burkina Faso, CERD/C/BFA/CO/12-19, para. 8; Ethiopia, CERD/C/ETH/CO/7-16, para. 15.

[339] Bell, *Racism and Equality*, p. 9.

[340] In concluding observations on Mauritius, CERD recommended, in accordance with the Convention, adding language as a protected ground under the equal opportunities act: CERD/C/MUS/CO/15-19, para. 10.

[341] The Committee has insisted that race/ethnicity need not be the 'sole' ground of discrimination, and that municipal law provisions that insist it should be in order to engage the legislation are incorrect: Concluding observations on Austria, CERD/C/60/CO/1, para. 9. This opens out the concept to accommodate discrimination based simultaneously on a number of factors. In such cases, the author reads Committee sentiment to the effect that the race/ethnic element must be a 'substantial' or 'significant' contributor to the discrimination experienced. Compare the view of ECRI: for racism to have taken place, 'it is not necessary that one or more of the grounds . . . should constitute the only factor or the determining factor . . . it suffices that these grounds are among the factors leading to contempt or the notion of superiority': Explanatory Memorandum to *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination* (13 December 2002), para. 7.

[342] With regard to sexual orientation, see concluding observations on the Czech Republic, CERD/C/CZE/CO/7, para. 18; on LGBTI issues, concluding observations on Germany, CERD/C/DEU/CO/19-22, para. 16; The Netherlands, CERD/C/NLD/CO/19-21, para. 34, recommendation to take measures regarding LGBTI persons among asylum-seekers. Issues regarding disability have tended to emerge in connection with so-called special schools for children with mental disabilities to which Roma children are assigned rather than in terms of an intersection with race/ethnicity to create a new subject of discrimination: see for example concluding observations on Slovakia, CERD/C/SVK/CO/6-8, para. 16. Cf. Para. 57 of the Durban Programme of Action regarding the situation of persons with disabilities who are also subjected to racism, etc.

[343] Specific objection is taken to para. 7 of GR 32, which refers to intersectionality on grounds of gender and religion, and ostensibly *in toto* to GR 25 on gender dimensions of racial discrimination: 'the terms "gender" and intersectionality" are not found in the Convention . . . Moreover, the topic of women is addressed in a separate and distinct international instrument . . . the Convention on the Elimination of All Forms of Discrimination

In light of the drafting history of the Convention and occasional objections from States parties, the race/religion crossover has been cautiously treated. While the Committee refers to the intersectionality of racial/ethnic and religious discrimination, the metaphor does not always work well, in that, in many instances, ethnicity and religion cannot be differentiated with any certainty and are, on the contrary, effectively 'fused'. The Committee has used the uncomfortable term 'ethno-religious' to describe some such instances, though many indigenous groups exhibit similar characteristics, even if the term 'ethno-religious' is not applied to them. In other instances, there may be different perceptions as to the respective 'weight' of cultural and religious factors in constituting identity.[344] The structure of the Convention mandates the Committee to appraise evidence of discrimination against freedom of thought conscience and religion on ethnic/racial grounds—an inherently complex exercise capable of generating conceptual bewilderment.[345]

Discussions on the limitation to 'public life' in the definition have elicited a range of commentary. Makkonen suggests that 'public life' might 'simply convey the idea that whenever a country provides for a particular right, then that right comes within the purview of "public life" for that particular country'.[346] Ruggie comments that it is unclear 'how much the mention of "public life" in article 1 limits the scope of application of the Convention... references to public life have practically disappeared in opinions on communications and concluding observations, confirming the expansion of the Convention's reach and application'.[347] He suggests that, in practice, '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',[348] while noting also that the Committee has stressed that the public sphere is, indeed, the central focus of the Convention',[349] a comment that echoes views expressed in the communication procedure under Article 14.[350]

With regard to the public and private realms, discussions do not always distinguish two overlapping aspects: State responsibility for private actors with a public role, and the extent of permissible intervention in family and interpersonal relations. On the first issue, key provisions of the Convention address the activities of private actors, including Article 2 explicitly, Article 3 as interpreted by the Committee regarding segregation,[351] Article 4 on hate speech and racist organizations, and Article 5. The Convention holds States

against Women': CERD/C/VAT/16-23 (4 September 2014), para. 5. The results of the examination by the Committee of the report of the Holy See are discussed in Chapter 20.

[344] See Chapters 11 and 13.

[345] See Chapter 13.

[346] T. Makkonen, *Equal in Law, Unequal in Fact*, p. 141.

[347] Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *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, 18 December 2006, para. 12: <http://www.business-humanrights.org/Documents/State-Obligations-Corporate-Acts-CERD-18-Dec-2006.pdf>. Some recent concluding observations appear to bear out Ruggie's perceptions: Algeria, CERD/C/DZA/CO/15-19, para. 11, recommendation for a definition of discrimination 'that applies to all areas of public and private life'; Uzbekistan, CERD/C/UZB/CO/6-7, para. 7 (recommendation for a definition of discrimination 'covering all fields of public and private life').

[348] *Ibid.*, para. 93.

[349] *Ibid.*, para. 94.

[350] See *Gelle v Denmark*, CERD/C/68/D/34/2004 (2006), para. 6.5, and *Quereshi v Denmark*, CERD/C/66/D/33/2003 (2005), para. 6.3, for remarks on the public arena as the central focus of the Convention.

[351] Segregation 'which can also arise without any initiative or direct involvement by the public authorities': GR 19, para. 4, discussed in Chapter 10.

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responsible for discriminatory activities carried out by 'any persons, group and organization'.[352] Beyond this template, rights to privacy and family life presumptively limit the reach of the Convention and the obligation of the State to regulate private conduct, so that legitimate questions may be asked about the desirability of carrying the principle of racial non-discrimination into the interstices of interpersonal or family relations.[353] The interrogation of endogamous cultural relations and traditions where the Committee has insisted on its application raises analogous questions, especially in light of the principle of self-determination.[354] Practice does, however, delve further into some areas of social relations compared with others.[355] If the central case of CEDAW is the effective promotion of social transformation down to the level of interpersonal relations, and that of ICERD the recognition of multiple groups within States and the regulation of the space they occupy, this has not ruled out 'intrusion' into cultural space to safeguard the rights of women. GR 25 on gender-related dimensions of racial discrimination of racial discrimination includes reference to (paragraph 2) 'discrimination against women in private spheres of life'. The Convention does not, however, delineate the private from the public with any degree of precision, and Henrard appears substantially correct in suggesting that it 'does not impose such positive obligation to prevent and eradicate private discrimination in a comprehensive way that would reach every interaction between private persons'.[356] In sum, practice under the Convention addresses 'private actors' more substantially than it does 'private life'.

[352] Article 2(1)(d).

[353] See the comment on *Nahlik v Austria*, CCPR/C/57/D/608/1995 (1996), para. 8.2 of which refers to discrimination in the 'quasi-public sphere', in Joseph *et al.*, *The International Covenant on Civil and Political Rights*, p. 734: 'Whilst the Covenant requires regulation of private sector discrimination in "quasi-public" arenas such as employment, housing, or access to publicly available goods and services, it may not require regulation within the "totally private" or personal sphere, such as the home or within the family or other private relationships... how could a State meaningfully regulate instances of parental disapproval over the race of a child's spouse?... the totally private sphere is perhaps best addressed by educational measures, rather than by coercive laws.' See also the Explanatory report to Protocol 12 of the European Convention on Human Rights, para. 26: States parties may not, under the pretext of protecting from discrimination, commit disproportionate interferences with the right to respect for private or family life'. De Schutter, *International Human Rights Law*, p. 614, distinguishes between 'interactions between private individuals in the context of market relationships, where non-discrimination law may intervene, and interactions in the "sphere of intimacy" of private and family life, where it should not'.

[354] The Human Rights Committee narrowed the gap between ethnicity and family life in *Hopu and Bessert v France*, CCPR/C/60/D/549/1993/Rev.1 (1997), where the construction of a hotel complex in Tahiti that threatened to destroy ancestral burial grounds was treated as a violation of the rights of the authors of the communication to family and privacy—their relationship to ancestors was considered an essential element in their identity. A dissenting opinion by Committee members Kretzmer and Buergenthal, joined by others, criticized the blurring of the line between family, privacy, and ethnicity, insisting, *inter alia*, that 'family' however extended 'does not include all members of one's ethnic or cultural group'.

[355] For comment on the gendered nature of the public/private divide, see S. Mullally, 'The UN, Minority Rights and Gender Equality: Setting Limits to Collective Claims', *IJMGR* 14 (2007), 263–83.

[356] Henrard, 'Non-Discrimination and Full and Effective Equality', p. 143.

# 7. Article 1, Paragraphs 2 and 3

*Discrimination and Non-Citizens*

> 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.

## A. Introduction

The definition of discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) appears to be significantly narrowed by the above paragraphs which, like Article 1(1), apply to the Convention as a whole. The potential limitation of the scope of the Convention as a consequence of Article 1(2) is particularly striking. The entitlements of 'everyone' or 'all persons' to enjoy human rights are set out in the core human rights texts from the Universal Declaration of Human Rights (UDHR) onwards. Taken at face value, the language of the two paragraphs appears to undermine the universalist ambition of the text, the progenitors of which include the UDHR. The 'non-citizens' in Article 1(2) will in most migration cases possess the citizenship of a State other than the State party whose conduct is under scrutiny by the Committee; in other cases the 'non-citizens' will be so in the sense of statelessness or 'undetermined citizenship'.[1]

In general terms and as befitting the character of human rights as rights decoupled from the possession of citizenship, Weissbrodt reminds us that the 'architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should equally enjoy all human rights'.[2] The principle that human rights apply to all, irrespective of citizenship, is emphasized by the Human Rights Committee in an observation that reflects the ethics of human rights more generally:

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness... Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights... in the Covenant.[3]

[1] For use of the phrase, see concluding observations on Estonia, CERD/C/EST/CO/8-9, para. 15. For analogous indeterminacies, including the problem of 'the erased', see concluding observations on Slovenia, CERD/C/62/CO/9, para. 13, CERD/C/SVN/CO/7, para. 13; CERD/C/SVN/CO/8-11, paras 12 and 13.

[2] D. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008), p. 34.

[3] Human Rights Committee General Comment (GC) 15, *The Position of Aliens under the Covenant*, paras 1 and 2.

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The universality of the human rights canon does not necessarily supply adequate detail or signpost practical solutions to a host of problems affecting non-citizens. A sizeable corpus of standards is clustered around sundry categories of non-citizen, including stateless persons,[4] asylum seekers and refugees,[5] migrants,[6] and trafficked persons,[7] while the Declaration on the Human Rights of Individuals who are Not Nationals of the Country in Which They Live is the general UN instrument in this field.[8] The range and scope of international instruments on the non-citizen categories suggests that, in addition to practical human rights handicaps based on legal status, non-citizens are likely to experience oppression resulting from racist and xenophobic attitudes and practices. Following the references to xenophobia in the Vienna Declaration and Programme of Action,[9] the Durban Declaration of 2001 recognizes that xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constituted one of the main sources of contemporary racism;[10] the Outcome Document of 2009 urges States to combat the persistence of xenophobic attitudes towards and negative stereotyping of non-citizens.[11] The oppressive realities behind the Durban statements are well recognized in the Committee on the Elimination of Racial Discrimination (CERD) practice, motivating it to adopt two general recommendations (GRs) on non-citizens: GR 11 in 1993,[12] and GR 30 in 2004,[13] in addition to GR 22 on Article 5 and Refugees, opinions under Article 14 and copious individual decisions and recommendations.

The rights of citizens and non-citizens are not expressed as fully congruent in the major international human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) recognizes distinctions between citizens and non-citizens with respect to political rights,[14] freedom of movement,[15] and expulsion.[16] The limited exception to the non-discrimination provisions in Article 2(3) of the International Covenant-on Economic, Social and Cultural Rights (ICESCR) with regard to economic

[4] Convention relating to the Status of Stateless Persons 1954; Convention on the Reduction of Statelessness 1961. Chapter 4 of Weissbrodt, *The Human Rights of Non-Citizens*, canvasses a wide range of instruments relevant to statelessness.

[5] Notably the 1951 Convention relating to the Status of Refugees: see *infra* on GR 22.

[6] The CMW.

[7] Weissbrodt, *The Human Rights of Non-Citizens*, Chapter 9, 'Trafficked Persons'.

[8] Adopted by General Assembly resolution 40/144, 13 December 1985, the preamble to which recites general provisions on equality and, *inter alia*, recognizes 'that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live'.

[9] A/CONF.157/23, paras 15 and 30 in the first chapter; paras 19–24 of the second.

[10] Para. 16, the particular recital is recalled in the preamble to CERD GR 30.

[11] Para. 76.

[12] A/48/18, Annex VIII B.

[13] A/59/18, chapter VIII.

[14] Article 25, rights to participate in public affairs, to vote and hold office, and to have access to public service.

[15] Article 12.

[16] Article 13, applying only to aliens. The general rule of application to all persons is set out in detail in GC 15 of the Human Rights Committee, *The Position of Aliens under the Covenant*, HRI/GEN/1/Rev.9 (Vol. I), pp. 189–91. GC 31, *The Nature of the General Legal Obligation Imposed on States parties to the Covenant*, *ibid.*, pp. 243–7, provides that 'the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory': for reflection on extraterritoriality in the context of ICERD, see the commentary on Article 2 in the present work.

rights may also be borne in mind,[17] even if there is no agreed account of what rights should be listed as 'economic'.[18] Distinctions between citizens and non-citizens in the enjoyment of human rights, and distinctions among non-citizens, may, therefore, be contemplated in particular circumstances. In this perspective, the human rights canon is a *lex imperfecta*, incompletely emancipated from associations with nationality and citizenship. The possession of nationality thereby assumes greater importance than it ought to as a facilitator of equitable treatment. In view of the links between lack of citizenship status and racism, it is appropriate that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) lists the right to nationality as among the rights benefiting from the equal treatment and non-discrimination guarantees of Article 5.[19]

## B. *Travaux Préparatoires*

The Sub-Commission's draft Convention included an article—VIII—relating to the interpretation of the Convention; the first version, submitted by Calvocoressi and Capotorti, included the provision that nothing in the Convention 'shall be interpreted as implying a grant of equal political rights to nationals of a contracting State or a grant of political rights to a distinct racial, ethnic or national group as such'.[20] The minorities element was attached to a provision regarding non-citizens in a draft by Cuevas Cancino:

> Nothing in this Convention shall be interpreted as implying positive obligations . . . [for States parties] . . . to grant a specific political or social status to aliens in their territory. It shall not be interpreted as a grant of political rights to racial, ethnic or national groups as such, if such a grant might destroy, in whole or in part, the national unity or territorial integrity of a State party.[21]

After further drafts,[22] the Chairman proposed a new text:

> Nothing in the present Convention may be interpreted as implicitly recognizing or denying political rights or obligations to non-nationals nor to groups of persons of a common race, colour, ethnic or national origin which exist or may exist as distinct groups within a State party.[23]

In discussions, 'political rights' was expanded to 'political or other rights', and the reference to 'or obligations' was dropped.[24] The amended text was submitted to the Commission and

[17] 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present covenant to non-nationals.' Para. 30 CESCR GC 20, which states that 'nationality should not bar access to Covenant rights . . . the . . . rights apply to everyone including non-nationals', stresses that this is without prejudice to Article 2(3). Weissbrodt comments on Article 2(3) that, as 'an exception to the rule of equality, article 2(3) must be narrowly construed, may be relied upon only be developing countries, and only with respect to economic rights. States may not draw distinctions between citizens and non-citizens as to social and cultural rights': Weissbrodt, *The Human Rights of Non-Citizens*, p. 49.

[18] Thus, with regard to the right to education, GC 11 of the CESCR, para. 2, observes that 'the right to education . . . has been variously classified as an economic, rights, a social right and a cultural right. It is all of these'.

[19] Article 5(d)(iii).

[20] E/CN.4/Sub.2/L.340.

[21] E/CN.4/Sub.2/L.347.

[22] Including a text by Krishnaswami and Mudawi, E/CN.4/Sub.2./L.348.

[23] E/CN.4/Sub.2/L.349.

[24] E/CN.4/873, para. 109; voting is recalled, *ibid.*, para. 111.

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discussed in a series of meetings.[25] Following suggestions for amendments, the representatives of France, India, and The Philippines proposed to replace the Sub-Commission's text by the following:

> Nothing in the present Convention may be interpreted as affecting in any way the distinction between nationals and non-nationals of a State, as recognized by international law, in the enjoyment of political or other rights, or as amending provisions governing the exercise of political or other rights by naturalized persons; nor does anything in this Convention impose a duty to grant special political or other rights to any groups of persons because of race, colour or ethnic origin.[26]

In the event, India and The Philippines withdrew their sponsorship of the proposal; France stated that it would be willing to withdraw the amendment if the Commission reverted to the consideration of 'national origin' and deleted that reference from Article 1.[27] In complex discussions, the US proposed the deletion of the reference to 'international law', 'since no rule of international law specifically covered the question of the distinction between nationals and non-nationals concerning political and particularly other rights'.[28] The representative of the USSR argued that the draft article was a reservation clause, though it was not customary to reserve against matters that were not dealt with in the text;[29] he noted, however, that it 'was fully accepted that differences of status should exist between the nationals and the non-nationals of a State'.[30] The rather confused debate in the Commission was in part the result of continuing disagreements over the meaning and place of 'national origin' in Article 1. The proposed 'interpretative' Article VIII was deleted at the 808th meeting on the proposal of Austria.[31]

The inconclusive discussions of 'national origin' in the *travaux* allow comparatively little room for precise comment on the position of non-citizens in the emerging ICERD framework. The issues of citizenship were not clarified until the nine-power draft of Article 1 that emerged in the Third Committee shortly before adoption.[32] In themselves, the discussions of national origin as a ground of discrimination were strongly influenced by concerns on the part of many States about an undue opening out of the provisions against discrimination. According to India, the purpose of the draft Convention was 'to eliminate all forms of racial discrimination which might exist between the inhabitants of a given

[25] The article was considered at the 802nd to 804th meetings, and the 808th and 809th meetings of the Commission,

[26] E/CN.4/L.715. The phrase 'as recognized by international law' was subsequently deleted by the sponsors.

[27] E/CN.4/874, para. 255. In the view of France, its representative observed that Article VIII owed its existence to the inclusion of 'national origin', which the Commission was obliged to clarify: 'it was generally agreed that the case of non-nationals was one to which the Convention did not apply': E/CN.4/SR.803, p. 4; see also Denmark and the UK: E/CN.4/SR.804, pp. 10 and 8, respectively. In relation to naturalized persons, the representative of France recalled that 'France had laws and regulations which temporarily limited the political rights of naturalized persons, e.g. the right to vote. Naturalized persons . . . were often not very familiar with French politics [and] much less interested in political rights than in economic, social and cultural rights, at least during the first few years after their naturalization': E/CN.4/SR.802, p. 12.

[28] E/CN.4/SR.804, p. 5. According to the representative of Turkey, international law 'had not yet succeeded in defining the political, civil, economic, social and cultural rights listed in Article V' (Article 5): E/CN.4/SR.804, p. 7.

[29] E/CN.4/SR.804, p. 6; on the second element in the draft, the representative observed that, though it did not impose a duty to grant special political rights or the right to self-determination, it might give the impression that it wished to set aside or even prevent the exercise of the right of peoples to self-determination.

[30] E/CN.4/SR.804, p. 7.

[31] E/CN.4/874, para. 256.

[32] A/C.3/L.1238.

State; no delegation had suggested that the rights guaranteed and the duties imposed should be extended to aliens'.[33] According to the representative of Uganda, it was natural that a country which had just become independent should wish to give its own nationals the key posts in the economy hitherto largely held by nationals of the metropolitan country or other developed countries.[34] The latter statement hints at the residual fears of countries newly liberated from colonialism, anxious to consolidate their Statehood through, *inter alia*, building a strong apparatus of national governance and developing a local intelligentsia for key sectors of the economy. In the event, the ostensibly ungenerous Article 1(2) was adopted with little specific discussion of its terms.

With regard to 1(3), the term 'nationality' is used twice: in relation to the provisions of the States parties on nationality, citizenship, and naturalization, and on the principle that these should not discriminate against a particular nationality, raising the question as to whether the term is being used in the same sense in both cases. If the first use may be regarded as clear in referring to legal citizenship and related matters, the second is less so, bearing in mind the ambiguity of 'national' and 'nationality', and the fact that the Convention addresses various grounds of discrimination, one of which is 'national origin'. The view that 'nationality' shifts its meaning in 1(3) from the legal concept to a concept closer to ethnicity was expressed by the representative of the UK in the Third Committee who observed, following the voting on the article, that 'nationality' 'was obviously interpreted in different ways in different countries; her delegation understood the word "nationality" as used at the end of the new text... to mean persons of a particular national origin'.[35] The representative of Canada explained that he had voted in favour of 1(3) 'because the text adopted made it clear that individuals could have a nationality on the basis of race as well as citizenship'.[36] Schwelb suggests that paragraph 3 of Article 1 was inserted by the Third Committee because it 'appears, to a certain extent at least, to be a saving clause for maintaining disabilities of naturalized persons', recalling a range of constitutional provisions whereby offices of State are reserved to nationals by birth.[37]

## C. Practice

### I. Reservations and Declarations

Reservations in almost identical terms are extant for Monaco and Switzerland to Article 2 of the Convention which nonetheless relate to Article 1: the States parties reserve the right to apply their legal provisions the right to concerning the admission of foreigners. In the

[33] A/C.3/SR.1304, para. 19. See also the discussions on Article V (final Article 5) where India proposed to delete the words 'the right of everyone' because 'it did not make the distinction between citizens and non-citizens which any State might legitimately wish to make'. The representative noted that Article 1 made such a distinction which was why the delegation proposed there should be a reference to it in Article 5: A/C.3/SR.1308, para. 58; the amendment was withdrawn in light of the non-citizens clause in Article 1(2): A/C.3/SR.1309, para. 2.

[34] A/C.2/SR.1305, para. 30.

[35] A/C.3/SR.1307, para. 24, the text referred to is A/C.3/L.1238.

[36] A/C.3/SR.1307, para. 28.

[37] E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', *ICLQ* 15 (1966), 996–1068, 1010–11 [henceforth 'The International Convention'].

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case of the UK, distinctions made under immigration acts are expressed as being in relation to 1(1) 'or any other provision of the Convention'.[38]

## II. Guidelines and General Recommendations

The CERD-specific guidelines on Article 1 are relatively brief on non-citizens, requesting information on 'the extent to which domestic law provides for differential treatment based on citizenship or immigration', taking into account Article 1(2) and (3), and GR 30.[39] However, the guidelines for Article 5 on information by relevant groups of potential victims of racial discrimination requests information on, *inter alios*, refugees and displaced persons, in light of GR 22 on Article 5, and on non-citizens, including immigrants, refugees, asylum-seekers, and stateless persons, in light of GR 30.[40]

At first glance, paragraphs 2 and 3 of Article 1 limit the applicability of the definition in Article 1(1) to the detriment of a potentially massive constituency. With regard to Article 1(2), Diaconu notes that, taken literally, the provision 'would have compelled the Committee to avoid any discussion on the situation of stateless populations or those of a foreign citizenship living on the territories of the States [parties]'.[41] This restrictive general stipulation is supplemented by paragraph 3 on access to citizenship which, while exempting legal provisions 'concerning nationality, citizenship or naturalization' from Convention control, provided that there is no discrimination 'against any particular nationality', is less evidently sweeping than 1(2) and at least reiterates the principle of non-discrimination in its limited field.[42] On the other hand, the 'literal reading' of 1(2) may not be as exclusionary as it superficially appears.

As noted, the double use of 'nationality' in 1(3) was the subject of comment in drafting the Convention, and subsequent commentators differ in their appreciation of the term. Schwelb reads the 'no discrimination against a particular nationality' as implying nationality in the 'politico-legal' sense, 'if for no other reason than because it ought not to be lightly assumed that within one sentence the same term is given two different meanings';[43] whereas its first use in the paragraph links with legal processes and concepts and not with nationality in an 'ethnic' sense.[44] Lerner, on the other hand, states that the second reference to 'nationality' is equivalent to 'national origin';[45] Diaconu takes the view that 'nationality' means citizenship in the first sense and national origin in the second.[46]

The paired paragraphs 2 and 3 of Article 1 stand in contrast to more open approaches to non-citizens found in other 'core' UN human rights treaties, even where nationality is

[38] <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.
[39] CERD/C/2007/1, p. 5.
[40] *Ibid.*, p. 12.
[41] I. Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), p. 152.
[42] For an application of this principle in another context, see *Ponomaryovi v Bulgaria*, EctHR, App. No. 5335/05 (2011).
[43] Schwelb, 'The International Convention', 1009; see also W.A. McKean, *Equality and Discrimination under International Law* (Clarendon Press, 1983), p. 157.
[44] Schwelb, *ibid.*, 1009, refers to the 'historico-biological' understanding of nationality, substituted here by 'ethnic'; he also takes the view (1010) that 1(3) was 'to a certain extent at least . . . a savings clause for maintaining disabilities of naturalized persons'.
[45] N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 30.
[46] Diaconu, *Racial Discrimination*, p. 166.

not an expressly prohibited ground of discrimination. The relevance of the wider framework of human rights standards is intimated by CERD in paragraph 3 of GR 11 and paragraph 2 of GR 30, both of which imply that the restriction of rights in 1(2) and 1(3) is exceptional and should be construed narrowly. Article 1(3) may be read as 'qualifying' 1(2): as an exception to the exception that reinstates, within its frame, the non-discrimination principle as applicable among non-citizens when it concerns a particular nationality.

The general direction of the CERD approach has been to shrink progressively any lacuna in human rights protection represented by 1(2) and (3). In GR 11, the Committee affirmed that 1(2) and (3) did not exempt States parties from reporting on non-citizens: on the contrary, they were to 'report fully upon legislation on foreigners and its implementation'.[47] Paragraph 3 of the recommendation supplies a key interpretative move, which is carried on, *mutatis mutandis*, into the Committee's archive in general:

> The Committee . . . affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

The listing, in support of an interpretative principle, of 'different categories' of instrument—a declaration and two conventions—has elicited critical comment,[48] though the inclusion of the International Bill of Rights in a non-exhaustive list of international human right standards is not unreasonable as a pointer to the broader acceptance of principles of international law.[49] While ICERD does not include a specific clause to ensure that it should not be interpreted to detract from other international standards,[50] GR 11 suggests that such a principle is at work in the practice of the Committee. An outstanding feature of CERD methodology in general is that a heterogeneous assembly of human rights instruments and principles is brought within the interpretative frame of the Committee, particularly with regard to the elaboration of rights under Article 5, but not confined to such.[51]

The more ambitious GR 30, adopted in 2004, builds upon a further decade of CERD practice, as well as the Durban Declaration and Programme of Action. Section I on the responsibilities of States reiterates the message of GR 11 in asserting that Article 1(2) 'must be construed so as to avoid undermining the basic prohibition of discrimination' and so should not detract from the principles of the International Bill of Rights.[52] The recommendation also highlights the generalist equality and non-discrimination provisions

[47] GR 11, para. 2.

[48] M. O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (Zed Books and The Federation Press, 1998), pp. 162–83, at p. 168. The Committee has drawn heavily on other instruments on human rights, particularly in concluding observations on States reports: see the general discussion in Chapters 15 and 20.

[49] For a reflection on the consequences for States parties to ICERD of ratifying the Covenants, see T. Buergenthal, 'Implementing the UN Racial Convention', *Texas International Law Journal* 12 (1977), 187–221, 211.

[50] Examples of clauses include Article 5(2) of the ICCPR and the ICESCR; Articles 23 of CEDAW; 41 of the CRC, and 4(4) of the CRPD. In the field of minority rights, see Article 22 of the FCNM; for indigenous peoples, see Article 35 of ILO Convention 169. Non-treaty clauses include Articles 43 and 45 of the UNDRIP.

[51] See Chapters 15 and 20 in particular.

[52] Para. 2. GR 30 replaced GR 11.

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of Article 5 as a counterweight to Article 1(2). The Committee might also have drawn upon the provisions of Article 6—remedies applicable to 'everyone' within the jurisdiction—and the similar provision in Article 14; the broad language of Article 2 can also be called upon to widen the anti-discrimination prospectus. Article 5 is recalled 'in particular' in the final preambular paragraph as the principal basis for the recommendation, the operative part of which widens GR 11 in stating that Article 5

> incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.[53]

The paragraph is followed by the reflection that:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of Article 1, paragraph 4 . . . is not considered discriminatory.[54]

The last-cited statement might appear to suggest that 'citizenship or immigration status' is a ground of discrimination in itself, which would represent an addition to the grounds expressly laid out in the Convention. In light of the reference to 'the objectives and purposes of the Convention', and to Article 1(4), the 'differential treatment' referred to is racial/ethnic differentiation, which will constitute racial discrimination according to the 'usual tests'. While distinctions according to citizenship/nationality may be drawn by States parties, they will be tested for inferences that they are racially based, or used as a 'pretext for racial discrimination',[55] in purpose or effect. This interpretation is reinforced by the numerous references in the recommendation to discrimination on the basis of race, colour, descent, or national or ethnic origin that do not list legal nationality or citizenship as a specific ground of discrimination, as well as by subsequent practice. GR 30 proceeds to recommend that legislation should be revised to guarantee effective enjoyment of the rights in Article 5.[56] The recommendation underpins the understanding of the grounds of racial discrimination that includes their extension to gender, religion, and other instances by the operation of 'intersectionality', or 'multiple discrimination'.

GR 30 asserts that States should 'refrain from applying different standards of treatment to female non-citizen spouses and male non-citizen spouses of citizens';[57] and indirect discrimination: immigration policies should not have the effect of discriminating,[58] and neither should measures taken in the fight against terrorism, while non-citizens should not be 'subjected to racial or ethnic profiling or stereotyping'.[59] Sections on protection for

[53] Para. 3.
[54] Para. 4 of GR 30.
[55] T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' *AJIL* 79 (1985), 283–318, 311–12.
[56] Para. 7.
[57] Para. 8.
[58] Para. 9.
[59] Para. 10.

non-citizens against hate speech and racial violence,[60] on the administration of justice,[61] on expulsion and deportation of non-citizens,[62] and on economic, social, and cultural rights,[63] flesh out the implications of the Convention for non-citizens, further etiolating potential restrictions on their enjoyment of human rights.

Section IV of GR 30 is devoted to 'access to citizenship' and impacts primarily on Article 1(3). States are recommended to ensure that 'particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay attention to possible barriers to naturalization that may exist for long-term or permanent residents'.[64] It is further stated that deprivation of citizenship on racial, etc, grounds is a breach of the obligation to ensure non-discriminatory enjoyment of the right to nationality,[65] and that statelessness, in particular statelessness among children, is to be reduced. The section also asks States to take into consideration that 'in some cases, denial of citizenship for long-term or permanent residents could result in . . . violation of the Convention's . . . principles'.[66]

Elements of GR 30 are adapted by GR 34 under the rubric of 'access to citizenship': States parties should ensure that 'legislation regarding citizenship and naturalization does not discriminate against people of African Descent', and should pay attention to 'possible barriers to naturalization that may exist for long-term or permanent residents of African descent'.[67]

In the narrower field of refugees and displaced persons, GR 30 is complemented by GR 22, which also draws on Article 5 of ICERD, while taking as a point of reference—'the main source of the international system for the protection of refugees in general'[68]—the 1951 Convention and the 1967 Protocol relating to the status of refugees. In addition to restating general principles regarding equality and non-discrimination, the recommendation adapts language from the last-named instruments, emphasizing that:

(a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;
(b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observed the principle of non-refoulement and non-expulsion of refugees;
(c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored . . .
(d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance.[69]

[60] Section IV.
[61] Section V.
[62] Section VI.
[63] Section VII.
[64] Para. 13. Cf. the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries 1999: <http://legal.un.org/ilc/texts/instruments/english/commentaries/3_4_1999.pdf>, Article 5 of which provides that 'persons having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession also GA resolution 55/153, 12 December 2000. See comment in Diaconu, *Racial Discrimination*, pp. 166–9.
[65] Commentary in the present work on Article 5.
[66] *Ibid.*, Para. 15.
[67] GR 34, para. 47; and, *ibid.*, para. 49.
[68] Preamble.
[69] Para. 2.

While GR 22 has not been cited as extensively as GR 30, this may be on account of its more limited field; the Committee has been consistent in its concern for refugees, asylum-seekers, displaced persons, and other casualties of migration and conflict.[70] In the case of Georgia, CERD recommended that, in light of GR 22, the State party 'continue its efforts to improve the situation of IDPs... in particular with regard to integration, decent durable conditions, and food. It urges the State party to regulate the situation of those IDPs who will not be able to return soon'.[71] GR 22 may be cited along with GR 30 in highly specific recommendations with regard to refugees and IDPs.[72]

GR 30 built on the Committee's track record under Articles 14 and 9 in particular, and functions as a reference point for later developments.[73] The general recommendation has been cited in fields such as access to citizenship,[74] barriers to naturalization,[75] detention conditions,[76] education,[77] employment practices,[78] freedom of expression and religion,[79] the justice system,[80] migration in general including its gender dimensions and in connection with migrant workers[81]—including domestic migrant workers,[82] refugees and asylum-seekers including the issue of non-refoulement,[83] standards of physical and mental health,[84] transmission of citizenship,[85] and many other matters.

## III. Communications under Article 14

Non-citizens have figured in Article 14 cases from the beginning—*Yilmaz-Dogan v The Netherlands*[86]—the citizenship of petitioners has been treated as irrelevant to admissibility of the communication. Where a citizenship distinction appears pertinent, the distinction may be interrogated by the Committee to see whether other factors are at work. Illustrative cases include *Habassi v Denmark*,[87] where a Tunisian permanent resident in Denmark (married to a Danish citizen) was denied a loan by a Danish bank because he was not a Danish citizen. The Committee observed that he was denied the loan 'on the sole ground of his non-Danish nationality',[88] having been told that the restriction was necessary in order to ensure repayment of the loan. In the view of the Committee, nationality was not the most appropriate requirement when deciding on the will or

[70] Further examples in Chapters 13 and 14.
[71] CERD/C/GEO/CO/4-5, para. 20.
[72] Concluding observations on Chad, CERD/C/TCD/CO/16-18, para. 15, see also para. 14; Kuwait, CERD/C/KWT/CO/15-20, para. 20.
[73] There is a helpful list of Article 14 communications disaggregated by nationality in S. Berry, 'Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?' *Human Rights Law Review* 11/3, 2011, 423–50, at 424.
[74] UAR, CERD/C/ARE/CO/12-17, para. 17; Liechtenstein, CERD/C/LIE/CO/4.
[75] Mozambique, CERD/C/MOZ/CO/12, para. 17.
[76] Canada, CERD/C/CAN/CO/18, para. 18; Morocco, CERD/C/MAR/CO/17-18, para. 14.
[77] Germany, CERD/C/DEU/CO/18, 2008, paras 22 and 23.
[78] Italy, CERD/C/ITA/CO/15, para. 17.
[79] Iran, CERD/C/IRN/CO/18-19, para. 15.
[80] Norway, CERD/C/NOR/CO/18, para. 18.
[81] Mexico, CERD/C/MEX/CO/15, para. 16.
[82] China, CERD/C/CHN/CO/10-13, CERD/C/HKG/CO/13, CERD/C/MAC/CO/13, para. 30.
[83] Lithuania, CERD/C/LTU/CO/3, para. 14; Yemen, CERD/C/YEM/CO/16, para. 14.
[84] Dominican Republic, CERD/C/DOM/CO/12, para. 18.
[85] UAE, CERD/C/ARE/CO/12-17, para. 17.
[86] CERD/C/36/D/1/1984 (1988).
[87] CERD/C/54/D/10/1997 (1999).
[88] Para. 9.3.

capacity to repay a loan, as a citizen could avoid repayment by moving himself or his property abroad. Habassi had therefore suffered discrimination. The Committee found—under Article 2(d)—that it was 'appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis à vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, *within the meaning of article 1 of the Convention* was being applied'.[89]

Objections to a communication based on an exclusionary reading of 1(2) may receive short shrift from the Committee. In *D.R. v Australia*[90] CERD treated the case as concerning national origin rather than nationality and held that unfavourable distinctions with regard to social security and education were not made on the basis of national origin and that it was 'not possible to reach the conclusion that the system works to the detriment of persons of a particular national origin'.[91] Australia asserted that the applicant's arguments were based on his nationality, a ground of discrimination outside the purview of the Convention, to which the Committee responded:

> The State party argues that the author's allegations do not fall ... within the scope of the definition of racial discrimination ... in article 1(1) ... The State party noted that this definition does not recognise nationality as a ground of racial discrimination. ... Taking into account general recommendation 30 ... and in particular the necessity to interpret article 1, paragraph 2, of the Convention in the light of article 5, the Committee does not consider that the communication as such is prima facie incompatible with the provisions of the Convention.[92]

In some instances, the Committee has treated Article 1(2) as a factor in its decision. In *Diop v France*[93] a Senegalese citizen applied for admission to the French Bar. According to the Court of Cassation, the applicant met all the criteria for admission to the French bar, except one: French nationality. The applicant alleged violation of a number of articles of ICERD including the right to work, as well as denial of equal treatment, adding points on detriment to his family life since he could practise in Senegal but had to leave his family in France. The State party argued that the refusal to allow him to practice was exclusively based on nationality, not because he was Senegalese but because he was not French, and that it was exercising its prerogatives under Article 1(2). Regarding the interpretation of a Franco-Senegalese Convention on Establishment relied upon by the petitioner, the Committee commented that it was not within its mandate 'to interpret or monitor the application of bilateral conventions concluded between States parties ... unless it can be ascertained that the application of these conventions results is manifestly discriminatory or arbitrary treatment of individuals under the jurisdiction of States parties'.[94] Regarding the French/non-French distinction, the Committee concluded that this 'operates as a preference or distinction between citizens and non-citizens ... the refusal to admit Mr Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds ... in article 1, paragraph 1'.[95] Further, the Committee observed that the author's allegation of discrimination related to a situation in which the right to

[89] Para. 9.3 (emphasis added).
[90] CERD/C/75/D/42/2008 (2009).
[91] Para. 7.2.
[92] Para. 6.3.
[93] CERD/C/38/D/2/1989 (1990).
[94] Merits, para. 6.3.
[95] *Ibid.*, para. 6.6.

practise law existed only for French nationals and not to a situation in which 'this right has been granted in principle and may be generally invoked'.[96] The case was analysed as non-discriminatory because of (a) a French-not French distinction, assisted by (b) a reading of the scope of human rights obligations bearing on the respondent State.

*Quereshi v Denmark No. 2* provides an instance of a general principle that limits the application of the Convention to non-citizens, as it does to other groups. In that case, insulting and derogatory statements were made by various members of a political party against 'Mohammedans', 'foreigners', 'fifth columnists', etc, with prosecutions following in some cases. The decision focused on statements made by one speaker in relation to 'foreigners' following the complaint that the speaker had equated 'a group of people of an ethnic origin other than Danish'[97] with criminality. The State party argued that the language employed by the speaker was so diffuse that it did not signify a group within the meaning of the law and was therefore inappropriate for prosecution under Article 266 (b) of the Danish Criminal Code.[98] In finding no violation of the Convention, the Committee endorsed the position of the State party in that 'a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent, or national or ethnic origin'.[99] *Quereshi* was drawn upon by the Committee in the later hate speech case of *P.S.N. v Denmark*,[100] where, by analogy with general references to 'foreigners', a general reference to 'Muslims' was deemed not specific enough to engage the prohibitions in the Convention.[101]

In *A.M.M. v Switzerland*[102] the petitioner, a Somali national, complained under Articles 1, 4, 5, 6, and 7 of the Convention regarding various privations in the fields of education, employment, health, and privacy associated the system of 'F' permit holders—a status of temporary admission and not permanent residence. With regard to Article 1(2), the Committee followed the State party in its view that the complaints of the petitioner were based 'solely on his status under the law on foreign nationals and not on his origin or his Somali nationality'.[103] The Committee elaborated that the challenged regulations did 'not apply only to Somali nationals or a specific group of individuals within the meaning of Article 1 . . . temporary admission is a legal status and no particular link with the individual and his or her personal situation, such as that required to demonstrate discrimination' was inherent in such legal status.[104] Accordingly, while the Committee was not convinced that the facts before it constituted racial discrimination,[105] it drew

[96] Para. 6.6. .

[97] CERD/C/66/D/33/2003 (2005), para. 2.8.

[98] Para. 2.13. The State party, *ibid.*, Para. 4.7, contrasted the case of derogatory references to guest workers which had attracted prosecution because 'according to general understanding, that expression designated a person living in Denmark of South European, Asian or African origin . . . persons originating from specific countries'.

[99] *ibid.*, para. 7.3. The Committee did however call the attention of the State party—*ibid.*, para. 8—to the hateful nature of the comments concerning foreigners, and to GR 30 on discrimination against non-citizens.

[100] CERD/C/71/D/36/2006 (2007).

[101] Para. 6.4. The case is further discussed in Chapter 11.

[102] CERD/C/84/D/50/2012 (2014).

[103] Para. 8.4; for the view of the State party, see paras 4.4, 4.5, and 4.11. In para. 4.5, Switzerland cited a study commissioned by the Federal Commission against Racism to the effect that 'a group defined by residence status is not one of those protected by the prohibition on discrimination'.

[104] Para. 8.4.

[105] Para. 8.6. The Committee considered that the petitioner had not 'unequivocally established' the existence of discriminatory acts based on ethnic origin or Somali nationality, a high standard of proof for Article 14 proceedings that appears to approach the criminal law standard of 'beyond reasonable doubt'.

attention to GR 30 and the statement therein of the obligation to eliminate discrimination against non-citizens in relation to working conditions and work requirements.[106]

In *L.G. v Republic of Korea*[107] the petitioner, a national of New Zealand, claimed violation of her rights under various articles of the Convention, on account of the regime of tests prescribed by the Korean authorities for HIV/AIDS and illegal drugs. No equivalent tests were required for Korean teachers, nor for 'foreign native speaking teachers who are ethnically Koreans . . . and who are considered "overseas Koreans"'.[108] The petitioner underwent a series of tests in 2008. On being informed that in order to renew her teaching contract, she would have to undergo a new series of tests, the petitioner refused to take them: 'while she was willing to undergo any health check required from her fellow Korean teachers, she would not undertake the medical tests required only from foreigners'.[109] Her employer stated that, while the petitioner was free to refuse the tests, a refusal would mean the termination of the teaching contract. A complaint to the National Human Rights Commission of Korea (NHRCK) and a request for mediation before the Korean Commercial Arbitration Board (KCAB) brought no relief to the complainant. The Committee observed that 'the NHRCK declined to investigate the . . . complaint', while 'no assessment of the compliance of the contested testing policy with the Convention was made by KCAB or any other State party authority'.[110] In finding that the State party had failed to carry out an assessment as to whether racially discriminatory criteria were at the origin of the testing policy, the Committee concluded that the petitioner's rights under Articles 2(1)(c) and (d), and Article 6 of the Convention had been violated,[111] as had the petitioner's right to work.[112]

> The mandatory testing policy limited to foreign English teachers who are not ethnically Koreans, does not appear to be justified on public health grounds or any other ground, and is a breach of the right to work without distinction as to race, colour, national or ethnic origin, in violation of the State party's obligation to guarantee the right to work as enshrined in Article 5 . . . (e)(i) of the Convention.[113]

With implied reference to Article 1(2), the Committee observed that, in light of the exemptions for Koreans and ethnic Koreans, the testing was 'therefore not decided on the basis of distinction between citizens and non-citizens, but of ethnic origin'. In response to the claims that the testing regime was viewed as a means 'to check the values and morality' of foreign English teachers,[114] paragraph 12 of GR 30 was recalled for its recommendation that States parties 'take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, or national or ethnic origin, members of "non-Citizen" population groups, especially by politicians'.[115]

[106] Para. 33 of GR 30.
[107] CERD/C/86/D/51/2012 (2015).
[108] Para. 2.2.
[109] Para. 2.7. Further, the petitioner noted that 'such tests were stemming from a governmental policy and were not even prescribed by law, and that they contributed to promote xenophobic beliefs that "foreigners do drugs", "have diseases" and are "sex offenders"'. The government denied (para. 2.8) that there was any discriminatory intent behind the tests, which 'were needed to identify the foreigners who are doing drugs and have HIV/AIDS'.
[110] Para. 7.3.
[111] Para. 7.3; para. 8.
[112] The issue of violation of Article 5(e)(iv)—right to health, etc—was not separately examined: para. 7.5.
[113] Para. 7.4.
[114] *Ibid.*
[115] *Ibid.*

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## IV. Concluding Observations

As regards the run of concluding observations relating to non-citizens, bearing in mind the limitations on non-citizen rights in human rights instruments such as the ICCPR, distinctions between citizens and non-citizens in the field of political participation have nonetheless attracted the attention of the Committee. In the case of the Czech Republic, the Committee noted 'that several distinctions made under domestic law between the rights of citizens and non-citizens may not be fully justified . . . in particular that European Union non-citizens, although they are entitled to vote and be elected at local elections, may not belong to a political party'.[116] In the case of Latvia, the Committee recognized 'that political rights can be legitimately limited to citizens. Nevertheless, noting that most non-citizens have been residing in Latvia for many years, if not for their whole lives', the Committee strongly recommended 'that the State party consider facilitating the integration process by making it possible for all non-citizens who are long-time permanent residents to participate in local elections'.[117] To Estonia, the Committee reiterated an earlier concluding observation in conspicuously gentle terms, recommending that 'the State party give due consideration to the possibility of allowing non-citizens to participate in political parties'.[118]

The structure of basic legislation frequently raises the concerns of the Committee. In light of the information that the equality provisions of the Italian Constitution did not include non-citizens, the State party was urged 'to endure that non-citizens enjoy equal protection and recognition before the law'; CERD drew attention 'to the importance of ensuring that legislative guarantees against racial discrimination regardless of their immigration status'.[119] In the case of Tajikistan, the Committee recalled GR 30 and the fact that 'States parties have the duty to ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens'.[120] Many cases refer to the principle of the guarantee of equal rights between citizens and non-citizens 'to the extent recognized under international law'.[121] Specific exemptions of non-citizens from anti-discrimination protection, or limitations on such protection, have been subject to criticism,[122] including where they involve the exercise of discretionary powers—hence the recommendation to the UK to 'remove the exceptions based on ethnic and national origin to the exercise of immigration functions as well as the discretionary powers granted to the UK Border Agency . . . to discriminate at border posts among those entering the territory of the State party'.[123]

A key to ameliorating the situation of non-citizens is to grant citizenship—part of the 'reserved domain' intimated by 1(3). Access to citizenship may present considerable problems for certain minorities, and it raises the question of whether a particular

[116] CERD/C/CZE/CO/7, para. 18.
[117] Latvia, CERD/C/63/CO/8, para. 12.
[118] CERD/C/EST/CO/7, para. 14.
[119] CERD/C/ITA/CO/16-18, para. 12.
[120] CERD/C/TJK/CO/6-8, para. 16, under the heading: 'Discriminatory law against non-citizens'.
[121] Examples concluding observations on the Former Yugoslav Republic of Macedonia, CERD/C/MKD/CO/7, para.10; United Arab Emirates, CERD/C/ARE/CO/12-17, para.11; the USA, CERD/C/USA/CO/6, para.24. See also on Moldova, CERD/C/MDA/CO/8-9, para. 9.
[122] Botswana, CERD/C/BWA/CO/16, para. 8.
[123] Concluding observations on the UK, CERD/C/GBR/CO/18-20, para. 16.

nationality or nationalities is disproportionately disadvantaged by legal arrangements for the acquisition of citizenship. In a number of instances, the disadvantaged group has been the Roma, a situation adverted to in GR 27 on Discrimination against Roma with reference to legislation on citizenship and naturalization.[124] In the case of Italy, the Committee recommended 'measures to facilitate access to citizenship for stateless Roma, Sinti and non-citizens who have lived in Italy for many years, and to... removed existing barriers'.[125] In the case of the Russian Federation, CERD recommended that the State party's action plan for Roma should include 'measures to facilitate their access to residence registration, citizenship, education', and adequate housing and other rights, in accordance with GR 27.[126] The denial of naturalization following requests by persons of South-East Asian origin who met the relevant legal requirements raised concern in the case of Cyprus.[127] In the case of naturalization of refugees by Turkmenistan, it was recommended that 'the same treatment be granted to refugees of Turkmen, Uzbek, or other ethnic origin', including refugees from Afghanistan.[128]

Impediments to naturalization encountered in practice invariably elicit comments from the Committee in terms of information about the legal process, overemphasis on language as part of an integration strategy for non-citizens, the need for positive measures to attract applications for citizenship, etc.[129] In the case of Croatia, persons of Roma, Bosniak, and Serb origin were specifically referred to in terms of access to citizenship.[130] In such cases, the spectre of statelessness is evoked in the comments of the Committee as an impermissible consequence of barriers to citizenship, regularly coupled with invitations to the States parties to accede to the relevant UN conventions to avoid that consequence.[131] CERD practice is not consistent with one apparent motivation behind 1(3)—to exempt distinctions between citizens by birth and naturalized citizens from categorization as discrimination. Concern has been expressed regarding distinctions between citizens by birth and naturalized citizens in relation to access to public office;[132] rules on family reunification that disadvantaged naturalized citizens of non-European Union origin;[133] and restrictions to the right of naturalized citizens to participate in elections, where the State party was urged 'to accord equal civil and political rights to all citizens irrespective of the mode of acquisition of citizenship'.[134] Comments pertinent to 1(3) frequently overlap with or are subsumed under those on Article 5(d).

[124] Para. 4.

[125] CERD/C/ITA/CO/16-18, para. 24.

[126] CERD/C/RUS/CO/20-22, para. 15.

[127] CERD/C/CYP/CO/17-22, para. 18; the Committee requested data on naturalization requests and decisions 'disaggregated by ethnic group, sex, length of residence in the State party, and any other relevant criteria'.

[128] CERD/C/TKM/CO/5, para. 18.

[129] *Inter alia*, concluding observations on Estonia, CERD/C/61/CO/4, para. 10, CERD/C/EST/CO/7, para. 15, CERD/C/EST/CO/10-11, paras 9, 10, 11; Latvia, CERD/C/63/CO/8, para. 14; Nigeria, CERD/C/NGA/CO/18, para. 21.

[130] CERD/C/HRV/CO/8, para. 17.

[131] In the case of Turkmenistan, the Committee recommended measures to ensure that 'the solution of issues related to citizenship did not increase the number of stateless persons who would thereby be deprived of human rights and freedoms in practice': CERD/C/TKM/CO/6-7, para. 18.

[132] Concluding observations on Qatar, CERD/C/60/CO/11, para. 12.

[133] Concluding observations on Belgium, CERD/C/BEL/CO/16-19, para. 17.

[134] Concluding observations on Thailand, CERD/C/THA/CO/1-3, para. 13.

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## D. Comment

Discourses of a xenophobic nature characterize some national responses to contemporary phenomena of populations in flux. CERD's concerns have primarily related to the non-citizen category.[135] Without attempting a definition of 'xenophobia', GR 30 counsels the taking of 'steps to address xenophobic attitudes and behaviour towards non-citizens'.[136] Committee perceptions of xenophobia also colour many sets of concluding observations,[137] notably in the field of hate speech, although the capacity of xenophobic attitudes and prejudices to generate racial discrimination across a wider spectrum of rights is clear.[138] The etymology of 'xenophobia' is well known: from the Greek ξένος (xenos), stranger or foreigner and φόβος (phobos), fear; the term commonly understood as signifying hatred or fear of foreigners or strangers, of their politics or culture. The wider meaning of xenophobia is generalized fear of 'the Other'—'heterophobia' or fear of strangers; a narrower meaning relates to foreigners. 'Xenophobia' does not appear on the face of the principal HR instruments and does not benefit from a general normative definition. Even if they do not specifically identify the phenomenon, international instruments visualize xenophobia as setting the scene for negative action against targeted groups and violence against them, including genocide, where xenophobia characteristically transmutes itself into a language of dehumanization of others, easing the consciences of killers.[139] CERD's endorsement of the Durban documentation does not differentiate among a range of aspects: in GR 33, the Committee recommended to the States parties to be mindful that their response to the current financial and economic crisis should not lead to a situation which would increase poverty and underdevelopment and, potentially, a rise in racism, racial discrimination, xenophobia, and related intolerance against foreigners, immigrants, indigenous peoples, persons belonging to minorities, and other particularly

[135] For helpful references to phenomena of xenophobia, see the report to the General Assembly of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/49/677 (1994), who stresses its similarities to racism and comments on overlaps. Xenophobia is not the subject of a definitive interpretation in international human rights instruments, nor is 'heterophobia'.

[136] See Section III. See also GR 31, preamble, and paras 4, 5, 26, 31, and 37, 38, and 40.

[137] Searching for 'xenophobia' in databases is complicated, perhaps particularly in the case of CERD, by the copious references to the Durban documentation that appear in the practice.

[138] Among many and various examples, see concluding observations on Chile, CERD/C/CHL/CO/15-18, para. 18; Dominican Republic, CERD/C/DOM/CO/13-14, paras 9 and 15; France, CERD/C/FRA/CO/17-19, para. 10; Germany, CERD/C/DEU/CO/18, para. 15; Portugal, CERD/C/PRT/CO/12-14, para. 14; Russian Federation, CERD/C/RUS/CO/20-22, paras 11 and 12; South Africa, CERD/C/ZAF/CO/13, para. 27; Sweden, CERD/C/SWE/CO/19-21, para. 11.

[139] The accounts of xenophobia in the panoply of human rights instruments oscillate between wide and narrow views; where xenophobia is explicitly referred to, it may be imperfectly distinguished from and mentioned alongside racism as in Article 2 of the Additional Protocol to the Council of Europe Cybercrime Convention, paragraph 1 of which offers a broad reading of xenophobia. For the purposes of this Protocol: 'racist and xenophobic material' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors'. Xenophobia is also flagged up specifically in the Durban documentation. The Durban Declaration and Programme of Action link xenophobia, racism, and related intolerance. While the separate concepts are rarely individuated therein, paragraph 16 of the Durban Declaration underlines the perceptions of the participating States: 'We recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.'

vulnerable groups all over the world.[140] The primary focus of the Convention is on racial discrimination. CERD practice takes a view of xenophobia as implicating a range of groups, though the paradigm case of non-citizens—or, *de minimis*, persons of foreign origin, or 'visible minorities'—attracts the most frequent references. While xenophobia as such is not the subject of the Convention, intolerance, racism, racial discrimination, and xenophobia have been identified by the Committee as a combined attitudinal stream that requires effective combating by the State concerned.

The archive of CERD recommendations on non-citizens represents a formidable body of work—no Committee session passes without extensive reference to non-citizens in the dialogue with States parties and in the concluding observations. The area of non-citizens is also an area where CERD copiously and persistently refers to international conventions on refugees and asylum-seekers, on migrant workers, and on statelessness. The Committee almost inevitably recommends ratification of the convention or conventions that apply to this field when it finds that the instrument in question is absent from the State party's portfolio.[141] In addition to the proliferation of recommendations on specific aspects of the rights of non-citizens, the Committee continues to stress need for data as the necessary background to a national anti-discrimination policy, and to appraise the shape of the legislative framework in broad terms. Specific data on immigration in general, disaggregated by nationality, and on the impact of laws and policies on immigrants may be called for.[142] States parties may also be enjoined to provide statistics on the national origin of, for example, migrant workers or refugees,[143] and on the ethnic background to naturalization requests in order to ensure that no particular nationality is discriminated against contrary to Article 1(3).[144]

The grounds of discrimination in Article 1(1) of ICERD do not include nationality, the explicit listing of which among the grounds of discrimination is also comparatively rare in the core UN instruments.[145] Treaty bodies have nonetheless deliberated on discrimination against non-nationals in the absence of an express ground of nationality;[146] the burden of addressing discrimination in such cases has tended to fall on 'national origin' or 'other status'.[147] In light of the limited range of grounds in ICERD, the limitations in 1(2) and 1(3) raise difficult issues. Meron describes 1(2) as 'overly broad', and suggests that 'a more careful formulation, placing upon the State the burden of demonstrating that its discriminatory action was based exclusively upon alienage would have been preferable.

[140] Para. 1 (f).

[141] See Chapter 15.

[142] Concluding observations on Malta, CERD/C/MLT/CO/15-20, paras 6 and 16; Moldova, CERD/C/MDA/CO/8-9, para. 8.

[143] Examples include Qatar, CERD/C/60/CO/11, para. 21, and Saudi Arabia, CERD/C/62/CO/8, para. 20.

[144] Concluding observations on Cyprus, CERD/C/CYP/CO/17-22, para. 18: the Committee had noted with concern that 'naturalization requests, including by persons of South-East Asian origin, whose situations sometimes meet the State party's legal requirements for naturalization eligibility have some times been denied'.

[145] Articles 1 and 7 of the CMW include 'nationality' among prohibited grounds; see also CPED Article 13.7.

[146] Under the ICCPR, see, *inter alia*, *Adam v Czech Republic*, CCPR/C/57/D/586/1994 (1996); *Borzov v Estonia*, CCPR/81/D/1136/2002 (2004); *Ibrahima Gueye and Others v France*, CCPR/C/35/D/196/1985 (1989); *Karakurt v Austria* CCPR/C/74/D/965/2000 (2002); *Sipin v Estonia*, CCPR/C/93/D/1423/2005 (2008); *Tsarjov v Estonia*, CCPR/C/91/D/1223/2003 (2007); nationality is not specifically mentioned in the ICCPR as a ground of discrimination.

[147] Vandenhole, *Non-Discrimination and Equality*, chapter III, summary of 'nationality' as a ground at p. 185.

The use of the citizenship exception as a pretext for discrimination could thus have been deterred'.[148] McKean observes that it is unfortunate that 'the restrictions upon aliens were not made more selective', suggesting that restrictions on the universality of rights follow inevitably from the existence of sovereign States.[149]

The negativity expressed in the *travaux* regarding non-citizens may be recalled, including the sweeping proposal to exclude them from the purview of the Convention *tout court*. The gap between the assumptions of at least some participants active in the drafting of the Convention and current practice is notable.[150] As the *travaux* suggest, the restrictive approach to non-citizens was to some extent bound up with the necessity of strengthening the sovereignty of newly independent States and nascent problems of the nationalization of resources including personnel. In light of the history of international law, protection of aliens may also have evoked memories of domination by powerful States,[151] raising concerns analogous to those intimated regarding minorities, especially powerful minorities, as obstacles to national consolidation. Many States in the drafting process were silent regarding the extension of the Convention to non-citizens, while some envisaged the need for the further development of international law.[152]

In outcome, the Convention is less generous than its predecessor Declaration on the Elimination of Racial Discrimination which, while it does not treat nationality as a ground of discrimination, does not include a clause equivalent to 1(2), and expressly applies the non-discrimination principle to 'access to citizenship'.[153] Of the instruments referred to in the preamble to the Convention, International Labour Organization (ILO) Convention 111 does not include nationality as a ground, though the list of grounds is not closed;[154] the UNESCO Convention against Discrimination in Education incorporates, among the undertakings by States parties, to 'give foreign nationals resident within their territory the same access to education as that given to their own nationals'.[155] Among newer instruments, the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance, reaches, as its broad title implies, beyond the citizen/non-citizen distinction and does not contain a clause equivalent to ICERD 1(2) or 1(3). While the grounds of discrimination—race, colour, lineage, or national or ethnic origin—echo those in ICERD, the preamble to the Inter-American Convention recites the consideration that 'the individual and collective experience of discrimination must be taken into account to combat segregation and marginalization based on race, ethnicity, or nationality, and to protect the life plan of those individuals and communities at risk of such segregation and marginalization'.

[148] Meron, *Meaning and Reach*, 311–12.

[149] McKean, *Equality and Discrimination under International Law*, p. 158.

[150] Implicit confinement of rights to citizens is suggested in remarks by, *inter alios*, representatives of Zambia, A/C.3/SR.1299, para. 41; Romania, A/C.3/SR.1300, para. 11; Senegal, A/C.3/SR.1304, para. 16; Hungary, *ibid.*, para. 21; and Ceylon, A/C.3/SR.1306, para. 28.

[151] For a brief recapitulation of the minimum standard in the treatment of aliens and related institutions, see R. Kolb, 'The Protection of the Individual in Times of War and Peace', *The Oxford Handbook of the History of International Law*, pp. 317–37.

[152] According to the representative of Jamaica, discussion of national origin diverted attention away from discrimination based on race; the question of nationality 'was a separate one which could itself be made the subject of a declaration': A/C.3/SR.1305, para. 26.

[153] Article 3. See however the references to political and citizenship rights 'in his country', Article 6.

[154] Article 1(1)(a), subject to the potential extension in 1(1)(b).

[155] Article 3(e).

The worth of the Convention would be reduced for large segments of humanity if 1(2) and 1(3) were given a broad reading, leaving human rights concerns snagged in the thickets of nationality and citizenship.[156] Vandenhole comments that the narrowing by the Committee of exceptions to discrimination was well advanced before the advent of GR 30.[157] In a systemic sense, the practice of the Committee, on non-citizens and more generally, reaches out to other human rights instruments in order to buttress an interpretation of the Convention that is as inclusive as the text can sustain. In terms intrinsic to the text, the technical point that exceptions to a principle should be construed narrowly is important: in functional terms, paragraph 2 of Article 1 is an exception to a wider principle. Further, the potentially restrictive provisions in 1(2) and 1(3) have been set against Article 5 (and other generalist provisions), with the latter generally treated as dominant. It may, however be argued that, in light of the ambiguity of 1(2), the Committee's approach, based on taking the Convention as a whole in a wider context, does not appreciably transcend a literal reading—the conclusion that distinctions formally based on citizenship that conceal racial distinctions are prohibited by 1(1) is warranted by the text. A reading of 1(2) that rules out from the Convention any concern with non-citizens could be classified in Vienna Convention on the Law of Treaties (VCLT) terms as a 'manifestly absurd or unreasonable' reading of ICERD,[158] and as not corresponding to its object and purpose. In light of the ambition expressed in the Convention to eliminate racial discrimination, and a human rights approach *pro homine* and *pro femina*, it is reasonable to prefer effective interpretations that protect the widest span of potential victims.

With regard to 1(3) and the repeated use of 'nationality', the *travaux* and subsequent practice support the view that 'nationality' in the second sense of a forbidden ground of discrimination means 'national origin' on a par with 'ethnic origin'. Even in this case, distinctions must apply to a particular nationality (or nationalities) to fall foul of the provision. The reference to discrimination against a particular nationality is in line with the stance of the Committee that a general reference to foreigners which does not single out a group or groups is insufficient to validate a charge of discrimination. In light of the application of this last principle in the standard repertoire of the Committee, the right to nationality protected by Article 5, and attendant questions around citizenship and naturalization, are not treated as appreciably diminished by Article 1(3). The paragraph essentially serves as a reminder that while there are State prerogatives in the fields referred to, such prerogatives are limited by international anti-discrimination standards.

As elsewhere in CERD practice, the approach taken by the Committee for communications under Article 14 is more narrowly defined than in the generality of concluding

[156] 'There are different groups of non-citizens, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. While each of these groups may have rights based on separate legal regimes, the problems faced by most, if not all, non-citizens are very similar. These common concerns affect approximately 175 million individuals worldwide – or 3 percent of the world's population': Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-Citizens* (New York and Geneva, 2006), p. 5. Weissbrodt, *The Rights of Non-Citizens*, p. 1, cites, on the basis of UN sources, a figure of 191 million persons 'who currently reside in a country other than where they were born'.

[157] *Non-Discrimination and Equality*, pp. 91–92.

[158] According to Article 32 of the VCLT, recourse may be had to supplementary means of interpretation when the textual method in Article 31 leaves the meaning ambiguous or obscure, or (b) 'leads to a result which is manifestly absurd or unreasonable'.

observations. As with other areas of practice, the Committee's recommendations to individual States on non-citizens generally avoid the language of violations. The recommendations express concern for the negative consequences for non-citizens in terms of direct, indirect, and structural discrimination flowing from State policies in general, legal institutions and practices, and 'measures' capable of influencing public opinion. The State-directed recommendations are broader than opinions under Article 14, oriented more towards general policy, and are hortatory and interrogative. The examination of reports under Article 9 generates holistic appraisals of situations in States parties that subsume and transcend a mass of detail. In terms of focus, the overall approach of a State party to deal with racial discrimination may be deemed insufficiently attentive to 'immigrants and foreigners'.[159] In many instances, recommendations seek to ascertain whether there exists a xenophobic climate of opinion that bears down heavily on non-citizens generally or particular categories thereof.

Despite the apparent limitations placed by the text of the Convention on concern for non-citizens, there is little appreciable difference between their treatment and the treatment of other groups by the Committee as victims of discrimination.[160] Practice with respect to non-citizens encompasses all the rights listed or implied in the Convention. While an amendment to the Convention deleting the qualifications on the scope of discrimination would not have a significant practical effect, it is worthy of consideration, financial crises notwithstanding, for its symbolic value in taking the Convention forward from some of the limiting assumptions of the 1960s.

[159] Concluding observations on Portugal, CERD/C/PRT/CO/12-14, para. 13; see also, *ibid.*, paras 14, 125, 16, and 20.

[160] See Chapters 11, 13, 14, and 15.

# 8. Article 2

*Obligations to Eliminate Racial Discrimination*

The present chapter addresses Article 2(1). Along with Article 1(4), Article 2(2) is the subject of Chapter 9 on special measures.

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.

## A. Introduction

Human rights instruments, after the model of the Universal Declaration of Human Rights (UDHR), characteristically combine statements of rights with statements of obligation in order to convert principle into practice: the language of obligation varies according to the nature of the instrument. Following the definition of racial discrimination in Article 1, the complex and action-oriented Article 2 sets out the Convention's broadest portfolio of State 'undertakings' or obligations—referred to in Article 5 as 'fundamental obligations'—on the basis of which racial discrimination is prohibited across a spectrum of human rights. The breadth and depth of the requirements of Article 2, coupled with the obligations set out elsewhere in the Convention, might leave an impression that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is principally concerned with obligations rather than rights. The Committee on the Elimination of Racial Discrimination (CERD) has, however, found, by necessary implication, a wider presence of rights in the Convention beyond their explicit listing in Article 5.[1]

[1] *Moylan v Australia*, CERD/C/83/D/47/2010 92013), para. 6.2, citing *Habassi v Denmark*, CERD/C/54/D/10/1997 (1999), para. 10, *Ahmad v Denmark*, CERD/C/56/D/16/1999 (2000), para. 8, and *Durmic v Serbia and Montenegro*, CERD/C/68/D/29/2003 (2006), para. 10.

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Instruments focusing on the elimination of particular evils analogous to racial discrimination, such as the Convention against Torture (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), are replete with references to obligations, as is ICERD's sister instrument on discrimination, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[2] Texts devoted principally to the enunciation of rights characteristically include a general obligations clause supplemented by more detailed prescriptions. States parties to the International Covenant on Civil and Political Rights (ICCPR) undertake 'to respect and to ensure' the rights,[3] and those to the International Covenant on Economic, Social and Cultural Rights (ICESCR) 'to take steps . . . with a view to achieving progressively the full realization of the rights' as well as to guarantee that they will be exercised without discrimination.[4] The Convention on the Rights of the Child (CRC) opts for the basic formula of 'to respect and ensure' the rights 'without discrimination of any kind',[5] and devotes a wide range of articles to elaborating on the basic obligation; 'respect and ensure' is also employed by the International Convention on the Protection of the Rights of All Migrant Workers and their Families (CMW),[6] while the 'general obligations' article in the Convention on the Rights of Persons with Disabilities (CRPD) employs the formula of 'to ensure and promote'[7] the full realization of convention rights, and makes provision for the specifics of economic and social rights. Among the regional instruments on human rights, the African Charter on Human and Peoples' Rights (ACHPR) obliges States to 'recognise' the rights and adopt measures to give effect to them;[8] the European Convention on Human Rights (ECHR) includes a general obligations Article, directing States to 'secure' the rights,[9] while the American Convention on Human Rights (ACHR) mandates 'respect' for rights.[10] Group-oriented human rights instruments also concern themselves with general obligations—the United Nations Declaration on Minorities (UNDM), for example, elaborates a platform of obligations in Article 4, while the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) employs a characteristic mix of rights and obligations throughout the greater part of its text.[11]

The nature and scope of obligations under human rights instruments has been the subject of sustained analysis over decades, resulting in deconstructive typologies and characterizations. Landmark studies and scholarly proposals from human rights bodies and academics include those prepared by Eide[12] and Shue.[13] The latter referred to moving

[2] CEDAW GR 28 addresses 'the core obligations of States parties under Article 2', an article that shows affinities with Article 2 of ICERD: CEDAW/C/GC/28, 16 December 2010. CERD has not issued a comparable general recommendation that covers the full range of obligations under Article 2 ICERD.

[3] Article 2(1).

[4] Article 2(1).

[5] Article 2(1).

[6] Article 7.

[7] Article 4.

[8] Article 1.

[9] Article 1.

[10] Article 1.

[11] See in particular, Articles 8, 11, 12, 13, 14, 15, 16, 17, 19, 21, 22, 26, 27, 29, 30, 31, 32, 36, and 38.

[12] *The Right to Adequate Food as a Human Right*, Final Report of the UN Special Rapporteur on the Right to Food, A. Eide, E/CN.4/Sub.2/1987/23. For use by the Committee on Economic, Social and Cultural Rights, see for example GC 12, *The Right to Adequate Food*, E/C.12/1999/5.

[13] H. Shue, *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton University Press, 1996).

beyond the simplistic assumption that for every right there was a single correlative duty, and categorized duties in the field of human rights as duties (a) to avoid depriving, (b) to protect from deprivation, and (c) to aid. Eide's typology of obligations to respect, protect, and fulfil human rights has become a standard point of reference for monitoring institutions, activists, and commentators. Roughly translated, the obligation to respect signifies the primarily negative principle that the State should refrain from interfering with the enjoyment of a right; the obligation to protect implies that States should actively shield right holders from the actions of third parties;[14] the obligation to fulfil requires to duty-bearer 'to adopt appropriate legislative, administrative and other measures towards the full realization of human rights'.[15] For this last aspect of obligation, sub-obligations to facilitate, to promote,[16] and to provide have been individuated.[17] The typology of obligations was developed principally in the context of economic, social, and cultural rights,[18] though claims are made for it to function as a template for the generality of human rights in that it supplies nuance and progression to the simple distinction between positive and negative action.[19]

[14] Thus, 'in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention': *Velásquez Rodríguez v Honduras*, (Merits), IACtHR Ser. C No. 4 (1988), para. 172.

[15] *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (Office of the UN High Commissioner for Human Rights, 2005), para. 48—the foreword by the High Commissioner recalls that the work 'builds upon several previous publications of the Office of the United Nations High Commissioner for Human Rights, *Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002) and *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), drafted by Professors Hunt, Nowak, and Siddiq Osmani, and also draws on consultations with various stakeholders (including Member States, intergovernmental and non-governmental organizations)'. The obligation to fulfil entails provision of a remedy for victims of human rights violations: *Velásquez Rodríguez v Honduras*, para. 176; in the present work, see the discussion of remedies in the commentary on Article 6 of ICERD.

[16] 'At its most general, the obligation to fulfil is considered also to involve an obligation to promote human rights, which means that States should adopt policies that *promote* rights both domestically (for example, human rights education) and internationally': F. Mégret, 'Nature of Obligations', in D. Moeckli, S. Shah, and S. Sivakumaran (eds.), *International Human Rights Law* (2nd edn, Oxford University Press, 2014), p. 103 (emphasis in the original) [henceforth *International Human Rights Law*].

[17] See the summary by W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005), pp. 187–90 [henceforth *Non-Discrimination and Equality*].

[18] For an example of their employment, see GC 12 of the Committee on Economic, Social and Cultural Rights, The Right to Adequate Food, E/C.12/1999/5 (1999), paras 14–20.

[19] D. Shelton and A. Gould, 'Positive and Negative Obligations', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015), pp. 562–83 [henceforth 'Positive and Negative Obligations']. The web page of the Office of the UN High Commissioner for Human Rights offers the following information: 'International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.' <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>.

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'Respect', 'protect', and 'fulfil' appear in the regular discourse of the Committee, even if not framed as a tripartite typology.[20] 'Respect' appears in contexts such as ensuring respect for the ways of life of ethnic groups,[21] in relation to particular rights and freedoms,[22] or human rights more generally. 'Protect' appears in many contexts, notably in protection of vulnerable groups such as indigenous peoples in their livelihoods[23] and in other respects—citations of the protection provisions of GR 23 are much in evidence;[24] in relation to other oppressed populations or individuals;[25] in measures to protect the security of persons from violence,[26] from stereotyping,[27] or simply from racial discrimination.[28] In the context of special measures in Articles 1(4) and 2(2), 'protection' is concerned, according to GR 32, with 'violations of human rights emanating from any source, including discriminatory activities of private persons'.[29] 'Fulfil' tends to appear in the context of fulfilment of obligations specifically or generally.

## B. *Travaux Préparatoires*

The initial Sub-Commission drafts of a general obligations paragraph showed considerable variation. The Abram draft made reference to 'persons, groups of persons or institutions' to be protected against discrimination on various 'grounds' (the ultimate destination of which was Article 1 of the Convention)—'race, colour, or ethnic origin, or where applicable, on the basis of "nationality" or national origin'.[30] States would also be obliged not to encourage or lend support 'through police action or otherwise' to discrimination by 'any group, institution or individual'.[31] 'Grounds' of discrimination—'race, colour or ethnic origin'—were also alluded to in the drafts of Calvocoressi[32] and Kertzynski—'race, colour or ethnic origin or, where applicable, on the basis of "nationality" or national origin'.[33] The Calvocoressi draft included the obligation 'to pursue a national policy designed to prevent discrimination within its territory',[34] as well as broaching the issue of criminal responsibility for racial violence.[35] Legislation for the

[20] For a critique of the typology, see I.E. Koch, 'Dichotomies, Trichtomies or Waves of Duties?' *Human Rights Law Review* 5 (2005), 81–103. Vandenhole, *Equality and Discrimination*, pp. 187–287, applies the typology of obligations to ICERD as well as to related instruments. The present chapter follows the more open and Convention-specific approach adopted (so far) by CERD.

[21] Concluding observations on Thailand, CERD/C/THA/CO/1-3, para. 16.

[22] Concluding observations on Turkmenistan, CERD/C/TKM/CO/5, para. 17 (freedom of religion).

[23] Concluding observations on Finland, CERD/C/FIN/CO/20-22, para. 13.

[24] Concluding observations on Costa Rica, CERD/C/CRI/CO/18, para. 10; Guatemala, CERD/C/GTM/CO/11, para. 17; Venezuela, CERD/C/VEN/CO/18, para. 20.

[25] Concluding observations on Slovenia, CERD/C/SVN/CO/6-7, para. 12 (political rights).

[26] Concluding observations on Colombia, CERD/C/COL/CO/14, para. 14; Israel, CERD/C/ISR/CO/13, para. 37.

[27] Concluding observations on, CERD/C/CAN/CO/18, para. 14 (stereotypes associated with terrorism).

[28] Concluding observations on Ecuador, CERD/C/ECU/CO/20-22, para. 13.

[29] GR 32, para. 23.

[30] E/CN.4/Sub.2/L.308, Article 2, para. 1.

[31] Discrimination by groups, institutions, or individuals was also adverted to in the Kertzynski draft, E/CN.4/Sub.2/L.323, Article 2, para. 2.

[32] E/CN.4/Sub.2/L.309, Article 2, para. 3.

[33] E/CN.4/Sub.2/L.323, Article 2 para. 1.

[34] E/CN.4/Sub.2/L.309, Article 2, para. 2. The Ivanov/Ketrzynski draft, E/CN.4/Sub.2/L.314, Article 2, para. 1, and the Ketrzynski draft, E/CN.4/Sub.2/L.323, Article 2, para. 2, also included limiting references to territory.

[35] E/CN.4/Sub.2/L.309, Article 2, para. 3.

speedy elimination of racial discrimination was expressly adverted to in the Kertzynski text.[36] The Calvocoressi/Capotorti text selected for discussion included the following elements for what became paragraph 1 of Article 2 of the Convention:[37]

1. Each Contracting State undertakes to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms.
2. Each Contracting State shall rigorously abstain from any act or practice of racial discrimination and undertakes that all its legislative, executive, administrative and judicial organs, and also local authorities and public institutions of all kinds within its territory, shall act in conformity with this obligation. No contracting State shall encourage, advocate or support racial discrimination by any individual, group or private organization.
3. Each Contracting State shall rescind any laws and regulations which have the effect of creating or perpetuating racial discrimination.
4. Each Contracting State undertakes to adopt all necessary measures, including legislation if appropriate, to prohibit racial discrimination by any individual, group or private organization.

Following discussions, the phrase 'and without delay' was added by the authors after 'all appropriate means' in the first sentence of paragraph 1; 'to this end' was also added at the end of the sentence. In a reorganization of the text, sub-paragraphs 2, 3, and 4 were converted into (a), (b), and (c) of paragraph 1.[38] Key deletions were made from new sub-paragraph (a), including the words 'rigorously', 'legislative, executive, administrative and judicial',[39] and 'private'.[40] 'Public institutions' was retained as a phrase because, as explained by Capotorti, the words 'could cover any institutions not entirely dependent on the State, established by law for public purposes';[41] he also defended the inclusion of a reference to local authorities 'which in many countries were not part of the State machinery'.[42] Reference to 'individuals' was changed to 'persons': according to Capotorti, the change widened the scope of the text.[43] The words 'take effective measures to revise government policies' were added to new sub-paragraph (b) after 'each contracting State shall',[44] and the order of sub-paragraph (c) was changed, placing the prohibition of racial discrimination first. The reference to 'within its territory' was also dropped, with Ferguson offering the comment that deletion of 'within its territory' would 'have the advantage of

[36] States parties would undertake not to permit, etc. racial discrimination in its territory 'and, if necessary... make legislative provision for and... implement such measures as are required for the speedy elimination of all racial discrimination': E/CN.4/Sub.2/L.323, Article 2, para. 3.

[37] E/CN.4/Sub.2/L.324, this text did not include a paragraph on special measures.

[38] E/CN.4/873, para. 59.

[39] Capotorti commented that the State 'was... a complex which included all its organs': E/CN.4/Sub.2/SR.415, p. 5.

[40] 'Private' appears to have been dropped because, in the words of Ketrzynski, 'it might be interpreted in some States as restrictive': E/CN.4/Sub.2/SR.415, p. 7; see also the comments of Ingles, E/CN.4/Sub.2/SR.415, p. 8, and Capotorti, E/CN.4/Sub.2/SR. 415, pp. 9 and 10.

[41] E/CN.4/Sub.2/SR.415, p. 9. Capotorti expanded on examples, which included 'not only organs which depended directly on the central government, but also autonomous entities such as State railways, public power authorities and local institutions'; the paragraph 'was intended to cover all public activities': E/CN.4/Sub.2/SR.417, p. 4. Following Capotorti, Lerner reads the provision as covering such autonomous entities, which 'are always of a public nature': N. Lerner, *The International Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 37 [henceforth *The International Convention*].

[42] E/CN.4/Sub.2.SR.415, p. 9.

[43] E/CN.4/Sub.2/SR.415, p. 10.

[44] The difference between 'rescind' and 'nullify' in the paragraph was explained by Ferguson in response to a question by Capotorti: according to Ferguson, 'in common law countries, only bodies which had the power to make laws could rescind them... Bodies such as courts, which did not have the power to make laws, were entitled to nullify them': E/CN.4/Sub.2/SR.416, p. 6.

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implying that the responsibility of the State extended to all areas in which it exercised authority'.[45] Further amendments by Ivanov were not accepted by the Sub-Commission, including one which incorporated an explanation of the unacceptability of racial discrimination as 'an infringement of the rights and an offence to the dignity of the human person and a denial of the rules of international law and of the principles and objectives set forth in the United Nations documents mentioned in the preamble of the present Convention'.[46]

The Commission on Human Rights had before it the following text of Article 2(1):

> States parties to the present Convention 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 to this end:
>
> (a) Each State party undertakes to engage in no act or practice of racial discrimination, and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. Each State party undertakes not to encourage, advocate or support racial discrimination by any person, group or organization;
> (b) Each State party shall take effective measures to revise governmental and other public policies, and to rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.
> (c) Each State party shall prohibit racial discrimination by any person, group or organization, and undertakes to adopt all necessary measures, including legislation, if appropriate.

In discussions, Lebanon proposed and gained acceptance for the deletion of the second sentence of paragraph 1(a),[47] 'since it was unthinkable that States parties would encourage, advocate or support racial discrimination'.[48] An Austrian amendment to add the words 'against persons, groups or organizations' after 'practice of racial discrimination' on the basis that in the matter of the fundamental obligations of States parties it was important to be clear and explicit,[49] was also adopted.[50]

A number of amendments to paragraph 1(b) were accepted without objection. Hence the word 'revise' was replaced by 'review' on the proposal of the United Kingdom (UK),[51] whose representative argued that 'revise' implied that all countries would have to change their policy, while 'review' would mean that 'all governments would be required to examine their laws with care and would therefore be in a better position to decide what changes they should make in those laws'.[52] There was some discussion on the phrase 'rescind or nullify' in sub-paragraph (b), based partly on the text of Article 4 of the Declaration on the Elimination of All Forms of Racial Discrimination which used only the term 'rescind'.[53] This led to the suggestion that 'nullify' be deleted, in case it merely

[45] E/CN.4/Sub.2/SR.416, p. 5.
[46] E/CN.4/Sub.2/L.327, E/CN.4/Sub.2/SR.416, p. 5. The amendment was rejected by 6 votes to 4 with 3 abstentions: E/CN.4/Sub.2/241, para. 66. See also further comments by Ivanov, E/CN.4/Sub.2/SR.417, p. 7.
[47] E/CN.4/L.691. The proposal was adopted by 15 votes to 1 with 1 abstention: E/CN.4/874, para. 128.
[48] E/CN.4/874, para. 116. The 'unthinkable' substance of the impugned sentence appears as Article 2(1)(b) of the final text.
[49] E/CN.4/L.687; E/CN.4/SR.787, p. 7, representative of Austria.
[50] E/CN.4/874, para. 127: voting was 12 to none, with 8 abstentions.
[51] E/CN.4/L.689.
[52] E/CN.4/874, para. 117; observations of the United Kingdom in E/CN.4/SR.789, p. 4.
[53] Comment by the representative of The Netherlands, E/CN.4/SR.789, p. 6.

duplicated 'rescind'.[54] 'Nullify' was, however, retained along with 'rescind' on the basis that they were both a means of attaining the same end,[55] and by retaining both, the Commission would 'be sure of taking into account the differences between legal systems'.[56] On a proposal by India, the two terms were added to by 'amend' before 'rescind or nullify'.[57]

Discussions on sub-paragraph (c) brought forth a substantive dispute on whether the elimination of racial discrimination must inevitably take time. The UK proposed to delete the reference to 'prohibition' and replace it with 'undertake all necessary measures, including legislation if appropriate',[58] to bring racial discrimination to an end. The UK argued that the chapeau of paragraph 1 suggested that the elimination of racial discrimination would take time and that this was contradicted by sub-paragraph (c) where prohibition implied an immediate undertaking, bearing in mind that the rest of sub-paragraph (c) did not imply immediate action.[59] The UK also felt that to eliminate racial discrimination, methods other than legislation would be required,[60] including education.[61] The proposal, eventually superseded by an oral Turkish amendment,[62] nevertheless evoked strong opposition:

> If a State party refused to prohibit racial discrimination and proposed instead a very vague undertaking to bring it to an end within an unspecified period of time, the purpose for which the Convention had been drafted would never be attained. The question was whether the State party should begin by prohibiting discrimination... The United Kingdom text was far more than an exercise in semantics. The only States likely to be pleased by its wording were those which had no desire to take firm measures but were ready to affix their signatures to the Convention because of the pressure of public opinion... The... text would prolong the struggle against discrimination indefinitely and would provide... loopholes by means of which compliance... could be evaded.[63]

Despite this, the Turkish text, while retaining the word 'prohibition' was read, on account of its use of the phrase 'all appropriate means', to allow a certain latitude to States.[64]

[54] Observation of the Chairman, the representative of Ecuador, E/CN.4/SR.789, p. 6.

[55] Observation by the representative of India, E/CN.4/SR.789, p. 6.

[56] Representative of Austria, E/CN.4/SR.789, p. 7.

[57] E/CN.4/874, paras 118 and 119: on the proposal by India, 'It was considered that the text should contain some provision... for the amending of existing laws and regulations which had the effect of creating or perpetuating racial discrimination wherever it existed': *ibid.*, para. 119; E/CN.4/SR.789, p. 5.

[58] E/CN.4/L.689, summarized in E/3873; E/CN.4/874, para. 120.

[59] E/CN.4/SR.787, p. 10 for part of the UK explanation.

[60] The representative of Canada wondered 'whether it was really necessary to bind States to prohibit racial discrimination. If the intention was to place upon States the obligation to abolish racial discrimination, the Convention should emphasize positive measures to that end': E/CN.4/SR.788, p. 5; see also remarks by the representative of France, *ibid.*, pp. 6–7.

[61] The UK also made the point that, in common law countries, racial discrimination was dealt with not by making it an offence but by the protection given to all under the law in the enjoyment of human rights and fundamental freedoms: E/CN.4/SR.788, pp. 4–5.

[62] 'Each State party shall prohibit and bring to an end by all appropriate means, including legislation if necessary, racial discrimination by any person, group or national organization.'

[63] Comments by the representative of the USSR, E/CN.4/SR.787, p. 11.

[64] The Turkish amendment was adopted unanimously: E/CN.4/874, para. 132. Various comments on the text are made in E/CN.4/SR.788, pp. 9–10. The representative of Costa Rica read the Turkish proposal as emphasizing 'that States were to prohibit racial discrimination "by all appropriate means", that was to say any means within the law, and it did not commit them to enact new legislation unless it was necessary': E/CN.4/SR.788, p. 9.

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The text of Article 2(1) before the Third Committee read as follows:

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, 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 shall take effective measures to review governmental and other public policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
(c) Each State party shall prohibit and bring to an end, by all appropriate means, including legislation if necessary, racial discrimination by any persons, group or national organization.

In the Third Committee the phrase 'and promoting understanding among all races' was successfully proposed by Brazil, Colombia, and Senegal as an addition to the chapeau after 'racial discrimination in all its forms'.[65] The final Article 2, paragraph 1(b) of the Convention owes its place to a multi-State amendment which superseded an amendment of Brazil,[66] and was viewed as adding to the reach of the Convention.[67] The Commission's sub-paragraph (b) (sub-paragraph (c) of the Convention) was amended to replace the words 'other public' by 'national and local' by virtue of the same multi-State amendment.[68] Sub-paragraph (c) of the Commission's text (sub-paragraph (d) of the Convention) was also amended to delete from 'group or national organization' the word 'national', a change that widens its scope.[69] In this sub-paragraph, the phrase 'if necessary' was replaced by 'as required by circumstances' on the initiative of Poland and Ghana.[70] The Polish representative, echoing similar points made before the Commission, objected to the wording of the sub-paragraph which

was open to the interpretation that the decision as to whether there was any need for legislation to put an end to racial discrimination rested solely with the State concerned, even in States where no such legislation existed. There was therefore no guarantee that racial discrimination would be

[65] A/C.3/L.1217. The amendment was adopted by 85 votes to none, with 7 abstentions: General Assembly Official Records, Twentieth Session, Annexes, Agenda item 58, Report of the Third Committee, A/6181, para. 55.

[66] The amendment 'Each State party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations' (A/C.3/L.1226 and Corr. 1) replaced 'Each State party undertakes not to encourage, advocate or support racial discrimination by any persons or organizations' (A/C.3/L.1209), which conveys essentially the same message. The multi-party amendment was adopted by 47 votes to 2 with 39 abstentions: A/6181, para. 55.

[67] The logic of the new paragraph did not commend itself to the representative of Italy: 'the Italian delegation considered that, if States undertook to prohibit certain activities, it was pointless to invite them, at the same time, not to encourage those activities': A/C.3/SR.1308, para. 20.

[68] A/C.3/L.1226 and Corr. 1; the amendment was adopted by 56 votes to 2 with 34 abstentions: A/6181, *ibid.* The representative of the Netherlands intimated that 'other public policies' was wider that 'national and local' in that it 'sufficed to cover all the policies to which sub-para. 1(a) applied': A/C.3/SR.1308, para. 12. Austria abstained on the paragraph because, according to the representative, 'legislation having local application was not possible in her country': A/C.3/SR.1308, para. 35.

[69] Now sub-para. (d) of Article 2.1 of the Convention; this was the result of an oral suggestion by Italy at the 1308th meeting, revising the multi-State amendment A/C.3/L.1226 and Corr. 1, and was adopted by 81 votes to 1, with 11 abstentions: A/6181, para. 49.

[70] A/C.3/L.1210, amendment by Poland to replace 'if necessary' by 'in the absence thereof' was itself replaced on the oral suggestion of Ghana at the 1308th meeting: A/6181, para. 48; the representative of Ghana observed that some delegations regarded the Polish phrase as 'too peremptory': A/C.3/SR.1308, para. 3.

prohibited by law in all States ... the Convention should impose upon States parties the obligation to prohibit racial discrimination through their legislation if they had not yet done so.[71]

As it had in the Commission, the UK objected, arguing that racial discrimination might persist even after the adoption of legislation, and that the General Assembly 'should not attempt to dictate to States, particularly since the nature and size of the problem varied from country to country'.[72] The representative of Haiti introduced a motif which became important in the life of the Convention: explaining Haiti's abstention, the representative 'could not accept the imposition on States of an obligation to adopt legislation which was not necessary in cases where, as in Haiti, racial discrimination did not exist'.[73]

Sub-paragraph (e) of Article 2.1, which had not figured in the text prepared by the Commission, was introduced by Brazil, Colombia, and Senegal.[74] This was supported by Ecuador, among others, because it 'contained a positive idea, in contrast with the negative character of all the previous provisions ... [and] ... concerned measures calculated to promote integration ... in keeping with the traditions of Latin America, where all multi-racial societies were integrated'.[75] On the other hand, in an explanation of vote, the representative of Costa Rica considered that 'the word "discourage" had no legal validity and only weakened the text'.[76] In a similar vein, the UK considered that the paragraph was superfluous and that the weak verb 'discourage' contrasted (badly) with the 'vigorous nature' of the language of Article 2, paragraph 1.[77] Austria abstained in the vote on sub-paragraph (e) 'since the problem of racial barriers did not exist in Austria'.[78]

## C. Practice

### I. Reservations and Declarations

A small number of reservations relate specifically to Article 2: on 2(1), Monaco declares that 'it reserves the right to apply its own legal provisions concerning the admission of foreigners to the labour market of the Principality'.[79] The reservation by the US is the most extensive, relating essentially to obligations to address private conduct: 'the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph 1 of Article 2, sub-paragraphs 1(c) and (d) of Article 2, Article 3, and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States'. The Committee noted the reservation with concern and has,[80] *inter alia*, invited the US to 'consider withdrawing or narrowing the scope of its reservation to Article 2 of the Convention'.[81] Banton is less respectful,

[71] A/C.3/SR.1306, para. 18. This was clarified further by the representative of Poland to the effect that if 'such legislation already existed, there was no need for adoption of any new legislation': A/C.3/SR.1307, para. 33.
[72] A/C.3/SR.1307, para. 3.
[73] A/C.3/SR.1308, para. 31.
[74] A/C.3/L.1217 was adopted on a roll-call vote by 97 votes to none, with 4 abstentions: A/6181, para. 55.
[75] A/C.3/SR.1308, para. 18. For comments by the representative of Italy, see para. 19, *ibid.*
[76] A/C.3/SR.1308, para. 29.
[77] *Ibid.*, para. 30. See also the negative comments of Jamaica, *ibid.*, para. 37.
[78] A/C.3/SR.1308, para. 36.
[79] The Committee has recommended that Monaco withdraw the reservation in light of 'developments in its legislation': A/65/18, p. 86, para. 7. Switzerland maintains a similar reservation.
[80] A/56/18, para. 392.
[81] CERD/C/USA/CO/6, para. 11. The issue is recalled and expanded in the 2014 concluding observations of the Committee, wherein the State party is called upon to consider withdrawing or narrowing the reservation

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reflecting that 'the reservations [by the USA] show no understanding of the Convention and what it is attempting to achieve'.[82]

## II. Guidelines

The harmonized reporting guidelines request information for the common core document that impinges on Article 2. In addition to information on the legal framework for the protection of human rights at the national level, more focused information is requested 'on whether the principle of non-discrimination is included as a general binding principle' in domestic law,[83] and on 'steps taken to ensure that discrimination in all its forms and on all grounds is prevented and combated in practice'.[84] The CERD-specific guidelines do little more than to restate the provisions of Article 2 paragraph by paragraph;[85] the only novel note is the request for information on whether a national human rights institution (NHRI) or other appropriate bodies have been mandated with the task of combating racial discrimination.

## III. Convention Obligations and Domestic Law

International law requires that States bring their domestic (national) law into line with their international obligations and that domestic provisions may not be invoked to defeat an international obligation.[86] Article 2, as the principal repository of general obligations to implement the Convention, is a useful starting point to consider the relationship between the Convention and the law of the State, bearing in mind Leary's observation that the efficacy of human rights treaties depends in essence on their translation into domestic law.[87] Discussion of the relationship between systems of law is often enmeshed in generalized theory. Approaches to the incorporation of international law into domestic legal orders are sometimes characterized in reductionist mode as monist or dualist—the former signifying automatic incorporation into domestic law with binding effects therein, the latter implying that specific legislative adjustments are required to give international law binding effects within national legal orders.[88] The theories are saturated with competing notions of the superiority of one system over another, which may serve to obscure the complex connections between the domestic and international spheres.[89] There is a fair degree of convergence across civil and common law jurisdictions with regard to the incorporation of customary international law—automatic incorporation at least in theory, although issues of consonance with established domestic law and status in

'and broaden the protection afforded by law against all discriminatory acts perpetrated by private individuals, groups or organizations': CERD/C/USA/CO/7-9, para. 5.

[82] *International Action*, p. 247.

[83] HRI/GEN/2/Rev.5, p. 14, para. 52.

[84] *Ibid.*, p. 14, para. 53.

[85] CERD/C/2007/1, pp. 5–6.

[86] Article 27 of the Vienna Convention on the Law of Treaties. For applications by the International Court of Justice, see the *Lockerbie* case, ICJ reports 1992, pp. 3, 32; *Avena* (*Mexico v USA*), (Provisional Measures) ICJ reports 2004, p. 12, p. 65, cited in M.N. Shaw, *International Law* (6th edn, Cambridge University Press, 2008), p. 135 [henceforth *International Law*].

[87] V. Leary, *International Labour Conventions and National Law* (Martinus Nijhoff Publishers, 1982), p. 1.

[88] For a general treatment, with useful illustrations, see Shaw, *International Law*, chapter 4; for application to international human rights conventions, see A. Byrnes and C. Renshaw, 'Within the State', in Moeckli *et al.*, *International Human Rights Law*, Chapter 22, at pp. 460–5.

[89] For a helpful general review of the range of approaches to international law taken by domestic legal systems, see D. Sloss, 'Domestic Application of Treaties', D. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press, 2014), pp. 367–95 [henceforth *Domestic Application*].

the legal hierarchy position its practical effect.[90] On the other hand, patterns of incorporation of international treaties vary widely. Committee discussions regularly refer to the variety of techniques of incorporating human rights treaties into the domestic realm. International law does not dictate a preference for one system of incorporation over another but requires that, whatever the mode, the standards of the Convention in question are adequately reflected in domestic practice.

In States where the prevailing practice is automatic incorporation through constitutional provision, CERD prefers that constitutions underline the primacy of international treaties over domestic law as clearly as possible,[91] and frequently recalls that incorporation in the constitution may not in itself be sufficient. Apart from the question of the 'non-self-executing' nature of—at least some—of the provisions in the Convention,[92] the constitution may not be drafted in terms adequate to capture the full range of grounds of discrimination or the rights in the Convention.[93] Constitutional review[94] or amendments may be urged upon the State,[95] as well as supplementary legislation to give full effect to the Constitution and remedy legal lacunae.[96] Requested legislation may be compendious, as with Panama, recommended to 'adopt legislation to make fully effective the provisions of the constitution relating to non-discrimination and expressly prohibiting discrimination based on grounds of race and to guarantee the availability of effective remedies to endure implementation of such legislation'.[97] A State party may be requested to clarify the relationship between the Convention and domestic law.[98]

In the case of 'dualist' systems, the Committee accepts that there is no obligation to incorporate the Convention as such into law but may express regret that this has not been done, an argument linked to the concern that, without such incorporation, the Convention may not be given full effect. Thus, CERD reiterated to the UK 'its continuing concern that the State party's courts may not give full effect to the provisions of the Convention unless it is expressly incorporated into its domestic law or the State party adopt necessary provisions in its legislation'; the UK was therefore requested to reconsider its position—non-incorporation as such—'so that the Convention can be more readily invoked in the domestic courts of the State party'.[99] In the case of Denmark, CERD suggested that the non-incorporation of international treaties resulted 'in reluctance by

[90] Shaw, *International Law*, Chapter 4 'International Law and Municipal Law'.

[91] Concluding observations on Morocco, CERD/C/MAR/17-18, para. 8, recommend that the State party 'incorporate provisions in its constitution on the primacy of international treaties over domestic law, in order to ensure broad application of this principle and enable litigants to invoke the relevant provisions of the constitution before the courts'.

[92] Article 4 of the Convention is the most frequently cited Article with reference to its non-self-executing nature, and thus of the need to legislate its requirements to make them effective in domestic law.

[93] 'The Committee is concerned that the definition of racial discrimination in . . . the Constitution of Japan, which prescribes the principles of equality and non-discrimination, does not include the grounds of national or ethnic origin, colour or descent and therefore does not fully meet the requirements of Article 1 of the Convention': concluding observations on Japan, CERD/C/JPN/CO/7-9, para. 7; see also concluding observations on Korea, CERD/C/KOR/CO/14, para. 10.

[94] Concluding observations on Nigeria, CERD/C/NGA/CO/18, para. 11.

[95] Concluding observations on Bosnia and Herzegovina, CERD/C/BIH/CO/6, para. 11.

[96] Concluding observations on Colombia, CERD/C/COL/CO/14, para. 13. The Committee has also called for the 'entrenchment' of constitutional provisions and that legislative acts against racial discrimination prevail over all other legislation: concluding observations on Australia, CERD/C/AUS/CO/15-17, para. 110.

[97] CERD/C/PAN/CO/15-20, para. 9.

[98] Concluding observations on Portugal, CERD/C/PRT/CO/12-14, para. 11.

[99] CERD/C/GBR/CO/18-20, para. 10.

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lawyers and judges to invoke such treaties in Danish courts'; incorporation, it was argued, was necessary 'to ensure [the Convention's] direct application before Danish courts in order to afford all individuals its full protection'.[100] When incorporation of the Convention is a possible agenda, it should be, according to the Committee, at an appropriately high level, not lower than other, comparable human rights treaties.[101] When incorporation is a less probable State agenda, the Committee's preference is for legislation to be as comprehensive as possible.[102]

Preoccupations over the functioning of the Convention in domestic law were aptly summarized by CERD member de Gouttes:

> The debate on the contrast between countries with a monist legal system, in which international treaties and agreements took precedence over domestic legislation as soon as they had been approved, and those with a dualist legal system was perhaps not the most consequential. It was more important to know whether a duly ratified instrument was self-executing. Even in the case of a monist system, any ratified treaty had to be accompanied by internal legislation defining the sanctions and penalties incurred for any derogation from the obligations... indeed, since no human rights treaty provided for punishment in the event of non-compliance with its provisions, implementing regulations were absolutely necessary to ensure its application.[103]

The Committee has not been completely consistent with regard to the self-executing nature of the provisions of the Convention *in toto*, with statements recalling that 'the Convention is not self-executing'[104] standing alongside statements that 'many provisions of the Convention' are not self-executing.[105] The Committee has made clear its view that Article 4 is not self-executing but requires implementing legislation, a proposition cemented into GR 35 on combating racist hate speech: 'As Article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope'.[106] Criticism of the 'far-reaching reservations' of the US,[107] particularly with regard to Article 4 and the limitation as to private conduct, has not extended to specific criticism of its declaration that the provisions of the Convention are not self-executing, though in this case, the absence of contestation does not necessarily signify agreement with the view of the State party.[108]

## IV. The Reach of the Convention

Unlike the ICCPR, which requires a State party to respect and endure civil and political rights 'to all individuals within its territory and subject to its jurisdiction',[109] there is no

[100] CERD/C/DNK/CO/18-19, para. 8; CERD/C/NK/O/20-21, para. 8.

[101] Concluding observations on Norway, CERD/C/NOR/CO/19-20, para. 7.

[102] 'The Committee urges the State party to review its legislation and take the most appropriate approach for incorporating the Convention's provisions into domestic law, either by adopting a comprehensive law against racial discrimination or amending existing laws': concluding observations on Laos, CERD/C/LAO/CO/16-18, para. 7.

[103] CERD/C/SR.1444, para. 37, discussing the initial and second periodic report of Japan.

[104] Concluding observations on Japan, CERD/C/304/Add.114, para. 20.

[105] Concluding observations on Armenia, CERD/C/ARM/CO/5-6, para. 8; The Philippines, CERD/C/PHL/CO/20, para. 14.

[106] GR 35, para. 13.

[107] CERD/C/304/Add.125, paras 12 and 13; CERD/C/USA/CO/6, para. 11.

[108] For a review of the position in US courts on self-executing treaties and related issues, see C. Vázquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties', *Harvard Law Review* 122 (2008), 599–695; Sloss, *Domestic Application*, 387, describes the position in the US as 'analytically incoherent'.

[109] Article 2(1).

equivalent general clause limiting the application of ICERD to the jurisdiction or territory of States parties.[110] Only two substantive Articles—Article 3 on segregation and apartheid and Article 6 on remedies—include such references: to 'territories under [the] jurisdiction' of States parties in Article 3, while Article 6 obliges States parties to assure to 'everyone within their jurisdiction' effective protection and remedies. In the context of the individual communications procedure, Article 14 envisages communications from individuals or groups of individuals within the jurisdiction of the State party. Neither Article 2—the general repository of obligations—nor Article 5, the principal repository of rights, refers to territory or jurisdiction.[111]

The question of the application of international human rights instruments beyond the national territory to extraterritorial acts and omissions has become a prominent focus of interest in recent international human rights practice.[112] According to the Human Rights Committee, a State party must respect and ensure ICCPR rights to anyone within its 'power or effective control',[113] even if not situated within the territory of the State party, a principle that also applies to 'those within the power or effective control of the forces of a State party acting outside its territory'.[114] CEDAW takes the view that 'States primarily exercise territorial jurisdiction. The obligations of States parties apply, however to [those] within their territory or effective control even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.'[115] Other human rights instruments have been interpreted to include an extraterritorial dimension to human rights obligations, even if

[110] The ICESCR is similarly devoid of a provision regarding territory or jurisdiction, though, analogously to Article 14 of ICERD, its Optional Protocol envisages communications from people under the jurisdiction of a State party. The ACHR—Article 1(1)—requires States parties to respect and ensure the rights of persons subject to their jurisdiction, without reference to a territorial condition; an analogous provision appears in Article 1 of the ECHR.

[111] 'Jurisdiction' is a term with multiple meanings in international law and the international law of human rights, ranging over the different bases for the legal exercise of jurisdiction over persons outside the State's territory—delimitation of sovereign competence—to the question of obligations incurred towards groups and individuals protected by ICERD but situated extra-territorially. For a review of the general position in international law, see Shaw, *International Law*, Chapter 12; for distinctions between the position in general international law and that in human rights, see M. Milanovic, 'From Compromise to Principle: Clarifying the Conception of Jurisdiction in Human Rights Treaties', *HRLR* 8 (2008), 411–48; also the presentation by the last author on <http://webtv.un.org/news-features/watch/marko-milanovic-on-the-extraterritorial-application-of-human-rights-treaties/3875099482001>.

[112] International human rights law highlights different concerns than international law more broadly, historically concerned with the 'protection of aliens'; for a short summary, see R. Kolb, 'The Protection of the Individual in Times of War and Peace', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law*, Chapter 13.

[113] Lubell summarizes the point: 'The very object and purpose of the Covenant would be severely undermined if States could evade responsibility by relocating their abuse of individuals': N. Lubell, Extraterritorial *Use of Force against Non-State Actors* (Oxford University Press, 2010), p. 205.

[114] General Comment 31, para. 10. Cases are relatively sparse: see discussion by S. Joseph and A. Fletcher, 'Scope of Application', chapter 6 of Moeckli *et al.*, *International Human Rights Law*, pp. 119–39, pp. 133–4, who note the assertion by the Human Rights Committee of the responsibility of Israel for the Occupied Territories, and of the US for Guantanamo Bay—both situations have been addressed by CERD. The authors conclude, p. 133, that 'the ICCPR and the ACHR apply extraterritorially where an affected person is under the effective control of a State's agents, rather than only where an affected person is within territory that is effectively controlled by a State', while observing, p. 138, that ECHR practice may not be fully consonant with their position.

[115] CEDAW GR 28 on 'the Core Obligations of States parties under Article 2', CEDAW/C/GC/28 (2010), para. 12.

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practice does not always display consistency.[116] In *Construction of a Wall in Palestinian Occupied Territory*, the International Court of Justice (ICJ) stated with respect to the ICCPR that '[w]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR] it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.'[117] With regard to the ICESCR, the ICJ noted that it contained no provision as to its scope of application; it was, however, 'not to be excluded that it applies both to territories over which a party has sovereignty and to those over which that State exercises territorial jurisdiction'.[118]

In the case of ICERD, in *Georgia v the Russian Federation* the ICJ observed that

> there is no restriction of a general nature in CERD relating to its territorial application... neither Article 2 nor Article 5, alleged violations of which are invoked by Georgia, contain a specific territorial limitation... the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.[119]

With regard to human rights treaties which do not contain a provision delimiting their territorial application, Sivakumaran interprets the cited paragraph as representing a 'presumption... that they have extraterritorial effect'.[120] For ICERD, the 'presumption' is given substance by the removal, in the drafting process, of any territorial restriction on the ambit of the Convention.[121] The comment in *Georgia v Russian Federation* on 'instruments of that nature' is apt to include instruments of a 'universal' nature such as ICERD and the Covenants, etc, unconstrained by notions of '*espace juridique*'.[122] In light

[116] Notable cases before the European Court of Human Rights include *Loizidou v Turkey*, App. No. 15318/89 (1996); Cyprus *v Turkey*, App. No. 25781/94 (2001); *Ilaşcu and Others v Moldova and Russia*, App. No. 48787/99 (2004); *Issa v Turkey*, App. No. 31821/96 (2004); *Al Skeini and Others v UK*, App. No. 55721/07 (2011). In the Inter-American system, see *Saldano v Argentina*, Inter-American Commission report No. 38/99.

[117] *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, para. 109; the Court found that the constant practice of the Human Rights Committee is consistent with this view, a practice confirmed by the *travaux préparatoires* of the Covenant. The Court therefore concluded, para. 111, that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.

[118] *Construction of a Wall*, para. 112. As with the Human Rights Committee under the ICCPR, the Court cited the position taken by the Committee on Economic, Social and Cultural Rights in support of its reasoning. The interpretation of the scope of jurisdiction in *Construction of a Wall* was recalled by the Court in *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Uganda*), Judgment of 19 December 2005, ICJ Rep. 168, para. 216.

[119] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation*, Request for Provisional Measures, International Court of Justice, 15 October 2008, para. 109. The preceding paragraph. recited the disagreement of the parties on the territorial scope of obligations under ICERD: Georgia claimed that Russia's obligations extended to 'acts and omissions attributable to Russia' which had their locus 'within Georgia's territory and in particular in Abkhazia and South Ossetia'; Russia on the other hand, claimed that the Convention could not be applied extraterritorially and, in particular, that Articles 2 and 5 could not 'govern a State's conduct outside its own borders'. See further discussion in Chapter 19.

[120] S. Sivakumaran, 'International Humanitarian Law', in Moeckli *et al.*, *International Human Rights Law*, pp. 480–95, p. 494.

[121] Comment by Sub-Commission member Ferguson on the deletion of a reference to territory, *supra*, n. 45. The issue of territory was not well-aired in the *travaux*.

[122] European Court of Human Rights, *Banković et al. v Belgium et al.*, App. No. 52207/99, Admissibility (2001), para. 80: 'the [ECHR] is a multi-lateral treaty operating... in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States... The Convention was not designed to be applied throughout the world'. For a critique, see M. Milanović, *Extraterritorial Application of Human Rights*

of such a presumption, it is noteworthy that Turkey entered a reservation declaring that its ratification of the Convention related 'exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied'.[123]

In CERD practice, assertions regarding the responsibility of State X beyond territorial boundaries have characteristically been linked to situations where another State party—Y—has lost effective control over parts of its territory to the forces of State X (foreign occupation) or a secessionist administration presumed to be under the control of State X.[124] In the case of Cyprus, the Committee took a view on the occupation of 37 per cent of the territory of Cyprus by Turkish forces and its consequences in causing 'the *de facto* separation of the various ethnic and religious communities', an artificial division that was 'an obstacle to peace and the enjoyment of human rights in the region', impeding 'the construction of a progressive anti-discrimination strategy for the island as a whole'.[125] In the case of Moldova, it was noted that the Transniestria region 'continued to be outside the effective control of the State party, which was therefore unable to monitor the application of the Convention in that part of its territory'.[126] In these and other cases, the Committee has expressed serious concerns about the malign influence of international and internal conflicts on the enjoyment of human rights, together with recommendations on steps necessary to solve the resulting problems, including calls for prosecution of those responsible for violence and compensation for victims.[127] Recommended steps have also included confidence-building measures by States parties and civil society.[128]

*Treaties: Law, Principles, and Policy* (Oxford University Press, 2011), p. 40, describing a confusion between legality and the operation of facts in *Banković* as a category error; also M. Happold, 'Banković v Belgium, and the Territorial Scope of the European Convention on Human Rights', *HRLR* 3 (2003), 77–90.

[123] In concluding observations, the Committee encouraged the State party to consider withdrawing its reservation and declarations 'including removal of the territorial limitation to the application of the Convention': CERD/C/TUR/CO/3, para. 8. Cyprus objects to the 'declaration deeming it to be a reservation: 'the Government of the Republic of Cyprus has examined the declaration made by the Government of the Republic of Turkey to the International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966) on 16 September 2002 in respect of the implementation of the provisions of the Convention only to the States Parties with which it has diplomatic relations.

In the view of the Government of the Republic of Cyprus, this declaration amounts to a reservation. This reservation creates uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Convention. The Government of the Republic of Cyprus therefore objects to the reservation made by the Government of the Republic of Turkey. This reservation or the objection to it shall not preclude the entry into force of the Convention between the Republic of Cyprus and the Republic of Turkey': <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec>. Further on reservations to the Convention, see Chapter 18.

[124] Such situations are characteristically listed in concluding observations under 'factors and difficulties' in implementing the Convention: discussion in Chapter 4 of the present work. For early practice of the Committee with regard to the Panama Canal Zone, the Golan Heights, Cyprus, the West Bank of the River Jordan, and Sinai, see Lerner, *The International Convention*, Chapter 4.

[125] CERD/C/304/Add.124, para. 3. The issue of lack of control by the State party over all of its territory is a recurring theme in observations on Cyprus: CERD/C/CYP/CO/17-22, para. 6. For earlier observations on Cyprus, see L. Holmström (ed.), *Concluding Observations of the UN Committee on the Elimination of Racial Discrimination* (Kluwer Law International, 2002), pp. 171–7 [henceforth *Concluding Observations*].

[126] Moldova, CERD/C/MDA/CO/8-9, para. 3.

[127] Examples include Decision 1(76) on Nigeria, A/65/18, pp. 6–7; Decision 1(77) on Kyrgyzstan, *ibid.*, pp. 7–8; Decision 1(78) on Côte d'Ivoire, A/66/18, pp. 6–7; Concluding observations on Kenya, CERD/C/KEN/CO/1-4, para. 15. For an extensive list of conflict-related recommendations, see I. Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), pp. 191–4.

[128] In the case of Cyprus, the Committee requested information on 'intercommunal initiatives undertaken by the State party and by civil society to restore mutual confidence and improve relations between ethnic and/or

In some cases, the Committee has supplemented assertions as to lack of 'effective control' by suggesting that responsibility for implementation of the Convention in the contested area lies elsewhere than with the reporting State. In the case of Georgia, the Committee, following its standard recital that 'Abkhazia and South Ossetia continue to be outside the effective control of the State party, which made it therefore unable to implement the Convention in these territories',[129] added the following:

> The Committee notes the State party's position that the obligation for implementing the Convention in South Ossetia and Abkhazia belongs to a neighbouring country which has effective control over those territories. The Committee notes that it has in the past taken the view that States that have effective control over a territory have the responsibility under international law and the spirit of the Convention for implementing the Convention.[130]

*Ex facie*, the Committee's comment to Georgia appears as a *lex imperfecta* in that the position of the State party (Georgia) is noted without drawing a specific legal conclusion, although the second sentence intimates a wider practice 'under international law and the spirit of the Convention'.[131] The usual CERD approach in Article 9 cases is to draw attention to the inability of reporting States to apply the Convention in cases of occupation or secession, and to stress the need to end the occupation or resolve the conflict. In cases with 'international' dimensions, and in the absence thus far of proceedings under Articles 11–13, broader comments by the Committee are restrained in light of the country-by-country focus of reporting under Article 9. Lack of 'control' or 'effective control' in such cases has been treated by international bodies as diminishing, though not eliminating, obligations to apply human rights conventions on the part of the State whose territory is compromised,[132] so that jurisdiction may appear as 'a relative concept, a matter of degree determining the scope of the obligations of the State concerned'.[133] This

religious communities as well as raise awareness through the impartial teaching of the history of Cyprus in schools and other State institutions': CERD/C/CYP/CO/17-22, para. 7.

[129] CERD/C/GEO/CO/4-5, para. 8.

[130] *Ibid.*, para. 9.

[131] The preceding sentence of the paragraph refers to Security Council resolution 1866 (2009) requesting the parties in conflict to facilitate the free movement of refugees and internally displaced persons (IDPs).

[132] In *Ilaşcu and others v Moldova*, the European Court of Human Rights interpreted the 'jurisdiction' of States parties over secessionist territories as implying not the absence of jurisdiction but its reduced scope, so that the State must still endeavour, 'with all the legal and diplomatic means available to it . . . to continue to guarantee the enjoyment of . . . rights and freedoms': App No. 48787/99 (2004), para. 333, also para. 331. See also *Catan and Others v Moldova and Russia*, App. Nos. 43370/04, 8252/05, and 18454/06, (2012). For a Critique of *Ilaşcu* and *Catan*, see comments by M. Milanovic, <http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others>. For further comment on the implications of Ilaşcu following the take-over of Crimea but the Russian Federation, see T.D. Grant, 'Ukraine v Russian Federation in Light of Ilaşcu: Two Short Points', <http://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two-short-points>. Clarification of distinctions between jurisdiction and attribution is offered in O. De Schutter, *International Human Rights Law* (Cambridge University Press, 2010), pp. 147 ff. [henceforth *International human Rights Law*]. Commentators have summarized Ilaşcu as implying that 'just because a State does not have plenary jurisdiction does not mean that it has none': F. Hampson and N. Lubell, *Amicus Curiae Brief for Georgia v Russia (II)*, ECHR, <http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf>.

[133] De Schutter, *ibid.*, p. 134. The point made by Besson may also be borne in mind: 'Without jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a State and *a fortiori* no potential responsibility of the State for violating those duties later on': S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on jurisdiction and what Jurisdiction Amounts to', <http://doc.rero.ch/record/32542/files/ExtraterritorialityECHR.pdf>.

approach is not at odds with the general tenor of CERD approaches to the resolution of conflicts.[134]

Interspersed with wider discussions of extraterritoriality, the issue of the applicability of international human rights law and international humanitarian law to specific situations has also been raised.[135] There has been a persistent line of disagreement between the Committee and Israel regarding the application of the Convention to territories under Israeli control,[136] with the Committee asserting applicability and the State party denying it. The detailed series of exchanges that took place in 2012 regarding the scope of application of the Convention are instructive, and included questions from Committee members as to why Israel denied applicability when the Occupied Territories were effectively under the control of the State party.[137] In response, the delegation of Israel noted that ICERD did not apply because no special declaration had been made extending it to the West Bank 'which lay outside Israeli national territory'; Palestinians did not exist in a state of legal limbo but were subject to the law of armed conflict.[138] Further, agreements had made the majority of Palestinians subject to Palestinian jurisdiction.[139] On the point of a special declaration, CERD member Diaconu asserted that the legal basis for jurisdiction was not a declaration 'but the fact that Israel occupied and controlled those territories. That was a generally accepted rule of international law'.[140] In response, the Israeli delegation stated that 'the understanding that all human rights conventions were territorially bound was connected to the use of... jurisdiction in the relevant provision of all such conventions... jurisdiction was commonly understood to be connected to...

[134] Responding to CERD's concluding observations of 2011, Georgia welcomed the acknowledgement 'that the third State that exercises effective control of Abkhazia... [etc.]... has a responsibility to observe and implement the Convention in these regions. Hence the Russian Federation bears responsibility for the respect, observance and implementation of the Convention in the occupied regions... Georgia... remains committed to report about undertaken efforts originating from its positive obligations vis-à-vis occupied regions of Georgia': A/66/18, Annex VIII. Co-opting the terminology of 'Occupied Territories', the 2014 periodic report of Georgia states that while Georgia 'fully undertakes the obligation to take all possible measures for implementing the provisions of the Convention... in light of its positive obligations under... human rights law, it contends that the primary responsibility... rests with the Russian Federation': CERD/C/GEO/6-8, para. 33. See generally, Diaconu, *Racial Discrimination*, pp. 191–4, 320–3.

[135] One commentator suggests that the reference in the Abram draft in the Sub-Commission, E/CN.4/Sub.2/L.308, Article 2, para. 2, referring to a prohibition on States lending support to racial discrimination 'through police action or otherwise', was dropped 'not because the delegates thought the use of force should not be covered, but because they did not want to include any language that could be limiting or confusing': C.G. Buys, 'Application of the International Convention on the Elimination of All Forms of Racial Discrimination', *AJIL* 103 (2009), 294–99, 297; the author cites the comments in E/CN/4/Sub.2/SR.419, p. 7, remarks of Mudawi.

[136] M. Banton, *International Action against Racial Discrimination* (Clarendon Press, 1996), pp. 128–30, and 300–3 [henceforth *International Action*]. See also Holmström (ed.), *Concluding Observations*, pp. 327–35. Early in its practice, CERD declared its competence to examine the manner in which Israel is fulfilling its obligations under the Convention 'with respect to everyone falling under the jurisdiction of Israel, including all persons living in the territories occupied by Israel': A/48/18, para. 83. In discussion of decisions by Israel on the inclusion of information on the Occupied Territories in its reports to CERD, concern was expressed by CERD members as to whether requesting such information could imply recognizing Israel's rights over such territories; other views were expressed that inclusion was necessitated by the de facto situation without regard to questions of legitimacy on the basis that 'the Convention was universal in scope and thus applied to every person who might be affected by the exercise of jurisdiction by a State party, whether that jurisdiction was legitimate or not': A/36/18, paras 108–9, 109. At the time no clear consensus emerged as to how the situation should be treated.

[137] Commenced by country rapporteur Kut, CERD/C/SR.2131, para. 18, followed by CERD members Diaconu, paras 23; de Gouttes, para. 35; Amir, para. 44; and Vázquez, para. 45.

[138] CERD/C/SR.2132, para. 4.

[139] *Ibid.*, para. 5, in any case, Israel did not have control of Gaza, responsibility for which lay with Hamas.

[140] *Ibid.*, para. 50.

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sovereignty and by extension to . . . territoriality';[141] it was added that 'the law of armed conflict and international human rights law did not apply together in the present case',[142] despite a discernment of the 'profound connection between international human rights law and the law of armed conflict'.[143] In conclusion, the Committee took note of the willingness of the State party to discuss the situation in the West Bank and Gaza but regretted the absence of any such information in the State report. Further the Committee was 'deeply concerned at the position [of Israel] . . . that the Convention does not apply to all the territories under the State party's effective control', and recommended that it be applied to such territories.[144]

In the case of the US, discussions were interlinked with an assessment of the scope of Article 1(2) and the treatment of non-citizens. Hence the Committee regretted the position taken by the US 'the Convention is not applicable to the treatment of foreign detainees held as "enemy combatants", on the basis of the argument that the law of armed conflict is the exclusive *lex specialis* applicable', and that in any event, concern over the alleged unequal treatment of foreign detainees was not applicable in light of Article 1(2) of the Convention.[145] The Committee recalled GR 30 on non-citizens as well as its statement on measures to combat terrorism—which should not discriminate in purpose or effect on the grounds in Article 1; with regard to 'enemy combatants' the associated recommendation was for judicial review of the lawfulness and conditions of detention, and the right to remedy for human rights violations.

Pronouncements by the Committee on *lex specialis* are rare;[146] its approach to specific situations is evidence of the acceptance of the principle of the coexistence of international humanitarian law and international human rights law, especially in light of the prominence of the principle of non-discrimination, including on the grounds of race and nationality, in the Geneva Conventions.[147] The Committee has on occasions ventured to pronounce on the requirements of international humanitarian law, though the dominant approach is to translate the requirements of international humanitarian law into the human rights language of the Convention.[148] As Weissbrodt has demonstrated, the

[141] CERD/C/SR.2132, para. 82.

[142] *Ibid.*, para. 83.

[143] *Ibid.*, para. 81.

[144] CERD/C/ISR/CO/14-16, para. 10; see also, *ibid.*, paras 20 and 27. For similar arguments in relation to the ICCPR, see O. De Schutter, *International Human Rights Law*, p. 129.

[145] CERD/C/USA/CO/6, para. 24.

[146] *Lex specialis* (*lex specialis derogat generali*) has a double sense, the first of which is that the specific rule modifies the general rule to the extent of an inconsistency between them; the second is where the specific rule is an instance of the application of the more general but there is no inconsistency between them: Sivakumaran, 'International Humanitarian Law', in Moeckli *et al.*, *International Human Rights Law*, p. 489; authors have found the term unhelpful in that it 'was designed to deal with . . . a vertical relationship' and not 'the horizontal collision between two separate regimes': F. Hampson and N. Lubell, *Amicus Curiae Brief for Hassan v UK, ECHR*, para. 18 <http://repository.essex.ac.uk/9690/1/hampson-lubell-amicus-ecthr-oct-2013.pdf>. See also Chapter 18 with regard to the Committee's stance on reservations.

[147] According to the ICRC, <https://www.icrc.org/eng/resources/documents/misc/57jqzq.htm>: 'The principle of non-discrimination underlies all international humanitarian law, which is a body of rules specifically intended to solve humanitarian problems arising directly from armed conflicts.' See in particular Art. 16, Geneva Convention III; Art. 13 Geneva Convention IV, and common Article 3; Art. 27, Geneva Convention IV; Additional Protocol I, Art. 75(1). The prohibition against 'adverse distinction' is considered by the ICRC to be part of customary international law.

[148] In the case of Israel, the Committee stated that it regarded 'the Israeli settlements in the occupied territories as not only illegal under international law but also as obstacles to peace and to the enjoyment of human rights by the whole population': A/48/18, para. 87.

engagement of CERD with international humanitarian law has been persistent and wide-ranging through key CERD mechanisms, notably including the 'regular' reporting procedure, the archive of general recommendations, and the early warning and urgent action procedures.[149] With regard to CERD's concluding observations, Weissbrodt observes that

> [m]ention of international humanitarian norms or instruments generally come in the context of armed conflict, genocide or terrorism, and concentrate on refugees and displaced persons in attempts to ensure that these groups are protected during times of instability. CERD also places emphasis on cooperation with international tribunals, as they are a primary means by which the principles of the Race Convention can be enforced.[150]

CERD recommendations are characteristically made on the basis that the Convention norms should be applied in light of the 'root causes'[151] and ethnic/racial dimensions of a conflict situation, interpreted according to the grounds of discrimination in Article 1 and the 'forms' of discrimination developed under it. The prevalence of non-international, frequently ethnically based armed conflict highlights the appropriateness of applying universal norms of non-discrimination;[152] and, as the events surrounding *Georgia v the Russian Federation* conform, allegations of 'ethnic cleansing' are appropriate to take international conflicts within the non-discrimination frame. CERD also pays close attention to situations perceived as evolving into conflicts with ethnic dimensions.[153]

## V. Chapeau: No Delay in Eliminating Racial Discrimination

The specific contribution of the chapeau is to lend a heightened sense of urgency to the Convention through the specific undertaking to pursue, 'by all appropriate means and without delay', a policy of eliminating racial discrimination and promoting understanding. The requirement of an anti-discrimination 'policy' is wide-ranging and in itself subsumes and intersects with the paragraphs and sub-paragraphs of the article. The language of the chapeau suggests legal guarantees and a range of measures including action plans and strategies, institutional mechanisms, indicators, benchmarks, and timelines for measurement and monitoring of the incidence and scale of discrimination in the society concerned, all dedicated to eliminating racial discrimination in practice 'in all its forms'; the last phrase is adequate to capture existing and developing forms of discrimination. The 'all appropriate means' provision was present in early drafts in the Sub-Commission; the addition of the 'no delay' clause in the Sub-Commission to tighten the obligation will also be recalled. Mahalic and Mahalic regard the phrase 'by all appropriate means' as a limitation clause,[154] however their suggestion that the formulation rules out 'inappropriate means', such as the use of force to secure an anti-discrimination policy, is

[149] D. Weissbrodt, 'The Approach of the Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law', *Minnesota Journal of International Law* 19 (2010), 327–62 [henceforth *The Approach of the Committee*].

[150] *Ibid.*, 349.

[151] Concluding observations on Kyrgyzstan, CERD/C/KGZS/CO/5-7, para. 5.

[152] As Weissbrodt observes, the Committee 'recognizes that armed conflicts represent serious obstacles to the implementation of the Race Convention and, further, that armed conflicts often stem from racially and ethnically motivated violence': *The Approach of the Committee*, p. 344.

[153] Comments to Sudan on the situation in Darfur, CERD/C/SDN/CO/12-16, para. 7.

[154] D. Mahalic and G. M. Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' *HRQ* 9 (1987), 74–101, 85.

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less of a limitation than a reminder to States that action to correct the injustice of discrimination against one group should not spill over into injustice against another: the means employed to pursue an anti-discrimination policy should not subvert their ends, judged according to the letter and spirit of the Convention. In a positive sense, the phrase 'all appropriate means' engages the full arsenal of measures available to the State to combat discrimination, described in GR 32 in the context of special measures as including 'the full span of legislative, executive, administrative, budgetary and regulatory instruments... as well as plans, policies, programmes and preferential regimes'.[155] Large-scale 'national strategies or plan[s] of action' are envisaged in GR 31 to eliminate structural discrimination; strategies should include, *inter alia*, 'specific objectives and actions as well as indicators against which progress can be measured'.[156]

The reference to speed of action is complemented by references elsewhere in the Convention. The relevant paragraphs in the preamble to speedily eliminating racial discrimination,[157] in Article 4 to 'immediate and positive measures', and in Article 7 to 'immediate and effective measures' reinforce the urgency of the message; the reference in 2(1) to a 'no delay' policy for 'promoting understanding' has its closest parallel in Article 7. Concluding observations are replete with references to action that is to be taken 'without delay'. Bearing in mind the generously broad concept of a 'policy' to eliminate racial discrimination,[158] references to accelerated action occur across a wide spectrum of issues. The passing or implementation of particular laws[159] or amending others may be recommended as a matter of urgency,[160] as well as the adoption of more general 'measures',[161] or putting mechanisms into place.[162] Urgency may also be regarded as intrinsic to the pursuit of investigations of complaints with due diligence.[163] Exhortations to speedy action may apply to general laws as well as those to benefit specific groups. In terms of Committee procedures, legislative and other processes that can be completed rapidly are likely to be singled out for accelerated reporting back under the Committee's 'follow-up procedure', while pressing, potentially serious issues of human rights of sufficient 'gravity and scale' are characteristically addressed under the Committee's 'early warning and urgent action procedure'. Urgent situations concerning indigenous communities have dominated the latter procedure in recent years, a situation to some extent paralleled in concluding observations on periodic reports.[164]

[155] GR 32, para. 13. See the fuller citation of this paragraph in Chapter 9.

[156] Para. 5.

[157] As well as its endorsement of the UN General Assembly's objective of speedily eliminating colonialism.

[158] Diaconu, *Racial Discrimination*, pp. 178–82, offers an extended reflection on 'types and forms of policies'.

[159] Recommendation to Paraguay to implement a languages act and provide a suitable budget therefor: CERD/C/PRY/CO/1-3, para. 19.

[160] Recommendation to Cuba to amend legislation on foreigners, CERD/C/CUB/14-18, para. 18.

[161] CERD/C/CAN/CO/18, para. 15, take necessary measures to amend the Indian Act in view of discriminatory effects on rights of aboriginal women and children.

[162] Recommendation to Kenya to mechanisms to implement constitutional provisions on political representation. CERD/C/KEN/CO/1-4, para. 20.

[163] Recommendation to Israel regarding expeditious investigations of racist complaints: CERD/C/ISR/CO/13, para. 30.

[164] Examples in 2011 include recommendations for urgent action to Bolivia, CERD/C/BOL/CO/17-20, para. 18; and Paraguay, CERD/C/PRY/CO/1-3, para. 17; in 2013, Chile, CERD/C/CHL/CO/19-21, para. 14. See the discussion in Chapter 4.

In relation to Article 2, the general interpretation offered by Australia that its obligations are 'of general principle and programmatic in character' may be borne in mind.[165] The claimed 'programmatic' element is *ex facie* irreconcilable with the explicit Article 2 requirement that an anti-discrimination policy must be pursued 'without delay'[166] and with the general characterization that, even in the case of avowedly programmatic rights, the elimination of discrimination in the enjoyment of such rights represents an obligation with immediate effect.[167] On the other hand, the immediacy required by Article 2 refers to the general notion of a policy to eliminate racial discrimination, important elements of which are clearly in place in the case of Australia, notably through specific discrimination legislation at federal and state levels.[168] The declaration entered by Australia with regard to Article 4(a) cuts across the grain of urgency in Article 2 as well as the explicit requirements of Article 4:

> The government of Australia . . . declares that Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4(a).

Unsurprisingly, the Committee has repeatedly called for the withdrawal of this reservation and for legislation to give full effect to Article 4;[169] the compatibility with the Convention of the Australian statement, characterized as a reservation also by the State party,[170] has not been tested under the Article 14 procedure. Characterization of statements as reservations effectively blocks any determination of compatibility by the Committee in light of two-thirds rule in Article 20(2); characterization as an interpretation on the other hand invites a comparison between the Committee's reading of the Convention and that of the State party.[171]

## VI. Article 2(1)(a) No Discrimination by the State, Public Authorities, Public Institutions

Sub-paragraphs (a)–(c) distil the basic message that the State itself shall not discriminate, directly or indirectly. Statements in the *travaux* suggesting that discriminatory action by States was 'unthinkable' are best understood as relating to the view that State-sponsored racial discrimination was a colonial aberration and not the global phenomenon discerned

[165] *Hagan v Australia*, CERD/C/62/D/26/2002 (2003), para. 4.4.

[166] The similar wording of Article 2 of CEDAW draws the response from the CEDAW Committee that '[t]he words "without delay" make it clear that the obligation of States parties to pursue their policy by all appropriate means is of an immediate nature. This language is unqualified, and does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume': CEDAW GR 28 on Core Obligations under Article 2, para. 29.

[167] CESCR, General Comment No. 3, *The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant)*, 14 December 1990, para. 1; paragraph 7 of CESCR General Comment No. 20 describes non-discrimination as 'an immediate and cross-cutting obligation'. For nuances regarding *de facto* and *de jure* discrimination, see B. Saul, D. Kinley, and J. Mowbray (eds.), *The International Covenant on Economic, Social and Political Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014), pp. 203–5.

[168] Consult <https://www.humanrights.gov.au/guide-australias-anti-discrimination-laws>.

[169] CERD/C/AUS/CO/14, para. 12; CERD/C/AUS/CO/15-17, para. 17.

[170] *Hagan v Australia*, para. 4.7.

[171] See, for example, *T.K. v France*, CCPR/C/37/D/220/1987 (1989), dissenting opinion of Human Rights Committee member Higgins.

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in Committee practice. 'Racial discrimination' in Article 2 must be assumed to carry its full meaning as discrimination in intention or effect as well as related forms identified in Committee practice. Article 2(1) addresses State-generated racial discrimination;[172] Article 4(c) refers to the impermissibility of promotion of discrimination or incitement thereto by public officials, authorities, or institutions;[173] Article 5 sets out a spectrum of rights that implicate State bodies particularly in the fields of justice, security, and political organization.

There is an overlap between 2(1)(a) and 2(1)(c) in that, if there are discriminatory policies, they must be reviewed, amended, rescinded, or nullified. State-generated discrimination may arise from specific legislation or specific or general policy. The CERD archive is replete with examples that range from relatively minor, filigreed instances of discrimination to severe forms of oppression as recognized in the early warning and urgent action procedure and further identified in the Committee indicators of mass violations of human rights.[174] Racial discrimination by organs of State, as a sub-set of the State's general obligation to eliminate racial discrimination *in toto*, remains among the Committee's principal concerns, not entirely eclipsed by the growing emphasis on responsibility for discrimination by private actors.

The State obligation not to discriminate reaches vertically through levels of governance and laterally to territories under State control. The explicit reference in 2(1)(a) to 'national and local' levels of State administration is noteworthy; the 'local' also figures in 2(1)(c) and 4(c). In light of the general principle of international law that internal law may not be invoked to defeat a charge of failure to perform a treaty, CERD has not been impressed by arguments that, for example, the government of a federation cannot compel component administrations to implement obligations under the Convention. This insistence on the responsibility of the State party to ensure that the Convention is implemented 'all the way down' through the levels of administration is made in the absence of a 'federal clause' in the Convention.[175] Such a clause was proposed during the drafting of the Convention but rejected in the Third Committee on the grounds,[176] *inter alia*, that a federal clause would have represented a weakening, and not a strengthening, of direct obligations to implement.[177]

[172] In *Hagan v Australia*, para. 4.5, the State party cited 'academic authority' to the effect that 2(1)(a) 'does not deal with private acts of discrimination': the citation was to Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*.

[173] For a summary of what count as organs of State in the practice of the Human Rights Committee, see D. McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights', in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, 2004), 161–99.

[174] A/60/18, para. 20.

[175] 'Federal clauses' appear in a number of UN 'core' instruments and take the general form that the provisions of the convention 'shall apply to all parts of federal States without any limitations or exceptions'. Examples include Article 50 of the ICCPR, Article 28 of the ICESCR, Article 4 of the CRPD, and Article 41 of the CPED.

[176] The clause envisaged a distinction between Articles of the Convention under federal legislative jurisdiction and those under state (of the federation), cantonal, or provincial jurisdiction: in the latter case, the obligation expressed was 'to bring such Articles before the appropriate authorities with a favourable recommendation' (to implement): A/6181, para. 187. On the proposal of Poland, the clauses were rejected by 63 votes to 7, with 16 abstentions: *ibid.*, paras 188–89.

[177] Such a clause 'would substantially weaken the Convention as a whole by establishing inequality of obligations as between federal and unitary States. It would not be in conformity with international law, under which a federal State as a whole was regarded as a subject of international law': observations by the representative of Czechoslovakia, A/C.3/SR.1367, para. 6. According to the representative of the USA, *ibid.*, para. 8, 'such

Banton introduces the issue in relation to early reports of Canada;[178] it resurfaces in the Committee's conclusions on Canada, including those of 2007:

> The Committee, while welcoming the information that the Action Plan Against Racism: A Canada for All, together with other initiatives mentioned by the State party, will, *inter alia*, ensure the coordination of efforts of federal departments and provincial/territorial governments in the fight against racism, is concerned about remaining discrepancies in the level of implementation of the Convention among the provinces. The Committee underscores once again the responsibility of the Federal Government of Canada for the implementation of the Convention[179]

A similar exposition of CERD's position was made in 2008 in relation to Belgium in relation to discriminatory decrees of regional and local authorities. While noting that the State party has a federal structure, the Committee recalled that 'Belgium is a single State under international law and has the obligation to ensure the implementation of the provisions of the Convention throughout its territory'.[180] The insistence on full implementation is not confined to States with a federal structure, and it is clear from the text of 2(1)(a) that obligations implicate the actions of lower level or local authorities. The question of political and administrative divisions of States is addressed by paragraph 31 of GR 32 in the context of special measures, stating a broader principle:

> The internal structure of States parties, whether unitary, federal or decentralized, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralized States, the federal authority shall be responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.

GR 32 points to the need for consistent implementation of the Convention across the board, a Committee preference that regularly emerges in concluding observations. The emphasis in the above-cited paragraph on coordination is amplified in the case of the US through a recommendation to 'establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, State and local levels'.[181] Mechanisms of coordination may be viewed as particularly pressing in heavily decentralized systems.[182] In the case of Italy, CERD expressed concern that 'the strongly decentralized system of Italy [might] lead to diversity of policies and decisions at the level of regions and provinces with regard to discrimination', and noted 'the need to adopt a global and comprehensive plan of action on human rights in view of the fragmented nature of measures on human rights taken by regional authorities'.[183] The last-cited

clauses tended to destroy the uniform application of international agreements by placing federal States in a special position'. The federal clause was vigorously advocated by Australia: A/C.3/SR.1367, paras 5 and 13.

[178] *International Action*, pp. 243–44.

[179] CERD/C/CAN/CO/18, para. 12. Coordination of federal and provincial mechanisms 'in order to remove discrepancies and disparities in the implementation of anti-racism legislation, policies, programmes and best practices' is urged in concluding observations of 2012: CERD/C/CAN/CO/19-20, para. 9.

[180] CERD/C/BEL/CO/15, para. 16; references to 'federal, regional and community levels' of governance are made in later concluding observations to Belgium in connection with structural discrimination, and Roma: CERD/C/BEL/CO/16-19, paras 15 and 18.

[181] CERD/C/USA/CO/6, para. 13.

[182] On devolution of powers potentially impeding the discharge of obligations, see concluding observations on France, CERD/C/FRA/CO/20-21, para. 4.

[183] CERD/C/ITA/CO/16-18, para. 27. Accordingly, the Committee recommended, *ibid.*, 'a mechanism for consultation and coordination with . . . local authorities'.

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comment on Italy does not challenge the political and administrative organization of the State party. While the architecture of government is a sovereign prerogative, boundary/territorial manipulation can raise serious human rights concerns, including those connected with political participation, amounting in some cases to racial discrimination.[184] Particular systems of government have also been the subject of interrogation by the Committee for possible discriminatory effects.[185]

The reference to 'public authorities and public institutions' was the subject of analyses by CERD in *Anna Koptova v Slovakia*,[186] and *L.R. v Slovakia*.[187] The point for present purposes relates to the argument of the State party that municipal councils—alleged to have issued discriminatory resolutions targeting Roma—were not State bodies.[188] The Committee took the view, as articulated in *L.R.*, that 'the acts of municipal councils, including the adoption of public resolutions of legal character... amounted to acts of public authorities within the meaning of the Convention',[189] and that 'the racial discrimination in question is attributable to the State party'.[190] *L.R. v Slovakia* is also notable for the proposition that the obligation not to discriminate is not confined to the final steps in a process:

> In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right... must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements connected to that implementation were to be severed and be free from scrutiny... the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation... taken together, do... amount to the impairment of the recognition or exercise on an equal basis of the human right to housing...[191]

In later concluding observations on Slovakia, the Committee noted with concern that the State party described 'the autonomy of local self-governing bodies as a major obstacle to achieving non-discrimination in access to social housing for the Roma community'.[192] The concern led to the recommendation that the State party 'take effective measures to implement the

[184] See M. Weller (ed.), *The Rights of Minorities in Europe* (Oxford University Press, 2005), particularly the comment by Jennifer Jackson-Preece on Article 16 of the Council of Europe Framework Convention for the Protection of National Minorities, *ibid.*, pp. 463–85.

[185] See comments by the Committee on the system of 'ethnic federalism' practised in Ethiopia, whereby the State party was requested to ensure that its operation served to protect all ethnic groups: CERD/C/ETH/CO/15, para. 16. Para. 15, *ibid.*, includes a related comment on diversity of court systems within the State party and a recommendation to ensure conformity with Article 2(1). For academic comment, see K. Tronvoll, 'Human Rights Violations in Federal Ethiopia: When Ethnic Identity is a Political Stigma', *IJMGR 15* (2008), 49–79, and G. Assefa, 'Human and Group Rights Issues in Ethiopia: a Reply to Kjetil Tronvoll', *IJMGR 16* (2009), 245–59.

[186] CERD/C/57/D/131998 (2000).

[187] CERD/C/66/D/31/2003 (2005). Article 2(1)(a) figures in other case but without notable illumination as to its meaning. Examples include *B.J. v Denmark*, CERD/C/56/D/17/1999 (2000). The claim under 2(1)(a) was contested by the State party (para. 4.3) because the facts involved discrimination by a private individual; the specifics of 2(1)(a) were not commented upon by the Committee.

[188] *Koptova*, para. 4.8; *L.R*, para. 2.3. Petitioners comments in *Koptova*, para. 5.18; petitioner's comments in *L.R.*, paras 5.1 and 5.3. Petitioners in both cases cited, *inter alia*, para. 4 of CERD's GR 15 on Article 4 (c), which stated that public authorities 'at all administrative levels, *including municipalities*' were bound by 4 (c) (present author's emphasis).

[189] *L.R. v Slovakia*, para. 6.3.

[190] *Ibid.*, para. 10.8.

[191] *Ibid.*, para. 10.7. For comment, see S. Joseph, 'The Right to Housing, Discrimination and the Roma in Slovakia', *HRLR 5* (2005), 347–49.

[192] CERD/C/SVK/CO/9-10, para. 16.

Convention and ensure that the principle of self-governance of local and regional bodies does not hamper its human rights obligations to promote economic, social and cultural rights of disadvantaged or discrimination groups, as per the Convention'.[193]

Discussions in the *travaux* clarified that 'public institutions' is wider than 'public authorities'. In *Hagan v Australia*, the State party claimed that the sports trust which owned the stadium which exhibited an offensive racial sign was 'a private body rather than a public authority or government agent', the acts of which therefore fell outside 2(1)(a) which did 'not deal with private acts of discrimination'.[194] This was contested by the petitioner, who pointed out that the trustees were appointed and could be removed by a minister and that their function was 'to manage land for public (community) purposes' and that the trust was 'therefore a public authority or institution for Convention purposes'.[195] The Committee did not comment on the Article 2 point in its reference to 'displaying a public sign considered to be racially offensive'.[196] In light of the general understanding of 'public institutions' in the drafting of Article 2, the more open interpretation of the sub-paragraph coheres better with the letter and spirit of the Convention.

## VII. Article 2(1)(b) Not to Sponsor, Defend or Support Racial Discrimination by any Persons or Organizations

The trope of negative statements of obligation in Article 2 continues in Article 2(1)(b), which shifts the emphasis from discrimination by organs of State and 'public institutions' towards discrimination by actors backed by the State, though an expanded reading of 'public institutions' in 2(1)(a) suggests an overlap between the two sub-paragraphs. Non-State actors, or 'private' persons or organizations are not explicitly identified as the focus of the text: the reluctance of the drafters to qualify persons or organizations by 'private' will be recalled.[197] Lerner discerns a 'gradual system of undertakings' in Article 2, moving from negative statements in the first two sub-paragraphs to explicit statements of positive action;[198] 2(1)(b) in his view, 'simply intends to prevent persons or organizations engaged in racial discrimination getting the official support of the State'.[199] The provision complements the other reference to persons and organizations in Article 2, and the proscription of racist organizations in Article 4(b). The negative phraseology does not rule out an active stance by the State vis-à-vis the fulfilment of its obligation: in terms of the typology of obligations referred to above, Ruggie lists 2(1)(b) and 2(1)(d) as aspects of 'the obligation to protect'.[200]

[193] *Ibid.*
[194] Para. 4.5.
[195] Para. 5.4.
[196] Para. 8.
[197] The commentary on the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts notes that 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State': <http://legal.un.org/legislativeseries/documents/Book25/Book25_part1_ch2.pdf>, commentary on chapter II, para. 2. CEDAW GR 28, para. 13, recalls the due diligence obligation on States parties to prevent discrimination by private actors, adding that the acts of some private actors may be attributed to the State under general international law.
[198] *The International Convention*, p. 37.
[199] *Ibid.*
[200] *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*, 18 December 2006, p. 4.

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Regarding the verbs in the sub-paragraph, 'sponsor' overlaps with 'support' and may be understood in terms of contribution to costs, taking responsibility for the acts of another, or generalized support for a person or organization.[201] 'Support' is wider and may include assistance, encouragement, or approval as well as financial support; in a related sense it may include 'endure' or 'tolerate'.[202] 'Defend' has an altogether more active significance, and, when too active, may be a good candidate to engage proscriptions such as those in Article 4. Regarding the potential application of 2(1)(b), Lerner's examples are those of 'an official publishing house that prints a racist book, or a local government that gives financial support to a school engaging in racial discrimination'.[203] Meron comments that 'support' may (arguably) encompass 'not only the extension of benefits as a positive action but also the failure to impose obligations that are required of other persons or organizations', instancing the granting of tax-exempt benefits to a private organization that discriminates on account of race.[204] In view of the extensive interpenetration and blurring of boundaries between public and private activities in modern States, including the financial nexus, the sub-paragraph potentially opens up a broad prospectus. The sub-paragraph is under-litigated in Article 14 cases. Along with 2(1)(a), the citation of 2(1)(b) was dismissed as irrelevant by the State party in *B.J. v Denmark*,[205] because that case did not involve State-promoted discrimination. In *Hagan v Australia*, the State party simply denied that the establishment of the sports ground trust in question, its continued existence, or its response to the claim by Hagan, engaged the sub-paragraph in any manner, a claim that was not commented upon by the Committee.[206]

2(1)(b) is relevant in principle to discrimination in any field covered by the Convention: activities of individuals as well as collective action are caught by the provision, and the term 'persons' includes legal persons such as corporations as well as natural persons. Cases include organizations close to the apparatus of governance as well as those removed from it. Egregious cases of State support for organizations in close proximity to governance would include, *inter alia*, private militias supported by the State, and funding for political parties. In concluding observations on the Russian Federation, CERD expressed concerned at information that Cossack organizations had engaged in acts of violence against ethnic groups, were used by local authorities to carry out enforcement operations, and enjoyed State funding. The Committee recommended that the State party ensure that no support would be provided 'to organizations that promote racial discrimination', and that Cossack paramilitary units be prevented from carrying out law enforcement functions against ethnic groups.[207] The Committee interrogated the Cossack question in later observations, concerned by information 'that voluntary "Cossack patrols" began to appear in 2012 . . . to carry out law enforcement functions alongside the police'.[208] Belgium was

[201] *Concise Oxford English Dictionary* (11th edn, Oxford University Press, 2004), pp. 1394–5.
[202] *Ibid.*, p. 1448.
[203] *Ibid.*
[204] T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, *AJIL* 79 (1985), 283–318, 295.
[205] Para. 4.3.
[206] Para. 4.5.
[207] CERD/C/62/CO/7, para. 16.
[208] CERD/C/RUS/CO/20-22, para. 14.

requested to provide information on a law of 1998 on withdrawing financial support to political parties that incite racism or racial hostility.[209]

Corporations, whether acting territorially or extraterritorially,[210] have increasingly been drawn into the orbit of Article 2, notably in connection with despoliation of indigenous lands and territories, including sacred sites. The Committee is critical of arrangements for resource exploitation such as permissions for tourism developments, or concessions and licences for mining and logging operations, granted without the free, prior, and informed consent of the indigenous peoples concerned.[211] GR 23 summarized the seriousness of situations where 'indigenous peoples have been, and are still being, discriminated against and deprived of their human rights . . . and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises'.[212] The concluding observations of the Committee provide examples of many cases involving indigenous peoples, which are, as noted, accorded a prominent place in the Committee's early warning procedure. In some instances, State bodies are implicated—Article 2(1)(a)—while many cases concern the activities of private corporations enjoying sundry forms of state support and approval. Notable early warning 'decisions' of the Committee include Decision 1(68) regarding the Western Shoshone,[213] and a series regarding resource exploitation in Suriname.[214] Letters of concern at the activities of corporations are more numerous than decisions: instructive illustrations of the Committee's approach include communications to Canada (2008 and 2009); France (2009); Niger (2009 and 2010); Papua New Guinea (2011); Peru (2010); The Philippines (2007–12); and Tanzania (2009–13).[215] The Committee may link its censuring of corporate activity to 2(1)(d) rather than 2(1)(b) without the implication that such activity is sponsored, defended, or supported by the State.

## VIII. Article 2(1)(c) Review Policy, Amend, Rescind, Nullify Discriminatory Laws and Regulations

Continuing the logic of Article 2, instances of State-based and State-supported discrimination referred to in the first two sub-paragraphs require modifications of existing law and policy. The accumulation of verbs suggests an obligation to mount a holistic assault on defective legal structures and institutions. The *travaux* evidence some difficulties with terminology including the claimed redundancy of 'nullify' following 'rescind'; both were retained in order to satisfy the variety of concepts among legal systems. The injunctions to act are arranged more or less sequentially in that before action is taken, the policy architecture (including laws that express that policy) should be 'reviewed', followed by necessary amendments to laws and regulations, including their rescission. Lerner cites the *travaux* for the view that 'nullify' is equivalent to 'suppress entirely', which may add

[209] CERD/C/60/CO/2, para. 14.

[210] See remarks on extraterritorial activities of corporations in the present chapter.

[211] In some cases, the concerns have related to the activities of non-indigenous individuals who trespass on indigenous territories, rather than corporations: see for example the series of letter sent to Brazil regarding the Raposa Serra do Sol: <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>.

[212] GR 23, para. 3.

[213] A/61/18, pp. 7–10.

[214] Decision 1(67), A/60/18, pp. 9–10; 1(69), A/61/18, pp. 10–11.

[215] Individual letters may be found on the Committee's web page: <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>.

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something to 'rescind'.[216] 'Nullify' may also have a stronger aftermath in terms of eliminating the lingering after-effects of misdirected or misapplied legislation.

Recommendations to review, amend, or rescind discriminatory legislation are common practice. The scope of a 'review' of legislation can extend from reviewing a specific law, including a constitutional provision,[217] to a general law or 'legal regime' such as a land regime,[218] review of legal remedies,[219] review of policies,[220] or review of 'positions' such as the position taken by a State party that a law against racial discrimination was not necessary.[221] Recommendations to 'amend' may come together with a recommendation to review,[222] or may stand alone, and, as with review, range from recommendations to amend specific pieces of legislation or adopt new legislation, to wholesale amendment of 'domestic laws, regulations or practices',[223] or harmonizing amendments of 'legislation on land, water, mining and other sectors' so that it does not conflict with other legislation on indigenous peoples.[224]

Bearing in mind the overlap between amendment and rescission, specific recommendations to abrogate or rescind laws or policies are uncommon—in the early warning/urgent action decision regarding the Western Shoshone, the US was urged to rescind trespass and collection notices, etc, inflicted on the Shoshone for using their ancestral lands.[225] 'Nullify' is more likely referred in data searches to with reference to the definition of discrimination in Article 1 rather than Article 2, though the challenge, referred to above, of remedying the after-effects of a formerly discriminatory legal system or laws is strongly felt in CERD practice, notably through recommendations to apply wide-ranging measures, such as those to address 'the legacy of apartheid' in the case of South Africa.[226] In the case of Serbia, 2(1)(c) was employed to cover existing structural discrimination, in that certain groups continued to be subject to exclusion and discrimination in employment, education, and participation in public affairs. Unspecific measures were recommended to address structural discrimination and the engagement of minorities with the public sphere.[227]

In *Hagan v Australia*, the author invoked, *inter alia*, 2(1)(c), stating that, under this provision, States parties have an obligation 'to amend laws having the effect of perpetuating racial discrimination . . . the use of words such as the offending term in a very public way provides the term with formal sanction or approval. Words convey ideas and power, and influence thoughts and beliefs. They may perpetuate racism.'[228] Australia replied regarding its Racial Discrimination Act that the fact that Hagan's claim under the Act was unsuccessful, 'did not detract from the effectiveness of that legislation', nor did it suggest

[216] Lerner, *The International Convention*, p. 37.
[217] Zambia, CERD/C/ZMB/CO/16, para. 12.
[218] Lao People's Democratic Republic, CERD/C/LAO/16-18, para. 16, review of the land regime was recommended with a view to recognizing the cultural aspect of land as an integral part of the identity of some ethnic groups.
[219] Estonia, CERD/C/EST/8-9, para. 18.
[220] Botswana, CERD/C/BWA/CO/16, para. 9.
[221] Korea, CERD/C/KOR/15-16, para. 6.
[222] Concluding observations on Jordan, CERD/C/JOR/CO/13-17, para. 11.
[223] Indonesia, CERD/C/IDN/CO/3, para. 16.
[224] Chile, CERD/C/CHL/CO/15-18, para. 23.
[225] CERD/C/USA/DEC/1 (2006), para. 10.
[226] Concluding observations on South Africa, CERD/C/ZAF/CO/3, para. 13.
[227] CERD/C/SRB/CO/1, para. 17.
[228] Para. 3.3.

that the Act created or perpetuated racial discrimination.[229] The Committee, while not finding a violation of the Convention, nonetheless recommended that 'the State party take the necessary measures to secure the removal of the offending term from the sign in question',[230] which suggests that, while 2(1)(c) was not deemed to be violated, measures in line with the spirit of the paragraph could and should have been taken.[231]

## IX. Article 2(1)(d) Prohibit and Bring to an End, by all Appropriate Means Including Legislation as Required by Circumstances, Racial Discrimination by any Persons, Group, or Organization

This provision ranks as one of the key obligations in the Convention, described by Schwelb as 'the most important and far-reaching of all the substantive provisions'.[232] Over decades, CERD has built up a profile of an idealized architecture of laws and supporting institutions to give substance to the obligation in Article 2(1)(d), while making it abundantly clear that legislation is always 'appropriate' to combat racial discrimination—as Banton notes, 'for an action to be discriminatory in law, there must first be a law'.[233] Analogously, Mahalic and Mahalic contend that no State is exempt from the need to legislate.[234] Banton offers an overview of the paragraph, which

> is unqualified in its requirement that a State party bring to an end racial discrimination; it is not limited to the State sector or to governmental action or to the enactment of laws, but makes the State responsible for bringing to an end racial discrimination throughout the society.[235]

Progress in adopting and implementing legislation on racial discrimination is inevitably welcomed by the Committee. Strengthening existing legislation also draws favourable comment, as does the consolidation of institutional support for the anti-discrimination standards. The Committee's clear preference is for specific legislation against racial discrimination, while it is not contrary to the Convention to supplement this with laws against defamatory statements which cover racist statements even if they do not specifically target racism.[236] In light of the absence of legislation, Committee records are replete with recommendations urging the merits of a 'comprehensive law' or 'comprehensive legislation' against racial discrimination,[237] including a 'comprehensive' or clear definition thereof.[238] Preferences for a comprehensive approach extend to legislation to implement

[229] Para. 4.6.

[230] Para. 8.

[231] In *L.R. v Slovakia*, (para. 3.2) the petitioner alleged violation of, *inter alia*, 2(1)(c), but this was not the subject of comment from the Committee, which based its finding on Articles 2(1)(a), 5, and 6.

[232] At 1017.

[233] M. Banton, *Discrimination* (Open University Press, 1994), p. 6.

[234] P. 85; see comments, supra, p. 166.

[235] M. Banton, *International Action*, p. 199.

[236] *Sadic v Denmark*, para. 6.3.

[237] Concluding observations on Japan recommended 'a specific and comprehensive law' and 'specific and comprehensive legislation' against racial discrimination: CERD/C/JPN/CO/7-9, para. 8. While the divergence in terminology may represent a distinction without a difference, the 'law' formulation suggests a civil law codification approach, whereas 'legislation' offers a more open approach that would leave the details of legal design to the State party.

[238] Concluding observations on Fiji, CERD/C/FJI/CO/18-20, para. 9; Japan, CERD/C/JPN/CO/7-9, para. 7; Russian Federation, CERD/C/RUS/CO/19, para. 7.

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particular articles of the Convention such as Article 4.[239] The shape of legislation envisaged by the Committee is set out in concluding observations:

> The Committee urges the State party to accelerate the adoption of a comprehensive anti-discrimination act to stipulate, *inter alia*, the definition of direct and indirect as well as *de facto* and *de jure* discrimination, together with structural discrimination, liability for natural and legal persons extending to both public authorities and private persons, remedies to victims of racial discrimination and the institutional mechanisms necessary to guarantee the implementation of the provisions of the Act in a holistic manner.[240]

In addition to specific forms of legislation, the Committee frequently urges the inclusion in criminal codes of racial motivation as a general aggravating factor in sentencing,[241] a stance generalized in GR 31, encouraging States parties 'to incorporate a provision in their criminal legislation to the effect that committing offences for racial reasons generally constitutes an aggravating circumstance'.[242] CERD has criticized and recommended the amendment of legislation that makes the racial motivation element subject to a proviso that it must be the only motivation behind the offence.[243]

CERD has been particularly strong on the important role played by criminal law in anti-discrimination legislation, a preference not confined to the hate speech area.[244] Legislation to prevent racial discrimination should, however, reach beyond criminal law and include civil and administrative law. On proving discrimination in civil cases, recommendations are regularly made to 'reverse',[245] 'share',[246] or 'shift'[247] the burden of proof to respondents once plaintiffs have made out a prima facie case of discrimination. The requirement is occasionally detailed[248] and coupled with an explanation of why the change on burden of proof is warranted.[249] In the case of Cyprus, the limitation to certain defined areas of the principle of 'sharing' the burden of proof in

[239] Concluding observations on Croatia, CERD/C/HRV/CO/8, para. 12; on Tajikistan, CERD/C/TJK/CO/6-8, para. 10. Para. 9 of GR 35 on combating racist hate speech refers to the need for 'comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law'.

[240] Concluding observations on Ukraine, CERD/C/UKR/19-21, para. 5.

[241] Examples include concluding observations on Mauritius, CERD/C/MUS/CO/15-19, para. 11; Venezuela, CERD/C/VEN/CO/19-21, para. 14.

[242] Para. 4(a).

[243] 'The Committee is concerned that the provision on aggravating circumstances is used when a racist motivation appears to be the only motivation but not when there are mixed motives', a concern that led to a recommendation to establish that 'an offence with racist motivation constitutes an aggravating circumstance, including in cases where there are mixed motives': concluding observations on Italy, CERD/C/ITA/CO/16-18, para. 16.

[244] See Chapter 11. Concluding observations on this point in A/68/18 (2012 and 2013) include Algeria, CERD/C/DZA/CO/15-19, para. 12; Dominican Republic, CERD/C/DOM/CO/13-14, para. 11; Korea, CERD/C/KOR/CO/15-16, para. 8; Liechtenstein, CERD/C/LIE/CO/4-6, para. 9 (mainly re Article 4); Tajikistan, CERD/C/TJK/CO/6-8, para. 10; and Thailand, CERD/C/THA/CO/1-3, para. 9.

[245] Concluding observations on Morocco, MAR/CO/17-18, para. 18.

[246] Concluding observations on Moldova, CERD/C/MDA/CO/8-9, para. 9.

[247] Concluding observations on Iceland, CERD/C/ISL/CO/19-20, para. 15.

[248] In concluding observations on Australia, the State party was invited to address the issue of burden of proof 'so that once an alleged victim has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for differential treatment': CERD/C/AUS/CO/14, para. 15.

[249] The perceived difficulty may simply be that of substantiating claims of racial discrimination: concluding observations on Armenia, CERD/C/ARM/CO/5-6, para. 9.

civil cases drew forth the recommendation that the principle be applied 'to all civil law cases of racial discrimination'.[250]

In cases of defective or incomplete legislation, States may be urged to amend relevant legal codes and establish a broader range of liability.[251] The preference, in the interests of clarification, predictability, and accessibility, for a comprehensive legal framework goes in tandem with a preference for an integrated framework rather than a scattergun approach to laws,[252] and, *a fortiori*, a preference for a straightforward incorporation of the Convention into domestic law, as noted earlier. In this respect, the remarks made to the UK and Denmark regarding the non-incorporation of ICERD will be recalled; the critical comments focus on the perceived or asserted effects flowing from lack of a 'comprehensive' approach to legislation or lack of explicit incorporation. It may be argued, however, that pressing such points towards an expression of preference for a defined legal architecture would not do justice to the variety of national legal styles, in particular to the looser structures of common law systems.

Measured against the legislative patterns recommended, deficiencies in the existing legal framework attract critical attention, especially if important areas (as perceived by the Committee) are omitted;[253] recommendations to review and amend the legislation may follow. In light of the 'bring to an end' (racial discrimination) element in Article 2(1)(d), the implementation—and disparities in implementation[254]—and not merely the design of legal regimes, is apt to generate critical comment.[255] CERD is particularly attentive to the role of the courts—the pre-eminent 'supporting institutions'—in the implementation of anti-discrimination standards. Concerns have been expressed about such matters as the independence and impartiality of judges,[256] the possibilities of invoking the Convention in domestic courts,[257] the possibilities of addressing courts in the mother tongue of minorities,[258] and the representation[259]—including support for local legislation on proportionate representation[260]—of ethnic minorities and other groups in the judiciary and police.

The obligation to address racial discrimination 'by all appropriate means' in Article 2(1)(d) suggests strategies that reach beyond specific anti-discrimination legislation and its implementation. Strategies may be recommended in broad and unspecific terms, such as national plans of action, or focused on campaigns of education and awareness-raising. In virtue of the importance of the Durban World Conference as, *inter alia*, a repository of principle and action in the discrimination field, the Committee has arrived at a (more or less) standard formula, recommending that States parties give effect to the Durban Declaration and Programme of Action of 2001, taking into account the Durban Review

[250] CERD/C/CYP/CO/17-22, para. 9.
[251] Concluding observations on Turkmenistan, CERD/C/TKM/CO/6-7, para. 23.
[252] Concluding observations on Austria, CERD/C/AUT/CO/17, para. 12.
[253] In the case of Latvia, the provisions examined by the Committee did 'not fully cover civil, political, social, cultural and other fields of public life', as required by the Convention: CERD/C/63/CO/7, para. 8.
[254] Concluding observations on Austria, CERD/C/AUT/CO/17, para. 11.
[255] Concluding observations on Greece, CERD/C/GRC/CO/16-19, para. 10.
[256] Examples include Cambodia, CERD/C/KHM/CO/8-13, para. 13; Uzbekistan, CERD/C/UZB/CO/5, para. 12.
[257] CERD/C/DNK/CO/18-19, para. 8.
[258] CERD/C/ROU/CO/16-19, para. 19.
[259] Croatia, CERD/C/HRV/CO/8, para. 16; Lithuania, CERD/C/LTU/CO/4-5, para. 14.
[260] Moldova, CERD/C/MDA/CO/8-9, para. 16.

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Conference in 2009 when implementing the Convention in their domestic legal order, and requesting information on action plans and other measures to implement their provisions. Durban-related recommendations have also less ambitiously referred to taking into account or giving effect to 'relevant parts' of the Durban instruments.[261] In response to the refusal by Israel to 'acknowledge and abide' by the Durban framework, CERD urged a re-examination of this position 'taking into consideration the evident importance of that document for a large segment of humanity';[262] the US was reminded of the importance of the Durban process 'for the achievement of the goals of the Convention'.[263] The Committee regretted the refusal of the Czech Republic to develop a national action plan against racism in line with Durban and urged the development of a plan.[264] The Holy See has expressed its strong reservations regarding recommendations to implement the Durban framework.[265]

This sub-paragraph features strongly in the communications procedure in combination with other articles. In *Habassi v Denmark* (refusal of a bank loanon account of his non-Danish nationality) the Committee found a violation of 2(1)(d) in combination with Article 6 in the absence of a proper investigation into whether racially discriminatory criteria were being applied.[266] What 2(1)(d) requires was considered by the same State party in another case where prosecution of a doorman followed the refusal of entry to a discotheque of the author who was of Iranian origin: not only 'has the State party adopted law that criminalizes acts of racial discrimination such as that of which the applicant was a victim . . . but . . . authorities have enforced these criminal provisions in a specific case'.[267]

On similar principles, a violation of 2(1)(d) in conjunction with Articles 4 and 6 was found in *Gelle v Denmark*,[268] where a politician criticized plans to consult with, *inter alios*, a Danish-Somali association prior to legislation on female genital mutilation (FGM) equating Somalis, in the words of the petitioner, with paedophiles and rapists.[269] The State party claimed, in light of 2(1)(d) and Article 6, that their evaluation of the statements 'fully satisfied the requirement that an investigation must be carried out with due diligence and expedition and must be sufficient to determine whether or not an act of racial discrimination . . . [had] . . . taken place'.[270] The Committee disagreed on the facts while maintaining the principle that it was not enough to declare acts of racial discrimination punishable on paper, they must also be effectively implemented, a principle reflected in, *inter alia*, Article 2(1)(d), which was specifically cited.[271] In *Murat Er v Denmark*, the Committee distinguished between legislation and its interpretation in the Danish courts as applied to the petitioner, which was deemed compatible with the Convention,[272] and the lack of effective investigation into an allegedly racist act, which

[261] Examples include Ethiopia, CERD/C/ETH/CO/15, para. 29; Pakistan, CERD/C/PAK/CO/20, para. 27.
[262] CERD/C/ISR/CO/14-16, para. 31.
[263] CERD/C/USA/CO/6, para. 39.
[264] CERD/C/CZE/CO/8-9, para. 23.
[265] CERD/C/VAT/16-23, para. 5, discussed in the concluding chapter of the present work.
[266] Para. 9.3. The Committee found that the author had also been denied an effective remedy. See the more detailed discussion in Chapter 7. See comment by the State party in para. 7.4.
[267] *B.J. v Denmark*, para. 4.3. No violation was found in this case.
[268] *Gelle v Denmark*, CERD/C/68/D/34/2004 (2006).
[269] *Ibid.*, para. 2.2.
[270] *Ibid.*, para. 4.4.
[271] *Gelle v Denmark*, para. 7.3. See also *Jama v Denmark*, para. 7.3, and discussion in chapter 16.
[272] *Murat Er v Denmark*, CERD/C/71/D/40/2007 (2007), para. 7.2.

violated Article 2(1)(d).[273] Contestations of alleged violations of 2(1)(d) by States parties are usually couched in terms of the facts of the situation; in other cases a substantive interpretative point is made. In *Murat Er*, the State party argued that:

> Article 2(1)(d) is a policy statement and the obligation it contains is a general principle [which] does not impose concrete obligations... and, even less, specific requirements on the wording of a possible national statute on racial discrimination. On the contrary, State parties enjoy a significant margin of appreciation in this regard.[274]

In some cases, the requirements of the sub-paragraph have been impressed upon a State party despite a claim that 'no racial discrimination' on the part of public authorities had manifested itself.[275]

## X. Persons, Group, or Organization...

The concerns of 2(1)(d) encompass non-State 'private' actors. While secondary rules of State responsibility address the actions of private persons in general terms for purposes of attribution,[276] provisions in human rights treaties and practice are more explicit. With regard to the American Convention on Human Rights, the Inter-American Court of Human Rights articulated a basic principle that illegal actions violating human rights that are not directly imputable to the State can nonetheless lead to international responsibility 'not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it'.[277] As is evident from the cases cited in the present section and Chapter 6, CERD addresses situations concerning private bodies as a matter of course, having become more explicit over time on the targets of its concern.[278]

CERD GR 19 reminds us that segregation may arise as an 'unintended by-product of the actions of private persons'[279] and, according to GR 20, to the extent that 'private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination'.[280] In similar vein, GR 25 recalls the different life experiences of women and men, 'in areas of both public and private life',[281] referring to 'abuse of women workers in the informal sector or domestic workers' and to 'discrimination

[273] *Ibid.*, para. 7.4.

[274] *Ibid.*, para. 4.6. In other circumstances, CERD has shown little appreciation for the doctrine of margin of appreciation expressed as such, the use of which by a State party 'in order to strike a balance between existing interests is limited by its obligations under the Convention': concluding observations on Australia, CERD/C/AUS/CO/14, para. 16. However, insofar as 'margin of appreciation' spills over into interpretation in context, see especially the present commentary on Article 4.

[275] Concluding observations on the Dominican Republic, CERD/C/DOM/CO/12, para. 8.

[276] In a case where private parties are acting in a governmental capacity, where they are directed or controlled by a State, or where their conduct is acknowledged or adopted by a State: *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, A/56/10 (2001), Articles 5, 8, and 11.

[277] *Velásquez-Rodríguez v Honduras*, IACtHR, Ser. C No. 4 (10988), para. 172; for a general discussion, see Shelton and Gould, 'Positive and Negative Obligations', 577–82.

[278] Diaconu notes that previous practice of CERD that used 'broad terms' such as labour market and employment, has been sharpened up to refer to companies and corporations, restaurants, clubs and agencies, etc: *Racial Discrimination*, pp. 35–6.

[279] A/50/18, Annex VII, para. 3.

[280] A/51/18, Annex VIII A, para. 5.

[281] Para. 1.

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against women in private spheres of life'.[282] Discriminatory practices 'mainly by local authorities and private owners' in relation to housing are referred to in GR 27 on Roma,[283] while in relation to descent/caste groups, GR 29 refers, *inter alia*, to special measures to promote the employment of members of affected communities 'in the public and private sectors'; 'measures against public bodies, private companies and other associations that investigate the descent background of applicants for employment'; 'discriminatory practices of local authorities or private owners' in housing, etc; 'public or private education systems'; and 'discrimination by public or private bodies and any harassment of students from descent-based communities'.[284]

In the Article 14 communications procedure, the first finding of a violation of the Convention—*Yilmaz-Dogan v The Netherlands*—addressed the legal consequences flowing from the actions of a private employer.[285] Analogous private sector cases characterize the Article 14 archive as a whole, emanating from the actions of banks,[286] loan and insurance companies,[287] prevention by private persons of individuals wishing to settle into a neighbourhood,[288] discrimination in access to restaurants, clubs, and discotheques, etc.[289] In the reporting procedure, CERD requests information on racial discrimination legislation in force for the private sector and is critical of the absence of such legislation.[290] With regard to the US reservation on regulation of private conduct, the Committee in 2001 recommended legislation applicable to 'the largest possible sphere of private conduct which is discriminatory',[291] and in similar vein in 2008 recommended the State party to 'broaden the protection afforded by the law against discriminatory acts perpetrated by private individuals, groups or organizations'.[292] CERD has been critical of exempting 'private transactions' from discrimination legislation in housing and related market areas.[293]

In addition to obligations resulting from situations of conflict and occupation of territory, CERD has explored the issue of extraterritorial activities of corporate actors domiciled within the State, an issue that generates significant international interest, and a strong but not exclusive emphasis on economic, social, and cultural rights.[294] Based in part on an analysis of the work of treaty bodies, the Special representative of the Secretary-General developed a 'Protect, Respect and Remedy' framework that focuses on State obligations to regulate corporate actors working beyond State territorial confines rather

[282] Para. 2.
[283] GR 27, para. 31.
[284] Paras jj, kk, mm, and tt. See also GR 30 on non-citizens, paras 32, 33, and 34.
[285] CERD/C/36/D/1/1984 (1988).
[286] *Habassi v Denmark*.
[287] *Sefic v Denmark*, CERD/C/66/D/32/2003 (2005).
[288] *L.K. v The Netherlands*, CERD/C/42/D/1991 (1993).
[289] *Lacko v Slovakia*, CERD/C/59/D/11/1998 (2001); *B.J. v Denmark*; *Durmic v Serbia and Montenegro*.
[290] Concluding observations on China, CERD/C/304/Add.122, para. 17; Fiji, CERD/C/FJI/CO/117, para. 15.
[291] CERD/C/304/Add.125, para. 13.
[292] CERD/C/USA/CO/6, para. 11.
[293] Concluding observations on Finland, CERD/C/FIN/CO/20-22, para. 9.
[294] CEDAW has stated that the obligation of States parties to establish legal protection of the rights of women extends to acts of national corporations operating extraterritorially: General Comment 28 on the Core Obligations of States Parties under Article 2 (2010), infra, p. 194.

than through norms directly constraining corporations.[295] The latter framework was endorsed by the Human Rights Council in 2011 as the Guiding Principles on Business and Human Rights.[296]

The commentary on Guiding Principle 2 on business and human rights observes that,[297] at present, 'States are not generally required to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so', adding that within 'these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by businesses enterprises within their jurisdiction'.[298] These observations do not draw hard legal conclusions with regard to treaty body practice, in particular whether the international law position they distil is one of permissions as opposed to obligations. States may be 'permitted' to establish extraterritorial jurisdiction under a number of grounds as a function of sovereignty, while extraterritorial obligations under human rights treaties generally stem from situations of *de facto* control.[299] Augenstein and Kinley carry through the 'control' relationship expressed in cases of territorial occupation to the regulation of corporate activities abroad, contending that

> the (non) regulation or control of corporate actors by the State establishes a relationship of *de facto* power between the State and the individual constitutive of extra-territorial human rights obligations. A State's *de jure* authority to exercise extra-territorial jurisdiction under public international law not only delimits the State's lawful competence to regulate and control business entities as perpetrators of extra-territorial human rights violations, but also constitutes a *de facto* relationship of power of the State over the individual that brings the individual under the State's human rights jurisdiction and triggers corresponding extra-territorial obligations.[300]

Of the UN treaty bodies, GR 28 of CEDAW states that the obligation of States parties to establish legal protection of the rights of women on an equal basis with men, 'and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, also extend to acts of national corporations operating extra-territorially'.[301] General comments of the CESCR articulate extraterritoriality principles with some consistency with regard to the activities 'abroad' of private actors including corporations that affect rights to health, water, and social security.[302] According to De

[295] *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, E/CN.4/Sub2/2003/12, 26 August 2003.

[296] A/HRC/17/31, 21 March 2011. There is a helpful summary and comment in *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (United Nations, 2014).

[297] *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (United Nations, 2011): 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'

[298] *Ibid.*, pp. 3–4.

[299] See references, *supra*, in the present chapter.

[300] D. Augenstein and D. Kinley, 'When Human Rights "Responsibilities" become "Duties": the Extra-Territorial Obligations of States that Bind Corporations', *University of Sydney Law School, Legal Studies Research Paper* (September 2012), available at: <http://ssrn.com/abstract=21499211>; further references to this field, are detailed especially in footnote 4. See also R. McCorquodale and P. Simons, 'Responsibility beyond Borders: State responsibility for Extraterritorial violations by Corporations of International Human Rights Law', *Modern Law Review* 70(4) (2007, 598–625.

[301] CEDAW/C/2010/47/GC.2 (2010), para. 36.

[302] General Comment No. 14, The Right to the Highest Attainable Standard of Health (2000), paras 39; General Comment No. 15, The Right to Water (2003), para. 31; General Comment 19, The Right to Social Security (2008), para. 54.

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Schutter, the position of the CESCR 'is supported by an emerging scholarship that the extra-territorial obligations under the ICESCR entail, at a minimum, that States parties should refrain from the adoption of measures that could negatively affect the enjoyment of such rights abroad, and that they should control the activities of private actors, particularly transnational corporations which they recognize as having their "nationality", in order to ensure that such corporations do not violate these rights, directly or indirectly, in foreign jurisdictions'.[303] On the other hand, the author cautions that, in the current state of international law a clear obligation on States to control private actors operating outside their national territory has not yet crystallized, and that 'this is the case even as regards those private actors having the nationality of the State concerned, and whose behaviour therefore a State may decisively influence and on whom it may impose certain obligations in conformity with international law'.[304]

As noted, the Committee's approach to extraterritorial obligations has emerged through a pattern of recommendations where the predominant focus has been the rights of indigenous peoples. CERD set the ball rolling in 2007 in concluding observations on Canada, expressing concern regarding reports 'of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples', and recommending 'appropriate legislative or administrative measures' to prevent such activities, and in particular to 'explore ways to hold transnational organizations registered in Canada accountable'.[305] Similar recommendations referring to corporations 'registered' in a State party have been made in connection with the reports of the USA[306] and the UK.[307] In the case of Australia the issue of a national legal framework was raised.[308] In the case of Norway, concern was expressed about 'the effects on indigenous peoples and other ethnic groups in territories outside Norway, including impact on their way of life and on the environment, of the activities by transnational corporations domiciled in the territory and/or under the jurisdiction of Norway'. The attendant recommendation was more elaborate than for Canada: Norway was invited 'to explore ways to hold transnational corporations domiciled in the territory and/or under the jurisdiction of Norway accountable for any adverse impacts on the rights of indigenous peoples and other ethnic groups, in conformity with the principles of social responsibility and the ethics code of corporations'.[309]

[303] De Schutter, *International Human Rights Law*, p. 163, and citations therein.

[304] *Ibid.*, pp. 162–3.

[305] CERD/C/CAN/CO/18, para. 17. CERD returned to the issue in 2012, reiterating its concerns and recommendations, despite Canada's invocation of the merits of its Corporate Responsibility Strategy, CERD/C/CAN/CO/19-20, para. 14.

[306] CERD/C/USA/CO/6, para. 30, responded to in CERD/C/USA/7-9, para. 177; also CERD/C/USA/CO/7-9, para. 10.

[307] CERD/C/GBR/CO/18-20, para. 29.

[308] The Committee regretted the absence of a legal framework regulating the obligations of 'Australian corporations' at home and overseas, and in addition to recommending appropriate legislative or administrative measures as per Canada, encouraged Australia to fulfil its commitments under the different international initiatives it supports to advance 'responsible corporate citizenship', CERD/C/AUS/CO/15-17, para. 13.

[309] CERD/C/NOR/CO/19-20, para. 17; CERD/C/NOR/CO/21-22, paras 23 and 24.

## XI. Article (1)(e) Encouragement of Integrationist Multiracial Organizations and Movements and other Means of Eliminating Barriers Between Races—Discouraging Anything that Leads to Racial Division

The sub-paragraph, was introduced by sponsors in the Third Committee of the GA as a 'positive' statement, while its 'racial barriers' aspect links with the condemnation of such in the preamble and the anti-segregation focus of Article 3. Reporting guidelines interpret 'integrationist multiracial organizations' as 'non-governmental organizations and institutions that combat racial discrimination and foster mutual understanding',[310] phrases linked to the anti-discrimination infrastructure required to fulfil obligations under Article 2 generally, as well as the hortatory language of Article 7 and the preamble. The issue makes a rare appearance in the procedure under Article 14 in *Hagan v Australia*,[311] where the State party referred to academic commentary to the effect that 1(e) was broadly and vaguely worded, leaving undefined what 'integrationist' movements are and what 'strengthens' racial division.[312]

Practice does not greatly illuminate the State party's implicit question. In the face of concerns over 'the lack of social movements that promote integrationist multiracial values', Barbados was requested to 'create an enabling environment' for such organizations',[313] while Iceland was recommended to ensure adequate finding and independence for non-governmental organizations (NGOs) combating racial discrimination.[314] It would seem that organizations combating racial discrimination are ipso facto regarded as examples of 2(1)(e) organizations, an understanding that reaches out to human rights NGOs and NHRIs, especially those that attempt to translate ICERD principles into action and disseminate them to a wider public. The banning of human rights centres is thus liable to generate critical remarks,[315] as is making registration of NGOs unduly burdensome, blunting their critical capacity and shrinking the space for civil society, a critique that reaches out to attacks on human right defenders; pro-tolerance NGOs—and other organizations under the rubric of Article 7—are clearly regarded as worthy of support.[316] The sub-paragraph has also been used to criticize the prevalence of political parties structured on ethnic lines, based on the premise that this had the potential to increase ethnic tension;[317] while the observations made were contextual, such parties were clearly not the 'integrationist multiracial organizations' envisaged in the sub-paragraph. The opposite end of the integrationist spectrum is represented by the racist organizations envisaged in Article 4(b). If 'integrationist' is given a narrow meaning, the range of organizations to be

[310] CERD/C/2007/1, p. 5.
[311] CERD/C/62/D/26/2002 (2003), para. 4.6.
[312] The sole citation is to Lerner, *The UN Convention*, p. 38.
[313] CERD/C/BRB/CO/16, para. 12.
[314] CERD/C/ISL/CO/18, para. 10.
[315] Concluding observations on Bahrain, CERD/C/BHR/CO/7, para. 13.
[316] Concluding observations on the Russian Federation recommend that legislation be reviewed 'to ensure that non-governmental organizations working with ethnic minorities, indigenous peoples, non-citizens and other vulnerable groups who are subjected to discrimination are able to carry out their work effectively to promote and protect the rights . . . in the Convention without any undue interference or onerous obligations': CERD/C/RUS/20-22, para. 13. In general, see the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally recognized Human Rights and Fundamental Freedoms*, adopted by the General Assembly in Resolution 53/144, 9 December 1998.
[317] Concluding observations on Ethiopia, CERD/C/ETH/CO/7-16, para. 13.

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encouraged will be correspondingly narrow; if however, the term is understood as 'in support of the principles of the Convention' the field is wider. NGOs and community organizations that 'promote a culture of tolerance and ethnic diversity'[318] are clearly within the remit of the clause and are to be encouraged. Public bodies are included in the 2(1)(e) remit.[319] Organizations that advocate respect for caste, immigrant, indigenous, and minority rights within the purview of the Convention are equally entitled to be regarded as 'integrationist'.

## D. Comment

Article 2 is the engine of the Convention, using language of a 'vigorous nature' to convert rights into a platform for practical action.[320] While the article is logically organized in progressing from obligations directed at the State and its bodies—public authorities and public institutions, legislation, and policy—towards regulating the actions of persons and groups, it is not a masterpiece of drafting; the *travaux* reveal degrees of confusion regarding the proliferation of terms and the overlapping of sub-paragraphs. The drafting was strongly influenced by the metaphors of immediate action and speed of response, illustrating the then dominant view that the swift elimination of racial discrimination was achievable if only the colonial systems could be swiftly demolished and apartheid consigned to history. The assertions of 'no discrimination here', allied with those on the 'unthinkable' notion of State-sponsored discrimination outside the customary circles of infamy, cemented the overall approach.

The *travaux*, as elsewhere, also reveal the minor key competing views that laws and prohibitions would not succeed without the assistance of education in combating racial discrimination, and that uniformity of approach and strict, unbending regulation were not appropriate to the Convention in light of the plurality of legal, political, and social arrangements in States, correlated with the complexities of their cultures, histories, and demographics. The overall approach in the Convention, however, is to combine legalistic with educational elements: both are indispensable to achieving the aims of the Convention, and both are integral to the Article 2(1)(d) requirement to prohibit and bring racial discrimination to an end 'by all appropriate means'. The specifics of legislation, including criminal law, are further refined in Article 4; education as a right is protected, and education in human rights including the principles of the Convention is mandated, by Articles 5 and 7 respectively, while GR 35 on combating racist hate speech recalls that legislation and education are complementary and that legal prohibitions of discrimination have educational functions.

The paragraphs of Article 2 add up to a demanding prospectus for States parties, culminating in the sweeping provisions of 2(1)(d). The expansion of the concept of racial discrimination through the adoption of concepts such as indirect, and even structural discrimination, widens the obligations prospectus further, as does the extended notion of a discriminatory 'act'.[321] A paper prepared by CERD for the Intergovernmental Working Group on the Durban Declaration and Programme of Action summarized the import of the article:

[318] Concluding observations on Serbia, CERD/C/SRB/CO/1, para. 13.
[319] Concluding observations on Moldova, CERD/C/MDA/CO/15, para. 11.
[320] Remarks of the delegate of the UK in the Third Committee.
[321] *L.R. v Slovakia*, paras 10.2, 10.6, 10.7.

Article 2 is a comprehensive provision addressing all aspects of States parties' obligation to pursue a policy of eliminating discrimination. Inter alia, it embraces the obligation to ensure that public authorities and institutions refrain from engaging in racial discrimination, to prohibit racial discrimination by any persons, group or organization and to take positive measures where necessary to guarantee to all racial groups the full and equal enjoyment of human rights and fundamental freedoms.[322]

The paper goes on to recall the importance of NHRIs for Article 2,[323] an example of the accretion in Committee practice of 'standard' recommended cases for the achievement of optimum effects in the implementation of the undertakings—an institutional superstructure largely replicated in recommendations regarding Article 6. The architecture of human rights institutions is ultimately a matter for the State. CERD has, however, developed positions on appropriate institutions to support the implementation of law and policy such as, in addition to the indispensable role of the courts, anti-racism bodies, ombudsmen, equality bodies, 'defenders of rights', specific protection bodies for indigenous peoples, etc. Aspects of the functioning of such bodies are of regular concern to the Committee in terms of their visibility, their range of functions, their objectivity and independence from political interference, the scope of their mandates, and the availability of resources for their effective functioning, Many of the concerns regarding the architecture of national human rights bodies are subsumed in references to the 'Paris Principles' relating to the status of national institutions for the promotion and protection of human rights.[324] Recommendations to establish an NHRI,[325] or expand existing institutional mandates to comply with the Paris Principles are standard, and include recommendations on independence and autonomy,[326] financing and staffing,[327] on the involvement of civil society in the process of establishment,[328] and on taking steps toward accreditation by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights;[329] responses by States parties to the downgrading of an NHRI by the International Coordinating Committee have also been sought.[330]

It is clear from the last-cited CERD summary that Article 2 reflects an integrated approach to the elimination of racial discrimination that incorporates negative and

[322] *Views of the Committee on the Elimination of Racial Discrimination on the Implementation of the Convention on the Elimination of All Forms of Racial Discrimination and its Effectiveness*, submitted under the rubric of 'complementary standards', E/CN.4/2004/WG.21/10/Add.1, 17 September 2004, p. 13.

[323] *Ibid.*, p. 14.

[324] *Principles Relating to the Status of National Institutions*, annexed to General Assembly resolution 48/134 of 20 December 1993. National human rights institutions (NHRIs) are 'State bodies with a constitutional and / or legal mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State... They are at arm's length from the government': *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (United Nations, 2010), p. 13. The OHCHR web page includes updated information and documentation the place of national human rights institutions in the United Nations system: <http://www.ohchr.org/en/countries/nhrimain.aspx>.

[325] Recent examples include Estonia, CERD/C/EST/CO/8-9 (2010); CERD/C/ITA/CO/16-18 (2012); Malta, CERD/C/MLT/CO/15-20 (2011).

[326] CERD/C/BIH/CO/7-8 (2010).

[327] Vietnam, CERD/C/VNM/CO/10-14 (2012).

[328] Concluding observations on Italy, CERD/C/ITA/CO/16-18, para. 13.

[329] Concluding observations on Estonia, CERD/C/EST/CO/8-9, para. 10.

[330] Concluding observations on Cameroon, CERD/C/CMR/15-18, para. 13.

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positive elements. While practice may approximate to the tripartite typology of obligations—respect, protect, fulfil—CERD has not systematically structured this usage in the manner of the CESCR and other bodies,[331] preferring to work though the implications of Article 2 by tracking the detailed demands made upon States parties by the Convention. Whether Committee work would gain in precision by the adoption of a typology of obligations is an open question, bearing in mind the already significant elaboration of detail in Article 2; similarly, the '4A' elaboration for the enjoyment of rights adopted by the CESCR (availability, accessibility, acceptability, and adaptability)[332] has not been adopted by CERD. A working 'typology' adopted by the Committee, referring to the 'substantive obligations in the Convention to prevent, protect against and remedy discriminatory acts', has been put forward in opinions under Article 14.[333]

With regard to the incorporation of the Convention into domestic legal systems, the practice has not been overly concerned with the nuances of theory.[334] Rather, it has sought to ensure that the provisions of the Convention are reflected as fully as possible in domestic law and practice, whatever patterns or techniques of incorporation are adopted. The Committee questions States on the reach of the Convention into court practice—whether it can be invoked in judicial or analogous proceedings, and to what effect. Absence of or limited invocation of the Convention before domestic courts is treated as a matter of concern,[335] not assuaged by claims that racial discrimination is not a significant issue in the State party concerned. The information from States asserting the direct applicability of the Convention in domestic law may sit uneasily with an absence of relevant cases where it is invoked: *inter alia*, training of judges and law officers in the principles of the Convention and its direct applicability may be recommended to remedy the situation.[336] The Committee has sought clarification of information that the application of the Convention is judged on a case by case basis, 'taking into consideration the purpose, meaning and wording of the provisions concerned',[337] although an examination of whether particular provisions are or are not self-executing would seem in itself to be unremarkable and undeserving of criticism.[338] Regarding the level of incorporation, expressed concerns for the status of the Convention in domestic law when compared with that of other human rights instruments are noted above, concerns that appear amply

[331] Even the lengthy section XI on economic, social, and cultural rights in CERD's GR 34 on persons of African descent does not reproduce the threefold typology.

[332] See, *inter alia*, CESCR General Comment No. 13 on *The Right to Education (Article 13)*: HRI/GEN/1/Rev.9 (Vol. I), pp. 63–77. The 4A scheme is discussed further in Chapter 15 of the present work.

[333] *A.M.M v Switzerland*, CERD/C/84/D/50/2012 (2014), para. 8.2; also *L. R v Slovakia*, para. 10.2.

[334] Concluding observations on Tanzania refer to its 'dualist' legal system: CERD/C/TZA/CO/16, para. 11. 'Monist' is used in the 2012 concluding observations on Jordan: CERD/C/JOR/CO/13-17, para. 8.

[335] Concluding observations on Vietnam, CERD/C/VNM/CO/10-14, para. 8.

[336] Concluding observations on Lithuania, CERD/C/LTU/CO/3, para. 10, and Namibia. CERD/C/NAM/CO/12, para. 10.

[337] Concluding observations on Japan, CERD/C/304/Add.114, para. 9. The delegation of Japan explained the position in CERD/C/SR.1144, para. 5. For a general treatment of the issue, see Y. Iwasawa, *International Law, Human Rights, and Japanese Law* (Clarendon Press, 1998).

[338] See the helpful summary of principles by A. Byrnes and C. Renshaw in Moeckli *et al.*, *International Human Rights Law*, pp. 460–5, who point out, p. 462, that the intention of the drafters of the treaty and the nature of the treaty provision may be factors in deciding whether the treaty or a provision thereof is directly applicable.

justified in light of the links between the Convention and the Charter of the United Nations,[339] customary international law, and even peremptory norms.[340]

In whatever form it takes, whether through civil law codes or the more diffuse methods employed by the common law, incorporation is, in the view of the Committee, not simply a matter of words on paper but is to be confirmed by programmes of practical action—legislative aesthetics are not an adequate response to the demands of the Convention.[341] The canons of practicality and effectiveness are further satisfied through awareness-raising and training in the principles of the Convention, notably for legal professionals and public service personnel, the promotion of institutional dialogue on the rights and obligations therein, and the transmission of the conclusions of the Committee to civil society. In the last respect, CERD has adopted its own version of the 'vernacularization' of its guidance functions,[342] exhorting States to disseminate their reports and the concluding observations thereon not only in official or national languages but also in 'other commonly used languages'.[343] This is an important reference principle for a Convention that centres on collective as well as individual rights, which, *inter alia*, serves to facilitate the realization of the right of minorities and comparable groups to participate in decisions affecting them.

With regard to the vertical and horizontal reach of the Convention, CERD has been robust on the requirement to implement the Convention through layers of governance, an obligation which has also been applied to religious and customary courts. Ethiopia was requested by the Committee to 'ensure that public authorities and officials, including those at the level of religious and customary courts, act in conformity with Article 2(1)';[344] in the case of Mozambique, information was requested on measures adopted 'to ensure that the actions of traditional authorities, and customary laws, are in conformity with . . . the Convention'.[345] The reaching down to customary and other institutions will be affected by the interpretation of 'private life' and freedom of association in the Convention and how these concepts should be applied to voluntary associations and ethnicities. The question of the Convention's 'reach'—and the Committee's approach to

[339] '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', *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Advisory Opinion of 21 June, para. 131.

[340] The Committee's own estimate of this link is included in a statement of 2002 on racial discrimination an measures to combat terrorism, where it was recalled simply that 'the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted': A/57/18, ch. XI C, para. 4. For a critical view, see P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), pp. 326–8.

[341] While reflecting on different methodologies of importing international standards into domestic law, CEDAW takes the view that the Convention on Discrimination against Women 'may receive enhanced protection in those States where the Convention is automatically or through specific incorporation part of the domestic legal order': CEDAW GR 28, para. 31.

[342] S.E. Merry 'Transnational Human Rights and Local Activism: Mapping the Middle', *American Anthropologist* 108 (2006), 38–51; P. Levitt and S.E. Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States', *Global Networks* 9 (2009), 441–61: <http://www.peggylevitt.org/assets/venacularization.pdf>.

[343] Dissemination and related issues are further discussed in the present work in the commentary on Article 7.

[344] CERD/C/ETH/CO/15, para. 14.

[345] CERD/C/MOZ/CO/12, para. 13.

interventions—intersects with questions on the content and role of religious and customary laws, though the two issues are not completely congruent.[346]

As to the lateral application of the Convention, the 'control' or 'effective control' principle characterizing situations of dependency or occupation has referred principally to control over a territory rather than extraterritorial application through control of persons by agents of a State. Both aspects of control potentially fit within the ICERD frame: the above-cited reference in *Georgia v Russian Federation* refers simply and openly to 'actions' of a State party. Practice has not consolidated itself in the form of a dedicated general recommendation, nor has extraterritoriality been engaged in the communications procedure under Article 14. International practice does not furnish ready answers to the further question of the comprehensiveness of State obligations when extraterritorial jurisdiction is established in terms of the triumvirate to 'respect, protect and fulfil' human rights.[347] In the case of the 'personal' mode of jurisdiction—where individuals are under the control of agents of the State—there is authority for the view that obligations can be 'divided and tailored', a limitation that would not apply to cases of territorial control through a subordinate local administration or armed forces, where the full range of human rights is applicable under the Convention in question.[348] In any case, 'dividing and tailoring' with regard to applying a determinate, context-specific range of human rights, would remain subject to ICERD standards prohibiting racial discrimination. It may be noted that Articles 3 and 6 of the Convention, which include reference to territory and to jurisdiction, appear not to have been treated in any different manner from Article 2 and the Convention generally when it comes to extraterritorial application.

The control principle is also deemed to apply to colonial territories, and the Committee is eminently capable of opposing its own view on the applicability of the Convention to that of the State party. In regretting the stance of the UK that the Convention does not apply to the British Indian Ocean Territory (BIOT),[349] the State party was reminded that

[346] For a brief discussion, see P. Thornberry, 'The Committee on the Elimination of Racial Discrimination—Questions of Concept and Practice', in R.F. Jørgensen and K. Slavensky (eds), *Implementing Human Rights—Essays in Honour of Morten Kjaerum* (Danish Institute for Human Rights, 2007), 318–36. For a general treatment of customary law, see B. Tobin: *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge, 2014). A (partly) critical view of the work of the Committee—and the views of the present author—is offered in M.K. Addo, 'Practice of United Nations Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights', *HRQ* 32 (2010), 601–64.

[347] The non-binding *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, cited by Joseph and Fletcher in Moeckli *et al.*, *International Human Rights Law*, p. 136, appear to take a maximalist position, with Principle 3 asserting that all States 'have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially'.

[348] European Court of Human Rights, *Al-Skeini and Others v the UK*, App. No. 55721/07 (2011), para. 137 on 'tailoring'; however, in the case of lawful or unlawful military action, when a State 'exercises control of an area outside... national territory', the controlling State 'has the responsibility... to secure, within the area under its control, the entire range of substantive rights' set out (in the ECHR), and will be liable for any violations: *ibid.*, para. 138. See discussion in S. Allen, *The Chagos Islanders and International Law* (Hart Publishing, 2014), pp. 56–8.

[349] The UK expressed its views to the Committee in Annex XI of its report examined by the Committee in 2011—CERD/C/GBR/18-20—arguing that ICERD did not apply because, *inter alia*, the territory had no permanent inhabitants and that members of the armed forces, officials and contractors spent only brief periods there. The Committee took the view that the Chagossians had a right to return to the Territory and regarded restrictions on the right to return as racially discriminatory. For detailed and helpful commentary on the overall dispute, see S. Allen, 'International Law and the Resettlement of the (Outer) Chagos Islands', *HRLR* 8(4) (2008), 683–702; and *The Chagos Islanders and International Law.*

it had 'an obligation to ensure that the Convention is applicable in all territories under its control', to which was added the recommendation that 'all discriminatory restrictions on Chagossians (Ilois) from entering Diego Garcia or other islands on the BIOT be withdrawn'.[350]

With regard to the Committee's stance on the extraterritorial activities of corporations, States have contested the Committee' hortatory recommendations. Canada expressed the view that 'obligations under the Convention did not extend beyond [Canada's] borders' and that 'primary responsibility for social and environmental issues rested with the foreign State in which Canadian multinationals operated'.[351] Norway stated simply that issues regarding the activities of Norwegian firms abroad 'were outside the Committee's purview'.[352] The UK explained that UK anti-discrimination legislation 'was not extended to British companies operating overseas. They [the companies] bore primary responsibility for their actions, and legal responsibility for any human rights abuses rested with the authorities in the States concerned'.[353]

It remains to be seen whether the exploration of extraterritorial regulation will in due course meet with more positive responses.[354] The Committee's stance derives from the assumption that States parties can and should exercise control over the actions of corporations registered in the State. Practice has not adequately clarified the conditions for the exercise of control, what forms of control are in question, and what are the triggering conditions for the principle to operate. Thus far, the focus has been on recommendations for the protection of indigenous peoples from grave damage to lives, territories, and resources where their local State appears unable or unwilling to offer an equivalent response. The Committee's *in statu nascendi* approach includes elements that await further determination and would benefit from a general recommendation or statement, perhaps in conjunction with a body such as the CESCR, to implement the position as treaty interpretation and contribute to the development of international customary law.

The fulfilment of the demands of Article 2 is necessarily differentiated in light of the rights and different circumstances of groups and individuals; the development of policy is subject to the general Convention principle that uniformity of response to different circumstances can be discriminatory in itself.[355] The necessity to work on the basis of accurate, disaggregated data, applies to the discharge of obligations as elsewhere in the application of the Convention. Article 2 focuses on the elaboration and structuring of State efforts to combat discrimination through the prism of obligations, and is a vehicle for assessing the adequacy of measures taken towards the objectives of the Convention. The article is noteworthy in the breadth of its ambition to bring racial discrimination to an end—2(1)(d)—throughout society. Makkonen asserts that the combination of

[350] CERD/C/GBR/CO/18-20, para. 12.

[351] CERD/SR.2142, para. 73.

[352] CERD/C/SR.2062, para. 23.

[353] CERD/C/SR.2113, para. 67.

[354] 'There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation': *Guiding Principles on Business and Human Rights*, commentary on Principle 2:'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'

[355] See commentary in the present work on Article 1.

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conventions and declarations to be implemented by States and intergovernmental organizations

> creates a statist culture which emphasises the role of legislation, policy programmes and other centrally coordinated action, and sustains the utopia that governments can effectively prevent people from engaging in discrimination and thereby eliminate all forms of discrimination. Such statism may inadvertently or even openly discourage non-State action[356]

Whatever the intellectual coherence and practicality of the Convention's ultimate ambition to eliminate racial discrimination, its 'statism' is increasingly mitigated by the growing impact of a range of actors beyond the State, working to make a reality of international professions of human rights standards. The spectrum of obligations in Article 2 integrates with the whole Convention, the implementation of which is markedly less 'statist' than in the early years following its adoption. Civil society has made tremendous strides in working with the Convention in a wide range of countries, while articulations of group rights press upon the interpretation of the text. Article 2, and the Convention as a whole, should be interpreted as not discouraging civil society but as soliciting its collaboration. GR 32 on special measures recalls the desideratum of consultation with affected communities and their active participation in the design and implementation of 'measures'[357]—plans, policies, and programmes—a stipulation that is applicable, *mutatis mutandis*, across the spectrum of activity engaged by Article 2.

[356] T. Makkonen, *Equal in Law, Unequal in Fact* (Martinus Nijhoff, 2012), p. 272.
[357] Para. 18.

# 11. Article 4

## *Racist Hate Speech*

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.

## A. Introduction

Article 4 is the principal focus in the Convention for addressing 'racist hate speech', through the use of penal provisions. The term 'hate speech' is not used in Article 4 or other articles of the Convention, though its use by the Committee has steadily advanced: building upon earlier usage, a thematic discussion on 'racist hate speech' was held in 2012, followed in 2013 by General Recommendation 35 (GR 35) on 'combating racist hate speech'.[1] The Committee on the Elimination of Racial Discrimination (CERD) understands racist hate

[1] 'Hate speech' is identified by the Committee of Ministers of the Council of Europe as a term 'covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin': Appendix to Council of Europe Committee of Ministers Recommendation No. R (97) 20; the definition was referred to by the ECtHR in *Gündüz v Turkey*, App. No. 35071/97; ECHR 2003-XI [2003], paras 22 and 43. In a significant body of literature, the essays in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) offer a range of critical commentary [henceforth *Extreme Speech*]; see also J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) [henceforth *The Harm in Hate Speech*]. According to Post, to prohibit hate speech is 'to forbid expression of "extreme" intolerance or "extreme" dislike', the qualification 'extreme' is prerequisite 'because intolerance and dislike are necessary human emotions which no legal order could pretend to abolish': R. Post, 'Hate Speech' in Hare and Weinstein, *Extreme Speech*, pp. 123–38, p. 123. For many offences, on the other hand, the speech provocation may be expressed in mild language but intended to provoke 'extreme' hatred with its attendant consequences.

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speech, as distinct from racially motivated 'hate crimes', as 'a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society'.[2] Beyond this generic statement, the approach of the Committee is to find the meaning of racist hate speech in the Convention itself, the provisions of which 'cumulatively enable the identification of expression that constitutes hate speech'.[3] GR 35 also makes it clear that the burden of combating racist hate speech does not fall on Article 4 alone, bearing in mind that 'effectively combating racist hate speech involves the mobilization of the full normative and procedural resources of the Convention'[4] that may be invoked by States in the pursuance of anti-hate speech policies. The recommendation gives pride of place among such 'resources' to Article 5 with particular reference to freedom of opinion and expression—5(d)(viii)—and to Article 7, whilst reiterating that Article 4 remains central to the struggle against racial discrimination.[5]

The track record of the Committee evidences significant continuity through volatile operating contexts in its approach to Article 4, though GR 35 strikes fresh notes in refining, revisiting, and elaborating CERD practice. While the proscription of 'racist' hate speech is supported in broad terms by all States, the 'overlapping consensus'[6] on the relationship between hate speech and basic freedoms, notably the freedoms of expression and assembly, is narrower. States and sundry non-governmental actors take divergent views on hate speech, self-presenting as occasion demands as warriors for freedom or zealots for proscription; the issue is rarely conducive to a benign neutrality. Philosophical, political, and cultural factors influence positioning on the freedom-proscription axis. In drafting the Convention, Western States struck agonistic poses in defence of freedom of expression, while others, notably the Communist States and the newly independent States, took a tougher stance on suppressing racist speech. All the 'freedom-protecting' reservations are from Western or Western-aligned States or States with an inheritance of colonial legislation, and Western States are still the most reluctant to assimilate the Committee's prescriptions in this area; it remains to be seen whether the emergence of GR 35 will encourage revaluations of the hitherto obdurate retention of reservations.

Issues related to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) have produced a raft of international human rights provisions. Bearing in mind that the chapeau of Article 4 of ICERD makes specific reference to 'the principles embodied' in the Universal Declaration of Human Rights (UDHR), elements of particular relevance in the UDHR include Articles 19 and 20 on freedom of opinion and expression, and freedom of assembly, respectively, as well as Article 7, particularly its second sentence on equal protection against discrimination and against any incitement to such discrimination, and Article 12, referring *inter alia*, to 'attacks

[2] GR 35 (2013), para. 10. Waldron, *The Harm in Hate Speech*, argues that dignity 'is precisely what hate speech laws are designed to protect . . . dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify . . . from ordinary social intercourse': p. 104.

[3] GR 35, para. 5.

[4] Para. 3.

[5] GR 35, para. 10, citing para. 1 of GR 15.

[6] J. Rawls, *Political Liberalism* (Columbia University Press, 1993 and 1996), Lecture IV.

upon . . . honour and reputation'; the general limitations on human rights provisions set out in Articles 29 and 30 are also prominent in the network of principles. Relevant statements in 'core' treaties emanating from the UDHR include Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which incorporates a general statement according to which the exercise of the right to freedom of expression 'carries with it special duties and responsibilities' and may be subject to restrictions but only such 'as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals'.[7] This 'freedom provision' in the ICCPR is directly followed by Article 20, which makes mandatory the prohibition by law of 'any propaganda for war',[8] and any advocacy 'of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[9]

Besides the above, Article 13 of the International Convention on the Protection of the Rights of All Migrant Workers and members of their Families (CMW), Article 9.2 of the African Charter on Human and Peoples' Rights (ACHPR), Article IV of the American Declaration of the Rights and Duties of Man, Article 13 of the American Convention on Human Rights (ACHR), and Article 10 of the European Convention on Human Rights (ECHR) incorporate principles on freedom of expression. These expressions of principle usually incorporate limitations which are either specific to the right in question or are of a general kind applicable to all the rights in the instrument in question and/or interface with provisions on hate speech. Article 13 of the CMW is one example of a 'compound Article' that combines freedom of expression with a provision on hate speech.[10]

Article 4 of the Inter-American Convention against Racism, Racial Discrimination and Related Intolerance, under the rubric of duties of the State, refers to undertakings to 'prevent, eliminate, prohibit and punish' manifestations of racism, etc that include

> [p]ublication, circulation or dissemination, by any form and/or means of communication, including the internet, of any racist or racially discriminatory materials that: a. Advocate, promote, or incite hatred, discrimination, and intolerance. b. Condone, justify, or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commitment of such acts.

[7] The right to freedom of opinion, on the other hand, is not expressed as subject to restrictions. Building on earlier GCs and a wealth of cases under the First Optional Protocol to the ICCR, the Human Rights Committee issued GC 34 on freedoms of opinion and expression on 2011. The specific reference to and citations of GC 34 by CERD GR 35 indicates that the approach taken by the Human Rights Committee has been influential on the formation of CERD opinion.

[8] GC 11 of the Human Rights Committee states, para. 2, that 'propaganda for war' does not prohibit advocacy for self-defence or the right of peoples to self-determination and independence in accordance with the UN Charter, nor, presumably, wars sanctioned by the UN Security Council under the terms of the UN Charter: HRI/GEN/1/Rev.9 (Vol. I), p. 182.

[9] Some fourteen States parties maintain reservations, declarations, etc, in relation to Article 20: <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en>.

[10] Note also para. 5 of Article 13 of the American Convention on Human Rights, which, following a lengthy account of freedom of expression, includes a paragraph 5 in the following terms: 'Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.'

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Additional accounts of freedom of expression and hate speech are included in a range of texts in the narrower context of instruments on minority rights.[11] Among the texts on indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) notably combines freedom of expression with hate speech-related protections.[12] Strong hate speech provisions are also found in the field of international criminal law, including the Genocide Convention which lists 'direct and public incitement to commit genocide' among the prohibited acts.[13] Numerous exercises in domestic law proscribe denials of genocide and crimes against humanity,[14] as does Article 6 of the Additional Protocol to the Council of Europe's Convention on Cybercrime.[15]

As regards freedom of assembly and association, implicated in the prohibitions in Article 4(b), general standards are set out in a spectrum of instruments. As in Article 5 of ICERD, both freedoms appear in Article 20 of the UDHR, while they are split in the ICCPR into the rights of peaceful assembly (Article 21) and freedom of association, including trade union rights (Article 22).[16] Regional instruments also include the rights;[17] freedom of association is also implicated in the Declaration on Human Rights

[11] *National Minority Standards: A Compilation of OSCE and Council of Europe Texts* (Council of Europe Publishing, 2007), *passim*; see in particular Article 9 of the Council of Europe Framework Convention for the Protection of National Minorities.

[12] Preamble, para. 4, and Articles 8(e), 15.2 and 16.2.

[13] Article 3. The prohibition is elaborated in *Prosecutor v Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (ICTR Trial Chamber, 2003), the 'Media Case'; the case was followed by a judgment of the Appeals Chamber of the same tribunal in 2007, *Nahimana et al. v The Prosecutor*, Case No. ICTR-99-52-A. The Appeals Chamber, with reference to the ICCPR and ICERD, elaborated, *ibid.*, para. 692, on the distinction between hate speech in general (or inciting discrimination and violence) and direct and public incitement to commit genocide... 'in most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under... the Statute [of the Tribunal]'.

[14] R.A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave Macmillan, 2004); M. Whine, 'Expanding Holocaust Denial and Legislation Against It', in Hare and Weinstein, *Extreme Speech*, pp. 538–56, who observes that fourteen separate European States have criminalized Holocaust Denial; with regard to the support given by the European Commission and Court of Human Rights to proscriptions of Holocaust denial, see, *inter alia*, the Commission decisions in *X. v F.R.G.*, App. No. 9235/81 (1982); *Honsik v Austria*, App. No. 25062/94 (1995); *Marais v France*, App. No. 31159/96 (1996); *Garaudy v France*, App. No. 65831/01 ECtHR 2003, where the Court said that because the Holocaust was 'clearly established historical fact', it was removed from the protection of Article 10 on freedom of expression: compare the Statement in the Canadian case of *R. v Zundel* [1992] 2 SCR 731 where it was argued that falsehoods may still have a value as a form of expression. For a general review of the treatment of 'deniers' under the European Convention on Human Rights, see P. Lobba, 'Holocaust Denial before the European Court of Human Rights', *EJIL* (2015) 26, 237–53. Views of UN bodies are considered later in the present chapter.

[15] 2003, ETS No. 189. See also the European Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 008/913/JHA (28 November 2008), which provides for the following to be treated as punishable acts: 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.... The reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.'

[16] Trade union rights are expressed in greater detail in Article 8 of the ICESCR and in a raft of instruments under the auspices of the International Labour Organization (ILO) and the ILO Committee on Freedom of Association. See chapter 14.

[17] ACHR Article 16; ACHPR, Article 10; Arab Charter on Human Rights, Article 24; ECHR, Article 11.

Defenders.[18] In the ICCPR, the possibilities for restricting either right are narrowly drawn, though neither right is listed as non-derogable.

Incitement to discrimination and measures to eradicate it are flagged up in the Declaration on Racial Discrimination, Article 9 of which provides that:

1. All propaganda and organizations based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin with a view to justifying or promoting racial discrimination in any form shall be severely condemned.
2. All incitement to or acts of violence, whether by individuals or organizations against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law.
3. In order to put into effect the purposes and principles of the present Declaration, all States shall take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organizations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin.

While there are important differences between this text and the Convention, the Declaration's condemnations of propaganda and ideas and incitement to racial discrimination and violence served as starting points for the later instrument.

## B. *Travaux Préparatoires*

The *travaux* of Article 4 are extensive, a measure of the strongly contested nature of the discussions from the outset, where the topic of racist speech brought forth a wide span of suggestions.[19] Texts incorporating provisions on incitement were submitted by Abram,[20] by Ivanov and Ketrzynski jointly,[21] Cuevas Cancino and Ingles jointly,[22] and Ketryznski.[23] The Abram draft commenced with a paragraph whereby incitement to racial hatred and discrimination was to be declared 'an offence against society and punishable under law',[24] a phrase culled from the Declaration. This was followed by paragraphs which included a provision whereby the State party would not permit 'its officials or any agency or organization supported... by government funds' to promote or incite racial hatred and discrimination; there was also a paragraph on establishing a national policy 'designed to eradicate all incitement to racial discrimination and hatred'. The Abram draft linked the provisions declaring incitement an offence with remedies: 'Each State party shall provide remedial relief for any individual who has suffered substantial harm as the result of racial violence, hatred or discrimination.' The Ivanov/Ketrzynski draft focused on 'racist, fascist and other organizations practising or inciting... racial discrimination' which States parties would undertake to 'prohibit and disband'.[25] This draconian provision was accompanied by another whereby the State undertook to

[18] General Assembly resolution 53/144, 8 March 1999.

[19] The heading for what became Article 4 of the Convention in the report of the Sub-Commission was '[t]he obligation of States to adopt positive measures to eradicate incitement to racial discrimination': report of the Sixteenth Session of the Sub-Commission, E/CN.4/873, p. 29.

[20] E/CN.4/Sub.2/L.308/Add.1/Rev.1/Corr.1.

[21] E/CN.4/Sub.2/L.314.

[22] E/CN.4/Sub.2/L.330.

[23] E/CN.4/Sub.2/L.331.

[24] E/CN.4/873, para. 74.

[25] *Ibid.*, para. 75.

consider participation in the activity of such organizations as well as incitement to violence or acts of violence against individuals or groups because of race, national, or ethnic origin as 'a criminal offence counter to the interest of society punishable under law, and to prosecute those guilty thereof'.[26] The draft also introduced a specific undertaking not to admit 'propaganda of any kind of the superiority of one race or national group over another' or propaganda with a view to justifying or promoting racial discrimination in any form.[27]

Cuevas Cancino and Ingles submitted a later text incorporating the propaganda point introduced by Ivanov/Ketrzynski, to the effect that States parties would 'severely condemn' propaganda justifying or promoting racial discrimination and undertake to initiate 'immediate and positive' measures to eradicate all incitement to such discrimination.[28] To this end, *inter alia*, measures included penalization of incitement to racial discrimination 'resulting in or likely to cause acts of violence',[29] the prohibition or outlawing of organizations promoting or inciting racial discrimination,[30] and a prohibition on government officials or State-supported organizations promoting or inciting racial discrimination; a 'remedial relief' provision similar to that in the Abram draft was also included. During discussion of this last text, Ketrzynski introduced a new text[31] which contained sub-paragraphs on taking appropriate measures to institute judicial proceedings against those inciting or committing acts of violence targeting 'a race or group of persons of a different colour or ethnic origin', against those implicated in propaganda aimed at inciting racial hatred, etc, and against organizations 'including fascist movements' which aim at inciting violence or racial discrimination.[32] This draft also referred to a national policy to 'eradicate all prejudices based on ideas of differentiation or inequality among races'. A revised text from Cuevas Cancino and Ingles produced further discussion and amendments and was adopted unanimously by the Sub-Commission.[33]

[26] *Ibid.*, para. 75.
[27] *Ibid.*
[28] E/CN.4/873, para. 77.
[29] *Ibid.*
[30] *Ibid.* Commenting on the text, Abram, in an observation which foreshadowed much of the discussion of Article 4, argued that 'it was not always necessary to suppress a racist organization in order to put an end to its activities . . . the prohibition of what was regarded as offensive might prove to be a double-edged weapon . . . it would be dangerous and useless to stipulate that States should prohibit organizations on the sole ground that they promoted racial discrimination': E/CN.4/Sub.2/SR.420, pp. 4–5. As an example he referred to the Ku Klux Klan, in relation to whose activities laws had been adopted in a number of states of the US requiring members to, *inter alia*, keep their faces uncovered during demonstrations. On the other hand, Ivanov emphasized the need for preventive measures, so that action 'should be taken before racist organizations poisoned the minds of young people by implanting in them hatred of certain races; otherwise the situation would soon be beyond the control of the authorities. That was what had happened in the case of the racist doctrine of hitlerism. If laws had been passed soon enough to prevent the dissemination of those harmful ideas, it would perhaps have been possible to avoid the catastrophe in which the modern world had been engulfed': E/CN.4/Sub.2/SR.420, p. 6.
[31] E/CN.4/Sub.2/L.331.
[32] E/CN.4/873, para. 79. Ketrzyinski had 'mentioned fascist movements because, although the term had given rise to several interpretations, no one could deny that all fascist movements were also racist': E/CN. 4/Sub.2/SR.420,p. 9. Capotorti, *ibid.*, p. 11, regarded the reference to fascist movements as inappropriate on the ground that 'some countries which, unlike Italy, did not possess very specific legislative and constitutional provisions on the subject might use that text as a reason for not acceding to the Convention'.
[33] E/CN.4/Sub.2/L.330/Rev.1; E/CN.4/873, para. 81.

Accordingly, the Commission had before it the following text of Article IV:

States parties condemn all propaganda and organizations which justify or promote racial hatred and discrimination and undertake to adopt immediate and positive measures designed to eradicate all incitement to such discrimination, and to this end, *inter alia*:

(a) Shall declare an offence punishable by law all incitement to racial discrimination resulting in or likely to cause acts of violence;[34]
(b) Shall declare illegal and prohibit organizations, and also organized propaganda activities, which promote and incite racial discrimination;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Amendments to the Sub-Commission's text were proposed by the USSR,[35] the US,[36] Poland,[37] Costa Rica,[38] and Denmark,[39] in addition to oral amendments.[40] The USSR amendment to the chapeau proposing the addition of 'severely' after 'States parties' attracted comment to the effect that this would only weaken the condemnation of racial discrimination elsewhere in the draft convention by raising the issue of degrees of condemnation, whilst adding nothing to the legal strength of the article.[41] A more substantial USSR amendment that proposed to add 'based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin' after 'organizations'[42] attracted significant comment. In support of the proposal, the text of Article 9.1 of the Declaration on Racial Discrimination was recalled and the contention was made that it was in keeping with the spirit of the Convention as a whole if organizations were to be condemned even if they did not put these 'ideas or theories' into practice. Against, it was claimed that in order to be condemned, the organizations would have to meet two qualifications instead of one,[43] limiting the applicability of the article. The representative of Ecuador added to the 'ideas or theories' discussion the observation that 'many racist acts had been based not on theories or systematized ideas, but rather on emotion, on hatred stemming from deep-seated prejudice'.[44] The debates also touched on the question of whether racial discrimination 'was necessarily founded on explicit or implicit concepts of racial superiority',[45] as claimed by the USSR but disputed by India.[46]

[34] The final Article 4 of the Convention does not link incitement with violence in the manner suggested in this draft.
[35] E/CN.4/L.681.
[36] E/CN.4/L.688.
[37] E/CN.4/L.699.
[38] E/CN.4/L.702.
[39] E/CN.4/L.704.
[40] Commission on Human Rights, Report on the Twentieth Session, February–March 1964, E/CN.4/874, paras 144–71.
[41] The amendment was rejected by 6 votes to 5, with 10 abstentions: E/CN.4/874, para. 173. Negative comments on the insertion of 'severely' were offered by a number of representatives, including the representative of The Philippines who claimed that 'the insertion of the word "severely" . . . might destroy the balance between the various Articles of the Convention', and Dahomey, for whom the insertion of the word 'would not only be superfluous, but would prejudge the nature of the penalty to be imposed by the competent organs of the State': E/CN.4/SR.791, pp. 7–8.
[42] As orally revised by India: E/CN.4/874, para. 147.
[43] E/CN.4/874, para. 158. See comment of Italy, E/CN.4/SR.792, p. 13.
[44] E/CN.4/SR.791, p. 10.
[45] E/CN.4/SR.792, p. 6.
[46] E/CN.4/SR.792, pp. 7–8. The representative used the homely example of a building concern, having built a group of houses, 'might find that the price of the dwellings tended to go down if they were offered to all

An Indian oral amendment replaced 'or likely to cause acts of violence' in the Sub-Commission's text by 'acts of violence 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'.[47]

On paragraph (b), an amendment by the US to add the words 'activities of' after 'organizations' raised once more the issue of banning racist organizations as such because, it was argued, under the law of many countries, organizations as such could not be prohibited while persons engaged in illegal activities could be prosecuted.[48] It was also claimed that attempts to outlaw 'speech' in the absence of 'acts' would be open to abuse, allowing the authorities to decide whether or not particular expressed opinions were punishable.[49] Other representatives made the subtle point that the formation of organizations constituted acts, and not merely thoughts, and if the organizations promoted discrimination, they must be banned.[50] Support was also expressed for the banning not only of dangerous organizations but also for the leaders of organizations and persons who provided assistance.[51] A Costa Rican amendment to soften the text by adding, after 'organizations', 'or the activities of organizations, as appropriate' attracted opposition on the basis that it would open the door to subjective choices by States parties.[52]

Two statements in particular give a flavour of the polarized debate on freedom of speech and organizations. In the view of the United States, 'pernicious ideas could not be eliminated by forcing them underground... the ideas of an organization operating in secrecy became subversive for the very reason they were not open to scrutiny'.[53] A colourful counter-analogy was offered by the representative of the USSR who recalled that

> there had been organizations which murdered for a fee; the notorious 'Murder incorporated' was an example. That organization had been set up for a definite object: the commission of crime. It would be curious logic to consider that it had the right to exist as long as it was not actually guilty of a murder, or that it was necessary to wait for a murder to be committed before prohibiting such an organization.[54]

Among other amendments, the proposal by the USSR to replace 'and' between 'promote' and 'incite' by the word 'or' also generated significant discussion. Recalling Article 9(3) of the Declaration on Racial Discrimination which used the expression 'promote or incite', it was asked whether both 'incitement' and 'promotion' of racial discrimination would be

buyers without distinction. To protect its interests, the concern might decide that only certain racial groups would be allowed to buy... It could hardly be said in that case that the concern was motivated by ideas of racial superiority; it simply wanted to make the largest possible profit.'

[47] E/CN.4/874, para. 149: the amendment was adopted unanimously: *ibid.*, para. 177.

[48] Comments of Canada, E/CN.4/SR.791,pp. 5–6; United Kingdom, *ibid.*, p. 9; Ecuador, *ibid.*, p. 10; France, E/CN.4/SR.792, pp. 11–12; Italy, *ibid.*, p. 14.

[49] United Kingdom, E/CN.4/SR.793, p. 5.

[50] Comment of the Ukrainian SSR, E/CN.4/SR.792, pp. 12–13.

[51] Observation by the USSR, E/CN.4/SR.794, pp. 6–7.

[52] E/CN.4/874, para. 169. The words 'as appropriate' were the subject of a separate roll-call vote on the request of the USSR, and were retained in the text by 15 votes to 3, with 3 abstentions, with Poland, the Ukrainian SSR and the USSR voted against: E/3873; E/CN.4/874, para. 180. The whole Costa Rican amendment was adopted on a roll-call vote by 15 votes to 4, with 2 abstentions: E/CN.4/874, para. 181. Again, the Soviet bloc, plus India, voted against.

[53] E/CN.4/SR.792, p. 10.

[54] E/CN.4/SR.794, p. 10. 'Murder incorporated' or 'Murder Inc.' was the name given by the press to an organized crime group in the US that carried out murders in the 1930s and 1940s. The title of the group was a journalistic invention.

necessary in order to tackle organizations and their activities when the obvious answer was that only one was needed. The report of the Commission summarizes this discussion:

> Several representatives objected to the amendment on the ground that while incitement was a conscious and motivated act, promotion presented a lower degree of motivation and might occur even without any real intention or endeavour to incite. Consequently, since the two words had different meanings . . . either the word 'and' should be retained, as there could not be incitement without promotion, or the word 'promote' should be deleted.[55]

The USSR also proposed to add the words 'as also the rendering of any assistance whatsoever to such organizations and their activities, including their financing' at the end of paragraph (b), recalling that the Nazis had been financed by industries and monopolies and that fascist organizations were springing up and securing financial support.[56] A Polish amendment to paragraph (b) to add 'and shall declare participation in such organizations or activities to be an offence punishable by law' attracted supporters and critics.[57] In favour, it was argued that the consequences of participating in organizations should be spelled out while others felt that it was going too far.[58] Paragraph (c) as submitted by the Sub-Commission was adopted unanimously as was Article IV as a whole.[59]

The Third Committee had before it the following text of Article IV:

> States parties condemn all propaganda and organizations which are based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin, or which justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to such discrimination, and to this end, *inter alia*:
>
> (a) Shall declare an offence punishable by law all incitement to racial discrimination resulting in acts of violence, 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;
> (b) Shall declare illegal and prohibit organizations or the activities of organizations, as appropriate, and also organized propaganda activities, which promote and incite racial discrimination;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The substantive discussion of the article was prefaced by a robust intervention by the representative of the United Kingdom who stated that the article went to the very heart of the Convention, since freedom of speech

> was the foundation-stone on which many of the other human rights were built . . . [the United Kingdom] . . . was taking legal and practical steps to tackle the problem of racial discrimination, but . . . also defended the right of all organizations, even fascist and communist ones, to exist and to

[55] E/CN.4/874, para. 169. The amendment was rejected by 12 votes to 8, with 1 abstention: E/CN.4/874, para. 178; opposition came principally from Western states.

[56] *Ibid.*, para. 170. The amendment, as revised—E/CN.4/L.703, para. 1—was rejected by 9 votes to 5, with 7 abstentions: E/3873; E/CN.4/874, para. 183. Opposition came mainly from Western States.

[57] E/CN.4/L.699. The amendment was rejected by 10 votes to 4, with 7 abstentions: E/CN.4/874, para. 184.

[58] Thus, the Italian delegation 'could not accept the Polish amendment . . . under which a person could be punished simply because he belonged to an organization some of whose other members engaged in discrimination': E/CN.4/SR.792, p. 15.

[59] E/CN.4/874, paras 187 and 188.

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make their views known . . . The views of such organizations were tolerated with one provision – that their expression did not involve incitement to racial violence.[60]

A number of representatives reacted to the statement of the UK in equally strong terms. For Czechoslovakia, freedom of expression 'was not entirely unrestricted',[61] and 'it was no proof of democracy that movements directed towards hatred and discrimination were allowed to exist. Her delegation was passionately dedicated to freedom of speech, but not when it was misused in the service of hatred, war and death.'[62] For Poland, 'every freedom was subject to certain limitations'.[63] The representative of Ceylon drew a distinction between the use and the abuse of freedom of speech, stating that an individual 'could not be punished merely for speaking against a particular race'.[64]

At the 1316th meeting, Nigeria submitted a full text to replace the whole of Article IV:

States parties condemn all propaganda and organizations which are based on ideas or theories of superiority of one race of 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.[65]

An attempt by Argentina to provide a further replacement text for paragraphs (a) and (b) was rejected.[66] The proposed text for paragraph (a) would have omitted reference to dissemination of racist ideas, confining itself to declaring as punishable offences 'all incitement to' and 'all promotion of racial discrimination' and 'all acts of' racist violence or incitement to such violence. However, the 'ideas' element re-surfaced in a proposed paragraph (b): 'Shall declare illegal, prohibit and declare an offence punishable by law all propaganda and organizations based on theories of the superiority of one race, or of a group of persons of one colour or national or ethnic origin, and having as their purpose the justification or promotion of racial discrimination in any of its forms.' While the

[60] A/C.3/SR.1315, para. 1. The representative added: '[s]peech should be free, but incitement to violence should be repressed': A/C.3/SR.1315, para. 2.
[61] A/C.3/SR.1315, para. 5. The representative cited, *inter alia*, Article 29 (2) of the Universal Declaration of Human Rights.
[62] A/C.3/SR.1315, para. 6.
[63] A/C.3/SR.1315, para. 16.
[64] A/C.3/SR.1315, para. 21. Reference to the distinction between use and abuse of freedoms was also made by the representative of France, arguing that the Commission's text had made that distinction sufficiently clear: A/C.3/SR.1315, para. 19.
[65] A/C.3/L.1250, A/6181, para. 72.
[66] A/C.3/L.1253, introduced by the representative in A/C.3/SR.1318, para. 7. For the voting, see A/6181, para. 74, sub-paragraphs (c) and (g).

proposals of Argentina attracted some support,[67] the proposal of Nigeria enjoyed greater support, despite recognition by some that it was not perfect.[68] Continuing doubts were expressed on the provisions regarding the dissemination of ideas:

> the application of penal law to the dissemination of ideas of racial superiority . . . was not the best way of combating such ideas, negative and harmful though they were. The best approach was through education. While his delegation could agree that States should be asked to prohibit racial discrimination, it doubted whether it was desirable to provide that ideas, however regrettable they might be, should be punished by law.[69]

Others, however, took the view that the Commission had taken too timid an approach to 'the very important question of the dissemination of racist ideas'.[70]

A separate vote was taken at the request of Ethiopia on the 'due regard' clause, which was adopted by 76 votes to 1 with 14 abstentions. Separate votes were also taken at the request of Colombia on the dissemination of ideas aspect of paragraph (a),[71] and at the request of Austria on the reference in that paragraph to assistance to racist activities, etc.[72] The voting favoured the Nigerian text as 'the clearest expression of the views of the majority',[73] and although the abstention count was high on specific issues, Article IV as a whole was adopted by 88 votes to none, with 5 abstentions.[74] In explanations of vote, a number of delegations took the view that the 'due regard' clause represented 'a reasonable accommodation between the requirement to create a new offence and the fundamental right to freedom of association'.[75] The US interpreted the Article on the understanding that it 'did not impose on a State party the obligation to take any action impairing the right to freedom of speech and freedom of association'.[76] A last chance attempt by Argentina, Colombia, Ecuador, Panama, and Peru in the plenary session of the General Assembly to amend the beginning of Article 4, paragraph (a) to read that States parties '(a) Shall declare an offence punishable by law all incitement to racial discrimination, particularly discrimination based on racial superiority or hatred', was defeated.[77] In the words of the representative of Argentina, the proposal was designed to secure the point that the 'mere expression of ideas is not in itself punishable if it is not accompanied by incitement to discrimination or racial hatred'.[78] In a lengthy explanation of vote, the representative of Colombia commented that 'to penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power . . . ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile,

[67] See, for example, the remarks by the representative of Austria, A/C.3/SR.1318, para. 13.

[68] For example, remarks by the representative of Argentina, A/C.3/SR.1318, para. 7; and the representative of Italy, *ibid.*, para. 18.

[69] Remarks by the representative of Italy, A/C.3/SR.1318, para. 20.

[70] Representative of Senegal, A/C.3/SR.1318, para. 31.

[71] Adopted by 57 votes to none, with 35 abstentions.

[72] Adopted by 57 votes to 1, with 33 abstentions. The representative had argued that 'the reference to racist activities lacked the precision which was desirable in any penal law': A/C/3/SR.1318, para. 46.

[73] Remark by the representative of Syria, A/C.3/SR.1318, para. 58.

[74] A/6181, para. 74.

[75] Representative of Canada, A/C.3/SR.1318, para. 52. See remarks by the representatives of The Netherlands, Chile, the UK, Spain, France, Austria, US, and New Zealand, A/C.3/SR.1318, paras 47, 49, 51, 53, 54, 57, 59, 60, respectively.

[76] *Ibid.*, para. 59.

[77] A/L.480

[78] A/PV.1406, para. 49.

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confiscation or fines'; accordingly, the supporters of the Article as it stood were voting 'without seriously pondering on the dangers involved in authorizing penalties under criminal law for ideological offences'.[79]

### *Comment on the* Travaux

The *travaux* demonstrate that, broadly congruent with the strict approach taken in the Declaration, a majority of governments favoured the 'hard line' on hate speech restrictions. Both racial discrimination instruments adopt a rigorous stance against racist organizations. The condemnation of racist organizations in the Declaration is transmuted into a demand for their prohibition as such, a demand that is expressed as not depending on their pursuit of racist activities: it is enough simply to be 'Murder Incorporated'. The condemnation of 'propaganda', 'ideas', and 'theories' of racial superiority is sustained throughout the two texts, even though the opposition to the penalization of the expression of ideas was always significant. 'Dissemination' of racist ideas was added to the lexicon of prohibited acts in the course of discussion, so that incitement and violence are not the only forms of activity to be sanctioned. Incitement is to be addressed as such, and the case for its criminalization is not stated to depend on any consequences that follow from the act of incitement. The *travaux* also highlight the wide scope of the eventual Article in that, as in the Convention as a whole and excepting the mention of apartheid in Article 3, no particular 'isms'—Nazism, fascism—are identified as necessary for its engagement, only the ethnic/racial framework. They also help to make the point that punishment for the impugned activities is not simply an end in itself but has an underlying preventive justification. Arguments to the effect that education was at least equal to penal sanctions as a long-term preventive measure did not disturb the general direction of the text. On freedom of expression, the 'due regard' clause was a softened version of drafts that offered stronger protection to this freedom. The 'due regard' was understood by the majority to refer to the whole of the UDHR including but not limited to its principles on freedom of expression and association.

## C. Practice

### I. Reservations and Declarations

Reservations and declarations self-describe in varied terms:[80] that of Antigua and Barbuda is styled a 'declaration'; the interpretation by Fiji of Article 4 is part of its 'reservation and declarations' but is referred to specifically as its 'interpretation' of the Article; Ireland makes a 'reservation/interpretative declaration' on Article 4, and Italy a 'declaration'; Japan refers to its 'reservation', as do Monaco, Switzerland, Thailand, and Papua New Guinea; Tonga's reading of Article 4 is part of its 'declaration'; the UK sets out a 'reservation and interpretative statements'; the advice and consent of the US Senate is subject to 'reservations'. The preferred terminology of the UK was explained in discussions with the Committee

[79] A/PV.1406, paras 70 and 72; the representative regarded the Article as 'a retrograde measure': A/PV.1406, para. 74.

[80] <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.

[a]n interpretative statement was not a reservation but expressly recorded what the United Kingdom had always understood to be the correct legal interpretation of Article 4. His government recognised that... many members of the Committee took a different view... In practice, however, the positions were not so far apart. The United Kingdom did not assert that the right to freedom of expression was absolute.[81]

For Antigua and Barbuda and Thailand, legislation or measures under Article 4 would be enacted only where it is considered that 'the need arises' for such;[82] Australia declared that it was not at present in a position to treat as offences matters covered in Article 4(a) but would seek such legislation 'at the first suitable moment':[83] such reservations effectively subtract from the Article 4 requirement to adopt 'immediate and positive measures'. Most of the reserving States make reference to the principles of freedom of expression which were not to be jeopardized by Article 4, and repeatedly refer to the Universal Declaration of Human Rights, Articles 19 and 20,[84] Article 5 of the Convention, and Articles 19 and 21 of the ICCPR.[85] The essence of these reservations is that measures to implement Article 4 will only be adopted to the extent they are, in the view of the reserving States, compatible with principles of freedom of expression, assembly, and association. On the scope of the statements, whereas the majority cover the whole of Article 4, that of Australia addresses only Article 4(a), while those of Italy (ambiguously) and Japan relate to 4(a) and 4(b). Despite repeated requests by the Committee to withdraw or narrow reservations, some States parties have made it clear that they intend to maintain the reservation. Hence the statement of Japan in its consolidated third to sixth report that:

Article 4 may cover an extremely wide range of acts carried out in various situations and in various manners. Restricting all these acts with punitive laws that go beyond the existing legal system in Japan may conflict with what the Constitution guarantees, including the freedom of expression that strictly demands the necessity and rationale for its restrictions, and with the principle of legality of crime and punishment that requires concreteness and clarity in determining the punishable acts and penalties. It is on the basis of this judgment that the Japanese Government made its reservations... Japan was advised to retract the reservation it made about Article 4 (a) and (b) in the concluding observations of the Committee on the Elimination of Racial Discrimination... However, for the reasons given above, Japan does not intend to retract the said reservation.[86]

While some reservations may also have remained 'on the books' due to bureaucratic inertia, it remains to be seen whether, following GR 35, they will be withdrawn:

As part of its standard practice, the Committee recommends that States parties which have made reservations to the Convention withdraw them. In cases where a reservation affecting Convention provisions on racist speech is maintained, States parties are invited to provide information as to why

[81] CERD/C/SR.1589, paras 31 and 32.

[82] 'Ad hoc' legislation in the phrase of Malta; see also the statements of Nepal, Papua New Guinea, Tonga, *ibid.*, and the UK.

[83] Australia became a party to the Convention in 1975. Paragraph 26 of the 2009 report of Australia (CERD/C/AUS/15-17) makes the following statement: 'Australia made the reservation to Article 4(a) at the time of ratification because it was not in a position to treat all of the matters covered by Article 4 as offences. The RDA [Racial Discrimination Act] prohibits discrimination and vilification on the basis of race, and contains civil remedies. All states and territories have enacted legislation that prohibits discrimination and, in some cases, vilification.'

[84] Italy makes reference to Article 29 (2) of the UDHR.

[85] Belgium adds references to Articles 10 and 11 of the ECHR.

[86] CERD/C/JPN/3-6, para. 38.

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such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time frame.[87]

## II. Guidelines

The CERD-specific guidelines do not greatly elaborate the language of Article 4 though there are nuances of difference between the Article and the guidelines, which also make some additions.[88] The chapeau condemnation of propaganda and organizations is transmuted into a request for information on measures to '*publicly* condemn' propaganda, etc.[89] In cases where no specific legislation has been enacted to implement Article 4, States parties should explain the reasons for its absence and their difficulties in implementing the Article, as well as inform the Committee on 'the manner and extent' to which the application of existing laws effectively fulfils their obligations. Finally, information on tribunal and other decisions relevant to 4(a) and 4(b) is requested, as well as statistical data (to be qualitatively assessed) on related complaints, prosecutions and sentences. The guidelines recall GR 7 and GR 15 and would benefit in due course from alignment with GR 35.

## III. Character of the Article

Article 4 has been the subject of a series of general recommendations that cumulatively provide a sense of how the Committee envisages its character and functions. In GR 1 (1972), the Committee noted, on the basis of consideration of reports at its fifth session, that the legislation of a number of States parties did not include the provisions of Article 4(a) and 4(b) of the Convention 'the implementation of which . . . is obligatory under the Convention for all States parties'. Accordingly the Committee recommended that States parties should consider supplementing such 'deficient' legislation with provisions conforming to Article 4(a) and 4(b).[90] The Committee returned to the issue in GR 7 (1985),[91] which makes a point on 'the preventive aspects of the Article to deter racism and racial discrimination as well as activities aimed at their promotion or incitement',[92] recommending that, *inter alia*, necessary steps be taken with a view to 'satisfying the mandatory requirements of that Article'.[93]

GR 15 (1993) provides an analysis of the requirements of the Article, coupled with an explanatory justification. The recommendation reads the *travaux* of the Convention to the effect that the drafters regarded Article 4 as central to the struggle against racial discrimination in view of 'a widespread fear of the revival of authoritarian ideologies';[94] organized violence based on ethnic origin and the political exploitation of ethnic difference have only enhanced the relevance of Article 4.[95] The description of Article 4 as 'central' and 'crucial' in the struggle against racial discrimination was preferred to its description as the 'key Article', because this might give rise to misunderstanding concerning the force of

[87] GR 35, para. 23; the paragraph is adapted from the Committee's GR 32 on special measures, para. 38.
[88] CERD/C/2007/1, section C (CERD-Specific Guidelines).
[89] CERD-Specific Guidelines, Article 4, para. A, sub-para. 2 (present author's emphasis).
[90] A/8718, Chapter IX, section A.
[91] A/40/18, Chapter 7, section B.
[92] Final preambular paragraph of the recommendation.
[93] GR 7, para. 1.
[94] GR 15, para. 1.
[95] Para. 1.

other articles.[96] The 'mandatory character' of the article is recalled, and its implementation requires not only the enactment of appropriate legislation but the effective enforcement of such.[97] The latter point is made explicit in *Gelle v Denmark*: 'The Committee observes that it does not suffice, for purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 . . . it is also reflected in other provisions of the Convention.'[98]

The Committee understands Article 4 as having a preventive function. Paragraph 2 of GR 15 notes that, because 'threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response'. Further, on Article 4(b), the recommendation rejects the claim by 'some States' that 'it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination';[99] on the contrary, it is important to act against racist organizations at the earliest possible moment through banning them forthwith. Thus, States 'are bound to enact implementing legislation . . . even if they allege that racial discrimination is unknown or that there are no racist organizations in their respective jurisdictions'.[100] Situations of threat need to be defused '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'.[101]

The danger of racist discourse in stirring up hatred and the need to prevent it is also adverted to by the Committee in its indicators adopted in 2005 of 'patterns of systematic and massive racial discrimination'.[102] The indicators include 'systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media', and 'grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority; the indicators also refer to 'extreme political groups based on a racist platform'. The concepts in these indicators are close to criteria developed by the Committee to engage its early warning and urgent action procedure.[103]

The above themes are taken up and expanded in GR 35. The point on the importance of Article 4 is reiterated in paragraph 10 of GR 35, followed by an expanded reading of its functions: 'Article 4 comprises elements relating to speech and the organizational context for the production of speech, serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails. The Article also has an expressive function in

[96] Discussions of the draft in CERD/C/SR.980, paras 77–98. See also CERD/C/SR.981, para. 79 on the deletion of the term.

[97] GR 15, para. 1.

[98] *Gelle v Denmark*, CERD/C/68/D/34/2004 (2006), para. 7.3. The facts of the case are set out in Chapter 8.

[99] GR 15, para. 6.

[100] CERD 1986, para. 221.

[101] *L.K. v The Netherlands*, CERD/C/42/D/4/1991 (1993), para. 6.6.

[102] A/60/18, para. 20.

[103] Revised (2007) indicators on the early warning and urgent action procedure in A/62/18, Annex III.

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underlining the international community's abhorrence of racist hate speech.'[104] The point made in *Gelle* is also given an expansive reading:

> The Committee reiterates that it is not enough to declare the forms of conduct in Article 4 as offences; the provisions of the Article must also be effectively implemented. Effective implementation is characteristically achieved through investigations of offences set out in the Convention and, where appropriate, the prosecution of offenders. The Committee recognizes the principle of expediency in the prosecution of alleged offenders, and observes that it must in each case be applied in the light of the guarantees laid down in the Convention and in other instruments of international law. In this and other respects under the Convention, the Committee recalls that it is not its function to review the interpretation of facts and national law made by domestic authorities, unless the decisions are manifestly absurd or unreasonable.[105]

The recommendation reinforces the point on prevention, explaining the provisions in Article 4 on dissemination of ideas as 'a forthright expression of the preventive function of the Convention', and 'an important complement' to the provisions on incitement.[106] Paragraph 10 of the recommendation adds the function of 'deterrence' to 'prevention' with respect to Article 4, and also finds 'an expressive function in underlining the international community's abhorrence of racist hate speech'.

CERD takes the view that Article 4 is non-self-executing,[107] a stance reiterated in GR 35 which reminds States parties that they are 'required the terms of Article 4 to adopt legislation to combat racist hate speech that falls with its scope';[108] the legislation should cover all elements of the Article.[109] GR 35 introduces 'contextual factors' to be taken into account in qualifying certain forms of conduct as criminal offences:[110] the chapeau to paragraph 15 of the recommendation notes that while Article 4 requires certain forms of conduct to be declared offences punishable by law it does not supply detailed guidance for the qualification of forms of conduct as criminal offences.

## IV. Protected Groups and Persons

The chapeau of Article 4 condemns all propaganda and all organizations based on ideas or theories of the 'superiority of one race or group of persons of one colour or ethnic origin' over another. The Committee observes that the term 'based on' (in the chapeau and 4(a)) is understood in relation to Article 1 as equivalent to 'on the grounds of', and in principle holds the same meaning in Article 4.[111] The listing of race, colour, and ethnic origin omits 'descent' and 'national origin', both of which appear in Article 1. The *travaux* are not illuminating in this respect and should not be read to suggest that particular categories remain bereft of protection from hate speech. In *Gelle v Denmark*, speech against Somalis

[104] Para. 10.
[105] Para. 17.
[106] Para. 11.
[107] CERD Study on 'Positive measures designed to eradicate all incitement to, or acts of, racial discrimination' (United Nations, 1986), para. 216. [CERD 1986]. The study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10.
[108] Para. 13.
[109] Paragraph 9 states that '[a]s a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively'.
[110] Para. 15.
[111] GR 35, para. 11.

was understood as 'degrading or insulting to an entire group of people . . . on account of their *national or* ethnic origin'.[112] It is also clear from practice that descent-based groups are included: section 4 of GR 29 envisages States parties taking measures 'against any dissemination of ideas of caste superiority and inferiority or which attempt to justify violence, hatred or discrimination against descent-based communities', as well as 'strict measures against any incitement to discrimination or violence against the communities'.[113]

Regarding 'intersectionality',[114] practice treats Article 4 along the same lines as Article 1. Among victims of racist hate speech, paragraph 6 of GR 35 outlines a list of affected groups and singles out 'speech directed against women members of these and other vulnerable groups' as a specific subject of concern. In cases where there is a perception of an overlap between ethnicity and religion, as in discrimination against Jews and Sikhs,[115] or against Tatars, described as 'Muslim ethnic minorities'[116] etc, the Committee experiences little difficulty in applying the Convention. Thus, in *Jewish Community of Oslo v Norway*[117] the question of the reach of Article 4 to cover anti-Jewish hate speech by the 'Bootboys' did not trouble the Committee. In some areas of practice, there is a contrast between a relaxed approach taken in the concluding observations and a stricter approach in the context of Article 14 communications.

Thus, while the Committee has made reference in concluding observations to Islamophobia,[118] and to intolerance and hatred against 'Muslims' even without an apparent 'intersection' with ethnicity,[119] the case law exhibits greater caution. *P.S.N. v Denmark* concerned alleged violations of Articles 1(d), 4, and 6 of the Convention through statements published on a website by a Member of Parliament against immigration and Muslims, under the headline 'Articles no one dares to publish'.[120] The opinions expressed were reiterated in an interview given to a newspaper, and some had been previously published in a book. The petitioner filed complaints under the Danish Criminal Code, section 266b of which prohibits racial statements, on the grounds that the website statements targeted a specific group, Muslims, were degrading and propagandistic and were published to a large audience; analogous complaints related to the book and the interview. The State party argued against admissibility, stating that the case fell outside the scope of Article 1 of the Convention in referring to Muslims, while acknowledging that 'it is possible to argue to a certain extent that the statements refer to second-generation immigrants and set up a conflict between "the Danes" and them, thereby falling to some degree within the scope of the Convention'.[121] The petitioner contended that 'Islamophobia, just like attacks against Jews, has manifested itself as a form of racism in many

[112] *Gelle v Denmark*, para. 7.4 (emphasis added).

[113] A/57/18, Chapter XI F, paras (r) and (s).

[114] N. Ghanea, 'Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination', *HRQ* (2013) 25, 935–54 [henceforth 'Intersectionality'].

[115] Concluding observations on the UK, A/58/18, para. 539.

[116] Concluding observations on Moldova, A/63/18, para. 267.

[117] *Jewish Community of Oslo and ors v Norway*, CERD/C/67/D/30/2003 (2005).

[118] CERD/C/63/CO/11, para. 21 (United Kingdom). Paragraphs 20 and 21 of the UK concluding observations are contextualized as relating to 'immigrant communities', an implicit ethnic connection.

[119] Examples include Australia, CERD/C/AUS/CO/14, para. 13; Canada, CERD/C/61/CO/3, para. 24; and Switzerland, CERD/C/60/CO/14, para. 9.

[120] *PSN v Denmark*, CERD/C/71/D/36/2006 (2007), para. 1.1.

[121] Para. 4.1. The State party also contended (*ibid.*, para. 4.12) that 'the right to freedom of expression is particularly imperative for an elected representative of the people'.

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European countries'.[122] Hatred, it was claimed, had been stirred up against peoples of Arab and Muslim background, and 'culture and religion are connected in Islam'.[123]

In its admissibility decision, CERD observed that 'the impugned statements specifically refer to the Koran, to Islam and to Muslims in general', without any reference to the five grounds set out in Article 1 of the Convention.[124] Further, while the elements in the case file did not allow the Committee to ascertain the intention of the statements, 'it remains that no specific national or ethnic groups were directly targeted', and that 'Muslims currently living in the State party are of heterogeneous origin'.[125] The Committee recognized 'the importance of the interface between race and religion' and stated that 'it would be competent to consider a claim of "double" discrimination on the basis of religion and another ground specifically provided for in Article 1', which was not the case with the petition in question.[126] According to the Committee, the petition was based on religion alone, and 'Islam is not a religion practised solely by a particular group'.[127] The communication was therefore declared inadmissible. Reference to Islamophobia resurfaces in GR 35 in a partial list of communities targeted by hate speech which have engaged the attention of the Committee;[128] another paragraph refers to the use of indirect language to disguise the targets of speech.[129] It remains to be seen whether a greater awareness of 'racialized' communities will be factored into CERD practice.[130]

In the area of hate speech, citizenship is not a relevant factor in calibrating entitlement to protection under Article 4, though in line with practice deriving from Article 1, a general reference to 'foreigners' as targets of hate speech will not be enough to engage the Convention.[131] Paragraph 11 of CERD GR 30 refers to the taking of steps 'to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence', and paragraph 12 recommends 'resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent and national or ethnic origin, members of non-citizen population groups'.[132] In cases from

[122] Para. 5.3.

[123] Para. 5.3. The petitioner cited (para. 5.3.) the Committee's concluding observations of 2002 and 2006 on Denmark linking people of 'Arab and Muslim' background.

[124] Para. 6.2.

[125] Para. 6.2.

[126] Para. 6.3. The analysis of the possibility of grounding a 'double discrimination' claim will also apply to hate speech premised on the combination of, for example, race/ethnicity and gender.

[127] Para. 6.3. See also *A.W.R.A.P. v Denmark*, CERD/C/71/D/37/2006 (2007).

[128] GR 35, Para. 6.

[129] Para. 7.

[130] For a critique of CERD's position in the Danish hate speech cases, see S. Berry, 'Bringing Muslim Minorities within the ICERD—Square Peg in a Round Hole?' *Human Rights Law Review* 11.3 (2011), 423–50 [henceforth *Muslim Minorities*]; the discussion, 447–9, cites instances in national law where findings of indirect discrimination were made in circumstances not dissimilar to P.S.N. Ghanea, 'Intersectionality', 951, questions Berry's view that 'one can legitimately come to the general conclusion for a whole minority group in a particular region, regardless of the detailed facts, that "discrimination against Muslims constitutes indirect discrimination under ICERD"'. Whatever the merits of the critique and the response, the Committee evidently paid attention to facts and context in making its assessment, and, as noted, left the door open to future appraisals of 'double discrimination'. The resolution of the case links to the Committee's standard view that derogatory general references that do not identify targets of discrimination with adequate clarity are not caught by the Convention: *Quereshi*, *infra*, n. 131. Such cases are resolved in context, and it is difficult to draw general conclusions therefrom as to the degree of specificity required to engage the prohibitions of the Convention.

[131] *Quereshi v Denmark*, CERD/C/66/D/33/2003 (2005), discussed in Chapter 7.

[132] A/59/18, Chapter VIII.

*Yilmaz-Dogan* onwards, the nationality of hate speech victims has not been an issue.[133] Protection from xenophobic hate speech supports the overall project of the Convention in line with the corpus of international human rights standards including the forceful condemnation of xenophobic phenomena in the Durban process.[134] GR 35 summarizes the past practice of the Committee on intersectionality, citizenship, caste, etc, in a compendious paragraph which may be assumed to represent the current stance of CERD:

> Racist hate speech addressed in Committee practice has included all the specific speech forms referred to in Article 4 directed against groups recognized in Article 1 of the Convention—which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin—such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups. In the light of the principle of intersectionality, and bearing in mind that 'criticism of religious leaders or commentary on religious doctrine or tenets of faith' should not be prohibited or punished,[135] the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee.[136]

It is clear from the cited paragraph that any suggested limitation of hate speech offences to the three grounds of race, colour, and ethnic origin, is transcended in the view of the Committee through the description of the bulk of Article 4 offences as based on 'race, colour, descent or national or ethnic origin', a practice-based list that replicates the widest statement of grounds in Article 1 of the Convention.

## V. Chapeau

In the chapeau, 'ideas or theories of superiority' are not, *ex facie*, condemned as such; the chapeau recites a condemnation of propaganda or organizations based on such ideas or theories.[137] The Convention as a whole suggests a wider 'condemnation' of ideas of racial superiority, bearing in mind the condemnation of superiority doctrine in the preamble, and the demand to punish 'all dissemination of ideas' based on racial superiority or hatred in 4(a); a phrase which does not necessarily imply an organizational context. The assault on racist propaganda includes attempts at 'justification' of racial hatred and discrimination, and not simply their promotion. In GR 35, justification of hatred, etc, makes the leap from the chapeau to the operational aspect of Article 4—offences to be punishable by law—but only when it amounts to incitement.[138] The re-assignment of 'justification' to the category of offences punishable by law also impacts on genocide and crimes against humanity: 'public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be

[133] *Yilmaz-Dogan v The Netherlands*, CERD/C/36/D/1/1984 (1988); *L.K. v The Netherlands*, CERD/C/42/D/4/1991 (1993). On non-nationals generally, see Chapter 7.

[134] Recall the title of the 2001 Durban World Conference against Racism, Xenophobia and Related Intolerance

[135] Human Rights Committee GC 34, para. 48.

[136] GR 35, para. 6.

[137] Author's emphasis.

[138] Paras 13 and 14 of GR 35.

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declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred'. The Committee also underlines that '"the expression of opinions about historical facts" should not be prohibited or punished'.[139]

Condemnations of justification suggest that a distinction be made between justification of racial hatred and discrimination and explanations, including explanations of a 'scientific' nature. GR 35 alludes to the need to protect serious discussion of racial matters in a paragraph focused on Article 5 of the Convention:

> The Committee considers that the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial.[140]

The term 'propaganda' in the chapeau is carried through from the Declaration on Racial Discrimination and also appears in 4(b).[141] Although etymologically 'propaganda' is not a pejorative term, it has acquired a negative meaning in connection with its use in war and for political causes (isms).[142] In an assessment by one State party, 'propaganda' implies scale, systematic action, and extensive dissemination.[143] Propaganda[144] may be described as appealing to the emotions rather than reason and is intended to persuade to a point of view. Whilst propaganda has been described as 'epistemically defective',[145] the Committee commented in *Jewish Community* that 'the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate Article 4';[146] ambiguity of utterance has, however, been treated as relevant to such an assessment.[147]

In observations, CERD has frequently linked the term 'propaganda' to the media and the Internet,[148] bearing in mind that the chapeau refers to '*all* propaganda' and 4(b) to 'organized and *all other propaganda* activities'.[149] CERD also recommends, where appropriate, ratification of the Additional Protocol to the Convention on Cybercrime. GR 35 widens the concern with hate speech to include, as well as the Internet, electronic media in

[139] Para. 14. The quotation marks in the paragraph refer to paragraph 49 of GC 34 of the Human Rights Committee.

[140] GR 35, para. 25.

[141] With regard to GC 11 of the Human Rights Committee on Article 20, authors comment that 'it is unfortunate that the HRC did not take the opportunity in its General Comment to define the meaning of 'propaganda' for war': S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights* (3rd edn, Oxford University Press, 2014), p. 628. [henceforth *The International Covenant*].

[142] E.S. Herman and N. Chomsky, *Manufacturing Consent: the Political Economy of the Mass Media* (Pantheon Books, 1988).

[143] Statement in the thirteenth periodic report of Denmark, cited in *POEM and FASM v Denmark*, CERD/C/62/D/22/2002 (2003), para. 3.7.

[144] From the Latin gerund of '*propagare*', meaning to propagate.

[145] S.T. Ross, 'Understanding propaganda: the epistemic merit model and its application to art', *Journal of Aesthetic Education,* 3 No. 1 (2002), 16–30.

[146] *Jewish Community,* para. 10.4.

[147] Hence in a case involving a Danish politician's verbal reaction to an incident outside a nightclub, 'the *statement, despite its ambiguity, cannot necessarily be interpreted as claiming that persons of Somali origin* were responsible for the attack in question. Consequently . . . the Committee cannot conclude that her statement falls within the scope of . . . Article 4': *Jama v Denmark*, CERD/C/75/D/41/2008 (2009), para. 7.4.

[148] Examples include concluding observations on Canada, CERD/C/CAN/CO/18, 8; Finland, CERD/C/FIN/CO/19, para. 16; Germany, CERD/C/DEU/CO/18, para. 16; and the Russian Federation, CERD/C/RUS/CO/19, para. 16.

[149] Emphasis added.

general, and social networking sites.[150] In terms of the extent or reach of hate speech, dissemination on the Internet is listed among the contextual factors to be taken into account in qualifying speech as criminal,[151] while the potential contribution of the Internet to promoting a sense of responsibility in the dissemination of ideas is also underlined.[152]

## VI. The 'Due Regard' Clause

The chapeau to Article 4 incorporates the famous 'due regard' clause contextualizing the forms of specific action that are, *inter alia*, envisaged in the following paragraphs to fulfil the objectives of the Article. The broadly penal nature of the measures in 4(a) and 4(b) does not necessarily exhaust the range of 'immediate and positive measures' referred to in the *chapeau*, leaving open the question of what further measures might be required in specific situations. The nature and significance of 'immediate and positive measures' is partly explained in GR 35:

> The chapeau of Article 4 incorporates the obligation to take 'immediate and positive measures' to eradicate incitement and discrimination, a stipulation that complements and reinforces obligations under other Articles of the Convention to dedicate the widest possible range of resources to the eradication of hate speech. In general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee summarized 'measures' as comprising legislative, executive, administrative, budgetary and regulatory instruments . . . as well as plans, policies, programmes and . . . regimes.[153]

As is evident from the reservations to Article 4, the interpretation of the 'due regard' clause is an important issue since it contextualizes the measures to be adopted by States parties towards racist speech and organizations. Since the provisions of Article 4 against incitement and violence are legally commonplace, attention shifts to the relationship between dissemination and allied provisions in light of the principles of freedom of expression and association. With reference to the 'due regard' clause, the 1986 CERD study of Article 4 made the observation that:

> [a]nother factor hindering the full application of Article 4 . . . is the interpretation that implementation of the Article might impair or jeopardize freedom of opinion and expression and freedom of . . . assembly and association. This is the extreme position. Midway lies the proposition that a 'balance' has to be struck between Article 4(a) and freedom of speech, and between Article 4(b) and freedom of association. The weight of opinion inclines to the view that the rights of free speech and of free association are not absolute, but subject to limitations.[154]

The 'extreme position' in this reading is that which allows the least intrusion into freedom of expression, etc. Banton reads the study as defending the view that States 'may not invoke the protection of civil rights as a reason to avoid implementation of the Convention.'[155] An analysis by Partsch outlined three different views on the effect of the 'due regard' clause, the first being that States are not authorized to take action that would impair the 'freedoms',

[150] Para. 7.
[151] Para. 15.
[152] Para. 39. On the importance of the Internet to freedom of expression, see *Yildirim v Turkey*, EctHR, App. No. 3111/10 (2012), para. 54 (ECHR).
[153] *ibid.*, para. 10, drawing on GR 32, para. 13.
[154] *CERD Study*, para. 225.
[155] Banton, *International Action*, p. 203.

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the second being that a balance must be struck between the freedoms and the duties under the Convention, and the third being the above-cited reading ascribed to the CERD study by Banton.[156] It is not entirely clear that the practice can be reduced to the emollient metaphor of 'balancing' rights and restrictions;[157] there is also the element of the Committee responding to situations under review through a form of situation or context-dependent interpretation, and interpretations that respect the differing responsibilities of States parties and the Committee.[158] In some cases, the statement of freedom of expression has been uppermost in the Committee's observations. Thus, the Committee has reminded a State party of the 'obligation to respect the right to freedom of opinion and expression when implementing Article 4',[159] and recommended another that it 'guarantee respect for the freedoms of expression and association in its implementation of Article 4 (a) and (b)'.[160] In other cases, CERD addressed the situation with a different emphasis, expressing concern at impending litigation challenging the prohibition of hate speech as a violation of freedom of expression.[161]

In the *Jewish Community* case, which concerned public anti-Jewish statements by a leader of the 'Bootboys', the Committee noted that 'the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies',[162] commenting that

> the 'due regard' clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of Article 4 does not deprive the 'due regard' clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.[163]

[156] *Ibid.*, citing K.J. Partsch, 'Racial speech and human rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination', in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Article 19, 1992), pp. 21–28. Partsch favoured the 'balance' position between freedoms and State obligations.

[157] For an attempt to recast the debate as a conflict of liberties, based on the notion that protection from hate speech is a methodology to promote participation in public discussion and a liberty rather than a restriction, see O. Fiss, *The Irony of Free Speech* (Harvard University Press, 1996).

[158] See, for example, the remarks of Wolfrum in discussions on the eighth and ninth periodic reports of Denmark, CERD/C/SR.864, para. 64: 'Article 4 could not be invoked to assert that protection against racial discrimination took precedence over freedom of opinion. It emerged from that Article that it was for the State and not the Committee to determine whether respect for freedom of opinion and . . . information . . . should take precedence over the prohibition of incitement to racial discrimination.' Compare remarks of Aboul-Nasr, CERD/C/SR.865, para. 8, and Lamptey, *ibid.*, para. 9. The discussions are summarized in A/45/18, para. 56.

[159] Belarus, CERD/C/65/CO/2, para. 8.

[160] Mauritania, CERD/C/65/CO/5, para. 13.

[161] CERD/C/BEL/CO/15, para. 11.

[162] Para. 10.5.

[163] Para. 10.5. In the context of the European Convention on Human Rights, the 'abuse clause'—Article 17—has been utilized from time to time by the Strasbourg organs: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' For applications, notably in the case of right-wing or Neo-Nazi movements, see ECommHR, *Glimmerveen and Hagenbeek v The Netherlands*, App. Nos 8348/78 and 8406/78 (1979); *Kühnen v Germany*, App. No. 112194/86 (1988); ECtHR *Norwood v The UK*, App. No. 23131/03 (2004); also *Garaudy v France*. Comment in D. Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights* 25 (2007), 641–63; H. Cannie and D. Voorhoff, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' *Netherlands Quarterly of Human Rights* 29 (2011), 54–83.

The role of the freedoms was thus reduced in the racist context through an extrapolation from the texts of international law which restrict their exercise, including the text of the UDHR. While the Committee found meaning and utility in the 'due regard' clause, the invocation of the UDHR in its fullness and not only in relation to freedom of expression tilted the argument towards greater permissibility of restrictions on hate speech in the racist context. The statement on the 'due regard' clause in *Jewish Community* is counterpointed by GR 35:

> Article 4 requires that measures to eliminate incitement and discrimination must be made with due regard to the principles of the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. The phrase 'due regard' implies that, in the creation and application of offences, as well as fulfilling the other requirements of Article 4, the principles of the Universal Declaration of Human Rights and the rights in Article 5 must be given appropriate weight in decision-making processes. The due regard clause has been interpreted by the Committee to apply to human rights and freedoms as a whole, and not simply to freedom of opinion and expression,which should, however, be borne in mind as the most pertinent reference principle when calibrating the legitimacy of speech restrictions.[164]

Although the invocation of the UDHR in Article 4 is explicit, it may be suggested that, as elsewhere in CERD practice, the extent of the restrictions to which the Convention obligates States parties may be gauged through accounting for the Convention text as a whole measured in light of wider international standards and practice. The interrelationship between the Convention and the wider span of principles on freedom of speech is strongly asserted for interpretative purposes in GR 35:

> By virtue of its work in implementing the Convention as a living instrument, the Committee engages with the wider human rights environment, awareness of which suffuses the Convention. In gauging the scope of freedom of expression, it should be recalled that the right is integrated into the Convention and is not simply articulated outside it: the principles of the Convention contribute to a fuller understanding of the parameters of the right in contemporary international human rights law. The Committee has integrated this right to freedom of expression into its work on combating hate speech, commenting where appropriate on its lack of effective implementation and, where necessary, drawing upon its elaboration in sister human rights bodies.[165]

Part of the difficulty with Article 4 has been that it appeared to be less 'permeable' than other Convention articles—'the text of Article 4 is abundantly clear'[166]—and perhaps harder to integrate with broader standards. The adoption by the Committee of GR 35 in 2013 represents a determined attempt at 'integration' of the text of Article 4 into the broader stream of human rights principles, throwing into relief some earlier stances of CERD on the persistently controversial issue of racist speech.

## VII. Article 4(a)

In *Deutscher v Germany*, the Committee, apparently subsuming 'dissemination of ideas' under 'propaganda' stated that the list 'in Article 4, paragraph (a) . . . does not enumerate all conceivable discriminatory acts, but rather acts in which violence is used or where racist

[164] Para. 19.
[165] Para. 4.
[166] I. Diaconu, *Racial Discrimination* (UNDP Romania, 2007), p. 192.

propaganda in the goal'.[167] A literal analysis of Article 4(a) reveals that States parties shall declare as offences punishable by law: dissemination of ideas based on racial superiority; dissemination of ideas based on racial hatred; incitement to racial discrimination; acts of violence against any race or group of persons of another colour or ethnic origin; incitement to such acts of violence; and provision of assistance to racist activities including their financing. This classification omits 'incitement to racial hatred',[168] introduced as a component of the paragraph by GR 15,[169] departing from the literal wording of 4(a) which does not refer to incitement to racial hatred but to incitement to racial discrimination.[170] Concluding observations are replete with references to incitement to racial hatred, welcoming greater stringency in addressing incitement to racial hatred, references to which have been supplemented by references to 'ethnic'[171] or 'tribal'[172] hatred. The Committee has also recommended extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.[173] The Committee justifies its interpretation of Article 4 as including incitement to racial hatred by referring to the preventive aim of the Convention.[174]

GR 35 subsumes incitement to hatred into its classification of Article 4 offences and adds wider terminology on the basis of further Committee practice. Taking paragraphs of Article 4 together, the Committee recommends that States parties 'declare and effectively sanction as offences punishable by law':

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;
(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;
(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;
(e) Participation in organizations and activities which promote and incite racial discrimination.[175]

The list of offences to be declared, incorporating terms such as 'insults', 'ridicule', 'slander', and 'contempt', which are not described as such in the article, grafts elements of subsequent practice and understandings on to the skeleton of the article. The result is to widen the scope of Article 4, unless the refreshed terminology is understood as derived from the text and is not simply innovative. In practice, any implicit widening of the scope

[167] *Zentralrat Deutscher Sinti und Roma (on behalf of Zentralrat Deutscher Sinti und Roma and ors) v Germany*, CERD/C/72/D/38/2006 (2009), para. 4.3.

[168] See also CERD GR 31, para. 4(a) of which includes reference to incitement to racial hatred: HRI/GEN/Rev.9 (Vol. II), p. 309.

[169] The first four are set out in paragraph 3 of the recommendation, the fifth (financing activities) is set out in paragraph 5.

[170] Incitement to discrimination is referred to in paragraph 4 of GR 15 with reference to Article 20 of the ICCPR, and in paragraph 6 in connection with Article 4(b) of ICERD.

[171] CERD/C/60/CO/4, para. 12 (Croatia).

[172] CERD/C/65/CO/4, para. 13 (Madagascar).

[173] CERD/C/63/CO/11, para. 21 (United Kingdom).

[174] Principle 12 of Article 19's *Camden Principles on Freedom of Expression and Equality* (2009) define 'hatred' and 'hostility' to refer to 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group'. The reference to irrationality is appropriate in the context of incitement to racial hatred but in other contexts there may be perfectly rational justifications for hatred of those who commit great wrongs.

[175] Para. 13.

of the offences to be declared is likely to be countered by the more stringent requirements for the operation of law set out particularly in paragraphs 12, 14, 15, 16, 18, 20, and 25 of the recommendation.

Article 4 appears to represent a kind of apotheosis of the punitive approach to addressing racial discrimination through its references to 'an offence punishable by law'.[176] Despite the possible interpretation that 'offence punishable by law' could refer to, for example, the use of administrative or other sanctions, it has been observed that few Committee members 'have been persuaded that alternatives to criminal punishment are appropriate under 4(a)'.[177] CERD tended to adopt a strict, criminal law approach to the phrase: 'In saying that certain acts shall be punishable, the Convention requires sanctions under the criminal law. Actions prohibited under other Articles of the Convention can be dealt with under other branches of law: administrative law, constitutional law, civil law, labour law, and so on, but not those to which Articles 4(a) and 4(b) relate.'[178] While maintaining the centrality of criminal law in the application of Article 4 through references to 'criminalization', paragraph 12 of GR 35 introduces important nuances: 'the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups';[179] adding that, as a 'minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively'.[180]

## VIII. Dissemination and Incitement

The prohibition of the 'dissemination' of ideas based on racial superiority or hatred—from the Latin '*disseminare*' meaning to scatter, and defined simply as to 'spread widely',[181]—has been the subject of much urging by CERD. Statistics on cases brought, prosecutions launched, and penalties imposed under the dissemination rubric are requested in similar fashion to other data sought. The Committee has been critical of criminal provisions on 'dissemination' that confine the prohibition to dissemination among the public,[182] though the Committee has also commented on 'statements . . . made squarely in the public arena, which is the central focus of the . . . the Convention'.[183] On the dissemination of ideas, the provisions in GR 35 on denials of genocide and crimes against humanity should be

[176] Article 4 of ICERD and Article 13(5) of the American Convention on Human Rights refer the offending speech as 'punishable by law', whereas Article 20(2) of the ICCPR requires that it be 'prohibited by law'. Paragraph 2 of the general comment of the Human Rights Committee on Article 20 (GC 11) refers to 'an appropriate sanction 'in case of violation rather than simply 'punishment': HRI/GEN/1/Rev.9 (Vol. I), p. 182.

[177] D. Mahalic and J.G. Mahalic, 'The limitation of provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', *HRQ* 9 (1987), 74–101, 94.

[178] M. Banton, *International Action against Racial Discrimination* (Clarendon Press, 1996), p. 205, citing Wolfrum, another former member of the Committee.

[179] GR 35, para. 12.

[180] *Ibid.*, para. 9.

[181] *Concise Oxford English Dictionary* (11th edn, Oxford University Press, 2004), p. 414.

[182] A/58/18, para. 474 (Norway).

[183] *Gelle v Denmark*, para. 6.5; also *Jama v Denmark*, para. 6.5. See further discussion of 'public' and 'private' in Chapters 6 and 8.

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understood in light of previous practice .[184] The Committee has not criticized laws against Holocaust denial and took a step further in supporting the criminalization by France of 'attempts to deny war crimes and crimes against humanity as defined in the Statute of the International Criminal Court, and not only those committed during the Second World War',[185] as well as welcoming education on the Holocaust and on the 'causes of the genocide of Jews and Roma'.[186] GR 35 does not refer to the Statute of the International Criminal Court (ICC) but opts for a broader formulation. Statements based on racial superiority can in particular contexts be taken as incitement,[187] and 'Holocaust denial' can also function as a framework for incitement to discrimination; without specific reference to the Holocaust, GR 35 makes it clear that penalization of denials is permissible only when such denials constitute incitement.[188]

Incitement, or the stirring up of—usually—violent or unlawful behaviour, is a staple of systems of criminal law. Whereas the application of criminal law to incitement to racial discrimination and hatred and, *a fortiori*, to racial violence is unremarkable, its application to dissemination of ideas raises more questions. CERD has on occasions taken a strict line on the mental element supporting criminal liability for dissemination and incitement alike. The CERD study published by the United Nations in 1986 stated baldly that

> [t]wo things are prohibited to be disseminated under penalty of law... ideas based on racial superiority and ideas based on racial hatred. It is also clear that the mere act of dissemination is penalized, despite lack of intention to commit an offence and the consequences of the dissemination, whether they be grave or insignificant.[189]

Such a stance approaches the domain of strict or absolute liability, and such an absence of culpability elements beyond the act of dissemination would do violence to basic principles of criminal liability in many if not most jurisdictions.[190] Equally, on the definition of

[184] GR 35, para. 14.

[185] CERD/C/FRA/CO/16, para. 20.

[186] Concluding observations on Moldova, CERD/C/MDA/CO/15, para. 6.

[187] In *Jewish Community of Oslo v Norway*, para. 10.4, statements made by the leader of the 'Bootboys' 'contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and "footsteps" must... be taken as incitement at least to racial discrimination, if not to violence'.

[188] Para. 14, which footnotes paragraph 49 of GC 34 of the Human Rights Committee, which states that laws 'that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes... The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events... Restrictions on freedom of opinion should not go beyond. What is permitted in paragraph 3 [of Article 19] or required under Article 20.' The paragraph in GC 34 cites *Robert Faurisson v France*, CCPR/C/58/D/550/1993 (1996), where the author of the communication denied the existence of gas chambers for the extermination of Jews in concentration camps, and argued that the Gayssot Act of 1990 promoted the Nuremberg trial and judgment to the status of dogma by imposing criminal sanctions on those who challenged their findings and premises. The Human Rights Committee upheld the ban under Article 19(3)(a) of the ICCPR with regard to respect for the rights and reputation of others because (para. 9.6.) the restriction 'served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism'. The Views on the Gayssot Act are tailored to the facts, while the comment in paragraph 49 of GC 34 'seems to indicate that laws prohibiting Holocaust denial, or indeed the denial of any particular historical facts, are incompatible with Article 19': Joseph and Castan, *The International Covenant*, p. 643. See also *Ross v Canada*, where the Human Rights Committee recalled Faurisson, adding that the restrictions upheld in the latter case 'also derive support from the principles reflected in Article 20 (2) of the Covenant': CCPR/C/70/D/736/1997 (2000), para. 11.5.

[189] CERD 1986 Study, para. 83.

[190] See T. Meron, 'The meaning and reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *AJIL* 79 (1985), 283–318, Banton, *International Action*, pp. 202–9; S. Farrior,

incitement in Article 4(a), the same paper concluded that 'what is penalized . . . is the mere act of incitement, without reference to any intention on the part of the offender or the result of such incitement, if any'.[191]

Whatever comment might be made concerning a causal link between 'dissemination' of a racist tract and awareness of criminality,[192] the elements of striving to bring about a particular result or the creation of an imminent risk are commonly built into the notion of incitement, whether or not the results or consequences follow. It is not unreasonable to read the Convention to the effect that the local application of these provisions will be embedded in standard criminal law principles.[193] 'Hard-line' statements on behalf of the Committee rejecting the need for proof of *mens rea* for incitement and dissemination stand in stark contrast to GR 35, which in paragraph 16 rejects 'strict liability':

> Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in Article 4, States parties should take into account, as important elements in the incitement offences, in addition to the considerations outlined in paragraph 15 above, the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question, considerations which also apply to the other offences listed in paragraph 13.

Paragraph 15 of GR 35 refers to a range of 'contextual factors' in the qualification of dissemination and incitement as offences punishable by law: the content and form of speech, the economic, social and political climate, the position or status of the speaker, the reach of the speech, and the objectives of the speech, each subdivided into subsets of factors. The combination of provisions in paragraphs 15 and 16 constricts freewheeling approaches to criminal prosecution for speech offences. Instances where the Committee urged a State party to consider relaxing the strict requirement of intent (wilful conduct) in incitement to racial discrimination,[194] and welcomed an amendment to the penal code so that it was no longer necessary that incitement to racial hatred be intentional in order to

'Moulding the matrix: the historical and theoretical foundations of international law concerning hate speech', *Berkeley Journal of International Law* 14 (1996), 1–98, for samples of Committee practice.

[191] *CERD 1986 Study*, para. 96. Re dissemination and incitement together, see, *ibid.*, para. 235: 'The legislation of some States parties subjects . . . [dissemination and incitement] . . . to certain conditions, for example that the dissemination or incitement must be intentional, or must have certain objectives such as "to stir up hatred", or that they be "threatening, abusive or insulting" . . . these conditions are restrictive and ignore the fact that Article 4(a) of the Convention declares punishable the mere act of dissemination or incitement, without any conditions.'

[192] 'Laws against incitement to racial discrimination or hatred are . . . necessary to protect public order and the rights of others. The majority of the Committee is convinced that the same applies without distinction to the dissemination of ideas based on racial superiority': CERD 1986, para. 231; this formulation indicates that even in 1983 when the report was prepared for the World Conference the Committee was not unanimous on this question.

[193] The *travaux* are not outstandingly clear on this question. Referring to the prohibition in Article 4(b), the report of the Commission on Human Rights summarized a discussion on the distinction between 'incite' and promote' in terms of incitement being 'a conscious and motivated act', while promotion might occur 'without any real intention or endeavour to incite': E/CN.4/874, para. 169. This suggests that the standard criminal law character of incitement was well understood.

[194] Ukraine, CERD/C/UKR/CO/18, para. 9.

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be construed as an offence,[195] are not in accord with current practice as represented by GR 35. Concluding observations and communications that centre on intention to disseminate may be expected to respond to the reading of Article 4 set out in GR 35.

Racial and ethnic stereotyping and stigmatization have also been drawn into general discourse on Article 4. GR 35 refers to these forms of speech but does not list them as offences punishable by law, noting only that '[s]tereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee'.[196] The recommendation also asserts the power of free speech as such 'in the deconstruction of racial stereotypes',[197] and regards 'the avoidance of stereotyping' as a desideratum in media representations of ethnic, indigenous, and other groups.[198]

Assistance to racist activities is the last in the list of the 4(a) offences to be declared by law. GR 15 reminds States parties that Article 4(a) also penalizes the financing of racist activities, which the Committee takes to include all the offences to be declared under 4(a). The Committee has recommended the amendment or introduction of legislation to make such assistance a discrete criminal offence.[199] Whereas the 'provision of any assistance' may be consistent with general notions of assistance to crime, the financing aspect may also be associated with the organization-directed 4(b). Assistance to racist activities is not referred to explicitly in the list of offences in paragraph 13 of GR 35.

## IX. Article 4(b)

The banning of organizations in Article 4(b) is a strongly contested provision of Article 4, along with 'dissemination' in 4(a). The requirement to ban racist organizations in line with Article 4(b) has produced many exchanges between the Committee and States parties. If the reluctance of some States to ban racist groups has not significantly abated, neither has the Committee's resolve to press for such action to be taken. Paragraph 4(b) requires that States parties declare illegal and prohibit organizations which promote and incite racial discrimination, organized propaganda activities which promote and incite racial discrimination, and all other propaganda activities which promote and incite racial discrimination. Additionally, participation in the above organizations shall be recognized as an offence punishable by law, as shall participation in all other (racist) propaganda activities. GR 15 is combative:

> Some States have maintained that in their legal order it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination. The Committee is of the opinion that Article 4(b) places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment. These organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished.[200]

[195] A/56/18, para. 262 (Cyprus).
[196] Para. 6.
[197] Para. 29.
[198] Para. 40.
[199] 'The Committee recommends that the State party establish provisions making each of the criminal acts referred to in the relevant paragraphs of Article 4 . . . a criminal offence, including assistance to and financing of racist activities': concluding observations on Togo, CERD/C/TGO/CO/17, para. 12.
[200] GR 15, para. 6.

CERD insists that the organization is to be banned on the basis of its character—its purposes, aims, and objectives—without any hiatus, before it attempts to engage in nefarious activities. GR 35 reiterates the basics of 4(b):

> The Committee underlines that Article 4 (b) requires that racist organizations which promote and incite racial discrimination be declared illegal and prohibited. The Committee understands that the reference to 'organized... propaganda activities' implicates improvised forms of organization or networks, and that 'all other propaganda activities' may be taken to refer to unorganized or spontaneous promotion and incitement of racial discrimination.[201]

Participation in every case is to be punished by law, a requirement that overlaps with the assistance/financing reference in 4(a). The emphasis in 4(b) is presumably on private actors, since 4(c) addresses the possibility of promotion or incitement of racial discrimination by the public authorities.

Accordingly, CERD expresses concern about the absence of legislation prohibiting racist organizations or situations in States where the law focuses on prohibition of activities conducted by racist organizations rather than on the prohibition of the organizations as such.[202] The Committee has, *inter alia*, insisted on 'specific',[203] 'explicit',[204] or 'specific and unambiguous'[205] criminal legislation banning racist organizations. It has not been receptive to arguments that a formal ban on organizations would not be useful because the groups involved were loose networks rather than formal organizations,[206] nor to arguments that banning organizations would have adverse effects.[207] The argument that banning organizations would merely 'drive them underground' comes to mind in such cases; an 'organization driven underground by repressive measures might be much more dangerous than one allowed to act openly'.[208]

## X. Article 4(c)

The paragraph underscores the law and policy obligation in relation to public authorities as well as widening obligations beyond the application of criminal law. Lerner observes that 4(c) does not impose obligations regarding internal criminal law 'but only urges them to adjust their policies to principles in accordance with the Convention and to take care that public officers, on the national and local levels, do not depart from such policies. In that sense it complements Article 2, paragraph 1'.[209] Another author comments that 4(c) adds little to the other two paragraphs of Article 4 though it does 'serve to illustrate the particular evil of public officials and bodies engaging in racist activities'.[210] In more

[201] GR 35, para. 21.
[202] Concluding observations on Canada, CERD/C/61/CO/3, para. 21.
[203] Concluding observations on Jamaica, CERD/C/60/CO/6, para. 6.
[204] Concluding observations on Uganda, CERD/C/62/CO/11, para. 12.
[205] Concluding observations on Fiji, CERD/C/FJI/CO/17, para. 20.
[206] Concluding observations on Norway, CERD/C/63/CO/9, para. 13. The representative of Norway, CERD/C/SR.1603, para. 36, had observed that the government 'had not introduced a ban on racist organizations, since such a ban could have the indirect effect of making informal racist networks appear lawful'.
[207] Concluding observations on Trinidad and Tobago, A/56/18, para. 349.
[208] K. Boyle and A. Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism', in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001), Baldaccini, pp. 135–91, p. 162.
[209] *The UN Convention*, p. 51.
[210] T. Mendel, 'Equality and freedom of expression: an accommodative framework', Background Paper for 11 December 2008 Meeting for Promoting Equality within a Free Speech Framework.

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general terms, racist expression by public figures or officials has been judged by CERD to be of particular concern in view of the influence or power they exercise. Hence in one case, the Committee was 'deeply concerned about reported instances of hate speech directed against national and ethnic minorities, including statements attributed to high-ranking government officials and public figures . . . reported to have a significant detrimental effect on the population'.[211] On public and private authorities/institutions, in *Deutscher v Germany*, the petitioners complained under, *inter alia*, Article 4(c), about a letter published in a professional police journal that contained disparaging remarks about Roma and Sinti. The State party submitted that the letter was published by the author as a private person and not in his official capacity, adding that the 'absence of public charges and of a conviction by public prosecutorial authorities cannot be considered to be a violation of this provision, as promotion and incitement requires significantly more than merely refraining from further criminal prosecution'.[212] The Committee did not elaborate on the term 'permit' but agreed with the contention that the professional association that published the letter was not a State organ and that the letter was written in a private capacity, declaring that part of the claim to be inadmissible.[213]

GR 35 makes only limited reference to this paragraph of Article 4, focusing on the individuals who staff public authorities and institutions:

> Under the terms of Article 4 (c) regarding public authorities or public institutions, racist expressions emanating from such authorities or institutions are regarded by the Committee as of particular concern, especially statements attributed to high-ranking officials. Without prejudice to the application of the offences in subparagraphs (a) and (b) of Article 4, which apply to public officials as well as to all others, the 'immediate and positive measures' referred to in the chapeau may additionally include measures of a disciplinary nature, such as removal from office, where appropriate, as well as effective remedies for victims.[214]

The special responsibility of public figures to provide anti-racist and pro-tolerance leadership is a recurring motif in CERD work.

## D. Comment

The Committee considers it an obligation to 'ensure the coherence of the interpretation of the provisions of Article 4'.[215] The words and phrases and internal conceptual arrangement of the Article raise their own questions, as does its relationship to the Convention as a whole and to sibling provisions in human rights. Historically, CERD practice has tended towards literalism in downplaying the psychological, motivational elements in hate speech, and the circumstances and consequences of its production. Literalist tendencies were never complete in that practice includes the recognition of a wider span of victims of hate speech than strictly mandated by Article 4, augmenting the victim-oriented ethos of ICERD,[216] while the emphasis on State obligations in the Article has

[211] Concluding observations on Turkmenistan, CERD/C/TKM/CO/5, para. 11.
[212] Para. 4.6.
[213] Para. 7.5.
[214] GR 35, Para. 22.
[215] *Jewish Community*, para. 10.3.
[216] P. Thornberry, 'Bringing the victims to light under the International Convention on the Elimination of All Forms of Racial Discrimination', in M.A. Jovanović and I. Krstić (eds), *Human Rights Today—60 Years of the Universal Declaration* (Eleven International Publishing), pp. 145–70.

not ruled out its conceptualization as a right of individuals to be protected.[217] The perception of ICERD as a 'draconian' regulatory model that is less than generous to freedom of speech principles has nonetheless been widespread and is in some respects justified, particularly as regards the offence of dissemination of ideas based on superiority and hatred,[218] and the stern attitude to the banning of racist organizations where the 'Murder Incorporated' paradigm retains its lustre. The logic of the principled structure of the Convention is recalled in GR 35, when offences of dissemination and incitement are categorized as addressing the 'upstream' and 'downstream' manifestations of racist speech,[219] and the dissemination of ideas provisions are understood as 'a forthright expression of the preventive function of the Convention'.[220]

The emergence of GR 35 appears to mark an *aggiornamento* of the overall approach to Article 4 and racist hate speech in general.[221] As elsewhere in the operation of the Convention, and in light of its conceptualization as a 'living instrument', fresh currents of opinion have propelled the Committee towards a re-evaluation of the relationship between the proscription of hate speech and respect for freedom of expression,[222] standards which should 'be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other'.[223] Apart from replenishing the 'philosophy' and details of Article 4, the recommendation locates the article in the wider context of the 'resources of the Convention', an evocation that weakens the propensity 'to account for all appearances from as few principles as possible'.[224] Hence, the vision of Article 4 as the nucleus around which the other particles of the Convention circulate, has somewhat receded. The incorporation into the recommendation of Articles 5 and 7, which underline the potential of free speech and education to counter hate speech. Criminal law has a rightful place in the legal armoury against hate speech, and may be educative in itself, but also benefits through integration with a wider repertoire of law and policy: as noted, in GR 35, it is recommended that 'the criminalization of... racist expression should be reserved for serious cases... while less serious cases should be addressed by means other than criminal law'.[225] Taking a cue from the Human Rights Committee—and wider international understandings of freedom of

[217] '[T]he fact that Article 4 is couched in terms of States parties' responsibilities, rather than inherent rights of individuals, does not imply that they are matters to be left to the internal jurisdiction of States parties... If such were the case, the protection regime established by the Convention would be weakened significantly... the Convention's "rights" are not confined to Article 5': *Jewish Community*, para. 10.6. See further discussion in relation to Article 6 in Chapter 16.

[218] The dissemination ideas provision 'is unusual among human rights instruments in referring to the penalization of speech without an express link to the possibility that such speech will incite hatred or violence or discrimination': *TBB-Turkish Union in Berlin/Brandenburg v Germany*, CERD/C/82/D/48/2010 (2013), Vázquez dissent, para. 5.

[219] Para. 30.

[220] Para. 11.

[221] While 'hate speech' in Article 4 principally relates to crime, it is distinguishable from the broader question of 'hate crimes', that is, crimes in general aggravated by racist motivations: see commentary in Chapter 8 on Article 2 of the Convention.

[222] Footnotes to the recommendation accord prominence to GC 34 of the Human Rights Committee and The Rabat Plan of Action on the Prohibition of the Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence.

[223] Para. 45.

[224] Smith, *The Theory of Moral Sentiments* (1790), VII.ii.2.14, cited in A. Sen, *The Idea of Justice* (Penguin Books, 2010), 394.

[225] Para. 12; also *TBB-Turkish Union*, Vázquez dissent, para. 13.

speech principles—the recommendation insists that the 'application of criminal sanctions should be governed by principles of legality,[226] proportionality and necessity'.[227] Further, in light of the 'due regard' clause, the 'chilling effects' on freedom of speech of vaguely drafted laws and over-zealous approaches to criminal prosecution should also be borne in mind.[228]

With regard to the details of Article 4, GR 35 subtly widens the list of offences while placing stronger freedom of speech safeguards around their implementation. For incitement, recommendations on the mental and consequential aspects of the definition of crime, expressed in terms of intention and imminence of risk, would place greater constraints upon prosecutions than before.[229] The definition of incitement appears to mark a departure from earlier pronouncements, though, as paragraph 15 of the recommendation also makes clear, the understanding of context in the definition and application of offences is always crucial. 'Context' points made by paragraph 15 recall, *inter alia*, that '[d]iscourses which in one context are innocuous may take on a dangerous significance in another': genocidal discourses represent only the most potent case in point.[230] The provision on genocide denial suggests careful crafting of laws against, for example, Holocaust denial, though the public speech of the deniers may well have the capacity to provoke and incite in specific circumstances.

The dissemination offence is also subject to the modifiers in the recommendation, with its notable provision to protect academic and political speech from suppressive action, provided it does not amount to incitement.[231] *A fortiori*, human rights defenders should also not be subject to speech suppression. Serious discussions of racial questions are not in principle caught in the net of Article 4; they would not, *ex facie*, equate with 'propaganda' or preaching unless we succumb, *mirabile dictu*, to that classic of Oliver Wendell Holmes: 'Every idea is an incitement... Eloquence may set fire to reason.'[232] In *Poem and Fasm v Denmark*, the State party took the view that Article 4 did not impugn 'scientific theories put forward on differences of race, nationality or ethnicity... [and]... probably also... statements that were not made in a scientific context proper, but otherwise as part of an objective debate'.[233] The distinction between 'scientific contexts' and 'objective debate' on the one hand, and racist manipulation of opinion on the other is not always easy to draw, and the Committee may not be overly impressed by the cultural or academic credentials of an author or a publication. In *TBB-Turkish Union*, the fact that the impugned interview with the author (Sarrazin), headed 'Class instead of Mass', was published in the German cultural journal *Lettre International* (and subsequently included in a book) did not save his non-prosecution from criticism by the Committee, despite the comment by the State party that the comments were made in the context of 'a critical

[226] The essence of being 'provided by law' is that laws should be formulated with sufficient precision so that conduct can be appropriately regulated in advance.

[227] GR 35, para. 12.

[228] *Ibid.*, para. 20.

[229] The list of offences in paragraph 13.

[230] GR 35, para. 15.

[231] *Ibid.*, para. 25.

[232] In *Gitlow v New York*, 268 U.S. (1925). Perhaps less well known is his statement that a 'new and valid idea is worth more than a regiment and fewer men can furnish the former than can command the latter', in H.C. Shriver (ed.), *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Papers* (Central Book Co., 1936), p. 181.

[233] Para. 4.10.

discussion of economic and social problems' in Berlin.[234] The implied issue of genres of discourse was adverted to in the dissent of Committee member Vázquez, who argued that 'States parties should take account of the context and the genre of the discussion in which the statements were made . . . whether the statements were part of a vitriolic *ad hominem* attack or . . . were presented as a contribution, to reasoned debate on a matter of public concern, as the State party found'.[235] The history of race theory unfortunately shows that rabid views were regularly expressed through the best publishing vehicles for academic discussion. By contrast, the context of scientific research on a specific ethnic group saved the writers and the State in *Aksu v Turkey*, where a book and two dictionaries were alleged to have contained material offensive to Roma.[236] The 'academic' setting did not save Mr Sarrazin.[237]

Logic suggests that a line should be drawn between bringing racist arguments to light, in a sense 'disseminating' them, and endorsing such statements, though the distinction may be a fine one. The conviction by the Danish courts of a journalist (Jersild) for presenting a television programme containing racist statements from a group known as 'the greenjackets' is a case in point. The European Court of Human Rights (ECtHR) in *Jersild v Denmark*[238] took the view that the journalist had not intended to promote racism but to bring it to light, and the conviction had violated Jersild's right to freedom of expression under Article 10 of the ECHR. The case is instructive in that the relevant Danish law was passed to conform to its obligations under ICERD, while the European Court took the view that its own interpretation of Article 10 of the ECHR was also compatible with ICERD.[239]

What mode of superiority, if any, was being disseminated engaged the attention of the Committee in *TBB-Turkish Union*. The chapeau to Article 4 refers to 'theories of superiority of one race or group of persons of one colour or ethnic origin', while 4(a) refers curtly to 'ideas based on racial superiority or hatred'. For the majority, the ideas expressed by Sarrazin were ideas of 'racial superiority, denying respect as human beings and depicting generalized negative characteristics of the Turkish population'.[240] For dissenting member Vázquez, on the other hand, the issue was one of 'statements of superiority on the basis of nationality or ethnicity' and whether such were caught in the net of Article 4(a); whether or not such statements were to be declared as offences under

[234] *TBB-Turkish Union v Germany*, para. 4.4. In para. 8.1, the petitioner cites a 'scientific opinion' qualifying Sarrazin's interview statements as racist: there appears to have been, *vide* Swift, a 'battle of the books'.

[235] *TBB-Turkish Union v Germany*, Vázquez dissent, para. 14.

[236] EctHR, *Aksu v Turkey*, App. Nos 4149/04 and 41029/04 (2012). With regard to the book, the Court stated that it was 'consistent with the . . . case law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and publish their findings' (para. 71); it was also consistent 'to consider the impugned passages not in isolation but in the context of the book as a whole and to take into account the method of research' (para. 72). See also the concurring opinion of Evatt and Kretzmer, co-signed by Klein in *Faurisson v France*, para. 10 of which observed that while 'there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths . . . anti-Semitic allegations of the sort made by the author, which violate the rights of others . . . do not have the same protection . . . The restrictions placed on the author did not curb the core of his right to freedom of expression, nor . . . his freedom of research; they were intimately linked to . . . the right to be free from incitement to racism or anti-Semitism.'

[237] For an approach to a different branch of science, see the Inter-American Convention against Racism, Article 4 (xiii).

[238] ECtHR, App. No. 15890/89 (1994).

[239] *Jersild*, para. 30.

[240] *TBB-Turkish Union*, para. 12.6.

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4(a), he did not find that Sarrazin had asserted 'the inferiority of Turkish culture or Turks as a nationality or ethnic group'.[241] The majority did not unpack the race/ethnicity nexus, leaving unanswered what degree or quality of superiority was being asserted. However, Article 4(a) uses 'racial superiority' and 'racial discrimination' in the same sentence, making it somewhat implausible to argue that 'racial superiority' is to be understood narrowly as only 'race', while 'racial discrimination' carries the usual expansive meaning set out in Article 1; further the identified targets of hate speech in 4(a) include not only race but also groups of persons 'of another colour or ethnic origin'. The majority may also have detected a hint of biological racism in summarizing the author's suggestion that Turks were 'neither able nor willing' to integrate, and exhibited 'a collective mentality that is aggressive and ancestral';[242] the additional references to the intelligence of a population were also not helpful; the positive appreciation of the intelligence of other populations may only have hardened, not softened, the impression of an aggressive, racist discourse. The majority also found elements of incitement in the impugned discourse, an important consideration in light of GR 35, which consolidates the forms of superiority into 'ideas based on racial or ethnic superiority or hatred',[243] folding elements in the chapeau into the offences to be declared by law.

Ideas and theories of 'superiority' should be distinguished from ethnocentric expression in general and *a fortiori* from defensive 'recognition' or 'identity' politics practised by groups seeking their place in society: 'superiority' does not simply equal 'difference'. While this may seem an obvious point to labour, the Convention should not be understood as a homogenizing force but as one supporting diversity and self-expression, hostile only to certain categories of discourse. The justification of reaction against racist ideas would lose force if extended from a critique of racist hate as asserting racial hierarchies, to a generalized critique of expressive nationalisms of various kinds.

This above reading of Article 4 may offer a perspective on claims that the Convention is an 'outlier' among international instruments in the area of free speech,[244] and whether, in particular, it is 'compatible' with Articles 19 and 20 of the ICCPR. According to its General Comment (GC) 11,[245] the Human Rights Committee regards the prohibition in Article 20 as compatible with freedom of expression.[246] Paragraph 50 of GC 34 maintains that 'Articles 19 and 20 are compatible with and complement each other'; paragraph 52

[241] *TBB-Turkish Union*, Vázquez dissent, para. 8.

[242] *TBB-Turkish Union*, para. 12.6.

[243] GR 35, para. 13(a).

[244] See, *inter alia*, T. McGonagle, 'The Council of Europe against online hate speech: Conundrums and Challenges: Expert Paper': <http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227>.

[245] 'Prohibition of propaganda for war and inciting national, racial or religious hatred', HRI/GEN/1/Rev.9 (Vol. I), p. 182.

[246] On the prohibitions in Article 20, para. 2 of the comment states: 'In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in Article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while para. 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned... For Article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in Article 20, and should themselves refrain from any such propaganda or advocacy.'

adds that it is 'only with regard to the specific forms of expression indicated in Article 20 that states parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with Article 19', a stipulation requiring that Article 20 be interpreted in line with Article 19(3), which limits the range of justifications for restriction of the right.[247] Elements of this restrictive scenario (rights and reputation of others, public order, etc.) accord with the criminal law provisions of Article 4 relating to incitement to discrimination and violence, especially as restrictively interpreted in GR 35, where, *inter alia*, the mens rea requirements are 'upgraded',[248] prosecution is envisaged as reserved for serious cases,[249] and the 'due regard' principle is more closely linked to freedom of expression than in previous practice.[250] As regards 'the rights of others' (ICCPR, Article 19(3)), GR 35 carries the message that the conceptual nexus of the ICERD is complex and not reducible to a simple choice between a prohibition and a freedom: the protection of persons from racist hate speech

> is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups: the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims.[251]

On the other hand, authors discern an element of dissonance between CERD and the Human Rights Committee with regard to denials of genocide, etc. Temperman argues that paragraph 14 of GR 35, (demanding that States declare denials of genocide, etc, as offences when they constitute incitement), despite 'importing' phrases from GC 34 of the Human Rights Committee ('the expression of opinions about historical facts should not be prohibited or punished'), 'fails to distract from the fact that CERD has embarked on a fundamentally different path [to] its UN colleague'.[252] As noted, GC 34 has taken a sternly recalcitrant stance on denials.[253]

'Convergence' between the ICCPR and the ICERD criminalization of 'dissemination of ideas' also raises difficult questions. The Article 4 provision is stricter than Article 20

[247] Aside from GC 11 and the reference in GC 34, the Human Rights Committee has left the content of Article 20 somewhat undeveloped in cases where the State party was alleged to have offered insufficient protection against racial vilification. In *Vassilari v Greece*, CCPR/C/95/D/1570/2007 (2009), Roma complainants were threatened with militant action if they failed to comply with a petition calling for their eviction. The case was declared inadmissible because the facts could not be adequately substantiated. In *Anderson v Denmark*, CCPR/C/99/D/1868/2009 (2010), the complainant's claim that a politician had compared Islamic headscarves with Nazi swastikas was deemed inadmissible because she had not been personally affected. In light of these jurisprudential limitations, Joseph and Castan raise the question of 'whether an Article 20(2) complaint can ever be admissible': *The International Covenant*, p. 629.

[248] GR 35, para. 16.

[249] Para. 12.

[250] Para. 19.

[251] GR 35, para. 28. See also *Sangathan v Union of India*, Indian Supreme Court, March 2014, where the court stated that 'hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society... Hate speech... impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in... democracy': cited in S. Benesch, 'Defining and Diminishing Hate Speech', in P. Grant (ed.), *State of the World's Minorities and Indigenous Peoples 2014* (Minority Rights Group, 2014), pp. 18–25, p. 21.

[252] J. Temperman, 'Laws against the Denial of Historical Atrocities: A Human Rights Analysis', *Religion and Human Rights* 9 (2014), 151–80, 162.

[253] Comment by Joseph and Castan, *The International Covenant*.

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ICCPR which refers to 'advocacy . . . that constitutes incitement', which is to be 'prohibited by law' and not necessarily criminalized.[254] For dissemination of ideas as well as incitement crimes, the fresh reading of Article 4 takes the Convention closer to the ICCPR; context is equally insinuated into the qualification of the dissemination crime, as well as the 'risk or likelihood' of consequences resulting from speech.[255] Overall, it may be argued that GR 35 takes CERD practice nearer to 'libertarian' currents regarding the prosecution of hate speech crimes; the suggested criminal law requirement of the need for 'imminence' of the consequences of incitement may be more stringent than in many jurisdictions.[256]

With regard to Article 4(b), the principal Convention right against which it is to be calibrated is 'the right to freedom of peaceful assembly and association' in Article 5(d)(ix).[257] The freedom of association right, the essence of which is the freedom to join together in order to pursue common interests, implicates groups such as political parties, NGOs, trades unions, professional associations, corporations, etc. Regarding restrictions on association, much of the litigation before international bodies has revolved around the situation of political parties.[258] In *Vona v Hungary*,[259] a case involving the Hungarian Guard Movement, much of whose rhetoric centred around protection from 'Gypsy criminality', the ECtHR upheld the dissolution of the Movement in light of its race-based opposition of the Roma minority to the ethnic Hungarian majority that went beyond the peaceful articulation of political views.[260] In light of the frequently stressed preventive function of 4(b), it was also stated in Vona that the ECHR did not require that authorities to delay their intervention until anti-democratic action had been taken, or violence had erupted;[261] a concurring judgement made the point in even stronger terms.[262] As observed, Article 4(b) has been interpreted strictly, and the line does not appear to have moved following GR 35; explicit or implicit references to the position of associations are found in a number of paragraphs.[263]

In addition to the technicalities of textual interpretation, the issue of application to local circumstances adds a further dimension to complexity. Attention to locality includes the history of the country, the area and the groups implicated as oppressors and victims. Locality, as *Jewish Community* demonstrates, may also contribute to a finding of incitement

[254] The 'advocacy' provision in Article 20 includes 'religious hatred', which Article 4 of ICERD explicitly does not. Note however, para. 6 of GR 35.

[255] Paragraph 16 of GR 35, which would restrict criminalization to cases carrying a risk or likelihood of (negative) consequences resulting from speech that were 'desired or intended by the speaker'. While the syntax of the provision is better suited to incitement than to 'dissemination of ideas', the restrictive approach brings all the offences in Article 4 under a common rubric.

[256] On the wider 'integration' of Standards, see paragraph 4 of GR 35, discussed earlier in this chapter.

[257] See the commentary on Article 5 in the present work.

[258] See, *inter alia*, EctHR, *Refah Partisi and Others v Turkey* (2003), 37 EHRR 1; *United Communist Party of Turkey and Others v Turkey* (1998), 26 EHRR 121.

[259] EctHR, App. No. 35943 (2013).

[260] Para. 62, and paras 13 and 14.

[261] Paras 57 and 68. The Court cited Articles 1, 2, and 4 of ICERD as part of the legal framework in Hungarian domestic law.

[262] Judge Pinto de Albuquerque, following extensive citation of ICERD and other legal materials, stated that 'States parties to the Convention [the ECHR] have the duty to criminalize speech or any other form of dissemination of racism, xenophobia or ethnic intolerance, prohibit every assembly and dissolve every group, organisation, association or party that promotes them . . . Such an international positive obligation must be acknowledged . . . as a principle of customary international law, binding on all States, and a peremptory norm.'

[263] Paras 24, 39, 40, 41, 43, and 44.

and presumably its negation and penetrate the very construction of what counts as 'hate'. Locality is also culture, bearing in mind that different societies take different views on dignity and freedom, acceptable and unacceptable speech, and that all societies, even the most 'liberal', have their taboos. In this scenario, whilst the liberal defence of freedom of speech in relation to 'the marketplace of ideas' has intrinsic attraction, the stress laid on freedom of speech as permitting abuse, ridicule, statements that 'offend, shock or disturb', etc[264] may speak to certain kinds of society, the attributes of which may not be widely shared. As to whether the restatement of the relationship between freedom of speech and hate speech prohibitions in the recommendation speaks to hate speech phenomena across a wide cultural span, only time will tell.

Discourses of racial superiority, dehumanization, denigration, and contempt continue to direct themselves energetically to the categories of person recognized in Convention practice, and we may recognize freshly minted 'phobias' and 'isms' in the babble of sulphurous outpourings.[265] Half a century after the adoption of the Convention, it is depressingly evident that racist hate speech remains a significant social phenomenon, so that basic Convention framework for addressing it retains its *raison d'être*. The rationale of taking racist speech seriously can be understood by reflecting on the discourses of dehumanization that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that can flourish if unchecked against vulnerable minorities through normalization or banalization of discourses of racial inferiority and superiority. Targeted groups well appreciate that the walls between thought, public discourse, and oppressive action can be very thin.

## I. On Defamation of Religions

Parallel with reflections within CERD on how discrimination on the ground of religion should be treated under the Convention, a series of UN resolutions dating back to 1999 addressed the question of 'defamation of religions';[266] Human Rights Council resolution 7/19 may be taken to exemplify the series.[267] No definition of 'defamation of religions' is attempted therein, but the facets of defamation include negative stereotyping of religions, their adherents, and sacred persons, the identification of Islam with terrorism, the profiling of Muslims after 11 September 2001, laws controlling and stigmatizing Muslim minorities, and attacks on businesses, cultural centres, and places of worship. The resolution urges State action to prohibit 'the dissemination . . . of racist and xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility and violence',[268] and provide protection against 'acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion'.[269] On the relation between 'defamation of religions' and freedom of expression, the resolution is robust: 'respect of religions and protection from contempt is an essential

[264] EctHR, *Handyside v UK* (1976), 1 EHRR 737, para. 49.

[265] N. Ghanea, '"Phobias" and "Isms": Recognition of Difference or the Slippery Slope of Particularisms?' in N. Ghanea, A. Stephens, and R. Walden (eds), *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, 2007), pp. 211–32.

[266] E/CN.4/Res/1999/82.

[267] Adopted at the 40th meeting of the Council on 27 April 2008 by 21 votes to 10, with 14 abstentions; see also A/HRC/RES/4/9 (2007); A/HRC/RES/10/22 (2009), A/HRC/RES/13/16 (2010).

[268] Resolution 7/19, para. 8.

[269] *Ibid.*, para. 9.

element conducive for the exercise by all of the right to freedom of expression'.[270] 'Religion' is not defined: the emphasis is on religions in the plural. The issue intersected with discussions on possible amendments to ICERD.

As noted earlier, ICERD extends its protection to religious communities under defined circumstances, even if critics claim that extension to 'documented' religions that separate beliefs, theologies, and principles of right action from wider social practice, is beyond the Committee's mandate.[271] While *P.S.N.*[272] and *A.W.R.A.P.*[273] posit a boundary to speech directed at religious communities that are not coterminous with ethnic communities, GR 35 reaches out to 'Islamophobia' and 'ethno-religious groups' included by virtue of race/religion intersectionality.[274]

For those seeking to combat 'defamation of religions', ICERD superficially offers an attractive model on account of its list of offences to be declared by law, its tough stance on dissemination of ideas, its continuing hostility to racist organizations, and the unremitting demands to make the provisions of the convention effective in practice. Part of the attraction has been the supposed clarity and impermeability of the Article, a position challenged by recent developments in CERD practice. The spectrum of hostile speech outlined in the defamation resolutions includes actions more aggressive than 'defamation' in the commonly understood sense of a civil law 'tort'.[275] It does, however, include elements familiar in CERD practice such as dissemination, incitement, stereotyping, profiling, and stigmatization. The CERD ethos of favouring education for tolerance, and promoting dialogue—inter- and intra-religious,[276] inter-cultural,[277] between governments and ethnic or indigenous groups,[278] and governments and religious groups,[279]—should equally not be forgotten in the contexts envisioned by the resolutions.

The scope of 'defamation' in the resolutions is broadly matched by the scope of Article 4, but one major area of mismatch is that of the subject of the respective protections.[280] While the resolutions refer to religions, followers of religions, persons of certain ethnic and religious backgrounds, minorities, adherents of religion, etc, the protection of 'religions' remains the principal focus. The distinction between addressing the community and

[270] *Ibid.*, para. 10.

[271] See comment by the Islamic Republic of Iran on the concluding observations of CERD regarding its sixteenth and seventeenth periodic report, A/58/18, Annex VII.

[272] *P.S.N. v Denmark*, CERD/C/711/D/36/2006 (2007).

[273] *A.W.R.A.P. v Denmark*, CERD/C/71/D/37/2006 (2007).

[274] GR 35, para. 6.

[275] Defamation may be treated as a crime in some jurisdictions; criminal libel, for example. For a 'map' of such jurisdictions see: <http://www.Article19.org/advocacy/defamationmap/map/>.

[276] Concluding observations on the Holy See, CERD/C/304/Add.89, para. 6.

[277] CERD/C/GUY/CO/14, para. 22.

[278] Including, for example, in New Zealand, CERD/C/DEC/NZL/1, para. 7; Canada, CERD/C/CAN/CO/18, para. 6.

[279] In concluding observations on Belgium, the Committee welcomed the election of a body representing Muslim communities with a view to maintaining and developing dialogue with public authorities, CERD/C/60/CO/2, para. 9. In concluding observations on Germany, CERD/C/DEU/CO/18, para. 13, the Committee welcomed 'the establishment of the Islam Conference, as a forum in which representatives of... Muslim communities living in Germany meet with representatives of German authorities with the aim of establishing continuous dialogue to address Islamophobic tendencies and discuss relevant policy responses'.

[280] The most fundamental criticism of the defamation concept is that 'religions do not have any "right" as such to be protected from criticism': T. McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas* (Intersentia, 2011), p. 365.

addressing community beliefs and practices can be a fine one.[281] ICERD centres on protection of persons and communities, empowering human beings to sustain the codes and beliefs they regard as integral to their identity. This is not equivalent to affirming the truth of the codes themselves which may be competitive and contradictory.[282] GR 35, citing GC 34 of the Human Rights Committee, invites its addressees to bear in mind that '"criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished'.[283] While Human Rights Council resolution 16/18 shifts the emphasis from defamation of religions towards combating religious intolerance and discrimination, incitement to violence and violence against persons on account of their religious belief,[284] Lerner notes that 'the borderline between defamation and incitement is difficult to determine'.[285] His view is focused principally on Article 20 of the ICCPR; with regard to 'defamation of religions', the difficulties he refers to are compounded in the case of CERD because of its primary focus on race rather than religion.

[281] It may be interpreted as a racist attack on a community as such to claim or insinuate that it supports anti-human rights practices: *Gelle v Denmark*, para. 7.4.

[282] 'The civic dignity of the members of a group stands separately from the status of their beliefs': Waldron, *The Harm in Hate Speech*, p. 133.

[283] GR 35, para. 6. See also GC 34 of the Human Rights Committee, para. 48, where blasphemy laws are stated to be incompatible with freedom of expression. Compare *I.A. v Turkey* App. No. 2560/94/ (2002), paras 29 and 32, commentary in T. McGonagle, 'An Ode to Contextualization: I.A. v Turkey', *Irish Human Rights Law Review* 1 (2010), 237–51.

[284] Combating Intolerance, Negative Stereotyping and stigmatization of, and Discrimination, incitement to Violence and violence against, Persons Based on Religion or Belief, 12 April 2011, A/HRC/RES/16/18; S. Berry, 'Is Defamation of Religions Passé?', *George Washington International Law Review* 44 (2012), 431–539; L. B. Graham, 'Defamation of Religions: the End of Pluralism', *Emory Journal of International Law* 23 (2009), 69–84; L. Langer, 'The Rise (and Fall?) of Defamation of Religions', *Yale Journal of International Law* 35 (2010), 257–533; S. Parmar, 'Uprooting "Defamation of Religions" and Planting a New Approach to Freedom of Expression at the United Nations', in T. McGonagle and Y. Donders (eds), *The United Nations and Freedom of Expression and Information* (Cambridge University Press, 2015), pp. 373–427. For a wide review of issues including 'defamation of religions', see I. Cismas, *Religious Actors and International Law* (Oxford University Press, 2014).

[285] N. Lerner, 'Freedom of Expression and Advocacy of Group Hatred, Incitement to Hate Crimes and Religious Hatred', *Religion and Human Rights* 5 (2010), 137–45, 143.

# 12. Article 5

## *Introduction and Drafting*

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, cafés, theatres and parks.

## The Organization of the Commentary on Article 5

Because of the length and complexity of Article 5, the present and following chapters depart from the general style of presentation for individual articles of the Convention.

After the short introduction in the present chapter to the article, its *travaux*, and reservations thereto, and the general aspects of the reporting guidelines, Chapters 13 and 14 take the paragraphs and sub-paragraphs of the article sequentially. The discussion of each paragraph or sub-paragraph includes a brief, schematic account of relevant background international standards, followed by a modest selection of practice that highlights the principal concerns of the Committee in the application of the right in question. The chapters do not purport to delve deeply into background aspects of human rights practice outside the Convention. Chapter 15 reflects on the evidences of discrimination highlighted in Chapters 13 and 14, and comments critically on the interpretation of Article 5, taking its *travaux*, text, and the archive of CERD practice as the starting points.

## A. Introduction

Article 5 is the workhorse article of the Convention, and the longest of the substantive articles. It incorporates a complex obligation to prohibit and eliminate all forms of racial discrimination, and to guarantee equality before the law on a non-discriminatory basis. The equality guarantee applies to the enjoyment of an extensive, unclosed list of rights—'notably in the enjoyment of the following rights'—so that other, unnamed rights are also subject to its protection. The explicit naming of rights in Article 5 is unique in the Convention. Whereas the preamble and other articles refer generically to human rights, rights, and freedoms, or human rights and fundamental freedoms, Article 5 draws out the implications of the reference to rights and freedoms in Article 1, and is expressly linked to Article 2. As *Jewish Community of Oslo v Norway* makes clear, Article 5 is not the only article in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to evoke the notion of rights, notwithstanding the characteristic ICERD framework of obligations and undertakings to eliminate racial discrimination, and their fulfilment through the languages of condemnation, assurance, and prohibition[1]—discussions in the present work elaborate on the ICERD rights framework as a whole, notably in connection with Articles 2, 4, 6, and 7.

Article 5 does not replicate the style of the Declaration on the Elimination of Racial Discrimination, which does not carry a stand-alone article on rights but spreads a limited portfolio of rights across a number of articles.[2] Equally, while following the contours and inspiration of the Universal Declaration of Human Rights (UDHR), Article 5 is not its carbon copy, and concentrates on positive statements of rights to be protected from discrimination, including, for example, the right to inherit, and the right of access to places open to the public, rights that are absent from the UDHR.[3] The last named right, stemming from the reaction against apartheid-era practices of segregated public facilities, has particular resonance for a convention crafted in the glare of international and domestic action against racial segregation; the emblematic prohibition of discrimination in the right to marriage similarly recalls a history of anti-miscegenation statutes.[4] The

[1] *Jewish Community of Oslo et al. v Norway*, CERD/C/67/D/30/2003 (2005), para. 10.6, discussed in chapter 11.

[2] N. Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff, 1991), pp. 55–56.

[3] Article 3(2) of the Declaration on Race provides that everyone shall have 'equal access to any place or facility intended for use by the general public' without distinction as to race, colour, or ethnic origin.

[4] See the discussion of Article 3 in Chapter 10.

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elements of governmental systems dedicated to racially exclusive and exclusionary politics, and racially segregated housing and education, are alike made subject to the equality/non-discrimination critique of Article 5. The scope of the article exemplifies the UDHR principle of the interdependence and indivisibility of human rights through a darker lens, as discriminatory denials of disparate rights intersect and reinforce each other, creating downward spirals of deprivation.

The list of rights in Article 5 covers all the principal 'categories' of rights: civil, political, economic, social, and cultural, each presented in succinct form, without the further elaboration found in the UDHR itself, and in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other human rights instruments. The rights set out in Article 5, formulated using economical and porous language, made it almost inevitable that its interpretation and application would be influenced by developments in the broader international canon of human rights to which it is organically connected. The rights are described rather than defined, without the detailed apparatus of limitation or restriction clauses and specifications of permissible and impermissible derogations found in most other human rights instruments. They are also open-ended, a feature that presents a continuing challenge to the monitoring body—CERD—as to which version of the rights is subjected to critical appraisal under the Convention.

Further interpretative complexity results from the looseness of textual boundaries within the confines of the article, and from overlaps and inconsistencies with other elements in the Convention. CERD opinions, decisions, and concluding observations frequently couple or conflate Article 5 with other articles so that even the strenuous individuation of practice on a paragraph or sub-paragraph basis may not be fully determinative of its range of meaning.

While CERD practice may not illuminate every corner of the rights listed or rights implied in Article 5, it serves to highlight areas of sharp human rights detriment to persons and communities through its metric of racial discrimination. A practice that identifies where discrimination bites serves to illuminate important dimensions of human rights in general, uncovering the face of racial discrimination and testifying to its malign influence on human affairs.

## B. *Travaux Préparatoires*

The Abram text before the Sub-Commission focused on taking effective measures, necessary steps, etc, to secure equal access to 'any place or facility intended for use by the general public', and to prohibit racial discrimination therein; to prevent racial discrimination 'in the enjoyment of political and citizenship rights', including 'the right to participate in elections through universal and equal suffrage and to equal access to public service'; to 'assure everyone within its jurisdiction the right to equality before the law and equal justice under the law', as well as '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'.[5]

The Calvocoressi text focused on equality before the law, security of the person against bodily harm, equal access to public places, participation in elections, and eligibility for

[5] E/|CN.4/Sub.2/308, extracted in E/CN.4/873, para. 85.

public service.[6] The Ivanov and Ketrzynski text included a wide range of rights, subsuming the civil rights to political participation, equality before the law and access to public places in analogous fashion to Calvocoressi and Abram, adding provisions against discrimination in the right to marriage, in the 'granting and enjoyment of the right to form and join trade unions', and on admitting no racial discrimination in the field of 'economic rights'. The 'economic rights' included 'the right to employment and equal pay', education and training, housing, health, and social security.[7]

The Sub-Commission working group submitted a text in which can be glimpsed the eventual structure and content of Article 5 of the Convention,[8] the chapeau referring to the undertaking not to admit—and to eliminate[9]—racial discrimination 'notably in the enjoyment of the following rights'; a non-exhaustive list followed. Members of the Sub-Commission debated whether there should be a list of rights taken from the UDHR, or a general formula, with some members counselling that, if a list were adopted, the omission of a particular right could lead to misunderstanding.[10] However, in Ketryzinski's view, 'there was no reason to fear that the scope of the Convention might be reduced if all the rights . . . in the Universal Declaration of Human Rights were not listed . . . it was perfectly clear from the Preamble . . . that the provisions of the Convention applied to all the rights set out in the Universal Declaration of Human Rights'.[11] The working group's text combined the equality, security, and access provisions in the other drafts together with a range of civil rights including freedom of thought, conscience, and religion and freedom of opinion and expression, the right to nationality, and economic, social, and cultural rights, adding 'equal participation in cultural activities' to the Ivanov/Ketrzynski listing.[12] A far-reaching and innovative proposal by Ivanov to insert into the 'governance' elements of the working group text a reference to 'the right of racial, national and ethnic groups of the population to take part on a real footing of equality in the work of legislative and executive organs' was later withdrawn.[13] Sub-Commission member Ferguson objected to the proposal, arguing that inserting group rights might give rise to serious difficulties because 'the rights in question derived from membership of a group and not from the

[6] E/CN.4/Sub.2/L.309.

[7] E/CN.4/Sub.2/L.334. Krishnaswami—E/CN.4/Sub.2/L.310—submitted amendments to the Abram text, including the portmanteau: 'Each State shall prevent racial discrimination in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing.'

[8] E/CN.4/Sub.2/L/334.

[9] There was considerable discussion on the difference between not to 'permit' racial discrimination and not to 'admit' it. In the view of Capotorti, 'eliminate' covered both terms: E/CN.4/Sub.2/SR.423, p. 4.

[10] Ferguson (E/CN.4/Sub.2/SR.423, p. 4) considered that 'it would be dangerous to enumerate the rights, for fear of omitting some of them', preferring the formula of Capotorti who, for part of the draft article had suggested, *ibid.*, that it should refer to the elimination of racial discrimination 'in the enjoyment of civil, economic, social and cultural rights as set out in the Universal Declaration of Human Rights'.

[11] E/CN.4/Sub.2/SR.423, pp. 4–5.

[12] The working group draft referred to political rights as 'granted to any person in his own country'. The term 'granted' was proposed for deletion by Saario, a proposal supported by the Chairman (Santa Cruz), who declared that '"granted" was not satisfactory because it seemed to imply that rights which were in fact acquired rights had to be granted': E/CN/4/Sub.2/SR.424, p. 5. Mudawi, *ibid.*, suggested that the political rights paragraph under discussion 'would make it necessary to have a limiting clause specifying that aliens, in the host country, could not take advantage of the provisions in question'.

[13] E/CN.4/Sub.2/L.335. Among other objections, it was felt by Calvocoressi that 'by introducing the idea of the rights of groups [the] proposal might involve the Sub-Commission in a prolonged debate': E/CN.4/Sub.2/SR.423, p. 7. In withdrawing the proposal, Ivanov considered nonetheless that 'those groups had the right to take part in the work of legislative and executive organs': E/CN.4/Sub.2/SR.424, p. 6.

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merits of the individual members', and thus 'the proposal departed from individual rights and might lead to discrimination in reverse'.[14]

Accordingly the Commission on Human Rights had before it the following text:

In compliance with the fundamental obligations laid down in article [2], States parties undertake to prohibit and to eliminate racial discrimination in all its forms notably in the enjoyment of the following rights:

(a) The rights to equality before the law and to equal justice under the law;
(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 rights to participate in elections through 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 his own, and to return to his country;
  (iii) the right to nationality;
  (iv) the right to marriage;
  (v) the right to own property alone as well as in association with others;
  (vi) the right to freedom of thought, conscience and religion;
  (vii) the right to freedom of opinion and expression;
  (viii) the right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
  (i) the right to work, free choice of employment, just and favourable conditions of work, protection against unemployment, equal pay for equal work, just and favourable remuneration;
  (ii) the right to form and join trade unions;
  (iii) housing;
  (iv) public health, medical care and social security and social services;
  (v) education and training;
  (vi) equal participation in cultural activities;
(f) Access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafés, theatres, parks.

The article was discussed at the 796th to the 800th meetings of the Commission. There was broad agreement in the Commission that the structure of the article was satisfactory,[15] though some representatives preferred a general formulation rather than a detailed list of rights.[16] The report of the Commission summarizes discussion to the effect that 'many of the rights proclaimed in the Universal Declaration had been left out but that the word "notably" preceding the list of rights implied that there had been a selection of rights to which special attention should be accorded. On the other hand, it was pointed out that

[14] E/CN.4/Sub.2/SR.423, p. 7.

[15] 'Although the list did not cover all the rights set forth in the Universal Declaration, article V none the less mentioned all the rights which most frequently suffered as a result of racism': observation of the representative of The Philippines, E/CN.4/SR.796, p. 9.

[16] The representative of Italy echoed the sentiments of a number of delegations, notably those of Denmark, France, and the United Kingdom, and 'would have preferred a shorter and more general text. The listing of a number of rights involved the double risk of omitting important rights and defining others badly': E/CN.4/SR.796, p. 12. The representative suggested, *ibid.*, that 'the Commission should ask itself whether there were any fields of social life, such as those mentioned in sub-para. (f) which were insufficiently protected against racial discrimination by existing international instruments, and should take special measures to protect them'.

the selection was so wide as to nullify this intention.'[17] The difficulties experienced by some delegations were adverted to by the representative of The Netherlands who suggested that they arose 'largely due to the fact that their national legislation did not enable them fully to guarantee the rights listed... But the purpose of the article was not to proclaim that the rights... enumerated must be fully respected, but merely to prohibit racial discrimination with regard to their enjoyment'.[18]

In the introductory paragraph, Poland (joined by France) proposed to insert after 'racial discrimination in all its forms' the words 'and to guarantee, without distinction as to race, colour or ethnic origin, the right of everyone to equality before the law'.[19] A principal argument in favour of the Polish text was that it was appropriate to include the right to equality before the law in the introductory paragraph because that right

> was a general principle which the others merely served to illustrate; what was important in the exercise of the rights embodied in the other sub-paragraphs was that there should be no inequality before the law. It would accordingly be better to state the general principle before those other rights, which were important examples but by no means exhaustively enumerated.[20]

In processing the Polish proposals, the word 'citizen' in the first version[21] was replaced by 'everyone'.[22] On paragraph (a), Poland proposed to redraft it as '[t]he right to equal justice under the law',[23] later replaced by a joint amendment of France, Italy, and Poland which was revised orally to read[24] '[t]he right to equal treatment before the tribunals and all other organs administering justice'[25]; the revised paragraph survived into the text of the Convention. The expression 'equal justice under the law' used in the Sub-Commission text and the Polish amendment was ultimately regarded as too vague. A proposal to refer to 'equal treatment before the courts' also gave rise to misgivings, and the final, accepted phrasing on 'tribunals and all other organs administering justice' was designed to widen the remit of the Convention to include justice before, for example, administrative bodies as well as courts.[26] A Polish amendment to add 'the right to inherit' to paragraph (d) was adopted by 19 votes to none, with 2 abstentions.[27]

[17] Commission on Human Rights, report on the twentieth session, E/CN.4/874, para. 200. The representative of the UK 'thought it unfortunate that there was so long a catalogue of rights... only ten of the rights proclaimed in the Universal Declaration of Human Rights have been left out. That was certainly not good drafting': E/CN.4/SR.797, p. 3.

[18] E/CN.4/SR.796, p. 15.

[19] E/CN.4/L.699, E/CN.4/L.699/Rev.1, E/CN.4/874, paras 192–95.

[20] The position of Poland is summarized in E/CN.4/SR.796, pp. 6–7.

[21] E/CN.4/L.699.

[22] 'If the Convention was to be effective, it must protect not only citizens, but also aliens and non-citizens against racial discrimination': observation of the representative of Lebanon, E/CN.4/SR.796, p. 9. On the other hand, Italy regarded the word 'citizen' as appropriate to sub-para. (c) which dealt with political rights: E/CN.4/SR.796, p. 11. The Convention's provisions on citizenship are discussed principally in Chapter 7.

[23] E/CN.4/L.699 and E/CN.4/699/Rev.1

[24] E/CN.4/L.708.

[25] E/CN.4/874, para. 198.

[26] *Ibid.*, para. 207. Paragraph (a) as amended was adopted unanimously. The French version of the text, which at one point included the phrase '*droit a une justice egale devant la loi*', was criticized by Italy 'because either justice was equal or it was not justice': E/CN.4/SR.798, p. 11. For further discussion of tribunals and national institutions, see Chapter 16 on Article 6.

[27] E/CN.4/874, paras 199 and 211. The UK abstained in the vote on the right to inherit because, according to its representative, it was undesirable to extend the list of rights further, and 'the inclusion of that right was unjustified since discrimination based on colour or race must be extremely rare in questions of inheritance': E/CN.4/SR.800, p. 4.

In explanations of vote, France voted in favour of Article 5 while considering that the list set out in the article 'did not necessarily relate to rights in the strict sense of the term. The representative stated that in sub-paragraph (e) for example, 'the term *droit au logement* (right to housing), which had no counterpart in French law, must obviously be interpreted with considerable latitude'.[28] Italy considered that in sub-paragraph (d), the use of the word 'other' before the words 'civil rights' was inappropriate after an enumeration of political rights; Italy also had difficulty accepting the right to nationality and suggested that it should be replaced 'by an expression such as "equality with regard to the conditions for obtaining citizenship"'.[29]

The Third Committee had before it the following text:

> 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 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 rights to participate in elections through 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;
>  (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 assembly and association;
> (e) Economic, social and cultural rights, in particular:
>  (i) The right 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, café, theatres and parks.[30]

Relatively few amendments to draft Article 5 were proposed in the Third Committee. The representative of Ghana made the observation that 'the Convention was intended to eliminate racial discrimination and not to grant rights which might not be recognized in

[28] E/CN.4/SR.800, p. 4. See Chapters 10 and 14 for discussion of housing rights.
[29] *Ibid.*
[30] A/6181, para. 76, 'café' appears in para. (f) instead of 'cafés'.

certain countries'.[31] An attempt to harmonize the wording of the chapeau of Article 5 with Article 1 was made by the representative of Czechoslovakia who orally proposed to insert the words 'descent, national' before 'or ethnic origin'.[32] A request 'not to insist on the inclusion of the word "descent" in the introductory paragraph'[33] was made by the representative of Austria and accepted by Czechoslovakia,[34] while 'national' was retained. The summary records do not shed light on the reasons for withdrawing the reference to 'descent'. The result of the omission is that the list of prohibited grounds of discrimination in Article 5 is shorter than for Article 1. While India had feared that the inclusion of 'everyone' in the chapeau 'might be regarded as including non-citizens as well as citizens', the representative's fears had been assuaged by 'the clause in Article 1 stating that the Convention would not apply to distinctions made by a State party between citizens and non-citizens'.[35] In the course of discussions, the right in paragraph (c) to participate in elections was elaborated on the suggestion of Bulgaria to include 'to vote and to stand for election',[36] and the right to marriage was clarified to include the right to choice of spouse.[37]

The right to equal participation in cultural activities in the Commission's text elicited a (rejected)[38] proposal by Mauritania, Nigeria, and Uganda to replace it by '[t]he equal right to organize cultural associations and to participate in all kinds of cultural activities'.[39] The proposal attracted comment to the effect that the reference to cultural associations 'omitted the right of each individual to take part in cultural activities other than through an organization',[40] and that it 'introduced a collective notion' whereas the existing wording referred to an individual right.[41] The representative of Bolivia added that care should be taken to ensure that a clause on cultural associations 'did not have the effect of limiting the right of the individual to participate in existing cultural activities'.[42] The representative of India observed that there was a genuine difference between the right to participate in cultural activities on an individual basis and the right to organize cultural associations, and that the views of the sponsors of the amendment should be accommodated.[43] In the event, the original Commission text on cultural participation was retained.

The text of Article 5 as a whole was adopted unanimously.[44] In view of the frequent reading of the article as not creating rights but only forbidding discrimination in their

[31] A/C3/SR.1306, para. 16.
[32] A/C.3/SR.1309, para. 3.
[33] *Ibid.*, para. 4.
[34] *Ibid.*., para. 5.
[35] A/C.3/SR.1309, para. 2. See discussion in Chapters 6 and 7.
[36] A/6181, para. 80, adopted by 86 votes to none, with 10 abstentions. The representative of France observed that 'the right to participate in elections and the right to elect were not identical and . . . it was possible to participate in elections without actually electing anyone': A/C.3/SR.1308, para. 61.
[37] A/6181, para. 82, adopted by 90 votes to none with 3 abstentions. The representative of Ghana explained that the reference to choice of spouse was to be supported because 'the law in some countries prohibited interracial marriage': A/C.3/SR.1306, para. 16. Restrictions on interracial marriage are referred to in Chapter 10 on Article 3.
[38] A/6181, para. 84, narrowly rejected by 37 votes to 33 with 24 abstentions.
[39] A/C.3/L.1225, A/6181, para. 83.
[40] A/C.3/SR.1309, para. 16 (Italy)
[41] *Ibid.*, para. 18 (Chile). The representative of Argentina (*ibid.*, para. 19) argued that, in any case, the right to freedom of association already covered the right to cultural associations. The representative of Liberia considered the amendment redundant since 'the notion of participation included organization', *ibid.*, para. 21.
[42] A/C.3/SR.1309, para. 24.
[43] A/C.3/SR.1309, para. 22.
[44] A/6181, para. 84.

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enjoyment, the remark of the representative of Canada that the article 'attempted both to grant certain rights and to guarantee freedom from discrimination in the exercise of those rights' retains its interest.[45]

## C. Practice

### I. Reservations and Declarations

Article 5, despite its breadth of coverage, has attracted few reservations. The reservation by the US includes Article 5 along with other articles in its rejection of regulation of private conduct by the Convention 'except as mandated by the Constitution and laws of the United States'.[46] Yemen maintains a reservation regarding 5(c) and 5(d)(iv), (vi), and (vii) which has attracted numerous objections,[47] including a lengthy objection by Finland.[48] As with other reservations, CERD has invited States parties to consider removing them.[49]

### II. General Part of the Reporting Guidelines

The reporting Guidelines for Article 5 are more detailed overall than those for the other substantive articles,[50] requesting information categorized (a) in relation to particular rights and also (b) information by groups of victims or potential victims.[51] Regarding the situation of women, States parties are requested to describe 'as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women . . . of rights under the Convention'.[52] Accordingly they should pay attention also to 'complex forms of disadvantage in which racial discrimination is mixed with other causes of discrimination'—reference is made to discrimination based on age, sex, and gender, religion, disability, and low economic status.[53] The general elements of the Guidelines conclude with the recommendation that where 'no quantitative data relevant to the enjoyment of these rights is available, States parties should provide relevant information derived from social surveys, and report the opinions of representatives of disadvantaged groups'.[54] Further aspects of the Guidelines are outlined in the following two chapters in relation to specific rights.

[45] A/C.3/SR.1309, para. 6. The representative also regarded the phrase 'equality before the law' as limiting, recalling, *ibid.*, the reference in the Romanian amendment to the preamble—A/C.3/L.1219—to 'equal before the law and entitled to equal protection of the law'—the version of that appears in the final text of the Convention.

[46] A complex reservation by Fiji relating to elections and alienation of land was withdrawn in 2012; Tonga also withdrew reservations to Article 5.

[47] Reservations to the Convention, and objections thereto, etc, are set out in <https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en>.

[48] See the commentary on reservations—Article 20—in Chapter 18.

[49] The reservation to Article 5 by Yemen had 'the effect of neglecting the core purposes and objectives' of the Convention: concluding observations of the Committee, CERD/C/YEM/CO/17-18, para. 13 (2011).

[50] CERD/C/2007/1, pp. 8–13.

[51] *Ibid.*, pp. 12–13. Reference is made, p. 12, para. A, to information on refugees and displaced persons; non-citizens, including immigrants, refugees, asylum-seekers and stateless persons; indigenous peoples; minorities including the Roma; descent-based communities; and on women—GR 25.

[52] *Ibid.*, p. 12, para. A.

[53] *Ibid.*, p. 13, para. B.

[54] *Ibid.*, p. 13, para. C.

# 15. Article 5

## *Comment and Conclusions*

The chapeau to Article 5 makes an explicit link with obligations under Article 2 of the Convention and goes on to repeat the undertaking to eliminate racial discrimination—an unnecessary repetition according to some views.[1] Commentators have observed that there is a lack of 'fit' between Article 5 and Article 1,[2] including the reference to 'civil rights' in Article 5 but not in Article 1, and, further, that as noted, the 'grounds' of prohibited discrimination in Article 5 omit 'descent'. The lack of limitation regarding non-citizens in Article 5 has proved serviceable in facilitating more generous interpretations of the scope of the Convention vis-à-vis Article 1(2). In *D.R. v Australia*, the Committee took into account General Recommendation (GR) 30 'and in particular the necessity to interpret Article 1, paragraph 2 of the Convention in the light of article 5', rejecting the State party's claim that the communication was inadmissible.[3]

On interpretation of Article 5, three interrelated issues in particular have generated discussion: (1) whether rights are 'established' by the Convention or merely acknowledged where they appear in the legal system of the State and require protection from discrimination; (2) the question of which rights does Article 5 protect from discrimination, bearing in mind that the list of rights is not closed; and (3) the requirements flowing from the chapeau statements on discrimination and equality. A preliminary excursus by the Committee in 1973 registered a variety of views but without a consensus on the interpretation of an article described therein as obscure on more than one point.[4] The views expressed were summarized by Partsch according to three perspectives,[5] the first of which, 'the extremely wide concept',[6] was that Article 5 established the listed rights as legal obligations so that failure to comply with them would violate the Convention; the second, 'the extremely narrow concept',[7] held that the list of rights established the field of application of the principle of non-discrimination; a third, 'the intermediate concept',[8] expressed the position that Article 5 prohibited discrimination and guaranteed the right to equality before the law.[9] Meron notes a wide acknowledgement that

[1] N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 55.

[2] Schwelb, p. 1004.

[3] Para. 6.3.

[4] A/9018, Chapter V, paras 55 and 61.

[5] K.J. Partsch, Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights, *Texas International Law Journal* 14 (1979), 191–250.

[6] *Ibid.*, 215; according to Partsch, the concept 'was formulated by the rapporteur [Sayegh] in order to show it was unacceptable'.

[7] *Ibid.*, 216.

[8] *Ibid.*, 216.

[9] According to Committee member Haastrup, A/9018, para. 53, 'the essential element of article 5 was the right of everyone to equality before the law.' Aboul-Nasr on the other hand, argued, *ibid.*, para. 53, that the article was concerned only with discrimination in respect of the rights enumerated therein. See also the introduction to the debate by Sayegh, *ibid.*, paras 40–44, and comments in by Committee members Calovski, Macdonald, Ortiz-Martin, Partsch, Soler, and Tomko. Sayegh observed, *ibid.*, para. 42, that it should not be pretended that

the catalogue of human rights in article 5 does not create those rights but merely obligates a State to prevent racial discrimination in the exercise of those which it has recognised. Article 5 could have been drafted in a manner that clearly defined this limitation. But a more explicit formulation would have emphasised the liberty of States to deny some of the rights listed, which would possibly have weakened the authority of... [the UDHR]... and undermined the status of some rights as customary law.[10]

The ambiguities adverted to by Meron were spotted in the drafting of the Convention: the remarks of the representative of Canada who read Article 5 as granting rights as well as guaranteeing non-discrimination in their exercise will be recalled.[11]

The interpretative issues were further addressed by the Committee in GR 20 of 1996 which commences with the statement that 'the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list',[12] recalling the UN Charter and the Universal Declaration of Human Rights (UDHR) 'at the head of these rights and freedoms' as well as the elaboration of rights in the international covenants. The recommendation observes that States parties are 'obliged to acknowledge and protect the enjoyment of human rights', while 'the manner in which the obligations are translated into the legal order of States parties may differ'.[13] Paragraph 1 makes a general position statement:

> Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of such rights. The Convention obliges States to prohibit and eliminate discrimination in the enjoyment of such human rights.

The statement that Article 5 'assumes' the existence and recognition of rights is not unambiguous in that such an 'assumption' may carry a certain normative force, facilitating Article 5 critiques of the absence of certain rights in the constitutions or laws of States parties. Vandenhole recalls a more extensive interpretation by the Committee in concluding observations on Malawi: the State party was reminded that Article 5 implied the existence of civil, political, economic, social, and cultural rights, and that 'full respect for human rights is the necessary framework for the efficiency of measures adopted to combat racial discrimination'.[14] While the explicit recommendations by the Committee for States parties to broaden their range of human rights commitments suggest that Article 5 does not 'establish' such commitments, the rights listed in Article 5, together with rights that may be implicit in or derived from them, increasingly appear to be treated as standard, canonical requirements. The Committee does not restrict the range of its examination of reports on being informed that this or that human right is not guaranteed in the domestic or international portfolio of the State party concerned; on the contrary, the State party will be invited to remedy its absence as well as securing its enjoyment without discrimination.

article 5 amounted to a convention on civil, political, economic, social, cultural and other rights... the only human right given obligatory force by article 5 was the right of everyone to be protected from racial discrimination and to benefit from equality before the law in the enjoyment of fundamental human rights'.

[10] T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *American Journal of International Law* 79 (1985), 283–318, 294.

[11] Ch. 12.

[12] Para. 1.

[13] Para. 1.

[14] CERD/C/63/CO/13, para. 7, cited in W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005), p. 10.

Arguments on 'granting' or 'recognition' of rights intersect with interpretations of the range of protected rights. The final paragraph of GR 20 asserts, in light of 'notably' in the chapeau to Article 5, that the rights and freedoms referred to in 'and any similar rights' shall be protected. With regard to the *travaux* of Article 5, Lerner comments that '"notably" was used in order to avoid a restrictive interpretation of the rights enumerated... some delegations would have preferred a more general and less detailed wording, with a view to preventing such an interpretation'.[15] The recommendation's reference to 'similar rights' opens out to unlisted human rights displaying similar characteristics to those listed. Commentators go further. O'Flaherty suggests that the Convention addresses all rights regardless of source,[16] while Diaconu argues that Article 5 'extends to all rights', and if 'a certain right is granted, whether in an international [instrument] or through internal legislation, no discrimination is allowed with regard to its exercise'; he makes an analogy between Article 5 and Protocol 12 to the European Convention on Human Rights (ECHR), which forbids discrimination in relation to rights 'established by law'.[17] The Inter-American Convention on Racism, etc, with the advantage of much later adoption (2013) than the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), defines racial discrimination in its Article 1 as nullifying or curtailing the enjoyment of the 'human rights and fundamental freedoms enshrined in the international instruments applicable to the States parties', while Article 3 extends the anti-discrimination portfolio to 'all human rights and fundamental freedoms enshrined in... domestic law and in international law applicable to the States parties'.

If the range of protected rights subject to the equality/discrimination critique is understood expansively, the analytical point on whether Article 5 'establishes' or 'assumes' the rights becomes less important, though not without practical consequences in States that specifically recognize only a limited portfolio of rights. The bulk of commentary on ICERD aligns itself with wider views on the range of rights subject to undertakings under Article 5, which may thereby be described as setting out a floor of rights, not a ceiling, a description that resonates with the promise of the Convention to address all forms of racial discrimination. CERD practice suggests that the relevant international law applicable to States parties and treated as furnishing background standards of rights to be protected from discrimination extends beyond treaty law into rights presumptively generated through the operation of customary international law. Hence, for example, the regular endorsements by the Committee of the UNDRIP, treated as representing the best contemporary standard of indigenous rights, and particularly of its concept of indigenous self-determination.

Rights unspecified in Article 5 but alluded to in the practice outlined in Chapters 13 and 14 of this work include language rights; the right to a name and identity rights writ large; participation rights widened beyond the 'political' sphere; reproductive rights; the right to family life; the right to food; a battery of rights associated with refugees and asylum-seekers including non-refoulement, the right to asylum, and the right to appeal against denials of refugee status; economic, social, and cultural rights including the right

[15] N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 56.

[16] M. O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (Zed Books and the Federation Press, 1998), pp. 162–83, p. 179.

[17] I. Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), pp. 217–19, at p. 218.

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to an adequate standard of living, the right to water, and the right to register the births of children. The rights are derived from contemporary international practice as developed in universal (undifferentiated by category) and group-specific instruments, as well as customary law. Processes of discrimination can affect a number of rights simultaneously. The internal categories—civil rights, economic, social, and cultural rights—are interrelated and indivisible, so that violations of one right almost inevitably violate others. Racial discrimination characteristically targets or affects individuals and communities not in respect of rights punctiliously marked out but across the span of personal and communal rights and interests swept up in its wake.

As noted in Chapter 12, the rights in Article 5 are not 'fleshed out' through inclusion in a complex of a core rights statement subject to permissible limitations and derogations. In practice, Article 5 is treated as covering the various unstated facets of the expression of rights and limitations thereon. With regard to restrictions on the enjoyment of rights, GR 20 states that:

> [w]henever a State imposes a restriction upon one of the rights listed in Article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose or effect is the restriction incompatible with Article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.[18]

The admonition in *L.R. v Slovakia* regarding the inadmissibility of shielding stages in the implementation of a human right from scrutiny for racial discrimination may also be borne in mind.[19] The approximate, cursory statements of rights in Article 5, coupled with endorsement of rights from multiple sources have, nonetheless, the potential to generate indeterminacy in subjecting the rights protected by Article 5 to a standard discrimination analysis. Statements of rights subjected to discrimination analysis by the Committee are derived from their content as expressed in international law glimpsed through CERD lenses. CERD displays a tendency to optimize both the range and the standard of the rights to be protected from discrimination, in effect developing its own vision of them as a holistic construct emerging from a synthesis of multiple sources that includes their elaboration in the Convention.

Pertinent to the rights to be protected under Article 5 of ICERD, some general comments of the CESCR follow the '4A scheme', which translates rights into discrete but interconnected elements in order to clarify obligations deriving from them, facilitate their analysis, and measure the extent of their implementation. One such '4A' articulation appears in General Comment (GC) 13 on the *Right to Education*,[20] which measures the right in terms of its availability, accessibility, acceptability, and adaptability.[21] For education, *availability* refers to the existence of functioning educational institutions in the State party including the right of private parties to establish schools; *accessibility* focuses on discriminatory barriers to enjoyment of the rights; *acceptability* requires the

[18] Para. 2.

[19] *L.R. v Slovakia*, CERD/C/66/D/31/2003 (2005), para. 10.7. See further discussion in Chapter 8.

[20] E/C.12/1999/10.

[21] Footnote 2 of the GC states that the approach 'corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education'; the note also refers to GC No. 4 (right to adequate housing) and GC 12 (right to adequate food).

provision of curricula that are relevant, culturally appropriate and of good quality, including a safe and healthy school environment; *adaptability* signifies flexibility and responsiveness to the needs of students in diverse cultural settings. With nuances of difference, the '4A' formula has been repeated in later general comments, and is represented as '5A' in the later General Comment on *The Right to Take Part in Cultural Life* with the addition of *appropriateness*,[22] which ratchets up the cultural dimension of rights in referring to 'the realization of a specific human right in a way that is pertinent and suitable to a given modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and individuals'.[23]

While, as noted in Chapter 8, CERD has not explicitly adopted the '4A' or '5A' formulae of the CESCR, practice under Article 5 largely follows these contours. The principal focal points of practice are those of the provision of rights, linked to the argument as to the 'establishment' of rights by Article 5, or their 'availability' in the 4A formula, access to rights, and cultural appropriateness.[24] The listed rights, those derived from them, and background international law standards, are expected to be 'available', following the GR 20 vocabulary of 'assuming' the existence of rights. In terms of access to the enjoyment of rights, examples of racial, ethnic, and caste barriers to such enjoyment run through practice under Article 5, the need to address racial 'barriers' links with the statement in the preamble of their repugnancy to the ideals of any human society. 'Cultural' elements go beyond the category of economic, social, and cultural rights, and invest the understanding of rights in general.[25] The application of civil and political rights to, for example, justice and security areas is as likely to be as culturally influenced as rights to education or housing or the concept of participation in cultural activities itself. The stress on the limits of 'culture' from a human rights perspective, discussed elsewhere in the present work,[26] does not detract from its pervasiveness in providing templates for the interpretation and application of rights in a multiplicity of local contexts.

In particular, Committee practice has endorsed notions of culturally influenced collective rights associated with particular communities, notably indigenous peoples but also including Afro-descendant communities and others,[27] that present communal visions of human rights. Including but not confined to indigenous rights, international—and domestic—human rights standards have also embraced collective as well as individual rights.[28] While the collective rights addressed in practice move beyond the list in Article 5, the Committee treats their recognition as governed by principles of equality and non-discrimination. The work of other human rights bodies has been drawn upon in this area, notably the Inter-American Commission and Court of Human Rights, which has developed an understanding of the corpus of collective rights from constituent instruments on the rights of persons, applying their limited textual standards to the realities of communal

[22] E/C.12/GC/21 (2009).

[23] Paragraph 16 (e), which adds: The Committee wishes to stress... the need to take into account... cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed'.

[24] On 'availability' and necessary infrastructures of rights, see Chapters 8 and 16 in particular.

[25] See further Chapter 20.

[26] In particular Chapters 6, 14, and 20.

[27] See among other judgments cited in Chapter 13, *Saramaka People v Suriname*, IACtHR Ser. C No. 172 (2007); also CERD GR 34; see further Chapter 20.

[28] G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law* (Martinus Nijhoff Publishers, 2009).

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particularities and cultural diversity.[29] Article 5 of ICERD protects the rights of 'everyone'. In its interpretation of the right of 'everyone', CERD practice is in line with the position on cultural rights in GC 21 of the Committee on Economic, Social and Cultural Rights, which states that the word may denote 'the individual or the collective . . . In other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) in a community or group, as such'.[30] This flexibility, shared by CERD, contributes to the understanding that human rights, if they are to pursue a 'universal' vocation, cannot be inexorably tied to fundamentalist Liberal conceptions of rights as applying only paradigmatically or uniquely to 'individuals'.

The emphasis on the effect on CERD practice of developments in collective human rights under general international law should not detract from collective elements intrinsic to the Convention which, according to a member of the Committee in 1982,[31] represented 'a unique case in the international instruments on human rights'. The judgement of uniqueness is longer accurate but the comment on the intrinsic quality of the Convention retains its validity. Whatever the original drafting intentions behind the Convention, the reference to General Assembly resolution 1514 (XV) (the Colonial Declaration) in the preamble to the Convention serves to undermine any argument that ICERD is unfamiliar with collective rights, even in the 'hard' sense of rights inhering in a community as such. The outreach to collective concepts of rights has functional instrumentality in light of paradigmatic discriminatory practices that target groups, or target individuals on account of real or imagined appurtenance to racial/ethnic groups, of their actual or perceived membership thereof. The text of the Convention as a whole is not relentlessly 'individualistic' in its descriptions,[32] and should not be treated as a culturally assimilationist instrument, though it has been understood as such in (some) past practice.[33] Appraisals of discrimination against groups, taken holistically, and not simply of discrimination against individuals are an outstanding feature of the CERD repertoire. The raised profile of identity standards, particularly since the 1980s and 1990s, has further contoured the applications of equality and non-discrimination principles, directing attention towards gross collective harms.[34]

The practice generated by Article 5 presents a complex profile of racial discrimination, illustrating multiple forms and contexts of discrimination and denials of equality, their

[29] Concluding observations on Nicaragua, CERD/C/NIC/CO/14, para. 21, refer to the judgement of the Inter-American Court of Human Rights in the *Awas Tingni case*, IACtHR Ser. C No. 79 (2001); observations on Paraguay, CERD/C/PRY/CO/11-3, para. 17, refer to the judgments of the Inter-American Court of Human Rights in *Yakye Axa v Paraguay*, IACtHR Ser C No. 125 (2005); *Sawhoyamaxa v Paraguay*, IACtHR Ser. C No. 146 (2006); and *Xákmok Kásek v Paraguay*, IACtHR (2010). Decision 1 (68) on the Western Shoshone, A/61/18, Chapter II, applied aspects of the case of *Mary and Carrie Dann v United States* before the Inter-American Commission on Human Rights: Case 11.140, 27 December 2002. Note also the Committee's support for the decisions of the African Commission on Human and Peoples' Rights in the Endorois, Comm. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group international on behalf of the Endorois Welfare Council v Kenya* (2010); and *Ogiek* cases, now a judgement of the African Court of Human Rights, App. No. 006/2012, 15.03.2013, CERD/C/KEN/CO/1-4, para. 17.

[30] Para. 9.

[31] Devetak, A/37/18, para. 468.

[32] *Inter alia*, the right in 5(d)(v), referring to owning property 'alone as well as in association with others', may be recalled.

[33] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), Chapter 30, especially with reference to then situation of Turkish communities in Bulgaria.

[34] Discussed in Chapter 20.

institutional settings, and contemporary targets. The abstract grounds of discrimination on Article 1, in practice undiminished in scope under Article 5 despite the omission of 'descent', metamorphose into human form in the complex, interlocking narratives that characterize global practice in the vindication and denial of rights. Ethnic minorities—notably including Roma in many States and not simply in Europe—indigenous peoples, Afro-descendants, caste groups, multiple categories of non-citizens, groups and persons identified through intersectionalities, particularly women and religious groups, bear the brunt of discrimination, as shown in the melancholy record of 'concerns' over rights and their violations that populate the archives of Article 5.

Large-scale human vulnerabilities are also exposed to view, whether the result of historical exclusion and dispossession, the operation of prejudices and antipathies, residues of hierarchical classification including the racial (perhaps transmuted into denigration of cultures),[35] or choice or compulsion to leave countries of nationality. The identification of potential victims of discrimination in the universalist framework of the Convention has resolved itself into micro-identifications of categories of persons under threat, a process facilitated and constructed through utilizing legal classifications and statements of rights from the human rights canon writ large, including the categories of minorities and non-citizens that were largely put aside in the drafting process. While the utilization of such categories by CERD tends to be approximate, and their descriptions overlapping, they serve the purposes of pinpointing where discrimination operates and of facilitating judgements of compatibility with legal standards. The enjoyment and exercise of civil, political, economic, social, and cultural rights in their various aspects are all potentially subject to diminution by racially discriminatory practices on the part of States, individuals, communities, and corporations.

[35] See Chapter 6.

# 16. Article 6

## *Remedies for Racial Discrimination*

> 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.

## A. Introduction

In general international law, 'breach of an engagement involves an obligation to make reparation in an adequate form':[1] reparations are owed for every breach of an international obligation.[2] The traditional rules of international law regarding reparations apply to interstate claims, and while they may have 'limited utility when the claimant is an individual, group or organization,' they are without prejudice to rights 'accruing directly to a person or entity other than a State',[3] leaving it to primary rules to define such rights.[4] The corpus of international human rights law contains an abundance of such 'primary rules' including those in Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The function of a system of remedies in international human rights law is eloquently expressed in the Vienna Declaration of the World Conference on Human Rights:

[1] *Chorzów Factory*, Claim for Indemnity, Jurisdiction (*Germany v Poland*) [1927] PCIJ, Ser. A, No. 9, p. 21, reaffirmed in *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ rep 1949, para. 184.

[2] Such 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability have existed if that act had not been committed': *Chorzów Factory*, Merits [1928] PCIJ, Ser. A, No. 17, p. 47. See also the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, commended to States by the UN General Assembly in resolution 56/83, December 12, 2001, Articles 30 (Cessation and Non-repetition); 31 (Reparation); 34, full reparation for the injury caused by the internationally wrongful act 'shall take the form of restitution, compensation and satisfaction'; Article 35 (Restitution); Article 36 (Compensation), while Article 37 defines satisfaction as consisting in 'an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality', adding 'insofar as it cannot be made good by restitution or compensation'.

[3] D. Shelton, 'Reparations for Indigenous Peoples: the Present Value of Past Wrongs', in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008), 47–72 at 59.

[4] Nonetheless, in Antkowiak's reading, human rights instruments 'do not offer specific guidance as to how States should repair violations. Without many explicit parameters, the international bodies formulating remedies for victims of human rights abuse initially turned to principles of State responsibility': T.M. Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples', *Duke Journal of Comparative and International Law* 25 (2014), 1–80, 6 [henceforth 'The Inter-American Court and Reparations'].

Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.[5]

The right to a remedy is a key aspect of international human rights law[6] and is reflected in a wide variety of global and regional instruments, as well as in instruments of humanitarian law and international criminal law.[7] 'Remedial' provisions may be included in general statements or with regard to specific rights. The Universal Declaration of Human Rights (UDHR) provides that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[8] Among the UN 'core' treaties, the International Covenant on Civil and Political Rights (ICCPR) contains a general clause on remedies and specific clauses in connection with arrest, detention and conviction,[9] while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) includes general language on remedies,[10] as does the Convention on Migrant Workers (CMW).[11] Redress and compensation for torture victims are referred to in the Convention against Torture (CAT).[12] Protection against attacks on privacy, family, home, etc, and on honour and reputation, is envisaged in a number of treaties.[13] The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) includes a number of provisions regarding remedies, notably the comprehensive Article 24, where the 'right to reparation' is deemed to cover 'material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition'. Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) calls for measures to

[5] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, Article 27; text available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

[6] D. Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press, 2005). Other general treatments include M. Evans and S. Konstadinides (eds), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, 1998); C. Gray, *Judicial Remedies in International Law* (Clarendon Press, 1987).

[7] See, *inter alia*, Article 75 of the Statute of the International Criminal Court, requiring the Court to 'establish principles relating to reparations . . . including restitution, compensation and rehabilitation'. Issues are discussed broadly in E-C. Gillard, 'Reparation for Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 529–53; L. Zegveld, Remedies for Victims of Violations of International Humanitarian Law', *ibid.*, 497–526.

[8] Article 8.

[9] Articles 2(3), 9(5), and 14(6). See Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), paras 15–16; in para. 16 the Committee notes that 'where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.

[10] Article 2(c).

[11] Article 83.

[12] Article 14.

[13] Including Article 12 of the UDHR; ICCPR, Article 17; CRC, Article 16.

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promote 'the physical, cognitive and psychological recovery, rehabilitation and social integration of persons with disabilities'; habilitation and rehabilitation are elaborated in Article 26. Key regional instruments incorporating principles on reparation include the African Charter on Human and Peoples' Rights (ACHPR),[14] the American Convention on Human Rights (ACHR),[15] the Arab Charter on Human Rights,[16] and the European Convention on Human Rights (ECHR).[17]

In the field of racism and related intolerance, the Declaration against Racial Discrimination provides that everyone 'shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms through independent national tribunals competent to deal with such matters'.[18] The Inter-American Convention against Racism, etc, includes the undertaking to ensure 'that victims of racism, racial discrimination, and related forms of intolerance receive equitable and non-discriminatory treatment, equal access to the justice system, expeditious and effective proceedings, and fair compensation in the civil or criminal sphere'.[19]

The section of the Durban Declaration on remedies, etc, sets out a prospectus that addresses issues of historical memory, the importance of knowing the truth about abuses deriving from racism, honouring the victims of racist practices—including victims of the transatlantic slave trade—and apologies and reparation for race-related massive violations of human rights.[20] The Declaration takes note of the fact that some members of the international community have apologized or expressed regret and remorse for 'those dark chapters in history' and calls on others 'who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so'.[21] If many paragraphs in the section on remedies focus on past evils, the Durban Declaration also orients itself to the present day and incorporates elements of Article 6 of ICERD in affirming as a pressing requirement of justice,

> that victims of human rights violations resulting from racism [etc], especially in light of their vulnerable situation socially, culturally and economically, should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, as enshrined in numerous international and regional human rights instruments.[22]

[14] Articles 7, 21, and 26; Article 21 envisages the remedy of 'lawful recovery of its property' as well as 'adequate compensation' for a dispossessed people in case of spoliation.

[15] Articles 8, 10, and 25.

[16] Article 12.

[17] Article 13.

[18] Article 7(2).

[19] Article 10.

[20] 24 March was proclaimed by the General Assembly as the International Day for the Right to Truth Concerning Gross Human Rights Violations and for the Dignity of Victims: A/RES/65/196, 21 December 2010; see also the proclamation by the Human Rights Council, A/HRC/RES/14/7, 23 June 2010; *Study on the Right to Truth*, Report of the Office of the United Nations High Commissioner for Human Rights, E/CN.4/2006/91, 8 February 2006. 24 March commemorates the assassination of Archbishop Oscar Romero of El Salvador, who had denounced violations of the human rights of vulnerable populations including indigenous peoples. The UN has instituted a Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence; for the mandate see: <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx>.

[21] Para. 101.

[22] Para. 104.

The broad and narrower prescriptions in the Durban Declaration are followed up in the Programme of Action which recommends that national legislative frameworks should, *inter alia*, 'provide effective judicial and other remedies of redress, including through the designation of national, independent, specialized bodies',[23] and that access to such remedies 'should be widely available, on a non-discriminatory and equal basis'.[24] Within the overall redress framework the Programme of Action underlines the importance of access to the law and to the courts for complaints of racism and racial discrimination and draws attention to 'the need for judicial and other remedies to be made widely known, easily accessible, expeditious and not unduly complicated'.[25] The paragraph following adds to the tabulation of remedies a reference to designing 'effective measures to prevent the repetition of... acts' of racial discrimination.[26]

Reparation principles have been specifically elaborated for the benefit of particular constituencies such as indigenous peoples.[27] International Labour Organization (ILO) Convention 169 addresses the right of indigenous peoples to return to their lands and territories after relocation,[28] as well as sundry issues of compensation.[29] The UN Declaration on the Rights of Indigenous Peoples is replete with provisions regarding reparation, redress, restitution, compensation, and repatriation of ceremonial objects and human remains.[30] The broadest prescription is contained in Article 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.[31]

A body of substantive human rights provisions on reparations was synthesized into a set of *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights*, adopted by the UN General Assembly in 2005,[32] the

[23] Para. 163.
[24] Para. 164.
[25] Para. 165.
[26] Para. 166.
[27] See the extensive set of essays in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008). Group-oriented discussions of reparations drawing on more than one academic stream are included in R.L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparation* (University of California Press, 2004); M. du Plessis, 'Historical Justice and International Law: An Exploratory Discussion of Reparation for Slavery', *HRQ* 25 (2003), 624–59; R.E. Howard-Hassmann and A. P. Lombardo, *Reparations to Africa* (University of Pennsylvania Press, 2008); J. Miller and R. Kumar (eds), *Reparations: Interdisciplinary Perspectives* (Oxford University Press, 2007).
[28] Article 16(3).
[29] Articles 15(2), and 16(4), 16(5).
[30] Articles 8, 10, 11, 12, 20, 27, 28, 32, and 40, deal with various aspects of remedial processes.
[31] For broader comment, see International Law Association, The Hague Conference (2010), Rights of Indigenous Peoples, pp. 39–43: <http://www.ila-hq.org/...cfm/.../9E2AEDE9-BB41-42BA-9999F0359E79F62D>.
[32] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by GA resolution 60/147 of 16 December 2005 [henceforth *Basic Principles and Guidelines*]. See also Special Rapporteur on Rights of Victims of Gross Violations of Human Rights and Fundamental Freedoms, M. Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report*, E/CN.4/2000/62 (18 January, 2000). For

preamble to which recites the recognition that, 'in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law'. The *Basic Principles and Guidelines* elaborate the basic obligation to respect human rights law, etc, in terms of appropriate measures to prevent violations, prompt investigation of violations, taking action against those responsible for violations, access to justice and effective remedies.[33] Victims are deemed to have a right to equal and effective access to justice, adequate, effective, and prompt reparation for harm suffered, as well as access to information on violations and reparation mechanisms.[34]

The concepts are elaborated in a manner that echoes the inter-State principles of State responsibility set out in the Draft Articles of the International Law Commission (ILC).[35] Reparation is understood as intended to promote justice, and should be proportional to the gravity of the violations and harms suffered.[36] Reparation is sub-divided into restitution (designed to restore victims to the original pre-violation situation),[37] compensation (related to economically assessable damage that includes mental, physical, and moral harm as well as material losses),[38] and satisfaction (including measures aimed at cessation of violations, verification of the facts, apologies, sanctions, commemorations, and tributes to victims).[39] The *Basic Principles and Guidelines* also elaborate on such matters as rehabilitation of victims,[40] and on guarantees of non-repetition, a concept that involves a complex 'structural' prospectus that includes strengthening the independence of the judiciary and human rights education.[41] The focus on gross violations of human rights does not rule out adaptation to smaller scale violations. What counts as a gross violation has exercised the Committee on the Elimination of Racial Discrimination (CERD), particularly in connection with the criteria for taking action under its urgent procedure.[42] The emphasis on the gravity and scale of violations appropriate to trigger the procedure does not rule out its application to smaller populations where the impact of violations may be disproportionately large.[43]

In addition to the provisions cited in the present chapter laying out the duties of States to provide protection and remedies, in the terms of Article 6 'to everyone within their jurisdiction', it may be noted that some international conventions devolve significant

the development of the *Basic Principles*, including the seminal work by T. van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, E/CN.4/Sub.2/1993/8, 2 July 1993, see the collection of essays in K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2006).

[33] *Basic Principles and Guidelines*, para. 3.
[34] *Ibid.*, para. 11.
[35] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra*, n. 2.
[36] *Basic Principles and Guidelines*, para. 15.
[37] Para. 19.
[38] Para. 20.
[39] Para. 22.
[40] Para. 21.
[41] Para. 23.
[42] Discussed in Chapter 4.
[43] The point is referred to in Chapter 4.

remedial powers to their monitoring bodies in the context of binding court judgments.[44] Hence, regarding the jurisdiction and functions of the Inter-American Court of Human Rights, Article 63(1) of the Inter-American Convention on Human Rights provides that the Court may order in appropriate cases that the consequences of a breach of rights or freedoms protected by the Convention be remedied and compensation paid. The Inter-American Court in particular has been highly creative in extending the jurisprudential lexicon of remedies,[45] and its prescriptions have been influential in the work of other bodies, including CERD.[46]

## B. *Travaux Préparatoires*

In the Sub-Commission, the Abram text proposed that each State party 'shall assure to everyone within its jurisdiction' a right to an effective remedy for racial discrimination 'through independent national tribunals competent to deal with such matters', and also 'remedial relief for any individual who has suffered substantial harm as a result of racial violence, hatred or discrimination'.[47] The Calvocoressi,[48] and the later joint Abram, Calvocoressi, and Capotorti text also referred to effective remedies.[49] In discussions, Capotorti referred to the draft article as designed 'to ensure that the party responsible for causing injury as a result of racial discrimination, whether it was the State itself or a

[44] Article 41 of the ECHR, under the heading of 'Just Satisfaction', provides that if the Court 'finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

[45] 'For its part, the Inter-American Court of Human Rights stands as the only international tribunal with binding jurisdiction that has ordered all . . . remedies. The depth and breadth of its reparations jurisprudence are unparalleled. Often in potent combinations, the Court has ordered wide-ranging measures such as monetary compensation, restitution, cessation, medical and psychological rehabilitation, apologies, memorials, legislative reform, and training programmes for State officials . . . This approach sharply contrasts with . . . the European Court of Human Rights. The European Court has historically favoured only monetary compensation and declaratory relief, although exceptions . . . have appeared during recent years': Antkowiak, *The Inter-American Court and Reparations*, 10. See also J. Pasqualucci, 'The Americas', in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press, 2014), 398–415, 408–10, who observes, 408, in the context of the Court's 'enhancement of the concept of reparations' that 'the Court has ordered victim-centred reparations as well as reparations that . . . benefit specific communities or society as a whole'. Examples of the latter include return of ancestral lands, *Yakye Axa v Paraguay*, IACtHR Ser. C No. 125 (2005); a campaign to educate on the work of environmental activists, *Kawas Fernándes v Honduras*, IACtHR Ser. C No. 196 (2009); to reopen a school and a medical clinic, *Aloeboetoe v Suriname*, IACtHR Ser. C No. 15 (1993); to invest in collective service for the benefit of the community, *Awas Tingni v Nicaragua*, IACtHR Ser. C No. 79 (2001); and to develop programmes in the areas of health, housing, and education, *Moiwana Village v Suriname*, IACtHR Ser. C No. 125 (2005). Aspects of these cases are discussed in the present work, principally in connection with Article 5.

[46] References to the organs of the Inter-American system are found in, *inter alia*, concluding observations on Ecuador, CERD/C/ECU/CO/20-22, para. 8, welcoming the commitment to comply with the Court's ruling in the *Sarayaku* case (*Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR (27 June 2012)); Paraguay, CERD/C/PRY/CO/1-3, para. 17, re the Yakye Axa, Sawhoyamaxa, and Xamok Kasek indigenous communities; Suriname, CERD/C/SUR/CO/12, para. 18, implement the Court's judgments in *Moiwana* and *Saramaka (Saramaka People v Suriname)*, IACtHR Ser. C No. 185 (2008) cases, and para. 19, respond to the analysis by the inter-American organs regarding deficiencies in providing adequate remedies for collective rights. See also Chapter 13.

[47] E/CN.4/Sub.2/L.308.

[48] E/CN.4/Sub.2/L.309.

[49] E/CN.4/Sub.2/L.339.

private individual or organization, should provide effective remedy to the victim'.[50] A reference to remedial relief, 'including payment of damages' was incorporated into the text prepared by Cuevas Cancino and Ingles.[51] The reference to 'payment of damages' did not survive into the text presented to the Commission:

> States parties shall assure to everyone within their jurisdiction effective remedies and protection through independent tribunals against any racial discrimination and the right to obtain from such tribunals reparation for any damage suffered as a result of racial discrimination.[52]

A number of amendments to the Sub-Commission's text were submitted, notably that of the United Kingdom to add 'contrary to the present Convention' after 'racial discrimination'[53] and that of Austria to replace 'reparation' by 'just satisfaction'.[54] The USSR proposed the insertion of 'competent to consider such cases' after 'independent tribunals'.[55] An amendment by Lebanon proposed that the Sub-Commission's text be redrafted as follows:

> States parties shall assure to everyone within their jurisdiction effective remedies and protection through independent tribunals, competent to consider such cases, against any acts of racial discrimination which, contrary to this Convention, violate his human rights and fundamental freedoms, and the right to obtain from such tribunals remedial decisions for reparation of any damage suffered as a result of such discrimination.

It was pointed out that the reference to 'national' tribunals was important and that this qualification on the nature of the tribunal had been inadvertently omitted from the Sub-Commission's text.[56] The amendment proposed by the USSR on the tribunals issue suggested to some that only specially convened tribunals could deal with racial discrimination cases,[57] though 'competent' could also mean simply competent under national legislation.[58] The suggested addition of 'impartial' to the qualifications of tribunals did not find favour: insisting on impartiality in the text could, according to one representative,

[50] E/CN.4/Sub.2/SR.425, pp. 3–4.

[51] E/CN.4/Sub.2/L.330.

[52] Commission on Human Rights, Report on the Twentieth Session, E/CN.4/874, para. 213.

[53] E/CN.4/L.700.

[54] E/CN.4/L.711. The amendment was later withdrawn in favour of an amendment by Costa Rica to the revised proposal of Lebanon (E/CN.4/874, para. 220) to add 'or satisfaction' after 'reparation': E/CN.4/874, para. 221. This was accepted by 19 votes to none, with 2 abstentions: E/CN.4/874, para. 228.

[55] E/CN.4/L.681.

[56] Representative of the USSR, E/CN.4/SR.800, pp. 10–11, who noted that 'national' tribunals had also been referred to in the Abram text (E/CN.4/Sub.2/L.308) before the Sub-Commission. The Calvocoressi text (E/CN.4/Sub.2/L.309) had also referred to 'a national authority or tribunal'.

[57] Representative of Ecuador, E/CN.4/SR.800, p. 14, to which the reply of the USSR (*ibid.*) was that the purpose of the USSR amendment 'was not to set up new tribunals but to ensure that use was made of the competent national tribunals that already existed.' A number of representatives accepted the notion of 'competent national tribunals' provided 'its use did not in any way prejudice the right of victims of racial discrimination to turn to international bodies' for help: representative of Austria, E/CN.4/SR.801, p. 5; see also the representative of Italy, E/CN.4/SR.801, p. 8.

[58] According to the representative of the United Kingdom, 'The word "competent"... was necessary to indicate that the tribunals concerned were those which would naturally handle the types of cases in question': E/CN.4/SR.801, p. 7. At the request of the Representative of Austria, a separate vote was taken on the word 'competent'; the term was adopted by 20 votes to none, with 1 abstention: E/CN.4/874, para. 230. Cf. Article 8 of the UDHR where the phrase 'competent national tribunals' is employed, whereas the phrase 'independent and impartial tribunal' appears in its Article 10.

be seen as casting a slur on the administration of justice in certain countries.[59] A UK amendment was designed, according to its representative, to make clear that the tribunals would be competent to deal with discrimination the subject of obligations under other articles of the Convention;[60] against this, it was argued that the impression should not be given that the scope of the Convention was narrow and remedies outside it were not possible.[61] Suggestions to refer to 'acts of racial discrimination' rather than discrimination in general, and to 'acts' violating human rights and fundamental freedoms were eventually included: according to one representative, 'a remedy was not against abstract principles but against specific acts'.[62]

On reparations generally, representatives questioned whether the Sub-Commission text was correct to refer to a right to obtain reparation, since what was to be assured was the right to approach tribunals which would then decide on the merits of the case;[63] it would be better, therefore, to refer to the 'right to seek' reparations.[64] The Austrian suggestion to add 'just satisfaction' was understood by some discussants to meet the case where pecuniary damages were insufficient, thereby bringing into play the idea of equitable reparation.[65] Discussions produced additional terminology to the Austrian proposal so that the phrase became 'just and adequate reparation or satisfaction', despite doubts as to whether this would unduly burden tribunals and whether such remedies could be found in all cases of racial discrimination.[66] The expanded terminology was accepted.[67] It was observed that the right to obtain reparations should be stated broadly since it concerned not only reparation for financial damage, but also the restoration of the rights of victims.[68]

The term 'protection' was not much discussed in the Commission. The representative of Liberia made the substantive point that it should be retained, because 'even if a person

[59] Representative of Lebanon, E/CN.4/SR.800, p. 8; and according to the representative of Italy, the draft convention, 'like any other United Nations convention, should take for granted the independence and impartiality of the courts' of member States: E/CN.4/SR.801, p. 8.

[60] 'Although the expression "racial discrimination" was already defined in Article I, his delegation thought it would be useful to make even clearer that the obligations assumed by the State parties under this article [VI] related to the obligations they had assumed under articles II, III, IV and V': comment of the representative of the UK, E/CN.4/SR.800, p. 5.

[61] See in particular the remarks by the representative of The Philippines, E/CN.4/SR.800, pp. 5–6; and the USSR, *ibid.*, p. 11: the UK amendment 'might give the impression that effective remedies and protection would be available only in the event of discriminatory acts in violation of [the] convention, as if its scope was narrow and outside it no remedies were possible. That restriction . . . was inconceivable. Racial discrimination had been declared illegal in principle.'

[62] Representative of France, E/CN.4/SR.800, p. 12.

[63] Representative of the United Kingdom, E/CN.4/SR.801, p. 7.

[64] E/CN.4/SR.801, p. 6, representative of Costa Rica. France initially suggested referring to the 'possibility' to obtain reparations in preference to the 'right' to do so: E/CN.4/SR.800, p. 12.

[65] E/CN.4/SR.801, p. 5. The *travaux* reveal divergent views regarding the meaning of 'reparation', with a number of representatives assuming that it related to monetary compensation whilst others argued for a wider meaning; see, for example, comments by Poland, Austria, and Lebanon, E/CN.4/SR.801, pp. 4–5.

[66] For example remarks of the United Kingdom, E/CN.4/SR.801, pp. 6–7.

[67] At the request of the United Kingdom, a separate vote was taken on the words 'and adequate' in the Lebanese amendment; the term was retained by 13 votes to 4, with 4 abstentions: E/CN.4/874, para. 229.

[68] Remarks of the representative of Poland, E/CN.4/SR.800, p. 9. The representative of Italy, E/CN.4/SR.801, p. 8, observed that 'satisfaction' 'was primarily concerned with non-monetary compensation, whereas "reparation", which was a very broad term, covered both non-monetary and monetary damage . . . "adequate" should be inserted to indicate that the amount of the reparation must reflect the seriousness of the injury suffered.' In similar vein, the representative of Lebanon, *ibid.*, 'understood that the word "reparation" included not only monetary reparation but also all forms of remedy'.

was offered a remedy in the event of a violation or denial of his rights under the Convention, before attempting to obtain reparation from a tribunal, he must have the assurance that the latter would protect him'.[69] On the other hand, Italy argued that 'protection' was redundant because to be effective a remedy had to assure protection.[70]

The Third Committee examined the following text:

> States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals, 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.[71]

A first amendment that proposed adding 'and other State institutions' between 'tribunals' and 'against'[72] was adopted by an overwhelming majority.[73] A second amendment sought to insert 'where appropriate' after 'adequate reparation' but was subsequently withdrawn:[74] the sponsor of the amendment explained that 'there might be cases in which monetary compensation would not be adequate or appropriate, for instance the case of a person refused hotel accommodation because of his race. The words "where appropriate" would indicate that in such circumstances other forms of redress were necessary.'[75] On 'reparation' the representative of the UK added that 'for her delegation, "reparation" meant simply money, and no court in her country could put a price on an act of discrimination. It was difficult enough to set a price in cases of divorce or loss of limb; in the case of racial discrimination there could be no price',[76] to which it was pointed out that the draft article referred to 'reparation or satisfaction'.[77]

## C. Practice

### I. Reservations and Declarations

Six States parties maintain declarations and interpretations on Article 6: France, Italy, Malta, Nepal, Tonga, and the UK,[78] most of which are couched in uniform terms: the government of Malta states that it 'interprets the requirement in article 6 concerning "reparation or satisfaction" as being fulfilled if one or other of these forms of redress is made available and interprets "satisfaction" as including any form of redress effective to bring the discriminatory conduct to an end'; the same formula is employed by Nepal, Tonga, and the UK. The statement by France is brief: 'France declares that the question of remedy through tribunals is, as far as France is concerned, governed by the rules of ordinary law'; while Italy adds that claims for damage suffered must be brought against the persons responsible for malicious or criminal acts which caused the damage.

[69] E/CN.4/SR.802, p. 4.
[70] E/CN.4/SR.801, p. 7.
[71] A/6181, para. 86.
[72] Amendment by Bulgaria, A/C.3/L.1218, A/6181, para. 87.
[73] *Ibid.*, para. 89: the voting was 88 to 1 with 9 abstentions.
[74] By Mauritania, Nigeria, and Uganda, A/C.3/L.1225. A/6181, para. 88.
[75] Representative of Nigeria, A/C.3/SR.1309, para. 34.
[76] A/C.3/SR.1309, para. 40.
[77] *Ibid.*, para. 41; remark by the representative of Mexico as Chairman.
[78] <https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&lang=en>.

## II. Guidelines

Guidelines for the Common Core Document request that States provide information on the machinery for the protection of human rights. This includes information on the 'remedies . . . available to an individual who claims that any of his or her rights have been violated, and whether any systems of reparation, compensation and rehabilitation exist for victims'.[79] This is supplemented by a paragraph requesting 'general information . . . on the nature and scope of remedies provided in . . . domestic legislation against violations of human rights and whether victims have effective access to these remedies'.[80]

The CERD-specific guidelines request information on the 'legislative, judicial, administrative or other measures' giving effect to Article 6,[81] and on the practice and decisions of courts and other judicial and administrative organs relating to 'cases of racial discrimination'. The guidelines also summarize important considerations associated with 'effective protection and remedies'. Paragraph 2 requests information on measures taken 'to ensure (a) that victims have adequate information concerning their rights; (b) that they do not fear social censure or reprisals; (c) that victims with limited resources do not fear the cost and complexity of the judicial process; (d) that there is no lack of trust in the police and judicial authorities; and (e) that the authorities are sufficiently alert to, or aware of, offences with racial motives'. The institutional contexts for the handling of complaints of racial discrimination are referred to in paragraph 3 in relation to 'national human rights institutions and ombudspersons and other similar institutions', while paragraphs 4 and 5 request information on 'types of reparation and satisfaction' considered adequate in domestic law, and the burden of proof in civil proceedings for racial discrimination; footnotes in the guidelines refer to General Recommendations (GRs) 23, 26, 30, and 31. The guidelines conclude by referring to the communications procedure under Article 14, suggesting that States should indicate whether they intend to accede to the procedure, and in the case of those which have opted in to the procedure, whether they have designated a body competent to receive petitions from individuals and groups claiming to be victims of racial discrimination.[82]

## III. Everyone Within their Jurisdiction/Effective Protection and Remedies

The effective protection and remedies referred to must be assured to everyone within the jurisdiction: Article 6 is the second substantive article to refer to jurisdiction, the other being Article 3.[83] The open texture of Article 2 with regard to extraterritorial jurisdiction and the acceptance of extended jurisdiction under Article 3, discussed in previous chapters, suggest that similar principles may be applied, *mutatis mutandis*, to Article 6, which omits mention of territory or territories. In the case of the Occupied Palestinian Territory, the Committee commented in relation to violence by Jewish settlers that the State party 'should ensure that such incidents are investigated in a prompt, transparent and independent manner, the perpetrators are prosecuted and sentenced, and that

[79] HRI/GEN/2/Rev.5, p. 11, para. 42(e).
[80] *Ibid.*, para. 59.
[81] CERD/C/2007/1, p. 13.
[82] *Ibid.*, pp. 13–14. See discussion in Chapter 4.
[83] Article 6 has a certain unity that makes difficult the detachment of sections to illustrate the practice; observations below address issues that interrelate and overlap. Article 6 is the only substantive article in the Convention to use gendered language.

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avenues of redress are offered to the victims'.[84] The Committee has expressed concerns regarding practices of administrative detention, the competence of military tribunals to try Palestinian children, and 'the monetary and physical obstacles faced by Palestinians seeking compensation before Israeli tribunals for loss suffered'.[85] In consequence, citing, *inter alia*, Article 6, CERD recommended that 'the State party ensure equal access to justice for all persons residing in territories under the State party's effective control', and urged the ending of the current practice of administrative detention 'which is discriminatory and constitutes arbitrary detention under international human rights law'.[86]

Article 6 is expressed in mandatory terms—the use of 'shall assure' governs the whole of the article. As with Article 5, the universalist language of 'everyone' is treated as compatible with adaptation to the circumstances of a plurality of groups, including non-citizens.[87] While Article 6 contains an independent obligation, opinions under the communications procedure frequently read it together with other articles, as the basis of the decision.[88]

The requests for information in the Guidelines suggest some of the content of the demands of 'effectiveness' placed upon States parties. If the system of remedies in the State party is to function effectively, the public must be aware of it and have confidence in its workings. The absence of complaints of racial discrimination in a particular jurisdiction is not generally regarded as a positive sign or an accurate measure of the incidence of racial discrimination: a standardized version of this caution, recycled through numerous recommendations to States parties, is presented in GR 31 on the administration of criminal justice:

> The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination ... should not be viewed as necessarily positive ... It may ... reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism.[89]

Concerns regarding the small numbers of national cases on racial discrimination have been recycled through successive concluding observations; the concerns regarding low numbers of complaints reflect the Committee's sceptical approach to the (occasional) claims as to the absence or low incidence of racial discrimination in the States parties.[90] Concern has also been expressed about high numbers of discontinued cases,[91] including

[84] CERD/C/ISR/CO/13, para. 37; an earlier paragraph (35) recommended that, although different legal regimes may apply to Israeli citizens in the Occupied Territories and Palestinians, 'the State party should ensure that the same crime is judged equally, not taking into consideration the citizenship of the perpetrator'.

[85] CERD/C/ISR/CO/14-16, para. 27.

[86] *Ibid.*

[87] See Chapter 7 on non-citizens; it will be recalled that many communications under Article 14 have concerned non-citizens.

[88] As in, for example, *L.R. v Slovakia*, CERD/C/66/D/31/2003 (2005); *Gelle v Denmark*, CERD/C/68/D/34/2004 (2006); *Murat Er v Denmark*, CERD/C/71/D/40/2007 (2007).

[89] Para. 1(b).

[90] The point is made in broad terms in GR 31 among the 'factual indicators' of racial discrimination. Scepticism might appropriately be extended to the low numbers and national distribution of cases brought to the attention of CERD under Article 14, most of which emerge from a small coterie of States among the more than 50 acceptances of the procedure.

[91] Concluding observations on Belgium, CERD/C/BEL/CO/15, para. 13.

where police officers or public figures are involved, and cases of impunity.[92] Basic principles were recalled by the Committee in the case of Bolivia with regard to conflicts and acts of racist violence and campesino peoples and nations, some of which resulted in deaths, and the climate of impunity surrounding the events, in relation to which the Committee reaffirmed 'the duty of the State party to put an end to impunity for these acted' and, urging it 'to expedite the administration of justice, the investigation of the complaints... the identification and prosecution of the perpetrators and... guarantee victims and their family members an effective remedy'.[93] The training of the judiciary to discern and address issues of racial discrimination has also been suggested as correlated with the low numbers of cases.[94] As GR 31 suggests, the low profile of racial discrimination complaints may be linked with fear of reprisals on the part of human rights defenders, or lack of civil space for non-governmental organizations (NGOs) and others to take up cases involving 'racial' elements.[95] While the Committee requests data in order to inform its dialogues with States parties, the data on the profile of complaints to tribunals and other bodies, as with other data requested, are treated as essential to designing effective national anti-discrimination policies.

Bearing in mind the references in the *travaux* to the relationship between the competence and the independence of tribunals, the presence of an independent judiciary in the State party is as crucial to achieving the objectives of Article 6 as it is to other aspects of the Convention. GR 35 observes that:

> [i]ndependent, impartial and informed judicial bodies are crucial to ensuring that the facts and legal qualifications of individual cases are assessed consistently with international standards of human rights. Judicial infrastructures should be complemented in this respect by national human rights institutions in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).[96]

## IV. Duty of Effective Investigation

The practical working through of an institutional infrastructure providing effective protection and remedies is taken to imply that cases concerning racial discrimination must be properly investigated; a great many decisions under the Article 14 procedure revolve around this fundamental point. In *L.K. v The Netherlands*, the point of contention was whether police and judicial authorities had properly addressed the complaint of the author following an anti-foreigner petition by residents of a municipal housing development and threats of violence. The Committee found the response by police and judicial authorities incomplete and inadequate and a denial of effective protection, adding the observation that '[w]hen 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'.[97]

[92] Concluding observations on Bolivia, CERD/C/BOL/CO/17-20, para. 17; Denmark, CERD/C/DNK/CO/18-19, para. 9; Serbia, CERD/C/SRB/1, para. 22; see also the Committee's Declaration on the Prevention of Genocide, A/60/18, ch. VIII, para. 11.

[93] CERD/C/BOL/CO/17-20, para. 17.

[94] GR 31, paras 4 and 5.

[95] Para. 1.

[96] GR 35, para. 18.

[97] CERD/C/42/D/4/1991 (1993), para. 6.6.

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In *Kashif Ahmad v Denmark*, the claim was that racial insults against the applicant, family members, and friends who were waiting outside a school examination room had not been properly investigated by the police. In light of the discontinuation of proceedings, and the block on further prosecution by the Public Prosecutor, the author was 'denied any opportunity' to establish whether his rights under the Convention had been violated, from which it followed that he had been 'denied effective protection against racial discrimination and remedies attendant thereupon' by the State party.[98] *Habassi v Denmark* follows the same pattern: the State party should have investigated 'the real reasons' behind a bank's policy on refusing loans to foreigners to see if racial discrimination was involved.[99] Lack of effective investigation was also part of the motivation for decisions in *Durmic v Serbia and Montenegro*,[100] *Gelle v Denmark*,[101] *Adan v Denmark*,[102] *TBB-Turkish Union in Berlin/Brandenburg v Germany*,[103] and *Dawas and Shawva v Denmark*.[104] In the last-named case, which concerned an attack by a group of youths on the house of the petitioners, both of whom are Iraqi citizens recognized as refugees, the Committee found, *inter alia*, a failure to investigate the racist character of the attack, observing that

> [i]n circumstances as serious as those in this case, where the petitioners were subjected, in their own house, to a violent assault by 35 offenders, some of them armed, enough elements warranted a thorough investigation by public authorities of the possible racist nature of the attack against the family. Instead, the possibility was set aside at the level of the criminal investigation, thereby preventing the issue from even being adjudicated at the criminal trial. The Committee considers that the onus was on the State party to initiate an effective criminal investigation, instead of giving the petitioners the burden of proof in civil proceedings. The Committee recalls its jurisprudence, according to which when threats of violence are made, it is incumbent upon the State party to investigate with due diligence and expedition. The obligation is a fortiori applicable in the present case, where 35 individuals actually participated in an assault on the family.[105]

The State party dissented on fact and law from the Committee's conclusions, arguing, *inter alia*, that the evidence necessary to prove racist motivation was not available, that the number of thirty-five was disputed by witnesses, and that the petitioners had not referred to any racial motivation in their original statements. Further, on the Committee's conclusion that the investigation into the incident was incomplete, the State party wondered what further investigative steps could have been taken to shed light on the incident, bearing in mind that all identified witnesses had been interviewed.[106] The

[98] CERD/C/56/D/16/1999 (2000), para. 6.4; see also para. 9.
[99] CERD/C/54/D/10/1997 (1999), para. 9.3.
[100] CERD/C/68/D/29/2003 (2006), para. 10.
[101] *Gelle v Denmark*, para. 7.6.
[102] CERD/C/77/D/43/2008 (2010), para. 7.7.
[103] CERD/C/82/D/48/2010 (2013), paras 12.8 and 12.9.
[104] CERD/C/80/D/46/2009 (2012), para. 7.5.
[105] *Ibid.*, para. 7.4. In regard to remedies, the Committee recommended, *ibid.*, paras 9 and 10, that the State party grant the petitioners adequate compensation for the material and moral injury they had suffered and review policy and procedures in the matter of prosecution in cases of alleged racial discrimination or violence.
[106] A/67/18, Annex IV, 160–5. At a meeting with a representative of the State party, the Rapporteur on communications conveyed the Committee's position that the opinion was not subject to reconsideration in light of the absence of any such provision in the rules of procedure; the dialogue was stated to be ongoing. On the absence of reconsideration by the Committee, information was later conveyed by the State party reiterating the view that the Committee's opinion was based on misunderstandings and that the recommendation to pay compensation would not be applied, while the recommendation to review policy and procedures had generated

investigations carried out by national authorities have been regarded as satisfactory in other cases, leading to findings of no violation.[107] A State party has pointed out that the Convention 'does not specify which authority should decide to initiate prosecution or at what level of the hierarchy the decision should be taken',[108] to which the answer is presumably the authority in the best position to address the issues in light of the principle of effectiveness.

The mantra of 'effective investigation' also runs through the concluding observations on State reports. The Committee has called for the effective investigation of racially motivated offences,[109] and violations of the rights of ethnic and racial groups, as well as for 'the investigation of investigations' in order to be sure that an investigative methodology for such offences such as terrorism is not itself 'racialized' and that due process and the rule of law are effectively applied.[110] In addition to general statements, including those regarding racist political discourse,[111] the various groups protected by the Convention have been the subject of recommendations to investigate allegations of offences against them, including ethnic minorities,[112] indigenous peoples and Afro-descendants,[113] migrant workers and 'foreigners',[114] caste groups,[115] and specific, named nationalities and ethnicities.[116]

## V. The Expediency Principle

With regard to prosecutions following on from investigations, the Committee has referred to the expediency principle: the discretion/freedom to prosecute criminal offences or not to prosecute.[117] In *Yilmaz-Dogan v The Netherlands*, it was stated that

> the freedom to prosecute criminal offences—commonly known as the expediency principle—is governed by considerations of public policy . . . the Convention cannot be interpreted as challenging the *raison d'ètre* of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention.[118]

developments in Danish law and practice. The Committee treated the State party's response as partly satisfactory and discontinued the follow-up procedure: A/70/18, Annex II, 26–7.

[107] For example, *Quereshi v Denmark*, CERD/C/63/D/27/2002 (2003), para. 7.4; *Jama v Denmark*, CERD/C/75/D/41/2008 (2009), para. 7.4.

[108] *POEM and FASM v Denmark*, CERD/C/62/D/22/2002 (2003), para. 4.6.

[109] Concluding observations on Vietnam, CERD/C/VNM/CO/10-14, para. 10.

[110] The Committee recommended that that State party 'ensure that the new system of terrorism prevention and investigation include includes safeguards against abuse and the deliberate targeting of certain ethnic and religious groups': Concluding observations on the UK, CERD/C/GBR/CO/18-20, para. 21; see also para. 9, investigation and prosecution of riot-related cases.

[111] Concluding observations on Slovenia, CERD/C/SVN/CO/6-7, para. 11.

[112] *Ibid.*

[113] Concluding observations on Paraguay, CERD/C/PRY/CO/1-3, paras 15 and 16.

[114] Concluding observations on Kazakhstan, CERD/C/KAZ/CO/4-5, para. 16; Mauritius, CERD/C/MUS/CO/15-19, para. 22.

[115] Concluding observations on India, CERD//IND/CO/19, para. 26.

[116] Concluding observations on Russian Federation, CERD/C/RUS/CO/19, paras 12 and 13, Chechens, Roma, Africans, and Georgian nationals and ethnic Georgians; Slovakia, CERD/C/SV/CO/6-8, paras 15 and 16; Roma, Jews, Hungarians; Venezuela, CERD/C/VEV/CO/19-21, paras 16 and 17, Yanomami and Yupka peoples.

[117] *L.K. v The Netherlands*, CERD/C/42/D/41991 (1993), para. 3.3.

[118] CERD/C/36/D/1/1984 (1988), para. 9.4.

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*TBB-Turkish Union* raised issues including Committee review, effective investigation, and the expediency principle.[119] The Committee has frequently recalled that it is not its function to review the interpretation of facts and national law made by domestic authorities, unless the decisions are manifestly absurd or unreasonable.[120] In this instance, the Committee recalled its standard position on review, along with the observations of the State party that the contested statements of Sarrazin against the Turkish population had been appraised as not capable of disturbing the peace and that there was no increased risk for the petitioner or its members becoming victims of future criminal acts. Nonetheless, with reference to the elements of Article 4(a) (incitement, dissemination of ideas), the Committee found that by concentrating on the fact that the statements 'did not amount to incitement to racial hatred and were not capable of disturbing the public peace', the State party 'had failed in its duty to carry out an effective investigation into whether or not Mr Sarrazin's statements amounted to dissemination of ideas based on racial superiority or hatred'.[121] In other words, the State party's appraisal of the impugned statements had, on this view, been narrowly focused on incitement, absenting the 'dissemination of ideas' limb of Article 4 from effective scrutiny. The absence of an effective investigation amounted to a violation of Articles 6, 2(1)(d), and 4.

The opinion in *TBB-Turkish Union* was the subject of a vigorous and wide-ranging dissent on, *inter alia*, the application of the expediency principle, by Committee member Vázquez, who asserted that the Convention 'does not require the criminal prosecution of every expression of ideas of racial superiority or every statement inciting to racial discrimination, but leaves States parties with discretion to determine which prosecutions best serve the goals of the Convention'.[122] In his view, even if statements were not protected by freedom of expression, it did not follow that prosecution posed no risks, bearing in mind that criminal punishment is the most severe form of punishment that States can impose; criminal prosecution may cause greater harm to the goals of the Convention than other forms of response to offending statements. Further, the Convention 'does not preclude States from adopting a policy of prosecuting only the most serious cases... such a policy would appear to be required by the principle that any restriction on the right of free expression must conform to the... tests of necessity and proportionality'.[123] The Committee's concern with the State party's focus on disturbance of the peace was also stated to be misplaced in that it was only one element in the decision not to prosecute, and, in any case, considerations of public order are not irrelevant to the application of Article 4.[124]

*TBB-Turkish Union* was decided before the adoption of GR 35, and elements of both the majority and dissenting opinions surface in the later text. The standard formula on the expediency principle is restated in the recommendation as applicable in light of the guarantees laid down in the Convention 'and in other instruments of international law'. The additional phrase is innovative and situates the application of the principle in a wider normative field; the principle of respect for the domestic interpretation of law and facts 'unless the decisions are manifestly absurd or unreasonable', is also recalled.[125] Points

[119] For a further review of the 'hate speech' aspects of the opinion, see Chapter 11.
[120] *Murat Er v Denmark*, para. 7.2; *TBB-Turkish Union in Berlin/Brandenburg v Germany*, para. 12.5.
[121] *TBB-Turkish Union*, para. 12.8.
[122] *TBB-Turkish Union*, Appendix, para. 10.
[123] *Ibid.*, para. 13.
[124] *Ibid.*, para. 15.
[125] GR 35, para. 17.

close to the Vázquez dissent appear from the statement that 'the criminalization of forms of racist expression should be reserved for serious cases... while less serious cases should be addressed by means other than criminal law'.[126] That the emphasis on criminalization in this paragraph may be adapted to the issue of prosecution is suggested by the sentence in the same paragraph that '[t]he application of criminal sanctions should be governed by principles of legality, proportionality and necessity'. Further, while paragraph 15 of the recommendation refers somewhat ambiguously to the 'qualification' of forms of conduct as criminal offences on the basis of a range of contextual factors, the factors are transposable to the question of whether or not to prosecute.

## VI. On Civil and Criminal Law

It is clear that from the above that besides the provision of civil remedies, the required infrastructure to deliver 'effective protection and remedies' necessarily includes the institutions of criminal justice. Views thereon are elaborated in GR 31 on 'the prevention of racial discrimination in the administration and functioning of the criminal justice system'.[127] The lengthy preamble includes references to Articles 1, 5, and 6, as well as GR 27 (Roma), GR 29 (descent), and GR 30 (non-citizens), Article 16 of the Convention on Refugees, and paragraph 25 of the Durban Declaration, which expressed its profound repudiation of the racism, racial discrimination, xenophobia, and related intolerance that persist in some States in the functioning of the penal system and in the application of the law, as well as the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being overrepresented among persons under detention or imprisoned. The recommendation characterizes racial discrimination in the administration of justice as a particularly serious violation of the principles of the Convention and equality principles generally.

Factual indicators of a malfunctioning system, besides the low number of cases referred to earlier, include numbers and percentages of persons belonging to Article 1 groups who are victims of aggression, especially aggression by police and State officials; attribution of high crime rates to such groups, their insufficient representation in the ranks of the justice system, and percentages held in detention.[128] The recommendation ranges widely over linked issues of information on the functioning of the justice system, human rights and tolerance training strategies, plans of action to eliminate structural discrimination which should include, *inter alia* and in the context of structural discrimination, 'guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice'.[129] Sections on access to justice, reporting, and legal proceedings follow the general considerations in the opening sections of the recommendation, which concludes with recommendations on trials, sentencing, and punishment that include observations on remedying prejudice and corruption, and promoting racial/cultural sensitivity at all processual stages. In post-conflict situations, where legal institutions have been weakened or destroyed, the recommendation refers to setting up of reconstruction plans and to States parties availing themselves of international technical

[126] *Ibid.*, para. 12. See further discussion in Chapter 11.
[127] A/60/18, Chapter IX.
[128] GR 31, paras 1, 2, and 3.
[129] *Ibid.*, para. 5(i).

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assistance.[130] Extensive use is made in the recommendation of norms of hard and soft law emanating from treaty bodies and other sources.[131]

Civil remedies have been regarded as inadequate where the complaint alleges a criminal offence. In *Lacko v Slovakia*,[132] the petitioner, a person of Roma ethnicity, was required to leave a restaurant because of its policy not to serve Roma. A subsequent investigation found that no criminal offence had been committed. The State party argued that sundry administrative and civil avenues of complaint had not been exhausted by the petitioner and that the matter before CERD should be dismissed because of non-exhaustion of domestic remedies. In declaring the communication admissible, the Committee intimated that for some types of conduct, only criminal remedies are adequate, observing that

> [t]he State party failed to demonstrate that a petition for review, which would be a remedy against the legality of the decision, could in the present case lead to a new examination of the complaint. Furthermore, the Committee finds that the facts of the claim were of such a nature that only criminal remedies could constitute an adequate avenue of redress. The objectives pursued through a criminal investigation could not be achieved by means of civil or administrative remedies of the kind proposed by the State party. Therefore, the Committee found that no other effective remedies were available to the petitioner.[133]

In some instances, alternative forms of legal redress—prosecutions instigated by those claiming as victims, and civil procedure—are available as remedies. In *Sadic v Denmark*, an altercation between the petitioner and his employer resulted in a stream of racist abuse on the part of the latter. The specific provision of the penal code, subject to prosecution *ex officio*, was not pursued because of lack of evidence as to whether the altercation was sufficiently public to engage the legislation. An alternative form of prosecution for defamatory statements (not specific to racial discrimination) was available to the petitioner, as well as civil proceedings. In this case, the Committee accepted that the defamation proceedings were capable of constituting an effective remedy.[134] *Sadic* was distinguished in *Gelle v Denmark*, a case that concerned an insulting letter written by a politician regarding Somalis, where the 'defamation route' to prosecution was deemed not to be an effective remedy. The Committee in *Gelle* read *Sadic* as being related to a personal dispute that was 'essentially private',[135] whereas in *Gelle*, 'the statements were made squarely in the public arena, which is the central focus of the Convention' and the relevant Danish legislation.[136] Civil proceedings were also regarded as not effective in *Gelle* insofar as the petitioner sought a full criminal investigation of the politician's statements.[137]

Article 6 does not, in the view of the Committee, 'impose upon States parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court

[130] *Ibid*, para. 5(h).

[131] Extra-Convention guidelines and principles are referred to in paras 14, 22, 33, and 38.

[132] CERD/C/59/D/11/1998 (2001).

[133] Para. 6.3. In the event, the situation regarding prosecution was reviewed by the Slovak authorities, resulting in a conviction. The Committee, despite the delay of over three years in convicting and sanctioning the manager of the restaurant, found no violation of the Convention.

[134] CERD/C/62/D/25/2002 (2003), paras 6.3, 6.4.

[135] Para. 6.5. In *Quereshi v Denmark*, the *Sadic* situation was further distinguished as concerning 'comments . . . essentially private or . . . made within a very limited circle': CERD/C/66/D/33/2003 (2005), para. 6.3.

[136] *Gelle v Denmark*, para. 6.5.

[137] *Ibid.*, para. 6.6. Also *Jama v Denmark*, para. 6.5; *Adan v Denmark*, para. 6.3.

level, in cases of alleged racial discrimination'.[138] The limitation was given a nuanced reading in *Quereshi v Denmark*, where the Committee, citing *Yilmaz-Dogan*, reflected that while Article 6 'might be interpreted to require the possibility of judicial review of a decision not to bring a criminal prosecution in a particular case alleging racial discrimination', noted the statement by the State party that it was open under national law to judicially challenge a prosecutor's decision.[139]

## VII. Traditional Mechanisms of Justice

Additional to points on necessary access to the institutional apparatus of justice in the States, the recognition of traditional justice mechanisms, especially those of indigenous peoples, is a notable feature of CERD's oeuvre.[140] Background standards on indigenous justice mechanisms include ILO Convention 169, Articles 8–12, and the UN Declaration on the Rights of Indigenous Peoples, notably Article 34. While GR 31 focuses principally on 'formal' national systems of justice, it also recommends 'respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law'.[141] Examples include Mexico, where the State party was urged 'to respect the traditional systems of justice of indigenous peoples, in accordance with international human rights standards, including by establishing special indigenous courts'.[142] GR 31 was invoked in the case of Australia, encouraged to adopt a justice reinvestment strategy 'continuing and increasing the use of indigenous courts and conciliation mechanisms, diversionary and prevention programmes and restorative justice strategies'.[143] In terms of formal State justice tribunals, training of judges and prosecutors regarding indigenous rights has also been the subject of recommendations.[144]

Issues of coordination between justice systems have also engaged the Committee.[145] The knock-on effects on justice for indigenous peoples of failure to recognise the indigenous system is another aspect. Thus, in the case of Guatemala, concerns were raised regarding 'the problems experienced by indigenous peoples in gaining access to the justice system . . . because the indigenous legal system is not recognised and applied'.[146] Recommendations to strengthen indigenous tribunals have also been issued, with critical comments made on the non-binding nature of their decisions in State law and recom-

[138] *Yilmaz-Dogan v The Netherlands*, para. 9.4.

[139] CERD/C/63/D/27/2002 (2003), para. 7.5.

[140] See the discussion in the 'Comment' section of Chapter 8. For elaborations of key points regarding such systems, see Expert Mechanism Advice No. 6 (2014): *Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with Disabilities*, A/HRC/EMRIP/2014/3/Rev.1, included in the same document as the background study on the same [henceforth EMRIP Advice No. 6; EMRIP Study on Restorative Justice].

[141] GR 31, para. 5(e).

[142] CERD/C/MEX/CO/16-17, para. 12; see also concluding observations on Nicaragua, CERD/C/NIC/CO/14, para. 18; Venezuela, CERD/C/VEN/CO/19-21, para. 18.

[143] CERD/C/AUS/CO/15-17, para. 20.

[144] Concluding observations on India, CERD/C/IND/CO/19, para. 12.

[145] In the case of Venezuela, CERD/C/VEN/CO/19-21, para. 18, the Committee recommended ensuring that the main objective of a draft bill would be 'to regulate and harmonize the functions, powers and responsibilities of indigenous peoples' system of justice and the national system'.

[146] Concluding observations on Guatemala, CERD/C/GTM/CO/11, para. 15; on Ecuador, CERD/C/ECU/CO/19, para. 12, and CERD/C/ECU/CO/20-22, para. 19.

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mendations for entrenchment.[147] References to international human rights standards in recommendations also address the concern that traditional justice mechanisms should not fall below human rights standards in their conception or implementation.[148] Additional to the element of recognition as such to the institutions of indigenous peoples, recommendations in this area have also pointed to the limits of State institutions for particular groups in terms of access to justice, an issue not confined to the case of indigenous peoples.[149]

## VIII. 'Acts' of Discrimination

The reference to protection and remedies against 'acts of discrimination' appears to introduce an ambiguity in suggesting that an act of racial discrimination would have to be legally established before protection became available. The Declaration on Racial Discrimination deflects such an interpretation in providing that 'everyone shall have the right to an effective remedy and protection against *any discrimination* he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms through independent national tribunals competent to deal with such matters'.[150] In *L.R. v Slovakia*, the Committee observed that:

> [w]ith respect to the claim under article 6, the Committee observes that, at a minimum, the obligation requires the State party's legal system to afford a remedy in case where an act of racial discrimination ... has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.[151]

The restrictive construction of Article 6 was qualified in *Durmic v Serbia and Montenegro*:

> Although on a literal reading of the provision it would appear that an act of racial discrimination would have to be established before a petitioner would be entitled to protection and a remedy, the Committee notes that the State party must provide for the determination of this right through the national tribunals and other institutions, a guarantee that would be void were it unavailable in circumstances where a violation had not yet been established. While a State party cannot be reasonably required to provide for the determination of rights under the Convention no matter

[147] Concluding observations on New Zealand, CERD/C/NZL/CO/17, para. 18; CERD/C/NZL/CO/18-20, para. 7.

[148] Article 34 of the UNDRIP states that promotion, etc, of indigenous juridical systems must be done 'in accordance with international human rights standards'. Treaty bodies have expressed concerns regarding the position of indigenous women within their societies: CEDAW/C/MEX/CO/7-8, para. 34; the Human Rights Committee has expressed concern regarding the case of corporal punishment in the community justice system in Bolivia: CCPR/C/BOL/CO/3, para. 16. CERD has referred to the treatment of women in traditional societies, often adopting the unspecific terminology of 'multiple, intersectional discrimination' which may not necessarily specify the precise sources of discrimination. EMRIP Advice No. 6, para. 16, states that indigenous juridical systems 'should ensure that indigenous women, children and youth, and persons with disabilities are free from all forms of discrimination. The participation of indigenous women, children and youth, and persons with disabilities in indigenous justice systems should be respected and promoted. Accessibility should bee ensured for indigenous persons with disabilities.' See also Chapter 13.

[149] CERD/C/UKR/CO/19-21, para. 15, concerning the issuance of identification documents to Roma in order to facilitate their access to the courts.

[150] Article 7.2 (present author's emphasis).

[151] CERD/C/66/D/31/2003 (2005), para. 10.10.

how unmeritorious the claims may be, article 6 provides protection to alleged victims if their claims are arguable under the Convention.[152]

## IX. Compensation: Must Be Considered

The second element in Article 6 is a more sharply focused 'reactive' provision on remedies that employs the traditional international law language of reparation and satisfaction for damage suffered as a result of discrimination. The use of 'satisfaction' in Article 6 alongside 'reparation' sits oddly with the *Basic Principles and Guidelines* where 'satisfaction' is an aspect of 'reparation'. Article 6 is not a model of clarity and this has necessitated considerable reflection on its details; the collective dimension of rights has induced further complexities in its application. In GR 26 on Article 6,[153] the Committee took the view that the degree to which racial discrimination and racial insults 'damage the injured party's perception of his/her own worth and reputation is often underestimated'.[154] Accordingly, the Committee notified States parties that:

> the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination . . . is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim whenever appropriate.[155]

In *B.J. v Denmark*,[156] the author of the communication, a Danish national of Iranian origin, was refused entry to a discotheque by a doorman who was subsequently fined. The case was brought under Article 6 and other articles of the Convention[157] in connection with the alleged failure of the State authorities to provide effective satisfaction and reparation in that the author's claim for pecuniary compensation was rejected by a court because it was not of such grave or humiliating character as to justify the granting of pecuniary compensation. While satisfied that no violation of the Convention had taken place, CERD considered 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. The victim is not necessarily entitled to compensation in addition to the criminal sanction. However, in accordance with Article 6 of the Convention, the victim's claim for compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but

[152] Para. 9.6. The drafting proposal by the representative of France in the Commission on Human Rights (E/CN.4/SR.800) referred to effective protection and remedies 'against any act of racial discrimination which . . . *would* violate his fundamental rights and freedoms' (present author's emphasis), lessening the ambiguity in the final version of Article 6. On arguable claims under Article 13 of the ECHR, see ECtHR, *Klass v Germany*, App. No. 5029/71 (1978); *Boyle and Rice v the UK*, App. Nos 9659/82 and 9658/82 (1988); *Powell and Rayner v the UK*, App. No. 9310/81 (1990).

[153] A/55/18, p. 153.

[154] For a short reflection on the damage caused by racial discrimination in terms of its negative social and economic impact, consequences for the sense of personal and group identity and moral worth, and psychological and health effects, see T. Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Martinus Nijhoff, 2012), pp 83–90; with regard to 'hate speech' see J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

[155] Para. 2.

[156] CERD/C/56/D/17/1999 (2000).

[157] Article 2.1 (a), (b), and (d), of which (d) appears to have been the most relevant to the case which concerned discrimination by private persons; Article 5 (f), right of access to public places.

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where the victim has suffered humiliation, defamation or other attack against his/her reputation and self-esteem.[158]

This reference to considering the compensation aspect 'in every case' is a stronger formulation of the duty of States than the notification in GR 26 that the authorities 'should consider' compensation 'whenever appropriate'.

In *Adan v Denmark*, the Committee recommended the provision of adequate compensation for moral injury caused to the petitioner by speech implicating Somalis in the practice of female genital mutilation.[159] In follow-up proceedings, the State party declared its willingness to compensate for pecuniary damage (there was none) but not for non-pecuniary damage because the impugned political speech did not target the petitioner directly,[160] recalling a similar refusal in *Gelle* which the Committee had found satisfactory. The State argued that it nonetheless found it reasonable to pay the costs of legal assistance, an approach rejected by the Committee because it 'considered that legal aid cannot be considered as a payment of compensation'. In some cases, legislative change to ensure closer conformity with the Convention has been recommended as a remedy, as well as more effective and less prolonged investigative processes,[161] and publicity for the Committee's opinion.[162]

Combined criminal and civil remedial elements are envisaged in GR 29 on descent-based discrimination, which, *inter alia*, enjoins States to ensure 'the prosecution of persons who commit crimes against members of descent-based communities and the provision of adequate compensation for victims of such crimes'.[163] Measures against perpetrators of discriminatory practice are also envisaged, including 'against public bodies, private companies and other associations that investigate the descent background of applicants for employment'.[164]

## X. Reparation and Satisfaction: Article 14

The forms of 'reparation or satisfaction' accounted for in CERD practice are many and various and echo the complexities evident from statements of international law principles and international human rights law.[165] The concluding observations of CERD on State reports are expansive, whereas the range of remedies recommended under the Article 14 procedure is less so, a situation largely determined by the provenance of the applications and the nature of the injuries prompting the communications.[166] The practice under Article 14 should therefore be understood as without prejudice to the additional reparatory concepts recommended in concluding observations under Article 9 for indigenous peoples and other groups, particularly in relation to the element of 'satisfaction', which is,

[158] *B.J. v Denmark*, CERD/C/56/D/17/1999 (2000), para. 6.2.

[159] CERD/C/77/D/43/2008 (2010), para. 9.

[160] A/68/18, Annex IV; the dialogue between the Committee and Denmark was stated to be ongoing.

[161] *Lacko v Slovakia*, para. 11: a criminal penalty had already been applied for the offending conduct, refusing access to a restaurant because of Roma origin.

[162] *Murat Er v Denmark*, para. 9.

[163] GR 29, para. (w).

[164] *Ibid.*, para. (ll); concluding observations on Japan provide a point of reference for this provision: CERD/C/JPN/CO/3-6, para. 19.

[165] See, *inter alia*, the ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems, Geneva 2012: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Congress-Declaration-adoptedFINAL.pdf>.

[166] See Chapter 4.

however, accounted for under Article 14 in relation to, for example, recommendations for the cessation of violations.

Article 14 recommendations have been made to use good offices to secure alternative employment for the complainant,[167] pay due attention to the impartiality of juries,[168] to review policy,[169] provide relief commensurate with moral damage,[170] simplify national procedures for dealing with racial discrimination,[171] take measures to counteract racial discrimination in the national loan market,[172] complete legislation to guarantee access to public spaces,[173] reconsider legislation,[174] take necessary measures to secure freedom of movement,[175] remove a racially offensive sign,[176] ensure that rights are not violated in future,[177] conduct thorough investigations into allegations of racial discrimination,[178] give publicity to the Committee's opinions,[179] take effective measures to ensure that housing agencies refrain from discriminatory practices,[180] remind States of previous concluding observations,[181] etc. The lengthiest list of such recommendations is set out in *L.G. v Korea*, where 'adequate compensation' is (unusually) stated to include lost wages of the complainant.[182] While the recommendations are situation-specific, the Committee, in keeping with its limited powers, has not engaged in practices of precise quantification. The findings and recommendations under Article 4 are subject to a follow-up procedure which maintains the overall dialogic relationship between the Committee and State parties; recommendations may also be integrated with the reporting procedure under Article 9.

While references to remedies such as forms of redress such as restitution or apology tend to surface primarily in the reporting procedures,[183] reparations terminology, including apology, was extensively considered in *L.A. et al. v Slovakia*.[184] According to the facts as submitted by the petitioners (Roma of Slovak origin), they had been refused entry into a discotheque on the ground that it was a private club, and were then followed by a group of non-Roma human rights activists who were admitted to the discotheque without being required to display club membership.[185] Criminal proceedings ensured against the staff

[167] *Yilmaz-Dogan v The Netherlands*, para. 10.
[168] *Narrainen v Norway*, CERD/C/44/D/3/1991 (1993).
[169] *L.K v The Netherlands*, para. 6.8.
[170] *Ibid.*, para. 6.9; or reparation or satisfaction commensurate with any damage suffered: *Habassi v Denmark*, para. 11.2; reparation or satisfaction, including economic compensation, where the discrimination has not resulted in physical damage but in humiliation or similar suffering: *B.J. v Denmark*, CERD/C/56/D/17/1999 (2000), para. 7.
[171] *Z.U.B.S. v Australia*, CERD/C55/D/16/1999, para. 11.
[172] *Habassi v Denmark*, para. 11.1.
[173] *Lacko v Slovakia*, para. 11.
[174] *Sadic v Denmark*, para. 6.8.
[175] *Koptova v Slovakia*, CERD/C/57/D/13/1998 (2000), para. 10.3.
[176] *Hagan v Australia*, para. 8.
[177] *L.R. v Slovakia*, para. 12.
[178] *Jama v Denmark*, para. 9.
[179] *Murat Er v Denmark*, para. 9; *TBB-Turkish Union v Germany*, CERD/C/82/D/48/2010 (2013), para. 14.
[180] *F.A. v Norway*, CERD/C/58/D/18/2000 (2001), para. 8.
[181] *P.S.N. v Denmark*, para. 6.5.
[182] CERD/C/86/D/512012, para. 9.
[183] For instances where petitioners sought an apology from State authorities, see *Kashif Ahmad v Denmark*, para. 3.1, and *Hagan v Australia*, para. 3.5. Restitution is adverted to in GR 23 on indigenous peoples.
[184] CERD/C/85/D/49/2011 (2014).
[185] According to the facts as submitted by the petitioners, there was no indication of the private nature of the club at its entrance; *L.A. v Slovakia*, para. 2.1.

member who refused the group, but were discontinued on the ground that no offence had occurred. A written apology and financial compensation was requested from the company that owned the premises but only an apology was ordered by the District Court, a decision that was upheld on appeal. At the level of the appeal, compensation was refused on the ground that the petitioners had not suffered 'a real and grave diminution of their human dignity'.[186] In relation to Article 6, the petitioners complained that the State party had not provided them with effective protection and remedy, and that, *inter alia*, the civil courts had:

> failed to recognize that racial discrimination impairs human dignity and constitutes prima facie damage... which, is perceived subjectively by the injured person psychologically or emotionally [but] cannot necessarily be objectified as damage that can be proved or measured.[187]

The State party, on the other hand, argued that the petitioners had not proved 'a considerable diminishment of their dignity, social status or social functioning and that there had been no proven intent of the defendant to deeply discredit them';[188] the strict criteria for financial compensation for moral damage had accordingly not been met; further, the individual letters of apology ordered by the Court refuted the claim that State authorities had failed to ensure the elimination of discrimination in general.[189]

In the event, the Committee found that the decisions of the courts had been reasoned and based on legislation.[190] As to whether letters of apology constituted an effective remedy under Article 6, the Committee recalled United Nations *Basic Principles and Guidelines* including the principle that 'reparation should be proportional to the gravity of the violations and the harm suffered', deciding that it was not its role to decide what remedy should be awarded but 'to assess whether this remedy can be seen as an effective remedy in accordance with international principles and that it is not manifestly arbitrary or... a denial of justice'.[191] Accordingly, Article 6 was not violated, though the Committee regretted that the law in question did not provide sanctions to be imposed which could have had a preventive or deterrent effect.[192] In the circumstances, the five years of judicial procedure to determine the case did not amount to an undue delay in light of the complexities of jurisdiction and the fact that the decisions were mostly made in response to appeals by the petitioners.[193]

## XI. Individual and Collective Dimensions

Recommended programmes of reparations have included individual and group victims, and in some cases respond to attributions of collective rights. For the Roma in general, GR 27[194] advocates a range of remedial measures for protection against racial discrimination and violence, addressing such matters as prompt action by police and judiciary to investigate and punish racist violence, rejection of impunity for perpetrators of racist acts,

[186] *Ibid.*, para. 2.5.
[187] *Ibid.*, para. 3.3. See discussions in Chapter 5 of the concept of 'dignity'.
[188] *Ibid.*, para. 4.4.
[189] *Ibid.*, para. 4.5.
[190] *Ibid.*, para. 7.2.
[191] *Ibid.*, para. 7.4.
[192] *Ibid.*, para. 7.4.
[193] *Ibid.*, para. 7.5.
[194] A/55/18, Annex V.C.

acknowledgement of historical wrongs done to the Roma, and consideration of ways to compensate therefore, the taking of firm action against discriminatory practices in the field of housing, and punishment for discrimination against Roma in access to places and services for the use of the general public. In the case of individual Romani women victims of forced sterilization, a State party was recommended to:

> facilitate full reparation and compensation . . . give consideration to *ex gratia* compensation procedures, generate awareness among patients, doctors and the public on the Guidelines of the International Federation of Gynaecology and Obstetrics and put in place safeguards to avoid similar incidents . . . The Committee recommends that the State party consider legislating for a permanent waiver to limitation on all cases relating to compensation due to illegal sterilization.[195]

A general platform of remedial measures was recommended to address the situation of 'the erased' in Slovenia, including the granting of 'full reparation, including restitution, satisfaction, compensation, rehabilitation and guarantees of non-repetition, to all affected by the "erasure"'.[196] Restitution,[197] rescue and rehabilitation,[198] apology,[199] non-repetition, and other remedial modes have all at various times been commended to States parties. The introduction of specific remedies such as Amparo and Habeas Corpus is evaluated positively by the Committee.[200] The reconciliatory role of truth commissions has also been recognised,[201] and failure to act on their recommendations criticized.[202]

The most extensive account of modalities of reparations in their collective aspects emerges from Committee practice with regard to indigenous peoples,[203] practice that adapts the forms of reparation to accommodate their characteristic claims and rights.[204] GR 23 affirms that 'discrimination against indigenous peoples falls under the scope of the Convention', and includes principles on rights and reparations. Paragraph 3 states that the Committee is conscious of past and present discrimination against the peoples, and that 'in particular . . . they have lost their land and resources to colonists, commercial companies and state enterprises'; consequently, the preservation of their culture and their historical identity 'has been and still is' jeopardized. In paragraph 4, States parties are

[195] Concluding observations on the Czech Republic, CERD/C/CZE/CO/8-9, para. 19.

[196] CERD/C/SVN/CO/7, para. 13.

[197] Recommendations for restitution are not confined to indigenous peoples but include them: see, for example, concluding observations on Estonia, CERD/C/EST/CO/8-9, para. 18; Greece, CERD/C/GRC/CO/16-19, para.10; Serbia, CERD/C/SRB/CO/1, para 18, all dealing with general remedies for acts of racial discrimination. For restitution specific to indigenous peoples—restitution of their ancestral lands—see concluding observations on Chile, CERD/C/CHL/CO/19-21, para. 13; Colombia, CERD/C/COL/CO/14, para. 19; and Paraguay, CERD/C/PRY/CO/1-3, para. 15.

[198] Concluding observations on Senegal with regard to the problem of child beggars, CERD/C/SEN/16-18, para. 14; rehabilitation in the sphere of housing rights of Roma, CERD/C/SVK/CO/9-10, para. 12.

[199] Concluding observations on Slovakia, CERD/C/65/CO/7, para. 12, recommendation to ensure effective remedies 'including compensation and apology' are granted to victims (Roma women) of forced sterilization.

[200] For Amparo, see concluding observations on the Dominican Republic, CERD/C/DOM/CO/13-14, para. 4(a); Mexico, CERD/C/MEX/CO/16-17, para. 4; for Habeas Corpus, Uzbekistan, CERD/C/UZB/CO/6-7, para. 4.

[201] Concluding observations on Kenya, CERD/C/KEN/CO/1-4, para. 14

[202] Concluding observations on Paraguay, CERD/C/PRY/CO/1-3, para. 12.

[203] See the collection of essays in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008); F. MacKay, 'Indigenous Peoples' Rights and the UN Committee on the Elimination of Racial Discrimination', in S. Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (Pretoria University Law Press, 2010), pp. 155–204.

[204] Elements of the critique in this section apply also to certain peoples of African descent, see CERD GR 34 on Racial Discrimination against People of African Descent, section VIII (Administration of Justice).

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called upon to take a range of measures including recognition and respect for distinct indigenous culture and history; ensuring freedom from discrimination and the provision of conditions allowing for sustainable development 'compatible with their cultural characteristics'; ensuring equal rights in respect of effective participation in public life; and to ensure that 'rights to practise and revitalize' cultural traditions and customs 'and to practise . . . languages' can be exercised. Reparations language becomes more explicit in paragraph 5 with reference to deprivation of lands without the 'free and informed consent' of the peoples, where States parties are called upon:

> 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 formulation of the paragraph is closely related to ILO Convention 169,[205] which was in force when the recommendation was adopted (1997), and the UNDRIP,[206] preliminary drafts of which were available to the Committee.[207] With regard to applications of the second limb of Article 6, a report by the International Law Association observes that reparation for indigenous peoples attains a particularly high degree of complexity 'in light of the holistic vision of life of these peoples', a paramount element to be considered in programmes of reparations, where it is essential to go beyond the classical Western-shaped language that conceives reparation as individual and not collective, and where monetary compensation is the leading goal. In the event of dispossession of indigenous lands, the form of reparation to be pursued is *restitutio in integrum*, except where it is objectively unfeasible, making return of lands and territories the only means to provide redress:

> In other situations . . . due to the specific circumstances of the case, even *restitutio in integrum* may not represent the best practicable means of reparation, or can even be inadequate when the relevant human rights breaches take place in an environmental context characterized by social inequality or other structural situations incompatible with the individual and collective dignity of indigenous peoples. In such situations . . . *restitutio in integrum* . . . would simply recreate the pre-existing unacceptable social structure . . . Rectification of the pre-existing situation—aimed at removing the social and cultural roots favouring perpetration of human rights abuses—is therefore essential.[208]

Thus, in the context of the Convention, the 'remedy' is the full implementation of the programme of the Convention, interpreted and applied in the light of the best practices of international law with regard to indigenous rights.[209]

The reparation concepts in Article 6 and GR 23, in tandem with broader expressions associated with the 'satisfaction' pole of reparations law, have been recycled through multiple concluding observations and decisions of the Committee. Situations where effective remedies available to individuals were unavailable to indigenous peoples to vindicate their collective rights have been subjected to criticism by the Committee; in such instances, recognition of the collective existence and forms of land tenure of the

[205] Discussion above.
[206] Discussion above.
[207] For the early drafts of the UNDRIP, see P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002), Chapter 15.
[208] Interim Report of ILA Conference on Indigenous Peoples (2010), pp. 39–40.
[209] See comment by van Boven, *infra*.

peoples may have a further distinctive salience in the context of reparation.[210] In the case of Suriname, CERD observed that judicial remedies under the draft mining Act were not available to indigenous peoples who were compelled to depend instead on appeals to the Executive:[211] their traditional (communal) rights could not be vindicated before the courts because of lack of juridical recognition of indigenous peoples. The message conveyed is that differences in treatment between communal and individual claims may amount to discrimination: communal land tenure is in principle entitled to a level of protection equivalent to that enjoyed by individual tenure.[212]

Bearing in mind CERD's understanding that the ethnic and cultural distinctiveness of groups is to be taken into account in gauging discrimination, lack of recognition of the distinctiveness of indigenous peoples, and their subjection to processes identical to other rights claimants may amount to discrimination. Instances in a number of countries with regard to difficulties in establishing aboriginal title represent a case in point—recommendations to Canada reiterated the need to facilitate proof of aboriginal title and criticized the 'strongly adversarial positions' taken by the federal and provincial governments in this respect;[213] similar comments have been made to Australia[214] and New Zealand.[215] The Committee's critiques reflect underlying concerns that requirements for proof of title or related legal procedures in the general laws of States may not sufficiently accommodate indigenous traditions and thus potentially amount to discrimination in effect. Critiques also hint at the presence of inbuilt 'structural' or 'institutional' discrimination in laws and legal processes that negatively affect groups that historically have played little or no part in institutional developments.

## XII. Rights

In *Jewish Community v Norway*, the Committee stated that the notion of rights in the Convention is not confined to Article 5. Thus, Article 14 states that the Committee may receive complaints relating to 'any of the rights set forth in this Convention': the fact that Article 4 is couched in terms of State obligations rather than inherent rights of individuals:

[210] S.J. Anaya, 'Reparations for Neglect of Indigenous Land Rights at the Intersection of International and Domestic Law: the Maya Cases in the Supreme Court of Belize', in Lenzerini, *Reparations for Indigenous Peoples*, pp. 567–603, at p. 567.

[211] CERD/C/64/CO/9, para. 14.

[212] See, *inter alia*, Decision 1(66), on the New Zealand Foreshore and Seabed Act 2004, where the Committee found 'discriminatory aspects' in legislation 'in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under Article 5 and 6 of the Convention': A/60/18, ch. II. Further discussion in C. Charters and A. Erueti (eds), *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, 2007).

[213] CERD/C/CAN/CO/18, para. 22: 'The Committee is . . . concerned that the claims of aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions' taken by the federal and provincial governments'; see also para. 26.

[214] CERD/C/AUS/CO/15-17, para. 18, where the Committee regretted 'the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land'; see also para. 19. On the earlier, heated debates between the Committee and Australia over amendments to Australia's Native Title Act, see the discussion in P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002), pp. 218–23.

[215] CERD/C/NZL/CO/18-20, para. 13.

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does not imply that they are matters to be left to the internal jurisdiction of States parties, and as such immune from review under article 14... The Committee's conclusion is reinforced by the wording of article 6... by which States pledge to assure... effective protection and a right of recourse against any acts of racial discrimination which violate their "human rights" under the Convention... this confirms that the Convention's "rights" are not confined to article 5.[216]

The assertion that Article 6 extends the portfolio of rights in the Convention is not inherently surprising. Article 6 makes two references to rights: human rights and fundamental freedoms that are violated by racial discrimination, and 'the right to seek just and adequate reparation or satisfaction'. The assertion may have a clarifying function in the context of a convention largely given over to statements of obligation. In a number of cases, the Committee has found violations of Article 6 without finding a violation of any of the substantive articles.[217] In *Hagan v Australia*, the State party claimed that Article 6 is an accessory right and can only be found to have been violated 'once a separate violation of the specific rights in the Convention has been established (under articles 2, 4, 5 and 7)';[218] earlier in the case it had, inconsistently, made the qualified claim that Article 2 is also an 'accessory right'.[219] In *Kenneth Moylan v Australia*, the proposition as to the accessory nature of Article 6 was again advanced: 'where no substantive right is violated, there can be no claim under Article 6',[220] and specifically rejected by the Committee.[221] In light of the text of Article 6 and the Opinions and recommendations of the Committee, it is appropriate in the ICERD context to conclude that the article elaborates 'a right to a remedy'.

## D. Comment

Article 6 and the other international instruments cited above refer to the obligations of national authorities to provide remedies at the level of domestic law to 'everyone within their jurisdiction'. The engagement of the Committee is essentially subsidiary to the protection of rights nationally. In theory, the greater the effectiveness of the national recourse mechanisms, the less pressing is the need to engage international bodies. The range of defects in national mechanisms identified by the Committee over the decades of its operation reveals significant gaps in the general justice infrastructures of States parties and inefficiencies in their operation, as well as a lack of focus and adaptation to issues of racial discrimination. It is not without significance that Article 6 is the most litigated article under the Article 14 procedure, and that many cases turn on its application, alone or in conjunction with other articles.

The drafting of Article 6 reveals a complex trajectory towards the provisions in their present form, with amendments oscillating between more and less demanding approaches to the achievement of justice. The stronger notion of a right to reparation was replaced by one to 'seek' reparation, a phrase that nonetheless emphasizes the importance of dismantling racial barriers for those who attempt to access remedies; and explicit provisions on the

[216] *Jewish Community of Oslo v Norway*, para. 10.6. See also Chapter 11.
[217] *Habassi v Denmark; Ahmad v Denmark.*
[218] CERD/C/62/D/262002 (2003), para. 4.18.
[219] *Ibid.*, para. 4.4.
[220] CERD/C/83/D/47/2010 (2013), para. 4.16.
[221] *Ibid.*, para. 6.2, citing *Habassi*, *Ahmad*, and *Durmic*.

payment of damages were not adopted. The discussions on the impartiality and independence of tribunals, and their 'competence', in the *travaux* reveal sensitivities regarding opening up national systems to scrutiny, which did not, however, prevent the emergence of tolerably clear provisions on the necessary infrastructures of justice systems. Weakening amendments such as replacing 'reparation' by 'satisfaction' only, and conditioning remedies by 'where appropriate' were rejected, as was, implicitly, the reduction of 'reparation' to monetary compensation—the 'monetarization' of the remedial spectrum. It would appear from the *travaux* that the inclusion of the ambiguous 'acts of racial discrimination' was intended not to narrow the article but make it more precise on the basis that racial discrimination is constituted by acts, not abstractions. Notable statements emphasized that claimants were not barred by Article 6 from approaching international tribunals for the vindication of their claims. In the result, the article echoes the complex classifications of international law, though phrasing the principles as 'reparation or satisfaction' does not faithfully reflect the international template. In this, the pattern of reservations may be recalled: a few States regard either reparation *or* satisfaction as satisfying the Convention standard.[222] In applying the article, the Committee has treated reparations together with satisfaction as comprising the broad range of internationally recommended possibilities.

Shelton outlines the meaning of 'remedies' as containing 'two separate concepts, one procedural and one substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard, whether by courts, administrative agencies, or other competent bodies. The second notion refers to the outcome of the proceedings, the relief afforded the successful claimant'.[223] Shelton elaborates that the:

> obligation to afford remedies for violations of human rights requires in the first place the existence of remedial institutions and procedures to which victims may have access. Refusal of access to the tribunals of a country is considered a primary manifestation of the concept of denial of justice . . . Access to justice implies that the procedures are effective, i.e. capable of redressing the harm that was inflicted.[224]

The institutional/substantive pairing also assists in characterizing Article 6, a helpful summary of which was provided by Denmark in connection with one of the numerous Article 14 cases in which it has been involved: the first part, on 'effective protection and remedies', 'imposes on the States parties a positive obligation to introduce remedies that are available, adequate and effective', that protect against racial discrimination, make it possible to establish whether persons have been subject to racial discrimination, and make it possible for the acts of discrimination to be brought to an end.[225] '[A]dequate reparation or satisfaction' on the other hand, means that the racial discrimination is brought to an end and 'the consequences for the victim are remedied in such a manner that the State of affairs prior to the violation is restored to the greatest extent possible'.[226]

The essence of reparation in the context of the Convention is the restoration to a former state of those who have been damaged by racial discrimination. Remedies, as Shelton states, 'aim to place an aggrieved party in the same position as he or she would

[222] Present author's emphasis.
[223] Shelton, *Remedies in International Human Rights Law*, p. 7.
[224] *Ibid.*, pp. 8–9.
[225] *Mostafa v Denmark*, CERD/C/59/D/19/2000 (2001), para. 4.5.
[226] *Ibid.*, para. 4.6.

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have been had no injury occurred',[227] to which might be added the collective 'they' in the context of ICERD in order to recall the collective aspects of reparations appropriate to indigenous peoples and other groups.[228] Van Boven observes that 'when collective rights are involved, redress and reparational action through the lodging of individual claims appear of limited avail. Adequate provisions should be made to honour collective claims and to obtain collective reparation'; he adds that in this context special measures may be better at affording opportunities for development and self-advancement—they 'are intended to have remedial effects and may serve the purpose of effective protection and remedies in a broader structural sense'.[229] In this sense, Article 6 is integrated into the project of the Convention as a whole, notably in the field of combating structural discrimination through programmes of special measures and analogous means.

Van Boven also makes the point that CERD seeks to tailor remedies to the particular needs and circumstances of disadvantaged groups, whereas the Article 14 procedure is mainly for aggrieved individuals; the observation remains highly pertinent. Reporting procedures and communications procedures are not alternatives in the rehabilitation of individuals and communities. Both procedures have a role to play in their respective spheres. It is possible that the individual communications procedure will, in time, 'open out' to embrace other reparations modes, a development that depends to a large extent on making greater use of the facility for 'groups of individuals' was well as 'individuals' to engage Article 14.[230]

The first limb of Article 6 requires that effective protection and remedies are to be 'assured', a term that suggests they must be guaranteed through structures capable of delivering remedial justice. As is evident from repeated Convention practice, the mere enactment of laws will not be enough to satisfy its demands: laws must also be effectively implemented through an infrastructure of mechanisms appropriate to the task. The justice infrastructure requirements of Articles 2 and 5—notably 5(a)—are complemented by the specific requirements of Article 6.[231] The general part of Article 6 looks to the provision of effective protection and remedies for racial discrimination through the State apparatus, not limited to the judicial branch.[232] In contemporary societies, this will, *de minimis*, include institutions such as National Human Rights Institutions, national and regional Ombudsmen,[233] including specialized equality ombudsmen,[234] and community defenders.[235]

[227] *Ibid.*, p. 10.

[228] The Committee's endorsements of collective claims to rights and remedies are not confined to indigenous peoples, hence the recommendation that States parties take 'all necessary steps to secure equal access to the justice system for all people of African descent including by providing legal aid, facilitating individual *or group claims*, and encouraging non-governmental organizations to defend their rights': GR 34 on Racial Discrimination against People of African Descent, para. 35 (present author's emphasis).

[229] T. van Boven, 'Common Problems linked to all Remedies available to Victims of Racial Discrimination', background paper for the Expert seminar on Remedies in preparation for the World conference against Racism, HR/GVA/WCR/SEM.1/2000/BP.5, p. 11; special measures are discussed in Chapter 9.

[230] See Chapter 4.

[231] See Chapters 8 and 13.

[232] The basic requirement is summarized in *Jewish Community of Oslo v Norway*, CERD/C/67/D/30/2003 (2005), para. 10.6, as 'effective protection and a right of recourse against any acts of racial discrimination'.

[233] Concluding observations on the Russian Federation, CERD/C/RUS/CO/20-22, para. 10.

[234] Concluding observations on Sweden, CERD/C/SWE/CO/19-21, para. 9; on Chile, CERD/C/CHL/CO/19-21, para. 7.

[235] Concluding observations on Colombia, CERD/C/COL/CO/14, para. 15.

Further, the extensive practice of the Committee with regard to indigenous groups demonstrates a concern with informal as well as formal systems of justice, and consideration of the role of customary law. In light of the concern of Article 6 with 'national tribunals and other State institutions', it will be recalled that the drafts went through various permutations of language, from 'independent national tribunals', 'independent tribunals', 'competent national tribunals', and the final addition of 'other State institutions'. In light of the underdevelopment of indigenous rights at the time of drafting, and the focus on undivided nations emerging from decolonization processes rather than sub-State ethnicity, the summary records do not reveal that the drafters contemplated a role for traditional justice mechanisms; on the other hand, 'other State institutions' should not be interpreted narrowly, and suggests a concern with multiple forms of governance apt to include traditional, customary institutions which are recognized in many States and, from a non-discrimination perspective, ought to be recognized.[236] The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Study on Restorative Justice observes that the traditional justice systems of indigenous peoples:

> have largely been ignored, diminished or denied through colonial laws and policies of subordination to the formal justice systems of States. However, law is a complex notion arising in explicit and implicit ideas and practices. It is grounded in a people's worldview and the lands they inhabit, and is inextricably linked to culture and tradition . . . a narrow view of justice that excludes the traditions and customs of indigenous peoples violates the cultural base of all legal systems. Without the application and understanding of traditional indigenous conceptions of justice, a form of injustice emerges that . . . is based on unacceptable assumptions.[237]

The criterion of effectiveness runs through the Convention, surfacing explicitly in Articles 2, 6, and 7 and implied in the Convention project as a whole. In this, the principle of effectiveness in the interpretation of treaties is extended to their application in practice, and 'effectiveness' correlates with obligations to rectify *de facto* as well as *de jure* discrimination—towards substantive and not merely formal equality. The concept of 'just and adequate' reparation or satisfaction is implicated in the effectiveness standard to the same extent as that of 'effective' protection and remedies, while the right to 'seek' remedies, although less demanding than the right to 'obtain', implies the existence of genuine possibilities of accessing, and benefiting from, the institutions of justice. Evaluation of the effectiveness of a remedy essentially relates to criteria such as the independence of the body to which the victim appeals; the accessibility of the authority, and the flexibility—adaptability—of the procedure.

The criteria for effective remedies parallel the '4A' scheme for the enjoyment of human rights piloted by the Committee on Economic, Social and Cultural Rights (CESCR) and followed by others.[238] In light of the criterion of adaptability, the measurement of

[236] For comment on varieties and levels of governance and State obligations, see Chapter 8; for comments on legal pluralism and recognition of indigenous justice systems and customary law in many States, see EMRIP Study on Restorative Justice, paras 14–19; for a broad-based account of custom more generally, see B. Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Routledge, 2014).

[237] A/HRC/EMRIP/2014/3/Rev.1, para. 8, the footnote cites J. Borrows, *Canada's Indigenous Constitution* (Toronto University Press, 2010), pp. 6–9. EMRIP Advice No. 6, para. 4, provides that, in accordance with the UNDRIP, 'States must recognize indigenous peoples' right to maintain, develop and strengthen their own juridical systems, and . . . value the contribution that these systems can make to facilitating indigenous peoples' access to justice.'

[238] See Chapters 14 and 15.

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effectiveness is inevitably contextual, raising the general problematique of anti-discrimination legal regimes: that they should not simply mimic bureaucratic impulses to homogenize solutions to practical problems but relate to the circumstances of the persons and groups caught up in the situations under review. The integrated nature of the effectiveness/context relationship implicates all the parameters of Article 6. For remedies, as with anti-discrimination laws in general, they are required to function in the real world of those who suffer racial discrimination, and not merely within the Elysium of elegantly drafted abstract legal prescriptions. The concept of a remedy is as nuanced as the concept of discrimination itself.

Article 6 is an essential component of the Convention, integral to its overall conception and to the prospects of making a difference. The article insinuates that remedial justice processes have a vital role to play in buttressing and securing the human rights of threatened individuals and groups, a role that is complementary to but distinct from legislation that directly confronts racial discrimination. Justice processes also have educational and expressive functions in demonstrating the commitment of States to treating racial discrimination as a reprehensible, socially disruptive phenomenon, fully deserving of condemnation. In cases where the justice infrastructure fails to deter and protect from racial discrimination, the reparatory aspect of Article 6 is important in symbolizing dedication to the 'repair' of individuals and communities damaged by racial discrimination, the recognition of their dignity, and the restatement of their entitlement to the effective enjoyment of human rights.

**Annex 151**

D. Weissbrodt, *The Human Rights of Non-Citizens*
(Oxford University Press, 2008)

# The Human Rights of Non-Citizens

DAVID WEISSBRODT

OXFORD
UNIVERSITY PRESS

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OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
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Auckland Cape Town Dar es Salaam Hong Kong Karachi
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Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States
by Oxford University Press Inc., New York
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British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd., King's Lynn, Norfolk
ISBN 978–0–19–954782–1
1 3 5 7 9 10 8 6 4 2

4th floor
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3274
.W452
2008

# *Acknowledgements*

The author is grateful to Clay Collins and Shervon Cassim for their contributions to this book, as well as for the assistance of Kendall Bader, Marta Baró i Vilà, Chantal Bostock, Christopher Chinn, Mariana Ferreiro, Clark Goebel, Noriko Kurotsu, Eve Lotter, Shasha Mackin, Rosalyn Park, Nandana Perera, Virgie Roux, Mary Rumsey, Abraham Korir Sing'Oei, Bret Thiele, Mark Thieroff, Sam Walling, Erik Williamsen, and Zemeney Wondesen in researching this report. The author also wishes to thank Alexandre Sicilianos, Morten Kjaerum, and Patrick Thornberry of the Committee on the Elimination of Racial Discrimination, as well as Jim Goldston, Indira Goris, and Julia Harrington of the Open Society Justice Initiative, for their help in fulfilling the objectives of this study. The author wishes to convey further thanks to the John D. and Catherine T. MacArthur Foundation and the University of Minnesota Law School for their support of this project, as well as to members of the Sub-Commission on the Promotion and Protection of Human Rights and many other individuals, nongovernmental, and intergovernmental organizations for providing useful comments, suggestions, and information, including Andrew Brouwer, Rachel Brett, Claude Cahn, Alejandro Cedeno, Jean-François Durieux, Joan Fitzpatrick, Genevieve Gencianos, Avvy Go, Diane Goodman, Mariette Grange, Susan Gzesh, Sally Holt, Michelle Horton, Alaa Kaoud, Nathalie Karsenty, Amber S Lee, Anthony Lester, Mark P Lindberg, Tanya Lokshina, David Matas, Shamiso Mbizvo, Migrant Rights International, Suzanne Oboler, the Office of the UN High Commissioner for Refugees, John Packer, Elaine Pearson, Nathalie Prouvez, Marilia Sardenberg, Rebecca Smith, and Patrick Taran. In addition, the author wishes to acknowledge the assistance of Jonathan F Fanton, Thomas Hunecke, Guennadi Lebakine, Carlos Lopez, Maria-Luisa Silva, John Slocum, Lucie Viersma, and Hannah Wu in making the necessary arrangements for this study.

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# 2

# History of the rights of non-citizens

## A. Development of the rights of non-citizens

From ancient times to the present, there has been a growing but still fragmentary international legal consensus concerning the human rights of non-citizens.[1] The international law of State responsibility[2] originated from issues concerning the treatment of non-citizens,[3] and the rights of non-citizens developed as a precursor to the present-day international human rights regime. What follows is a historical overview of the development of the rights of 'outsiders'. This overview highlights the major themes and developments of these rights from the ancient period to the birth of the United Nations (UN) and the international human rights regime.

### Attitudes during the ancient period

Wariness towards 'strangers' predates any formal system for granting or denying citizenship.[4] In pre-modern times, prejudice against foreigners seems to have been justified by apparent cultural dichotomies that distinguished between 'non-believers' and 'believers', or 'barbarians' and 'civilized people'.[5] The early Greeks, for example, 'sharply distinguished "citizens" from "barbarians," and later distinguished among citizens, naturalized aliens, public guests, domiciled

[1] See Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (William S Hein, 1984) 13; Richard R Baxter, 'Reflections on Codification in light of the International Law of State Responsibility for Injuries to Aliens' (1965) 16 *Syracuse L Rev* 745, 756–7 cited in ibid.

[2] The law of State responsibility concerns how and when a State is responsible for an internationally wrongful act. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN GAOR, 56th Sess, Supp No 10, (2001) UN Doc A/56/10, art 33.

[3] Lillich, n 1 above, at 13. Richard R Baxter, 'Reflections on Codification in light of the International Law of State Responsibility for Injuries to Aliens' (1965) 16 *Syracuse L Rev* 745, 756–7 cited in ibid.

[4] Lillich, n 1 above, at 5.

[5] United Nations Educational, Scientific and Cultural Organization, 'Studies on Human Rights' (2004) 18. Remnants of such ingroup/outgroup dichotomies are still in existence and are used as the basis for granting or denying rights to non-citizens. Further, nationalism and issues of 'national identity' still play a relevant role in shaping a country's attitude towards other countries and non-citizens. See Martha Nussbaum, 'Patriotism and Cosmopolitanism' (1994) 19 *Boston Rev* 5, 7–8.

aliens, nondomiciled aliens, and strangers'.[6] Additionally, in ancient Greek, Roman, and Hindu societies, non-believers generally had no rights before the law, since the law—influenced by religion[7]—specified that a citizen was 'one who took part in the religion of the city'.[8] Likewise, dominant societies of Ancient Greece often viewed people from different cultures as being barbaric:

> [T]he fact that Homer, in his Odyssey, described the Cyclops as belonging to a less advanced civilization, suggests to us that the description of these strange people was in reality Homer's idea of aliens. As a rule, this feeling that primitive communities had for people with different customs from their own is expressed in the way these strangers were described, as monsters, giants, and such.[9]

Similarly, Plato, in his *Politics*, cites Homer's passage about the Cyclops in reference to the difference between Greeks and barbarians.[10] Furthermore, Aristotle believed in a hierarchy of social classes, and viewed non-citizens[11] as less than human. For Greeks like Aristotle, the awareness of 'mankind' as a single species was always threatened by the deep-seated belief in the unbridgeable distinction between Greek and barbarian.[12] Aristotle also thought that the lower classes lacked full human attributes.[13]

Despite such prejudices, notions of hospitality have long existed in many cultures, and hospitality towards foreigners was generally practiced by ancient peoples.[14] The Italian legal philosopher Giorgio Del Vecchio poses an interesting theory to explain the deferential treatment of 'strangers' in ancient times:

> The institution of hospitality to foreigners cannot be explained except as a function of the condition or status of foreigners themselves in primitive times...
>
> ...

[6] James AR Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 *Am J of Int'l L* 804, 810 (citing John Jones, *The Law and Legal Theory of the Greeks* (1956) 49 and Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* 145 (Macmillan, 1911)).

[7] Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Kluwer Law, 2001) 23.

[8] Ibid, at 23. Further complicating matters is the fact that 'religion [during ancient times] was a domestic matter... [and] anyone who came from another culture, another city, was excluded from this privilege'. Ibid.

[9] Ibid, at 25.

[10] Ibid.

[11] A non-citizen is anyone who is not in a State of their citizenship. Non-citizens include asylum seekers, rejected asylum seekers, immigrants, non-immigrants, migrant workers, refugees, stateless persons, and trafficked persons.

[12] Derek B Heater, *World Citizenship: Cosmopolitan Thinking and its Opponents* (Continuum International Publishing, 2002) 31–2.

[13] Goldsworthy L Dickinson, *The Greek View of Life* (Collier, 1967). Indeed, 'Aristotle, the most balanced of all Greek thinkers... excludes the class of artisans from the citizenship of his ideal state on the ground that they are debarred by their occupation from the characteristic excellence of men'. Ibid.

[14] Giorgio Del Vecchio, 'The Evolution of Hospitality: A Note on the History of the Treatment of Foreigners' (1962–4) 4 *Sydney L Rev* 211, 205.

> ...[I]n primitive society...a stranger found himself deprived of any legal protection.... By harming him, therefore, no profit would be gained either personally or for the homeland, and to attack an undefended person was already considered in ancient times as an act of cowardice. But in truth, given the above mentioned conditions, to deny shelter to a stranger and abandon him to himself would have been more than a simple lack of courtesy; it would have been an act of positive cruelty. For, there being no support from any public institution, life in a foreign country without the benefit of private hospitality would have been well nigh impossible.[15]

If Del Vecchio's theory is correct, it seems that hospitality towards foreigners existed because foreigners were immensely vulnerable. In this view, notions of hospitality towards foreigners could co-exist with legal systems that viewed non-citizens as non-persons. Indeed, despite a cultural milieu that made it unimaginable for the ancients to grant foreigners the same rights as citizens, they were still able to sympathize with the plight of non-citizens.

In addition to sympathy, religious ideas surrounding foreigners in ancient times also seem to have elicited hospitality. There existed the notion that 'under the pilgrim's garb a divinity might be hidden'.[16] Indeed, as evidenced by the poems of Homer and Hesiod, Buddhist scriptures, and the Bible, it was a common belief among the ancients that '[a] stranger is sacred and the gods desire that he should be protected'.[17] This belief provided an effective impetus to the practice of hospitality.[18] But despite both sympathy and religious ideas surrounding foreigners, there seems to be no correlation between notions of hospitality and the rights granted to foreigners. This ancient hospitality has been described as a 'primitive hospitality—unsure in its nature, not sufficient to remove the stranger from his basic condition of want or from the dangers of his condition, and far from sufficient to give him an adequate guarantee of security in his affairs'.[19]

Given the above, it is not surprising that non-citizens initially had no rights and were not recognized as persons under the law.[20] In the city-states of Ancient Greece, for example, a non-citizen was not simply someone who owed allegiance to another sovereign, but a non-believer in a religious sphere in which he held no status and was 'in the nature of a trespasser on private property'.[21] Such a person could be robbed of everything—and even murdered—without legal ramifications,[22] and was certainly not permitted to own property, marry, or have any access to legal processes. This situation discouraged trade, as non-citizen merchants could be robbed or cheated in a transaction and left with no means

[15] Del Vecchio, n 14 above, at 205–7.
[16] Ibid, at 208.
[17] Ibid, at 207.
[18] Ibid, at 208.
[19] Ibid, at 209.
[20] Lillich, n 1 above, at 5–6.
[21] Ibid, at 5.
[22] See Del Vecchio, n 14 above, at 206; Lillich, n 1 above, at 5.

for legal recourse.[23] Therefore, as industry developed and trade with the outside world became increasingly necessary, providing some protections for non-citizens became expedient.[24] As Giorgio Del Vecchio puts it, '[t]he fantastical ideas which kept primitive men from a general massacre of strangers and which even led them to a superstitious worship of them, were supplemented and largely supplanted by a new motive to respect such visitors and to favour their arrival: the need of exchange'.[25] This need for exchange prompted the gradual creation of protections for non-citizens in Greek city-states. Two early strategies for granting protections were particularly notable and effective. The first involved city-states unilaterally granting various rights to tradesmen and people skilled in crafts.[26] The second involved the creation of *isopolities*, or treaties, between city-states to guarantee rights and privileges to each other's citizens.[27]

## The Middle Ages

The plight of non-citizens improved marginally during the Middle Ages, since the Roman Empire had loosened some of the ancient bonds of men to their nations while giving birth to Christianity,[28] a universal religion in which scholarly dialogue about rights would continue through the Middle Ages and beyond. In general, Platonic and Aristotelian ideas in which some persons were considered better than others were partially eroded by ideas of equality during the emergence of Christianity.[29] Early medieval Church doctrine, such as that of Saint Augustine, affirmed equality among all individuals living in a 'City of God',[30] but explained the higher status of kings as the selection of God, and justified slavery as divine punishment.[31] Although Christianity initially espoused equality, early Church doctrine made use of the Greeks' organic imagery to show that each member of the social body needed to follow the leader for the sake of the whole.[32] Conceptions of citizenship in the Middle Ages contradicted each other because of the split between Church and State, between spiritual equality and secular inequality.[33] Further, feudal overlords' obligation to obey God's natural law gave merchant and craft guilds in the 11th and 12th centuries fodder to assert their personal and town rights over those of

[23] Ibid, at 6.
[24] Giorgio Del Vecchio, n 14 above, at 208–9.
[25] Ibid, at 208.
[26] Lillich, n 1 above, at 6.
[27] Ibid.
[28] See Gary B Herbert, *A Philosophical History of Rights* (Transaction Publishers, 2002) 50.
[29] Ibid, at 53.
[30] John C de V Roberts, *World Citizenship and Mundialism: A Guide to the Building of a World Community* (1999) 18.
[31] Herbert, n 28 above, at 54.
[32] Ibid, at 56.
[33] Ibid.

their lord protectors,[34] and '[i]t has been argued that, historically, the very first appeals to (subjective) rights by citizens or subjects against a sovereign can be found in this opposition of guilds and feudal lords'.[35]

Despite the emphasis placed on inherent dignity and equality during the Middle Ages, persons without a niche in the prevailing feudal order led extremely precarious lives.[36] Since one's juridical and social role was derived from the quality of one's land tenure, persons without tenurial rights were frequently without the protection of any law.[37] As in ancient Greece, however, privileges were given to merchants because many princes found it advantageous to encourage trade.[38]

Over time, and as the economy of Europe developed during the Middle Ages, foreigners and persons outside the prevailing feudal order became organized:[39]

> Traveling merchants, for instance, gathered themselves into convoys or caravans, whose organizational structure was quite advanced.... Whole mercantile communities began to negotiate with foreign governments for grants of extensive privileges. A notable example is the extensive range of concessions which the Genoese merchants negotiated in 1261 with the Byzantine Empire.[40]

In fact, through organization and collective bargaining, the *en masse* granting of privileges for alien communities emerged as one of the primary means by which aliens found protection during the Middle Ages.[41] For example, a 1260 agreement between the French King and the merchants of Douai grants 'to the merchants... "that they with their merchandise may safely come into [French] land and power and stay there, paying the due and rights customs" '[42] and also that 'if at any time there be war between the King of the French or others and us or our heirs, they [are to] be forewarned to depart from our realm with their goods within 40 days'.[43]

In addition to collective bargaining, the rights of aliens were also supported through 'private reprisals'. A subject of a given feudal State was entitled to raise his grievance before his sovereign when he considered himself wronged by the subject of another State.[44] If a wronged subject could satisfactorily show his sovereign that a wrong had been committed by another party, then that subject

[34] Herbert, n 28 above, at 57.
[35] Ibid.
[36] Ibid.
[37] Ibid, at 6.
[38] Lillich, n 1 above, at 6.
[39] Ibid, at 7.
[40] Ibid, at 6 (citing John H Mundy, *Europe in the High Middle Ages 1150–1309* (Longman, 1973) 155).
[41] Ibid, at 7.
[42] 'General Intelligence: The Alien in Legal History' (1927) 163 *The Law Times* 497, 498.
[43] Ibid.
[44] Philip A Seymour, 'The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism' (1990) 39 *Naval L Rev* 221, 225.

may have been issued a letter of reprisal from the sovereign.[45] Often, the letter authorized the wronged party to execute a reprisal action against any subject of the offending feudal State, and the letter frequently indicated the amount of property that could be seized.[46]

As an alternative to reprisal, alien plaintiffs in England could petition the King's Council concerning rights which, because they were aliens, might be practically unenforceable at common law.[47] Furthermore, towards the end of the Middle Ages, common law courts in England began taking cases previously handled by the mercantile courts, and even endeavored to extend their jurisdiction to cases handled by the King's Council.[48] In this manner, 'the distinction between merchants and other classes of the community tended to disappear and the rules for alien merchants became the rules for all aliens'.[49]

The treatment of non-citizens in Europe was by no means unique. In traditional African societies, for instance, a stranger had the right to food, water, and shelter under the concept of ***ubuntu***, which defined 'humanness' beyond an individual's immediate polity. According to Hammond Tooke, this culture of providing hospitality to bereft strangers was premised on the understanding that strangers were victims of isolation from their kin, were particularly vulnerable, and thus needed special protection.[50]

## Between the Middle Ages and the birth of the UN

During the Middle Ages, individuals generally possessed rights only to the extent to which they found protection from local rulers, such as feudal sovereigns. With the Renaissance and the increasing influence of natural rights philosophies, however, came further recognition of individual rights.

Eighteenth-century natural law philosophers like Locke (1632–1704) and Rousseau (1712–78) believed that fundamental rights were beyond State control and that individuals were autonomous in nature. A version of natural rights philosophy posited that, upon entering society, each individual's autonomy combined to form the people's sovereignty. Hence, the right of self-government, including the right to choose and change the government, became the first inalienable right. John Locke's 17th-century theory of natural rights asserts that the purpose of government is to protect the natural rights of life, liberty, and property. Natural rights, such as the right of self-government, were considered to be natural

[45] Ibid.
[46] Ibid.
[47] 'General Intelligence: The Alien in Legal History', n 42 above, at 498.
[48] Ibid.
[49] Ibid.
[50] Hammond Tooke, *The Roots of Black South Africa* (Johannesburg: Jonathan Ball Publishers, 1993) 99.

because all people earned these rights by virtue of being born, and Locke argued that governments which did not protect these rights should be overthrown.

Locke and Rousseau's ideas took root in the philosophical community and their thoughts were further developed and expanded upon by other natural rights philosophers and their followers such as Immanuel Kant (1724–1804), Johann Gottlieb Fichte (1762–1814), GWF Hegel (1770–1831), Thomas Jefferson (1743–1826), and Thomas Paine (1737–1809).

Kant, for example, relied on natural rights in setting out a number of 'definitive articles' which would lead to 'perpetual peace'.[51] After noting that a state of peace must necessarily be established to offset the hostility of the state of nature, Kant theorized that perpetual peace could be established if '[t]he civil constitution over every state [were] republican'.[52] Such a constitution would be 'established upon principles compatible with, first, the liberty of all the members of a society in the quality of men; second, with the submission of all to a common legislation, as subjects; and third, with the right of equality, which all share as members of a state'.[53] Further, Kant's focus on the necessity of republican government in part fuels European and Western ideas about global democratization.[54]

Natural rights philosophies and ideas also found further expression in notable 18th-century legal documents. The US Declaration of Independence (1776), for example, put the ideas of natural rights philosophers into practice by proclaiming not only the equality of men, but guaranteeing their possession of rights in writing. For instance, the US Declaration of Independence proclaims 'as self evident', the 'unalienable rights' of all men to 'life, liberty and the pursuit of happiness'. Later, natural rights ideas would pave the way for the Bill of Rights to the US Constitution between 1789 and 1791.

Natural rights ideas also found their way into other constitutions and legal systems. The 1789 French Declaration of the Rights of Man, for instance, affirmed that '[a]ll citizens... are equally eligible to all public dignities, places and employments, according to their capacities and without other distinction than their virtues and their talents'. A number of other nations, such as Belgium, Denmark, Liberia, the Netherlands, Norway, Prussia, Sardinia, Spain, and Sweden followed the US and French examples in their respective constitutions.

The American and French declarations substituted a social-contractual base for divine sources of the rights of man, and thus took 'natural rights and made

[51] Immanuel Kant, *Perpetual Peace* (1795) (Columbia University Press, 1939).

[52] Ibid, at 12.

[53] Ibid, at 12–13.

[54] Mike Featherstone, 'Cosmopolis: An Introduction' (2002) 19 *Theory, Culture, & Soc* 1, 3. Many modern Western and European theories regarding globalization, democracy, and liberalism are rooted in Kant's philosophy. For a discussion of how Kant's philosophy has been interpreted differently by modern political scientists and policymakers, see Antonio Franceschet, 'Popular Sovereignty or Cosmopolitan Democracy? Liberalism, Kant, and International Reform' (2000) 6 *Eur J Int'l Rel* 277, 278–80.

them secular, rational, universal, individual, democratic, and radical'.[55] These declarations effectuated broad human rights concepts by applying them to citizens. Nonetheless, because these documents connected the concept of 'human being' with the idea of 'citizen', the declarations unfortunately limited natural rights to citizens. Indeed, although natural rights theories granted every individual rights at birth, these rights could only be recognized and enforced in a practical way through membership in a State, which alone could prescribe the criteria for membership. Accordingly, the system of modern citizenship—arising from the French and American Revolutions of the late 1700s[56]—protected minority rights from the excesses of majority rule,[57] but only for individuals it labeled 'citizens' and to the exclusion of populations perceived as foreign or non-national.

### *Diplomatic protection*

The development of the modern nation-state, whose advent was marked by the French and American Declarations as well as the Treaty of Westphalia (1648), resulted in military and economic power concentrations that did not exist with city-states or feudal sovereigns. These concentrations of power allowed for diplomatic protection to become an effective means for the protection of citizens abroad. Diplomatic protection has been practiced since the rise of States. When States were small, such as during the time of city-states and feudal States, the practice of diplomatic protection was rare, but in the 16th century, newly emergent nation-States became increasingly involved in the protection and supervision of their citizens abroad.

In 1758 the doctrine of diplomatic protection was famously set forth by Emmerich de Vattel when he proclaimed in *The Law of Nations* that:

> [W]hoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.[58]

Vattel's statement expressed the growing consensus that the State had the right to intervene when its citizens were treated unjustly, and it did so by asserting the legal fiction that injuries to aliens were, in fact, injurious to the aliens' States.

[55] Louis Henkin, *The Rights of Man Today* (Westview Press, 1978) 5.

[56] Uri Davis, 'Conceptions of Citizenship in the Middle East: State, Nation, and People', in Butenschon *et al* (eds), *Citizenship and the State in the Middle East* (Syracuse University Press, 2000) 50.

[57] See JR Mallory, 'The Continuing Evolution of Canadian Constitutionalism', in Alan Cairns and Cynthia Williams, *Constitutionalism, Citizenship and Society in Canada* (University of Toronto Press, 1985) 92.

[58] Emmerich de Vattel, *Law of Nations* ed Joseph Chitty (1833) 161.

Although the ostensible purpose of diplomatic protection is to protect the legitimate needs of citizens living abroad when justice cannot be obtained locally,[59] diplomatic protection has too often been based not on legitimate aims, but rather on the strength of the non-citizen's home State.[60] To be sure, as the doctrine of diplomatic protection became established as customary international law, it became a tool used by powerful States—often without regard to the strength of a citizen's claim—to justify the arbitrary imposition of the powerful State's will over less powerful States.[61] In Professor John Dugard's First Report on Diplomatic Protection, the UN International Law Commission's Special Rapporteur on Diplomatic Protection noted some historically significant abuses of diplomatic protection:

> The Anglo-Boer war (1899–1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of the Witwatersrand. American military intervention, on the pretext of defending United States nationals in Latin America, has continued until recent times, as shown by the interventions in Grenada in 1983 and Panama in 1989. Non-military intervention, in the form of demands for compensation for injuries inflicted on the persons or property of aliens, has also been abused.[62]

Abuses like the ones mentioned above led to a resistance in the 1800s—especially in Latin America—against diplomatic protection as an institution. The best-known voice of resistance to diplomatic protection was Argentine jurist Carlos Calvo. The position of Calvo as expressed in *Derecho internacional teórico y práctico de Europa y América*[63] later became known as the 'Calvo Doctrine'. This doctrine was two-part. First, Calvo asserted that free and independent sovereign States must enjoy the right, on the basis of equality, to freedom from diplomatic or military interference from other States.[64] Second, Calvo stated that aliens do not deserve better than 'national treatment'; that is, aliens in a given State are not entitled to be treated better than the State's nationals. Despite the fact that the majority of States rejected the Calvo Doctrine's validity at the time of its emergence,[65] the Doctrine gained widespread acceptance among Latin American governments and businesses. Although the Calvo Doctrine did not make its way into many multilateral treaties, many Latin American States began unilaterally to

[59] Justine Daly, 'Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico after the NAFTA' (1994) 25 *St Mary's LJ* 1147, 1163.

[60] Ibid.

[61] Ibid, at 1162.

[62] John R Dugard, First Report on Diplomatic Protection, International Law Commission, 52nd Session, (2000) UN Doc A/CN.4/506, para 14 (footnotes omitted).

[63] Carlos Calvo, *Derecho Internacional Teórico y Práctico de Europa y América* (1868).

[64] Donald R Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press, 1955) 19–20.

[65] Denise Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors' (1995) 26 *L & Pol'y in Int'l Bus* 1169, 1172.

implement the Calvo Doctrine by inserting Calvo Clause requirements in their legislation and constitutions,[66] and the Clause thus became a mandatory contractual stipulation for non-citizen investors operating in many Latin American States.[67] The Calvo Clause contains three essential elements: restraints on diplomatic protection; equal treatment of citizens and non-citizens; and absolute jurisdiction of the host State.[68]

Critics of the Calvo Doctrine argue that it attempts to legitimatize non-responsibility, and that the Doctrine—purporting to eliminate abuses of diplomatic protection—fails to provide an alternative to such protection.[69] It should be noted that efforts to insert the Calvo Clause in treaties and international contracts have largely been ineffectual outside of Latin America[70] and that international court decisions have generally resulted in controversial and inconclusive decisions regarding the Doctrine as a principle of international law.[71]

### *Treaties*

In addition to paving the way for diplomatic protection as an effective means for the protection of a State's citizens living abroad, the concentration of power vested in nation-States also allowed for the modern bilateral and multilateral treaty systems that exist today. As previously mentioned, the interests of a State's citizens living abroad were promoted through treaties, which had been used for centuries to protect the rights of non-citizens and 'outsiders'.[72] One of the most important types of treaty for non-citizens was the capitulation treaty. Capitulations and the capitulation system evolved from agreements developed during the Middle Ages[73] in which a sovereign would grant a legal enclave to alien merchants.[74] Within this legal enclave, alien merchants were free from the jurisdiction of their host sovereign and were allowed to live under their own State's laws, administered by their States' courts.[75] (Such arrangements of extraterritoriality[76] were characteristic of capitulation treaties.) An example of one such capitulation treaty was a 1535

[66] Ibid.
[67] Ibid.
[68] Ibid, at 1173.
[69] Daly, n 58 above, at 1164.
[70] Ibid.
[71] Ibid.
[72] For example, in the 9th century AD, Harun ar-Rashid unilaterally granted rights and commercial facilities to the Franks, and in 1123 the king of Jerusalem gave certain guarantees—also unilaterally—to citizens of Italian city-States. Encyclopædia Britannica, *Capitulation*, Encyclopædia Britannica Online <http://www.search.eb.com/eb/article-9020158>.
[73] Lillich, n 1 above, at 7 (citing John H Mundy, *Europe in the High Middle Ages 1150–1309* (Longman, 1973) 155.
[74] Ibid.
[75] Ibid.
[76] If a State is granted the privilege of extraterritoriality by another State, then citizens of the former State are exempt from the latter State's jurisdiction and are subject to the authorities of their own government, usually by virtue of a treaty. Shih S Liu, *Extraterritoriality: Its Rise and its Decline* (1925) 19.

treaty between the Sultan of Turkey, Suleiman the Magnificent, and Francis I of France.[77] This treaty, one of the first of its particular kind, was groundbreaking because it greatly expanded legal relations between the Western Hemisphere and Asia[78] by granting French merchants in Turkey religious and individual liberties, and providing that French-appointed consuls should judge, according to French law, the criminal and civil affairs of French subjects in Turkey.[79] In addition to extraterritoriality, capitulation treaties usually granted trade rights and permission to establish residences.[80]

Because of the desire of Western States to protect their nationals from the operation of 'unfit or unequal laws' and 'the danger of corrupt and ignorant local courts',[81] the capitulation system spread widely throughout Asia and the Middle East during the 17th, 18th, and early 19th centuries.[82] For example, in 1787 the United States formed a treaty with Morocco and secured extraterritoriality privileges.[83] The US later concluded similar capitulation treaties with Tunis, Tripoli, Algiers, China, Japan, Turkey, Bulgaria, Persia, and Siam.[84]

Capitulation treaties, which originally took place on an equal basis, were undertaken voluntarily by non-Western parties who sought to facilitate trade and who were sympathetic to difficulties faced by traders.[85] But by the 19th century,[86] capitulations had become, for the most part, unequal,[87] and were generally regarded as humiliating to non-Western States because they usually involved the derogation of the non-European State's sovereignty.[88] For example, the Sino-British supplementary treaty (1843) created a system of courts in China to try all cases involving British nationals, but without granting corresponding rights to Chinese nationals living in Britain.[89] It is not surprising, then, that Eastern countries became resentful of the capitulation system and began taking steps to end it. In 1856 Turkey raised the question of abrogation, and this set off a chain of relinquishments of extraterritorial judicial rights that ended in 1943 when the United States and Great Britain formally relinquished extraterritorial rights in China.[90]

[77] Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1947) 54.
[78] Ibid.
[79] Encyclopædia Britannica, n 72 above.
[80] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harv Int'l L J* 1, 53.
[81] Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad* (William S Hein, 1970) 432.
[82] Lillich, n 1 above, at 19.
[83] Edwin M Borchard, n 81 above, at 432.
[84] Ibid.
[85] Charles H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford University Press, 1967) 97, cited in Anghie, n 80 above, at n 185.
[86] Ibid, cited in ibid, n 185.
[87] Ibid, at 53.
[88] Ibid.
[89] Encyclopædia Britannica, n 72 above.
[90] Ibid.

Although the capitulation system lasted well into the 19th century, the humanitarian spirit of the Enlightenment engendered the practice of concluding authentically equal treaties between States during the 18th century.[91] Such bilateral treaties, which were typically concluded to encourage trade and foreign investment, came to be known as Friendship, Commerce, and Navigation (FCN) treaties. The American-Prussian treaty of 1784 is considered by many to be the first FCN treaty, and a model for FCN treaties to follow. The 1784 treaty:

> [Granted] the 'most perfect freedom of conscience and of worship,' tried to establish humane conditions for the subjects of the signatory powers in the contingency of a future war. In such case not only were women and children provided for, but 'scholars of every faculty, cultivators of the earth, artisans, manufacturers, fishermen, and all others whose occupations are concerned with the common subsistence and benefit of mankind, shall be allowed to continue their respective employment and shall not be molested'.[92]

Typical FCN treaties secured reciprocal rights for businesses and citizens operating or living in the other party's territory. These FCN treaties commonly provided that the States parties would protect the personal welfare and property of each other's nationals;[93] they also frequently provided for the right of permanent settlement, free access to courts, freedom of religion and worship, exemption from military conscription, the right of free travel, protection from discriminatory taxes, and admission to trade and industry.[94]

Over time, the practice of making FCN and other similar treaties expanded until, as one scholar put it, '[t]he presence of a commercial treaty gradually became so much the normal situation between countries having any considerable trade with each other that the absence of a treaty suggested a state of tension'.[95]

Another important development was the creation of bilateral treaties bearing a most-favored-nation (MFN) clause. In general, MFN treatment was an innovation designed to create equivalent conditions among States competing for trade within the State granting equal treatment,[96] and MFN clauses generally provided that each State party would treat the other State party as well as it treats other States granted MFN treatment.[97] Although the practice of unilaterally granting MFN treatment existed during the Middle Ages, 'the first use of the expression of the most-favoured-nation or its equivalent in other languages [is in] the Trade Treaty of Nijmwegen of 1679 between Sweden and Holland'.[98]

[91] Lillich, n 1 above, at 19; Nussbaum, n 77 above, at 129.
[92] Ibid, at 129.
[93] Lillich, n 1 above, at 20.
[94] Ibid.
[95] Nussbaum, n 77 above, at 200.
[96] H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815)* (Sijthoff, 1971) 110.
[97] *Black's Law Dictionary* (8th edn, 2004), most-favored-nation clause.
[98] Neufeld, n 96 above, at 110.

But it was not until the 1713 Treaties of Utrecht that MFN treatment was commonly applied in treaties of Western European nations. While '[s]ome [t]reaties restricted most-favoured-nation treatment to matters relating to commerce[,]'[99] MFN clauses frequently equated the rights of all citizens of States granted favored status. For example, 'the Treaty between Spain and Holland of 1648 ... gave the Dutch the same security and freedom in Spain that the English enjoyed there on account of the Peace Treaty of 1630[,]'[100] while the 'Declaration of Britain and Savoy of 1712/3 provided equal treatment only for merchants and the Russian-Turkish Treaty of 1775 [provided] only for [equal] trade'.[101]

## Twentieth-century developments predating the creation of the UN

The beginning of the 20th century saw a number of multilateral efforts to codify the rights of non-citizens. For example, the second (1902), sixth (1928), and seventh (1933) International Conference of American States produced four international instruments[102] relating to the treatment of, and State responsibility for, injuries to non-citizens. While some of the provisions in these treaties were aimed at improving the plight of non-citizens, the treaties were also used by the drafters to limit diplomatic protection, to advocate for the national treatment approach to non-citizens' rights, and to promulgate the Calvo Doctrine.[103] In this sense, the treaties did not represent a regional consensus as much as they represented the views of Latin American States, as the United States did not favor the Calvo Doctrine, the national treatment approach,[104] or limits on diplomatic protection.[105]

The activities of the League of Nations in the early 20th century also bear mentioning. In the 1920s the League of Nations commenced an ambitious international effort to codify international law, which produced the Hague Conference for the Codification of International Law of 1930.[106] The conference delegates focused their efforts on three areas of international law, one area being the 'Responsibility of States for Damage Caused in Their Territory to the Person

[99] Neufeld, n 96 above, at 112.

[100] Ibid, at 110.

[101] Ibid, at 111.

[102] The Convention Relative to the Rights of Aliens, 29 Jan 1902, 32 OASTS 58; Convention Regarding the Status of Aliens, 20 Feb 1928, 46 Stat 2753, 132 LNTS 301; Antonio Sanchez de Bustamante y Sirvénv, *El Código de Derecho Internacional Privado y la Sexta Conferencia Panamericana* (1929); Convention on Rights and Duties of States, 26 December 1933, 49 Stat 3097, 165 LNTS 19.

[103] Lillich, n 1 above, at 30–1.

[104] The national treatment approach essentially posits that non-citizens in a given State are not entitled to better treatment than the State's nationals.

[105] Lillich, n 1 above, at 31.

[106] Andrea K Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Va J Int'l L* 809, 833.

or Property of Foreigners'.[107] The delegates to the 1930 Hague Conference disagreed on fundamental issues, and their codification efforts eventually ended inconclusively with the main sticking point being 'the refusal of [newly independent countries] to accept the... minimum standards of treatment insisted upon by the capital-exporting states'.[108]

Another significant early 20th-century development was the 1921 creation of the League of Nations' High Commission for Refugees. The Commission was the first international organization concerned solely with the welfare of refugees,[109] and its creation laid the foundation for the international refugee law regime and the later recognition of the refugee as a category of non-citizen under international law.[110] In 1922, and shortly after the Commission's founding, Dr Fridtjof Nansen (the Commission's founder) convened an inter-governmental conference which concluded the first multilateral treaty concerning refugees: the Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees.[111] The Russian Refugee Arrangement paved the way for a number of other refugee treaties concluded between the two World Wars,[112] such as The Arrangement Relating to the Legal Status of Russian and Armenian Refugees,[113] the Convention relating to the International Status of Refugees,[114] and the Convention Concerning the Status of Refugees Coming from Germany.[115]

## B. The UN and the modern human rights regime

Despite some worthy efforts on behalf of non-citizens during the beginning of the 20th century, the creation of the UN and the subsequent development of the modern human rights movement constitute the most historically significant events for the rights of non-citizens in the 20th century.

[107] Ibid, at 834 (citing Green H Hackworth, 'Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners' (1930) 24 *Am J Int'l L* 500, 500).

[108] Mirian Kene Omalu, *NAFTA and the Energy Charter Treaty* (Kluwer Law International, 1999) 41 cited in Bjorklund, n 106 above, at 834.

[109] Horst Rutsch, *The United Nations: Formally Recognized and Recognized by Association*, United Nations, <http://www.un.org/Pubs/chronicle/2003/issue3/0303p35.asp>.

[110] Lillich, n 1 above, at 34. See Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol 1 (1966).

[111] Atle Grahl-Madsen, 'Further Development of International Refugee Law' (1965) 35 *Nordisk Tidsskrift Int'l Ret* 159, 159; 'Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees', 5 July 1922, 13 LNTS 355.

[112] Grahl-Madsen, n 111 above.

[113] 'Arrangement Relating to the Legal Status of Russian and Armenian Refugees', 30 June 1928, 89 LNTS 55.

[114] Convention Relating to the International Status of Refugees, 28 October 1933, 159 LNTS 3663.

[115] Convention Concerning the Status of Refugees Coming from Germany, 10 February 1938, 191 LNTS No 4461.

World War II represented the ultimate extension of State sovereignty concepts that had dominated international relations for three centuries. The Nazis, seeking international preeminence, acted with unprecedented brutality and demonstrated that previous attempts to protect individuals were inadequate. The war and the Holocaust demonstrated that unfettered national sovereignty could not continue to exist without untold hardships and, ultimately, the threat of total destruction of human society.

## Birth of the UN

In response to the horrors of the World War II period, world leaders spoke out in defense of peace and the protection of human rights. On 6 January 1941 President Roosevelt, in his State of the Union address to Congress, outlined his vision of the future based on the 'four essential human freedoms'.[116] His speech was one of many strong statements as to the crucial importance of human rights in the international community. In addition, on 14 August 1941, Roosevelt and Prime Minister Churchill set forth the aims of the allied war effort in a joint declaration known as the Atlantic Charter.[117] It stated general principles regarding the structure of the post-war world. Among those principles, Article 6 stressed the importance of human rights:

> After the final destruction of Nazi tyranny they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all men in all the lands may live out their lives in freedom from fear and want.[118]

After the war, political leaders and scholars continued to look to the protection of human rights as both an end and a means of helping to ensure international peace and security. The victors responded to World War II and the Holocaust by forming the UN.

In 1944 Britain and the US met with the Soviet Union (and later with China) in Washington, DC to formulate a 'proposal for the establishment of a general international organization'.[119] The proposal envisioned that the organization's structure would include the means to help ensure protection of human rights. Unfortunately, only a brief statement demonstrating support for human rights was included in the draft UN Charter issued by the Conference on 7 October 1944.

[116] Franklin D Roosevelt, 'Four Freedoms' Speech, in (1941) 87 *Cong Rec* 44, 46–7.

[117] The Atlantic Charter, Joint Declaration by the President and The Prime Minister, Declaration of Principles (Known as the Atlantic Charter) 14 August 1941, US–UK, 55 Stat app 1603.

[118] Ibid.

[119] Bruno Simma, *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 295.

The United Nations Charter[120] was promulgated in 1945 to 'maintain international peace and security';[121] 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination';[122] and 'to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character'.[123] The Charter's preamble states that the 'Peoples of the United Nations' are determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.[124] According to Article 1 of the Charter, the UN seeks '[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Article 55 of the Charter requires that the United Nations promote 'conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for . . . human rights . . . without discrimination . . . '. In accordance with Article 56, members pledge 'joint and separate action . . . for the achievement of the purposes set forth in Article 55'.

## Formation of the International Bill of Human Rights

In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights (Universal Declaration),[125] defining the human rights guaranteed by the UN Charter and articulating the importance of rights which were placed at risk during the 1940s: the rights to life, liberty, and security of person; freedom of expression, peaceful assembly, association, religious belief, and movement; and protections from slavery, arbitrary arrest, imprisonment without fair trial, and invasion of privacy. The Universal Declaration also contains provisions for economic, social, and cultural rights. The Declaration's force, however, is unfortunately limited by very broad exclusions and the omission of monitoring and enforcement provisions.

Following adoption of the Universal Declaration, the UN Commission on Human Rights drafted the International Bill of Human Rights, which, in addition to the Universal Declaration, contains the International Covenant on

[120] Charter of the United Nations, 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945 [hereinafter UN Charter].

[121] Ibid, art 1, para 1.

[122] Ibid, art 1, para 2.

[123] Ibid, art 1, para 3.

[124] Ibid, preamble.

[125] Universal Declaration of Human Rights, GA res 217A (III) at 71, (1948) UN Doc A/810 [hereinafter Universal Declaration].

Economic, Social and Cultural Rights (Economic and Social Covenant);[126] the International Covenant on Civil and Political Rights (Civil and Political Covenant);[127] and an Optional Protocol to the Civil and Political Covenant.[128] The International Bill of Human Rights comprises the most authoritative and comprehensive prescription of human rights obligations that governments undertake in joining the UN.

The International Bill of Human Rights' two covenants distinguish between implementation of civil and political rights, on the one hand, and economic, social, and cultural rights, on the other. Civil and political rights, such as freedom of expression and the right to be free from torture or arbitrary arrest, are immediately enforceable. Economic, social, and cultural rights are to be implemented 'to the maximum of available resources, with a view to achieving progressively the full realization of the rights... by all appropriate means, including particularly the adoption of legislative measures'.[129] In other words, governments that ratify the Covenants must immediately cease torturing their citizens, but they are not immediately required to feed, clothe, and house them. These latter obligations are generally to be accomplished progressively as resources permit.

In addition to the International Bill of Human Rights, the UN has drafted, promulgated, and now helps to implement more than eighty human rights treaties, declarations, and other instruments dealing with genocide, racial discrimination, discrimination against women, religious intolerance, the rights of disabled persons, the right to development, and the rights of children.[130] Human rights law has thus become the most codified domain of international law.

## Human rights and the rights of non-citizens

The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should equally enjoy all human rights.[131] As such, international human rights law generally requires the equal

[126] International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, (1966) UN Doc A/6316, 993 UNTS 3, entered into force 3 January 1976 [hereinafter Economic and Social Covenant].

[127] International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, (1966) UN Doc A/6316, 999 UNTS 171, entered into force 23 March 1976 [hereinafter Civil and Political Covenant].

[128] Optional Protocol to the International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, (1966) UN Doc A/6316, 999 UNTS 302, entered into force 23 March 1976.

[129] Economic and Social Covenant, n 126 above, art 2, para 1.

[130] See University of Minnesota Human Rights Library, *International Human Rights Instruments*, <http://www1.umn.edu/humanrts/instree/ainstls1.htm>.

[131] Universal Declaration, n 125 above, recognizes this principle in Art 2(1): '*[e]veryone* is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property,

treatment of citizens and non-citizens.[132] In recognition of this principle, the Universal Declaration states that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of *any* kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status' (emphasis added).[133] This provision applies to everyone and thus includes non-citizens.

With regard to civil and political rights, the Human Rights Committee, which is responsible for monitoring the implementation of the Civil and Political Covenant, explained in its General Comment No 15 that almost all rights protected by the Covenant must be guaranteed without discrimination between citizens and non-citizens.[134] Among these rights are freedom from arbitrary killing and detention; freedom from torture or cruel, inhumane or degrading treatment or punishment; equality before courts and tribunals; and freedom of thought, conscience, and religion.[135] Furthermore, non-citizens should have the right to marry; to receive protection as minors; and the right to peaceful association and assembly.[136] The Civil and Political Covenant contains a narrow exception to the general principle of equality for non-citizens with respect to two categories of rights: political rights that are explicitly guaranteed to citizens, such as the right to vote; and freedom of movement, such as the right to choose one's place of residence, which may be denied to undocumented immigrants.

Likewise, the Economic and Social Covenant establishes that States shall, in general, protect the rights of all individuals—regardless of citizenship—to work; to have just and favorable working conditions; an adequate standard of living; good health; education; and other economic, social, and cultural rights. Article 2(3) of the Economic and Social Covenant allows developing countries, 'with due regard to human rights and their national economy', to 'determine to what extent they would guarantee the economic rights recognized in the [Economic and Social Covenant] to non-nationals'. This exception may be made only with respect to economic rights and not to social and cultural rights.[137]

birth or other status' (emphasis added). This provision applies to 'everyone' and thus includes non-citizens. The use of the words 'such as' indicates that this list is not exhaustive and makes clear that the operative phrase is: 'without distinction of *any kind*'. Similar non-discrimination principles with respect to non-citizens can be found in the UN Charter; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child, etc.

[132] Distinctions may be made to this general principle only if they are to serve a legitimate State objective and are proportional to the achievement of that objective. For a thorough explication of these exceptions, see Chapter 3.

[133] Universal Declaration, n 125 above, art 2.

[134] Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant' (1986).

[135] Ibid.

[136] Ibid.

[137] See Tiburcio, n 7 above, at 145–7.

Further, like all exceptions, those provisos must be narrowly construed so as to maintain the overall thrust of the human rights protections.[138]

In addition to the Civil and Political Covenant, and the Economic and Social Covenant—which have been ratified by 160 and 157 nations, respectively—a number of other human rights instruments protect the rights of non-citizens. These treaties, many of which will be discussed at greater length in Chapter 3, include the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Vienna Convention on Consular Relations; the Convention on the Reduction of Statelessness and the Convention relating to the status of Stateless Persons; the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live; and the United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking. Furthermore, there are several major treaties specifically protecting the rights of migrant workers, including the International Convention on the Protection of All Migrant Workers and Members of Their Families, which came into force in July 2003 and has been ratified by thirty-seven nations, and the Migration for Employment Convention.

## C. Conclusion

Since international human rights protections for non-citizens developed in parallel with the law of international commerce, protections for non-citizens have historically been protections for investors, traders, merchants, and business people, not individuals requiring humanitarian assistance. As such, the history of the rights of non-citizens began as the history of the rights of the privileged. Today, a number of human rights treaties exist for the protection of discrete groups of non-citizens—such as asylum seekers, refugees, stateless persons, trafficked persons, and others who have been categorized under such derogatory terms as 'aliens' or 'foreigners'. Still, little has been done to identify the common plights, needs, and approaches for redress of marginalized non-citizen groups; no treaty presently exists solely to delineate the rights of non-citizens *as* non-citizens; and the general substance of the law of State responsibility for injuries to non-citizens has yet to be established by a broadly-accepted international instrument.[139] This situation is, in part, due to the fact that diverse groups of non-citizens, and their respective advocacy and interest groups, have traditionally seen themselves as separate and their problems as unique, despite similar goals and common circumstances. For

[138] Measures taken by States to protect their citizens and economies from non-citizens should not be taken to the detriment of the enjoyment of human rights. *Federation Internationale des Ligues des Droits de L'Homme v Angola*, African Comm Hum & Peoples' Rights, Comm No 71/92 (October 1997) para 16; see Tiburcio, n 7 above, at 145–7.

[139] Bjorklund, n 106 above, at 833.

example, non-citizens, wherever they are located, have historically been scapegoated in times of economic downturn.[140] By acting in concert, non-citizen advocacy groups could focus the debate on the real issues that might be plaguing the economy. Additionally, a gap exists between the use of treaties in practice, and as aspirational instruments. There is a danger that this gap can be used to legitimize the hierarchical nature of international relations.[141] To the extent that treaties function as establishing common moral standards, and standards of global justice, they may also create double standards where countries expect others to comply with their treaty obligations, while relying on national priorities to justify its own noncompliance.[142] Further, international law and thematic mechanisms relating to non-citizens have, until just recently, focused on non-citizen sub-groups while neglecting broader protections for non-citizens as a whole. For example, various UN institutions have designated special rapporteurs on such themes as trafficking, migrants, indigenous people, refugees, and racial discrimination and xenophobia. Similarly, several treaties have been designed to protect trafficked persons, migrant workers, indigenous and tribal peoples, refugees, and stateless persons. While all of these measures are essential and do not overlap so much as to be rendered unnecessary, continued discriminatory treatment of non-citizens demonstrates the need for: (1) clear, comprehensive standards governing the rights of non-citizens and States' implementation of these rights; and (2) a unified movement for the protection of non-citizens.

Initial steps towards a unified approach to the human rights of non-citizens were taken when the Sub-Commission on the Promotion and Protection of Human Rights, in a 1 August 2000 decision,[143] appointed a special rapporteur on the rights of non-citizens. The Special Rapporteur's principal objective was to create a report which gathered the diverse sources of international law protecting the rights of non-citizens. In August 2004 further progress was made towards a unified approach when the Committee on the Elimination of Racial Discrimination (CERD) adopted General Recommendation no 30[144]—reproduced here in the Appendix to this chapter—which substantially reflected the observations and suggestions of the Special Rapporteur.

Progress was also made in December 2004 when the United Kingdom's (UK) House of Lords, citing CERD's General Comment no 30 and other human rights instruments, determined that it was discriminatory to, without charge or trial, indefinitely detain non-citizens—but not UK nationals—suspected

[140] See, eg, Richard A Boswell, 'Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response' (1995) 42 *UCLA L Rev* 1475, 1476–7.

[141] See David Chandler, 'The Cosmopolitan Paradox' (2003) 117 *Radical Phil* 25, 25–6.

[142] Samantha Besson, 'Human Rights, Institutional Duties, and Cosmopolitan Responsibilities' (2003) 23 *Oxford J Legal Stud* 507, 510 (discussing the writings of Thomas Pogge).

[143] (2000) UN Doc E/CN.4/Sub.2/DEC/2000/103.

[144] Committee on the Elimination of Racial Discrimination, General Recommendation 30, 'Discrimination against Non-citizens' (Sixty-fourth session, 2004) (2004) UN Doc CERD/C/64/Misc.11/rev.3.

of international terrorism.[145] In the court's view, such discrimination between citizens and non-citizens constituted discrimination on the grounds of immigration status or nationality and was a violation of the UK's obligations under the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention);[146] the Civil and Political Covenant; and the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention). It is unfortunate that other States parties to the European Convention, the Civil and Political Covenant, and the Race Convention have not similarly interpreted their treaty obligations.

While treaties on the rights of various sub-groups of non-citizens may be expedient in the short term, such instruments have—in many cases—created the illusion that the human rights of refugees, asylum seekers, etc. are somehow distinct from the general body of human rights. This is not the case. As CERD's General Comment no 30, the House of Lords decision, and the Human Rights Committee's General Comment no 15 have shown, the progressive realization of the rights of non-citizens will not likely come through the explicit codification of the 'rights of non-citizens'. Rather, the durable realization of non-citizens' rights is most likely to be achieved through international instruments and legal precedents which recognize that existing human rights law, in general, applies equally to citizens as well as non-citizens.

## Further reading

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[145] *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, 2004 WL 2810935, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>. Another important development occurred in October 2005, with the decision of the Inter-Amerian Court of Human Rights that forbids racial discrimination in the granting of citizenship. *Dilcia Yean and Violeta Bosico v Dominican Republic*, judgment of 8 September 2005, I/A Court HR (Ser C) No 134 (2005).

[146] [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950), entered into force 3 September 1953.

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## Appendix: CERD General Recommendation 30

Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-Citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

The Committee on the Elimination of Racial Discrimination,

*Recalling* the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, and the International Covenant on Economic,

Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination,

*Recalling* the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance recognized that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices,

*Noting* that, based on the International Convention on the Elimination of All Forms of Racial Discrimination and general recommendations XI and XX, it has become evident from the examination of the reports of States parties to the Convention that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory,

*Having organized* a thematic discussion on the issue of discrimination against non-citizens and received the contributions of members of the Committee and States parties, as well as contributions from experts of other United Nations organs and specialized agencies and from non-governmental organizations,

*Recognizing* the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens,

*Basing* its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms,

*Affirms* that:

## 1. RESPONSIBILITIES OF STATES PARTIES TO THE CONVENTION

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin;

*Recommends,*

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

## 2. MEASURES OF A GENERAL NATURE

6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination;

7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;

8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them;

9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;

10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

## 3. PROTECTION AGAINST HATE SPEECH AND RACIAL VIOLENCE

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;

12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, 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;

## 4. ACCESS TO CITIZENSHIP

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;

14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality;

15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;

16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;

17. Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State Party;

## 5. ADMINISTRATION OF JUSTICE

18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;

19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;

20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law;

21. Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying

relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;

22. 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;

23. Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny;

24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

## 6. EXPULSION AND DEPORTATION OF NON-CITIZENS

25. Ensure that laws concerning deportation or other form of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;

26. Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;

27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;

28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

## 7. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;

30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;

31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;

32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;

33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;

34. 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;

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;

37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;

38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

39. The present general recommendation replaces General Recommendation 11 (1993).

**Annex 152**

Aziz El Yaakoubi, "Emir of Qatar calls for negotiations to ease Gulf boycott", *The Independent* (22 July 2017), *available at* https://www.independent.co.uk/news/world/emir-qatar-sheikh-tamim-bin-hamad-al-thani-saudi-arabia-egypt-united-arab-emirates-bahrain-blockade-a7854311.html

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# Emir of Qatar calls for negotiations to ease Gulf boycott

'Any solution must respect the sovereignty and will of each state'

**Aziz El Yaakoubi** | Saturday 22 July 2017 00:53 |

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The countries cut ties and imposed sanctions on Qatar last month, accusing it of financing extremist groups and supporting terrorism, which the emir denied.

"Qatar is fighting terrorism relentlessly and without compromise, and the international community recognises this," Sheikh Tamim said in the televised speech.

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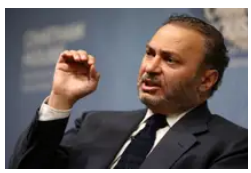

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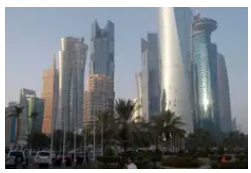
**What happens when you fly Qatar Airways during a diplomatic crisis**



**The situation in Qatar will soon become like Yemen**

**American Airlines Says Qatar Airways Investment Won't Fly**

He spoke hours after US Secretary of State Rex Tillerson said the United States was satisfied with Qatar's efforts to implement an agreement aimed at combating terror financing, and urged the four states to lift their "land blockade".

It also comes days before Turkish President Recep Tayyip Erdogan, who had supported Qatar in the crisis, was due to visit Qatar, Saudi Arabia and Kuwait to try to resolve the rift.

Earlier this month during a round of shuttle diplomacy, Tillerson signed a deal with Qatar to fight terrorism financing, part of efforts led by Kuwait to try to resolve the most serious rift in the Western-allied Gulf in decades.

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An official comment from the four Arab countries had yet to be issued, but a Saudi royal court advisor described it as a piece of literary work written by a school student. "Had it been written by a student in middle school he would have flunked," Saud al-Qahtani wrote on his Twitter account.

Commentators hosted by the Saudi-owned al-Arabiya television also denounced the speech.

"This is a speech of obstinacy which sends messages that Qatar will not stop supporting terrorism," said Ali al-Naimi, editor of an online news website published in the UAE.

The crisis revolves around allegations that Qatar supports Islamist militant groups, including in Syria and Libya, and hosts members of the Muslim Brotherhood.

It began after a speech in late May by Sheikh Tamim appeared on the state news agency's website, which Doha said he had never made and indicated the website had been hacked from one of its neighbours, indicating the UAE.

Qatar's stadium plans for 2022 World Cup Show all 12

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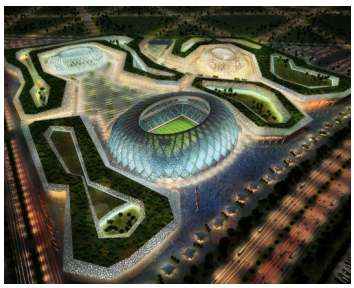

*The Washington Post*, citing US intelligence officials, last week reported that the United Arab Emirates had arranged for Qatari government social media and news sites to be hacked in order to post the fiery but false quotes. The UAE denied any involvement.

Sheikh Tamim described the sanctions as a campaign that had been pre-planned against Qatar, calling it an act of aggression against Doha's foreign policy.

"Its planners planted statements to mislead public opinion and the countries of the world," he said.

Sheikh Tamim vowed to withstand the sanctions and said he had instructed the Qatari government that Qataris should become more self-reliant and called for the economy to be opened up to foreign investments.

"The time has come for us to spare the people from the political differences between the governments," he said, urging dialogue.

"Any solution must respect the sovereignty and will of each state," he added.

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**Annex 153**

Nashwa Fakry, "Testimonies of Citizens and Residents Affected by the Blockade", *Al Sharq* (29 June 2018), *available at* https://www.al-sharq.com/article/29/06/2018/%D8%B4%D9%87%D8%A7%D8%AF%D8%A7%D8%AA-%D9%85%D9%88%D8%A7%D8%B7%D9%86%D9%8A%D9%86-%D9%88%D9%85%D9%82%D9%8A%D9%85%D9%8A%D9%86-%D8-%AA%D8%B6%D8%B1%D8%B1%D9%88%D8%A7-%D9%85%D9%86-%D8%A7%D9%84%D8%AD%D8%B5%D8%A7%D8%B1 (with certified translation)

**Testimonies of Citizens and Residents Affected by the Blockade**

URL for the article/al-sharq.com/article/29/06/2018

Local news, Friday 06/29/2018, 1:30 a.m.

*Arbitrary measures adopted against Qatar by blockade states*

Nashwa Fakry:

**Sad stories of people affected by the Gulf Crisis**

*** The blockade caused human, social and economic tragedies for every stratum of society**

*** Citizens and residents are banned from performing do Hajj and Umrah rituals**

*** Qatari women forced to leave their mothers in blockade states**

*** Student Abdullah Al-Qahtani: How can I get my official documents from an authority that is our enemy?**

The arbitrary measures, adopted by the blockade states against Qatar, have given rise to the rupture and separation of many families. Moreover, they inflicted economic damages to companies, real estate investments owned by Qataris, and students have been prevented from pursuing their studies in blockade states. Apart from that, citizens and residents were banned from performing Hajj and Umrah, and therefore, Hajj and Umrah companies had to close down in the country and went complete bankrupt.

Blockade states have prevented their citizens from going to Qatar, without due consideration to the mixed marriages of many Qatari women to men from the Gulf States and Qatari men married to women from the Gulf states, who have been forced to return to their countries and leave their families, their husbands, wives and children behind. There are also humanitarian cases: children divided between Qatari mothers and Gulf state fathers and vice versa or Qatari

women forced to leave their mothers in blockade states. Their close families are also subject to this punishment.

While the Qatari authorities have reiterated that everyone is welcome to remain in Qatari territory, however with pressure from human rights organizations, the blockade states to reconsider their policies, but in vain. The blockade states continued to exercise pressures on their citizens to leave Qatar. The National Human Rights Committee has recorded the numbers of families of both nationalities living in the state as follows: 556 Saudi men married to Qatari women; 401 Bahraini men married to Qatari women and 380 Emirati men married to Qatari women.

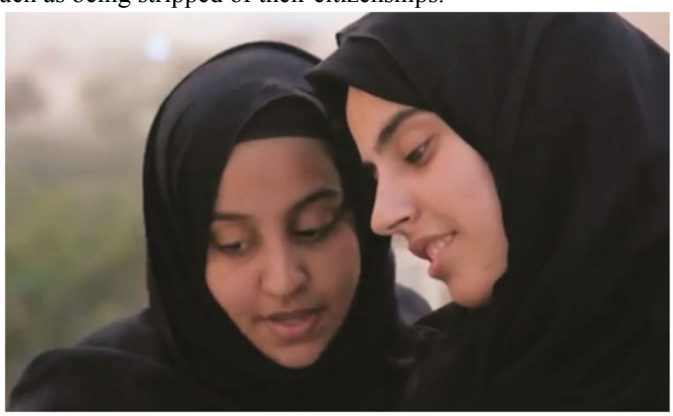
There are also 3,138 Saudi women married to Qatari citizens; 944 Bahraini women married to Qatari men and 1,055 Emirati women whose husbands are Qatari.

A number of Qatari national and resident businesspeople and investors have spoken to the local media, as well as families and students affected by the unjust blockade imposed on Qatar by neighbouring states, which has lasted nearly 389 days. It has caused a number of social and economic tragedies, not only for Qatari nationals but for residents in Qatar too.

There are a number of mixed families who have refused to appear in the media out of fear for their relatives and loved ones in blockade states being harmed or sanctioned, according to local media. Abdullah Dabsan Al-Qahtani, a Qatari student who was studying in Egypt, is an example of the students who have been denied the right to complete their university studies. He said, "On the morning of June 5, my flight to Qatar was at 10am. I was sleeping at the time. When I saw the enormous number of phone calls I received, I was afraid and anxious. I quickly called one of my brothers. He asked me whether I was aware of the unfolding events. I wondered, how can I go and get my official documents from an authority that is our enemy and looks at me as though I am a terrorist. I approached them many times, but there has been no response from them."

There is also a Qatari father, who wanted his name and photo to remain anonymous, separated from his Emirati wife. He has a daughter who lives with her mother. He cannot see her or check up on her. He said they will travel and meet in another state; he expressed his concern for his daughter and wants her to return to live with him in Qatar.

**A Bahraini student living with her Qatari mother narrating her story**
**"We received telephone calls instructing us to go back home or otherwise we would be stripped of our nationality.**
**Forcing me to leave Qatar would make me lose my whole life."**
One of the humanitarian cases of mixed families who have been harmed early by the unjust blockade imposed on Qatar is that of university student Unud Al-Jalahama and her sister Hunuf, who both live with their Qatari mother, who is separated from their Bahraini father. She and her sisters are afraid of being forced to leave Qatar. In an interview with Al Jazeera documentary channel, she stated that her father is a Bahraini citizen, separated from their mother since Unud was 4. She remained in her mother's custody in Qatar and lived with her in Qatar. After the blockade, the Saudi, Bahraini and Emirati governments issued instructions to their citizens requiring them to leave Qatari territories, otherwise measures will be taken against them, such as being stripped of their citizenships.



Unud said, "All my memories, my friends and my family are in Qatar. So being forced to leave Qatar would be difficult and painful for me. It's painful to imagine ones' life to go down the drain or to become on the edge, or one's memories are robbed away from him. It's extremely difficult." This is mainly due to the fact that she is studying medicine at the Weill Cornell Medical College. Just one week after the crisis started, her mother received telephone calls from people claiming to be from the Bahraini Embassy, demanding that Unud and her sister return to Bahrain or their passports would be cancelled.

In Gulf countries, the practice is that children are granted their citizenships by descent from their fathers' nationality. This means that Unud and her sister could then be between a rock and a hard place; i.e. Either they leave their mother and the place they grew up and were raised in, or lose their citizenship.

Unud said, "The Bahraini authorities gave us only around two weeks to go back." She mentioned that she remembers her feelings of fear and anxiety. A few days later, she mulled

over the options she had, and reflected on the consequences of the decision she would make and what would happen to her education since this could have an adverse impact on her mental health, let alone, her sisters above anything else. She said, "After that, we received another telephone call echoing the same demands, regardless of the fake news, which stated news that people with families in Qatar won't be forced to go to Bahrain. They were playing with people's feelings. They think they can control our feelings, that they will achieve their aims by putting pressure on the vulnerable, or they don't realize that people have a voice and they will raise it. Social media platforms have made the whole world a small village. The blockade states don't seem to realize this."

**Serious problems facing people performing Umrah in Saudi Arabia at the time of the blockade**
**Owner of a Hajj and Umrah agency closes his business for good after rents in arrears pile up**
*** Inhumane treatment by Saudi immigration officers against Qatari pilgrims**

Qatari nationals and residents are prevented from performing Hajj and Umrah rituals. Jaber Ali Al-Azba, the owner of a Hajj and Umrah agency said, "Previously, Hajj and Umrah services for pilgrims were easy on both sides, the Saudi and Qatari alike. Now things have changed after making a decision that prohibited us from performing the Hajj and Umrah rituals. Even our partners in Makkah and Madinah, the hotel owners and agencies, are very upset. They could not have anticipated this decision. At the same time, we had pilgrims in the Holy Land when this problem started. The immigration officers there banned the buses from entering or exiting Qatar. One of the buses had to wait from 7am until 2pm as the immigration officer refused to stamp the pilgrims' passports. Other problems included the immigration officers' denial of the pilgrims bus access to the gate and they had to walk, at 2pm from the gate to the immigration officer, which is about 500m" while they were fasting and accompanied by children, women and the elderly.

The Agency owner stated that he had to close the business after the rent demands and employees' wages piled up. He handed over the leased office to the landlord and removed the company signboard; he closed the office for good. He mentioned that he had calls and queries from many people; Qatari nationals and residents, seeking to perform Umrah in Ramadan, but he has no answers for them. Some of them said that they could perform Umrah by travelling via Oman or Kuwait. He said that he was in Kuwait a few days before Ramadan but that there was no programme scheduled for this at Kuwaiti travel agencies. He said, "if Makkah was open to pilgrims, I would have around 4000 pilgrims or even more who are willing to perform the pilgrimage rituals, should they have this option."

**"I have suffered because of this unjust blockade..."**
**Qatari businesswoman: My business was on the slide and I have been affected and prevented from contacting my family**

Qatari businesswoman, Lulu Al-Obaidali, restauranteur, is an example of those whose businesses and work have suffered as a result of the blockade. She has, however, been able to make a comeback as she placed an image of Tamim the Glorious outside her store for all her restaurant clients to see, in an expression of her pride and confidence. However, the blockade has had a huge negative effect on her business; she used to have 4 different restaurants in Doha and now she only has one. Though the turnover of her business plummeted down, she is still grappling with difficulties in the supply of ingredients for potato chips. Al-Obaidali said that the blockade has also had a negative effect on her family, which had a greater effect on her.

She said, "My siblings are my flesh and blood. You can't contact them, which is very hurtful and sad." She also has relatives in blockade states, some of whom have had happy and sad occasions to mark, yet she was unable to be with them.

She said that she used to import spices for the restaurants from a neighbouring state, but she had now agreed with some Qatari women traders for them to produce the spice mixes for her so that everything would be produced in Qatar. The blockade made her look for the necessary raw ingredient suppliers for the fast food restaurants she owns, particularly as her work relies on offering quick mixes of food offering up to 18 flavours. In her work, she uses spices and flavours for spiral chips, which she offers at her restaurant. She mentioned that they had simple stored ingredients that were enough for 3 months and these ran out and she had to find a way to deal with this problem. Al-Obaidali was able to easily arrange the basic ingredients to make the chips from other sources and was able to overcome the negative effects of the blockade. She has also not been able to provide all other ingredients, and therefore, focused primarily on the local market to find new suppliers for the other essential ingredients, particularly spices.

**He can no longer contact his business partners...**
**Yusuf Al-Naseer: My shop in the UAE was looted and lawyers are refusing to defend me**
Yusuf Al-Naseer is a Qatari investor who started up a business in the UAE, particularly as the market was open to all in neighbouring countries. The blockade came as a shock and his business suffered losses. He said, "My business partners with whom I share business interests in the UAE, and often met at my shop, and who once were by my side and my neighbours, don't talk to me. They've cut contact. I was told that the goods in my company there were looted and people took them."

He said that he had contacted many lawyers in the UAE. When he told them that he is a Qatari national, they refused to act on his behalf. He called other lawyers but they all had the same response, "Qatari? I'm sorry, I can't help."
He continued: There was a contact person between us and the UAE. Suddenly he stopped communicating with us. We learned that the authorities there had summoned him and prevented him from contacting me or anyone else in Qatar. We have not been able to get our profits and goods up until now, so how will we have the courage in the future to invest in these states?

**Huge losses accumulated by cargo companies between GCC countries**
**900 trucks used to cross the Abu Samra Al-Hammoudi crossing every day**
**Visas withheld from drivers coming from Qatar on the morning of the blockade**
The road is empty whereas it used to be full of trucks coming and going from the UAE, Kuwait, Bahrain and Saudi Arabia and to Qatar. Now, many companies have closed down after the highway border leading to Saudi Arabia closed. It was a corridor full of trucks. It is almost completely empty now since Qatar was targeted by its historical neighbours in Saudi Arabia, the UAE and Bahrain. All journeys to and from Qatar have been stopped and air space has been closed to Qatar Airways. Saudi Arabia has also closed the only land crossing to Qatar. In the past, it was an active area but now it is completely deserted. Economic integration, which was essential to GCC states, made Qatar rely

extensively on its GCC neighbours which has caused huge losses, particularly for freight companies responsible for transport between the states.

Mohammed Owais Shafiq, a Pakistani national, owner of a transport company, said that he had suffered huge losses of around 90% of his operations, which depend on freight transport between GCC states. He said that the blockade had forced them to stop completely. He hopes that everyone will resolve the Gulf Crisis. However, his hope is disappearing gradually as the months go by, without any breakthrough. Like other companies operating in Qatar, this company has to adapt to the new situation. The company has had to restructure and focus on internal transport through Qatar's sea ports.

Shafiq stated that transport to and from the port calls for a completely different strategy to transport across land borders. It also requires trucks and trailers with special specifications. He said that he had to make some changes to around 95% of trucks in his fleet, adding that drivers had to be retrained. He wonders how any economy can survive without transport? He went on saying, "We saw that around 800 to 900 trucks were crossing the Abu Samra border every day, carrying different types of materials only across the Abu Samra crossing. These materials still reach Qatar, but either via air or sea ports. These materials must reach consumers and, in this way, there will still be a need for transport. We will continue our operations in one way or another, but this time through internal transport only. The volume of work varies as does the revenue made. As a result of this, we haven't reached the maximum capacity of the transport fleet yet."

**When the borders closed**

For his part, Roshan Patrai, a truck driver, said that he loaded the truck going to Saudi Arabia, but he didn't know that the borders were closed. Arriving at the border checkpoint with Saudi Arabia, the Saudi borders and customs police officers told him that he had to return as he would not get a transport visa, as the borders had closed.
He went on saying, "My work as a truck driver transporting building materials to and from GCC countries is my main bread and butter. Crossing borders was easy up until the beginning of June 2017. There were more than 500 trucks with their drivers. Most of these trucks would carry goods from here from Qatar. They all had to turn back. I called my company and they asked him if we were the only ones not getting visas. I told them they would not give visas to any trucks and drivers coming from Qatar. They told us all to go back to where we came from."

Roshan came from Nepal to work in Qatar in 2010. Since then he has driven a truck for a company. The company's success and growth is due to it transporting goods between Qatar and its neighbours for 25 years. The company started with just 5 trucks and now owns more than 150 trucks.

# شهادات مواطنين ومقيمين تضرروا من الحصار

al-sharq.com/article/29/06/2018/شهادات-مواطنين-ومقيمين-تضرروا-من-الحصار

محليات الجمعة 29-06-2018 الساعة 1:30 ص

إجراءات تعسفية تبنتها دول الحصار ضد قطر

نشوى فكري:

**قصص مؤلمة لحالات متضررة من الأزمة الخليجية**

*** الحصار تسبب في مآسي إنسانية واجتماعية واقتصادية لكافة فئات المجتمع**

*** منع الحج والعمرة عن المواطنين والمقيمين**

*** قطريات أُجبرن على ترك أمهاتهن في دول الحصار**

*** الطالب عبدالله القحطاني: كيف أستطيع الذهاب للحصول على أوراق رسمية للجهة التي تعادينا**

أدت الإجراءات التعسفية، التي تبنتها دول الحصار ضد قطر، إلى تمزيق وتفرقة الكثير من العائلات، وأضرت اقتصاديا بشركات، واستثمارات عقارية يملكها القطريون، وتم حرمان طلاب وطالبات من إكمال دراستهم في دول الحصار، كل هذا بالإضافة إلى منع الحج والعمرة للمواطنين والمقيمين، الأمر الذي أدى إلى إغلاق مكاتب الحج والعمرة بالدولة، وإفلاسها تماما.

وقامت دول الحصار، بمنع مواطنيها من القدوم إلى قطر، دون النظر إلى الكثير من القطريات المتزوجات من خليجين، والقطريين المتزوجين من خليجيات، والذين تم إجبارهم على العودة لبلدانهم، وترك عائلاتهم من أزواج وزوجات وأبناء، ومن الحالات الإنسانية أيضا، أبناء تشتتوا بين أمهات قطريات وآباء خليجيين

والعكس، أو قطريات أجبرن على ترك أمهاتهن في دول الحصار، أو أسرهم من الدرجة الأولى، وهم أيضا سيتعرضون للعقاب.

ففي الوقت الذي أكدت فيه، السلطات القطرية أن الجميع مرحب بهم، للبقاء على أراضي قطر، إلا أن حقوق الإنسان حاولت أن تجعل دول الحصار تعيد سياساتها، بل بالعكس ظلت دول الحصار تمارس الضغوط على مواطنيها لمغادرة قطر، وقد سجلت اللجنة الوطنية لحقوق الإنسان أيضاً حالات لأسر مختلطة تقيم بالدولة، وهي 556 سعودياً متزوجين من قطريات، و401 بحريني متزوج من قطرية، و380 إماراتيا متزوجين من قطريات.

وهناك 3138 سعوديات متزوجات من مواطنين، و944 بحرينية متزوجات من قطريين، و1055 إماراتية متزوجات من مواطنين.

حيث تحدث لوسائل الإعلام المحلية، عدد من رجال الأعمال والمستثمرين القطريين والمقيمين، إضافة إلى عدد من العائلات والطلاب الذين تضرروا من الحصار الجائر المفروض على قطر من دول الجوار، والذي تخطى قرابة 389 يوما، والذي أفرز العديد من المآسي الاجتماعية والاقتصادية، ليس فقط للمواطنين القطريين، بل للمقيمين على أرض قطر ايضا.

وهناك العديد من العائلات المشتركة، الذين رفضوا الظهور في وسائل الإعلام، خوفا من تعرض أقرانهم وأقاربهم في دول الحصار للأذى أو العقاب، حسبما أكدت وسائل الإعلام المحلية، ويعد عبدالله دبسان القحطاني الطالب القطري الذي كان يدرس في مصر، أحد النماذج للطلاب الذين حرموا من استكمال دراستهم الجامعية، حيث تحدث قائلا: صباح 5 يونيه كانت رحلتي إلى قطر الساعة 10، وكنت وقتها نائما، وعند رؤية الكم الهائل من الاتصالات أصابني الخوف والقلق، فسارعت بالاتصال بأحد إخواني، والذي سألني ألا تعرف ماذا حدث، متسائلا كيف أستطيع الذهاب للحصول على أوراق رسمية للجهة التي تعادينا، وتنظر لي كإرهابي، تواصلت معهم أكثر من مرة ولم يكن هناك رد من جانبهم.

وأيضا أحد الآباء القطريين، والذي رفض الظهور باسمه أو صورته، حيث إنه قد انفصل عن زوجته من الجنسية الإماراتية، ولديه ابنة تعيش مع أمها، ولا يستطيع رؤيتها أو الاطمئنان عليها، مؤكدا أنهم يسافرون للالتقاء في إحدى الدول الأخرى، معربا عن قلقه على ابنته ويرغب في عودتها للعيش معه في قطر.

**طالبة بحرينية تعيش مع والدتها القطرية تروي قصتها**
**تلقينا مكالمات هاتفية تطالبنا بالعودة أو تجريدنا من الجنسية**
**إجباري على مغادرة قطر إهدار لكل سنوات حياتي**

واحدة من الحالات الإنسانية، للعائلات المشتركة التي تضررت من الحصار الجائر المفروض على الدولة، هي الطالبة الجامعية العنود الجلاهمة وأختها الهنوف، واللتان تعيشان مع أمهما القطرية، والتي انفصلت عن والدهما البحريني الجنسية، حيث إنها وأخواتها متخوفون، من اضطرارهم لمغادرة دولة قطر، وقد أوضحت لقناة الجزيرة الوثائقية، أن والدهم البحريني الجنسية، قد انفصل عن والدتهم، عندما كانت العنود في الرابعة من العمر، ظلت في حضانة والدتها في قطر، وتعيش معها في دولة قطر، إلا أنه بعد الحصار أصدرت حكومات السعودية والبحرين والإمارات تعليماتها لمواطنيهم، بضرورة مغادرة الأراضي القطرية، وإلا سيتم اتخاذ إجراءات ضدهم بما فيها تجريدهم من الجنسية.

وقالت العنود: إن كل ذكرياتي وصديقاتي وأسرتي فى قطر، لذا فإن إجباري على مغادرة قطر سيكون أمرا صعبا ومريرا، تخيلوا أن حياة شخص كاملة تنزع منه وتهدر سنوات عمره، وأن ذكريات تسلب منه بكاملها، إنه أمر صعب للغاية، خاصة أنها تدرس الطب في كلية وايل كورنيل، وبعد مضي أسبوع واحد فقط من مضي الأزمة، تلقت والدتها مكالمات هاتفية من أشخاص يدعون أنهم من سفارة البحرين، طلبوا من العنود وأخواتها العودة إلى البحرين، وإلا سيتم إلغاء جوازات سفرهم.

وكما هو معروف في الدول الخليجية، يكتسب الأولاد الجنسية من والدهم، وهذا يعني أن العنود وأخواتها قد يواجهون مأزقا كبيرا، فإما ان تترك والدتهم المكان الذي ترعرت وتربت فيه، وإما ان تفقد جنسيتها.

وأشارت العنود، لقد امهلتنا سلطات البحرين نحو أسبوعين فقط للعودة، مشيرة إلى أنها تتذكر شعورها بالرعب، وهي تقوم بعد أيام، وتفكر في الخيارات الموجودة أمامها، والعواقب التي ستترتب على القرار الذي ستتخذه، وماذا سيكون مصير مسيرتها التعليمية، خاصة أن لهذا الأمر آثارا نفسية وخيمة على

نفسياتها وأخواتها قبل أي شيء، وتابعت قائلة: بعد ذلك تلقينا مكالمة هاتفية أخرى، تكرر نفس الطلب رغم الإخبار المغلوطة، التي نشروها أن من لديه عائلة في قطر، لن يجبر على الذهاب للبحرين، إنهم يتلاعبون بمشاعر الناس، ويعتقدون أنه يمكنهم التحكم بمشاعرنا، وإنهم سيحققون مآربهم بالضغط على الضعفاء، أو لم يدركوا أن الناس لهم صوت سيرفعونه، وأن مواقع التوصل الاجتماعي جعلت من العالم بأسره قرية صغيرة، هذا الأمر لم تدركه دول الحصار.

**مشاكل جمة واجهت المعتمرين بالأراضي السعودية وقت الحصار**
**صاحب مكتب للحج والعمرة يغلقه نهائياً بعد تراكم الإيجارات**
*** معاملة لا إنسانية من ضباط الجوازات السعوديين مع المعتمرين القطريين**
وعن منع القطريين والمقيمين من العمرة والحج، تحدث جابر علي العذبة صاحب مكتب للحج والعمرة، قائلا: فيما سبق كانت خدمات المعتمرين والحجاج كانت سهلة من قبل الجانبين، سواء الجانب السعودي أو القطري، إلا أن الأمر أختلف بعد قرار حرماننا من الحج والعمرة، حتى شركاؤنا في مكة والمدينة أصحاب الفنادق والوكلاء، كانوا منزعجين جداً، ولم يكونوا يتوقعون هذا القرار، وفي نفس الوقت كان لدينا معتمرون ما بين مكة والمدينة، عندما وصلوا هنا كانت المشكلة، الضباط في الجوازات هناك رفضوا دخول الباصات إلي قطر وكذلك العكس، ولدينا باص جلس من الساعة السابعة صباحا إلى 2 ظهرا، فموظف الجوازات رفض ختم جوازات سفرهم، وأيضا المشكلة الأخرى، أن موظف الجوازات رفض أن يتم وصول الباص إلى البوابة، فاضطر المعتمرون للمشي على الأقدام الساعة 2 ظهرا وهم صائمون ومعهم أطفال ونساء وكبار السن، من البوابة إلى الجوازات مسافة حوالى 500 متر.

وأشار إلى اضطراره لإغلاق المكتب الخاص به، بعد تراكم الإيجارات ورواتب الموظفين، فقام بإرجاع المكتب وتنزيل اللافتة، وإغلاق المكتب نهائيا، لافتا إلى أنه قد جاءته اتصالات واستفسارات، من الكثير من الناس يطلبون العمرة في رمضان، سواء من قطريين أو مقيمين، ولم يكن لديه أي إجابة لهم، والبعض قال إنه يمكن أداء العمرة عن طريق عمان أو الكويت، مؤكدا أنه قبل رمضان بأيام قليلة، كان متواجدا بالكويت، ولا يوجد أي برنامج لهذا الموضوع في مكاتب السفر الكويتية، قائلا: إذا كانت مكة مفتوحة للمعتمرين يوجد عندي قرابة 4000 معتمر أو أكثر، من يؤكد يتصل ويضمن ذلك.

**تأثرت بسبب الحصار الظالم..**
**سيدة أعمال قطرية: تجارتي وأعمالي تقلصت وتضررت وحرمت من التواصل مع أهلي**

تعد لولوة العبيدلي، سيدة أعمال قطرية، صاحبة مطعم، أحد النماذج من الذين تأثرت أعمالهم وتجارتهم جراء الحصار، إلا أنها استطاعت النهوض مرة اخرى، حيث إنها رفعت لوحة تميم المجد أمام المحل الخاص بها ليراها جميع زبائن المطعم، وذلك تعبيرا عن فخرها واعتزازها، ولقد كان للحصار آثار سلبية كبيرة على عملها التجاري، حيث كان لها 4 مطاعم مختلفة في الدوحة، والآن لديها واحد فقط، ورغم تقليص حجم عملها إلا انها لا تزال تواجه صعوبة في توفير المواد ومكونات وجبة البطاطا المقلية.

حيث أكدت العبيدلي، ان للحصار أيضا آثارا سلبية على عائلتها، الأمر الذي كان له الأثر الأكبر على نفسها.. قالت: اخوانى من لحمي ودمي، لا تستطيعين التواصل معهم أمر مؤلم ومحزن، حيث يوجد لديها أيضا أقارب في دول الحصار، منهم من صادفته مناسبات سعيدة وحزينة، ولم تستطع التواجد معهم.

وأشارت إلى انها كانت تقوم باستيراد البهارات الخاصة بخلطات المطعم من احدى دول الجوار، إلا نها قامت بالاتفاق مع بعض التاجرات القطريات، لعمل الخلطات وبحيث يكون كل شيء مصنعا داخل قطر، فالحصار جعلها تبحث عن موردين للمواد الخام اللازمة، لتشغيل مطاعم الوجبات السريعة التي تمتلكها، خاصة وأن عملها يعتمد على تقديم خلطات سرية تقدمها تصل إلى 18 نكهة، تستخدمها في عملها الخاص في عمل البهارات والنكهات للبطاطا الحلزونية، التي يقدمها مطعمها، لافتة إلى انه كان يوجد لديها مواد مخزنة بسيطة تكفي لمدة 3 شهور وانتهت، ولابد من إيجاد طريقة لتعويض المشكلة، حيث تمكنت العبيدلي بسهولة من تدبير المكونات الأساسية لطبق البطاطا من مصادر أخرى، واستطاعت التغلب على الآثار السلبية للحصار، كما عانت في توفير باقي المكونات، إلا انها اضطرت للتركيز على السوق المحلى للبحث عن موردين جدد لباقي المكونات الأساسية وتحديداً التوابل.

**لم يعد يستطيع التواصل مع شركاء العمل التجاري..**
**يوسف النصير: محلي في الإمارات نهب والمحامون يرفضون الترافع عني**
يوسف النصير مستثمر قطري، قام بفتح تجارة في الإمارات، وخاصة ان السوق كانت مفتوحة امام الجميع في دول الجوار، إلا أن الحصار شكل صدمة وخسائر لتجارته، حيث تحدث قائلا: شركاء العمل التجارى الذين بيني وبينهم تجارة في دولة الامارات، يقابلوني في محلى التجاري، وهم بجواري وجيراني، ولا يتحدثون معى، انقطعت الاتصالات، وفيما يتعلق ببضاعتي التي كانت موجودة بشركتي هناك، أخبروني بأن المحل الخاص بي، أصبح سبيلا تم نهبه والناس تقوم بأخذ البضائع منه.

وأشار إلى انه قد تواصل مع أكثر من محام في دولة الإمارات، وعندما يخبره بأنه مواطن قطري، يرفضون الترافع عنه، منوها إلى انه قد اتصل على المحاميين الثاني والثالث، وجميعهم نفس الرد "قطري أنا آسف".. وتابع قائلا: كان هناك شخص نقطة الوصل بينا وبين الامارات، فجأة توقف عن التواصل معنا، علمنا ان الجهات المعنية هناك، استدعته وتم منعه من التواصل معي أو مع أى شخص من دولة قطر، فإذا أرباحنا وأموالنا إلى الآن، لم نستطع الحصول عليها، فكيف ستأتينا الجرأة مستقبلا للاستثمار في هذه الدول.

**خسائر كبيرة تكبدتها شركات الشحن بين دول مجلس التعاون الخليجي**
**900 شاحنة كانت تعبر منفذ أبو سمرة الحدودي يومياً**
**التأشيرات حجبت عن السائقين القادمين من قطر صباح يوم الحصار**
أصبح الطريق خاليا بعد أن كان عامراً بالشاحنات القادمة من بلدان الإمارات والكويت والبحرين والسعودية من وإلى قطر، إلا أنه الآن قد توقفت اعمال عدد كبير من الشركات مع إغلاق الحدود للطريق السريع المؤدي للمنفذ الحدودي مع السعودية، وكان ممرا بريا تتدفق عليه الشاحنات، وقد تحول الى طريق خال تماما بعد أن استهدفت قطر من جيرانها التاريخين، السعودية والإمارات والبحرين، كما اوقفوا جميع رحلات السفر من وإلي قطر، وأغلقوا مجالاتهم الجوية امام الطيران القطري،وأغلقت السعودية ايضا المنفذ البري الوحيد الذي يربطها بدولة قطر، في السابق كان نقطة نشطة، والآن بات مهجورا تماما، حيث كان

التكامل الاقتصادي الذي كان يشكل جوهر دول مجلس التعاون الخليجي جعل قطر تعتمد بشكل كبير على جيرانها من دول المجلس، مما تسبب في وقوع خسائر كبيرة وخاصة لشركات الشاحنات المسؤولة عن النقل بين الدول.

وقد أكد محمد عويس شفيق الباكستاني الجنسية، وصاحب شركة النقل، أنه قد تكبد خسائر كبيرة بنحو 90 % من عملياتهم التي تعتمد على الشحن بين دول مجلس التعاون الخليجي، مشيرا إلى أن الحصار اجبرهم على وقفها بالكامل، والامل الذي كان ينتظره الجميع في حل الازمة الخليجية، يختفي شيئا فشيئا مع مرور الأشهر، دون اى انفراجة، وكغيرها من شركات الاعمال في قطر، كان على هذه الشركة التكيف مع الوضع الجديد، حيث خضعت الشركة لإعادة هيكلة، وتركز الآن على النقل الداخلي عبر موانئ قطر البحرية.

وأوضح شفيق أن النقل من وإلى الميناء يتطلب استراتيجية مختلفة تماما عن النقل عبر الحدود، كما انه يحتاج إلى شاحنات وقاطرات ذات مواصفات خاصة، لافتا إلى أنه اضطر إلى اجراء بعض تعديلات لنحو 95 % من شاحنات اسطول النقل لديه، بالإضافة إلى اعادة تدريب السائقين، متسائلا كيف يمكن لأى اقتصاد أن يستمر في غياب عمليات النقل؟.. وتابع قائلا: فقد تبين لنا أن ما بين 800 إلى 900 شاحنة كانت تعبر منفذ أبو سمرة الحدودي كل يوم، محملة بمختلف أنواع المواد فقط عبر من أبو سمرة الحدودي، ولا تزال هذه المواد تصل إلى قطر، إما عبر الجو أو الموانئ البحرية، فتلك المواد يجب أن تصل للمستهلكين، وبهذا ستتواصل الحاجة لوسائل النقل، وستستمر عملياتنا بشكل أو بآخر، ولكن هذه المرة نقل على الصعيد الداخلى فقط، وبهذا تتفاوت حجم الأعمال كما تتباين العوائد المالية المحققة، ونتيجة لذلك فإننا لم نصل بعد لاستغلال الطاقة القصوى لأسطول النقل الخاص بنا.

**وقت إغلاق الحدود**

من جانبه تحدث روشان باتراي سائق شاحنة، أنه قد قام بتحميل الشاحنة متوجها للسعودية، ولم يكن يعلم أن الحدود أغلقت، وعندما وصل إلى النقطة الحدودية مع السعودية، قال له ضباط شرطة المنفذ والجمارك السعودي هناك انه يتعين عليه الرجوع فلن يحصل على تأشيرة مرور، حيث إن الحدود قد أغلقت... وتابع قائلا: اكسب قوت يومي من عملى كسائق شاحنة ينقل مواد بناء من وإلى دول مجلس التعاون الخليجي، وكان العبور سهلا حتى أوائل شهر يونيو 2017، وكان هناك أكثر من 500 شاحنة بسائقيها، معظم تلك الشاحنات كانت تحمل مواد من هنا من قطر، اضطرت جميعها إلى العودة، اتصلت بي شركتى، وسألتني عما اذا كنا نحن الوحيدون الذين لم نحصل على تأشيرة، وأخبرتهم بأنه تم حجب التأشيرة عن جميع الشاحنات والسائقين القادمين من قطر وطلبوا منا جميعا العودة من حيث أتينا.

وكان روشان قد جاء من النيبال للعمل في دولة قطر عام 2010، ومنذ ذلك الحين وهو يقود شاحنة لإحدى الشركات، ويعود الفضل في نجاح الشركة ونموها إلى نقل البضائع بين قطر وجيرانها على مدى 25 عاماً، حيث بدأت الشركة بـ 5 شاحنات فقط واليوم تمتلك أكثر من 150 شاحنة.

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STATE OF NEW YORK )
)
) ss
COUNTY OF NEW YORK )

**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Arabic into English of the attached article titled "Testimonies of Citizens and Residents Affected by the Blockade."

Kristen Duffy, Senior Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 15th day of February, 2017.

LYNDA GREEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GR6205401
Qualified In New York County
My Commission Expires 05-11-2021

**Annex 154**

Xinhua Online Dictionary, Definitions of "原", "属", and "国", *available at* http://xh.5156edu.com
(with certified translation)

原

Pinyin: yuán

Radical: 厂 guang

Stroke: 10

Wubi: drii

Chinese character evolution | Riddle of Yuan | English for Yuan | Kangxi Dictionary | origin of Yuan Surname | Yuan name

Basic explanation:

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原

## yuán

Initial, beginning: the original. Plaintiff. Original document. Originality. Principle. Raw material. Primary color. Original. Original work.
Originally: as is. Prototype. Original address. Original owner.
Understanding, tolerance: forgive. Forgive.
Wide and flat place: wilderness. Plain.
Same as "塬".

Principal.

Number of strokes: 10;

Radical: 厂 Guang;
Stroke Order Number: 1332511234

Detailed explanation:

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# 属

Radical：尸 Wubi: ntky

Chinese character evolution | English for Yuan | Kangxi Dictionary | Shu name

Basic explanation:

属

（屬）

shǔ

The same family: Relatives. Family dependents. Family of martyrs.

Category: Metal. My genus.

Be subject to, classify: belong. Subordinate. Territorial. Attribution. Directly affiliated. Affiliated. Be subordinate to.

In the biota [taxonomic rank] classification system, there are “genus” under “section”[family] and “species” under “genus”.

Is, be: is true. Purely a rumor.

Mark the birth year with the zodiac: animal zodiac

属

【Verb】

[be under; be subordinate to; belong to]

The girl learnt Pipa at the age of 13 years old and ranked first in the imperial music office. --- *Song of Pipa (with preface)* by Bai Juyi in Tang Dynasty

The mount Xiaogu is located in Susong County of Shuzhou. --- *Passing Mount Xiaogu and Mount Dagu* by Lu You of Song Dynasty

Also: dependent country; allegiance; accompanying vehicles; dependent county; concubine; subordinate officer (subordinate, troops under one's command)

[be]

The guns and gunpowder in the camp are all in the hands of Rong Lu, and the officers at the camp battalions are also mostly his old people. ----*Biography of Tan Sitong* by Liang Qichao in Qing Dynasty

Another example: it has been found true.

国

Pinyin: guó

Radical: 口

Stroke: 8

Wubi: lgyi

Evolution of Chinese character | related riddles | English | Kangxi Dictionary | Origin of Surname Guo | Names with character Guo

Basic explanations:

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国

（國）

## guó

A government with land, people and sovereignty (the area that a feudal prince is enfeoffed with): state. State land. State system (a. nature of the state; b. national prestige). State title. Nation (referring to country). National policy. National condition. National law. National Power. National defense. National prestige. a. National treasure (a. treasure of the state; b. people having made special contributions to the state). National dignity. National spirit. National affairs (state plans, such as "jointly discuss national affairs").
Referring particularly Chinese: made in China. Quintessence of Chinese culture. Chinese music. Chinese medicine.
Surname.

Nation.

Strokes: 8;
Radical: 口;
Stroke order number: 25112141

Detailed explanations:

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国

国、國

## guó

【NOUN】

(associative character. “口” (wéi), meaning territory. 或 (namely “country”). “或” also indicate the pronunciation of the character. Original meaning: state)

In Zhou dynasty, the emperor ruled the "world", roughly "state" we would now say [state]

在线汉语字典
xh. 5156edu. com

汉字 检索 按部首检索 按拼音检索

**相关成语**

| | |
|---|---|
| 甘心情原 | 封官许原 |
| 赌誓发原 | 雕虎焦原 |
| 厝火燎原 | 巢焚原燎 |
| 中原逐鹿 | 逐鹿中原 |
| 原形毕露 | 原封不动 |
| 星火燎原 | 如火燎原 |
| 情有可原 | 平原督邮 |
| 略迹原情 | 燎原烈火 |
| 九原可作 | 返本还原 |
| 令原之戚 | 潦原浸天 |

更多相关成语>>

**同音字**

yuán：
鼋 元 円 负 貟 沅 邓 园
杭 蚖 笕 魭 黿 茆 爰 垣

# 原

**拼音：** yuán, **笔划：** 10
**部首：** 厂 **五笔：** drii

汉字演变 | 原的谜语 | 原的英语 | 康熙字典 | 原姓起源 | 原字姓名

**基本解释：**

---

原

yuán

最初的，开始的：原本。原告。原稿。原籍。原理。原料。原色。原始。原著。

本来：原样。原型。原址。原主。

谅解，宽容：原宥。原谅。

宽广平坦的地方：原野。平原。

同“塬”。

本

笔画数：10；

部首：厂；

笔顺编号：1332511234

**详细解释：**

---

原

yuán

【名】

(会意。小篆字形。象泉水从山崖里涌出来。从厂(hǎn),象山崖石穴形。从泉。本义:水源,源泉)

“源”的古字。水源,水流起头的地方〖fountainhead;sourceofariver〗

原,水泉本也。——《说文》。俗字作“源”。

原泉混混。——《孟子》

原流、泉涔。——《淮南子·原道》

在线汉语字典
xh. 5156edu. com

汉字 检索 按部首检索 按拼音检索

**相关成语**

| | |
|---|---|
| 烟聚波属 | 属人耳目 |
| 属词比事 | 神情不属 |
| 龙兴云属 | 龙举云属 |
| 貂狗相属 | 道殣相属 |
| 波骇云属 | 比物属事 |
| 属毛离里 | 属垣有耳 |
| 属辞比事 | 一家眷属 |
| 纯属骗局 | 波属云委 |

**同音字**

shǔ ：
鼠 黍 蜀 署 暑 曙 薯 蜀 癙 蔬 襩 蠋 襩 屬

zhǔ ：
丶 拄 宝 矚 訡 罣 麈 煮 煮 帾 陼 渚 嘱 瞩 燭 潴

# 属

拼音： zhǔ, shǔ, 笔划： 12

部首： 尸 五笔： ntky

汉字演变 | 属的英语 | 康熙字典 | 属字姓名

**基本解释：**

---

属

（屬）

shǔ

同一家族的：亲属。眷属。烈属。

类别：金属。吾属。

有管辖关系的，归类：属于。属下。属地。归属。直属。附属。隶属。

生物群分类系统上，“科”下有“属”，“属”下有“种”。

系，是：属实。纯属谣言。

用十二生肖记生年：属相。

属

（屬）

zhǔ

连缀，接连：属文。属和（diào）。

（意念）集中于一点：属仰（注视仰望）。属望。属意。

古同“嘱”，嘱咐，托付。

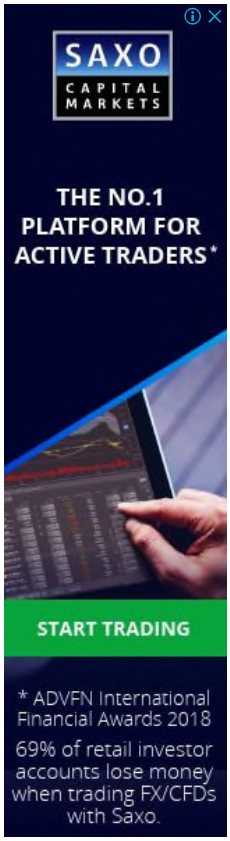
倾注，引申为劝酒：“举酒属客”。

恰好遇到：属京师乱。

笔画数：12；

部首：尸；

笔顺编号：513325125214




**详细解释:**

---

属

屬

shǔ

【名】

(形声。从尾,蜀声。“尾”与身体相连。①(zhǔ)本义:连接。②类,族)

种类。亦特指牲类〖category〗

忠之属也,可以一战。——《左传·庄公十年》

土地平旷,屋舍俨然,有良田美池桑竹之属。——晋·陶渊明《桃花源记》

又如:金属;属禽(分别飞禽的种类)

亲属〖kinsfolk;dependent;familymembers〗

是疾易传染,遘者虽戚属,不敢同卧起。——清·方苞《狱中杂记》

又如:家属(户主外的家庭成员);军属;眷属;属从(指按亲属关系而从其丧服);属党(亲属);属姓(同宗);属疏(宗族关系疏远)

侪辈。指同一类人〖fellows;associates〗

若属皆且为所虏。——《史记·项羽本纪》

有宁越徐尚苏秦杜赫之属为之谋。——汉·贾谊《过秦论》

官属;部属〖subordinate〗

徒属皆曰:“敬受命”。——《史记·陈涉世家》

六卿分职各率其属。——《书·周官》

台谒当以属礼。——《明史·海瑞传》

又如:下属(部下);属名(南北朝时,壮丁为了逃避繁苛的赋役,多投身于豪门势族为附隶,称为属名);属别(下属的类别);属官(属下的官吏);属佐(指下属佐助人员);属役(仆役,佣人);属部(部下,部属)

生物分类系统上所用的等级之一〖genus〗。动植物分类以种为单位,相近的种合为属,相近的属合为科

特指在十二属相中的归属〖bebornintheyearof(oneofthetwelveanimals)〗。如:属相

属

屬

shǔ

【动】

归属;隶属〖beunder;besubordinateto;belongto〗

十三学得琵琶成,名属教坊第一部。——唐·白居易《琵琶行(并序)》

小孤属舒州宿松县。——宋·陆游《过小孤山大孤山》
又如:属邦(附属国);属心(诚心归附);属车(随从的车辆。也称副车);属城(隶属的县城);属妇(指妾);属僚(属下,部下)
系;是〖be〗
今营中枪弹火药皆在荣贼之手,而营哨各官,亦多属旧人。——清·梁启超《谭嗣同传》
又如:查明属实
另见zhǔ

属地
shǔdì
〖possession;dependency〗某些国家侵占的殖民地或所控制的附属国
殖民地和属地
属国
shǔguó
〖dependency〗古时附属于宗主国的国家
属吏
shǔlì
〖staffmember〗下属的官吏
属下
shǔxià
〖subordinate〗：部下;下属
在下属面前,他总是神气十足
〖subordinate〗：统属下;管辖下
他是经理属下的干将
属相
shǔxiàng
〖anyofthetwelveanimals,representingthetwelveEarthlyBranches,usedtosymbolizetheyearinwhichapersonisborn〗用十二地支与十二种动物(鼠、牛、虎、兔、龙、蛇、马、羊、猴、鸡、狗、猪)相配合来记人生出年份,如子年出生则属鼠,称“属相”。又称“生肖”
属性
shǔxìng
〖attribute〗事物所具有的不可缺少的性质
属于
shǔyú
〖belongto〗归于某一方面;为某一方面所有

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汉字 检索 按部首检索 按拼音检索

**相关成语**

| | |
|---|---|
| 赤心报国 | 病民蛊国 |
| 闭关锁国 | 保国安民 |
| 安国宁家 | 民安国泰 |
| 捐躯报国 | 精忠报国 |
| 安邦治国 | 安邦定国 |
| 爱国如家 | 经国之才 |
| 尽忠报国 | 祸国殃民 |
| 国士无双 | 国富民强 |
| 富国强民 | 独立王国 |
| 病民害国 | 邦国殄瘁 |

更多相关成语>>

**同音字**

guó：
国 囤 囤 囵 帼 掴 國 腘
聝 馘 虢 簂 膕 慖 溾 幗

# 国

拼音： guó，　笔划： 8

部首： 口　五笔： lgyi

汉字演变 | 国的谜语 | 国的英语 | 康熙字典 | 国姓起源 | 国字姓名

**基本解释：**

国

（國）

guó

有土地、人民、主权的政体（古代指诸侯所受封的地域）：国家。国土。国体（ａ．国家的性质；ｂ．国家的体面）。国号。国度（指国家）。国策。国情。国法。国力。国防。国威。国宝（ａ．国家的宝物；ｂ．喻对国家有特殊贡献的人）。国格。国魂。国是（国家大计，如“共商国国”）。

特指中国的：国产。国货。国粹。国乐（yuè）。国药。

姓。

邦

笔画数：8；

部首：口；

笔顺编号：25112141

**详细解释：**

国

国、國

guó

【名】

(会意。从“口”(wéi),表示疆域。从或(即“国”)。“或”亦兼表字音。本义:邦国)

周代,天子统治的是“天下”,略等于现在说的“全国”〖state〗

LIONBRIDGE

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**Annex 155**

Ozhegov Dictionary, Definitions of “Национальный” and “Нация”, *available at* http://www.ozhegov.com;
Ushakov’s Dictionary, Definition of “Происхождение”, *available at* https://slovar.cc/rus/ushakov
(with certified translation)

# Ozhegov's Dictionary

## Explanatory Dictionary of the Russian Language

# NATIONAL

NATIONAL 1. see *nation*. 2. Characteristic of a particular nation, peculiar to it only. National culture. National language. National theater. National dress. 3. full form. Same as *state* (1st definition). National flag. National income. || n. nationality, *f* (2nd definition).

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- Letter Л
- Letter М
- Letter Н
- Letter О
- Letter П
- Letter Р
- Letter С
- Letter Т
- Letter У
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# Ozhegov's Dictionary

## Explanatory Dictionary of the Russian Language

# NATION

NATION, *f.* 1. A historically formed and settled community of people established in the process of formation of their territory, economical links, literature, cultural characteristics, and spiritual identity. 2. Sometimes used as country or state. The United Nations. || adj. national. National interests. National equality.

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**Definition of ORIGIN in Ushakov's Explanatory Dictionary of the Russian Language**

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**ORIGIN**

origin, no plural, *n*.

1. Denoting a belonging to a certain nation or class by birth. Proletarian origin. Of Russian origin.

2. Coming into being. Origin of language. Origin of species (biol.).

Ushakov. Ushakov's Explanatory Dictionary of the Russian Language.

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## Словарь Ожегова

толковый словарь русского языка

# НАЦИОНАЛЬНЫЙ

НАЦИОНАЛЬНЫЙ, -ая, -ое; -лен, -льна. 1. см. нация. 2. Характерный для данной нации, свойственный именно ей. Национальная культура. Н. язык. Н. театр. Н. костюм. 3. полн. ф. То же, что государственный (в 1 знач.). Н. флаг. Н. доход. || сущ национальность, -и, ж. (ко 2 знач.).

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- Буква Г
- Буква Д
- Буква Е
- Буква Ё
- Буква Ж
- Буква З
- Буква И
- Буква Й
- Буква К
- Буква Л
- Буква М
- Буква Н
- Буква О
- Буква П
- Буква Р
- Буква С
- Буква Т
- Буква У
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- Буква Х
- Буква Ц
- Буква Ч
- Буква Ш
- Буква Щ
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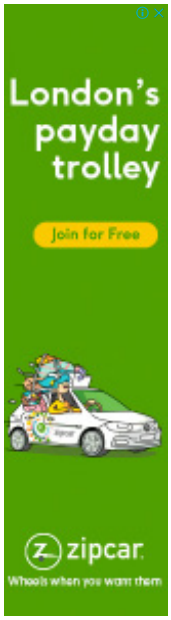


# НАЦИЯ

НАЦИЯ, -и, ж. 1. Исторически сложившаяся устойчивая общность людей, образующаяся в процессе формирования общности их территории, экономических связей, литературного языка, особенностей культуры и духовного облика. 2. В нек-рых сочетаниях: страна, государство. Организация Объединенных Наций. || прил. национальный, -ая, -ое. Национальные интересы. Национальное равноправие.

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- Буква И
- Буква Й
- Буква К
- Буква Л
- Буква М
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происхождения, мн. нет, ср.

1. Принадлежность по рождению к какому-н. сословию, нации или классу. Пролетарское происхождение. Русский по происхождению.

2. Возникновение. Происхождение языка. Происхождение видов (биол.).

Ушаков. Толковый словарь русского языка Ушакова. 2012

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**Annex 156**

Real Academia Española, Diccionario de la lengua española, Definitions of "Nacion", "Nacional", and "Origen", *available at* https://dle.rae.es (with certified translation)

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# national [*nacional*]

1. adj. Belonging or relative to a nation.
2. adj. Native of a nation, as opposed to a foreigner. Also used as a noun.
3. masculine noun. Member of the national militia.

National Court
national property
national capital
national colors
national council
national accounting
national identity card
national holiday
national lottery
national militia
national monument
national tourism parador hotel

national park

national heritage
majority party [in Congress of El Salvador; *plancha nacional*]
gross national product
net national product
national income
national territory

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# nation [*nación*]

From Latin natio, -ōnis 'place of birth', 'people, tribe'.

1. feminine noun. Inhabitants of a country governed by the same Government.
2. feminine noun. Territory of a nation.
3. feminine noun. Group of persons of a same origin who generally speak the same language and have a common tradition.
4. feminine noun. colloquial (uncommon) birth (‖ act of being born). Blind since birth [*Ciego de nación*].

## of — nationality

1. loc. adj. Used to imply someone's place of origin or the place of which he is a native.

most favored nation treatment

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# origin [*origen*]

From Latin orīgo, -ĭnis.

1. masculine noun. Beginning, birth, source, root and cause of something.
2. masculine noun. Homeland, country where a person was born or his/her family is originally from, or from where something comes.
3. masculine noun. ancestry (‖ series of ancestors).
4. masculine noun. Beginning, moral grounds or cause of something.

## origin of coordinates

1. masculine noun. Geom. Point of intersection of coordinate axes.

designation of origin
priority of origin

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# nacional

1. adj. Perteneciente o relativo a una nación.
2. adj. Natural de una nación, en contraposición a **extranjero**. U. t. c. s.
3. m. Individuo de la milicia **nacional**.

Audiencia Nacional

bienes nacionales

capital nacional

colores nacionales

concilio nacional

contabilidad nacional

documento nacional de identidad

fiesta nacional

lotería nacional

milicia nacional

monumento nacional

parador nacional de turismo

PUBLICIDAD

parque nacional

patrimonio nacional

plancha nacional

producto nacional bruto

producto nacional neto

renta nacional

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# nación

Del lat. natio, -ōnis 'lugar de nacimiento', 'pueblo, tribu'.

1. f. Conjunto de los habitantes de un país regido por el mismo Gobierno.
2. f. Territorio de una nación.
3. f. Conjunto de personas de un mismo origen y que generalmente hablan un mismo idioma y tienen una tradición común.
4. f. coloq. p. us. nacimiento (‖ acto de nacer). Ciego de nación.

## de nación

1. loc. adj. U. para dar a entender el origen de alguien, o de dónde es natural.

trato de nación más favorecida

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# origen

Del lat. orīgo, -ĭnis.

1. m. Principio, nacimiento, manantial, raíz y causa de algo.
2. m. Patria, país donde alguien ha nacido o donde tuvo principio su familia, o de donde algo proviene.
3. m. ascendencia ( ‖ serie de ascendientes).
4. m. Principio, motiv o causa moral de algo.

## origen de coordenadas

1. m. Geom. Punto de intersección de ejes de

denominación de origen

prioridad de origen

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GEOTEXT Translations

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STATE OF NEW YORK )
)
) ss
COUNTY OF NEW YORK )

**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English of the attached dictionary references.

Dilara O'Neil, Proofreader
Geotext Translations, Inc.

Sworn to and subscribed before me

this 15 day of April, 2019.

LAURA E MUSICH
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6386791
Qualified in Queens County
My Commission Expires 01-28-2023

**Annex 157**

Emirates Airline, *Help Centre: Travel updates*, *available at* https://www.emirates.com/ae/english/help/travel-updates.aspx#/#4258319

# Travel updates

Check flight status

Flight suspension Security alert Operational changes

## Flight suspension

**Last updated: 16 August 2018, 11:00 Dubai (GMT+4)**

### Entry guidelines to the UAE for Qatari Nationals and Foreign Expatriates residing in Qatar

As instructed by the UAE government, Emirates has suspended its flights to and from Doha until further notice.

Qatari nationals will be granted entry into the UAE on providing proof of first degree relatives (father, mother, husband, wife and children), who hold valid UAE citizenship. In addition, Qatari students enrolled in the UAE as well as persons in emergency or humanitarian situations will be granted entry provided they submit a request to the UAE Federal Authority for Identity and Citizenship through the following link:

https://beta.echannels.moi.gov.ae/echannels/web/client/guest/index.html#/dashboard (https://beta.echannels.moi.gov.ae/echannels/web/client/guest/index.html#/dashboard?pub=autodetect)

For more information on Qatari nationals traveling to the UAE, please call the Federal Authority for Identity and Citizenship's toll free number 8002626 or +971-8002626.

Expatriates holding valid Qatari residency, transiting or requiring entry into the UAE, will be processed in accordance with the normal entry formalities as per their national passport.

# Suspension of flights between Dubai and Doha with effect from 6 June 2017

As instructed by the UAE government, Emirates has suspend its flights to and from Doha, with effect from 6 June 2017, until further notice.

All customers booked on Emirates' flights to and from Doha will be provided with alternative options, including full refunds on unused tickets and rebooking to alternate Emirates destinations.

Customers who booked through a travel agency should contact their travel agents.

Customers who booked with Emirates can process refunds for their tickets at www.emirates.com/refund (https://www.emirates.com/english/help/contact-emirates/ccre/cancellations-and-changes/refunds?pub=autodetect) or contact their local Emirates office (https://www.emirates.com/english/help/offices/local_emirates_offices.aspx?pub=autodetect).

Frequently asked questions about flight refunds and rebooking can be viewed here (https://www.emirates.com/english/help/faqs/1769345/Cancellations-and-changes#title-3?pub=autodetect).

We apologise for the inconvenience caused to our customers.

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# Security alert

**Last updated: 23 January 2018, 10:14 Dubai (GMT+4)**

## New baggage rules – baggage screening and smart bags

**Updates to checked baggage screening**

For your safety, the General Department of Airport Security is required to inspect all checked baggage. Therefore, during the screening process some bags may be opened for further inspection.

To avoid missing your flight and baggage delays, Dubai International airport, the Dubai Airport Police and Emirates have agreed to a new bag check process in which customers no longer need to be present for the open-bag inspection. Instead, the Dubai Airport Police in the presence of an Emirates representative will open and inspect the bags.

In the case where these inspections are required, your bag(s) will be opened and the contents searched for prohibited items only. Any items found that are prohibited in checked baggage due to safety and security concerns will be confiscated. Please visit our Dangerous Goods page (https://www.emirates.com/english/before-you-fly/travel/dangerous-goods-policy.aspx?pub=autodetect) for a full list of prohibited items.

Upon completion of the inspection process, the contents will be returned to your bag and you will receive a letter from Dubai International airport explaining the reason the bag was opened. In some situations, customers may be requested in person for the bag inspection. For more information, please visit the Dubai International airport website.

**Smart baggage restrictions**

In line with IATA regulations, there will be restrictions on smart bags as checked-in or carry-on baggage on all Emirates flights as follows:

For cabin baggage:

- Smart bags are allowed in the cabin if the battery is removable and within the cabin baggage size and weight limits.
- The battery can remain installed as long as the smart bag is completely powered off.
- If the battery is not removable, the smart bag can't be carried on an Emirates flight.

For checked baggage:

- Smart bags are allowed in checked baggage if the battery is removed and carried in the cabin.
- If the smart bag exceeds the cabin baggage size/weight limitations for the route, or the battery is not removable, then the smart bag can't be carried on an Emirates flight.

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## Operational changes

We don't have any updates at the moment.

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**Annex 158**

United States Department of Justice, FARA Registration Unit, Exhibit A to SCL Social Limited Registration Statement Pursuant to the Foreign Agents Registration Act (6 October 2017), *available at* https://efile.fara.gov/docs/6473-Exhibit-AB-20171006-1.pdf

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OMB No. 1124-0006; Expires May 31, 2020

U.S. Department of Justice

Washington, DC 20530

# Exhibit A to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended*

INSTRUCTIONS. Furnish this exhibit for EACH foreign principal listed in an initial statement and for EACH additional foreign principal acquired subsequently. The filing of this document requires the payment of a filing fee as set forth in Rule (d)(1), 28 C.F.R. § 5.5(d)(1). Compliance is accomplished by filing an electronic Exhibit A form at https://www.fara.gov.

Privacy Act Statement. The filing of this document is required by the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.*, for the purposes of registration under the Act and public disclosure. Provision of the information requested is mandatory, and failure to provide this information is subject to the penalty and enforcement provisions established in Section 8 of the Act. Every registration statement, short form registration statement, supplemental statement, exhibit, amendment, copy of informational materials or other document or information filed with the Attorney General under this Act is a public record open to public examination, inspection and copying during the posted business hours of the Registration Unit in Washington, DC. Statements are also available online at the Registration Unit's webpage: https://www.fara.gov. One copy of every such document, other than informational materials, is automatically provided to the Secretary of State pursuant to Section 6(b) of the Act, and copies of any and all documents are routinely made available to other agencies, departments and Congress pursuant to Section 6(c) of the Act. The Attorney General also transmits a semi-annual report to Congress on the administration of the Act which lists the names of all agents registered under the Act and the foreign principals they represent. This report is available to the public in print and online at: https://www.fara.gov.

Public Reporting Burden. Public reporting burden for this collection of information is estimated to average .49 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Registration Unit, Counterintelligence and Export Control Section, National Security Division, U.S. Department of Justice, Washington, DC 20530; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

| 1. Name and Address of Registrant | 2. Registration No. |
|---|---|
| SCL Social Limited | 6473 |

| 3. Name of Foreign Principal | 4. Principal Address of Foreign Principal |
|---|---|
| National Media Council of UAE (via Project Associates) | Al Muroor Street<br>PO Box 3790<br>Abu Dhabi, UAE |

5. Indicate whether your foreign principal is one of the following:

- ☒ Government of a foreign country [1]
- ☐ Foreign political party
- ☐ Foreign or domestic organization: If either, check one of the following:
  - ☐ Partnership
  - ☐ Corporation
  - ☐ Association
  - ☐ Committee
  - ☐ Voluntary group
  - ☐ Other *(specify)* _____
- ☐ Individual-State nationality _____

6. If the foreign principal is a foreign government, state:

a) Branch or agency represented by the registrant

National Media Council

b) Name and title of official with whom registrant deals

Jaber al Lamki

7. If the foreign principal is a foreign political party, state:

a) Principal address

b) Name and title of official with whom registrant deals

c) Principal aim

1 "Government of a foreign country," as defined in Section 1(e) of the Act, includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.



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8. If the foreign principal is not a foreign government or a foreign political party:

a) State the nature of the business or activity of this foreign principal.

b) Is this foreign principal:

| | |
|---|---|
| Supervised by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Owned by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Directed by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Controlled by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Financed by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Subsidized in part by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |

9. Explain fully all items answered "Yes" in Item 8(b). *(If additional space is needed, a full insert page must be used.)*

10. If the foreign principal is an organization and is not owned or controlled by a foreign government, foreign political party or other foreign principal, state who owns and controls it.

**EXECUTION**

In accordance with 28 U.S.C. § 1746, the undersigned swears or affirms under penalty of perjury that he/she has read the information set forth in this Exhibit A to the registration statement and that he/she is familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her knowledge and belief.

| Date of Exhibit A | Name and Title | Signature |
|---|---|---|
| October 06, 2017 | Julian Wheatland, COO/CFO | /s/ Julian Wheatland eSigned |

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OMB No. 1124-0004; Expires May 31, 2020

U.S. Department of Justice

Washington, DC 20530

# Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended

INSTRUCTIONS. A registrant must furnish as an Exhibit B copies of each written agreement and the terms and conditions of each oral agreement with his foreign principal, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances by reason of which the registrant is acting as an agent of a foreign principal. Compliance is accomplished by filing an electronic Exhibit B form at https://www.fara.gov.

Privacy Act Statement. The filing of this document is required for the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.*, for the purposes of registration under the Act and public disclosure. Provision of the information requested is mandatory, and failure to provide the information is subject to the penalty and enforcement provisions established in Section 8 of the Act. Every registration statement, short form registration statement, supplemental statement, exhibit, amendment, copy of informational materials or other document or information filed with the Attorney General under this Act is a public record open to public examination, inspection and copying during the posted business hours of the Registration Unit in Washington, DC. Statements are also available online at the Registration Unit's webpage: https://www.fara.gov. One copy of every such document, other than informational materials, is automatically provided to the Secretary of State pursuant to Section 6(b) of the Act, and copies of any and all documents are routinely made available to other agencies, departments and Congress pursuant to Section 6(c) of the Act. The Attorney General also transmits a semi-annual report to Congress on the administration of the Act which lists the names of all agents registered under the Act and the foreign principals they represent. This report is available to the public in print and online at: https://www.fara.gov.

Public Reporting Burden. Public reporting burden for this collection of information is estimated to average .33 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Registration Unit, Counterintelligence and Export Control Section, National Security Division, U.S. Department of Justice, Washington, DC 20530; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

| 1. Name of Registrant | 2. Registration No. |
|---|---|
| SCL Social Limited | 6473 |

3. Name of Foreign Principal

National Media Council of UAE (via Project Associates)

Check Appropriate Box:

4. ☐ The agreement between the registrant and the above-named foreign principal is a formal written contract. If this box is checked, attach a copy of the contract to this exhibit.

5. ☐ There is no formal written contract between the registrant and the foreign principal. The agreement with the above-named foreign principal has resulted from an exchange of correspondence. If this box is checked, attach a copy of all pertinent correspondence, including a copy of any initial proposal which has been adopted by reference in such correspondence.

6. ☒ The agreement or understanding between the registrant and the foreign principal is the result of neither a formal written contract nor an exchange of correspondence between the parties. If this box is checked, give a complete description below of the terms and conditions of the oral agreement or understanding, its duration, the fees and expenses, if any, to be received.

7. Describe fully the nature and method of performance of the above indicated agreement or understanding.

SCL Social Limited was retained by Project Associates on September 19, 2017. That contract is attached. We have been advised that Project Associates was retained by the National Media Council of UAE via an oral agreement, but we are not privy to that information. Please note, not all activities covered under the contract with Project Associates are governed by FARA.



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8. Describe fully the activities the registrant engages in or proposes to engage in on behalf of the above foreign principal.

The registrant is responsible for developing and executing a global social media campaign on behalf of the foreign principal. Part of that campaign included social media activity focused on NGO's, foreign diplomats, and certain reporters, in New York City during the 72nd Regular Session of the United Nations General Assembly in New York City, specifically during the dates of September 19 - 22.

9. Will the activities on behalf of the above foreign principal include political activities as defined in Section 1(o) of the Act and in the footnote below? Yes ☒ No ☐

If yes, describe all such political activities indicating, among other things, the relations, interests or policies to be influenced together with the means to be employed to achieve this purpose.

The registrant is responsible for developing and executing a global social media campaign on behalf of the foreign principal. Part of that campaign included social media activity focused on NGO's, foreign diplomats, and certain reporters in New York City during the 72nd Regular Session of the United Nations General Assembly. Please note: U.S. government officials and members of the general public may have all been incidentally exposed to electronic communications disseminated by the registrant. However, the intended primary target audience includes NGO's, foreign diplomats, and certain reporters.

**EXECUTION**

In accordance with 28 U.S.C. § 1746, the undersigned swears or affirms under penalty of perjury that he/she has read the information set forth in this Exhibit B to the registration statement and that he/she is familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her knowledge and belief.

| Date of Exhibit B | Name and Title | Signature |
|---|---|---|
| October 06, 2017 | Julian Wheatland, COO/CFO | /s/ Julian Wheatland eSigned |

Footnote: "Political activity," as defined in Section 1(o) of the Act, means any activity which the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

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projectassociates
celebrating 20 years

**DATED 18 September 2017**

**(1) Project Associates (UK) Limited**

**(2) SCL Social Limited**

# CONSULTANCY AGREEMENT



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**THIS AGREEMENT** is made the 18th day of September 2017 (the "Agreement")

**BETWEEN:**

(1) Project Associates (UK) limited a company registered in the England and Wales, under number 4454838 whose registered office is at 235 Old Marylebone Road, London NW1 5QT ("the Company") and

(2) SCL Social Limited a company registered in England and Wales under company number 08410560 whose registered office is 1 Westferry Circus, Canary Wharf, London, E14 4HD United Kingdom ("the Contracting Party").

Each a "Party" and together "the Parties".

**WHEREAS:**

(1) The Company appoints the Contracting Party to provide Services (defined below) to the Company and the Contracting Party agrees to provide such Services for the Duration of the Agreement and upon the terms and conditions in the Agreement.

(2) The relationship of the Contracting Party to the Company will be that of independent contractor and nothing in this agreement shall be deemed to constitute a partnership or joint venture between the Parties or constitute any Party to be the agent of the other Party for any purpose and the Contracting Party shall not hold itself out as such.

**IT IS AGREED** as follows:

**1. Definitions**

1.1 In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

1:1.1 Analysed Dataset: any data that does not comprise solely Data (defined below) that results from Data being processed, augmented with other non-Data data, interpreted or appended with predictive scoring by equipment of methods developed by Contracting Party, including, without limitation, data, reports, results, analyses, evaluations, conclusions and other documents, records and materials in all forms and media any recommended messaging.

1.1.2 Commencement Date: 18 September 2017

1.1.3 Data: personal data as defined in the Data Protection Act 1998 and all other data.

1.1.4 Data Security Obligations: technical and organisational processes and procedures that will protect the Data against unauthorised or unlawful processing and accidental loss, theft, use, disclosure, destruction and/or damage and which include (a) technical security measures; (b) treating and



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safeguarding the Data as strictly private and confidential; (c) minimising disclosure of the Data to third parties to the fullest extent possible; (d) allowing access to the Data on a 'need to know' basis employing appropriate access controls at all times; (e) copying, reproducing and/or distributing the Data only to the extent necessary for performance of the Services and to maintain adequate back-ups to enable Data recovery in the event of damage or loss.

1.1.5 Data Security Obligations: technical and organisational processes and procedures that will protect the Company's Data against unauthorised or unlawful processing and accidental loss, theft, use, disclosure, destruction and/or damage and which include (a) technical security measures; (b) treating and safeguarding the Company's Data as strictly private and confidential; (c) minimising disclosure of the Company's Data to third parties to the fullest extent possible; (d) allowing access to the Company's Data on a 'need to know' basis employing appropriate access controls at all times; (e) copying, reproducing and/or distributing the Company's Data only to the extent necessary for performance of the Services and to maintain adequate back-ups to enable data recovery in the event of damage or loss.

1.1.6 Services:

1.1.6.1 As set out in clause 3.1.1 below;

1.1.6.2 Such other services as the Company and the Contracting Party may agree upon from time to time, during the Duration of this Agreement.

**2. Duration of the Agreement**

The Agreement shall commence on the Commencement Date and continue in force until 15 October 2017 or until terminated in accordance with Clause 11. This Agreement shall operate in two phases. Phase one commences with effect from Monday 18 September 2017 and ends on Sunday 01 October 2017. Phase two commences on Monday 02 October 2017 and ends on Sunday 15 October.

**3. Parties' Obligations**

3.1 For the duration of the Agreement the Contracting Party shall:

3.1.1 Provide consulting services as agreed on an ad hoc basis

3.1.2 Keep the Company informed of progress on the Services and in particular to liaise with Rob Worthington in respect of the day-to-day performance of the Services;

3.1.3 While the Contracting Party's method of working is entirely its own, and the Contracting Party is not subject to the control of the Company, the Contracting Party shall nevertheless use reasonable efforts to comply with the Company's reasonable requests;



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3.1.4 Agree that, for the duration of this Agreement, the Contracting Party will not undertake any additional activities which might reasonably lead to a conflict of interest between the Contracting Party and the best interests of the Company;

3.2 Contracting Party shall take reasonable steps to ensure the reliability of those of its employees, agents and subcontractors who may have access to the Company's Data and use all reasonable endeavours to ensure that such persons have sufficient skills and training in the handling of personal data and comply with applicable privacy laws.

3.3 Contracting Party agrees that it shall and shall procure that any employees, agents and/or subcontractors that may process the Company's Data shall:

3.3.1 process the Company's Data solely for the purpose of providing the Services and to fulfil Contracting Party's obligations and exercise its rights under this Agreement and for no other purpose during the term of this Agreement and thereafter;

3.3.2 comply with all applicable laws including privacy laws;

3.3.3 amend inaccurate Company Data promptly upon being notified by the data subject that the Company's Data is inaccurate, obtaining appropriate verification of the data subject's identity before making such change;

3.3.4 have, maintain and comply with the Data Security Obligations;

3.3.5 incorporate the Data Protection Notice for all data collection activities;

3.3.6 not cause or permit the Company's Data to be transferred outside the European Economic Area without the prior written consent of the Company;

3.3.7 not disclose the Company's Data to any third party in any circumstances other than with the written consent of the Company or in compliance with a legal obligation imposed upon Contracting Party;

3.3.8 provide such assistance as is necessary to enable the Company to comply with requests by data subjects for access to their personal data as required by applicable privacy laws;

3.3.9 on request from the Company, provide an up-to-date copy of the Company's Data in the format, on the media and within any reasonable time periods required by the Company; and

3.3.10 ensure that all promotional materials (in whatever media and channel) include details of how the person to whom such promotional materials have been sent may indicate that he does not wish to receive any further promotional materials.

3.3. To the extent permitted to do so by applicable law, Contracting Party shall notify the Company of all communications it receives from third parties relating to the Company's Data which suggest non-compliance by the Company, including communications from data subjects and regulatory bodies, and shall not do anything or enter into any communication with such third party unless expressly authorised to do so by the Company.

3.4 The Company shall:



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3.4.1 be solely responsible for all decisions and final determinations regarding the scheduling of delivery (timing), recipients of placement (audience), and budgeting (expenditures) for any messages based on Contracting Party Work Product (defined below); and

3.4.2 provide reasonable cooperation with Contracting Party to facilitate delivery the provision of Services.

**4. Fee**

4.1 The Company shall pay to the Contracting Party:

4.1.1 Upon execution of this Agreement USD 166,500 (exclusive of any value added tax) for the provision of the Services. The Contracting Party shall invoice the Company for its fees at the start of phase one.

4.1.2 A fee of USD 166,500 (exclusive of any value added tax) for the provision of the Services. The Contracting Party shall invoice the Company for its fees at the start of phase two.

4.2 Any additional work outside the original scope of agreed work in phase one or phase two will be chargeable at Contracting Party's prevailing rates. The Contracting Party shall invoice the Company upon commencement of such additional work. For the avoidance of doubt nothing in this provision creates any obligation on Company to request additional work from Contracting Party.

4.3 Fee invoices submitted by the Contracting Party will be paid within 7 calendar days of the invoice date by electronic transfer. Where the Contracting Party is registered for Value Added Tax, any Value Added Tax shall be shown separately on the invoice.

**5. Expenses**

5.1 All and any expenses incurred by the Contracting Party in relation to providing the services for this Project are the responsibility of the Contracting Party and will not be reimbursed by Project Associates.

**6. Late Payment**

6.1 If the Company fails to make any payment due to the Contracting Party on the due date then, without prejudice to any other right or remedy available to the Contracting Party, the Contracting Party shall be entitled to:

6.1.1 Terminate this Agreement by giving written notice to the Company provided that the Company fails to make the due payment within three working days after receiving written notice from the Contracting; and

6.1.2 Charge the Company interest (both before and after any judgement) on the amount unpaid, at the rate of four (4) per cent per annum above the Bank of England base rate, until payment in full is made (a part of a month being



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treated as a full month for the purpose of calculating interest).

**7. Intentionally deleted.**

**8. Exclusivity of Service and Competition**

8.1 The Contracting Party agrees that they will not be in any way directly or indirectly engaged or concerned in any other business or undertaking where this may adversely and materially affect the efficient discharge of the Contracting Party's duties under this Agreement.

8.2 Notwithstanding the above, the Company recognises that the Contracting Party has other clients and business interests. The Company recognises that any clients or interests of the Contracting Party which pre date this agreement are not covered by clauses 8.1 above.

**9. Confidential Information**

9.1 Neither Party shall throughout the Duration of this Agreement (except in the proper performance of their obligations) nor at any time (without limit) after the termination thereof, directly or indirectly disclose to any person, company, business entity or other organisation whatsoever, or use for their own purposes or those of any other person, company, business entity or other organisation whatsoever; any trade secrets or confidential business information relating or belonging to the other Party or its associated companies, including but not limited to any such information relating to customers, customer lists or requirements, price lists of pricing structures, marketing and sales information, business plans or dealings, employees or officers, financial information and plans, designs, formulae, specific technical information, research activities, any document marked "Confidential ", or any information which they have been told is confidential or which they might reasonably expect the other Party would regard as confidential, or any information which has been given to the other Party or any associated company in confidence by customers, suppliers and other persons.

9.2 Neither Party shall at any time throughout the Duration of this Agreement make any notes or memoranda relating to any matter within the scope of the other Party's business, dealings or affairs otherwise than for the benefit of the other Party or any the other Party's associated companies.

9.3 Notwithstanding the termination or expiry of this Agreement the obligations contained in Clause 9 shall continue to apply until such time as the information is no longer confidential and/or in the case of a trade secret, no longer a trade secret. disclosure.

9.4 If a receiving Party is required to provide confidential information to any court or government agency pursuant to written court order, regulation or process of law,



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receiving Party will provide disclosing Party with prompt written notice of such requirement and will provide reasonable cooperation with disclosing Party in disclosing Party's attempts to protect against or limit the scope of such disclosure. To the fullest extent permitted by law, receiving Party will continue to protect as confidential and proprietary all information disclosed in response to a written court order, regulation or process of law.

**10. Intellectual Property**

10.1 "Intellectual Property" shall include without limitation copyright, patent, trade mark, design right, trade secrets and other similar rights whether registered or unregistered existing anywhere in the world

10.2 All Company's Data and Intellectual Property shall remain the property of the Company.

10.3 All Contracting Party's Data and Intellectual Property shall remain the property of the Contracting Party.

10.4 The Company grants Contracting Party a royalty-free licence during the term of this Agreement to use, edit, create databases from, copy and store the Company's Data solely for the purposes of performing and fulfilling its rights and obligations under this Agreement.

10.5 The Analysed Dataset (to the extent that it does not include the Company's Data) and any other thing created therefrom or created in connection therewith ("Work Product") shall be the exclusive property of Contracting Party. All Intellectual Property in the Work Product (including the Analysed Dataset) produced pursuant to this Agreement shall be owned by Contracting Party, and Contracting Party hereby grants to the Company an exclusive, non-transferrable, non-assignable license to have, use, and display the Work Product for one (1) year from the delivery of the Services.

10.6 Work Product prepared specifically for Company pursuant to this Agreement may not be sold or transferred to any other entity or person without the express approval of Company.

10.7 The Company shall use Work Product solely for Project Seahawk and except as expressly permitted in this Agreement, the Company shall not share, rent, lease, disclose or distribute the same to the public or any third parties without the prior express written consent of Contracting Party. The Company shall be required to obtain from any third parties (including Project Seahawk) to whom the Work Product is provided a signed agreement between the Company and the third party, establishing that:

10.7.1 the third party shall use the Work Product only for work with the Company and in the case of Analysed Dataset in compliance with privacy laws;

10.7.2 upon termination or expiration of any license, partnership, agreement, or contractual relationship, the third party will return all Work Product to the Company; and

10.7.3 the third party will provide confirmation in writing that all copies of the Work Product in the third party's possession have been deleted or destroyed.

10.8 On termination or expiry of this Agreement:

10.8.1 Contracting Party's licence to the Data shall automatically terminate; and



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10.8.2 Contracting Party shall, and shall procure that any agents and/or subcontractors it engages shall promptly destroy or deliver to the Company all data (including all copies in every form and media) in its power, possession or control, and shall provide written confirmation of such action, except as set forth in Clause 12 hereunder.

**11. Termination**

11.1 Either Party may terminate this Agreement at any time upon giving 7 calendar days' notice in writing without giving any reason for such termination.

11.2 This Agreement shall terminate, notwithstanding any other rights and remedies the Parties may have, in the following circumstances:

11.2.1 Either Party fails to comply with the terms and obligations of this Agreement and such failure, if capable of remedy, is not remedied within 10 calendar days of written notice of such failure from the other Party; or

11.2.2 Either Party goes into bankruptcy or liquidation - either voluntary or compulsory-save for the purposes of bona fide corporate reconstruction or amalgamation, or if a receiver is appointed over the whole or any part of that Party's assets.

11.3 This Agreement shall terminate with immediate effect in the case that Project Seahawk is terminated by the client.

11.4 Upon termination all fees payable shall be paid by Company to Contracting Party.

11.5 The termination of this Agreement shall be without prejudice to any rights which have already accrued to either of the Parties under this Agreement.

**12. Return and Destruction of Property**

12.1 On the termination of this Agreement, each Party must immediately destroy or return to the other Party in accordance with its instructions all equipment, correspondence, records, specifications, software, models, notes, reports and other documents (and any copies thereof) and any other property belonging to the other Party or its associated companies which are in their possession or under their control. Each Party will, if so required by the other Party, confirm in writing that they have complied with their obligations under this clause.

12.2 Notwithstanding the foregoing, neither Party shall be required to return or destroy those copies of such property residing on backup, disaster recovery or business continuity systems and the obligations hereunder with respect to such property will survive until it is destroyed.

**13. Notices**



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13.1 All notices to be given under this Agreement by either Party to the other shall be in writing and in the case of Contracting Party via registered mail and in the case of Company, via registered mail or email.

13.2 All notices delivered in accordance with Sub-Clause 13.1 shall be deemed to be received within seven days of posting provided that the notice is sent to the following addresses in respect of each party:

Project Associates (UK) Limited: for the attention of: The Managing Director, at 30 Haymarket, St James's, London SW1Y 4EX
Email: Charlie.rigg@projectssociatesltd.com

SCL Social Limited: for the attention of: Alexander Nix, at 55 New Oxford Street, London, WC1A 1BS

**14. The Bribery Act**

Full compliance of the Company's Anti-bribery policy which is attached as appendix I is compulsory under this consultancy agreement.

**15. Indemnities**

15.1 Subject to the limitations set forth herein, each party shall indemnify the other against any costs, claims, expenses (including reasonable legal costs) damages, liabilities, actions and proceedings brought against such other by any third party arising out of a breach of this Agreement by the indemnifying party (or an employee, agent or subcontractor of such party). Except as expressly provided herein the total aggregate liability of Contracting Party will be limited to the fees (which may include interest on past due amounts) for this Agreement.

15.2. The Company recognises that Work Product will be provided on an "as is" basis and Contracting Party makes no warranty, express or implied, regarding the timeliness, accuracy or completeness of any proprietary information included in such Work Product. Except as specifically set forth herein, Contracting Party hereby disclaims all warranties (express or implied) with respect to the Services and Work Product. To the extent Contracting Party may not, as a matter of applicable law, disclaim any warranty, the scope and duration of such warranty shall be limited to the minimum permitted under such applicable law.

**16. Dispute resolution**

16.1. Contracting Party and the Company agree that any and all disputes arising under or pertaining to this Agreement, including disputes regarding billing and expenses and scope and nature of services, shall be resolved, if possible, by non-binding mediation conducted by a mutually acceptable mediator in London, England. The mediation



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process may be initiated by a written request with a list of acceptable mediators, with preference given to neutral former judges.

16.2. Company and Contracting Party also agree that in the event that mediation is not successful, any and all disputes arising under or pertaining to this engagement, including disputes regarding billing and expenses and scope and nature of services, shall be conducted according to the Arbitration Act.

16.3. The arbitration will be conducted by three arbitrators, with preference given to neutral former judges. Venue and choice of law of the arbitration shall be in London Court of International Arbitration, London, England. Company and Contracting Party agree and recognise that the arbitration process includes, among other things, a waiver of the right to a jury trial, waiver of the right to an appeal, waiver of the right to broad disclosure under the Civil Procedure Rules, and will involve upfront costs and expenses.

16.4. The costs and expenses of the mediators and arbitrators, along with other costs and expenses associated with the proceedings, shall be split equally between the Parties. Each Party shall bear its own costs and expenses, including legal fees and other costs associated with the presentation of its case.

**17. Assignment**

Neither Party shall be entitled to assign its rights or benefits and/or transfer its obligations or burdens under this Agreement or any other agreement under which the Data are or are to be processed in each case, whether in whole or in part.

**18. Entire agreement**

This Agreement and the documents referred to in it constitute the entire understanding and agreement of the parties in relation to the provision of the Services and supersede all prior agreements, discussions, negotiations, arrangements and understandings of the parties and/or their representatives in relation to such processing. However, nothing in this Agreement shall exclude or limit either party's liability for fraudulent misrepresentation in relation to this Agreement whether occurring before or after the Commencement Date.

**19. Further Assurance**

Each party will do and execute and/or arrange for the doing and executing of, any act and/or document reasonably requested of it by any other party to implement and give full effect to the terms of this Agreement.

**20. Survival**

Termination or expiry of this Agreement for any reason will not affect any rights or liabilities that have accrued prior to such termination or expiry, or the coming into force, or continuance in force, of



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any term that is expressly or by implication intended to come into, or continue in force, on or after termination or expiry.

**21. Waiver**

Delay in exercising, or failure to exercise, any right or remedy in connection with this Agreement will not operate as a waiver of that right or remedy.

**22. Severance**

The Parties intend each provision of this Agreement to be severable and distinct from the others. If a provision of this Agreement is held to be illegal, invalid or unenforceable, in whole or in part, such provision will be modified, rewritten or interpreted to include as much of its nature and scope as will render it enforceable and the remainder of this Agreement will continue in effect and be valid and enforceable to the fullest extent.

**23. Security Events**

23.1 In case of any loss of, actual or attempted unauthorized or unlawful access to, acquisition of, use of, or disclosure of the other Party's confidential information ("Security Event"), each Party shall:

23.1.1 Notify the other Party as soon as practicable if it learns or has reason to believe a Security Event has occurred within such Party's custody or control; and

23.1.2 provide reasonable assistance to the other Party in providing notice of a Security Event; and

23.1.3 reasonably cooperate in good faith with the other Party to investigate, mitigate any harmful effects, and resolve the Security Event; and

23.1.4 document responsive actions taken related to any Security Event.

23.2 Each Party acknowledges and agrees that, except as otherwise required by applicable law, with respect to a Security Event:

23.2.1 it shall not inform any third party of the Security Event without first obtaining the other Party's prior written consent, other than to inform a complainant that the matter has been forwarded to the other Party; and

23.2.2 the other Party shall have the sole right to determine whether notice of the Security Event is to be provided to any individuals, government entities, consumer reporting agencies, or others, and the contents of any such notice, whether any type of remediation may be offered to affected persons, and the nature and extent of any such remediation.



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23.3. With respect to each Security Event, Contracting Party, in cooperation with Company, shall promptly (and in any event as soon as reasonably practicable) perform a root cause analysis and prepare a corrective action plan, and if Company so requests, prepare a written report and detailed information, including how and when such Security Event occurred and what reasonably necessary actions Contracting Party is taking to remedy and prevent the recurrence of such Security Event.

**24. Warranties**

24. 1 Each Party warrants that:

24.1.1. it has full and due authority to enter into this Agreement and that doing so will not cause it to be in breach of any other contract or order of any competent court or regulatory authority; and

24.1.2. it has not done and shall not do or, where they have a duty to act, have not omitted to do and shall not omit to do anything in breach of applicable privacy laws.

**25. Counterparts**

This Agreement may be entered into in any number of counterparts and by the Parties on separate documents all of which taken together will constitute one and the same instrument.

**26. Third-party rights**

In all cases, a person who is not a party to this Agreement shall not be entitled to benefit or have any rights to enforce any of its provisions and the Contracts (Rights of Third Parties) Act 1999 shall not apply.

**27. Force majeure**

Neither Party shall be responsible for any failure to perform (except for payment obligations) due to unforeseen circumstances or to causes beyond its control, including but not limited to acts of God, war, terrorism, riot, embargoes, acts of civil or military authorities, earthquakes, fire, floods, accidents, strikes, shortages of transportation facilities, fuel, energy, labour or materials, catastrophic server failure or failures of telecommunications or electrical power supplies. A Party whose performance is affected by a force majeure event shall be excused from such performance to the extent required by the force majeure event so long as such party takes all reasonable steps to avoid or remove such causes of non-performance and immediately continues performance whenever and to the extent such causes are removed.

**28. No Variation**



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**This Agreement can only be amended by a written instrument which (i) specifically refers to the provision(s) of this Agreement to be amended and (ii) is signed by authorised signatories of both Parties.**

**29. Governance**

**This Agreement is to be governed by and construed in accordance with the laws of England.**

| **SIGNATURES** | |
|---|---|
| **Signed for and on behalf of Project Associates Ltd** | **Signed for and on behalf of SCL Social Limited** |
| Name: ROBERT WORTHINGTON | Name: JULIAN WHEATLAND |
| Date: 19/9/17 | Date: 19/9/17 |
| Title: DIRECTOR | Title: GROUP COO |



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# Annex 159

Government Communications Office for State of Qatar v. John Does 1-10 (Supreme Court of the State of New York, County of Kings): Documents obtained in U.S. proceedings

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## User Info

| Username<br>User ID<br>Account Locked | First Name<br>Last Name<br>Email | Support Pin<br>Pin Expiry | Signup Date<br>Signup IP | Account Balance<br>Available Balance<br>Earned Amount | Organization<br>Street Address<br>City, State | Phone<br>Fax<br>Country, Zip | Latest Transaction<br>Latest Login<br>Login IP |
|---|---|---|---|---|---|---|---|
| definersdevelopment<br>3022570<br>No | Marc<br>Hess<br>mhess@definerscorp.com | 2748<br>(8/22/2018 11:11:10 AM) | 8/22/2016 10:41:35 AM<br>96.91.230.230 | 0.0000<br>0.0000<br>0.0000 | Definers Corperation<br>1555 Wilson Blvd<br>Arlington, VA | +1.7034472123<br>NA<br>US, 22209 | NA<br>8/20/2018 9:13:16 AM<br>96.91.230.228 |

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Annex 159

# Whois details for qatarcrisisnews.com

## Registrant Contact

| | | | | | |
|---|---|---|---|---|---|
| First Name: | Marc | Last Name: | Hess | Organization: | Definers Corperation |
| Street Address: | 1555 Wilson Blvd | Address 2: | | Job Title: | Developer |
| City: | Arlington | State/Province, Zip/Postal Code: | VA, 22209 | Country: | United States |
| Email Address: | mhess@definerscorp.com | Phone Number: | +1 5712905463 | Fax Number: | |

## Administrative Contact

| | | | | | |
|---|---|---|---|---|---|
| First Name: | Marc | Last Name: | Hess | Organization: | Definers Corperation |
| Street Address: | 1555 Wilson Blvd | Address 2: | | Job Title: | Developer |
| City: | Arlington | State/Province, Zip/Postal Code: | VA, 22209 | Country: | United States |
| Email Address: | mhess@definerscorp.com | Phone Number: | +1 5712905463 | Fax Number: | |

## Technical Contact

| | | | | | |
|---|---|---|---|---|---|
| First Name: | Marc | Last Name: | Hess | Organization: | Definers Corperation |
| Street Address: | 1555 Wilson Blvd | Address 2: | | Job Title: | Developer |
| City: | Arlington | State/Province, Zip/Postal Code: | VA, 22209 | Country: | United States |
| Email Address: | mhess@definerscorp.com | Phone Number: | +1 5712905463 | Fax Number: | |

## Billing Contact

| | | | | | |
|---|---|---|---|---|---|
| First Name: | Marc | Last Name: | Hess | Organization: | Definers Corperation |
| Street Address: | 1555 Wilson Blvd | Address 2: | | Job Title: | Developer |
| City: | Arlington | State/Province, Zip/Postal Code: | VA, 22209 | Country: | United States |
| Email Address: | mhess@definerscorp.com | Phone Number: | +1 5712905463 | Fax Number: | |

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## Domain List

| Domain<br>ID | User<br>ID | Expiration<br>Creation<br>Registration | CC Order ID<br>CC Transaction ID | Locked | Expired | Auto-Renew | WhoisGuard | Marketplace | Abuse<br>Reported | DNS<br>Restriction | WhoisGuard<br>Auto-Renew |
|---|---|---|---|---|---|---|---|---|---|---|---|
| ukrisingconsole.com<br>22734897 | definersdevelopment<br>3022570 | 2/17/2022 3:50:15 PM<br>2/17/2017 10:50:19 AM<br>2/17/2017 3:50:15 PM | 32233713<br>37740898 | | | ✓ | ✓ | | | | ✓ |
| texascorenews.org<br>20669039 | definersdevelopment<br>3022570 | 8/22/2019 2:58:03 PM<br>8/22/2016 10:58:06 AM<br>8/22/2016 2:58:00 PM | 36721732<br>42647402 | | | ✓ | ✓ | | | | ✓ |
| risingconsole.com<br>22735441 | definersdevelopment<br>3022570 | 2/17/2019 4:37:22 PM<br>2/17/2017 11:37:26 AM<br>2/17/2017 4:37:22 PM | 32244346<br>37752481 | | | ✓ | ✓ | | | | ✓ |
| qatarcrisisnews.com<br>24593379 | definersdevelopment<br>3022570 | 7/6/2019 2:41:47 PM<br>7/6/2017 10:41:50 AM<br>7/6/2017 2:41:47 PM | 35578765<br>41389776 | | | ✓ | ✓ | | | | ✓ |
| mbsconsole.com<br>30391602 | definersdevelopment<br>3022570 | 6/22/2021 5:21:43 PM<br>6/22/2018 1:21:47 PM<br>6/22/2018 5:21:43 PM | ch_1CfsxTI2aKwfvOvnLI800OEC<br>ch_1CfsxTI2aKwfvOvnLI800OEC | | | ✓ | ✓ | | | | ✓ |
| litl.ink<br>29605769 | definersdevelopment<br>3022570 | 5/10/2021 11:59:59 PM<br>5/10/2018 12:44:32 PM<br>5/10/2018 11:59:59 PM | ch_1CQHsJI2aKwfvOvnuk76RPRg<br>ch_1CQHsJI2aKwfvOvnuk76RPRg | | | ✓ | ✓ | | | | ✓ |
| laborwire.org<br>21177474 | definersdevelopment<br>3022570 | 10/12/2019 6:58:31 PM<br>10/12/2016 2:58:35 PM<br>10/12/2016 6:58:00 PM | 38001301<br>44061996 | | | ✓ | ✓ | | | | ✓ |
| definersconsole.com<br>22734037 | definersdevelopment<br>3022570 | 2/17/2022 2:43:43 PM<br>2/17/2017 9:43:50 AM<br>2/17/2017 2:43:43 PM | 32233713<br>37740898 | | | ✓ | ✓ | | | | ✓ |
| d4stats.com<br>25719167 | definersdevelopment<br>3022570 | 9/19/2019 8:50:51 PM<br>9/19/2017 4:50:53 PM<br>9/19/2017 8:50:51 PM | 37408452<br>43402283 | | | ✓ | ✓ | | | | ✓ |
| corenewstx.org<br>20669486 | definersdevelopment<br>3022570 | 8/22/2019 3:35:36 PM<br>8/22/2016 11:35:39 AM<br>8/22/2016 3:35:00 PM | 36721732<br>42647402 | | | ✓ | ✓ | | | | ✓ |
| ardashtest.com<br>22703175 | definersdevelopment<br>3022570 | 2/15/2019 6:58:01 PM<br>2/15/2017 1:58:04 PM<br>2/15/2017 6:58:01 PM | 32193747<br>37697616 | | | ✓ | ✓ | | | | ✓ |
| arcorpconsole.com<br>22734036 | definersdevelopment<br>3022570 | 2/17/2022 2:43:41 PM<br>2/17/2017 9:43:45 AM<br>2/17/2017 2:43:41 PM | 32233713<br>37740898 | | | ✓ | ✓ | | | | ✓ |
| americarisingconsole.com<br>23358044 | definersdevelopment<br>3022570 | 4/4/2019 2:50:54 PM<br>4/4/2017 10:51:14 AM<br>4/4/2017 2:50:54 PM | 33309028<br>38909239 | | | ✓ | ✓ | | | | ✓ |
| affordablehawaii.org<br>31484439 | definersdevelopment<br>3022570 | 6/18/2020 6:54:52 PM<br>8/19/2018 11:10:12 PM<br>6/18/2005 6:54:52 PM | ch_1Cz2qeI2aKwfvOvnaRuxtRjq<br>Transferred In | | | ✓ | ✓ | | | | ✓ |

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Annex 159

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## Login History

| Date | Success | Username | IP Address |
|---|---|---|---|
| 8/21/2018 11:11:10 AM | True | definersdevelopment | 96.91.230.228 |
| 8/20/2018 9:13:54 AM | True | definersdevelopment | 96.91.230.228 |
| 8/14/2018 9:39:34 AM | True | definersdevelopment | 96.91.230.228 |
| 7/23/2018 3:47:17 PM | True | definersdevelopment | 96.91.230.228 |
| 7/18/2018 12:13:11 PM | True | definersdevelopment | 96.91.230.228 |
| 7/2/2018 3:34:34 PM | True | definersdevelopment | 96.91.230.228 |
| 7/2/2018 2:38:50 PM | True | definersdevelopment | 96.91.230.228 |
| 7/2/2018 2:27:56 PM | True | definersdevelopment | 96.91.230.228 |
| 7/2/2018 1:37:28 PM | True | definersdevelopment | 96.91.230.228 |
| 7/2/2018 12:12:25 PM | True | definersdevelopment | 96.91.230.228 |
| 6/30/2018 5:00:13 PM | True | definersdevelopment | 47.201.59.225 |
| 6/26/2018 4:32:04 PM | True | definersdevelopment | 96.91.230.228 |
| 6/22/2018 1:18:05 PM | True | definersdevelopment | 96.91.230.228 |
| 5/16/2018 2:15:44 PM | True | definersdevelopment | 96.91.230.225 |
| 5/14/2018 11:31:03 AM | True | definersdevelopment | 96.91.230.225 |
| 5/10/2018 12:43:21 PM | True | definersdevelopment | 96.91.230.225 |
| 3/12/2018 10:41:07 AM | True | definersdevelopment | 96.91.230.225 |
| 3/12/2018 10:06:15 AM | True | definersdevelopment | 96.91.230.225 |
| 2/5/2018 9:42:03 AM | True | definersdevelopment | 96.91.230.225 |
| 1/18/2018 11:28:16 AM | True | definersdevelopment | 96.91.230.225 |
| 1/4/2018 5:19:35 PM | True | definersdevelopment | 96.91.230.225 |
| 10/23/2017 10:36:27 AM | True | definersdevelopment | 96.91.230.225 |
| 10/16/2017 10:33:50 AM | True | definersdevelopment | 96.91.230.225 |
| 10/2/2017 10:08:40 AM | True | definersdevelopment | 96.91.230.225 |
| 9/20/2017 3:36:45 PM | True | definersdevelopment | 96.91.230.225 |
| 9/19/2017 4:49:36 PM | True | definersdevelopment | 96.91.230.225 |
| 9/18/2017 2:43:26 PM | True | definersdevelopment | 96.91.230.225 |
| 9/18/2017 11:42:59 AM | True | definersdevelopment | 96.91.230.225 |
| 8/15/2017 11:15:42 AM | True | definersdevelopment | 96.91.230.225 |
| 8/15/2017 10:39:36 AM | True | definersdevelopment | 96.91.230.225 |
| 8/11/2017 11:54:14 AM | True | definersdevelopment | 96.91.230.225 |
| 7/18/2017 2:03:21 PM | True | definersdevelopment | 96.91.230.225 |
| 7/10/2017 1:34:26 PM | True | definersdevelopment | 96.91.230.225 |
| 7/6/2017 10:40:21 AM | True | definersdevelopment | 96.91.230.225 |
| 6/30/2017 12:37:43 PM | True | definersdevelopment | 96.91.230.225 |
| 6/8/2017 3:54:18 PM | True | definersdevelopment | 96.91.230.225 |
| 6/7/2017 12:07:11 PM | True | definersdevelopment | 96.91.230.225 |
| 5/5/2017 3:27:20 PM | True | definersdevelopment | 96.91.230.225 |
| 5/4/2017 1:44:32 PM | True | definersdevelopment | 96.91.230.225 |
| 4/4/2017 10:44:58 AM | True | definersdevelopment | 96.91.230.225 |
| 3/2/2017 9:48:05 AM | True | definersdevelopment | 96.91.230.225 |
| 2/20/2017 12:01:08 PM | True | definersdevelopment | 96.91.230.225 |
| 2/17/2017 9:36:05 AM | True | definersdevelopment | 96.91.230.225 |
| 2/15/2017 1:55:31 PM | True | definersdevelopment | 96.91.230.225 |
| 2/15/2017 8:08:01 AM | True | definersdevelopment | 96.91.230.225 |
| 2/10/2017 4:11:21 PM | True | definersdevelopment | 68.100.206.150 |
| 1/23/2017 10:17:31 AM | True | definersdevelopment | 96.91.230.230 |
| 1/10/2017 10:24:37 AM | True | definersdevelopment | 96.91.230.230 |
| 1/10/2017 10:20:32 AM | True | definersdevelopment | 96.91.230.230 |
| 12/20/2016 12:45:21 PM | True | definersdevelopment | 96.91.230.230 |
| 10/27/2016 11:35:46 AM | True | definersdevelopment | 96.91.230.230 |
| 10/20/2016 10:11:06 AM | True | definersdevelopment | 96.91.230.230 |
| 10/12/2016 2:56:46 PM | True | definersdevelopment | 96.91.230.230 |
| 8/31/2016 10:10:40 AM | True | definersdevelopment | 96.91.230.230 |
| 8/23/2016 9:27:15 AM | True | definersdevelopment | 96.91.230.230 |

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# Order List

| Order ID<br>User<br>Date | CC Order ID<br>Transaction ID | Amount<br>Type<br>Promotion Code | Items | | |
|---|---|---|---|---|---|
| 38001301<br>definersdevelopment<br>9/12/2018 2:19:12 AM | ch_1D9Rgwl2aKwfvOvnrtjUevHN<br>ch_1D9Rgwl2aKwfvOvnrtjUevHN | $15.16/ $15.16<br>CREDIT CARD | Type: RENEW<br>RENEW laborwire.org | Years : 1<br>Qty: 1<br>Price: 14.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for laborwire.org | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES |
| 37408452<br>definersdevelopment<br>8/20/2018 2:06:41 AM | ch_1D16XEI2aKwfvOvnvbgy9NQ3<br>ch_1D16XEI2aKwfvOvnvbgy9NQ3 | $13.16/ $13.16<br>CREDIT CARD | Type: RENEW<br>RENEW d4stats.com | Years : 1<br>Qty: 1<br>Price: 12.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for d4stats.com | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES |
| 37275650<br>definersdevelopment<br>8/14/2018 9:46:27 AM | ch_1Cz2qeI2aKwfvOvnaRuxtRjq<br>ch_1Cz2qeI2aKwfvOvnaRuxtRjq | $11.66/ $11.66<br>CREDIT CARD<br>N/A | Type: transfer<br>Domain Transfer affordablehawaii.org | Years : 1<br>Qty: 1<br>Price: 11.48 | Successful: YES<br>Transfer confirmation e-mail will be sent soon. |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 36721732<br>definersdevelopment<br>7/23/2018 2:02:35 AM | ch_1Cqx7tI2aKwfvOvn8CUzwAgI<br>ch_1Cqx7tI2aKwfvOvn8CUzwAgI | $30.32/ $30.32<br>CREDIT CARD | Type: RENEW<br>RENEW corenewstx.org | Years : 1<br>Qty: 1<br>Price: 14.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for corenewstx.org | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES |
| | | | Type: RENEW<br>RENEW texascorenews.org | Years : 1<br>Qty: 1<br>Price: 14.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for texascorenews.org | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES |
| 36010854<br>definersdevelopment<br>6/22/2018 1:21:43 PM | ch_1Cfsx7I2aKwfvOvnLI800OEC<br>ch_1Cfsx7I2aKwfvOvnLI800OEC | $32.88/ $32.88<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration mbsconsole.com | Years : 3<br>Qty: 1<br>Price: 10.78 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 35578765<br>definersdevelopment<br>6/6/2018 2:08:23 AM | ch_1CZuoiI2aKwfvOvn3BoKKPZj<br>ch_1CZuoiI2aKwfvOvn3BoKKPZj | $13.16/ $13.16<br>CREDIT CARD | Type: RENEW<br>RENEW qatarcrisisnews.com | Years : 1<br>Qty: 1<br>Price: 12.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for qatarcrisisnews.com | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES |
| 34927955<br>definersdevelopment<br>5/10/2018 12:44:17 PM | ch_1CQHsJI2aKwfvOvnuk76RPRg<br>ch_1CQHsJI2aKwfvOvnuk76RPRg | $75.18/ $75.18<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration litl.ink | Years : 3<br>Qty: 1<br>Price: 24.88 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 33309028<br>definersdevelopment<br>3/5/2018 1:09:25 AM | ch_1C2CVjI2aKwfvOvnjEfwEoXF<br>ch_1C2CVjI2aKwfvOvnjEfwEoXF | $14.04/ $14.04<br>CREDIT CARD | Type: RENEW<br>RENEW americarisingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.98 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for americarisingconsole.com | Years : 1<br>Qty: 1<br>Price: 2.88 | Successful: YES |
| 32244346<br>definersdevelopment<br>1/18/2018 10:21:44 PM | ch_1BlqRmI2aKwfvOvnKESJ7zuy<br>ch_1BlqRmI2aKwfvOvnKESJ7zuy | $10.87/ $10.87<br>CREDIT CARD | Type: RENEW<br>RENEW risingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>Command completed successfully |
| 32233713<br>definersdevelopment<br>1/18/2018 11:31:10 AM | ch_1BlgICI2aKwfvOvnAxNm9APN<br>ch_1BlgICI2aKwfvOvnAxNm9APN | $172.92/ $172.92<br>CREDIT CARD<br>N/A | Type: renew<br>Domain Renewal ukrisingconsole.com | Years : 4<br>Qty: 1<br>Price: 10.39 | Successful: YES<br>Command completed successfully; Old Expiry:2/17/2018 3:50:15 PM; New Expiry:2/17/2022 3:50:15 PM |
| | | | Type: renew<br>Whoisguard | Years : 4<br>Qty: 1<br>Price: 2.88 | Successful: YES<br>Command completed successfully |
| | | | Type: renew<br>Domain Renewal definersconsole.com | Years : 4<br>Qty: 1<br>Price: 10.39 | Successful: YES<br>Command completed successfully; Old Expiry:2/17/2018 2:43:43 PM; New Expiry:2/17/2022 2:43:43 PM |
| | | | Type: renew<br>Whoisguard | Years : 4<br>Qty: 1<br>Price: 2.88 | Successful: YES<br>Command completed successfully |
| | | | Type: renew<br>Domain Renewal arcorpconsole.com | Years : 4<br>Qty: 1<br>Price: 10.39 | Successful: YES<br>Command completed successfully; Old Expiry:2/17/2018 2:43:41 PM; New Expiry:2/17/2022 2:43:41 PM |
| | | | Type: renew<br>Whoisguard | Years : 4<br>Qty: 1<br>Price: 2.88 | Successful: YES<br>Command completed successfully |
| | | | Type: renew<br>Whoisguard for risingconsole.com | Years : 4<br>Qty: 1<br>Price: 2.88 | Successful: YES<br>Command completed successfully |
| 32193747<br>definersdevelopment<br>1/16/2018 10:16:27 PM | ch_1Bl7PZI2aKwfvOvnHkFeCCbV<br>ch_1Bl7PZI2aKwfvOvnHkFeCCbV | $13.75/ $13.75<br>CREDIT CARD | Type: RENEW<br>RENEW ardashtest.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for ardashtest.com | Years : 1<br>Qty: 1<br>Price: 2.88 | Successful: YES |
| 29423579<br>definersdevelopment<br>9/19/2017 4:50:47 PM | ch_1B3sg6I2aKwfvOvnxLb2i3Zx<br>ch_1B3sg6I2aKwfvOvnxLb2i3Zx | $9.06/ $9.06<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration d4stats.com | Years : 1<br>Qty: 1<br>Price: 8.88 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 29393503<br>definersdevelopment<br>9/18/2017 11:50:06 AM | ch_1B3RVZI2aKwfvOvnyT2qXuZM<br>ch_1B3RVZI2aKwfvOvnyT2qXuZM | $6.88/ $6.88<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration partnershipforpeace.org | Years : 1<br>Qty: 1<br>Price: 6.88 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |

Annex 159

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| Order ID<br>User<br>Date | CC Order ID<br>Transaction ID | Amount<br>Type<br>Promotion Code | Items | | |
|---|---|---|---|---|---|
| 29280820<br>definersdevelopment<br>9/12/2017 10:57:40 PM | ch_1B1R4Il2aKwfvOvnUDOQLq7f<br>ch_1B1R4Il2aKwfvOvnUDOQLq7f | $15.36/ $15.36<br>CREDIT CARD | Type: RENEW<br>RENEW laborwire.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for laborwire.org | Years : 1<br>Qty: 1<br>Price: 2.88 | Successful: YES |
| 28205769<br>definersdevelopment<br>7/23/2017 11:04:00 PM | ch_1AiwrSI2aKwfvOvn8U2Rubg2<br>ch_1AiwrSI2aKwfvOvn8U2Rubg2 | $30.72/ $30.72<br>CREDIT CARD | Type: RENEW<br>RENEW corenewstx.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for corenewstx.org | Years : 1<br>Qty: 1<br>Price: 2.88 | Successful: YES |
| | | | Type: RENEW<br>RENEW texascorenews.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>Command completed successfully |
| | | | Type: RENEW<br>RENEW whoisguard-protect-one for texascorenews.org | Years : 1<br>Qty: 1<br>Price: 2.88 | Successful: YES |
| 27851321<br>definersdevelopment<br>7/6/2017 10:41:45 AM | ch_1AcbAqI2aKwfvOvnACNfXdoy<br>ch_1AcbAqI2aKwfvOvnACNfXdoy | $10.87/ $10.87<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration qatarcrisisnews.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 26046704<br>definersdevelopment<br>4/4/2017 10:50:27 AM | ch_1A4szGI2aKwfvOvndBAFdmjI<br>ch_1A4szGI2aKwfvOvndBAFdmjI | $10.87/ $10.87<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration americarisingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 25167856<br>definersdevelopment<br>2/17/2017 11:37:20 AM | ch_19oEjTI2aKwfvOvngLGMPD7O<br>ch_19oEjTI2aKwfvOvngLGMPD7O | $10.87/ $10.87<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration risingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 25167151<br>definersdevelopment<br>2/17/2017 10:50:16 AM | ch_19oDzuI2aKwfvOvnLGXgbtlW<br>ch_19oDzuI2aKwfvOvnLGXgbtlW | $10.87/ $0<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration ukrisingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: NO<br>Domain name not available |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: NO<br>Related item failed. |
| 25167150<br>definersdevelopment<br>2/17/2017 10:50:14 AM | ch_19oDzsI2aKwfvOvnlH1t06gm<br>ch_19oDzsI2aKwfvOvnlH1t06gm | $10.87/ $10.87<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration ukrisingconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>: |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 25166121<br>definersdevelopment<br>2/17/2017 9:43:40 AM | ch_19oCxSI2aKwfvOvn3P5P6C3D<br>ch_19oCxSI2aKwfvOvn3P5P6C3D | $21.74/ $21.74<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration arcorpconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| | | | Type: register<br>Domain Registration definersconsole.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 25133418<br>definersdevelopment<br>2/15/2017 1:58:00 PM | ch_19nXyII2aKwfvOvnSKWkil6L<br>ch_19nXyII2aKwfvOvnSKWkil6L | $10.87/ $10.87<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration ardashtest.com | Years : 1<br>Qty: 1<br>Price: 10.69 | Successful: YES<br>200:Command completed successfully |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 23038797<br>definersdevelopment<br>10/12/2016 2:58:30 PM | ch_193rvsI2aKwfvOvnGtKVicU9<br>ch_193rvsI2aKwfvOvnGtKVicU9 | $12.48/ $12.48<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration laborwire.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>200:Command completed successfully - 265893427 |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 22263626<br>definersdevelopment<br>8/22/2016 11:35:35 AM | ch_18lKSXI2aKwfvOvnN6aa4GF7<br>ch_18lKSXI2aKwfvOvnN6aa4GF7 | $12.48/ $12.48<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration corenewstx.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>200:Command completed successfully - 264430522 |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |
| 22263064<br>definersdevelopment<br>8/22/2016 10:58:02 AM | ch_18lJrulI2aKwfvOvnqwKgvz6k<br>ch_18lJrulI2aKwfvOvnqwKgvz6k | $12.48/ $12.48<br>CREDIT CARD<br>N/A | Type: register<br>Domain Registration texascorenews.org | Years : 1<br>Qty: 1<br>Price: 12.48 | Successful: YES<br>200:Command completed successfully - 264429548 |
| | | | Type: purchase<br>Free WhoisGuard | Years : 1<br>Qty: 1<br>Price: 0 | Successful: YES<br>Command completed successfully |

Exported on Oct/22/2018

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## Transaction Review

| ID | Username<br>IP (Country) | CC Order ID<br>CC Transaction ID | Transaction Type<br>Payment Source | Amount | Status<br>Score | CC-L4(exp)<br>Country IP / Bill | Date (PST) | Order ID | Name on Card<br>Email | Balance Before<br>Balance After |
|---|---|---|---|---|---|---|---|---|---|---|
| 44061996 | definersdevelopment<br>127.0.0.1 (US) | ch_1D9RgwI2aKwfvOvnrtjUevHN<br>ch_1D9RgwI2aKwfvOvnrtjUevHN | PURCHASE<br>CREDITCARD | $15.16 | APPROVED<br>0.1 / 0 | ...4348(04/2020)<br>US / US | 9/12/2018 2:19:11 AM | 38001301 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 43402283 | definersdevelopment<br>127.0.0.1 (US) | ch_1D16XEI2aKwfvOvnvbgy9NQ3<br>ch_1D16XEI2aKwfvOvnvbgy9NQ3 | PURCHASE<br>CREDITCARD | $13.16 | APPROVED<br>0.18 / 0 | ...4348(04/2020)<br>US / US | 8/20/2018 2:06:41 AM | 37408452 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 43257856 | definersdevelopment<br>96.91.230.228 (US) | ch_1Cz2qeI2aKwfvOvnaRuxtRjq<br>ch_1Cz2qeI2aKwfvOvnaRuxtRjq | PURCHASE<br>CREDITCARD | $11.66 | APPROVED<br>0.11 / 0 | ...2004(05/2023)<br>US / US | 8/14/2018 9:46:26 AM | 37275650 | Joeseph Pounder<br>N/A | $0.00<br>$0.00 |
| 42647402 | definersdevelopment<br>127.0.0.1 (US) | ch_1Cqx7tI2aKwfvOvn8CUzwAgI<br>ch_1Cqx7tI2aKwfvOvn8CUzwAgI | PURCHASE<br>CREDITCARD | $30.32 | APPROVED<br>15.5 / 1.5 | ...4348(04/2020)<br>US / US | 7/23/2018 2:02:35 AM | 36721732 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 41864361 | definersdevelopment<br>96.91.230.228 (US) | ch_1Cfsx7I2aKwfvOvnLI800OEC<br>ch_1Cfsx7I2aKwfvOvnLI800OEC | PURCHASE<br>CREDITCARD | $32.88 | APPROVED<br>0.11 / 0 | ...1003(03/2018)<br>US / US | 6/22/2018 1:21:42 PM | 36010854 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 41389776 | definersdevelopment<br>127.0.0.1 (US) | ch_1CZuoiI2aKwfvOvn3BoKKPZj<br>ch_1CZuoiI2aKwfvOvn3BoKKPZj | PURCHASE<br>CREDITCARD | $13.16 | APPROVED<br>0.17 / 0 | ...4348(04/2020)<br>US / US | 6/6/2018 2:08:22 AM | 35578765 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 40668299 | definersdevelopment<br>96.91.230.225 (US) | ch_1CQHsJI2aKwfvOvnuk76RPRg<br>ch_1CQHsJI2aKwfvOvnuk76RPRg | PURCHASE<br>CREDITCARD | $75.18 | APPROVED<br>0.2 / 0 | ...1003(03/2018)<br>US / US | 5/10/2018 12:44:16 PM | 34927955 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 38909239 | definersdevelopment<br>127.0.0.1 (US) | ch_1C2CVjI2aKwfvOvnjEfwEoXF<br>ch_1C2CVjI2aKwfvOvnjEfwEoXF | PURCHASE<br>CREDITCARD | $14.04 | APPROVED<br>0.14 / 0 | ...4348(04/2020)<br>US / US | 3/5/2018 1:09:24 AM | 33309028 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 37752481 | definersdevelopment<br>127.0.0.1 (US) | ch_1BlqRmI2aKwfvOvnKESJ7zuy<br>ch_1BlqRmI2aKwfvOvnKESJ7zuy | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.2 / 0 | ...4348(04/2020)<br>US / US | 1/18/2018 10:21:44 PM | 32244346 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 37740898 | definersdevelopment<br>96.91.230.225 (US) | ch_1BlgICI2aKwfvOvnAxNm9APN<br>ch_1BlgICI2aKwfvOvnAxNm9APN | PURCHASE<br>CREDITCARD | $172.92 | APPROVED<br>0.15 / 0 | ...1003(03/2018)<br>US / US | 1/18/2018 11:31:10 AM | 32233713 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 37697616 | definersdevelopment<br>127.0.0.1 (US) | ch_1Bl7PZI2aKwfvOvnHkFeCCbV<br>ch_1Bl7PZI2aKwfvOvnHkFeCCbV | PURCHASE<br>CREDITCARD | $13.75 | APPROVED<br>0.2 / 0 | ...4348(04/2020)<br>US / US | 1/16/2018 10:16:27 PM | 32193747 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 34674760 | definersdevelopment<br>96.91.230.225 (US) | ch_1B3sg6I2aKwfvOvnxLb2i3Zx<br>ch_1B3sg6I2aKwfvOvnxLb2i3Zx | PURCHASE<br>CREDITCARD | $9.06 | APPROVED<br>0.1 / 0 | ...1003(03/2018)<br>US / US | 9/19/2017 4:50:47 PM | 29423579 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 34641271 | definersdevelopment<br>96.91.230.225 (US) | ch_1B3RVZI2aKwfvOvnyT2qXuZM<br>ch_1B3RVZI2aKwfvOvnyT2qXuZM | PURCHASE<br>CREDITCARD | $6.88 | APPROVED<br>0.1 / 0 | ...1003(03/2018)<br>US / US | 9/18/2017 11:50:06 AM | 29393503 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 34518291 | definersdevelopment<br>127.0.0.1 (US) | ch_1B1R4II2aKwfvOvnUDOQLq7f<br>ch_1B1R4II2aKwfvOvnUDOQLq7f | PURCHASE<br>CREDITCARD | $15.36 | APPROVED<br>0.26 / 0 | ...4348(04/2020)<br>US / US | 9/12/2017 10:57:39 PM | 29280820 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 33351289 | definersdevelopment<br>127.0.0.1 (US) | ch_1AiwrSI2aKwfvOvn8U2Rubg2<br>ch_1AiwrSI2aKwfvOvn8U2Rubg2 | PURCHASE<br>CREDITCARD | $30.72 | APPROVED<br>0.19 / 0 | ...4348(04/2020)<br>US / US | 7/23/2017 11:03:59 PM | 28205769 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 32966221 | definersdevelopment<br>96.91.230.225 (US) | ch_1AcbAqI2aKwfvOvnACNfXdoy<br>ch_1AcbAqI2aKwfvOvnACNfXdoy | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.11 / 0 | ...4348(N/A)<br>US / US | 7/6/2017 10:41:45 AM | 27851321 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 30991589 | definersdevelopment<br>96.91.230.225 (US) | ch_1A4szGI2aKwfvOvndBAFdmjI<br>ch_1A4szGI2aKwfvOvndBAFdmjI | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.19 / 0 | ...1003(N/A)<br>US / US | 4/4/2017 10:50:27 AM | 26046704 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 30019910 | definersdevelopment<br>96.91.230.225 (US) | ch_19oEjTI2aKwfvOvngLGMPD7O<br>ch_19oEjTI2aKwfvOvngLGMPD7O | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.49 / 0 | ...1003(N/A)<br>US / US | 2/17/2017 11:37:20 AM | 25167856 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 30019142 | definersdevelopment<br>96.91.230.225 (US) | ch_19oDzuI2aKwfvOvnLGXgbtIW<br>ch_19oDzuI2aKwfvOvnLGXgbtIW | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.49 / 0 | ...1003(N/A)<br>US / US | 2/17/2017 10:50:15 AM | 25167151 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 30019141 | definersdevelopment<br>96.91.230.225 (US) | ch_19oDzsI2aKwfvOvnIH1t06gm<br>ch_19oDzsI2aKwfvOvnIH1t06gm | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.49 / 0 | ...1003(N/A)<br>US / US | 2/17/2017 10:50:13 AM | 25167150 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 30018005 | definersdevelopment<br>96.91.230.225 (US) | ch_19oCxSI2aKwfvOvn3P5P6C3D<br>ch_19oCxSI2aKwfvOvn3P5P6C3D | PURCHASE<br>CREDITCARD | $21.74 | APPROVED<br>0.49 / 0 | ...1003(N/A)<br>US / US | 2/17/2017 9:43:40 AM | 25166121 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 29981610 | definersdevelopment<br>96.91.230.225 (US) | ch_19nXyII2aKwfvOvnSKWkil6L<br>ch_19nXyII2aKwfvOvnSKWkil6L | PURCHASE<br>CREDITCARD | $10.87 | APPROVED<br>0.61 / 0 | ...1003(N/A)<br>US / US | 2/15/2017 1:57:59 PM | 25133418 | Joseph Pounder<br>N/A | $0.00<br>$0.00 |
| 27613296 | definersdevelopment<br>96.91.230.230 (US) | ch_193rvsI2aKwfvOvnGtKVicU9<br>ch_193rvsI2aKwfvOvnGtKVicU9 | PURCHASE<br>CREDITCARD | $12.48 | APPROVED<br>0.17 / 0 | ...4348(N/A)<br>US / US | 10/12/2016 2:58:29 PM | 23038797 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 26759149 | definersdevelopment<br>96.91.230.230 (US) | ch_18lKSXI2aKwfvOvnN6aa4GF7<br>ch_18lKSXI2aKwfvOvnN6aa4GF7 | PURCHASE<br>CREDITCARD | $12.48 | APPROVED<br>0.45 / 0 | ...4348(N/A)<br>US / US | 8/22/2016 11:35:34 AM | 22263626 | Brian Rogers<br>N/A | $0.00<br>$0.00 |
| 26758545 | definersdevelopment<br>96.91.230.230 (US) | ch_18lJrulI2aKwfvOvnqwKgvz6k<br>ch_18lJrulI2aKwfvOvnqwKgvz6k | PURCHASE<br>CREDITCARD | $12.48 | APPROVED<br>0.51 / 0 | ...4348(N/A)<br>US / US | 8/22/2016 10:58:01 AM | 22263064 | Brian Rogers<br>N/A | $0.00<br>$0.00 |

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Annex 159

namecheap

## Credit Card List

| Credit Card | Contact Address |
|---|---|
| AMEX-1003 XXXXXXXX1003 | 1555 Wilson Blvd, Suit 307<br>Arlington<br>VA,<br>22209<br>US |
| AMEX-2004 XXXXXXXX2004 | 1500 Wilson Blvd<br>Arlington<br>VA,<br>22209<br>US |
| MC-4348 XXXXXXXX4348 | 1555 Wilson Blvd, Suit 307<br>Arlington<br>VA,<br>22209<br>US |

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OMB No. 1124-0006; Expires May 31, 2020

U.S. Department of Justice

Washington, DC 20530

# Exhibit A to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended

INSTRUCTIONS. Furnish this exhibit for EACH foreign principal listed in an initial statement and for EACH additional foreign principal acquired subsequently. The filing of this document requires the payment of a filing fee as set forth in Rule (d)(1), 28 C.F.R. § 5.5(d)(1). Compliance is accomplished by filing an electronic Exhibit A form at https://www.fara.gov.

Privacy Act Statement. The filing of this document is required by the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.*, for the purposes of registration under the Act and public disclosure. Provision of the information requested is mandatory, and failure to provide this information is subject to the penalty and enforcement provisions established in Section 8 of the Act. Every registration statement, short form registration statement, supplemental statement, exhibit, amendment, copy of informational materials or other document or information filed with the Attorney General under this Act is a public record open to public examination, inspection and copying during the posted business hours of the Registration Unit in Washington, DC. Statements are also available online at the Registration Unit's webpage: https://www.fara.gov. One copy of every such document, other than informational materials, is automatically provided to the Secretary of State pursuant to Section 6(b) of the Act, and copies of any and all documents are routinely made available to other agencies, departments and Congress pursuant to Section 6(c) of the Act. The Attorney General also transmits a semi-annual report to Congress on the administration of the Act which lists the names of all agents registered under the Act and the foreign principals they represent. This report is available to the public in print and online at: https://www.fara.gov.

Public Reporting Burden. Public reporting burden for this collection of information is estimated to average .49 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Registration Unit, Counterintelligence and Export Control Section, National Security Division, U.S. Department of Justice, Washington, DC 20530; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

1. Name and Address of Registrant
Definers Corp.
1500 Wilson Boulevard, 5th Floor, Arlington, VA 22209

2. Registration No.
6504

3. Name of Foreign Principal
Akin Gump Strauss Hauer & Feld LLP on behalf of the Embassy of the United Arab Emirates

4. Principal Address of Foreign Principal
3522 International Court, NW, Suite 400
Washington, DC 20008

5. Indicate whether your foreign principal is one of the following:

- ☒ Government of a foreign country [1]
- ☐ Foreign political party
- ☐ Foreign or domestic organization: If either, check one of the following:
  - ☐ Partnership
  - ☐ Corporation
  - ☐ Association
  - ☐ Committee
  - ☐ Voluntary group
  - ☐ Other *(specify)* _____
- ☐ Individual-State nationality _____

6. If the foreign principal is a foreign government, state:

a) Branch or agency represented by the registrant

Embassy of the United Arab Emirates

b) Name and title of official with whom registrant deals

N/A (Definers Corp. is a subcontractor under this engagement, and will not report to any Embassy official)

7. If the foreign principal is a foreign political party, state:

a) Principal address

b) Name and title of official with whom registrant deals

c) Principal aim

1 "Government of a foreign country," as defined in Section 1(e) of the Act, includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States



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8. If the foreign principal is not a foreign government or a foreign political party:

a) State the nature of the business or activity of this foreign principal.

b) Is this foreign principal:

| | |
|---|---|
| Supervised by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Owned by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Directed by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Controlled by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Financed by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |
| Subsidized in part by a foreign government, foreign political party, or other foreign principal | Yes ☐ No ☐ |

9. Explain fully all items answered "Yes" in Item 8(b). *(If additional space is needed, a full insert page must be used.)*

10. If the foreign principal is an organization and is not owned or controlled by a foreign government, foreign political party or other foreign principal, state who owns and controls it.

**EXECUTION**

In accordance with 28 U.S.C. § 1746, the undersigned swears or affirms under penalty of perjury that he/she has read the information set forth in this Exhibit A to the registration statement and that he/she is familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her knowledge and belief.

| Date of Exhibit A | Name and Title | Signature |
|---|---|---|
| 12/21/17 | Joseph Pounder, President | |

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OMB No. 1124-0004; Expires May 31, 2020

U.S. Department of Justice

Washington, DC 20530

# Exhibit B to Registration Statement Pursuant to the Foreign Agents Registration Act of 1938, as amended

INSTRUCTIONS. A registrant must furnish as an Exhibit B copies of each written agreement and the terms and conditions of each oral agreement with his foreign principal, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances by reason of which the registrant is acting as an agent of a foreign principal. Compliance is accomplished by filing an electronic Exhibit B form at https://www.fara.gov.

Privacy Act Statement. The filing of this document is required for the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 *et seq.*, for the purposes of registration under the Act and public disclosure. Provision of the information requested is mandatory, and failure to provide the information is subject to the penalty and enforcement provisions established in Section 8 of the Act. Every registration statement, short form registration statement, supplemental statement, exhibit, amendment, copy of informational materials or other document or information filed with the Attorney General under this Act is a public record open to public examination, inspection and copying during the posted business hours of the Registration Unit in Washington, DC. Statements are also available online at the Registration Unit's webpage: https://www.fara.gov. One copy of every such document, other than informational materials, is automatically provided to the Secretary of State pursuant to Section 6(b) of the Act, and copies of any and all documents are routinely made available to other agencies, departments and Congress pursuant to Section 6(c) of the Act. The Attorney General also transmits a semi-annual report to Congress on the administration of the Act which lists the names of all agents registered under the Act and the foreign principals they represent. This report is available to the public in print and online at: https://www.fara.gov.

Public Reporting Burden. Public reporting burden for this collection of information is estimated to average .33 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Registration Unit, Counterintelligence and Export Control Section, National Security Division, U.S. Department of Justice, Washington, DC 20530; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

| 1. Name of Registrant | 2. Registration No. |
|---|---|
| Definers Corp. | 6504 |

3. Name of Foreign Principal

Akin Gump Strauss Hauer & Feld LLP on behalf of the Embassy of the United Arab Emirates

Check Appropriate Box:

4. ☒ The agreement between the registrant and the above-named foreign principal is a formal written contract. If this box is checked, attach a copy of the contract to this exhibit.

5. ☐ There is no formal written contract between the registrant and the foreign principal. The agreement with the above-named foreign principal has resulted from an exchange of correspondence. If this box is checked, attach a copy of all pertinent correspondence, including a copy of any initial proposal which has been adopted by reference in such correspondence.

6. ☐ The agreement or understanding between the registrant and the foreign principal is the result of neither a formal written contract nor an exchange of correspondence between the parties. If this box is checked, give a complete description below of the terms and conditions of the oral agreement or understanding, its duration, the fees and expenses, if any, to be received.

7. Describe fully the nature and method of performance of the above indicated agreement or understanding.

Definers Corp. is a subcontractor of Akin Gump Strauss Hauer & Feld LLP under this engagement. Please see attached agreement.



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8. Describe fully the activities the registrant engages in or proposes to engage in on behalf of the above foreign principal.

Registrant will provide strategic communications support and guidance in furtherance of the interests of the Embassy of the United Arab Emirates, with an emphasis on strengthening bilateral relations and regional security of the United Arab Emirates.

9. Will the activities on behalf of the above foreign principal include political activities as defined in Section 1(o) of the Act and in the footnote below? Yes ☒ No ☐

If yes, describe all such political activities indicating, among other things, the relations, interests or policies to be influenced together with the means to be employed to achieve this purpose.

See response to Question 8.

**EXECUTION**

In accordance with 28 U.S.C. § 1746, the undersigned swears or affirms under penalty of perjury that he/she has read the information set forth in this Exhibit B to the registration statement and that he/she is familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her knowledge and belief.

| Date of Exhibit B | Name and Title | Signature |
|---|---|---|
| 12/21/17 | Joseph Pounder, President | |

Footnote: "Political activity," as defined in Section 1(o) of the Act, means any activity which the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

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**Akin Gump**
STRAUSS HAUER & FELD LLP

HAL S. SHAPIRO
+1 202.887.4053/fax: +1 202.887.4288
hshapiro@akingump.com

ATTORNEY-CLIENT PRIVILEGED
ATTORNEY WORK PRODUCT
PRIVILEGED & CONFIDENTIAL

December 19, 2017

Joe Pounder
Definers Corp.
1500 Wilson Blvd.
5th Floor
Arlington, VA 22209

Dear Mr. Pounder:

This letter shall serve to confirm our Agreement as follows:

1. Effective as of December 19, 2017, Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") has retained Definers Corp. ("Definers"), to assist the firm in providing legal advice to its client, the Embassy of the United Arab Emirates, and its agents and representatives ("the Client"). The Client has authorized Akin Gump to retain Definers to work under Akin Gump's direction and report directly to Akin Gump on this matter.

2. It is understood that Definers will provide strategic communications support and guidance ("Consulting Services") in furtherance of the interests of the Client, with an emphasis on strengthening bilateral relations and regional security of the United Arab Emirates.

3. Akin Gump agrees to pay Definers a monthly retainer of $20,000 for the Consulting Services, and Akin Gump agrees to reimburse Definers for reasonable, pre-approved out-of-pocket expenses incurred in connection with the Consulting Services.

4. Definers will provide the Consulting Services on a month-to-month basis, and either party may terminate the Agreement by giving fifteen (15) days prior written notice to the other party. Akin Gump anticipates, but does not represent or guarantee, that the Consulting Services will be needed for at least six (6) months.

5. Definers acknowledges that performance of the Consulting Services may trigger compliance obligations under various U.S. laws, including the Foreign Agents Registration Act ("FARA"). Each party shall be responsible for any liability or costs arising from any failure or requirement of such party to comply with FARA or other applicable regulatory requirements.

6. All information released by and exchanged among Akin Gump, Definers, the Client, or any of their designees, and all work, opinions, conclusions, and communications produced by Definers or its employees hereunder—including information released by and exchanged among Akin Gump, Definers, or the Client, or work, opinions, conclusions, and communications produced by Definers prior to the date of this Agreement—(herein collectively referred to as the "Information") is or will be protected by the attorney-client privilege, attorney work product doctrine, confidentiality, and/or other applicable privileges or protections, to the fullest extent provided by law. As a condition of receiving such Information, Definers agrees to treat any such Information in accordance with the provisions of this Agreement.

7. Definers further agrees to take all reasonable steps to maintain the security and confidentiality of Information received in connection with this engagement. Definers acknowledges that the unauthorized disclosure of any Information would cause irreparable harm to the Client. Definers agrees to take reasonable measures to



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ensure the materials it receives or produces in connection with this matter are securely stored and transmitted, including by use of encryption and passwords where reasonable.

8. Definers hereby agrees that, absent authorization from Akin Gump, it will not: (a) disclose any Information to any third party unless required to do so by law; (b) make any use of the Information for any purpose that is not related to its work for Akin Gump related to the Client; (c) make any use of the name, marks, or identity of Akin Gump or the Client in connection with any marketing, advertising, promotion, or other purpose not related to its work for Akin Gump related to the Client; or (d) disclose the specific terms of this Agreement to any third party unless required to do so by law.

9. If Definers is requested or required (*e.g.*, by oral questions, interrogatories, requests for information or documents, subpoenas, Civil Investigative Demand, or similar process) to disclose any Information, Definers agrees that it will provide Akin Gump with prompt notice of such request or requirement, and provide Akin Gump an opportunity to intervene and raise objections, if available. Definers also agrees to cooperate with Akin Gump, or its designees, in any attempt to obtain a protective order or other remedy to prevent such release (including, but not limited to, injunctive relief). Any legally mandated disclosure shall be limited to that which is legally required.

10. Definers will submit invoices for fees and expenses for services directly to Akin Gump, attention Hal Shapiro, which shall be solely responsible for payment.

11. This Agreement may be modified only by written agreement.

12. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same Agreement.

13. The provisions of sections 5-9 of this Agreement shall survive the termination of the Agreement.

Agreed to and Accepted by:

Akin Gump Strauss Hauer & Feld LLP

By: _____

Date: 12/22/17

Definers Corp.

By: _____

Date: 12/19/17



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**CERTIFICATE OF AUTHENTICITY**
**OF**
**BUSINESS RECORDS**

I, Kimberly A. Groff, declare that I am employed by Domains by Proxy, LLC, and that my office title or position is Legal-Admin II. I further declare that I am a custodian of records of said business and that each of the records attached hereto is the original or a duplicate (exact photocopy) of an original record in the custody of Domains by Proxy, LLC.

I further state that:

1. Such records were made, at or near the times of the occurrence of the matters set forth by (or from information transmitting by) a person with knowledge of those matters;
2. such records are kept in the course of a regularly conducted business activity;
3. the business activity made such records as a regular practice; and
4. if such records are not the originals, such records are duplicates of the originals.

I declare under penalty of perjury the forgoing is true and correct.

Dated this 26th day of September 2018.

Kimberly A. Groff
Legal-Admin II
Domains by Proxy, LLC
14455 North Hayden Road
Scottsdale, Arizona 85260

# Shopper Info for Shopper ID 159344741

| | |
|---|---|
| Shopper ID: | 159344741 |
| Private Label ID: | 1695 |
| Login Name: | 159344741 |
| First Name: | Haitham |
| Middle Name: | |
| Last Name: | Al Mussawi |
| Company: | |
| Address1: | 2501 9th Road South |
| Address2: | #251 |
| City: | Arlington |
| State/Prov: | VA |
| Postal Code: | 22204 |
| Country: | us |
| Phone Work: | +1.2023402624 |
| Phone Home: | |
| Mobile: | |
| Fax: | |
| Email: | hamussawi@gmail.com |
| BirthDate: | |
| Gender: | |
| Date Created: | 6/18/2017 1:21:45 PM |
| Last Changed By: | pci.eCommClient.prod.intranet.gdg |
| Last Changed By Date: | 7/18/2018 1:39:16 AM |
| Status: | |
| Fraud: | Not Checked / Unknown |
| Shopper Pin: | |
| Password Reminder: | |
| Twitter Handle: | |

# Domain List for Shopper ID 159344741

| Domain Name | Status | Created | Expires | Order ID |
|---|---|---|---|---|
| QATARTRUTH.COM | Active | 6/18/2017 | n/a | 1149150591 |

# Domain Information for Shopper ID 159344741

| | |
|---|---|
| Shopper ID: | 159344741 |
| Domain Name: | QATARTRUTH.COM |
| Registrar: | GoDaddy.com, LLC |
| Status: | Active |
| Name Servers: | |
| Auto Renew: | |
| Renew Period: | 0 |

## Registrant Contact

| | |
|---|---|
| Name: | Haitham Al Mussawi |
| Company: | |
| Email: | hamussawi@gmail.com |
| Address 1: | 2501 9th Road South |
| Address 2: | #251 |
| City: | Arlington |
| State/Province: | Virginia |
| Postal Code: | 22204 |
| Country: | United States |
| Phone: | +1.2023402624 |
| Fax: | |
| Modify Time: | 6/18/2017 1:22:48 PM |

## Technical Contact

| | |
|---|---|
| Name: | Haitham Al Mussawi |
| Company: | |
| Email: | hamussawi@gmail.com |
| Address 1: | 2501 9th Road South |
| Address 2: | #251 |
| City: | Arlington |
| State/Province: | Virginia |
| Postal Code: | 22204 |
| Country: | United States |
| Phone: | +1.2023402624 |
| Fax: | |
| Modify Time: | 6/18/2017 1:22:48 PM |

## Administrative Contact

| | |
|---|---|
| Name: | Haitham Al Mussawi |
| Company: | |
| Email: | hamussawi@gmail.com |
| Address 1: | 2501 9th Road South |
| Address 2: | #251 |
| City: | Arlington |
| State/Province: | Virginia |
| Postal Code: | 22204 |
| Country: | United States |
| Phone: | +1.2023402624 |
| Fax: | |
| Modify Time: | 6/18/2017 1:22:48 PM |

## Billing Contact

| | |
|---|---|
| Name: | Haitham Al Mussawi |
| Company: | |
| Email: | hamussawi@gmail.com |
| Address 1: | 2501 9th Road South |
| Address 2: | #251 |
| City: | Arlington |
| State/Province: | Virginia |
| Postal Code: | 22204 |
| Country: | United States |
| Phone: | +1.2023402624 |
| Fax: | |
| Modify Time: | 6/18/2017 1:22:48 PM |

# Notes for Shopper ID 159344741
# 6/18/2017 to 9/18/2018

| Entered Date / By | Note |
|---|---|
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATAREXPOSED.COM privacy set up. DBP service purchased by customer 159344664. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain TRUTHABOUTQATAR.COM privacy set up. DBP service purchased by customer 159344664. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARTRUTH.COM privacy set up. DBP service purchased by customer 159344664. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARISAPROBLEM.COM privacy set up. DBP service purchased by customer 159344664. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARUNCOVERED.COM privacy set up. DBP service purchased by customer 159344664. |

# Shopper Contact Audit for Shopper ID 159344741

| Change Date | Requested By | IP Address | Value Changed | Previous Value | Changed To |
|---|---|---|---|---|---|
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | city | | Arlington |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | country | | us |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | email | 159344741 | hamussawi@gmail.com |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | first_name | | Haitham |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | last_name | | Al Mussawi |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | phone1 | | +1.2023402624 |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | state | | VA |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | street1 | | 2501 9th Road South |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | street2 | | #251 |
| 6/18/2017 1:21:46 PM | Fort Knox Shopper Attribute Copy | P3PWGDCOM M008 | zip | | 22204 |

**CERTIFICATE OF AUTHENTICITY**
**OF**
**BUSINESS RECORDS**

I, Kimberly A. Groff, declare that I am employed by GoDaddy.com, LLC, and that my office title or position is Admin-Legal II. I further declare that I am a custodian of records of said business and that each of the records attached hereto is the original or a duplicate (exact photocopy) of an original record in the custody of GoDaddy.com, LLC.

I further state that:

1. Such records were made, at or near the times of the occurrence of the matters set forth by (or from information transmitting by) a person with knowledge of those matters;
2. such records are kept in the course of a regularly conducted business activity;
3. the business activity made such records as a regular practice; and
4. if such records are not the originals, such records are duplicates of the originals.

I declare under penalty of perjury the forgoing is true and correct.

Dated this 26th day of September 2018.

Kimberly A. Groff
Admin-Legal II
GoDaddy.com, LLC
14455 N. Hayden Road, Suite 219
Scottsdale, AZ 85260

# Shopper Info for Shopper ID 159344664

| | |
|---|---|
| Shopper ID: | 159344664 |
| Private Label ID: | 1 |
| Login Name: | hamussawi@gmail.com |
| First Name: | Haitham |
| Middle Name: | |
| Last Name: | Al Mussawi |
| Company: | |
| Address1: | 2501 9th Road South |
| Address2: | #251 |
| City: | Arlington |
| State/Prov: | VA |
| Postal Code: | 22204 |
| Country: | us |
| Phone Work: | +1.2023402624 |
| Phone Home: | |
| Mobile: | |
| Fax: | |
| Email: | hamussawi@gmail.com |
| BirthDate: | |
| Gender: | |
| Date Created: | 6/18/2017 1:19:39 PM |
| Last Changed By: | PLATAPI-8521 |
| Last Changed By Date: | 5/25/2018 6:45:50 PM |
| Status: | |
| Fraud: | Verified by Fraud Dept - Customer OK |
| Shopper Pin: | |
| Password Reminder: | |
| Twitter Handle: | |

# Domain List for Shopper ID 159344664

| Domain Name | Status | Created | Expires | Order ID |
|---|---|---|---|---|
| qatartruth.com | 0 Active | 6/18/2017 | 6/18/2019 | 1149150591 |

# Domain Information for Shopper ID 159344664

| | |
|---|---|
| Shopper ID: | 159344664 |
| Domain Name: | qatartruth.com |
| Registrar: | GoDaddy.com, LLC |
| Registration Period: | 2 |
| Create Date: | 6/18/2017 3:21:56 PM |
| Expiration Date: | 6/18/2019 3:21:56 PM |
| Update Date: | 6/18/2017 3:21:56 PM |
| Transfer Away Eligibility Date: | |
| Status: | 0 Active |
| Is Certified Domain: | False |
| Gaining Registrar Name: | |
| Transferred Away Date: | |
| Last Modified: | 11/21/2017 3:49:36 PM |
| Custom DNS: | No |
| Name Servers: | kate.ns.cloudflare.com<br>trey.ns.cloudflare.com |
| Auto Renew: | Yes |
| Renew Period: | 0 |

## Registrant Contact

| | |
|---|---|
| Name: | Registration Private |
| Company: | Domains By Proxy, LLC |
| Email: | qatartruth.com@domainsbyproxy.com |
| Address 1: | DomainsByProxy.com |
| Address 2: | 14455 N. Hayden Road |
| City: | Scottsdale |
| State/Province: | Arizona |
| Postal Code: | 85260 |
| Country: | United States |
| Phone: | +1.4806242599 |
| Fax: | +1.4806242598 |
| Modify Time: | 6/18/2017 1:21:47 PM |

## Technical Contact

| | |
|---|---|
| Name: | Registration Private |
| Company: | Domains By Proxy, LLC |
| Email: | qatartruth.com@domainsbyproxy.com |
| Address 1: | DomainsByProxy.com |
| Address 2: | 14455 N. Hayden Road |
| City: | Scottsdale |
| State/Province: | Arizona |
| Postal Code: | 85260 |
| Country: | United States |
| Phone: | +1.4806242599 |
| Fax: | +1.4806242598 |
| Modify Time: | 6/18/2017 1:21:47 PM |

## Administrative Contact

| | |
|---|---|
| Name: | Registration Private |
| Company: | Domains By Proxy, LLC |
| Email: | qatartruth.com@domainsbyproxy.com |
| Address 1: | DomainsByProxy.com |
| Address 2: | 14455 N. Hayden Road |
| City: | Scottsdale |
| State/Province: | Arizona |
| Postal Code: | 85260 |
| Country: | United States |
| Phone: | +1.4806242599 |
| Fax: | +1.4806242598 |
| Modify Time: | 6/18/2017 1:21:48 PM |

## Billing Contact

| | |
|---|---|
| Name: | Registration Private |
| Company: | Domains By Proxy, LLC |
| Email: | qatartruth.com@domainsbyproxy.com |
| Address 1: | DomainsByProxy.com |
| Address 2: | 14455 N. Hayden Road |
| City: | Scottsdale |
| State/Province: | Arizona |
| Postal Code: | 85260 |
| Country: | United States |
| Phone: | +1.4806242599 |
| Fax: | +1.4806242598 |
| Modify Time: | 6/18/2017 1:21:48 PM |

# Notes for Shopper ID 159344664
# 6/18/2017 to 9/18/2018

| Entered Date / By | Note |
|---|---|
| 11/21/2017 4:09:46 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .ORG Domain Name Registration - 2 Years (recurring) OrderID: 1152676212 RowID: 0 Namespace:domain ResourceID: 241162501 |
| 11/21/2017 3:50:39 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 2 Namespace:domain ResourceID: 240699210 |
| 11/21/2017 3:49:36 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 8 Namespace:domain ResourceID: 240699214 |
| 11/21/2017 3:49:36 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 6 Namespace:domain ResourceID: 240699213 |
| 11/21/2017 3:49:36 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 0 Namespace:domain ResourceID: 240699211 |
| 11/21/2017 3:49:36 PM / EP-17933 / Client IP: GoDaddy Internal | Setting AutoRenew = 1: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 4 Namespace:domain ResourceID: 240699212 |
| 8/15/2017 3:25:55 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt: 3. Cancelling Website Builder wsb. Reason: Autorenew is off. Account: Billing for 07/26/2017. qatartruth.org |
| 8/15/2017 3:25:55 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt: 3. Cancelling.Account Billing Usage. Reason: Autorenew is off. Account: Monthly Addon Billing for 07/26/2017. qatartruth.org |
| 8/15/2017 3:25:54 AM / BillingAgent / Client IP: GoDaddy Internal | Cancelling: GoCentral Website Builder Business Plan - Free Month OrderID: 1152676212 RowID: 2 Namespace:wsb ResourceID: 348719607 |
| 8/7/2017 5:06:29 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt: 3. Cancelling.Account Billing Usage. Reason: Autorenew is off. Account: Monthly Addon Billing for 07/18/2017. truthaboutqatar.com |
| 8/7/2017 5:06:29 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt: 3. Cancelling Website Builder wsb. Reason: Autorenew is off. Account: Billing for 07/18/2017. truthaboutqatar.com |
| 8/7/2017 5:06:28 AM / BillingAgent / Client IP: GoDaddy Internal | Cancelling: GoCentral Website Builder Business Plan - Free Month OrderID: 1149150591 RowID: 10 Namespace:wsb ResourceID: 347947217 |
| 8/5/2017 4:22:19 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Website Builder wsb): 2. Next Attempt Date: Aug 15 201 Reason: Autorenew is off. Account: Billing for 07/26/2017. qatartruth.org |
| 8/5/2017 4:22:19 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Account Billing Usage): 2. Next Attempt Date: Aug 15 201 Reason: Autorenew is off. Account: Monthly Addon Billing for 07/26/2017. qatartruth.org |
| 7/28/2017 9:39:31 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Account Billing Usage): 2. Next Attempt Date: Aug 7 201 Reason: Autorenew is off. Account: Monthly Addon Billing for 07/18/2017. truthaboutqatar.com |
| 7/28/2017 9:39:31 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Website Builder wsb): 2. Next Attempt Date: Aug 7 201 Reason: Autorenew is off. Account: Billing for 07/18/2017. truthaboutqatar.com |
| 7/26/2017 8:25:33 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Account Billing Usage): 1. Next Attempt Date: Aug 5 201 Reason: Autorenew is off. Account: Monthly Addon Billing for 07/26/2017. qatartruth.org |
| 7/26/2017 8:25:33 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Website Builder wsb): 1. Next Attempt Date: Aug 5 201 Reason: Autorenew is off. Account: Billing for 07/26/2017. qatartruth.org |
| 7/18/2017 5:46:13 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Account Billing Usage): 1. Next Attempt Date: Jul 28 201 Reason: Autorenew is off. Account: Monthly Addon Billing for 07/18/2017. truthaboutqatar.com |
| 7/18/2017 5:46:13 AM / BillingAgent / Client IP: GoDaddy Internal | Failed Billing Attempt (Website Builder wsb): 1. Next Attempt Date: Jul 28 201 Reason: Autorenew is off. Account: Billing for 07/18/2017. truthaboutqatar.com |
| 6/26/2017 11:18:50 AM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 2 Namespace:domain ResourceID: 240699210 EAR: OFF |
| 6/26/2017 11:18:47 AM / Customer / Client IP: 70.88.147.109 | DCC domain nameserver update requested qatarexposed.com (ID=240699210) |
| 6/26/2017 8:35:10 AM / RegBulkEmailSvc / Client IP: GoDaddy Internal | RegBulkEmailSvc: Sent DomainAddSuccess email for qatartruth.org to: shopper. |

# Notes for Shopper ID 159344664
# 6/18/2017 to 9/18/2018

| Entered Date / By | Note |
|---|---|
| 6/26/2017 8:27:08 AM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .ORG Domain Name Registration - 2 Years (recurring) OrderID: 1152676212 RowID: 0 Namespace:domain ResourceID: 241162501 EAR: OFF |
| 6/26/2017 8:27:02 AM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name qatartruth.org registered |
| 6/26/2017 8:27:02 AM / RegAgentSvc / Client IP: GoDaddy Internal | A DomainAddSuccess E-mail has been sent to shopperId 159344664 for domain qatartruth.org. |
| 6/26/2017 8:26:56 AM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARTRUTH.ORG privacy set up.  DBP customer number is 159973303. |
| 6/26/2017 7:29:14 AM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 6 Namespace:domain ResourceID: 240699213 EAR: OFF |
| 6/26/2017 7:28:02 AM / Customer / Client IP: 70.88.147.109 | DCC domain nameserver update requested qatartruth.com (ID=240699213) |
| 6/23/2017 6:06:52 AM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 2 Namespace:domain ResourceID: 240699210 EAR: OFF |
| 6/23/2017 6:06:43 AM / RegAgentSvc / Client IP: GoDaddy Internal | DNSSEC modify for domain qatarexposed.com, processed by RegAgentSvc, returning to status 0, on 06/23/2017 06:06:43. |
| 6/23/2017 6:06:34 AM / Customer / Client IP: 71.178.245.9 | DCC dnsSec update requested qatarexposed.com (ID=240699210) |
| 6/23/2017 5:54:17 AM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 2 Namespace:domain ResourceID: 240699210 EAR: OFF |
| 6/23/2017 5:54:06 AM / Customer / Client IP: 71.178.245.9 | DCC domain nameserver update requested qatarexposed.com (ID=240699210) |
| 6/21/2017 2:29:01 PM / NewCustomerEmail / Client IP: | Sending customer contacted email with survey. |
| 6/21/2017 2:29:00 PM / Kaminski, Justin / Client IP: GoDaddy Internal | Finesse: An outbound US New Customer call was made. Customer was contacted. |
| 6/21/2017 2:26:57 PM / Kaminski, Justin / Client IP: GoDaddy Internal | helped Haitham Al Mussawi CB# +1.2023402624 regarding Domain Domains<br><br>Additional Comments:<br>#MONI - embassy that doesn't need help apparently |
| 6/21/2017 2:24:11 PM / Kaminski, Justin / Client IP: GoDaddy Internal | Justin Kaminski accessed account with reason "Lynx Outbound Tasks". Validation was skipped. |
| 6/21/2017 2:01:25 AM / RegRaaVerifyMailerSvc / Client IP: GoDaddy Internal | Registrar Verification E-mail sent to hamussawi@gmail.com Namespace: Domain Type: DomainRegistrationVerifyReminderEmail Messaging Tracking GUID: 51cd273d-fc62-4aed-afb7-6feb481dfe9e |
| 6/19/2017 8:57:56 AM / gdwshAuthenticate / Client IP: GoDaddy Internal | Password Reset performed by shopper |
| 6/18/2017 1:30:02 PM / RegBulkEmailSvc / Client IP: GoDaddy Internal | RegBulkEmailSvc: Sent RegistrationConfirmationAlt email for truthaboutqatar.com qatarexposed.com qataruncovered.com qatarisaproblem.com qatartruth.com to: shopper. |
| 6/18/2017 1:26:08 PM / Fraud Auto Verify - Service / Client IP: GoDaddy Internal | Marked as VERIFIED NO FRAUD. |
| 6/18/2017 1:23:02 PM / RegRaaVerifyMailerSvc / Client IP: GoDaddy Internal | Registrar Verification E-mail sent to hamussawi@gmail.com Namespace: Domain Type: DomainRegistrationVerifyEmail Messaging Tracking GUID: ad036c5b-7397-4e46-8ecf-3854731ef280 |
| 6/18/2017 1:22:01 PM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 4 Namespace:domain ResourceID: 240699212 EAR: OFF |
| 6/18/2017 1:22:01 PM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 6 Namespace:domain ResourceID: 240699213 EAR: OFF |

# Notes for Shopper ID 159344664
# 6/18/2017 to 9/18/2018

| Entered Date / By | Note |
|---|---|
| 6/18/2017 1:22:00 PM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 8 Namespace:domain ResourceID: 240699214 EAR: OFF |
| 6/18/2017 1:21:57 PM / RegAgentSvc / Client IP: GoDaddy Internal | A RegistrationConfirmationAlt E-mail has been sent to shopperId 159344664 for domain qatarisaproblem.com. |
| 6/18/2017 1:21:57 PM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name qatartruth.com registered |
| 6/18/2017 1:21:57 PM / RegAgentSvc / Client IP: GoDaddy Internal | A RegistrationConfirmationAlt E-mail has been sent to shopperId 159344664 for domain qatartruth.com. |
| 6/18/2017 1:21:56 PM / RegAgentSvc / Client IP: GoDaddy Internal | A RegistrationConfirmationAlt E-mail has been sent to shopperId 159344664 for domain qataruncovered.com. |
| 6/18/2017 1:21:56 PM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name qatarisaproblem.com registered |
| 6/18/2017 1:21:56 PM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name qataruncovered.com registered |
| 6/18/2017 1:21:55 PM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 2 Namespace:domain ResourceID: 240699210 EAR: OFF |
| 6/18/2017 1:21:53 PM / RegHerculesSvc / Client IP: GoDaddy Internal | Setting AutoRenew = 0: .COM Domain Name Registration - 2 Years (recurring) OrderID: 1149150591 RowID: 0 Namespace:domain ResourceID: 240699211 EAR: OFF |
| 6/18/2017 1:21:52 PM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name qatarexposed.com registered |
| 6/18/2017 1:21:52 PM / RegAgentSvc / Client IP: GoDaddy Internal | A RegistrationConfirmationAlt E-mail has been sent to shopperId 159344664 for domain qatarexposed.com. |
| 6/18/2017 1:21:49 PM / RegAgentSvc / Client IP: GoDaddy Internal | A RegistrationConfirmationAlt E-mail has been sent to shopperId 159344664 for domain truthaboutqatar.com. |
| 6/18/2017 1:21:49 PM / RegAgentSvc / Client IP: GoDaddy Internal | Domain name truthaboutqatar.com registered |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain TRUTHABOUTQATAR.COM privacy set up. DBP customer number is 159344741. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATAREXPOSED.COM privacy set up. DBP customer number is 159344741. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARUNCOVERED.COM privacy set up. DBP customer number is 159344741. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARISAPROBLEM.COM privacy set up. DBP customer number is 159344741. |
| 6/18/2017 1:21:45 PM / Post Purchase Processing / Client IP: GoDaddy Internal | Domain QATARTRUTH.COM privacy set up. DBP customer number is 159344741. |
| 6/18/2017 1:19:38 PM / Customer / Client IP: 71.191.184.13 | Shopper 159344664 accepted and agreed to the Universal Terms of Service and Privacy Policy |

# Shopper Contact Audit for Shopper ID 159344664

| Change Date | Requested By | IP Address | Value Changed | Previous Value | Changed To |
|---|---|---|---|---|---|
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | city | | Arlington |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | country | | us |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | first_name | | Haitham |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | last_name | | Al Mussawi |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | phone1 | | +1.2023402624 |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | state | | VA |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | street1 | | 2501 9th Road South |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | street2 | | #251 |
| 6/18/2017 1:21:45 PM | gdPostPurchase.StoreShopperInfo | 71.191.184.13 | zip | | 22204 |
| 6/18/2017 1:19:39 PM | Shopper | 71.191.184.13 | email | 159344664 | hamussawi@gmail.com |

# Legal Receipt for Shopper ID 159344664

Shopper ID: 159344664
Receipt ID: 1152676212
ProgId: GoDaddy
SiteUrl: http://registrar.godaddy.com
Date: 6/26/2017 8:26:54 AM By customer via Online
Source Code: GDBBA2472

## Shipping Information

Haitham Al Mussawi
2501 9th Road South
#251
Arlington, VA 22204 us
Daytime Phone: +1.2023402624
hamussawi@gmail.com

## Billing Information

Haitham Al Mussawi
2501 9th Road South
#251
Arlington, VA 22204 us
Daytime Phone: +1.2023402624
hamussawi@gmail.com

IP: 71.191.184.13::71.191.184.13

**Transaction Occurred as: United States Dollar (USD)**

***Payment 1: $43.32***

Paid: Credit Card
Processor: AMEXDirect-GD
AVS Code: M
Name: Haitham Al mussawi
Creditcard Number: ##########4009
Creditcard Information: AMEX Exp. 4/2022

Our Charges will appear on their credit card statement in the name "GODADDY.COM"

| Row | Label | Name | Unit Price | Today's Price | ICANN Fee | Qty | Extra Disc. | Total Price |
|---|---|---|---|---|---|---|---|---|
| 1 | 12102-1 | .ORG Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: qatartruth.org<br>This a service item. | $39.98 | $26.98 | $0.36 | 1 | $0.00 | $27.34 |
| 2 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: qatartruth.org<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |
| 3 | 1055118-1 | GoCentral Website Builder Business Plan - Free Month<br>Length: 1 Month(s)<br>Domain:<br>This a service item. | $0.00 | $0.00 | $0.00 | 1 | $0.00 | $0.00 |

| Subtotal | Shipping & Handling | Tax | Total |
|---|---|---|---|
| $43.32 | $0.00 | $0.00 | $43.32 |

# Legal Receipt for Shopper ID 159344664

| | |
|---|---|
| Shopper ID: | 159344664 |
| Receipt ID: | 1149150591 |
| ProgId: | GoDaddy |
| SiteUrl: | http://registrar.godaddy.com |
| Date: | 6/18/2017 1:21:43 PM By customer via Online |
| Source Code: | ??? |

## Shipping Information

hamussawi@gmail.com

## Billing Information

Haitham Al Mussawi

2501 9th Road South
#251
Arlington, VA 22204 us
Daytime Phone: +1.2023402624
hamussawi@gmail.com

| | |
|---|---|
| IP: | 71.191.184.13::71.191.184.13 |

**Transaction Occurred as: United States Dollar (USD)**

***Payment 1: $221.60***

| | |
|---|---|
| Paid: | Credit Card |
| Processor: | AMEXDirect-GD |
| AVS Code: | M |
| Name: | Haitham Al mussawi |
| Creditcard Number: | ##########4009 |
| Creditcard Information: | AMEX Exp. 4/2022 |

Our Charges will appear on their credit card statement in the name "GODADDY.COM"

| Row | Label | Name | Unit Price | Today's Price | ICANN Fee | Qty | Extra Disc. | Total Price |
|---|---|---|---|---|---|---|---|---|
| 1 | 102-1 | .COM Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: truthaboutqatar.com<br>This a service item. | $29.98 | $27.98 | $0.36 | 1 | $0.00 | $28.34 |
| 2 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: truthaboutqatar.com<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |
| 3 | 102-1 | .COM Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: qatarexposed.com<br>This a service item. | $29.98 | $27.98 | $0.36 | 1 | $0.00 | $28.34 |
| 4 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: qatarexposed.com<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |

# Legal Receipt for Shopper ID 159344664

| Row | Label | Name | Unit Price | Today's Price | ICANN Fee | Qty | Extra Disc. | Total Price |
|---|---|---|---|---|---|---|---|---|
| 5 | 102-1 | .COM Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: qataruncovered.com<br>This a service item. | $29.98 | $27.98 | $0.36 | 1 | $0.00 | $28.34 |
| 6 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: qataruncovered.com<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |
| 7 | 102-1 | .COM Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: qatartruth.com<br>This a service item. | $29.98 | $27.98 | $0.36 | 1 | $0.00 | $28.34 |
| 8 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: qatartruth.com<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |
| 9 | 102-1 | .COM Domain Name Registration - 2 Years (recurring)<br>Length: 2 Year(s)<br>Domain: qatarisaproblem.com<br>This a service item. | $29.98 | $27.98 | $0.36 | 1 | $0.00 | $28.34 |
| 10 | 7001-1 | Private Registration Services<br>Length: 1 Year(s)<br>Domain: qatarisaproblem.com<br>This a service item. | $9.99 | $7.99 | $0.00 | 1 | $0.00 | $15.98 |
| 11 | 1055118-1 | GoCentral Business - Free Month<br>Length: 1 Month(s)<br>Domain:<br>This a service item. | $0.00 | $0.00 | $0.00 | 1 | $0.00 | $0.00 |

| Subtotal | Shipping & Handling | Tax | Total |
|---|---|---|---|
| $221.60 | $0.00 | $0.00 | $221.60 |

**Annex 160**

Video, posted on Snapchat by Ghanem Abdullah Mattar (undated) (with certified translation)
(Video on CD-ROM located at the back cover of last volume)

(Mark all inaudible or unintelligible conversation as “[inaudible]”)

Title of Clip [video Ghanem Matar July 12 2017 (youtube)]:

| Time Stamp [00:00] | Speaker | Transcription Arabic | Translation English |
|---|---|---|---|
| [00:00:00] | banner scrolling across the screen from begging until end | الإماراتي البطل غانم عبدالله مطر من أبوظبي<br>قال كلمة الحق فاعتقلوه. | Emarati hero Ghanem Abdullah Matar from Abu Dhabi<br>He was arrested because he said the truth. |
| [00:00:02] | Ghanem Abdullah Matar | اللي يقول قطر مسكرين عليهم وما يوصلهم أكل وما يوصلهم شيء، لا أبشركم، حليبهم يوصلهم من بلجيكا. | Some people say that Qatar is besieged. They don't receive any food or anything. No, see, they receive their milk from Belgium. |
| [00:00:08] | Ghanem Abdullah Matar | إذا حليبهم يوصلهم من بلجيكا على الأقل أكلهم من وين يوصلهم. | If their milk comes from Belgium at least, where their food should come from? |
| [00:00:12] | Ghanem Abdullah Matar | توني باخد لفة بالاسناب بشوف منو يينبع منو يرمز، هاد في ناس في سالفة قطر كانت بتنبع وتسرب | I'll review Snap Chat to see who is chatting and who is talking. In Qatar's issue, some people were swearing and insulting. |
| [00:00:22] | Ghanem Abdullah Matar | ونباها الناس تعرف تتحشم ولا تسب، ولا تشتم ولا تغلط، لأن قطر أهلنا وعمر الظفر ما طلع من اللحم. | We want them to be polite and to stop insulting. Stop swearing and cursing. We have kinship ties with our people in Qatar. Blood is thicker than water. |
| [00:00:31] | Ghanem Abdullah Matar | أنا من بداية الموضوع قلتلكم تراها تيتي تيتي زي ما روحتي جيتي. | Since the begging of this issue, I told you that it will end up with nothing. |
| [00:00:63] | Ghanem Abdullah Matar | ترى قبل سنتين استوت وردت العلاقات زي السمن على العسل ولا شيء صار. | Two year ago, relations went back to normal. Nothing happened. |
| [00:00:42] | Ghanem Abdullah Matar | ويلكم أول أسبوع في الأزمة يا ها القطر يا قطر يا الإرهابين يا سبلان يا مدري شو ما حد رديتم. | During the first week of the crisis, people kept saying "hey Qatar, you Qatar are terrorists… "you young people…" you didn't respond." |

| Time Stamp [00:00] | Speaker | Transcription Arabic | Translation English |
|---|---|---|---|
| [00:00:51] | Ghanem Abdullah Matar | على العموم هاليوم أخر يوم للمهلة حق قطر، لكن أنا أقولكم قطر ردت وقالت انعصي مالكم شيء عندي. | Anyways, today is the last day of the respite of Qatar. But, I tell you, Qatar replied and said you don't have anything to do with me. |
| [00:01:01] | Ghanem Abdullah Matar | على العموم احتشار الاسناب عندي يقولون هالموضوع ماله داعي | Generally speaking, in brief, people on Snap Chat say this topic is unimportant. |
| [00:01:06] | Ghanem Abdullah Matar | لاء أبشركم له داعي علشان الناس اللي ما بتحس تحس على دمها بس. | No, it's important so that insensible people become more sensible. |
| [00:01:12] | Ghanem Abdullah Matar | ونقطة مهمة بعد لازم ما ننسى وقفتها لقطر معنا في حرب اليمن يوم طرشوا جنودهم اليمن. | One important point that we should not forget, Qatar stood by our side in Yemen War when they sent their soldiers to Yemen. |
| [00:01:21] | Ghanem Abdullah Matar | يوم شافوا أن قطر ما افتكرت في المطالب ولا بعد عطاتها لفتة نظر ولا سوتلها سالفة. | Today, they believe that Qatar neither responded nor considered the requests. |
| [00:01:30] | Ghanem Abdullah Matar | اللي حاب أقولكم أياه في ناس تقود وناس تقاد وهذه قطر أثبتت لنا أنها ما تنقاد تقود شعبها وما حد يقودها | I would like to tell you that some people lead and some others are led.<br>Here is Qatar proving that it will never be led. It leads its people but nobody leads it. |

GEOTEXT Translations

translations@geotext.com
www.geotext.com

STATE OF NEW YORK )
)
) ss
COUNTY OF NEW YORK )

**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Arabic into English of the attached transcription.

Kristen Duffy, Senior Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 8th day of April, 2019.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified In New York County
Term Expires April 27, 2019

# Annex 161

Compendium of Social Media Posts
(with certified translation)

## Social Media Compendium Index

| Index No. | Website | Date | Source | Position |
|---|---|---|---|---|
| 1. | Twitter | 17 August 2017 | Anwar Gargash @AnwarGargash | UAE Government |
| 2. | Twitter | 10 October 2017 | Anwar Gargash @AnwarGargash | UAE Government |
| 3. | Twitter | 10 October 2017 | Anwar Gargash @AnwarGargash | UAE Government |
| 4. | Twitter | 11 December 2018 | Anwar Gargash @AnwarGargash | UAE Government |
| 5. | Twitter | 14 December 2018 | Anwar Gargash @AnwarGargash | UAE Government |
| 6. | Twitter | 19 September 2018 | Anwar Gargash @AnwarGargash | UAE Government |
| 7. | Twitter | 21 May 2017 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 8. | Twitter | 23 May 2017 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 9. | Twitter | 8 October 2017 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 10. | Twitter | 24 November 2017 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 11. | Twitter | 24 November 2017 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 12. | Twitter | 6 February 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 13. | Twitter | 7 August 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 14. | Twitter | 8 August 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 15. | Twitter | 8 August 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 16. | Twitter | 28 August 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |

| Index No. | Website | Date | Source | Position |
|---|---|---|---|---|
| 17. | Twitter | 1 September 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 18. | Twitter | 1 September 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 19. | Twitter | 1 September 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 20. | Twitter | 5 September 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 21. | Twitter | 13 October 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 22. | Twitter | 20 October 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 23. | Twitter | 23 October 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 24. | Twitter | 23 October 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 25. | Twitter | 28 October 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 26. | Twitter | 12 November 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 27. | Twitter | 17 November 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 28. | Twitter | 9 December 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 29. | Twitter | 9 December 2018 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 30. | Twitter | 18 February 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 31. | Twitter | 18 February 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 32. | Twitter | 7 March 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 33. | Twitter | 4 April 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |

| Index No. | Website | Date | Source | Position |
|---|---|---|---|---|
| 34. | Twitter | 5 April 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 35. | Twitter | 5 April 2019 | Dhahi Khalfan @Dhali_Khafan | UAE Government |
| 36. | Twitter | 16 August 2018 | Hamad Mazroui @uae_3G | UAE Government |
| 37. | Twitter | 14 September 2018 | Hamad Mazrouei @HMazrouei | UAE Government |
| 38. | Twitter | 12 September 2018 | Hamad Mazrouei @uae_3G | UAE Government |
| 39. | Twitter | 19 September 2018 | Hamad Mazrouei @HMazrouei | UAE Government |
| 40. | Twitter | 29 September 2018 | Hamad Mazrouei @HMazrouei | UAE Government |
| 41. | Video | 12 December 2018 | Hamad Al Mazroui @uae_3G | UAE Government |
| 42. | Twitter | 18 January 2019 | Hamad Al Mazroui @uae_3G | UAE Government |
| 43. | Twitter | 8 March 2019 | Hamad Al Mazroui @uae_3G | UAE Government |
| 44. | Twitter | 26 June 2017 | Sultan Ali Rashed Lootah @slootah | UAE Government |
| 45. | Website | 27 October 2018 | Al-Ittihad Emaratiya Journal | UAE Media News |
| 46. | Twitter | 15 October 2018 | Sky News Arabia @skynewsarabia | UAE Media News |
| 47. | Twitter and Youtube | 2 February 2019 | Al-jazeera Nashratukom + @qatari2209 | UAE Related News |
| 48. | Twitter | 30 January 2019 | Emir of Arab @emirofarab | UAE Related News |
| 49. | Twitter | 30 January 2019 | Middle East Monitor @MiddleEastMnt | UAE Related News |

| Index No. | Website | Date | Source | Position |
|---|---|---|---|---|
| 50. | Twitter | 30 January 2019 | Mohd @mBinAmmar | UAE Related News |
| 51. | Twitter | 30 January 2019 | Sonia @Soniaoryx | UAE Related News |
| 52. | Twitter | 30 January 2019 | Saqib Ali Hameed @SaqibAliHameed1 | UAE Related News |
| 53. | Twitter | 30 January 2019 | Ziad Ahmed @Ziadh25 | UAE Related News |
| 54. | Twitter | 5 June 2017 | Hassan Sajwani @HSajwanization | Private Individual |
| 55. | Twitter | 5 June 2017 | Hassan Sajwani @HSajwanization | Private Individual |
| 56. | Twitter | 8 July 2018 | Hassan Sajwani @HSajwanization | Private Individual |
| 57. | Twitter | 20 October 2018 | Hassan Sajwani @HSajwanization | Private Individual |
| 58. | Twitter | 20 October 2018 | Hassan Sajwani @HSajwanization | Private Individual |
| 59. | Twitter | 21 October 2018 | Hassan Sajwani @HSajwanization | Private Individual |
| 60. | Twitter | 23 May 2017 | Ali Naimi @Dralnoami | Private Individual |
| 61. | Twitter | 24 May 2017 | Ali Noaimi @Dralnoami | Private Individual |
| 62. | Twitter | 28 May 2017 | Majed al Raeesi @majedalraeesi1 | Private Individual |
| 63. | Twitter | 2 November 2018 | Majed al Raeesi @majedalraeesi1 | Private Individual |
| 64. | Twitter | 6 November 2018 | Abdulla Albaloushi @Abdulla_jumavip | Private Individual |
| 65. | Twitter | 17 December 2018 | Abdulla Albaloushi @Abdulla_jumavip | Private Individual |
| 66. | Twitter | 20 December 2018 | Abdulla Albaloushi @Abdulla_jumavip | Private Individual |

| Index No. | Website | Date | Source | Position |
|---|---|---|---|---|
| 67. | Twitter | 25 December 2018 | Abdulla Albaloushi @Abdulla_jumavip | Private Individual |
| 68. | Twitter | 25 November 2017 | Ali AL Hammadi @HammadiAD | Private Individual |
| 69. | Twitter | N/A | Ali AL Hammadi @HammadiAD | Private Individual |
| 70. | Twitter | 1 July 2018 | @Musabbeh7777 | Private Individual |
| 71. | Twitter | 22 October 2018 | Hamood Binhamad- @hamoodbinhamad | Private Individual |
| 72. | Twitter | 3 January 2019 | Al-Saeqa @UAEd9 | Private Individual |
| 73. | Twitter | 7 July 2017 | Nasser Al-Niyadi @nasser4556 | Private Individual |
| 74. | Twitter | 6 July 2017 | Nasser Al-Niyadi @nasser4556 | Private Individual |
| 75. | Twitter | 10 July 2017 | Moona Ghareeb @Mona_Ghareeb | Private Individual |
| 76. | Twitter | 28 March 2018 | Taim AlFalasi @3litamim | Private Individual |
| 77. | Twitter | 27 January 2019 | Al_Azy @el3azy22 | Private Individual |
| 78. | Twitter | 21 August 2018 | Khalid al-Raeesi @khalid_kfn | Private Individual |
| 79. | Twitter | 28 December 2017 | Nawal @AlhouliN | Private Individual |
| 80. | Twitter | 12 June 2018 | misho86elkady @misho86elkady | Private Individual |

*Translation: Brother Saud al-Qahtani is an important voice in the Qatar crisis, and following him is imperative, and the sell-outs try but will not succeed in attacking him, and his tweet about the 'blacklist' is extremely important.*

**Dr. Anwar Gargash**
@AnwarGargash

Brother Saud al-Qahtani is an important voice in the Qatar crisis, and following him is imperative, and the sell-outs try but will not succeed in attacking him, and his tweet about the 'blacklist' is extremely important.

*Translation: Brother Saud al-Qahtani is an important voice in the Qatar crisis, and following him is imperative, and the sell-outs try but will not succeed in attacking him, and his tweet about the 'blacklist' is extremely important.*

د. أنور قرقاش
@AnwarGargash
Qatar's hosting of World Cup 2022 should include a repudiation of policies supporting extremism & terrorism. Doha should review its record.
144 6:19 AM - Oct 10, 2017
186 people are talking about this

Index No. 002

د. أنور قرقاش
@AnwarGargash
Hosting World Cup 2022 should not be tainted by suppot of extremist individuals & orgs/ terrorist figures,review of Qatar's policies a must.
141 6:23 AM - Oct 10, 2017
189 people are talking about this

Index No. 003

**Dr. Anwar Gargash** @AnwarGargash - Dec 11
We have become accustomed to the duplicity and exploitativeness of Qatari policy, and we have seen it at the Riyadh Summit. It continues to harm and incite against its neighbors, while at the same time searching for reconciliation “in words.” It is a position that ignores the suffering of Qatari citizens and cares mostly for the legacy of the previous Emir, when the regional theater was a target for his conspiracies and dreams.

377 2.5K 3.2K

د. أنور قرقاش @AnwarGargash · Dec 14
الحملة القطرية الممنهجة ضد السعودية وقيادتها ليست بالجديدة أو بالمستغربة بل اعادة انتاج لمنهج مسجل وموثق في استهداف الدوحة لجيرانها، والمنطقي أن الدور التركي في سعيه لاستهداف الرياض سيضر بموقع أنقرة في المنطقة وسيساهم في انحسار نفوذها.
375
4.3K
4.5K

Dr. Anwar Gargash @AnwarGargash · Dec 14
The methodical Qatari campaign against Saudi Arabia and its leadership is not new or surprising, but it is the reproduction of Doha's recorded and documented approach of targeting its neighbors. And it is logical that the Turkish role in seeking to target Riyadh will harm Ankara's position in the region and contribute to the decline of its influence.
375
4.3K
4.5K

It is important to read the comments of Qatari intellectuals regarding Al-Jazeera channel. In their opinion, it is an imposed model that has deviated away from its path, and it has become a deformation of squares and beacons. The voice of the people of Qatar has become absent from the platforms of Al-Jazeera, thus aggravating and deepening their crisis. What the revolutionaries of Al Jazeera want is to continue to earn their living, whereas Qatar itself and its isolation is of secondary importance to them.

7:18 pm - 19 September 2018

ضاحي خلفان تميم
@Dhahi_Khalfan
الذي سوف يحاول المرواغة في مكافحة الإرهاب لن يفلح هذه المرة
10:16 PM - May 21, 2017
78 67 people are talking about this

Dhahi Khalfan Tamim
@Dhahi_Khalfan
Those who aim to be evasive in fighting terrorism, will not get away this time.
10:16 PM - May 21, 2017
78 67 people are talking about this

Dhahi Khalfan Tamim

@Dhahi_Khalfan

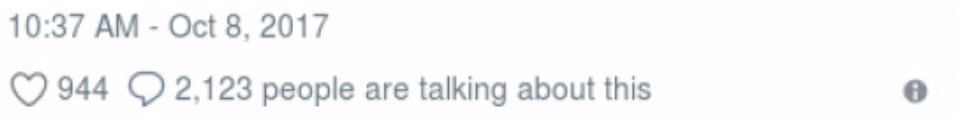
Follow

Qatar's preference for the Muslim Brotherhood and Iran over Saudi Arabia, UAE, Kuwait and Bahrain is a political disaster!!!

Dhahi Khalfan Tamim

@Dhahi_Khalfan

If Qatar is deprived from hosting the World Cup, the crisis of Qatar will come to an end. It's a fabricated crisis to get away from it. The cost are much more than anticipated by the Organization of the Two Hamads.

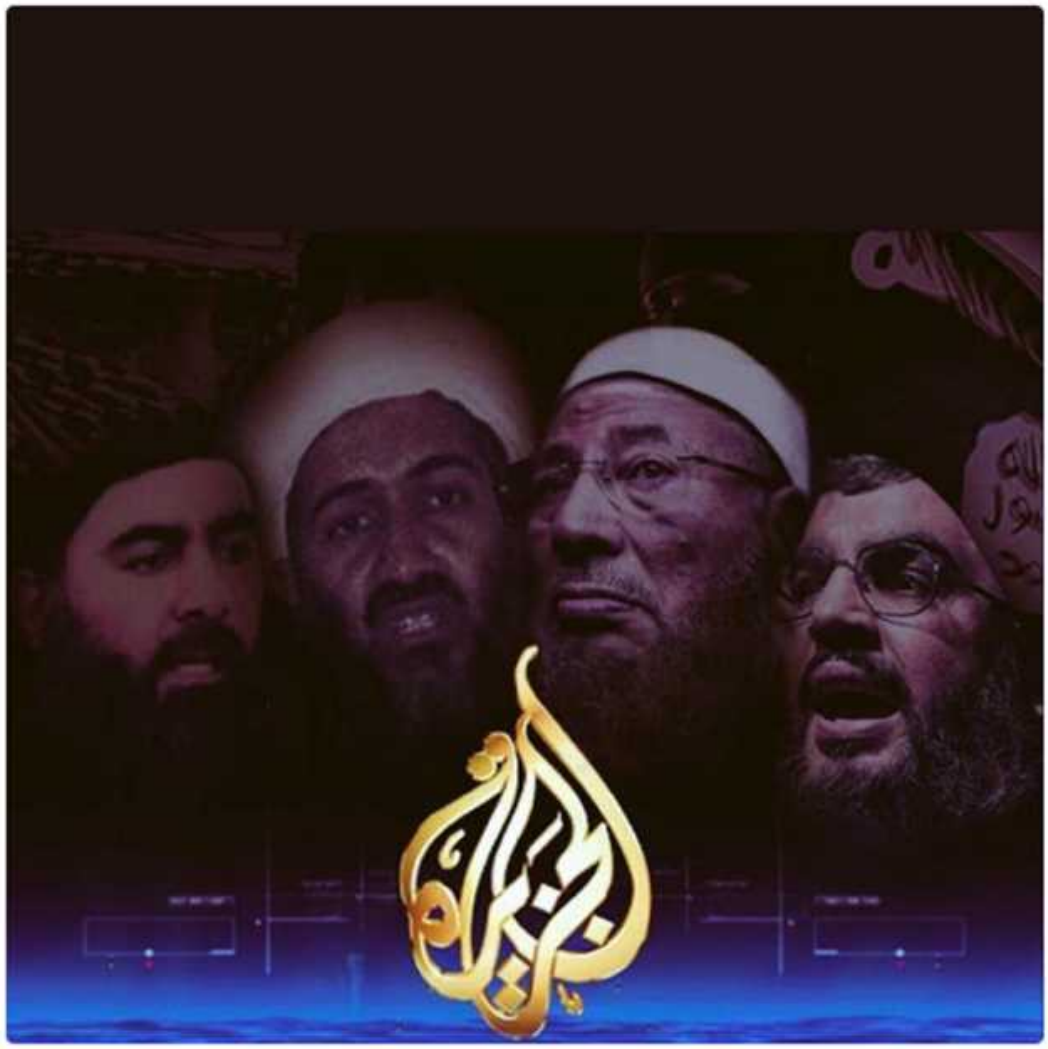


ضاحي خلفان تميم @Dhahi_Khalfan · 24 Nov 2017

جزيرة الارهاب

Translated from Arabic by Microsoft

The island of terrorism



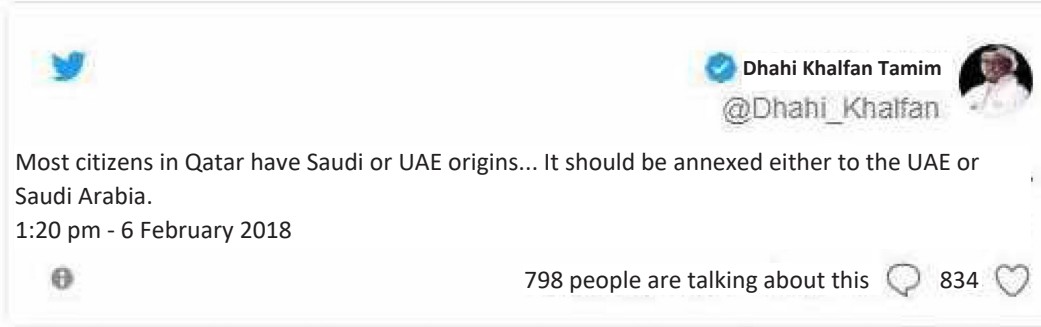
113 735 562

Dhahi Khalfan Tamim
@Dhahi_Khalfan · 24 Nov 2017
The Jazeera [island] of terrorism
Translated from Arabic by Microsoft
The island of terrorism
113
735
562

ضاحي خلفان تميم
@Dhahi_Khalfan
على التحالف أن يقصف الآلة الداعية للارهاب. قناة داعش والقاعدة والنصرة جزيرة الارهاب
951 10:41 AM - Nov 24, 2017
1,197 people are talking about this

Dhahi Khalfan Tamim
@Dhahi _Khalfan
The coalition should bombard the machine advocating for terrorism, Daesh, Al Qaeda and Al Nusra Channel. The Jazeera of Terrorism
951 10:41 AM - Nov 24, 2017
1,197 people are talking about this

ضاحي خلفان تميم
@Dhahi_Khalfan
معظم المواطنين سعوديين الأصل أو اماراتيين في قطر..اما تضم للامارات أو تضم للسعودية
١:٢٠ م - ٦ فبراير ٢٠١٨
٨٣٤
٧٩٨ من الأشخاص يتحدثون عن ذلك


Dhahi Khalfan Tamim
@Dhahi_Khalfan
Most citizens in Qatar have Saudi or UAE origins... It should be annexed either to the UAE or Saudi Arabia.
1:20 pm - 6 February 2018
798 people are talking about this
834

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 7

ذات صباح ستصبحون على خبر مفرح في قطر.

408 252 649

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 7

سؤالي لماذا ياقطر فعلتوا هذا الخراب ..الربيع القطري المشؤوم في الدول العربية.؟

156 190 401

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 7

اغلى ما نملك بلداننا العربية..قطر بحجم مطارين في دبي ..اذا ضاعت قطر لا يعني شئ..ولكن ضياع الامة مصيبة كبرى.

213 459 959

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 7

دولة احتضنت الارهابين واطلقتهم لتدمير كل شئ في الوطن العربي ليتولى اردوغان الخلافة وحمد بن جاسم التلافة.

36 237 414

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 7

ستتعلم قطر درسا لن تنساه عندما تتجرأ وتحاول الاطاحة بالحكام الخليجيين والعرب وتنشر الارهابيين لتدمير الاوطان..ستذوق الامرين.

115 518 809

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 7

One day you will wake up to some good news about Qatar.

408 252 649

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 7

My question to Qatar is that why did you wreak this havoc? Why did you create this damned Qatari Spring in the Arab World?

156 190 401

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 7

Our Arab countries are the most precious things we have. Qatar is the size of two airports in Dubai. If Qatar is lost, it means nothing, but the loss of the nation is a serious disaster.

213 459 959

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 7

A country that harbored terrorists and released them to destroy everything in the Arab World so Erdogan of Turkey will take the reins of the caliphate and Hamad Bin Jassim will take the reins of destruction.

36 237 414

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 7

Qatar will learn a lesson that it will never forget for being so bold as to attempt to topple the Gulf and Arab leaders and deploy terrorists to destroy our nations. It will backfire ferociously on Qatar. It will suffer greatly.

115 518 809

Index No. 013

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8

ما بين شخصين قارن... كي ترى قيما فيها التساوي ...والا كان مختلفا
كلامها همه يغتال امتنا... اليس عهدهما بالوعد مؤتلفا

45 174 214

**Dhahi Khalfan Tamim** @Dhahi_Khalfan · Aug 8

Compare these two men to see equal values. Even if their words are different, they are assassinating our nation. Their allegiance to this promise holds them in friendship, doesn't it?

45 174 214

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
سنفضح دور قطر لكل اجيال الوطن العربي في سلسلة محاضرات قادمة...قطر وصناعة الارهاب لنشر الدمار في الوطن العربي.
43 223 398

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
دور قطر في الربيع وحركته بالضبط دور المخبر الذي يظهر للعصابة انه احد رجالها بينما هو عميل لاجهزة الأمن....قطر كانت تشارك المتظاهرين ظاهريا وباطنيا عميلة للمشروع الاسرائيلي الرامي لخلق الفوضى.
هذا المخبر اليوم انكشف امره
34 153 276

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
لقطت الدوحة كل العملاء والمخبرين الذي كانوا يتعاملون مع الاجهزة الاسرائيلية وجندتهم في الجزيرة..امثال جمال ريال وفيصل.
23 87 155

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
في الدوحة اليوم شلة مخربين للامن العام العربي.
11 45 105

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
هذه دولة استحلت ممارسة دور الشرير في المنطقة.
14 38 111

ضاحي خلفان تميم @Dhahi_Khalfan · Aug 8
تكسير مجاديف قطر مهمة قومية
52 60 168

د. انور قرقاش @AnwarGargash Follow

سيف بن زايد آل نهيان @SaifBZayed Follow

Show more

Trending now

#Stc_تحررنا_من_دورينا
25.9K Tweets

#らごばすたん
19.6K Tweets

#IDOL100M
187K Tweets

#WednesdayWisdom
38.3K Tweets

#MichaelJacksonDay
55.8K Tweets

Show more

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Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
We will expose the role of Qatar to all generations of the Arab world in an upcoming series of lectures. Qatar and the terrorism industry to spread destruction across the Arab World.
43 223 398

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
The role of Qatar in the Arab Spring is exactly the same as the role of an informant who tells the gang that he is one of its men while, in fact, he is an agent of the security services. Qatar was sympathizing with the demonstrators on the face of it, but was actually serving the interests of Israel aiming to create chaos.
34 153 276

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
Doha has recruited all of the agents and informants who were dealing with the Israeli services and employed them at Al Jazeera... people like Jamal Rayan and Faisal.
23 87 155

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
In Doha, there are now a bunch of people who are seeking to sabotage security in the Arab World.
11 45 105

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
This State seems to have enjoyed playing the role of the villain in the region.
14 38 111

Dhahi Khalfan Tamim @Dhahi_Khalfan · Aug 8
Smashing the ego of Qatar has now become a national duty.
52 60 168

Dr. Anwar Gargash @AnwarGargash Follow

Saif Bin Zayed Al Nahyan @SaifBZayed Follow

Show more

Trending now

#Stc_is_depriving_us_from_our_league
25.9K Tweets

#らごばすたん
19.6K Tweets

#IDOL100M
187K Tweets

#WednesdayWisdom
38.3K Tweets

#MichaelJacksonDay
55.8K Tweets

Show more

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ضاحي خلفان تميم @Dhahi_Khalfan · Aug 28
هذا بالفعل هو ما رصد أيضا من قبلنا ومن قبل كل دول المنطقة.youtu.be/1oRL5BucC5Q
الآن ينبغي اسقاط النظام القطري
أخطر مافعلته قطر تجاه دول المنطقة
youtube.com
105
147
251

Dhahi Khalfan Tamim @Dhahi_Khalfan - Aug 28
youtu.be/1oRL5BucC5Q This is also what we and all states of the region have seen.
It is now time to topple the Qatari regime.
The most serious thing Qatar has ever done vis-à-vis the countries in the region.
youtube.com
105
147
251

Dhahi Khalfan Tamim Retweeted

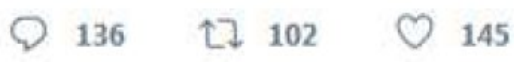
Dhahi Khalfan @Dhahi_Khalfan - Sep 1

Do you consider Qatar to be an integral part of the ancient Kingdom of Bahrain?

69% yes

31% no

7,151 votes. Final Results

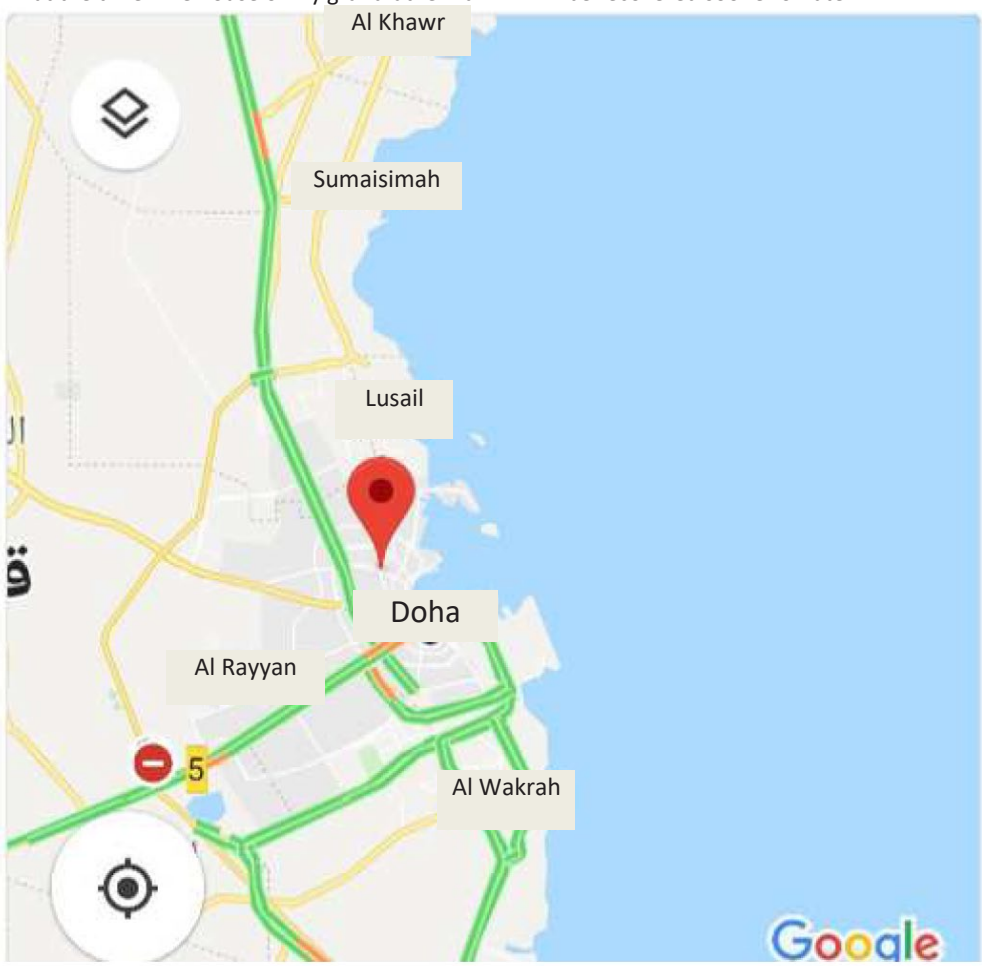


ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1

في هذا الموقع يقع منزل جدي الذي بناه في الدوحة سنة 1717 ميلادي قبل حكم آل ثاني عام 1850 م اي ان جدي تميم الكبير كان قبل آل ثاني في قطر ب 133 سنة...وكانت الدوحة تحت حكم مشيخة ابوظبي آنذاك.
بيت جدي تميم بيرجع أجلا او عاجلا.

**Dhahi Khalfan Tamim** @Dhahi_Khalfan · Sep 1

This is the location of my grandfather's house that he built in Doha in 1717G before the rise of Al Thani to power in 1850. In other words, my great grandfather Tamim was there before Al Thani in Qatar by 133 years, and Doha was governed by the rule of the Abu Dhabi Sheikhdom at the time. The house of my grandfather Tamim will be recovered sooner or later.



ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1
اريد ان انقب عن هيكل بيت جدي في الدوحة.
385 169 601

Dhahi Khalfan Tamim @Dhahi_Khalfan · Sep 1
I want to excavate the structure of my grandfather's house in Doha
385 169 601

ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1

الآن لا تخلونا نطالب بكل املاكنا تراها بتوصل نصف قطر تقريبا..
فقط نريد بيت الجد على الاقل هذا مالا يمكن ان انتازل عنه انا

100 149 363

Dhahi Khalfan Tamim @Dhahi_Khalfan · Sep 1

Now don't make us demand all of our properties because they amount to almost half of Qatar. We just want my grandfathers' house; I could never give that up.

100 149 363

Dhahi Khalfan Tamim Retweeted

**Fares Abu Hamdan** @1XBshVp40uNPLmc · Sep 1

Replying to @Dhahi_Khalfan

Lieutenant General Dhahi Khalfan has the right to demand rent for half of Qatar's area, the property of his ancestors.

17 20 63

ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1
ويكون ملك البحرين مملك المملكة الاتحادية البحرينة
15
29
89

Dhahi Khalfan Tamim @Dhahi_Khalfan · Sep 1
And the King of Bahrain is the King of the Federal Kingdom of Bahrain
15
29
89

32
39
95
ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1
اعلان : اعلن اعترافي بان قطر جزء لا يتجزأ من حدود مملكة البحرين العريقة.
87
202
508

Dhahi Khalfan Tamim @Dhahi_Khalfan · Sep 1
Announcement: I declare my admission that Qatar is an integral part of the borders of the noble Kingdom of Bahrain.
87
202
508

ضاحي خلفان تميم @Dhahi_Khalfan · Sep 1
يجب ان تعود قطر الى الوطن الأم اصلا الا وهي البحرين.
117 164 365

Dhahi Khalfan Tamim @Dhahi_Khalfan · Sep 1
Qatar must be restored to the original home nation, which is Bahrain.
117 164 365

Dhahi Khalfan Tamim

@Dhahi_Khalfan

We didn't hack Qatar. Now we are hacking everything in it. Hacking a terrorist organization is something that is permissible by Sharia and the law.

8:05 pm –September 5, 2018

877 681 people are talking about this

ضاحي خلفان تميم @Dhahi_Khalfan · Oct 13
علينا ان نلغي شئ اسمه دولة قطر ونجعلها احدى توابع المملكة العربية السعودية طال الزمان او قصر...هذا الحل الأنجح.
2.3K
4.2K
5.9K

Dhahi Khalfan Tamim @Dhahi_Khalfan · Oct 13
We have to cancel anything called the "State of Qatar" and make it a subordinate of the Kingdom of Saudi Arabia sooner or later... The is the most effective solution.
2.3K
4.2K
5.9K

ضاحي خلفان تميم @Dhahi_Khalfan · Oct 20
كم من منتهك حقوقه في قطر...
176 294 469
ضاحي خلفان تميم @Dhahi_Khalfan · Oct 20
قطر اسوأ نظام عربي عرفه التاريخ
734 2.7K 3.3K

Dhahi Khalfan Tamim @Dhahi_Khalfan · Oct 20
How many people are there in Qatar whose rights are violated?
176 294 469

---

Dhahi Khalfan Tamim @Dhahi_Khalfan · Oct 20
Qatar is the worst Arab regime known to history
734 2.7K 3.3K

0

ضاحي خلفان تميم @Dhahi_Khalfan · 32m
ترشي قطر عناصر غربية فقط لإطلاق تصريح ضد المملكة لغايات في نفس الحمدين...تركنا الحمدين سنوات ما سنعناهم...تمادوا في اللعب بالنار ولم يمسسهم حريقها.
55
115
152

Dhahi Khalfan Tamim @Dhahi_Khalfan · 32m
Qatar bribes foreign elements just to launch statements against the Kingdom for purposes of the two Hamads... We have let the two Hamads be for many years and did not listen to them… They have been excessive in playing with fire and have not been burned.
55
115
152

ضاحي خلفان تميم @Dhahi_Khalfan · 2h
قطر الحمدين المنبوذة بسوء تصرفاتها..تتفرج على مسيرة قيادات من حولها تجتمع لخير المنطقة الا جماعة هاي بيبي واعوان شريفة فإنهم في ورطة.
100
340
440

Dhahi Khalfan Tamim @Dhahi_Khalfan · 2h
The exiled Qatar of the two Hamads, due to its misconduct, is watching the progress of leaders around it who are coming together for the good of the region, except for the “Hi, baby” group and “Sharifa’s Supporters.” They are in trouble.
100
340
440

ضاحي خلفان تميم @Dhahi_Khalfan · Oct 28
من يريد مصالحة قطر الحمدين فليفعل...اما نحن فلا مصالحة مع وجود الحمدين.
976 1.5K 2.9K
ضاحي خلفان تميم @Dhahi_Khalfan · Oct 28
المصالحة مع قطر في زمن الحمدين مصالحة كاذبة.
رحم الله الملك عبدالله بن عبدالعزيز
156 788 1.2K

Dhahi Khalfan Tamim @Dhahi_Khalfan · Oct 28
Whoever wishes to reconcile with the Qatar of the two Hamads, let him do so.
As for us, we will never reconcile as long as the two Hamads exist.
976 1.5K 2.9K
Dhahi Khalfan Tamim @Dhahi_Khalfan · Oct 28
.Reconciliation with Qatar in the era of two Hamads is a false conciliation
.May King Abdullah bin Abdulaziz rest in peace
156 788 1.2K

ضاحي خلفان تميم @Dhahi_Khalfan · 12h
سود الله وجه قناة الجزيرة
لي تمادت في عملها بالخيانة
أي ديرة تحتضنها أي ديرة
تجلب إلها كل الفاظ الاهانة
المحطة لي يسموها الحقيرة السبل ما عندها ذرة أمانة
108
441
761

Dhahi Khalfan Tamim @Dhahi_Khalfan · 12h
Shame on Al Jazeera Channel.
It has gone too far in treason.
Who is supporting it?
It's bringing disrespect and disgrace upon itself.
They label Al Jazeera "the despicable." They lack every shred of integrity.
108
441
761

ضاحي خلفان تميم @Dhahi_Khalfan · Nov 17
تشويق ثقافة الكراهية = قناة الجزيرة
نشرثقافة الدناءة = قناة الجزيرة
نشر ثقافة التلفيق = قناة الجزيرة
نشر ثقافة الإحباط = قناة الجزيرة.....القائمة طويلة
585
1.2K
2.0K

Dhahi Khalfan Tamim @Dhahi_Khalfan · Nov 17
Promoting a culture of hatred = Al Jazeera Channel
Spreading a culture of rudeness = Al Jazeera Channel
Spreading a culture of corruption = Al Jazeera Channel
Spreading a culture of frustration = Al Jazeera Channel…The list is long…
585
1.2K
2.0K

**Dhahi Khalfan Tamim** ✓@Dhahi_Khalfan - Dec 9

The media campaigns against the Gulf rulers and the Arab leaders started from Qatar... More than twenty years and they have not stopped… The patience of the Gulf and Arab countries has run out, and people have begun to attack Qatar... Now Qatar is weeping… Unfortunately, if they were to stop the campaigns against it now, Qatar would continue to attack our Arab states.

A shadow cannot be straightened, and a reed is crooked.

483 2.2K 3.4K

**Dhahi Khalfan Tamim** ✓@Dhahi_Khalfan - Dec 9

The culture of the Gulf rulers and people has been not to launch media campaigns against rulers... Qatar has trodden on this Gulf norm and tradition to the point that it is of the utmost importance to treat it the same way.

137 374 659

**Dhahi Khalfan Tamim** ✓ @Dhahi_Khalfan - Feb. 18

In order for Qatar to rejoin the Arab front as a government, it needs national social and psychological rehabilitation to enable it to be harmonious with the Arab nations.

It has become addict to violating the rules of political courtesy in respect of our sober Arab values in dealing with the leaders of the people, and it has undermined the Arabs with its media that have depicted them as regressive.

144 286 567

ضاحي خلفان تميم @Dhahi_Khalfan · Feb 18

العالم العربي اليوم امام نظام حكم عربي قطري مريض نفسيا...وعلاجه يحتاج الى وقت طويل .

26 59 113

**Dhahi Khalfan Tamim** ✓@Dhahi_Khalfan - Feb 18

The Arab World today is facing an Arab Qatari regime that is mentally ill… and treating it will take a long time.

26 59 113

**Dhahi Khalfan**

@Dhahi_Khalfan

Follow

This recklessness practiced by the Qatari politics will not end until the end of the reckless people in it.

ضاحي خلفان تميم
@Dhahi_Khalfan

قطر لن تتوقف الا اذا شنت مليشيات عربية عليها هجمة مركزة
هذه المليشيات يمكن جمعها من الدول المتضررة من تدخلات قطر..يجندون ويزحفون على الدوحة...على شأن يفهم من يحكم قطر ان الفوضى تقابل بهكذا فوضى

2,384 7:09 PM - Apr 4, 2019

3,203 people are talking about this

**Dhahi Khalfan Tamim**
@Dhahi_Khalfan

Qatar will not stop unless Arab militias launch a concerted attack on it.
These militias could be assembled from the countries harmed by Qatar's interference … They can be recruited to advance toward Doha … so that those ruling Qatar may understand that chaos shall be met with similar chaos.

2,384 7:09 PM - Apr 4, 2019

3,203 people are talking about this

ضاحي خلفان تميم
@Dhahi_Khalfan

سلحوا 6000 مليشيات واعطوهم سلاح
وهدوهم على قطر..

Translated from Arabic by Google

They armed 6,000 militias and gave them weapons and guided them to Qatar.

2:01 AM · 4/5/19 · Twitter for Android

**50** Retweets **156** Likes

**Dhahi Khalfan Tamim**
@Dhahi_Khalfan

Arm 6,000 militias, give them weapons and send them to Qatar …

Translated from Arabic by Google

They armed 6,000 militias and gave them weapons and guided them to Qatar.

2:01 AM · 4/5/19 · Twitter for Android

**50** Retweets **156** Likes

ضاحي خلفان تميم
@Dhahi_Khalfan

هل تريد قطر ان ترى مليشيات تجوب شوارعها.

Translated from Arabic by Google

Qatar wants to see militias roaming its streets.

2:00 AM · 4/5/19 · Twitter for Android

**28** Retweets **86** Likes

**Dhahi Khalfan Tamim**
@Dhahi_Khalfan

Does Qatar want to see militias roaming its streets?

Translated from Arabic by Google

Qatar wants to see militias roaming its streets.

2:00 AM · 4/5/19 · Twitter for Android

**28** Retweets **86** Likes

حمد المزروعي
@uae_3G | 298,316 followers

... الخطوط الجوية البقرية تبيع العفش 😂

240 257

02:44, 16 Aug 2018 · View on Twitter · Twitter for iPhone

Hamad Al Mazrouei ✓
@uae_3G | 298,316 followers

Al Baqareyeh[1] Airway is selling its furniture 😂

[clipped ad not related to tweet]

**Miscellaneous**

Used office furniture and electrical appliances for sale

Qatar Airways announces the sale of used furniture and electrical appliances.

To inspect and for details call 065679444

[clipped ad: Greater Amman Municipality, unrelated to tweet]

240 257

02:44, 16 Aug 2018 · View on Twitter · Twitter for iPhone

[1] Translator's Note: Baqareyeh literally translates as "bovine". It sounds similar to "Qatareyeh" and is meant as an insult.

Hamad Al Mazrouei @HMazrouei @HMazrouei · Sep 14

The fastest way to spread lies is to use carrier pigeons… the telephone... the internet… However, if you are in a hurry, use Al Jazeera Channel.

1 5 8

---

Hamad Al Mazrouei @HMazrouei @HMazrouei · Sep 14

If the devil fails to infiltrate anywhere, he sends a member of the Muslim Brotherhood movement.

1

**Video on CD-ROM located at the back cover of last volume.**

**Hamad Al-Mazrouei**
@uae_3G

Follow

The moment the “Sammad” strikes. Here is the precision of the bombardment, Qatar …
[video clip]

Hamad Al Mazrouei Retweeted

معيض الرفدي @Dsa1333 · Sep 19

اذا سقط نظام #الحمدين في #قطر نذراً علي نحر 30 من الإبل لوجة الله تعالى ..
بمناسبة إنقاذ العالم من القيادة الإرهابية #الجزيره_تستضيف_المرتزقه

224 328 327

Hamad Al Mazrouei Retweeted

Hamad Al Mazrouei Retweeted

Mueedh Al Rafdi @Dsa1333 · Sep 19

If the regime of #The_Two_Hamads falls in #Qatar, I vow to slaughter 30 camels and donate them for God's sake…

On the occasion of saving the world from the terrorist leadership #Al_Jazeera_hosts_mercenaries.

224 328 327

Hamad Al Mazrouei Retweeted

Hamad Al Mazrouei Retweeted

**قطرية اصيلة** @H21Qatar · Sep 29

تم تنزيل اسم دولة قطر من الألواح علي طريق الاحساء #سلوى أستعداد

لـ أستبدالها بعبارة جزيرة قطر ..!

تفهم ماتفهم مشكلتك

#حفار_المجد
#جزيرة_شرق_سلوى

Hamad Al Mazrouei Retweeted

قطرية أصيلة [Authentic Qatari] @H21Qatar - Sep 29

The name of Qatar has been taken down from the signs on Al-Ahsa #Salwa Highway in preparation to replace it with the phrase "Al Jazeera of Qatar"!

Whether you get this or not, it’s your problem.

#Hafar Al Majd

#East_Salwa_Island

**Video on CD-ROM located at the back cover of last volume.**

Title of Clip [02 - 12-17-2018 4-35-35 PM_ tweet_Dec 10_AR]:

| **Time Stamp [00:00]** | **Speaker** | **Transcription [Arabic]** | **Translation [English]** |
|---|---|---|---|
| | [On screen] | حمد المزروعي<br>أبناء زايد<br>لحظه وصول مندوب قطر امس في القمة. | Hamad Al Mazroui<br>Sons of Zayed<br>The moment Qatar representative arrived at the summit yesterday |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

**Hamad Al Mazroui** ✓@uae_3G - Jan 18

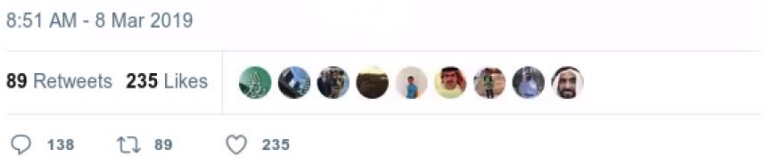
The number of first-class original Qatari nationals is 100,000 and there are 100,000 from the second class, according to their passports and citizenships. This is why the idea of elections has been postponed several times despite Hamad Bin Khalifa and his son's promises; the number is small and they do not want to expand the elections to the second class.

284 279 503

**Hamad Al Mazroui**

@uae_3G

There is not a single Qatari at Dubai Mall today 😂 ...



"Every dollar spent in Harrods is contributing to the deaths of innocent people," wrote Sultan Ali Rashed Lootah, an Emirati diplomat from Dubai, asking users to not "stand with the terrorist state, stand with us by boycotting Harrods".

Every dollar spent at Harrods contributes to the death of innocent people… Do not stand with the terrorist state… Stand with us and #boycott_the_Qatari_Harrods

"Every dollar spent in Harrods is contributing to the deaths of innocent people," wrote Sultan Ali Rashed Lootah, an Emirati diplomat from Dubai, asking users to not "stand with the terrorist state, stand with us by boycotting Harrods".

Caricature

## #Caricature_Ittihad

October 27, 2018 – 08:57 PM

**Video on CD-ROM located at the back cover of last volume.**

| (Tweet (Arabic | (Tweet (English |
|---|---|
| | @skynewsarabia<br>#SuspiciousDeals … The financing of terrorists, kidnapping, hostage-taking, and secret deals all reveal Qatar's role in shifting the course of the Syrian conflict #SkyDocumentaries<br>"The Subversive project in the Middle East (Part 3)…" #SuspiciousDeals<br>skynewsarabia.com/video/1190420-3 |

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [English] |
|---|---|---|---|
| 00:00-00:03 | Narrator | عمليات خطفٍ واحتجاز رهائن | Kidnappings, hostage-taking, |
| 00:04-00:07 | Narrator | وتبادل معتقلين وصفقاتٌ سرية عديدة | prisoner exchanges, and numerous secret deals |
| 00:08-00:10 | Narrator | رافقت تحولات الحرب في سوريا | have accompanied the shifts in the war in Syria, |
| 00:11-00:16 | Narrator | وتركت آثارها عميقًا على مسارات الصراع وعلى حياة السوريين. | having a profound impact on the development of the conflict and on the lives of Syrians. |
| 00:17-00:22 | Narrator | فما حقيقة الأدوار التي لعبتها الأطراف الخارجية في تلك الصفقات؟ | What roles did the external parties play in these deals? |
| 00:23-00:26 | Narrator | وما هو دور حكام قطر وحلفائهم فيها؟ | What is the role of Qatar's rulers and their allies in said deals? |
| 00:27-00:30 | Narrator | وكيف حولت مجرى الصراع؟ | And how did they change the course of the conflict? |
| 00:27-end | Title on screen | **الصفقات المشبوهة** | **Suspicious Deals** |

**Video on CD-ROM located at the back cover of last volume.**

Title of Clip [04 - @qatari2209 Abu Dhabi police chasing Omani supporters and seized a Qatari flag_AR]:

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [English] |
|---|---|---|---|
| | [On screen] | الكولونيل<br>الجمهور العماني الشقيق ورقم مطارات الشرطه لهم لاحتفالهم بفوز المنتخب القطري ورفع علم دولة قطر إلا أنهم رفضوا التوقف وأصروا على الاحتفال ورفع علم دولة قطر في عقر دار #أعيال_النعاشة كفووو عليكم يا أعيال قابوس وهذه مو غريبه عليكم. | The colonel:<br>The neighboring Omani people refused to stop and insisted on celebrating even though the police is chasing them for raising the Qatari flag. They did so intransigently, right at the home of the sons of Na'asha.<br>Kudos to you sons of Qaboos, that's not new to you. |
| 00:03 | Crowd | [inaudible] | |
| 00:11 | [On screen] | الشرطه تبي توقفهم | Police wants to stop them |
| 00:34 | Unidentified Male | [inaudible] | |
| 00:41 | Unidentified Male | هذا علم قطر | This is the Qatari Flag |

**Emir of Arab (أمير)** @emirofarab · 3h

With all the hype of UAE losing the @afcasiancup semi finals against #Qatar, it seems that the #UAE can put #blockade on everything but their goal.
The loss, understandably wasn't taken well by Emirati fans as they hurled shoes & bottles at the Qatari players @FIFAcom
**#UAEvsQatar**

1

**Middle East Monitor** @MiddleEastMnt · 3h

WATCH: Emirati fans were NOT happy about the Qatari 4-0 win, so unleashed a rain of shoes and fury... 😬 👞 #UAEvsQatar #AsiaCup2019

**UAE fans throw shoes at Qatari players**

Asian Cup 2019: Fans throw shoes at Qatari footballers as they score against UAE...

middleeastmonitor.com

4 1

Index No. 049

Mohd @mBinAmmar · 6h
#UAEvsQatar
gettyimages
Zhizhao Wu

**Video on CD-ROM located at the back cover of last volume.**

**Saqib Ali Hameed** @SaqibAliHameed1 · 9h

#Qatar beat hosts #UAE 4-0 to reach the final of the #AsianCup2019 in a game that witnessed UAE fans throwing shoes at opposition players

**#UAEvsQatar**

**Asian Cup: Qatar beat UAE 4-0 as hosts' fans throw shoes at players**

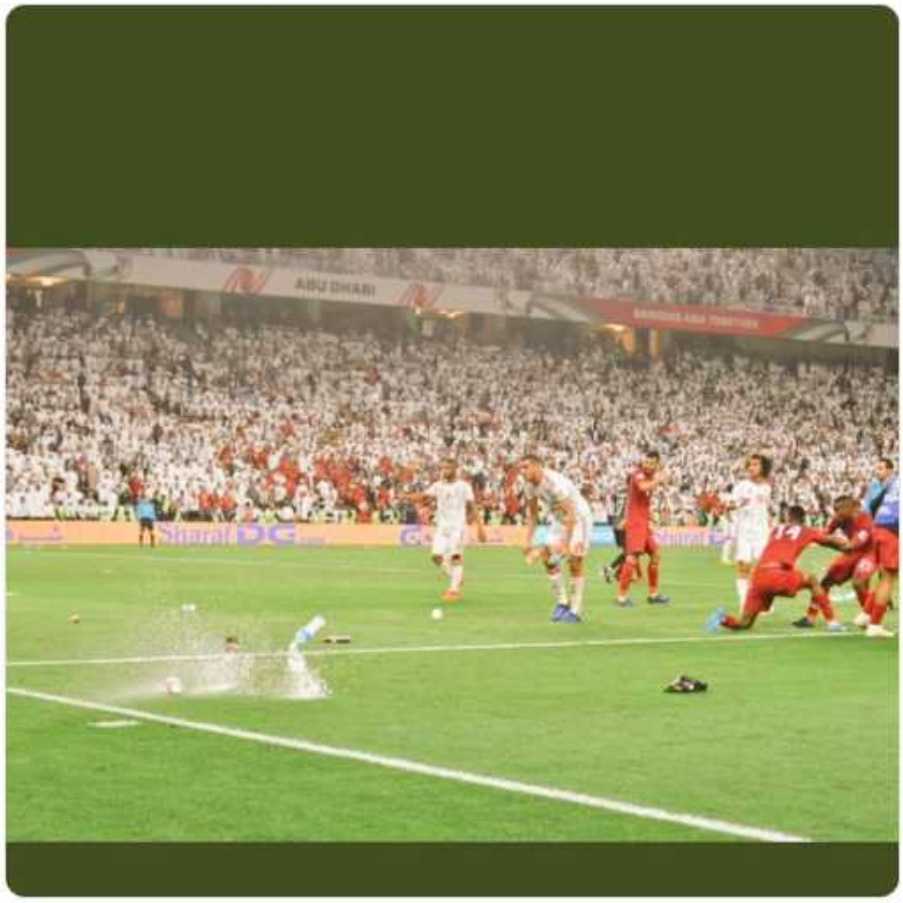
United Arab Emirates fans throw shoes at Qatar players during their side's 4-0 defeat in the semi-final of the Asian Cup.

bbc.com

1

**Ziad Ahmed** @Ziadh25 · 21h

Qatar is about to win the Asian cup semi finals with no fans at the field, man this gonna be hard for UAE #AsianCup2019 #semifinal #Qatar #UAE **#UAEvsQatar** #Qatar #AsianCup2019 #4vs0




1 2

حسن سجواني Hassan Sajwani @HSajwanization · 5 Jun 2017
Before the airspace closes, the last flight of @qatarairways from #Dubai to #Doha is about to land in #Qatar in 10 min #QR1021 #QatarCrisis
Al Jubayl
Dammam
Manama
Persian Gulf
DOHA (DOH)
QR1021
QATAR
UNITED ARAB EMIRATES
QATAR
سالم بن تميم الريامي and Saeed Al Ali
1
15
10

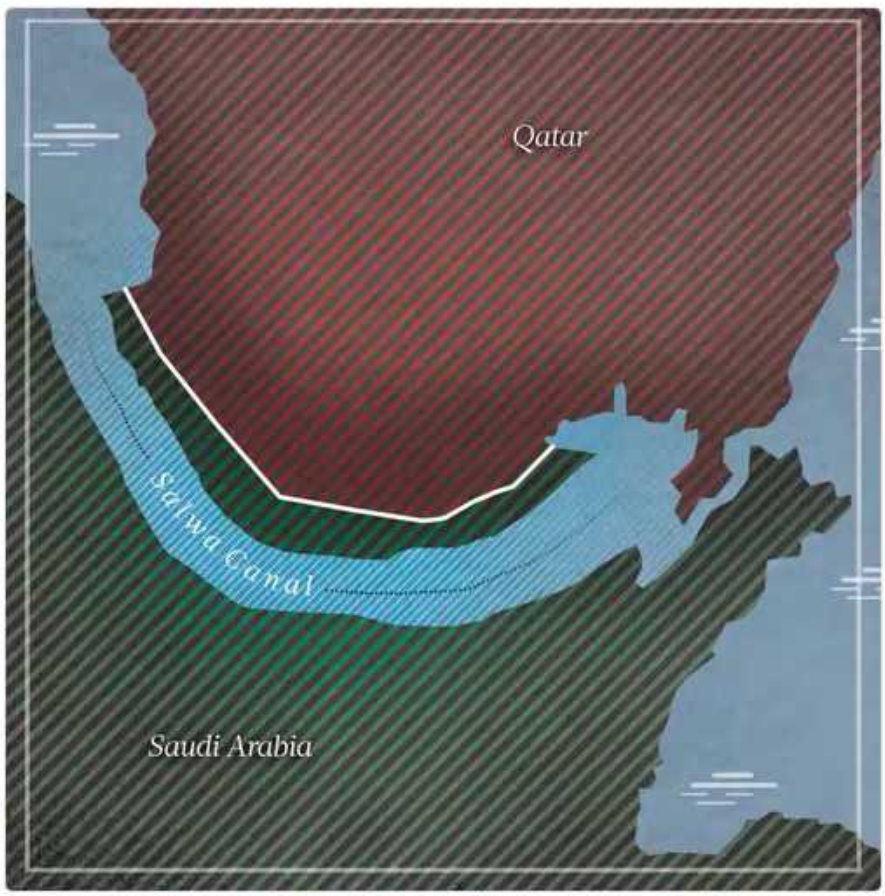
حسن سجواني Hassan Sajwani
@HSajwanization
Follow
This map shows how much trouble #QatarAirways may be in. #QatarCrisis #Qatar read.bi/2ruelEC
QATAR
4:24 PM - 5 Jun 2017
33 Retweets 35 Likes
2
33
35

حسن سجواني Hassan Sajwani

@HSajwanization

Follow

" #SalwaCanal Arab quartet's silent message to #Qatar " - my latest piece in @gulf_news on how #SaudiArabia will turn #Qatar from peninsula to an #island, another #Qatari failure as @AnwarGargash said #جزيرة_شرق_سلوى #قناة_سلوى_البحرية #QatarCrisis gulfnews.com/opinion/thinke …




11:01 AM - 8 Jul 2018 from Dubai, United Arab Emirates

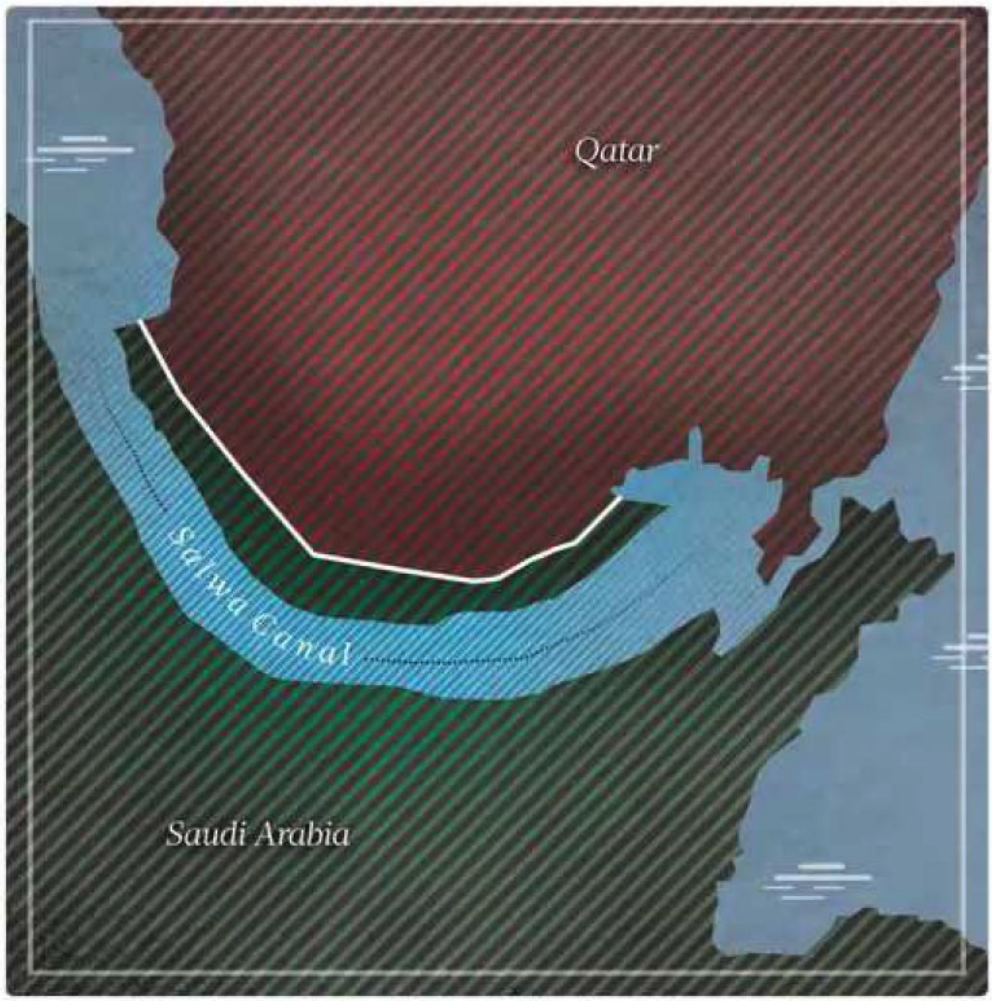
حسن سجواني Hassan Sajwani

@HSajwanization

Follow

"#SalwaCanal Arab quartet's silent message to #Qatar"-my latest piece in @gulf_news on #SaudiArabia will turn #Qatar from peninsula to an #island, another #Qatari failure as @AnwarGargash said #East_Salwa_island #Bahraini_Salwa_Canal #QatarCrisis

Gulfnews.com/opinion.thinke...




11:01 AM - 8 Jul 2018 from Dubai, United Arab Emirates

Hassan Sajwani حسن سجواني @HSajwanization · Oct 20
#QatariRegime has literally paralyzed its nationals, who cannot even protect themselves nor run their day to day life without a subcontinent and blue-collar worker, but #QatarFundsTerror and #MuslimBrotherhood!
#قطر_تغرق #الدوحة_تغرق
0:13
24.5K views

Hassan Sajwani @HSaiwanization · Oct 20

#QatariRegime has literally paralyzed its nationals, who cannot even protect themselves nor run their day to day life without a subcontinent and blue-collar worker, but #QatarFundsTerror and #MuslimBrotherhood!

#Qatar_is_drowning #Doha_is_drowning

Retweeted Hassan Sajwani حسن سجواني

**David Reaboi** @davereaboi · Oct 20

Money for terrorism, not for plumbing. #Qatar

> **Hassan Sajwani حسن سجواني** @HSajwanization
>
> Now this is serious - @NorthwesternU #Qatar campus building #Doha is in serious flooding (brand new building), while #Qatar regime is funding #MuslimBrotherhood and #ISIS they've lost control of infrastructure.
>
> Show this thread

2 41 39

Hassan Sajwani حسن سجواني @HSajwanization · 19h
#AbuDhabi's @oloumaldar covering the flooded roads and infrastructure of #Doha.
علوم الدار @oloumaldar
#قطر.. النظام وجه أموال البلاد لدعم الإرهاب بدلاً من إنشاء بنية تحتية
#علوم_الدار
قطر
ناشطون ينشرون صوراً صادمة لغرق شوارع الدوحة بمياه الأمطار
0:58
4.6K views
2
2
2

Hassan Sajwani @HSajwanization · 19h
#AbuDhabi's @oloumaldar covering the flooded roads and infrastructure of #Doha
Oloumaldar @Oloumaldar
#Qatar… The regime has directed its funds to supporting terrorism instead of building infrastructure.
#Oloum_Al_Dar
Qatar
Activists publish shocking photos of the flooding of the streets of Doha with rainwater
Abu Dhabi
…leasing them to Israel in accordance with the Peace Accord | Israel's Prime Minister: We will negotiate…
0:58
4.6K views

**Video on CD-ROM located at the back cover of last volume.**

Title of Clip [06 - Ali Nuaimi May 23 2017 posted the fake news that appeared on Qatar TV_AR]:

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [English] |
|---|---|---|---|
| | [On screen] | د. علي النعيمي<br>شريط التلفزيون القطري ينشر #تصريحات_تميم في الشريط أسفل الشاشة فهل تم اختراق التلفزيون القطري أيضا؟<br>التلفزيون الرسمي القطري يبث تصريحات تميم.<br>حضرة صاحب السمو الشيخ تميم بن حمد ال ثاني أمير البلاد المفدى ما نتعرض له قطرس حملة ظالمة تزامنت مع زيارة الرئيس الأمريكي إلى المنطقة وتستهدف ربطها بالإرهاب وتشويه جهودها في تحقيق الاستقرار معروفة الأسباب والدوافع وسنلاحق القائمين عليها من دول ومنظمات حماية للدور الرائد لقطر إقليميا ودوليا وبما يحفظ كرامتها وكرامة شعبها.<br>أمير البلاد المفدى الخطر الحقيقي هو سلوك بعض الحكومات التي سببت الإرهاب بتبنيها لنسخة متطرفة من الإسلام لا تمثل حقيقته السمحة.<br>أمير البلاد المفدى الخطر الحقيقي هو سلوك بعض الحكومات التي سببت الإرهاب بتبنيها لنسخة متطرفة من الإسلام. | Dr. Ali Al Nuaimi<br>The news line in Qatar TV is broadcasting #Tamim's_Statements at the bottom of the screen, has Qatar TV been hacked too?<br>His Highness Sheikh Tamim; son of Hamad Al Thani, the prince: What Qatar is facing is an unfair campaign that coincided with the American president's visit to the region. It aimed at linking it to terrorism and distorting its efforts to achieve stability. The causes and motives are known, we will chase those who incited them whether they are driven by countries or other organizations to protect the leading role of Qatar regionally and internationally, in a way that preserves its dignity and the dignity of its people.<br>The prince: The real danger lies in the behavior of some governments that caused terrorism by adopting an extreme version of Islam that does not represent the peaceful truth of Islam.<br>The prince: The real danger lies in the behavior of some governments that caused terrorism by adopting an extreme version of Islam. |
| 00:02 | Unidentified | إلى التفاصيل. شهد حضرة | To details: His Highness the |

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [English] |
|---|---|---|---|
| | Female | صاحب السمو الشيخ تميم بن حمد آل ثاني أمير البلاد المفدى حفل تخريج الدفعة الثامنة من مجندي الخدمة الوطنية في ميدان معسكر الشمال. حضر الحفل عدد من أصحاب السعادة الوزراء وكبار المسؤولين العسكريين وقادة القوات المسلحة ووزارة الداخلية والضباط وضباط الصف وأولياء أمور منتسبي الخدمة الوطنية. وكرّم حضرة صاحب السمو أمير البلاد المفدى المتميزين الأوائل من مجندي الكتيبة الأولى حملة الشهادة الجامعية ومجندي الكتيبة الثانية حملة الشهادة الثانوية. | prince Sheikh Tamim; son Hamad Al Thani attended the graduation ceremony of the eighth group of national service recruits in the square of North Camp. The ceremony was attended by high-profile dignitaries including ministers, senior military officials, commanders of the armed forces, the Ministry of the Interior, officers, non-commissioned officers and parents of national service personnel. His Highness the prince honored the first distinguished recruits from the 1st Battalion recruits with college degrees and the 2nd battalion recruits with high school degrees. |
| 00:43 | | [inaudible] | |
| 01:16 | Unidentified Female | هذا وقد ألقى العميد الركن سعيد بن حمد النعيمي رئيس هيئة الخدمة الوطنية كلمة أكد فيها أن ما نشهده اليوم هو ثمرة من ثمار دعم سمو الأمير المفدى المتواصل لمشاريع. | In addition, Brigadier General Saeed Bin Hamad Al Nuaimi, Chairman of the National Service Authority, delivered a speech in which he affirmed that what we are seeing today is the result of His Highness the Prince's continuing support for the projects. |

**Dr. Ali Al Noaimi** @Dralnoami

Certified individual Twitter accounts are restored within minutes, so how then in the case of an official government entity? There will be a lot of fake news to prove that #Tamim's_statements are fake.

**Video on CD-ROM located at the back cover of last volume.**

Title of Clip [07 - Majed Al-Raeissi May 28 2017 Tamim Statements AR]:

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [language to] |
|---|---|---|---|
| | [On screen] | ماجد الرئيسي<br>مراجعة لـ #تصريحات_تميم وما الذي يقوله الواقع! | Majed Al Raeesi<br>Review of #Tamim's_Statements and examining them in realistic terms |
| 00:00 | Majed Al Raeissi | المهمة يكفي التصريح ومن شوف على الواقع كيف هل هم كذابين ولا كذابين؟ نبدأ أول شي بالتصريح ليقول في تميم إن نحن ما نعتبر ايران كدولة عدوة وطربتنا علاقات كبيرة وياهم نفترض [inaudible]. الواقع يقول ان في 2007 صارت القمة الخليجية في الدوحة واستضافت قطر ايران كضيف شرف لهذه القمة. والواقع بعد يقول ان قطر ابرمت اتفاقية عسكرية امنية مع ايران في 2015 عن قريب من سنتين هذه النقطة الأولى. والواقع بعد يقول ان وزير الخارجية القطري اجتمع مع قاسم سليمان قبل قمة الرياض في بغداد. شو سوى؟ وبعد هذا الاجتماع اللي حصل بينهم شفنا ان الاعلام المحسوب على قطر حاول انه ينتقص من قمة الرياض والنتائج اللي ترتبت عليه. والواقع بعد يقول ان تميم بالأمس أجرى اتصال هاتفي مع الروحاني الرئيس الإيراني وهنأه بمناسبة الشهر الفضيل. ليش ما اتصل للملك ولّا ما رد عليه. التصريح الثاني تميم يقول ان قاعدة العديد لحماية قطر من الدول المجاورة. خلينا نفترض ان هذا التصريح مفبرك. خلينا شوف شو بقول الواقع. الواقع يقول ان الدول المجاورة لقطر هم السعودية والبحرين والامارات. زين. أي دولة هي مجاورة بتشكل خطورة على قطر؟<br><br>نرجع للنقطة الأولى أن قطر | The important thing is to examine the statement, so that we can decide, on the grounds, if they are liars, or in fact, crooks?<br>We will start with the first statement. Tamim says that we do not consider Iran as a foe and we have strong relationship with Iran. Let's assume [inaudible]. As a matter of fact, in 2007, there was a Gulf Summit in Doha and Qatar hosted Iran as an honorary guest for that summit. Again, in fact, Qatar recently signed a security military agreement with Iran in 2015, which was two years ago. That's the first point. Reality also says that the Qatari Minister of foreign affairs met with Qassim Soliman before the Riyadh Summit in Baghdad, so what did he do? After this meeting between them, we saw that the media outlets based in Qatar tried to detract from the Riyadh summit and the results that came out from it. Reality also says that Tamim had called the Iranian President Ali Rohani and congratulated him on the eve of the Holy month. Why didn't he call the king? Or did he not answer?<br>In the second Statement Tamim says that Al Udeid Air Base is there to protect Qatar from neighboring countries. Let's assume that this statement is fabricated. Let's see what the reality says. The reality is that neighboring countries of Qatar are Saudi Arabia, Bahrain and the UAE. Ok? Which county is considered to be posing a threat to Qatar?<br><br>Let's go back to the first point, that |

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [language to] |
|---|---|---|---|
| | | ابرمت اتفاقية عسكرية مع ايران. معناها الدول اللي تشكل خطورة على قطر حسب التميم هم الدول الثلاثة. التصريح الثالث اللي يقول فيه تميم ان حزب الله حزب مقاومة. نفترض انه مفبرك. زين. شو يقول الواقع؟ الواقع يقول ان الامارات والسعودية مصنفين حزب الله كمنظمة إرهابية طيب ليه يا قطر ليش ما تصنفون كمنظمة إرهابية تشوفيها كمقاومة؟ فعلا واقع. تصريحات تميم، أن تميم يقول ان الامارات والبحرين ومصر لهم سياسات مناوءة لقطر يعني نحن ضد قطر. والواقع يقول ما دام هذه الدول الثلاثة تعمل على مكافحة الإرهاب معناتها ان ما في دولة متضررة الّا الدولة لتدعم الاهاب، إنت يا قطر. فا بسكم كذب وبلاش كذب يا قطر حتى مسيلم الكذاب ما براضي يطلع وسى انتم قدامكم موجودين وحتى في النسب تكذبون. | Qatar had a Military agreement with Iran. That means that the countries that are a danger to Qatar, according to Tamim, are the three countries named above. The third statement is where Tamim says that Hezbollah is a resistance party. Let's assume it's fabricated, ok? What does reality say? Reality says that UAE and Saudi Arabia consider Hezbollah as a terrorist party, then why don't you Qatar, consider them as terrorist party, and you see them as a symbol of resistance? That in fact is reality. Tamim says that UAE, Bahrain, and Egypt have policies against Qatar, which means, we are against Qatar. Reality says that as long as these three countries are working to fight terrorism, which means that no other country would be harmed except the one supporting terrorism, you Qatar. So, stop lying and do not lie Qatar, even Musaylimah the liar wouldn't want to come out and lie when you're around. You even lie about your Descent. |

ماجد الرئيسي @majedalraeesi1 · Nov 2
أدركت #قطر أنها لن تستفيد من حملتها ضد #السعودية فعادت إلى بكائياتها في المنابر الدولية بعد أن تعنترت قبل أسبوع أما شعبها ، تبقى الاسود أسود و الكلاب كلاب
72
2.0K
1.6K

Majed Al-Raeesi @majedalraeesi1 · Nov 2
#Qatar has realized that it will not benefit from its campaign against #Saudi_Arabia, so it resorted to its weeping at the international arenas after one week of bullying. As for its people, lions will always remain lions and dogs will remain dogs.
72
2.0K
1.6K

عبدالله جمعة البلوشي Retweeted
د. علي النعيمي @Dralnoaimi · Nov 5
#الإمارات_تستثمر_في_الوطن_والمواطن و الإنجازات الحالية و المشاريع المستقبلية تؤكد ذلك بينما يستثمر النظام القطري في دعم الجماعات الإرهابية و تمويلها أو شراء المواقف السياسية لحماية الإرهابين و داعميهم
9
141
143
Show this thread

Abdulla Jumaa Al Baloushi Retweeted
Dr. Ali Al Nouaimi @Dralnoaimi · Nov 5
#UAE_invests_in_the_nation_and_its_nationals. The current achievements and future projects confirm this, while the Qatari regime invests in supporting and financing terrorist groups or buying political positions to protect and harbor terrorists.
9
141
143
Show this thread

عبدالله جمعة البلوشي Retweeted

**خالد بن ضحي** @KH_KDK · Dec 17

على شعب #قطر التفكير جلياً فيما آلت اليه اوضاع الشعب القطري بسبب السياسات العدائيه التي تقوم بها الحكومة القطرية ..

1- عزلة الشعب القطري

2- التصاق كلمة الارهاب بقطر

3- التحالف القطري مع المجموعات و الكيانات الارهابية

9 1.5K 501

Show this thread

عبدالله جمعة البلوشي Retweeted

**خالد بن ضحي** @KH_KDK · Dec 17

يبدأ الانسان العاقل و المتزن بالاحتفال بعيد بلاده بذكر تاريخه المشرف الا في #قطر تبدأ حكومة قطر احتفالاتها بالاساءه لـ #زايد الرمز العربي الذي شهد له بالوفاء و الحب للجميع رحمه الله ، فعلاً حكومة قطر اصبحت هزيله وتعيش في وهم وشتات ..

3 1.5K 487

Show this thread

عبدالله جمعة البلوشي Retweeted

**خالد بن ضحي** @KH_KDK · Dec 17

#قطر اختطفها #تنظيم_الحمدين و تنظيم #الاخوان من شعب قطر ..

وعلى العقلاء ادراك ان لا مستقبل لأبنائهم ان استمرت الاوضاع على ماهي عليه .

2 1.6K 482

Show this thread

Abdulla Jumaa Al Baloushi Retweeted

**Khalid Bin Dhahi** ✓@KH_KDK - Dec 17

The people of #Qatar must give serious thought to the situation of the Qatari people due to the hostile policies adopted by the Qatari government of Qatar…

1- Isolation of the Qatari people
2- Stigma of terrorism attached to Qatar
3- Qatar's alliance with terrorist groups and entities

---

Abdulla Jumaa Al Baloushi Retweeted

**Khalid Bin Dhahi** @KH_KDK - Dec 17

A rational person begins to celebrate his birthday by remembering his honorable history. Except in #Qatar, the government of Qatar begins its celebrations insulting #Zayed, the Arab icon whose loyalty and love has been witnessed by everybody, may God rest his soul. The government of Qatar has become weak and lives in delusion and incoherence.

---

Abdulla Jumaa Al Baloushi Retweeted

**Khalid Bin Dhahi** @KH_KDK - Dec 17

#Qatar has been hijacked by the #Two_Hamads_Organization and the #Muslim_Brotherhood Organization from the people of Qatar…
Rational people must realize that there will be no future for their children if the status quo persists.

Abdullah Jumaa Al Baloushi Retweeted

Saif Bin Dhehai @saifmdalkaabi · 4h

The people of Qatar do only understand obscene words and lowness... I hope tweets will be focused on attacking them because the best defense is to attack them, Tamim, his father, and the mother of wickedness.

#Mouzah_the_mother_of_wickedness

#Qatar

#Qatarael

You are not worth a shoe of one of our children… So don't dream about Al Falahi and his children…

#All_but_Zayed

1 12 3

Abdulla Jumaa Al Baloushi Retweeted

**Ali Leytaim** @Alileytaim - Dec 25

It would be better for #Qatar to call upon its terrorist regime and medial political mercenaries of all kinds to stop abusing all of humankind, for the world has had enough of their terrorism, and this is the real insult to the peoples!!

As for dismissively praying that he would stop using verbal abuse, this simply reflects the value of the person who utter them. As for us, we don't pay attention to that at all!

**Almajliss** ✓
@Almajlliss

Qatar calls on its nationals to refrain from abusing and reciprocating and to refrain from attacking the icons and peoples of other countries through the different social media websites.

ALI ALHAMMADI @Hamm... · 11 د
أكثر شيء أتمناه الآن هو قصف قطر حتى
تُسوى مبانيها بالأرض
١٠
٥
٤
zayed❤️
@zayedAlemarat
ردًا على @HammadiAD
اتمنى ذلك تُباد بمن فيها
٢٠١٧/١١/٢٥، ١٠:٢٥ م

ALI ALHAMMADI @HammadiAD11
The thing I wish most now is for Qatar to be bombed so that its buildings are leveled to the ground.
10
5
4
zayed❤️
@zayedAlemarat
In response to @HammadiAD
I wish that as well, may it perish with those in it
11/25/2017, 10:25 p.m.

ALI ALHAMMADI
@HammadiAD
تصبحون على دمار قطر وارتياح العالم منها
ومن شرها 🌹 zzZ
3
11
2

ALI ALHAMMADI
@HammadiAD
May you wake up to the destruction of Qatar, so
that the world may rest from it and its evil 🌹 zzZ
3
11
2

ابو سعود
@MII619339815
3 months ago
Replying to @saoud_k_althani
بوذياب الاماراتي
@Musabbeh7777
وضع حمير قطر في تويتر
0 0 0

Abu Saoud
@MII619339815
3 months ago
Replying to @saoud_k_althani
Bou Dhiyab Al-Imarati
@Musabbeh7777
The status of Qatar's donkeys on Twitter
0 0 0

عبدالله جمعة البلوشي Retweeted
حمود حمد الغبري @hamoodbinhamad · 20h
#Qatar does not work as respected governments work in clear ways, but always use twisted methods and tricks of fraud and deception to destroy the internal security of all countries, especially neighboring countries.
#qatar_fund_terrorist
#قطر_تهدد_أمن_بريطانيا
@theresa_may
13
3
Show this thread
عبدالله جمعة البلوشي Retweeted
حمود حمد الغبري @hamoodbinhamad · 20h
#qatar_fund_terrorist
#قطر_تهدد_أمن_بريطانيا
#قطر لا تعمل كما تعمل الحكومات بطرق واضحة بل تستخدم دائما الطرق الملتوية وحيل الغش والخداع لتدمير الأمن الداخلي لكل الدول وخاصة الدول التي تجاورها
@theresa_may
@sajidjavid
@GavinWilliamson
@BBCTimDonovan
1
19
4
Show this thread

Abdulla Jumaa Al-Baloushi Retweeted
Hamood Hamad Al-Ghabri @hamoodbinhamad • 20h
#Qatar does not work as respected governments work in clear ways, but always use twisted methods and tricks of fraud and deception to destroy the internal security of all countries, especially neighboring countries.
#qatar_fund_terrorist
#Qatar_threatens_the_security_of_Britain
@theresa_may
13
3
Show this thread
Abdulla Jumaa Al-Baloushi Retweeted
Hamood Hamad Al-Ghabri @hamoodbinhamad • 20h
#qatar_fund_terrorist
#Qatar_threatens_the_security_of_Britain
#Qatar does not work as respected governments work in clear ways, but always uses twisted methods and tricks of fraud and deception to destroy the internal security of all countries, especially its neighboring countries.
@theresa_may
@sajidjavid
@GavinWilliamson
@BBCTimDonovan
1
19
4
Show this thread

الصاعقـــه @UAEd9 · Jan 3
على القطريين في #قطر يفهمون انهم منبوذين وحلمهم لتنظيم #مونديال_قطر_2022 كل يوم وهو يتبخر بكل بساطه لأن العالم يعرف ان قطر هي الداعم للارهاب من قبل احداث سبتمبر حتى يومنا هذا
العربية @AlArabiya
أزمة بسبب تصريحات اليوسف عن رفض #الكويت مشاركة #قطر مونديال 2022 اعتراضا على الإسرائيليين والكحول
ara.tv/whmyn
1
4
8

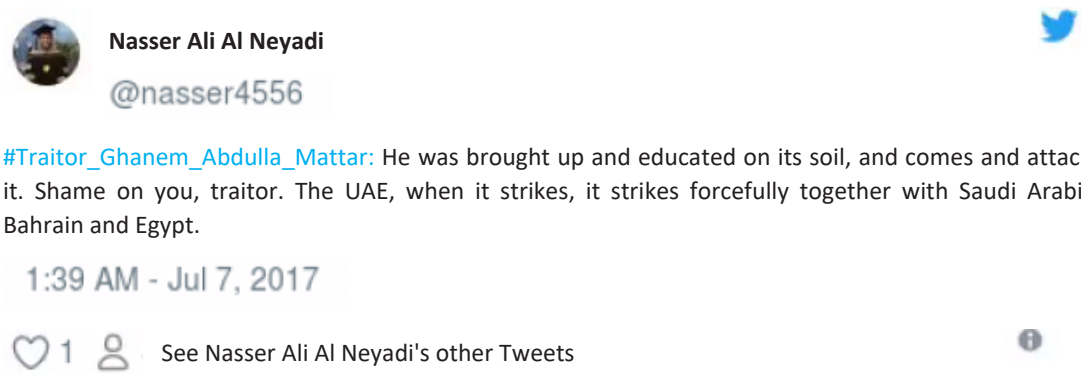
Al-Saeqa @UAEd9 · Jan 3
The Qataris in #Qatar must understand that they are ostracized and that their dream of organizing the #QatarWorldCup2020 will simply evaporate every day, because the world knows that Qatar supports terrorism since before the events of 9/11 until this day
Al-Arabiya @AlArabiya
Crisis because of the statements from Al-Yousef regarding #Kuwait refusing to participate in #QatarWorldCup2022 in objection to the Israelis and the alcohol
ara.tv/whmyn
1
4
8

ناصر علي النيادي
@nasser4556

#الخاين_غانم_عبدالله_مطر تربى على ترابها و تعلم و يأتي يتهجم عليها اتخسي يا الخاين الامارات ان ضربت ضربت بحزم مع السعودية و البحرين و مصر

1:39 AM - Jul 7, 2017

1 See ناصر علي النيادي's other Tweets



**Nasser Ali Al Neyadi**

@nasser4556

#Traitor_Ghanem_Abdulla_Mattar: He was brought up and educated on its soil, and comes and attacks it. Shame on you, traitor. The UAE, when it strikes, it strikes forcefully together with Saudi Arabia, Bahrain and Egypt.

1:39 AM - Jul 7, 2017

1 See Nasser Ali Al Neyadi's other Tweets

ناصر علي النيادي @nasser4556 · 6 Jul 2017

#الخاين_غانم_عبدالله_مطر تربى على ترابها و تعلم و يأتي يتهجم عليها اتخسي يا الخاين الامارات ان ضربت ضربت بحزم مع السعودية و البحرين و مصر

1

ناصر علي النيادي @nasser4556 · 6 Jul 2017

Replying to @watan_usa

يعله الحريق #الخاين_غانم_عبدالله_مطر

1

Nasser Ali Al Neyadi @nasser4556 - Jul 6, 2017

#Traitor_Ghanem_Abdulla_Mattar: He was brought up and educated on its soil and comes and attacks it. Shame on you, traitor. The UAE, when it strikes, it strikes forcefully together with Saudi Arabia, Bahrain, and Egypt.

1

Nasser Ali Al Neyadi @nasser4556 - Jul 6, 2017

Replying to @watan_usa

May the #Traitor_Ghanem_Abdulla_Mattar burn in hell

1

منى غريب @Mona_Ghareeb · 10 Jul 2017

Replying to @AmnestyAR

من أنتم لكي تطالبون بالعفو عنه! بيان النائب العام للدولةواضح بخصوص التعاطف مع #قطر ونحن مع حكومتنا في جميع قرارتها فلا تتدخلون فيما لايعنيكم

28 10 10

Tweet unavailable

منى غريب @Mona_Ghareeb · 10 Jul 2017

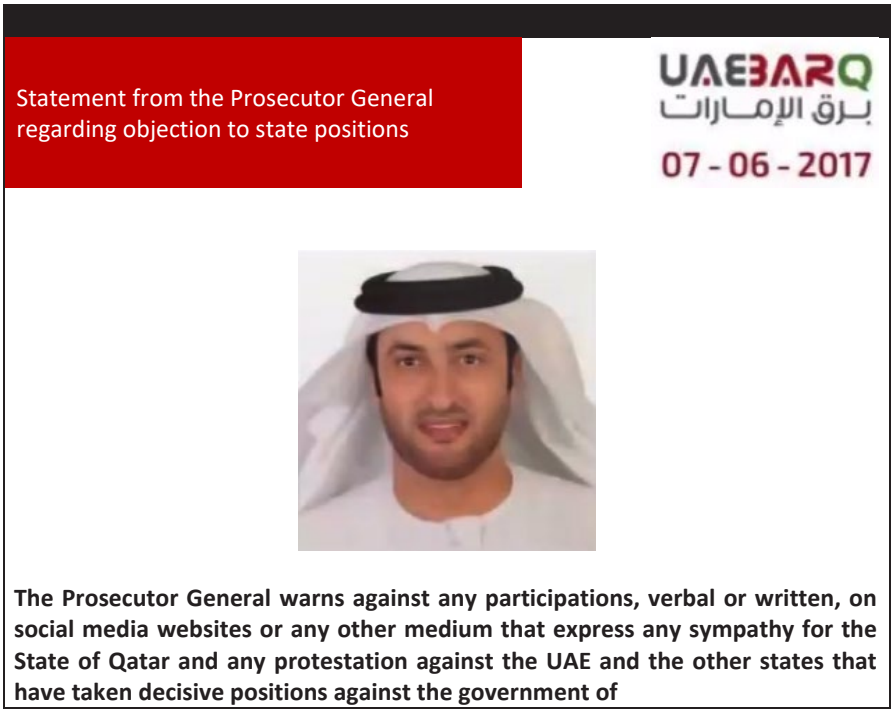
Replying to @dalal505Q @AmnestyAR

اقسم باللي رفع السموات انه لو حد من اخواني او اهلي وقف معارضاً لقرارت الدولة والله إني اسلمه بإيدي ..الولاء للوطن عملة صعبه على امثالكم

**Mona Ghareeb** 🇦🇪@Mona_Ghareeb - 10 Jul 2017

Replying to @AmenstyAR

Who are you to demand a pardon for him? The statement by the Public Prosecutor of the State is clear with respect to sympathizing with #Qatar. We stand by our government in all of its decisions, so don't interfere in something that is none of your business.




28 10 10

Tweet unavailable

**Mona Ghareeb** 🇦🇪@Mona_Ghareeb - 10 Jul 2017

Replying to @dalal505Q @AmenstyAR

I swear by He who Raised the Heavens that if one of my siblings or family stood against the decisions of the state, by God, I would turn him in myself… Loyalty to country is difficult for people like you

Taim Al Falasi Retweeted

**Ali Bin Tamim** @3litamim - Mar 28

Saudi Arabia and the UAE are working together, one heart beating with brotherhood. The faith in fate that they have between them irritates some and make them unable to sleep. There will come a day when #The_Two_Hamads_Organization will learn that it should have saided with the truth and apologized to those that it has conspired against, and know that this buffoon and his likes have led it to the roads to perdition. Tomorrow is coming.

**Jamal Rayan**

@Jamalrayyan

#Saudi_Arabia can never be Emirati. There will come a day when Saudi Arabia, with its great standing, prestige, and respect will apologize for its blockade of Qatar. There will come a day when it will regret being dragged by the UAE into trivialities, bickering, and follies at the expense of its sovereignty and national dignity. You will see. May God preserve Saudi Arabia and its people. ##Gulf

**Video on CD-ROM located at the back cover of last volume.**

Title of Clip [05 - al_Azy jan 27 2019 video showing the long lines of Emirati supporters AR]:

| Time Stamp [00:00] | Speaker | Transcription [Arabic] | Translation [English] |
|---|---|---|---|
| | [On screen] | العازي<br>هذا الحماس في نقاط توزرع التذاكر لمباراة منتخبنا الوطني رسالته واضحة<br>الثلاثاء<br>يوم للحمااااس<br>يوم للدفاااان<br>يوم الجلدددد<br>الكرة فوز وخسارة #نعم<br>لكن أقسم أنها لن تنمر بسلام<br>Welcome to the Hell<br>شوف يا الطاجيكي<br>@khalidjassem74<br>#بالروح_للنهائي_نروح #نخلص_معاً | El Aazy<br>This sense of enthusiasm at the ticket distribution points for our national team is a clear testament<br>Tuesday<br>Day for excitement<br>Day for burial<br>Day for patience<br>Soccer truly is either to win or to lose #yes But I swear it will not pass peacefully<br>Welcome to Hell<br>Take a look Aktajeeki<br>@khalidjassem74<br>#we'll go to finals with our souls #we'll finish together |
| 00:00 | Crowd | [inaudible]<br>(**Note:** Repeated) | |

خالد الرئيسي
@khalid__kfn
Follow
Replying to @uae_3G
المزروعي متى بيفتحون التأشيرة لبعض القطريات عشان
يشتغلون خدم في بيوتنا افضل عن الجنسيات الأخرى .
2:09 PM - 21 Aug 2018
2 Retweets 2 Likes
14
2
2

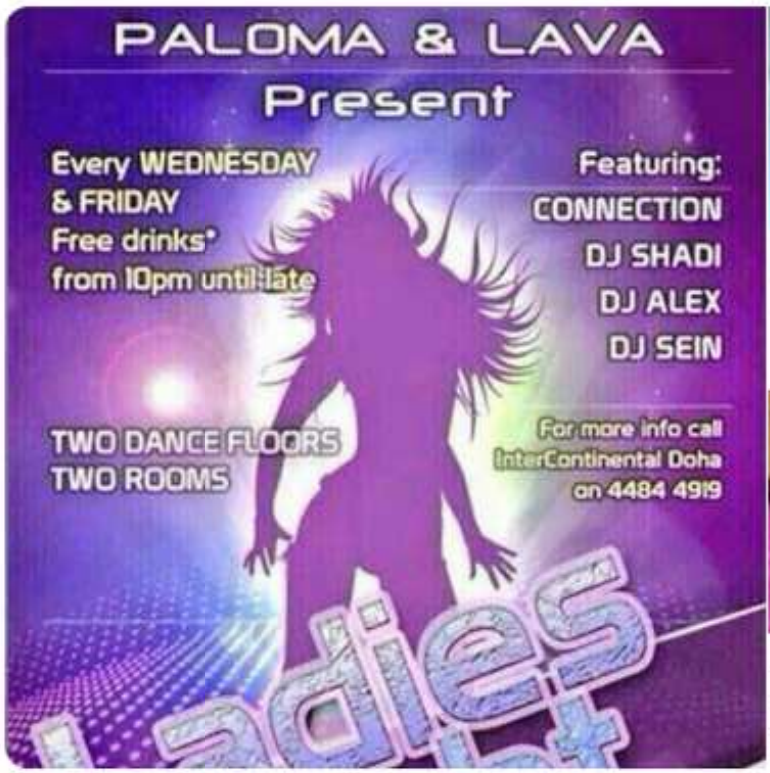
Khalid Al-Rayesi
@khalid_kfn
Follow
Replying to @uae_3G
Al-Mazrou'i, when will they give out visas to some Qatari women to work as servants at our homes? Better them than other nationalities.
2:09 PM - 21 Aug 2018
2 Retweets 2 Likes
14
2
2

**Nawal**
@AlhouliN

Follow

Replying to @M93750921 @Saroooonh445772 and 3 others

هذي قطريه يايه تدور رزقها في الامارات مثل باقي القطريات، بنات قطر ما لقو عندكم رجال و يو يدورون فالامارت.. دويلة قطر تعودت تربي رخاص



سارة المسعودي قطرية عمرها 26 عام ... مقيمة ...

ف سليمان المري مطلقة قطرية عمرها 27 سنة...

12:13 AM - 28 Dec 2017 from Ajman, United Arab Emirates

**1** Retweet **2** Likes

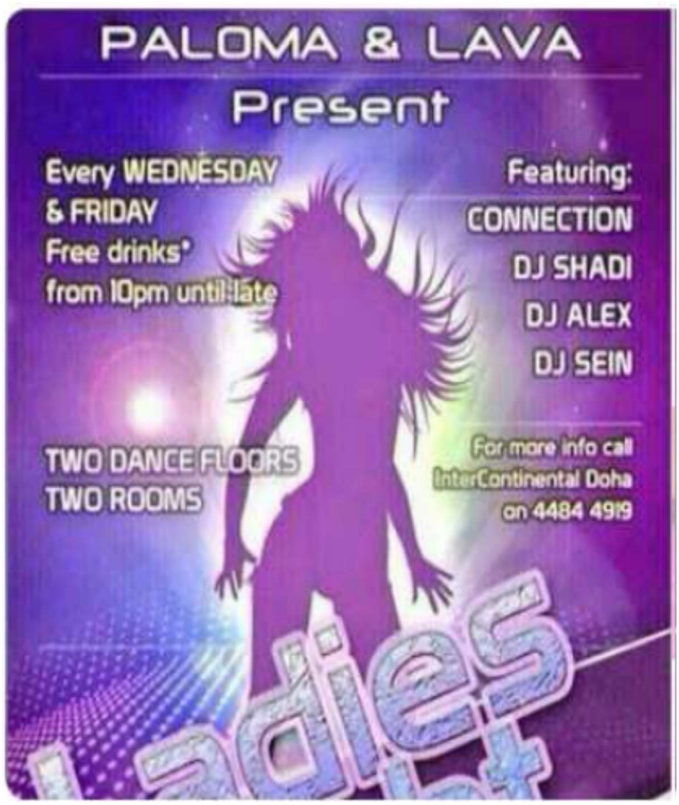
1 1 2

**Nawal**
@AlhouliN

Follow

Replying to @M93750921 @Saroooonh445772 and 3 others

Here is a Qatari girl coming to earn her living in the United Arab Emirates, just like other Qatari women. Qatari girls did not find any men in Qatar and came to look for them in the UAE. The small State of Qatar is used to raise "cheap" people.

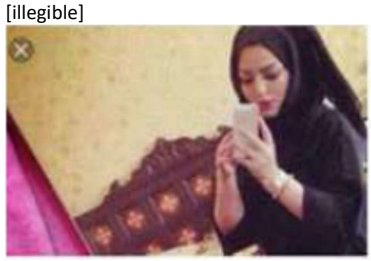



12:13 AM - 28 Dec 2017 from Ajman, United Arab Emirates

**1** Retweet **2** Likes

1 1 2

Sara Al-Masoudi Qatari, 26 years, resident
Sara Al-Masoudi Qatari, 26 years, resident of the UAE.
[illegible]



[illegible] Sulaiman Al-Marry, 27 year-old divorced, Qatari woman…
[illegible] Sulaiman Al-Marry, 27 year-old divorced, Qatari woman, resident of the UAE, looking for a man of the same age to marry her, in accordance to the Book of God and the Sunnah of His Messenger and who accepts to live with her. [illegible]

misho86elkady
@misho86elkady
Follow
Replying to @salmsalm134 @nsryyy and 3 others
القطرى عبارة عن الكائن خنزير او حلوف حيث يتميز الخنزير عن بقية الحيوانات بالدياثة وانعدام الذكورة..وجة الشبة مع القطرى تنعدم عندة الرجولة و الذكورة ... فلا يوجد ما يكفى من الرجال فى قطر فتستورد لة حكومتة رجال من تركيا و ايران ليحموا نسائة و أهل بيتة 😂😂😂😂😂😂
7:34 AM - 12 Jun 2018

misho86elkady
@misho86elkady
Follow
Replying to @salmsalm134 @nsryyy and 3 others
The Qatari is like a pig or a swine (wild boar). The pig is distinguished from other animals by the fact that it is a cuckold and lacks virility… The Qatari does not have any manhood or masculinity… There are not enough men in Qatar, so its government imports men for them from Turkey and Iran to protect their wives and families.
😂😂😂😂😂😂
7:34 AM - 12 Jun 2018

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STATE OF NEW YORK )
)
) ss
COUNTY OF NEW YORK )

**CERTIFICATION**

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Arabic into English of the attached Compendium of Social Media Posts.

David O. Rene

David Rene, Project Manager
Geotext Translations, Inc.

Sworn to and subscribed before me
this 6th day of April, 2019.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

**Annex 162**

Expert Report of Dr. J.E. Peterson,
dated 9 April 2019

# NATIONAL ORIGINS AND NATIONAL IDENTITY IN QATAR

**Dr. J.E. Peterson**

9 April 2019

**About the Author**

I am a historian and political scientist with expertise in Gulf politics and history, including state formation and tribes. My career began with a Ph.D. in international relations (focusing on Middle East Studies) from the Johns Hopkins University School of Advanced International Studies ("*SAIS*") in the United States and continued with teaching in other U.S. universities such as Bowdoin College, the College of William and Mary, and the University of Pennsylvania. I have also taught at Sciences Po in France, in addition to affiliations with several prominent think-tanks and lengthy employment by the Sultanate of Oman. I have published a dozen books on the Arabian Peninsula and Gulf, dealing with such subjects as contemporary history, state formation, political participation, and Gulf and national security. My most recent books are *The Emergence of the Gulf States: Studies in Modern History* (ed., 2016) and *Saudi Arabia Under Ibn Saud: Financial and Economic Foundations of the State* (2018). Three publications are particularly germane to this opinion: "Tribes and Politics in Eastern Arabia" (1977), "Qatar and the World: Branding for a Micro-State" (2006), and "Yemen: The Tribes, the State, and the Unravelling" (2016). My expertise has most recently been recognized by my participation in a workshop on tribe and the State in the Middle East at the London School of Economics (June 2018). A copy of my *curriculum vitae* is attached as Appendix A to this report.

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## I. Overview: The Roots of Qatari National Identity in the Context of State Formation in the Gulf

1. My opinion concerns the concepts of nation, national origin, nationalism, and national identity in the context of the historical evolution of Qatar. Key to understanding this process of evolution is the origins and persistence of a "Gulf ethos" centered on Arab tribal bedouin background, which formed the foundations of Qatari society. The existence of a tribal and mostly bedouin society centered on the Qatari peninsula served as the basis for the creation of a unique Qatari political entity and identity. While the emergence of a Qatari State, led by the Al Thani family, began only in the 19th century, the foundations of a national identity were present already. The impact of political and social change in both the pre-oil and early oil eras reinforced the sense of a distinct Qatari identity, which succeeding decades have strengthened and deepened.

2. The concepts of "national," "national origin," "nationality," and "nation-State," are new to the Gulf States, emerging around the beginning of the oil era in the mid-20th century.[1] Their impetus can be termed "legal" rather than "ideological" or "emotional," in that their emergence was the consequence of two roughly simultaneous impulses: the consolidation of a primary political role by certain tribes and shaykhly families and the impact of the British.[2] The term "national origin" does not possess a specific or authoritative scholarly definition but it is often used, as here, to refer to the historically-based commonality of members of a social and political community who perceive themselves as belonging to the same nation. In this sense, national origin underpins the

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[1] The term "Gulf States" as used here refers particularly to the four smaller member States of the Gulf Cooperation Council ("*GCC*"), that is, Kuwait, Bahrain, Qatar and the UAE. It may extend to Saudi Arabia and Oman on occasion.

[2] *See* J.E. Peterson, "Tribes and Politics in Eastern Arabia," 31 *Middle East Journal* (1977) 297, pp. 297–312.

notion of a nation, whose members or citizens share the same nationality. While citizenship or nationality in the legal or political sense confers Qatari legal identity, the sense of who is a Qatari and who is not extends well beyond formal citizenship. There has long existed in Qatar a common identity that, although blending into ties beyond the Qatar peninsula, created a sense of "us" versus "them." Over the course of the 20th century, this commonality gradually intensified into a feeling of nationalism, of distinct Qatari identity.[3] The following discussion demonstrates how this evolution occurred and what it means to be a Qatari today by tracing the following elements: the Gulf ethos; the British role in state formation; social organization in the Gulf with emphasis on the fundamental role of tribes and bedouin; the historical origins and evolution of Qatar; examination of who constitute Qataris; and the emergence and development of a Qatari national identity.

## II. Social and Political Organization in the Gulf Prior to the Era of the Nation-State

3. As noted above, the predominant—and State-promoted—ethos of national myths[4] in the Gulf is without question centered on Arab tribal bedouin origin and background. Tribes in the Gulf constitute a fundamental component of life in the region and bear little or no relation to the largely anthropological opinion that tribes, as in Africa, are a creation of

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[3] The term "nationalism" has acquired a rather pejorative connotation, particularly due to its association with the more specific concept of integral nationalism, where individual rights of the citizens are subordinated to the needs of the State, as in the Fascist regimes of the 20th century. The use of the term here relies on the concept of liberal nationalism, whereby a group or groups of people assume a shared identity on the basis of common history, ethnicity, religion, culture, or other self-perceived unity to form a "nation" that ideally is expressed politically within a nation-State. Thus, the emergence of nationalism is a prerequisite for the creation of a nation-State. As Benedict Anderson remarks, "Nation, nationality, nationalism – all have proved notoriously difficult to define, let alone to analyse." He goes on to say that "[i]n an anthropological spirit, then, I propose the following definition of the nation: it is an imagined political community – and imagined as both inherently limited and sovereign." B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev. ed.; Verso, 1991), pp. 3, 5–6.

[4] Myth is used here to refer to a set of beliefs and imagined memory that guides a community's perception of its existence, history, cohesion and values.

the colonial legacy or, most recently, the view that Western politics are polarized because of "tribalism." In the Middle East, and particularly in the Arabian Peninsula, the concepts of tribe (*qabilah* in Arabic) and tribalism (*qabaliyyah*) represent the predominant form of social organization and self-perception. While the prevailing "norm" of previous centuries may have been that of pure or noble tribes of bedouin origin—most of which are no longer nomadic—small settlements evidenced increasing political power. Gulf society in the pre-oil era was multifaceted and constituted a variety of communities, such as recognized and respected tribes, others of non-tribal but presumably Arab descent, "townspeople," and merchants of generally Iranian or Indian origin. Technically, bedouin means nomadic. But in the oil era and before, bedouin heritage was shared by sedentarized elements of the same bedouin tribes. As a consequence, in practice "bedouin" does not have to mean nomadic.

### A. Tribal Ethos in the Gulf

4. The more powerful tribal groups along the Arab littoral of the Gulf were largely of Najdi origin who had moved into the Gulf for unknown reasons but possibly because of famine, population pressure on scarce resources, or ambitious leadership. At the beginning of the 18th century, the dominant force along the Arab littoral of the Gulf was that of the mixed bedouin and *hadar* (settled or sedentary) Bani Khalid tribe, whose center was at al-Hasa oasis (in present-day Saudi Arabia). The oasis had been captured from the Ottomans in 1670, and the writ of the Bani Khalid extended from Qatar in the south to Basra (in present-day Iraq) and beyond to the Nafud Desert in the north, as well as inland to parts of the Najd (the central region of the Arabian Peninsula, now part of Saudi Arabia).[5]

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[5] *See generally* A. Abu Hakima, *History of Eastern Arabia, 1750–1800: The Rise and Development of Bahrain and Kuwait* (Khayats, 1965), pp. 25–43; J. Lorimer, *Gazetteer of the Persian Gulf, 'Oman, and Central Arabia, Vol. I*: *Historical* (Superintendent Government Printing, 1915), pp. 787–835.

5. Also in the 18th century, sections of the 'Utub tribe, itself thought to be part of the larger 'Anazah tribe, moved from Najd into the Gulf littoral and established permanent settlements on the Gulf, a pattern replicated by other tribes. The Bani Khalid's domain could be described, in loose terms, as more empire than nation. In contrast, these new settlements and their hinterlands were more local and based on more durable tribal alliances. By these movements, as well as other migrations into the southern part of the littoral, including Qatar, what is now the United Arab Emirates ("*UAE*"), and parts of Oman, the scene was set for the contemporary tribal composition of the Arab littoral of the Gulf and the inception of what may be discerned as nascent national identity in the various regions of the Gulf, including Qatar.

6. Bedouin. The process of State formation and how the role of the prevailing ethos applies is based on various fundamental assumptions. The first and perhaps most important is the bedouin-*hadar* dichotomy. The centuries-old state of contention between the nomadic and pastoralist bedouin (more accurately transliterated as *badu*) and the sedentary *hadar* population of settlements, ports, and oases has deep cultural connotations in addition to opposing lifestyles. In its literal sense, the distinction applies mostly to the pre-oil era but not entirely. The *hadar* were settled in fixed places, tethered to agricultural areas by property and crops, or resident in urban settlements in order to pursue trading, pearling, or seafaring. As a consequence, they were more easily controllable by rulers. The bedouin on the other hand were, by definition, nomadic. The roaming territory of a bedouin tribe was and is generally defined by a distinct *dirah* or tribal territory, even if sometimes contested or not defined precisely. At the same time, however, a bedouin tribe may have owed allegiance to or have links with a ruler of a coastal settlement. Therefore, there were often limitations on its area of activity and a linkage to the territory of a particular State. As is shown below, these circumstances

applied to Qatar as much as the surrounding regions, with the proviso that the *hadar* population of Qatar was much smaller than elsewhere.

7. The matter is additionally complicated by the fact that even nomadic bedouin tribes possessed connections to fixed points on the map. Livestock required access to wells and grazing territory that were not contested with other tribes. Tribal members often owned date palm gardens, which required periodic attendance to harvest the dates. Many tribesmen undertook seasonal employment in the pearling industry. These ties also served to bring them under the purview or control of the local ruler.

8. What is a Tribe? Distinguishing what constitutes a tribe is not simple. Every tribe is defined by a perceived shared descent, or, as it has been termed, a "myth of common ancestry."[6] Actual descent from an eponymous ancestor cannot be empirically proven and there is no real attempt to do so. It is simply important to believe that descent is shared. The composition of "super-tribes" such as the 'Anazah or Bani Tamim are lost in time, as is the ability to accept or reject claims of belonging to one "super-tribe" or another. There may be some emotional connection between constituent tribes, particularly when local rivalries create opposing alliances.

9. It is equally important to realize that tribes are flexible both in their constituent elements and their practical status over time. Tribes emerge and recede in strength and influence,

---

[6] *See* A. Hourani, "Conclusion: Tribes and States in Islamic History" in *Tribes and State Formation in the Middle East* (University of California Press, 1990); pp. 303–311. Anthropologist Richard Tapper suggests that a tribe "is rather a state of mind, a construction of reality, a model for organization and action." R. Tapper, "Anthropologists, Historians, and Tribespeople on Tribe and State formation in the Middle East" in *Tribes and State Formation in the Middle East* (University of California Press, 1990), p. 56. It should also be kept in mind that while tribes and tribalism have acquired negative connotations elsewhere, *qabilah* (tribe) and *qabaliyyah* (tribalism) in the Middle East, and particularly in the Gulf States, are viewed favorably and describe a form of identity and organization to which ethnicity, religion, class, and other markers either do not apply or are secondary markers.

and may disappear or appear entirely. Subtribal elements may change their affiliation to a different tribe or even establish themselves as separate tribes. In addition, tribes may acquire clients, which can be either tribal or non-tribal in nature, as well as in a group or by individuals. Tribes may grow more powerful or weaker depending on the vitality and competence of its leadership. The shaykh of a tribe served more as a chairman than a king and a weak shaykh could lose his position with the tribe gravitating to a more capable shaykh. While shaykhs were typically chosen from within a shaykhly family, the fortunes of families could change over time, as well and there is evidence of some tribes recruiting shaykhly families from other tribes.

10. Bedouin or *Hadar*. Most tribes possessed both bedouin and *hadar* elements. These elements may or may not be contiguous; even bedouin sections of the same tribe may be scattered across regions. Thus, tribal allegiances may be split between rulers. Tribal migration (separate from nomadism) between regions was also a feature of the pre-oil era. Historical ties might lead tribes to join linked tribes elsewhere. Dissatisfaction or a dispute with a particular ruler or tribe might cause a tribe to move to a neighboring State. While the rivalry between bedouin and *hadar* may be mostly a relic of history,[7] it still

[7] The balance between bedouin and *hadar* has dramatically shifted to the latter's advantage since the mid-20th century. There are many reasons for this. There has been a natural impulse for bedouin to settle because of opportunities for employment, educational opportunities for children, and access to state-provided social services. States have tended to support this change because it is easier to control settled populations and provide services to them (not to mention avoiding the headaches posed by nomadic pastoralists roaming regularly across national borders). The formation of the Third Saudi State (the present Kingdom of Saudi Arabia) at the beginning of the 20th century was assisted by the establishment of special settlements for bedouin tribes where they became fervent supporters of the Wahhabi interpretation of Islam and, as the Ikhwan, provided the armed might of Ibn Sa'ud, the Saudi leader, in the conquest of much of the Arabian Peninsula. *See* J. Habib, *Ibn Sa'ud's Warriors of Islam: The Ikhwan of Najd and Their Role in the Creation of the Sa'udi Kingdom, 1910–1930* (Brill, 1978), pp. 156–161. In the 1960s, Saudi Arabia was active in deliberately seeking to sedentarize its bedouin, as detailed in T. El-Farra, "The Effects of Detribalizing the Bedouins on the Internal Cohesion of an Emerging State: The Kingdom of Saudi Arabia," Ph.D. dissertation (University of Pittsburgh, 1973) and M. Al-Fiar, "The Faisal Settlement Project at Haradh, Saudi Arabia: A Study in Nomad Attitudes Toward Sedentarization," Ph.D. dissertation, (Michigan State University, 1977).

does retain some current significance. Recapitulating, the bedouin or tribal ethos maintained and cultivated by the Gulf States, Qatar among them, centers on the importance of tribal descent. National distinctions are, for the most part, new in the Gulf and the Gulf States.

11. Non-Tribal Groups. For the majority of the people, tribal membership has been far more central. Nevertheless, there has always been a simultaneous presence of *hadar* and non-tribal communities. These included the agriculturalists in Bahrain and in the oases of al-Hasa and al-Qatif, as well as elsewhere. These communities are referred to as Baharinah and were presumably the original indigenous inhabitants with later absorptions; they identify as Arab and Shi'ah (the principal breakaway sect from the main body of Islam). The merchants of the settlements both on the coast and inland constituted another group. Sedentary communities also included tribespeople who did not fit that Arab tribal bedouin ethos because they were not practicing bedouin or from bedouin stock. Others were not even Arab, tribal, or Sunni (the majority sect of Islam and the Arab littoral of the Gulf). While ethnicity in particular and religion to a certain extent (often the two were intermingled) generally indicated a geographical origin beyond the Gulf States (*e.g.*, Persians from Iran, some Shi'ah from either Iran or Iraq, Baluch from Pakistan and Iran, Banians and Lawatis from India, and, later, "Zanzibaris" from East Africa), they were not regarded as "foreigners" or "expatriates" and therefore of national origin or identity elsewhere. Some of the important merchants in the port towns were—and are—*hawalah*, Sunni Arab families immigrating (or returning as some insist) from the Persian coast of the Gulf. The *hadari* population also included groups of uncertain origin but mean descent, such as the *bayasirah* (a community of uncertain origin engaged in occupations of low status), slaves, and those of slave stock, although the latter might often belong to tribes or be tribal clients.

### B. The British Role in State Formation

12. The second impetus to State formation in the Gulf States derived from the presence and activities of Britain in the Gulf, particularly as expressed through the Anglo-Indian government. While the Portuguese and the Dutch were the first European empires to enter the Gulf, the British achieved dominance by the late 18th century. The Anglo-Indian government at this time was particularly concerned with trade, which required unhindered maritime passage for British and Indian vessels. Accordingly, Britain sought to bring various littoral chieftains into a network of treaties that rejected warfare by sea; these culminated in the General Treaty of Maritime Peace in 1853. These treaties were signed with the leaders of the ports where armed ships were based; the leaders were the shaykhs of dominant tribes at that point in time. Accordingly, the political order of eastern Arabia was "fossilized": British recognition of these prominent shaykhs gave them initial standing as supratribal leaders and their positions gradually transformed into rulership of proto-States. Subsequent formal treaties of protection, whereby Britain assumed responsibility for foreign affairs and defense, made these political entities protected States within Britain's informal empire and further solidified the rule of the same shaykhly families.[8]

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[8] *See generally* J. Onley, *The Arabian Frontier of the British Raj: Merchants, Rulers, and the British in the Nineteenth-Century Gulf* (Oxford University Press, 2007), pp. 44–54; *idem*, *Britain and the Gulf Shaikhdoms, 1820–1971: The Politics of Protection* (Georgetown University Center for International and Regional Studies, 2009).

### C. The Initial Impact of the Oil Era

13. The transition into nation-States accelerated with the awarding of oil concessions in the Gulf States and then the discovery of oil. It became necessary to define territorial domains and boundaries in order to permit oil companies to identify the limits of their concessions.[9] This required the classification of tribes—or at least subtribal groups—as belonging to one ruler or another. Shortly afterward, it also became necessary to distinguish between indigenous populations, who were entitled to the benefits of oil income, and those who were not, as explained below in Section IV. With exceptions, those who resided in the Gulf States for a significant—and precisely defined—period before the discovery of oil became citizens, and those who came later were denied citizenship. Despite the prevailing Arab bedouin ethos of these States, not all Gulf citizens were bedouin or Arab or even Muslim. Conformity to the bedouin ethos was not a condition of citizenship even though the majority of Gulf citizens in general, including Qataris, largely fell into this category.

## III. The Historical Development of Qatari Identity and the Qatari State

### A. Mid 1700s—Early 1900s

14. In the modern era of the last few centuries, the Qatar peninsula was home to a number of bedouin tribes. Among these were Bani Khalid tribes along the western shores, where groups of al-Na'im (originally from Oman) also lived. Elsewhere, the Ma'adid, Al Bin 'Ali, and Al Bu 'Aynayn were prominent. 'Utbi groups moved into Qatar in the mid-18th century. The town of Zubarah was founded on the west coast in 1766. Elsewhere, the coastline was dotted with small settlements, of which al-Fuwayrat, al-Wakrah, and Bida'

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9 *See* J.E. Peterson, "Sovereignty and Boundaries in the Gulf States: Settling the Peripheries" in *The International Politics of the Gulf* (Syracuse University Press, 2011), p. 25.

(now Doha) were the best known. A bid for primacy over Qatar by the Al Jalahimah was stymied by British opposition.[10]

15. As a result of skirmishes in 1867–1868 between Bahrain and Abu Dhabi on the one hand, and Qatari tribes on the other, the British reached agreement with the most prominent Qatari shaykh of the time, Muhammad bin Thani, an Al Thani shaykh of the Ma'adid (often regarded as part of the larger Al Bin 'Ali tribe) to maintain friendly relations with Bahrain and to refer all disputes to British officials. A few years later, Muhammad's son Jasim became head of the Al Thani. Jasim needed to preserve relations with the Ottomans, who situated a garrison in Doha first in 1872, and with Abu Dhabi, with which Qatar was at war from 1876–1891. A battle between Jasim bin Muhammad and the Ottomans in 1893 failed to dislodge the latter and subsequent efforts by Jasim to reach an agreement with the British for protection along the lines of other Gulf States were rebuffed because of delicate Anglo-Ottoman relations throughout the Middle East. It was not until 1916 that Jasim's son 'Abdullah signed a treaty placing Qatar under British protection and aligning the country's status with neighboring States. Rule over Qatar has continued down the line of Al Thani shaykhs until the present.

### B. Pre-Oil Social and Political Distinctions vs. Oil-Era Changes

16. In the pre-oil era, the British role in elevating paramount shaykhs or proto-rulers on the Arab littoral of the Gulf assisted the transformation of the traditional role of the shaykh vis-à-vis his tribe into a similar role of the ruler vis-à-vis his State. That is, the ruler acted in a combination of "father" of his community, which ensured his legitimacy and

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[10] This brief historical survey is drawn from: J. Lorimer, *Gazetteer of the Persian Gulf, 'Oman, and Central Arabia, Vol. I*: *Historical* (Superintendent Government Printing, 1915), pp. 787–835; R. Zahlan, *The Creation of Qatar* (Croom Helm, 1979), pp. 16–20; A. Montigny-Kozlowska, "Histoire et changements sociaux au Qatar" in *La Péninsule Arabique d'aujourd'hui* (Centre National de la Recherche Scientifique, 1982), pp. 475–517.

confirmed his authority, and the representative of his community in relations with other tribes and powers. As shaykhs became rulers, they acquired dominion over territory as well as people. The Al Thani pursuance of British protection resulted in an affirmation of their legitimacy as rulers of a proto-State in Qatar in addition to their status as paramount shaykhs of the peninsula's tribes. As supratribal leaders, they gradually required the allegiance of everyone in their territory, regardless of tribe or non-tribe, bedouin or *hadar*, while also acquiring responsibility for everyone resident in their domain. For the individual, belonging to the Qatari proto-State grew out of shared (including presumed or adopted) genealogical origins for bedouin tribes and *hadar* tribal elements, as well as a shared pattern of occupation of contiguous territory encompassing the Qatari peninsula. Belonging for other *hadar* relied upon ethnicity, occupation, and family descent. Merchants tended to be close to the ruling family since it was necessary to rely on rulers for protection and the rulers were dependent on loans from, and customs farming by, merchants to carry out their governing.

17. In the immediate oil era, this led to closer, stronger bonds between an emerging ruler and his constituents, regardless of their tribal relationship with the ruler. As the notion of statehood and nation-State took hold, identity as fellow nationals in an accepted and legitimate State grew. As the oil era proceeded, succeeding generations appeared who had no personal knowledge of the amorphous political situation of the pre-oil era, and who were socialized both by their elders and especially the State to recognize their belonging to a distinct country and State. Intermarriage between tribes and tribal clans had always existed, particularly within shaykhly families, but this increased as society changed and became broader. Eventually, identification as members of tribes, ethnic groups, or sects for most Qataris became accompanied by that of a Qatari identity, which closely aligned with Qatari nationality. As the oil era progressed, the Qatari identity grew stronger and deeper, becoming the primary identification of Qataris.

### C. The Qatari People

18. Qataris as a people are comprised of tribes that have been resident in what is now Qatar for centuries and may have both bedouin and *hadar* elements. While there is no accurate way to determine their present composition, Lorimer's turn of the 20th- century *Gazetteer* identifies bedouin tribes properly belonging to Qatar such as the Bani Hajir and the small Ka'ban. Other bedouin tribes have fluctuated in location over the eastern half of the Arabian Peninsula during the last century or two.[11] Prominent among them are the al-Na'im, originating from Oman and what is now the UAE, which settled on the west coast of Qatar and are still also present in Bahrain. Sections of the Al Murrah, most of whom are found in what is now the Eastern Province of Saudi Arabia, and the Manasir, mostly found in the UAE, also fall into this category.[12]

19. Many of Qatar's tribes have long been sedentary. Lorimer lists the largest of these in order as: Sulutah, Al Bu Kuwarah, Mahandah, Al Bu 'Aynayn, Al Bu 'Ali, Ma'adid, Khulayfat, Kibisah, and Sudan.[13] It is clear that these sedentary tribes and many of the bedouin tribes have resided in Qatar through recorded history and also constitute the great majority of Qataris today.

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[11] Employment of the term "migrated" invites confusion with normal nomadic migratory patterns, whereas the meaning here is that the tribe as a unit has shifted from one region to another.

[12] *See* A. Fromherz, *Qatar: A Modern History* (Georgetown University Press, 2012), p. 3 ("In fact, the legitimacy of the claims of Al-Thani and of Qatar over inland areas and over the Qatar national border is tied to their association with Bedouin tribes such as the Naim . . . In the midst of territorial disputes, urbanized rulers such as Al-Thani actively competed to lure Bedouin into their territories as citizens."); *see also* A. Montigny-Kozlowska, "Les lieux de l'identité des Âl Na'îm de Qatar," *Espaces et Sociétés du Monde Arabe,* 123 *Maghreb-Machrek* (1989) 132, pp. 132–143.

[13] *See* J. Lorimer, *Gazetteer of the Persian Gulf, 'Oman, and Central Arabia*, *Vol. II*: *Geographical and Statistical* (Superintendent Government Printing, 1908), pp. 1530–1531.

20. However, there are also a number of other *hadari*s of long Qatari presence regarded as part of the "native" population. According to Lorimer's estimation, at the turn of the 20th century these included (in order of size) *hawalah*, Baharinah, Persians, and also Africans, both free and slaves. Lorimer also noted that there had been a few British Indian merchants in Doha but they had left. In religion, all four schools of Sunni Islam were represented among the tribes and *hawalah*, while the Baharinah and Persians were Shi'ah.[14]

### D. The Emergence of a National Identity

21. The communities enumerated in Lorimer's *Gazetteer* can be found still in today's Qatar, probably in about the same proportions. It can be reasonably postulated further that most of these communities had resided in Qatar for one or more centuries before that. The development of an identity beyond that of the tribe or ethnic / religious minority seems to be tied to the emergence of the Al Thani in the second half of the 19th century and, in particular, the role of Muhammad bin Thani and Jasim bin Muhammad in establishing a dominant position and in forging alliances among tribes in the Qatar peninsula. Their actions sowed the seeds of a tribal congruence on top of a common cultural outlook that perhaps can be termed proto-Qatari consciousness. The presence of the Al Thani in Doha and their expansion into pearl trading led to Doha's growth as the natural center and capital of Qatar.

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[14] *See* J. Lorimer, *Gazetteer of the Persian Gulf, 'Oman, and Central Arabia*, *Vol. II*: *Geographical and Statistical* (Superintendent Government Printing, 1908), pp. 1530–1532; *ibid.*, pp. 490–491. The bedouin tribes were primarily pastoralists and Doha served as their principal market town. But pearling played a major role in the economy, with more than 350 pearling boats counted. Fishing was also carried out along the coast. In Doha, pearl diving, fishing, and local trade were important livelihoods, while the Baharinah were described as blacksmiths, coppersmiths and petty pearl dealers. Most foreign trade was with Bahrain and secondarily Lingeh on the Persian coast. *Ibid.*; *see* R. Zahlan, *The Creation of Qatar* (Croom Helm, 1979) pp. 16–20; A. Montigny, "Les Arabes de l'autre rive," 22 *Cahiers d'études sur la Méditerranée orientale et le monde turco-iranien* (1996), pp. 51-81; A. Montigny et al., "L'Afrique oubliée des noirs du Qatar," 72 *Journal des Africanistes* (2002), tome 72, fascicule 2, pp. 213–225.

22. The extension of tribal leadership into territorial sovereignty, *i.e.*, the role of the Al Thani in uniting Qatari tribes and *hadari*s into a loose political entity comprising present-day Qatar, was a "push" factor in creating a Qatari identity. At the same time, the residents of Qatar were "pulled" together by the pressure of external forces. Firmer, and eventually formal, recognition of a Qatari proto-State began with the Ottoman expansion into the Qatar peninsula and the appointment of the Al Thani as their local representatives. Ottoman claims to sovereignty over the Qatar peninsula indicated that there was a territorial dimension to "Qatar" and Ottoman competition with Britain and discussions over Qatar's status constituted the beginnings of an international recognition of a Qatar. The opposition of the Al Thani and allied tribes, as well as possibly the *hadar* of Doha, to the Ottomans further inculcated a Qatari commonality. Not long afterward, the political role of the Al Thani and their control over all of Qatar was recognized by the British, and the Qatari entity was incorporated into the British protected-State system in the Gulf. Thus, Qatar received a legal as well as practical status.

23. The advent of the oil era and the necessity of determining who was a Qatari and who was not, in order to distribute benefits from oil income, intensified the solidarity among "original" Qataris. The influx of huge numbers of expatriates during the succeeding decades also reinforced the sense of "us" versus "them." The transition from a traditional legitimacy (founded on the shaykh *cum* ruler as "father" of the community) to a more modern legitimacy (in which the State provides benefits and opportunities in return for loyalty and legitimacy) deepened the sense of "nationalism" and identity as nationals of a particular State. While the State encourages and advocates for a national identity through such symbols and functions as the national flag, constitution, government services, National Day celebrations, emphasis on defense capabilities, and supportive media, the sense of "Qatariness" is also expressed voluntarily by Qataris. Examples include Qataris proudly waving the Qatari flag and portraits of the country's ruler at sporting events, or

adorning their car windows with wrap-around see-through decals displaying the Qatari flag or ruler, or composing and reciting tribal poetry that extols the country and its people.[15] An argument can also be made for an adversarial legitimacy based on a "rallying around the flag" effect when the country is threatened by outside elements. This has been evident in Qatari disputes with Bahrain, Saudi Arabia and the UAE prior to the current boycott.

## IV. Nationality and Identity in the Gulf

24. The concept of nationality is a new concept in the world, and this is especially true in the Gulf States. The first State with a nationality law was Bahrain in 1937, followed by Saudi Arabia in 1956. Kuwait's law in 1959, however, set the pattern followed by other States: Kuwaitis were defined as those who were normally resident in Kuwait before 1920.[16] The guiding idea was that citizenship should be possessed only by those who were resident in these States prior to the discovery and exploitation of oil. Once oil income began to transform the economy of each State, there was an influx of expatriates. The absence of strict restrictions on citizenship would have both diluted the benefits of oil income and encouraged even greater mass immigration from the Middle East and Asia. Qatar followed the Kuwaiti model. The Qatar nationality law of 2005 (amended from the 1961 law) defines a Qatari for citizenship purposes as anyone normally resident in Qatar during the period of 1930 to 1961 and their descendants (referred to above and

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[15] One of the most popular television programs in the Gulf is a reality show called *Sha'ir al-Milyun* ("Poet of the Million"), a competition similar to *American Idol* but focusing on *nabati* or tribal poetry. One of the early winners was a Qatari, whose verse included the passage, "Qatar is my homeland and I am like any other person who grew up in it, the cameleer, the shepherd, the rich, the pearl diver and the farmer ... Men in danger respond as a man willing to sacrifice their pride . . . and lives to save their country's dignity and glory." M. Cooke, *Tribal Modern: Branding New Nations in the Arab Gulf* (University of California Press, 2014), pp. 132–133.

[16] *See* P. Dresch, "Debates on Marriage and Nationality in the United Arab Emirates," in *Monarchies and Nations: Globalization and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 141.

below as the "original" Qataris). This qualification embraces the great majority of Qatari citizens today. Naturalization involves only a small number of people. Most of these would seem to be the wives of Qatari citizens and their children. Individual naturalization is stated in the law to be limited to 50 individuals per year (although the Amir retains the right to naturalize others). It should be noted though that there are a number of naturalized Qataris of Omani and Yemeni origin. Their status derives from their residence and employment in Qatar during the very early years of the oil era, typically working in the oil company or serving in the Qatari police and armed forces.

25. The UAE Nationality Law (originally issued in 1972 and reissued in 1975 and 2017) employs more specific language for both "original" Emirati citizens and naturalized Emirati citizens. For the first, citizenship is reserved for "Arab" normal residents of the Trucial States (the previous name of the UAE) in 1925 or before and still resident until 1972. But it also provides more specific direction for categories of eligibility for naturalization. The first includes "Arab" individuals of Omani, Qatari, or Bahraini extraction residing in the UAE for at least three years. (The qualification of "Arab" is a significant departure from the nationality laws of the other Gulf States.) This provision would seem to have been added because the UAE began receiving oil income in the 1960s, later than Bahrain (1930s) and Qatar (1950s). Qatar's development began at least a decade before the UAE and so Qatar freely opened its schools and jobs to Emiratis. The inclusion of Qataris in the UAE nationality law seems to apply to tribes that were encouraged to settle in the UAE.[17] In its early years of development, the UAE relied on educated Bahrainis to fill positions in the UAE government and private sector. Omanis had long sought employment in other Gulf States before 1970 and they were especially prevalent in the UAE armed forces. It was natural that the UAE would welcome citizens

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[17] *See* A. Kapiszewski, *Nationals and Expatriates: Population and Labour Dilemmas of the Gulf Cooperation Council States* (Ithaca Press, 2001), p. 51.

from neighboring countries with close cultural and historical affinity. The second specific direction allows "members of Arab tribes who emigrated from neighboring countries" to seek naturalization after three years of residence. This seems to be directed at Yemenis, particularly from the eastern regions of Yemen and the bedouin tribes along the southern edge of the great Rub' al-Khali desert. The impetus for this group, as well as the Omani / Qatari / Bahraini group, would seem to be twofold: first, to recruit educated government employees and adequate ranks of police and soldiers, and second, to increase the total numbers of Emirati citizens in the face of an overwhelming influx of northern Arabs and other expatriates.

26. In this respect, Qatar is not substantially different from the UAE, except that the provisions for these groups are not explicitly spelled out in its nationality law. It can be assumed that there is a similar emphasis on the Arab nature of Qatar identity, even though only the UAE spells this out. This may lead to a surmise that the emphasis on Arab and Arab tribes may mean that non-tribal and non-Arab Qataris are "less Qatari" than "pure" tribespeople. On the contrary, this should be seen as a social phenomenon and not a political dimension. It does not indicate that "non-tribal" Qataris have fewer rights as "tribal" Qataris or that they are considered to be non-Qatari. The distinction has remained fundamentally unchanged since the pre-oil era and, in fact, is probably diminishing as social standing becomes relatively more nuanced or egalitarian.

27. Only a very rough guess can be made of the proportion of naturalized to "original" Qataris. Like all the Gulf States, the Qatari government does not release a breakdown of its population by citizen and expatriate, let alone provide the numbers of naturalized Qataris. The total population of Qatar was estimated at 2,363,000 in July 2018. It is generally believed that Qatari citizens represent only some 15–20 percent of the total

population[18]; a United States government estimate is 11.6 percent as of 2015.[19] Thus the number of Qatari citizens would be approximately 274,000. Relying on my expertise developed over some 45 years of fieldwork in the Gulf and Qatar, I believe the total of naturalized Qataris might be somewhere between 30,000 and 50,000 of that 274,000, although there are no published sources on this point. This would represent only about 11–18 percent of the total population with Qatari nationality, meaning that "original" Qataris comprise the vast majority of the Qatari population, at around 82–89 percent.

## V. Conclusion: The Existence of a Distinct Qatari Identity or National Origin

28. One useful way in which to describe the Qatari national identity is in terms of an ethnocracy. Political scientist Ali Mazrui defined ethnocracy in the 1970s as "a political system based on kinship, real or presumed."[20] The term was subsequently used to describe "the tendency for an elite to posit their own physical characteristics and cultural norms as the essence of the nation over which they rule, thus narrowing its definition and excluding all those within the polity who do not exhibit the same characteristics or embrace the same norms. In this sense, ethnocracy as a socio-political regime is the outcome of ethno-nationalism, that brand of nationalism that views the nation as a 'natural' and ethnically 'pure' community, as opposed to its liberal conceptualisation as a

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18 One recent source estimates the percentage of Qataris at 15 percent. *See* M. Kamrava, *Qatar: Small State, Big Politics* (Cornell University Press, 2013), p. 5. Another puts it at less than 20 percent. *See* A. Fromherz, *Qatar: A Modern History* (Georgetown University Press, 2012), p. 2.

19 The figures for total population and the proportion of Qataris are drawn from the United States Central Intelligence Agency's *The World Factbook*. *See* Central Intelligence Agency, *The World Factbook: Qatar* (accessed 29 January 2019), https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html.

20 A. Longva, "Neither Autocracy Nor Democracy But Ethnocracy: Citizens, Expatriates and the Socio-Political System in Kuwait" in *Monarchies and Nations: Globalization and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 119.

community based on equal rights and duties."[21] As applied to the Gulf, "the defining feature is not race, language or religion but citizenship conceived in terms of shared descent . . . Ethnocracy develops in societies that are heterogenous, and with a pronounced degree of perceived cultural variation."[22]

29. The ethos of Qatari national identity is Arab Muslim (that is, Sunni) tribal. But this represents more of an ideal and it is not expected that every Qatari exhibits these traits. Thus while the prevailing ethos is as above, current conceptions of "Qatari" identity can and do include: myths of origin (in terms of shared heritage or descent, long-standing residence in what is now Qatar, meritorious service to rulers); the myth of shared experiences during times of hardship, thus deserving the bounty of the oil age; myths of shared livelihoods (such as bedouin heritage, ownership of date gardens, or engagement in pearling); living memory and passed-down memories of existence in Qatar, commingling with other similar families or groups; shared characteristics (ethnocracy); and, most recently, loyalty and allegiance to the Qatari State.

30. While Qatari national identity shares the Arab Muslim tribal ethos with its Gulf neighbors, it is distinct, centered on these elements of shared Qatari heritage or descent, historical ties, and shared national myths. As described above, the great majority of individuals considered to be "original" Qataris today are part of a community whose origins pre-date the nation-State era in the Gulf, and which over the last century or so

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[21] A. Longva, "Neither Autocracy Nor Democracy But Ethnocracy: Citizens, Expatriates and the Socio-Political System in Kuwait" in *Monarchies and Nations: Globalization and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 119.

[22] A. Longva, "Neither Autocracy Nor Democracy But Ethnocracy: Citizens, Expatriates and the Socio-Political System in Kuwait" in *Monarchies and Nations: Globalization and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), pp. 119–120. Longva adds that since citizenship is the major feature and thus expatriates are excluded, the Gulf situation can be described as civic ethnocracy as opposed to racial ethnocracy with its negative overtones.

crystallized into a distinct Qatari national identity that deeply correlates to the modern Qatari State. As such, and as is the case throughout the region, Qatari national origin and nationality are closely intertwined.

Dr. J.E. Peterson

# Appendix A

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| 2001-present | Independent historian and political scientist based in Tucson, Arizona, affiliated with the Center for Middle Eastern Studies at the University of Arizona. In addition to writing, publishing, and speaking on areas of professional concern, involved with consulting and writing for such as organizations as the National Council on US-Arab Relations, the Foreign Policy Research Institute, the International Crisis Group, the Gulf Research Center, Congressional Quarterly, Al Turath (Riyadh), Centra, Al-Tajir Trust, the London School of Economics, Oxford Analytica, the Norwegian Ministry of Foreign Affairs, and the Academic Consortium for Global Education, in addition to work with international banks, legal firms, and consultancies. Served as Sir William Luce Fellow at the University of Durham (2004) and as Kuwait Visiting Professor at SciencesPo, Paris (2014). |
| 2000-2001 | Research Associate, **International Institute for Strategic Studies**, London. Wrote Adelphi Paper on Saudi Arabia and Gulf Security; organized workshop on Gulf security in Muscat, Oman; contributed to Strategic Survey, Strategic Comments, and other IISS publications |
| 1989-1999 | On commission to write a history of and establish an archives for the **Sultan's Armed Forces of the Sultanate of Oman**. |
| 1984-1989 | **Writer and consultant on Middle East affairs**, Washington, DC. Also served as Adjunct Fellow, Center for Strategic and International Studies (Washington, DC); Research Fellow, Middle East Institute (Washington, DC); and Adjunct Scholar, Foreign Policy Research Institute (Philadelphia, PA). |
| Summer 1984 | Visiting Professor of History, **Portland State University**, Portland, OR. Taught courses on: OPEC and US Policy; Gulf Politics and War. |
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| 1979-1980 | Conducted research in the United Kingdom and Middle East on topic of "Comparative Political Change in the Arabian Peninsula," as recipient of **Social Science Research Council postdoctoral research grant**. |
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| 1971-1977 | **School of Advanced International Studies, The Johns Hopkins University**, Washington, DC. Ph.D. degree, May 1977. Major in Middle East Studies; minors in International Politics and International Economics. Dissertation topic concerned with political change in the Sultanate of Oman. |
| 1967-1971 | **University of Arizona**, Tucson. M.A. degree, June 1971. Major in Oriental Studies, with concentration in the Middle East. B.A. degree, June 1970. Major in History; minor in Political Science. |
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Journal of Arabian Studies (Exeter)
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Read and speak Arabic; read French and Spanish, some Italian and Persian.

*FELLOWSHIPS AND GRANTS*:

- Sir William Luce Fellow at the University of Durham (2004).
- MacArthur Foundation Fellowship at the International Institute for Strategic Studies for research on Saudi Arabia and Gulf security (2000-2001).
- Earhart Foundation Fellowship Research Grant, for research in Saudi Arabia and the Middle East (1988-1989).
- American Political Science Association Research Grant, for research in the United Kingdom (Summer 1987).
- Fulbright Senior Research Grant in the "Islamic Civilization Research Program," for research in the Middle East (1985-1986).
- Thornton D. Hooper Fellowship in International Security Affairs, for research and writing in residence at the Foreign Policy Research Institute (1983-1984).
- Earhart Foundation Fellowship Research Grant, for research in the United Kingdom (Summer 1982).
- American Council of Learned Societies/Social Science Research Council Postdoctoral Research Grant, for research in Europe and Middle East (1979-1980).
- Shell Foundation Fellowship, for dissertation research in Europe and Middle East (1974-1975).
- Center for Arabic Study Abroad Fellowship, American University of Cairo (Summer 1971).

*INVITED SEMINAR PAPERS, LECTURES, AND PRESENTATIONS*:

- University of Illinois, Champaign
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- Emirates Literary Festival, Dubai
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- National Intelligence Council, Washington, DC.
- National Counter-Terrorism Center, Washington, DC.
- Princeton University, Princeton, NJ.
- Qatar National Day Organizing Committee, Doha.
- Emirates Center for Strategic Studies and Research, Abu Dhabi.
- National Center for Documentation and Research, Abu Dhabi.
- Gulf/2000 Project, Sharjah, UAE.
- Center for Naval Analyses, Alexandria, VA.
- Dubai Police, Dubai.
- Portland State University, Portland, Oregon.
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*(April 2019)*

***N.B.*** *Many of the publications listed below, especially the more recent ones, may be viewed on or downloaded from the author's website, www.JEPeterson.net.*

**FORTHCOMING STUDIES:**

- *Historical Dictionary of Saudi Arabia* (3rd ed.; Lanham, MD: Scarecrow Press, forthcoming 2019).
- *Defending Oman: A History of the Sultan's Armed Forces* (publication details not arranged).

**WORK IN PROGRESS:**

- *Oman Since 1970* (London: I.B. Tauris).
- *Historical Dictionary of the Gulf Arab States* (3rd ed.; Lanham, MD: Scarecrow Press).
- *The Modernization of Tradition: Comparative Political Change in the Arabian Peninsula* (London: I.B. Tauris).
- *A Modern History of the Arabian Peninsula* (London: I.B. Tauris).

**2018:**

- *Saudi Arabia Under Ibn Saud: The Economic and Financial Foundations of the State* (London: I.B. Tauris, 2018).
- "Prospects for Proliferation in Saudi Arabia." In Jeannie L. Johnson, Kerry M. Kartchner, and Marilyn J. Maines, eds., *Crossing Nuclear Thresholds: Leveraging Sociocultural Insights into Nuclear Decisionmaking* (New York: Palgrave Macmillan, 2018), pp. 109-139.

**2016:**

- Editor, *The Emergence of the Gulf States: Studies in Modern History* (London: Bloomsbury, 2016).
- "Yemen: Tribes, the State, and the Awakening." In Uzi Rabi, ed., *The State and Tribal Society in the Middle East* (London: C. Hurst; New York: Oxford University Press, 2017), pp. 111-143.

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- "Oman's Next Sultan Will Face Greater Social Challenges." *Oxford Analytica*, 12 May 2015.

**2014:**

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*(April 2019)*