

# Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination

By JOSÉ A. LINDGREN ALVES\*

## Introduction\*\*

IN TODAY'S POSTMODERN WORLD, where previously cherished socio-political utopias give way to disbelief in universal values, religion has reemerged as a central component of secular activity. With that in mind, all institutions dealing with social matters must try to correctly understand and direct this seemingly anachronistic phenomenon towards positive goals.

Among the institutions involved in efforts to grasp and orient manifestations of religion in the material world, those established through the international law of human rights should play a relevant role. Though these institutions often lack enforcement tools, they bear non-negligible moral responsibility, particularly in view of the expectations societies and individuals are supposed to confer upon them. In its capacity as the monitoring body of the International Convention on the Elimination of All Forms of Racial Discrimination<sup>1</sup>

---

\* José A. Lindgren Alves is a Brazilian diplomat with particular expertise in international human rights. A former member of the now extinct United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Lindgren Alves was a delegate to the 1993 World Conference on Human Rights in Vienna, to the 2001 World Conference Against Racial Discrimination in Durban, and has been a member of the Committee on the Elimination of Racial Discrimination in Geneva since 2002.

\*\* Editor's note: The issues raised by the interrelationships between religion and non-discrimination described in this Article were recently at the forefront of a debate on freedom of expression at the United Nations Human Rights Council ("U.N. HRC"). See U.N. HRC, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/L.39 (Mar. 25, 2008), U.N. Doc. A/HRC/7/L.24 (Mar. 26, 2008).

1. Dec. 21, 1965, S. TREATY DOC. NO. 95-18 (1994), 660 U.N.T.S. 195 [hereinafter ICERD].

(“ICERD” or “Convention”), the Committee on the Elimination of Racial Discrimination<sup>2</sup> (“CERD” or “Committee”) is one such institution.

While racism and religious prejudice are commonly interlinked, they are in essence different phenomena. Past civil rights violations amongst specific groups were mostly based on physical features.<sup>3</sup> It is therefore natural that ICERD, drafted in the 1960s, should not necessarily include religion in the list of elements on which racial discrimination is based. CERD, however, soon noticed that the intersection between racial and religious discrimination was a fact, and little by little devised ways of dealing with it.

This Article will analyze the work of CERD in the area of religion, a field which, by definition, would not necessarily be covered by the mandate of a committee devoted to the eradication of racism and racial discrimination. Notwithstanding this difference of scope, to the extent that, in the contemporary world, race and religion appear increasingly interwoven, the work of CERD on religion has gradually become accepted and considered necessary.

This analysis begins in 2002, the year following the devastating events of September 11, a date that marks a fundamental shift in global affairs. Such shift affected inter alia the way questions of race, racism, religion and human rights had been evolving, especially after the implosion of the former Communist bloc and since the end of apartheid in South Africa. By coincidence, 2002 was also the year in which the author of this text was elected as a member of CERD, and this whole Article is based on his experience as part of the Committee.<sup>4</sup>

Part I briefly sets the sociological background of today’s re-emergence of religion. Part II defines the nature, functions, and general work of CERD. Part III describes the interpretation and legal sources CERD uses for dealing with religion. Part IV shows how September 11 and its aftermath changed the treatment of race and racial discrimina-

---

2. A detailed description of CERD will be made further on in this Article. *See infra* Part III.

3. It is true that anti-Semitism, one of the oldest forms of racism, always had some reference to religion, albeit indirectly. But racism and the notion of race were so closely associated with physical appearance that the outdated “science” of phrenology was used and abused by the Nazis in their attempt to define characteristic features of Jews and “Aryans” according to prejudiced stereotypes. *See* Nicole Hahn Rafter, *Seeing and Believing: Images of Heredity in Biological Theories of Crime*, 67 BROOKLYN L. REV. 71 (2001).

4. This is the reason why no example or quotation is taken directly from any United States report or recommendations made thereon. The first United States report was formally presented to CERD in August 2001; the second was presented in February 2008.

tion in the world. Part V surveys the evolution of CERD's work, using examples from its recommendations. Part VI explains the Committee's position with regard to caste—a traditional, non-racial discriminatory system with religious origin. Part VII describes CERD's recent attempt to use religion to limit freedom of expression. Part VIII reports on a dialogue of CERD with another United Nations mechanism that widely endorses the Committee's approach. Part IX concludes by bringing in support of its concerns through stunning speeches made elsewhere. Pronounced by different religious leaders, they abundantly show the threats to universal human rights involved, not in religion itself, but in the peculiar circumstances of today's return to religion.

### **I. The Reemergence of Religion**

In order to thoroughly understand the position of religion in today's secular affairs, it is essential to recall structural facts and trends that characterize our times as postmodern. The first element that must be stressed is the overbearing concern with economic competitiveness, which, more than ever before, now displaces and surpasses other concerns in the realm of social relations. This competitiveness is aggravated by radicalization of capitalistic liberalism and the abandonment of collective, universal goals, in the context of globalization. While individualism has reached the level of utter selfishness, indifference towards others' plight sets the background for successful economic, artistic, professional performance. Concurrently, while scientific knowledge has focused on technology geared exclusively towards power and profit, the ideal political aim of overall social improvement seems to have been relegated to the dustbin of history. The very notion of history as a dialectical movement towards higher levels of civilization is seen as a philosophical relic of "modern times" past.

Amidst an overwhelming lack of universal values, cultural relativism and rampant greed, group identification appears as a protection against globalized economic materialism. For many who struggle to keep afloat on the waters of material uncertainty, religion materializes as the only lifebuoy left to grab on to. Unable to plan and pursue a reasonably secure life with the volatile tools of an elusive reality, many men and women resort to the sacred as a means of overcoming difficulties on earth, or as an insurance policy for heavenly compensation in the expected afterlife. As if the clock of history has been turned back, community religion, anachronistic traditions, and newly invented creeds that resemble business undertakings have replaced the

humanistic values of modernity, once devised as universal by the Enlightenment.<sup>5</sup>

Although the beginnings of this return to the sacred occurred in the late 1960s and 70s during the American war in Vietnam and the counter-cultural revolution, the trend has clearly spread and intensified since the end of the Cold War. First presented in the West in the form of alternatives to the Judeo-Christian tradition—through the adoption of de-localized Oriental beliefs—one can notice the present pervasiveness of the return to religion in the proliferation of sects within Christianity, literal interpretations of the Bible, integrist versions of Judaism, and the especially demonized Islamic fundamentalism. Zealotry, however, is not exclusive of the three most disseminated monotheistic faiths. It is also noticeable in non-Western mainstream religions like Hinduism and Buddhism. It equally occurs in traditional animist faiths of descendants of black slaves and indigenous peoples in the Americas and Africa, as well as, possibly, in Australia and New Zealand.<sup>6</sup>

Though the contemporary return to religion can be mostly ascribed to a sense of hopelessness and disbelief in universalistic secular utopias, it is also the basis for other aims. In the republics that constituted the former Yugoslavia, for instance, religion—or, rather, the remnants of local branches of historic religious beliefs after four decades of official atheism—was and still is strongly promoted in order to enhance national identities. This same type of pragmatic use of faith and tradition is common everywhere nowadays to differentiate specific communities within a larger society, like the veiled Muslim women in Europe, the black-dressed Orthodox Jews in the United States, and the singing orange-clad Hare Krishnas everywhere in the West. Such stress on religion is often used not only as a means to defend minorities from absorption into the cultural majority, but also to attract foreign assistance from donors and institutions that share the

---

5. For a brief description of modernity and postmodernity as referred to in this text, see José A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity*, 22 HUM. RTS. Q. 478, 478–500 (2000); see also J.A. Lindgren Alves, *The United Nations, Postmodernity and Human Rights*, 32 U.S.F. L. REV. 479 (1998) [hereinafter, Alves, *The United Nations Postmodernity and Human Rights*].

6. See, e.g., Ramachandra Guha, *India's Sectarian Tension*, INT'L HERALD TRIB., Aug. 15, 2007, at 6; Mohsin Hamid, *Pakistan's First Three Generations*, INT'L HERALD TRIB., Aug. 15, 2007, at 6; Somini Sengupta, *Hindu Party in Gujarat Re-elects Supremacist*, INT'L HERALD TRIB., Dec. 24–25, 2007, at 3. For more information, see MARK JUERGENSMAYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* (3d ed. 2003); GILES KEPPEL, *LA REVANCHE DE DIEU: CHRÉTIENS, JUIFS ET MUSULMANS À LA RECONQUÊTE DU MONDE* (1991); SLAVOJ ŽIZEK, *ON BELIEF* (2001).

same faith.<sup>7</sup> With such varied uses, religion has emerged once again with force in the political arena. Spiritual belief is now not only a guiding force, defensive and offensive, for groups, states, and alliances, but is also a source of concern in our postmodern times, as it had been in the supposedly surpassed, obscure, pre-modern, “unenlightened” past.<sup>8</sup>

Hideously violated before and during the Second World War, particularly in the form of the Holocaust, freedom of religion was enshrined in the Universal Declaration of Human Rights<sup>9</sup> (“Universal Declaration”) as one of those fundamental birthrights to which every person is entitled simply by virtue of being human. Nevertheless, in contrast with other rights and freedoms internationally proclaimed in the same Universal Declaration,<sup>10</sup> the international law of human rights never regulated this freedom in a specific juridical instrument. The most ever achieved by the United Nations was the inclusion of freedom of religion in the comprehensive, but non-detailed, International Covenant on Civil and Political Rights<sup>11</sup> (“ICCPR” or “Covenant”), which is obligatory on all States Parties. Aside from that, there exists only a scarcely recalled Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,<sup>12</sup> which has no more than recommendatory force. This normative paucity stems from the fact that any attempt to cogently rule with precision on such a delicate field outside each cultural boundary would necessarily infringe upon sacred dogmas or dominant traditions of different faiths. Since no convention or treaty specifically deals with

---

7. As is widely known, the State of Israel is financed by Jews in the Diaspora, while the embryonic State of Palestine survives mostly on donations from the Muslim world. Oil-producing Islamic nations give financial assistance to Muslim communities in many parts of the world, the Shiites of Iran support Shiites in Iraq and Lebanon, and Christian charities naturally help first those who are Christian or willing to convert.

8. In fact, more than in the past, because of the fear of terrorism combined with the unavoidable heterogeneity—or “multiculturality”—of most contemporary societies.

9. G.A. Res. 217A (III), art. 25(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

10. For example, the rights to racial and gender non-discrimination and the right not to be tortured are protected by specific conventions. See ICERD, *supra* note 1; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Discrimination Against Women Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113 [hereinafter Torture Convention].

11. Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1992), 999 U.N.T.S. 171 [hereinafter ICCPR].

12. G.A. Res. 36/55, at 171, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter Declaration of Religion].

“freedom of thought, conscience and religion,” as recorded in article 18 of the Universal Declaration,<sup>13</sup> the only treaty body which, in theory, should address that question would be the Human Rights Committee, created by the ICCPR.<sup>14</sup> Indeed, “freedom of thought, conscience and religion,” imposed as an obligation to be respected by the States Parties of that covenant, is an area of interest and concern for the Human Rights Committee. In 1993, that treaty body adopted General Comment No. 22, elaborating on the scope of definition and application of this triple freedom.<sup>15</sup> However, as the international practice evolved—with support from the widespread understanding that whatever reinforces human rights is legitimate—other organs, mechanisms, and treaty bodies have often addressed freedom of religion. These mechanisms do and should deal with religious freedom bearing in mind their respective mandates, since the overall implications of freedom of religion are immense.

Defining now more precisely the content and scope of this Article, it addresses some of the most delicate aspects of the reemergence of religion in today’s world by focusing on CERD’s ways of dealing with them. The field of survey will be the Committee’s work with regard to religious freedom, not as an aim in itself—which is of the competence of the Human Rights Committee—but mostly as a means of countering the repression of ethnic minorities. It will also deal with related problems of a different nature, like individual persecutions based on religion or belief, as well as with the misuse of religion to limit other human rights. In these cases, CERD’s efforts purport either to oppose discrimination of specific persons because of their “ethnic” faith or position in traditional systems of social stratification, or to defend the existing international law of human rights as a means of avoiding further damage to the system. These possibilities fre-

---

13. Universal Declaration, *supra* note 9.

14. ICCPR, *supra* note 11. The Human Rights Committee was created by article 28 of that Covenant. *Id.* art. 28. Its name is an odd by-product of East-West disagreements throughout the twenty years of negotiations on a cogent instrument for human rights, which led to the approval of two separate covenants: one on civil and political rights, *id.*; the other on economic, social, and cultural rights, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Human Rights Committee gives the false impression that the economic, social, and cultural rights are not human rights—a position now held by very few states and always rejected by the United Nations.

15. See U.N. Human Rights Treaty Comm’n, General Comment 22, Art. 18 (Freedom of Thought, Conscience and Religion), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Ver. 7, at 155–58 (May 12, 2004) [hereinafter HRC, General Comment No. 22].

quently occur, endangering specific groups on the one hand, and threatening the whole architecture of norms, treaties, and monitoring tools established by the United Nations to promote and protect human rights worldwide on the other.

Needless to say, the positive and negative aspects of the general reemergence of religion have accelerated radically since the terrorist attacks of September 11. Whereas one can interpret the attacks themselves as an abominable extremist manifestation of one religion in the politico-military-strategic scene, the reaction and counter-reaction so far deployed, even if without religious undertones, point to a permanent situation of instability and fear, which every national and international institution—both secular and religious—will have to face and control with great care.

From a non-ideological perspective, the postmodern return to religion—in the present fundamentalist mold—is a symptom, not a cause. Unless one realizes that it is essential to tackle economic injustices, cultural and racial prejudices, globalized mercantile fads that misuse sexual liberty, political distortions of democracy, and other abundant causes of today's shocking disarray, the alternative is nothing other than anger, hopelessness, and chaos.

## II. What is CERD?

CERD is the oldest human rights “treaty body,” that is to say the first collective expert mechanism created by the international law of human rights to monitor implementation of a covenant or convention. In CERD's case, the treaty in question is ICERD,<sup>16</sup> one of the most important instruments of that branch of international law. Precisely because of its nature, a non-judicial juridical mechanism of control established by a convention, CERD is often cited by advocates of non-discrimination, but remains mostly unknown to the public at

---

16. ICERD, *supra* note 1. There are now seven treaty bodies in operation, each one established by the respective convention or covenant: CERD (for ICERD), the Human Rights Committee (for ICCPR), the Committee on Economic, Social and Cultural Rights (for ICESCR), the Committee on the Elimination of Discrimination Against Women (for the Convention on the Elimination of All Forms of Discrimination Against Women), the Committee Against Torture (for the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families). *Id.*; ICCPR, *supra* note 11; ICESCR, *supra* note 14; Discrimination Against Women Convention, *supra* note 10; Torture Convention, *supra* note 10; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

large, even to active non-governmental organizations (“NGOs”) and human rights activists. Ignoring its origin, mandate, and methods of work, most people confuse the Committee with the many political organs and mechanisms of the United Nations.

As part of the international system of protecting human rights, CERD holds two regular sessions per year, of three weeks each, at the United Nations office in Geneva. It uses the services of the United Nations Secretariat, reports to the United Nations General Assembly, and is now funded by the United Nations regular budget.<sup>17</sup> However, it cannot be properly called an organ of the United Nations. Unlike the United Nations Charter organs and the other bodies and mechanisms created by them,<sup>18</sup> CERD was created by the same convention that specifically bans racial discrimination, detailing State obligations in this area, and defines its composition and field of competence.

According to article 8 of ICERD, CERD is composed of eighteen “experts of high moral standing and acknowledged impartiality” from different geographical areas and legal systems.<sup>19</sup> These eighteen members, or experts, are elected by the States Parties to ICERD from a list of candidates presented by their respective governments, to perform their mandate “in their personal capacity.”<sup>20</sup> Such mandate essentially consists of accompanying and verifying implementation of the Convention’s substantive stipulations.<sup>21</sup> Articles 8 to 15 of ICERD detail the composition and functions of CERD, but, according to its own rules of procedure, the Committee can address any issue it may consider relevant to its mandate.<sup>22</sup> It is the flexibility allowed by its rules of procedure that has enabled CERD to adapt to new circumstances

---

17. While treaty bodies are supposed to be financed by the States Parties of the respective convention, in view of frequent lack of funds, CERD is now being financed by U.N. funds, thanks to a provisional amendment to article 8, paragraph 6, of ICERD, an amendment that awaits ratification by many States Parties in order to become definitive. ICERD, *supra* note 1, art. 8, ¶ 6.

18. Examples of other United Nations organs include the Human Rights Council (previously the Commission on Human Rights) and the Special Rapporteurs and Working Groups of the Human Rights Council. *See* G.A. Res. 60/251, ¶ 1, U.N. Doc. A/RES/60/251 (Apr. 3, 2006); United Nations High Comm’r for Human Rights, Human Rights Fact Sheet No. 27: Seventeen Frequently Asked Questions About United Nations Special Rapporteurs 4–5 (2001) (describing the various mandates), *available at* <http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf>.

19. ICERD, *supra* note 1.

20. *Id.* art. 8, ¶¶ 1–2.

21. Substantive stipulations are those covered in articles 1 through 7 of ICERD. *Id.* arts. 1–7.

22. *Id.* arts. 8–15.

by adopting heterodox practices, spreading its focus of attention to areas that were considered, in the past, out of its competence.

CERD is a fairly balanced, non-politicized body in part because of its internationally official but non-governmental character, in part because of its members' gentlemen's agreements that recommendations are to be made by consensus and that an expert does not get involved whenever a case relates to his or her country. CERD's activities do not attract media attention because its work does not conform to the aims of propaganda and sensationalism. Precisely for these reasons, CERD maintains credibility as a bona fide result-oriented mechanism, enjoying remarkable independence.<sup>23</sup>

As stated in article 9 of ICERD, States Parties "undertake to submit, for consideration by the Committee," periodical reports "on the legislative, administrative and other measures which they have adopted and which give effect to the provisions" of the Convention.<sup>24</sup> In other words, the main activity of CERD is to examine the reports of the states—now 173—which have voluntarily subscribed to ICERD and are thus obliged to regularly submit such reports. Each report must bring information on the state's domestic policies and national situation, including legislation, difficulties, and failures observed in its jurisdiction.

For the consideration of each report, CERD invites the State Party to send an official delegation to the respective meetings to intro-

---

23. Contrary to common misperception, CERD's credibility has nothing to do with the profession of its members, who may or may not be civil servants at home. It is a widely held belief that individuals who are not civil servants tend to act more freely in U.N. expert bodies. My own experience as a previous member of the now extinguished Sub-Commission on Prevention of Discrimination and Protection of Minorities from 1994–1997, and of CERD since 2002, has led me to the conclusion that experts' levels of independence have little to do with their professional links with their governments. It varies mostly with the level of independence anyone is capable of deploying vis à vis their respective state, whatever its régime, and vis à vis civil society, which some want to please at any cost. An expert from a non-democratic régime will almost certainly act according to its official line, no matter if he or she is a diplomat, judge, professor, or a lawyer (and often they act so both by obligation and by real belief, for it is difficult to imagine that a totalitarian state would ever appoint a dissident as candidate). In the case of democracies, the formal linkage between the expert and the state is also irrelevant. Although a career diplomat, I have never received any instruction from the Brazilian government. On the other hand, those who are not civil servants also tend to desire to please the government at home, because they hold identical views, because they intend to seek re-election, because they need a favorable opinion from the ruling party, or for other natural reasons. Or, on the contrary, sometimes a non-civil servant will adopt a different line, not only because he or she thinks differently, but rather to clearly mark his or her distance from a new ruling party, elected to government while he or she is in mid-term of the committee.

24. ICERD, *supra* note 1, art. 9.

duce, defend, and update the national document, as well as to answer queries by the experts. Afterwards, in closed session, members draft, discuss, and adopt a set of observations and recommendations to the respective government.<sup>25</sup> Implementation of such recommendations in each country is currently monitored by a CERD member, chosen by his or her peers to perform that supervising function. The country is to answer the written questions put to it by the Committee's monitor and to properly reflect its domestic measures taken to implement such recommendations in its following periodic report.

Besides examining national reports in public sessions and making recommendations thereafter in closed sessions, the Committee considers—also in closed sessions—communications by individuals or groups of individuals claiming to be victims of specific violations of rights set forth in the Convention. For CERD to be able to receive and examine such communications, the State Party in question must have made a formal declaration, as prescribed by article 14 of ICERD, that it accepts the competence of the Committee to do so.<sup>26</sup>

Apart from these two activities foreseen and defined in the Convention, CERD has developed others as deemed necessary by its own working methods. It conducts “country reviews” of States Parties that do not submit timely reports (the review is then made and recommendations adopted on the basis of information gathered from other sources), invites States Parties for exchanges of ideas on its work, and keeps regular dialogue with other human rights monitoring mechanisms of the United Nations. The Committee often organizes public and private general debates on specific themes, often with the intent of adopting a General Recommendation to clarify the meaning of some of ICERD's articles. Since 1993, CERD has also dealt with cases under “urgent procedure” and “early action,” established in response to the United Nations Secretary General report *An Agenda for Peace*.<sup>27</sup> It is through this rather undefined channel that communications which have no other methods to go before CERD manage to reach the Committee (i.e., when the respective State Party is not scheduled

---

25. Since the recommendations are always adopted by consensus, it is in the discussion of the proposed recommendations that differing views regularly clash. Since 2002, however, I have been witness to the fact that, no matter how serious the disagreements, consensus language in the end does emerge. This is one of the most constructive aspects of CERD.

26. Article 14 of ICERD, in its many paragraphs, details the complex rules that necessarily apply to this semi-judicial activity of CERD. ICERD, *supra* note 1, art. 14.

27. Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, at 10–16, U.N. Doc. A/47/277 (June 17, 1992).

to have a report examined, nor has made the declaration required by article 14 of the Convention accepting the communications procedure).<sup>28</sup>

### III. CERD and Religious Discrimination

ICERD explicitly deals only with *racial* discrimination, not with religious discrimination. Its sole mention of religion is found in article 5, where the “right to freedom of thought, conscience and religion” is listed among the civil rights States Parties undertake to protect for their citizens regardless of their “race.”<sup>29</sup> On the other hand, in article 1, ICERD defines “racial discrimination” to include “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin”—except those distinctions or preferences “between citizens and non-citizens,” and the “special measures” usually referred to, in common parlance, as affirmative action.<sup>30</sup> This comprehensive definition has enabled CERD to open a necessary window in the limited semantic of its name in order to monitor the situation of religious liberty in many countries.

Of course religion is neither nationality nor ethnic origin, let alone race or colour. But since religion has historically been one of the defining components of ethnicity, and ethnic origin is mentioned as one of the bases of racial discrimination, it is generally considered fitting that CERD should pay attention to the situation of religious minorities. Although this activity by CERD is still sometimes objected to on grounds that religion is not race (mostly by experts who share the dominant religion of the state considered), it is becoming commonly accepted by all. The work done by CERD does not duplicate the function conventionally mandated to the Human Rights Committee, to the extent that CERD does not control the observance of religious freedom per se, but only controls it insofar as it affects the situation of minorities, or when it deals with cases that mix religion and race.<sup>31</sup>

For addressing issues that involve religion, CERD uses not only ICERD as its legal reference, but the whole arsenal of documents, in-

28. Although this non-conventional procedure was devised in the 1990s because of the proliferation of internal armed conflicts, like those of the former Yugoslavia, most of the “urgent procedure” cases nowadays relate to non-observation of indigenous land rights, frequently involving illegal occupation by others and acts of violence.

29. ICERD, *supra* note 1, art. 5.

30. *Id.* art. 1, ¶¶ 2, 4.

31. Similar observations could be made on the work of CERD concerning the rights of women, often subject to double discrimination, on the bases of race and gender.

struments, and mechanisms for the promotion and protection of human rights established by the United Nations. The first, of course, is the Universal Declaration, which states in its article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public and private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>32</sup>

Another legal source for CERD's work on the matter can be found in the ICCPR.<sup>33</sup> Article 18 of the ICCPR repeats the wording "freedom of thought, conscience and religion" as it appears in the Universal Declaration, followed by: (1) the prohibition of coercion which would impair this freedom "to have or to adopt a religion or belief" of one's own choice; (2) by the freedom to manifest one's religion or belief; and (3) the prohibition to limit such manifestation, except to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>34</sup> In addition to this primary source, the other fundamental reference for CERD and any other international body that deals with this freedom is the already mentioned General Comment No. 22 of the Human Rights Committee.<sup>35</sup> In dealing with cases of minorities, CERD also refers to the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>36</sup>

Because racial discrimination has transcended physical appearance to encompass other aspects that make people "different" from the majority or dominant minority, regardless of how physically similar they may look, CERD now dedicates a large part of its work to these relatively new forms of discrimination. Very often they stem from race, colour, descent, national or ethnic origin *and religious beliefs*. Frequently these new bases of discrimination are also aggravated by gender. In such cases of compounded discriminatory bases, the phenomenon is called "double" or "multiple discrimination."<sup>37</sup>

32. See Universal Declaration, *supra* note 9, art. 18. The wording here reproduced will also be useful further on.

33. ICCPR, *supra* note 11, art. 18.

34. *Id.*

35. See HRC, General Comment No. 22, *supra* note 15.

36. G.A. Res. 47/135, U.N. Doc. A/Res/47/135/Annex (Dec. 18, 1992). A typical product of currently prevailing multiculturalist thinking, this declaration says that states must "protect the existence and the national or ethnic cultural, religious and linguistic identity of minorities within their respective territories," by enacting legislation and taking measures towards that end. *Id.* art. 1, ¶ 1.

37. See Douglas M. Staudmeister, Comment, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189, 221 (1996)

#### IV. CERD and Terrorism

It was precisely with the mixture of race, national origin, and religion in mind that, in its first session after September 11, 2001, CERD issued a statement of prophetic, important value. It was not prophetic in the sense that nobody else could foresee what was coming. Nor was it important as a deterrent against decisions already taken and plans to be formulated by those who held real power. Even though Committee members knew that the strength of their declaration would be no more than symbolic, CERD's March 2002 Statement on Racial Discrimination and Measures to Combat Terrorism ("Statement") was relevant because it was adopted at the exact moment it was most needed.<sup>38</sup> Even if it was totally disregarded by its real, non-immediate addressees, the Statement has since then become a guideline for the work of the Committee on that matter. Furthermore, for quite a long time, the Statement remained somewhat unique, as the political bodies that ought to have taken the lead kept silent on the matter.

The text was drafted and approved in response to a request of the United Nations High Commissioner for Human Rights calling for CERD's contribution in the search for guarantees of respect for human rights in the struggle against terrorism. Essentially the Statement contained: (1) an unequivocal condemnation of the terrorist attacks on the United States; (2) an affirmation that terrorism goes against the Charter of the United Nations and other human rights instruments; (3) a forceful warning that measures to combat terrorism are only legitimate if they respect international standards, human rights and humanitarian law; (4) a reaffirmation that the international prohibition of racial discrimination does not permit derogation; (5) a demand that States and international organizations ensure non-discrimination on the grounds of race, colour, descent, national or ethnic origin in all measures against terrorism; (6) a reiteration that non-discrimination must be observed in all matters, in particular those concerning liberty, security and dignity of the person, with emphasis on equality before the courts and due process of law; and (7) the announcement that the Committee intended to monitor the potentially discriminatory effects of legislation and practices in the fight against terrorism.<sup>39</sup> Indeed, CERD has monitored these effects with a great

---

(stating an example of double or multiple discrimination as "disparate treatment on the grounds of both race and sex").

38. See CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 60-61st Sess., at 106-07, U.N. Doc. A/57/18 (2002) [hereinafter CERD, *Report* (2002)].

39. *Id.*

amount of accuracy and courage, in contrast to intergovernmental organs, which have all declined to do so. The continuous silence of these organs is all the more shocking now, in view of daily media reports that confirm the discriminatory side-effects of many security measures, some of which not only violate, but destroy the very notion of universal human rights.

*Already in 2002, considering the situation of States Parties with reports scheduled for that year, the Committee raised the issue with the countries listed below (together with its expressions of concern in the concluding observations):*

**Belgium:**

While noting the satisfactory measures taken by the State party, especially by the Centre for Equal Opportunity and the Struggle against Racism, following the events of 11 September 2001 in the United States, in order to promote tolerance between religious communities, the Committee regrets occurrences of racial acts against persons belonging to ethnic minorities, especially those of the Muslim faith.<sup>40</sup>

**Denmark:**

The Committee is concerned about reports of a considerable increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001. The Committee recommends that the State party monitor this situation carefully, take decisive action to protect the rights of victims and deal with perpetrators, and report on this matter on its next periodic report.<sup>41</sup>

**Canada:**

The Committee notes with concern that in the aftermath of the events of 11 September 2001, Muslim and Arabs have suffered from increased racial hatred, violence and discrimination. The Committee therefore welcomes the statement of the Prime Minister in the Ottawa Central Mosque condemning all acts of intolerance and hatred against Muslims, as well as the reinforcement of Canadian legislation to address hate speech and violence. In this connection, the Committee requests the State party to ensure that the application of the Anti-Terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling.<sup>42</sup>

This Article does not intend to survey every recommendation related to the side effects of counter-terrorism measures. On the other hand, it cannot fail to emphasize that the Committee's expressions of concern, always balanced, are not exclusively addressed to Western

---

40. *Id.* at 20.

41. *Id.* at 30.

42. *Id.* at 59.

countries. In 2003, CERD sent the following observations to States belonging to other groups:

**Morocco:**

The Committee notes the submission in November 2002 to the House of Representatives of two bills: one related to ‘foreigners’ entry into and residence in the Kingdom of Morocco, illegal immigration and emigration’, and the other on terrorism, and draws the State Party’s attention to the statement on racial discrimination and measures to combat terrorism adopted by the Committee on 8 March 2002.<sup>43</sup>

**Russian Federation:**

While acknowledging the efforts made to confront the scourge of terrorism, the Committee is concerned about reports that members of particular groups, notably Chechens, are singled out by law enforcement officials. In this regard, the Committee draws the State party’s attention to its statement of 8 March 2002 in which the Committee underlines the obligation of States to ‘ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.’<sup>44</sup>

**Albania:**

The Committee regrets the lack of information provided by the State party on the possible impact on the application of the Convention of the changes made to its domestic legislation to combat terrorism.

The Committee invites the State party, in its next periodic report, to provide information on its law and practice in this regard, particularly on identity, entry and residence checks of foreigners, the right of asylum and extradition.<sup>45</sup>

To Western countries that had their reports examined in 2003, CERD gave expressions of concern along with the recommendations:

**Norway:**

The Committee takes note of the amendments to the Aliens Act, which include provisions for the expulsion of persons charged with terrorist acts or where there are serious reasons to suspect a person of participating in such an act.

While acknowledging the State party’s national security concerns, the Committee recommends that the State party seek to balance those concerns with its human rights obligations. In this regard, it draws the State party’s attention to the Committee’s statement of 8 March 2002 in which it underlines the obligation of States to “ensure that measures taken in the struggle against terror-

---

43. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 62–63 Sess., at 35, U.N. Doc. A/58/18 (2003) [hereinafter CERD, *Report* (2003)].

44. *Id.* at 40.

45. *Id.* at 57.

ism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.”<sup>46</sup>

**United Kingdom of Great Britain and Northern Ireland** (three related non-sequential recommendations on the same set of concluding observations):

The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities.

While acknowledging the State party’s national security concerns, the Committee recommends that the State party seek to balance those concerns with its human rights obligations. In this regard, it draws the State party’s attention to the Committee’s statement of 8 March 2002 in which it underlines the obligation of States to “ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.”

. . . .

The Committee notes that the State party recognizes the “intersectionality” of racial and religious discrimination, as illustrated by the prohibition of discrimination on ethnic grounds against such communities as Jews and Sikhs, and recommends that religious discrimination against other immigrant religious minorities be likewise prohibited.

. . . .

The Committee is concerned about reported cases of “Islamophobia” following the 11 September attacks. Furthermore, while the Committee takes note that the State party’s criminal legislation includes offences where religious motives are an aggravating factor, it regrets that incitement to racially motivated religious hatred is not outlawed.

The Committee recommends that the State party give early consideration to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.<sup>47</sup>

In its sessions of 2004, after examining the respective official reports, together, as usual, with other information received from different sources, CERD addressed the following observations, still on the same line, to two countries:

**Sweden:**

The Committee takes note of the Special Control of Foreigners Act, which allows the Government to expel a foreigner if this is deemed necessary to the security of Sweden . . . .

---

46. *Id.* at 81.

47. *Id.* at 91.

While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with its human rights obligations.<sup>48</sup>

**Kazakhstan:**

While acknowledging the efforts made by the State party to confront the scourge of terrorism with a national counter-terrorism programme, the Committee is concerned about the lack of information on the impact of this programme on the principle of non-discrimination.

The Committee draws the State party's attention to its statement of 8 March 2002 in which it stressed the obligation of States to ensure that measures taken in the struggle against terrorism did not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin and requests the State party to include in its next periodic report further information on its counter-terrorism programme.<sup>49</sup>

While the interest in monitoring the "side effects" of counter-terrorism measures taken by States continues to this day, as September 11 becomes more distant and as the evolving state of international affairs reveals a proliferation of acts of violence by individuals and human rights violations by States, the form of CERD's recommendations have also changed. But the same concern is still present in such observations sent to, among others:

**Australia**, in 2005 (three non-sequential concerned recommendations):

The Committee notes with concern reports that prejudice against Arabs and Muslims in Australia has increased and that the enforcement of counter-terrorism legislation may have an indirect discriminatory effect against Arab and Muslim Australians.

The Committee welcomes the national consultations on eliminating prejudice against Arab and Muslim Australians and wishes to receive more detailed information on the results of such consultations. It recommends that the State party increase its efforts to eliminate such prejudice and ensure that enforcement of counter-terrorism legislation does not disproportionately impact on specific ethnic groups and people of other national origins.

.....

The Committee notes with concern reports of alleged discrimination in the grant of visas against persons from Asian countries and Muslims, and further notes the assurances given by the delegation that no such discrimination occurs.

The Committee would like to receive more information on this issue, including statistical data. The Committee reiterates that

48. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 64–65 Sess., at 44, U.N. Doc. A/59/18 (2004) [hereinafter CERD, *Report* (2004)].

49. *Id.* at 56.

States parties should 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.

. . . .

The Committee expresses concern about the mandatory detention of illegal migrants, including asylum seekers, in particular when such detention affects women, children, unaccompanied minors, and those who are considered stateless. It is concerned that many persons have been in administrative detention for over three years.

The Committee recommends that the State party review the mandatory, automatic and indeterminate character of the detention of migrants. It wishes to receive statistical data, disaggregated by nationality and length of detention, relating to persons held under such detention, including in offshore detention centres.<sup>50</sup>

**Canada** (which had already been warned about the increase in acts of violence, discrimination and hatred against Arabs and Muslims in 2002, immediately after the September 11 attacks), in 2007:

The Committee is concerned about the heightened risks of racial profiling and discrimination on the ground of racial and ethnic origin in the context of increased national security measures in the State party, and in particular, in the application of the Anti-Terrorist Act (2001). The Committee is also concerned about the use by the State party of security certificates under the Immigration and Refugee Protection Act which provides for indefinite detention without charge or trial of non-nationals who are suspected of terrorism-related activities . . . .

While acknowledging the State party's national security concerns, the Committee underlines the obligation of the State party to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin. The Committee urges the State party to continue to review existing national security measures, and to ensure that individuals are not targeted on the ground of race or ethnicity. The Committee also recommends that the State party undertake sensitisation campaigns to protect persons and groups from stereotypes associating them with terrorism. The Committee further recommends that the State party consider amending the Anti-Terrorism Act to include an explicit anti-discrimination clause.<sup>51</sup>

Perhaps CERD's most concrete criticism of a compounded racial and religious discriminatory counter-terrorism act, involving multiple

---

50. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: Australia*, ¶¶ 13, 22–23, U.N. Doc. CERD/C/AUS/CO/14 (Apr. 14, 2005).

51. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: Canada*, ¶ 14, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007).

abuses of human rights during the period surveyed, was addressed to the **Republic of Macedonia**, in 2007:

Taking into consideration its statement on racial discrimination and measures to combat terrorism of 8 March 2001, the Committee regrets the rendition under suspicion of terrorism of Mr. Khaled al-Masri, a German citizen of Lebanese origin, to a third country for purposes of detention and interrogation.

The Committee draws the attention of the State party to its general statement on racial discrimination and measures to combat terrorism adopted at its sixtieth session on 8 March 2002, in which the Committee demands that States and international organizations ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.<sup>52</sup>

CERD correctly reprimanded Macedonia for having taken part in the discriminatory act of arresting a foreign Arab tourist, legally present in the country, without any cause of founded suspicion, and for surrendering him in the now widely exposed and condemned practice of “rendition.”<sup>53</sup> However, it is obvious that the real addressee of the criticism was not Macedonia.

## V. The Activity of CERD on Monitoring Religion

In order to better understand CERD’s activity on matters related to religious freedom, it is useful to examine some examples of its manifestations over the last few years.

In 2002, after considering the same report of Belgium that led to the above cited expression of regret at occurrences of acts against persons belonging to ethnic minorities,<sup>54</sup> “especially those of the Muslim faith,”<sup>55</sup> the Committee welcomed “the election of a body represent-

52. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: the Former Yugoslav Republic of Macedonia*, ¶ 12, U.N. Doc. CERD/C/MKD/CO/7 (June 13, 2007).

53. See Dana Priest, *The Wronged Man: Unjustly Imprisoned and Mistreated, Khaled al-Masri Wants Answers the U.S. Government Doesn't Want to Give*, WASH. POST, Nov. 29, 2006, at C1. The case of Khalid al-Masri started in 2004, when he was arrested by Macedonian border guards and handed in custody to the United States. In 2006, the case was widely publicized by the international press when al-Masri was released. It was brought to CERD’s attention in 2007 by a non-governmental organization, when CERD was considering the Macedonian report. At this time, the case had come back to the headlines of European newspapers because the victim had filed a claim before the German justice against the American officers involved, demanding reparation for the two years he had been imprisoned in Afghanistan and subjected to torture. See Associated Press, *Germany Issues Arrest Warrants for Suspected CIA Agents*, GUARDIAN.CO.UK, Jan. 31, 2007, <http://www.guardian.co.uk/world/2007/jan/31/usa.germany>. He lost his plea. *Id.*

54. CERD, *Report* (2002), *supra* note 38.

55. *Id.* at 20.

ing the Muslim communities with a view to maintaining and developing dialogue with the public authorities of Belgium.”<sup>56</sup> After examining the report of **Qatar**, the Committee included in the observations the following non-sequential paragraphs:

As regards the right to equal treatment before the courts, the Committee takes note of the details provided by the delegation on the judicial reforms under way with a view to the establishment of a single jurisdiction for the enforcement of new legislation in areas including civil, commercial and penal law. It would like to know whether, given the current state of legislation, non-citizens and non-Muslims who suffer discrimination and who are entitled to bring proceedings before a civil court can also bring their cases before the Islamic Shariah courts. The Committee also wishes to know to what extent the Convention can be invoked before the civil and Shariah courts, and what rules of the Shariah answer to the requirements of the Convention. It wishes to receive more information about the relationship between the Provisional Constitution of 1972, in particular article 9 guaranteeing equality before the law, and the principles of Sharia as a source of law.

.....

The Committee notes that the State party’s legislation does not, in principle, allow members of different religions to inherit from each other; it has learned from the delegation’s explanations, however, that a Muslim can draw up a will in favour of a non-Muslim. The Committee emphasizes that such a situation should not result in certain categories of people being excluded from the right to inherit, given the requirements of article 5 (d) (iv) of the Convention. The Committee asks the State party to include fuller information on this subject in its next report.

.....

While noting with satisfaction that minorities are entitled to practise their religious rites, the Committee wishes to receive further information regarding limitations on this right, based on respect for public order or Islamic precepts.<sup>57</sup>

To **Switzerland**, CERD had no qualms in writing: “The persistence of hostile attitudes towards black people, Muslims and asylum-seekers in Switzerland is of utmost concern to the Committee.”<sup>58</sup> Nor did CERD have any hesitation in manifesting to the Government of Armenia concerns “about reports of obstacles imposed on religious organizations other than the Armenian Apostolic Church.”<sup>59</sup> More incisive was, however, its attitude towards **Turkmenistan**, a country which, having failed to present its report in due time, had its situation

---

56. *Id.* at 18.

57. *Id.* at 39–40.

58. *Id.* at 47.

59. *Id.* at 52.

examined in the “country review procedure.”<sup>60</sup> Worried that the State Party’s policy of promoting Turkmen identity was allegedly leading to discrimination against non-Turkmen, CERD wrote:

The Committee further notes with deep concern that, according to information received, only the Russian Orthodox Church and the Sunni branch of Islam enjoy legal status, while other confessions are denied registration by the State party and their members are subject to increased persecution, such as disruption of religious services, including in private homes, prohibition of literature, detentions and ill-treatment of religious leaders, destruction of places of worship and restriction of freedom of movement imposed on religious leaders, which may be in contravention with article 5 of the Convention.<sup>61</sup>

In 2003, at least four States from Africa and Asia were subjects of concern in matters regarding the enjoyment of religious freedom by minorities. The main observations that expressly mentioned religion or religious groups read as follows:

**Côte d’Ivoire** (which had just been the scene of serious violent popular disturbances):

The Committee notes with concern that the misinterpretation of election laws has given rise to tensions between ethnic and religious groups and recommends that these laws be reviewed in the light of the provisions of the Convention relating to the right of all citizens to take part in the country’s political life.<sup>62</sup>

**Ghana:**

The Committee notes that, out of a total of 9,265 complaints heard by the Commission (on Human Rights and Administrative Justice – CHAJ) in 2000, the CHRAJ only dealt with fewer than five complaints directly relating to alleged racial discrimination. According to the State party, the majority of the complaints received by the Commission were cases of religious discrimination which, because religion in Ghana is often related to ethnicity, could be classified, in some cases, as indirect racial discrimination. The Committee would like to receive more detailed information on this matter.<sup>63</sup>

**Saudi Arabia** (which had then presented its first report ever to an international human rights treaty body):

The Committee is concerned about reports that persons of some racial or ethnic origins are unable to manifest their religious

---

60. See *supra* Part II.

61. CERD, *Report* (2002), *supra* note 38, at 49.

62. CERD, *Report* (2003), *supra* note 43, at 20.

63. *Id.* at 32.

beliefs in the State party. The Committee wishes to receive further information on this issue.<sup>64</sup>

#### **Islamic Republic of Iran:**

The Committee takes note with concern of the reported discrimination faced by certain minorities, including the Bahá'ís, who are deprived of certain rights, and that certain provisions of the State party's legislation appear to be discriminatory on both ethnic and religious grounds.

The Committee recommends that the State party ensure that all persons enjoy their right to freedom of thought, conscience and religion, without any discrimination based on race, colour, descent or national or ethnic origin, in accordance with article 5 (d) of the Convention. The Committee recommends that the State party permit students of different origins to register in universities without being compelled to state their religion. Furthermore, the Committee invites the State party to submit additional information on the mandate and functions of the Special National Committee for the Promotion and Protection of the Rights of Religious Minorities.<sup>65</sup>

Other examples from subsequent years illustrate how CERD has been dealing with these problems, while managing to avoid the political clashes common in intergovernmental organs.

In 2004, reflecting the new language used in international jargon to refer to long-existing, specific racial discrimination with religious undertones, CERD conveyed to the Netherlands its concern "about the occurrence in the State Party of racist and xenophobic incidents, particularly of an anti-Semitic and 'Islamophobic' nature."<sup>66</sup> In addition, in a clear confirmation that discrimination is not only spreading to new victims, but is now based on a disparate mixture of elements, the Committee noted "the creation of the Spanish Observatory for Racism and Xenophobia" among the efforts of Spain to combat racial discrimination, adding its concern "about the occurrence of racist and xenophobic incidents and the reemergence of discriminatory attitudes towards Gypsies, North Africans, Muslims and Latin Americans."<sup>67</sup>

In 2005, one interesting illustration of CERD's method of dealing with religious intolerance was its message to France on the country's recently adopted prohibition of conspicuous religious garments by young students in public schools. The new piece of legislation, commonly referred to as the "law of the veil"—now similarly considered for adoption in other European countries—was still subject to lively

64. *Id.* at 43.

65. *Id.* at 73–74.

66. CERD, *Report* (2004), *supra* note 48, at 30.

67. *Id.* at 34.

arguments among human rights activists.<sup>68</sup> CERD members themselves were divided on the matter. The concluding observation sent to **France**—together with expressions of concern for other facts, some involving serious anti-semitic and xenophobic incidents—stated, in a neutral manner:

The Committee takes note of the information supplied by the State party on the implementation of the Act of 15 March 2004 governing the wearing of symbols or clothing denoting religious affiliation in State primary and secondary schools, in pursuance of the principle of secularism.

The Committee recommends to the State party that it should continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that everyone can always exercise that right.<sup>69</sup>

CERD sessions of 2006 were, as usual, rich in recommendations and manifestations of concern involving freedom of religion. The most complex case was that of **Bosnia-Herzegovina**, a state created on the basis of separating ethnic groups whose identities are closely tied to their religious affiliation. Before expressing specific observations to Sarajevo (which it did), CERD welcomed the report and the opportunity it offered the Committee to open a constructive dialogue with the State Party, and declared in a factual manner:

The Committee notes that the structure of the current Constitution of Bosnia and Herzegovina allocates certain important rights on an explicit ethnic basis. The Committee recognizes that this structure arises from the Dayton/Paris Peace Agreements and that it may have been necessary, on an interim basis, to secure peace in the aftermath of the armed conflict. However, the Committee also notes that the Constitution's current assignment of important rights based expressly on ethnicity may impede the full implementation of the Convention.<sup>70</sup>

The consideration of the periodic report of Israel in the winter session of 2007, a few months after the bombing of Lebanon,<sup>71</sup> definitively shows the unbiased way in which CERD approaches even the

68. See *Factbox: Policies on Muslim Scarves and Veils in Europe*, REUTERS, Feb. 27, 2008, <http://www.reuters.com/article/gc05/idUSL2764903920080227?sp=true>.

69. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 66–67 Sess., at 28–29, U.N. Doc. A/60/18 (2005) [hereinafter CERD, *Report* (2005)].

70. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 68–69 Sess., at 68–69, U.N. Doc. A/61/18 (2006) [hereinafter CERD, *Report* (2006)].

71. See, e.g., Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. TIMES, July 13, 2006, at A1.

most entangled hotbeds of tension—whether or not involving race and religion. The bombing, in retaliation for the kidnapping of Israeli soldiers by the Lebanese party Hezbollah, which escalated to actions of devastating proportions on both sides, had led the Israeli Government to request postponement of consideration of its report, originally scheduled for August 2006. Consequently, instead of examining the Israeli report, in view of the horrendous scenes of mutual destruction that could be seen on television, in August 2006, CERD held a closed debate on the situation of Lebanon, issuing then a statement of concern that “the continuation of the conflict may intensify racial discrimination and hatred in the region and the wider world.”<sup>72</sup>

In the winter of 2007, after a smooth and constructive discussion with the Israeli delegation sent to introduce the report, CERD approved by consensus the usual set of concluding observations. Among them the Committee praised the Supreme Court of Israel for its role “in combating racial discrimination, for example in matters of allocation of State land,” welcomed the “affirmative action programmes to ensure better representation of minority groups in the civil-service and within government-owned corporations,” noted “with satisfaction that for the first time an Arab-Israeli citizen has been appointed to the cabinet,” and capped its list of recommendations to the **State of Israel** with the following paragraph that requires no further comments:

In the present context of violence, the Committee recognizes the difficulties of the State party in fully implementing the Convention. Guided by the principles of the Convention, the State party should ensure, however, that security measures taken in response to legitimate security concerns are guided by proportionality, and do not discriminate in purpose or in effect against Arab Israeli citizens, or Palestinians in the Occupied Palestinian Territories, and that they are implemented with full respect for human rights as well as relevant principles of international humanitarian law.<sup>73</sup>

## VI. The Question of Caste

The definition of racial discrimination in article 1 of ICERD does not expressly refer to “caste,” but instead, to any “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”<sup>74</sup> In contrast, however, with the omission of “religion,” which had to be implied by CERD from the notion of

---

72. CERD, *Report* (2006), *supra* note 70, at 100.

73. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: Israel*, ¶ 13, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007).

74. ICERD, *supra* note 1, art. 1.

ethnicity and then applied to the expression “ethnic origin,” the concept of caste was simply disguised in article 1 under the word “descent” among the bases for the kinds of discrimination covered by the Convention.<sup>75</sup>

Castes are a religious form of social stratification, generally related to Hinduism, that the democratic Constitution of the Republic of India has banned since its adoption. Such stratification of society is, however, a millenary tradition, deeply rooted among Hindu populations, which modern governments have had serious difficulties eradicating. Within the United Nations, it is widely known that the word “descent” was included in ICERD’s definition of “racial discrimination” by the delegation of India. At the time the Convention was drafted in the early 1960s, India wanted to make sure that the future international instrument would deal with the caste system. Actively engaged in the *travaux préparatoires*,<sup>76</sup> the delegates from New Delhi were probably thus instructed because it was then believed that moral pressure from international law could provide positive support for the actions of their government towards the concrete abolition of the caste system.

In contemporary times, when one’s sense of identity is stimulated by attaching renewed worth to one’s culture, and secularism seems overcome by a general reversion to religion, India modified its external position. Justifiably proud that their country is acknowledged as the largest democracy in the world, India’s political leaders now refuse to include caste in the meaning of “descent” in the Convention. Domestic programmes of affirmative action are still kept for *dalits*—the correct word for “pariahs” or “untouchables” in Indian society—and other lower castes.<sup>77</sup> Governments, however, which regularly count with elected *dalits* (one of them was even President of the Republic of India), refuse international monitoring of their system, probably in defense of traditional Hinduism.<sup>78</sup>

Thus, at the 2001 World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, no mention of caste was

---

75. *Id.*

76. The French expression *travaux préparatoires* translates as preparatory work (but in the plural) and is used in international law to designate the negotiating process of every convention.

77. See Clifford Bob, “Dalit Rights Are Human Rights”: *Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue*, 29 HUM. RTS. Q. 167 (2007).

78. See HUMAN RIGHTS WATCH, HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA’S “UNTOUCHABLES” (2007), available at <http://www.hrw.org/reports/2007/india0207/india0207webwcover.pdf>.

made in the final declaration and programme of action,<sup>79</sup> despite the presence and pressure of numerous *dalits* who went to Durban to lobby NGOs and governmental delegations in favour of their claims for equal rights. Unable to foster their case in Durban due to the strong opposition of the official Indian delegation, *dalit* organizations then resorted to CERD, which convened a general debate on caste in Geneva, during its summer session of 2002.

In that general debate, many “untouchables” of India and other countries gave testimony of their personal experiences, making it abundantly clear that the discriminatory caste system is not exclusive of India or Hinduism, nor an exclusively religious phenomenon. It is a form of stratification found in many societies, with different shapes—like that of the *burakumin* in Japan, or professional castes in Africa, not to mention its “Hinduist” persistence among immigrant communities in Western states. As a result of the debate, CERD adopted a detailed General Recommendation (number XXIX) on the subject.<sup>80</sup>

Moved by what had just been heard from people belonging to the lowest strata of the system, but aware of the resistance the Committee might still face on the issue, the text of General Recommendation XXIX is cautious and detailed. It says, inter alia, in the Preamble:

*Recalling* the terms of the Universal Declaration of Human Rights according to which all human beings are born free and equal . . . .

*Recalling also* the Vienna Declaration and Programme of Action of the World Conference on Human Rights according to which it is the duty of States, regardless of political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms, . . . .

. . . .

*Reaffirming also* the condemnation of discrimination against persons of Asian and African descent and indigenous and other forms of descent in the Durban Declaration and Programme of Action . . . .

. . . .

*Confirming* the consistent view of the Committee that the term “descent” in article 1, paragraph 1, of the Convention does not

79. See World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Aug. 31–Sept. 8, 2001, *Durban Declaration and Programme of Action*, U.N. Doc. A/Conf.189/12 (Jan. 2002).

80. See CERD, General Recommendation XXIX on Art. 1, Paragraph 1 of the Convention (Descent), 61st Sess. (2002), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 226, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

solely refer to “race” and also has a meaning and application which complement the other prohibited grounds of discrimination,

*Strongly reaffirming* 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”, . . . .

. . . .

*Concluding* that fresh efforts need to be made as well as existing efforts intensified at the level of domestic law and practice to eliminate the scourge of descent-based discrimination and empower communities affected by it,

. . . .

*Attaching the highest* importance to its ongoing work in combating all forms of descent-based discrimination, . . .

. . . .

*Recommends* that the States Parties, as appropriate for their particular circumstances, adopt some or all of the following measures . . . .<sup>81</sup>

There follows, in the operative part, a long list of suggestions, grouped into eight categories as: (1) measures of a general nature; (2) multiple discrimination against women members of descent-based communities; (3) segregation; (4) dissemination of hate speech including through the mass media and the Internet; (5) administration of justice; (6) civil and political rights; (7) economic and social rights; and (8) right to education.<sup>82</sup>

Based on that adopted guideline, CERD immediately started monitoring remnants of caste systems in States Parties. Still in August 2002, it expressed concern at vestiges of castes in Mali and requested information on how the government of Mali intended to deal with “the persistence of the consequences of a traditional caste system that could give rise to descent-based discrimination.”<sup>83</sup> Also in the same session, the Committee showed concern at “the continuing legacy” of aspects of a caste-based system banned by law in Senegal.<sup>84</sup> In 2003, in the first session after adoption of General Recommendation XXIX, the Committee orally raised the question of caste with the delegation of Ghana, and repeated in the concluding observations that it wished to know “whether descent-based discrimination exists” in that country.<sup>85</sup> Aware of manifestations of the caste system among immigrants

---

81. *Id.* at 226–28.

82. *Id.* at 228–32.

83. CERD, *Report* (2002), *supra* note 38, at 69.

84. *Id.* at 73.

85. CERD, *Report* (2003), *supra* note 43, at 32.

in the United Kingdom, CERD referred London to General Recommendation XXIX, suggested that “a prohibition against such discrimination be included in domestic legislation,” and requested “information on this issue in the next periodic report.”<sup>86</sup>

In 2004, CERD was particularly attentive to the question of caste in view of the characteristics of some of the situations examined. The most obvious were those of Nepal. From the information available, one gleaned the image of a desperately poor country with a deeply ingrained, banned system of caste, struggling under an unusual array of difficulties compounded by the large presence of refugees, growing Hindu fundamentalism, and a Maoist insurgent movement. Far from refusing dialogue, the Nepalese government described the domestic problems and efforts to improve the situation of *dalits*. In its concluding observations, the Committee praised these efforts, while remaining “deeply concerned at the de facto caste-based discrimination and the culture of impunity that apparently permeates the higher strata of a hierarchical social system.”<sup>87</sup> In a different tone, in view of different circumstances, the Committee also addressed vestiges of abolished caste and slavery systems still found in Madagascar and Mauritania.

CERD’s attention to the question of discrimination by descent continues to this day. Only India objects to the consideration of the issue.

The latest Indian report was examined in March 2007.<sup>88</sup> The meetings reviewing that document were marked by problems uncharacteristic of CERD’s dialogue with delegations. Difficulties stemmed less from omissions than from positions of principle.

In the report, the government of India reiterated its formal understanding “that ‘caste’ cannot be equated with ‘race’ or covered under ‘descent’ under Article 1 of the Convention.”<sup>89</sup> To substantiate this understanding, the report recalled that, while the country’s fundamental law forbade discrimination by either caste or race, the two are mentioned separately in the Indian Constitution as prohibited grounds of discrimination. Therefore they cannot be considered as interchangeable or synonymous . . . . As a matter of courtesy to the

---

86. *Id.* at 92.

87. CERD, *Report* (2004), *supra* note 48, at 25–26.

88. Gov’t of India, *Reports Submitted By States Parties Under Article 9 of the Convention: Nineteenth Periodic Reports of States Parties Due in 2006: Addendum*, U.N. Doc. CERD/C/IND/19 (Jan. 26, 2006). In itself the delay is not extraordinary (many States Parties take still longer than that). However, during the period 1970–1986, India submitted its reports more regularly.

89. *Id.* ¶ 16.

members of the Committee, if it so desires, the Government of India would be happy to provide information relating to Scheduled Castes and Scheduled Tribes to them though not as a reporting obligation under CERD.<sup>90</sup>

Accordingly, the delegation from New Delhi, mostly comprised of civil servants, included one academician as an expert on the system of caste. His function, more than that of the other delegates, was to explain in detail the difference between caste and race, and the consequent refusal by the government to accept CERD's monitoring of the former. He spoke at length about historical and anthropological aspects of traditional Hindu categories.

What seemed to be overlooked by the Indian delegation present in Geneva as well as by the drafters of the report at home was that neither the members of the Committee, nor the wording of General Recommendation XXIX, equated caste to race—as no statement was ever made that religion is race or can be equated to it. What CERD, like ICERD, had always meant, and the members of the Committee stressed in the meetings, was the very understanding which the Constitution of India seemed to endorse: that caste is a serious *ground of discrimination*. Furthermore, CERD pointed out that caste was a form of inherited status, similar to descent, and that the term “descent” was included in the wording of article 1 of the Convention by India itself.<sup>91</sup> CERD then stated that for all those reasons the system of caste has always been within the purview of the Committee.

CERD's concluding observations to India in 2007, after praising the “constitutional provisions and other legislation of the State party to combat discrimination, including discrimination based on race and caste,” together with measures taken to “advance the equal enjoyment of rights by members of scheduled castes and scheduled tribes,” started the series of requests and recommendations by saying:

The Committee takes note of the State party's position that discrimination based on caste falls outside the scope of article 1 of the Convention. However, after an extensive exchange of views with the State party, the Committee maintains its position expressed in general recommendation No. 29 . . . . Therefore, the Committee reaffirms that discrimination based on the ground of caste is fully covered by article 1 of the Convention.

The Committee regrets that lack of information in the State party's report on concrete measures taken to implement existing anti-discrimination and affirmative action legislation, as well as on

---

90. *Id.* ¶ 17.

91. ICERD, *supra* note 1, art. 1.

*de facto* enjoyment by members of scheduled castes and scheduled and other tribes of the rights guaranteed by the Convention.

Notwithstanding the above-mentioned legal position of the State party, the Committee invites it to include in its next periodic report detailed information on measures taken to implement anti-discrimination and affirmative action legislation, disaggregated by caste, tribe, gender, State/district and rural/urban population.<sup>92</sup>

## VII. CERD and Freedom of Expression

While the question of caste presented a challenge for CERD from external agents, another delicate risk was posed by the internal initiative of one of its most respected members.<sup>93</sup> It also involved a religious issue. And damage was finally avoided thanks to the courage of other experts of the same faith.

Article 4 of ICERD provides for the condemnation of racist propaganda and organizations based on ideas of superiority of race, colour, or ethnic origin. Its paragraphs determine that States Parties:

- (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 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 offense punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.<sup>94</sup>

While this provision goes hand in hand with article 20, paragraph 2, of the ICCPR, which bans “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,” it cannot disregard article 19, paragraph 2, of the same Covenant, which protects the right to freedom of expression.<sup>95</sup> As disposed in the Covenant, freedom of expression includes “the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art,

---

92. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: India*, ¶¶ 8, 9, U.N. Doc. CERD/C/IND/CO/19 (May 5, 2007).

93. I take the opportunity to pay homage here to our previous, very esteemed, Dean, Mr. Aga Shahi, recently deceased, including my admiration for the unflinching devotion he always rendered to his faith.

94. ICERD, *supra* note 1, art. 4.

95. ICCPR, *supra* note 11, arts. 19, 20.

or through any other media of one's choice."<sup>96</sup> Restrictions are only contemplated under two circumstances: (1) respect of rights of others, and (2) protection of national security or of public order, public health, and morals.

For CERD, article 4 is one of the most critical provisions of ICERD. Racial discrimination directly violates rights of the victims and poses the danger of seriously disrupting life in society. Limiting freedom of expression by outlawing such propaganda, and groups or organizations that make it, conforms to both circumstances contemplated in ICCPR.

Since 1972, the Committee has adopted several general recommendations insisting and elaborating on the obligatory nature of article 4 for all States Parties. The latest and most detailed is General Recommendation XV, of 1993, which starts by explaining:

When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.<sup>97</sup>

The problems that surround article 4 exist both by omission and by excess. By omission, because some United Nations countries from the Western Group, having entered a reservation to it when ratifying the Convention, refuse to adopt the prescribed legislation. By excess, because some non-secular countries as well as religious groups with divergent values from mainstream Western societies wish for CERD and secular States to extend the ban of racist propaganda to manifestations of expression that they consider offensive to their faith.

With regard to the first category, by omission, when CERD insists on the need for States Parties to review and withdraw their reservation, some States simply repeat the interpretation that prohibition of propaganda of racial supremacy and hatred goes against the right to freedom of expression. Others declare that such prohibition can be counterproductive, by indirectly recognizing marginal organizations

---

96. *Id.*

97. CERD, General Recommendation XV on Art. 4 of the Convention, 42d Sess. (1993), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 207, U.N. Doc. HR/GEN/1/Rev.7 (May 12, 1994).

and legitimizing their theories by attracting attention to them. The second category of difficulty, by excess, is less common, or, at least, less evidently challenging within CERD. While it is often manifested through the positions of some experts when dealing with issues raised in the consideration of country reports, it was more seriously presented to the Committee in the wake of the Muslim reaction around the famed cartoons of Mohammed, the Prophet of Islam, published in Copenhagen.<sup>98</sup>

Based on these caricatures, in February/March 2006, a few experts from Islamic nations insistently proposed that CERD adopt a general recommendation for States Parties to prohibit any oral or printed manifestation considered blasphemous to any religion as a violation of article 4. No matter how displeased the Committee as a whole might be with the episode of the Danish cartoons and its sequels, it could not recommend such a ban. For it would certainly go beyond the competence of an organ established to deal with racial discrimination to rule on an issue of religious blasphemy. It amounted to recommending an unauthorized form of censure, which would be unavoidably prone to abuse by the subjective interpretation of leaders of each creed.

After discussions and evident disagreement among CERD members along the winter session of 2006, the proposal was not tabled for adoption. Still in the form of a non-paper, the initiative was withdrawn at the request of other Muslim experts, who appealed to their fellow Muslim colleagues not to insist. Such a general recommendation, if

---

98. This case started with the publication, in September 2005, in the Danish newspaper *Jyllands Posten*, of several caricatures of the Prophet of Islam. The cartoon considered most offensive showed a man wearing a turban in the shape of a bomb ready to explode. Reaction by Muslims everywhere took different forms. Some manifestations of anger were legal, in the form of peaceful protests and a lawsuit filed in Copenhagen (when judged, in 2007, the claim was rejected). The worst reactions were violent, from apparently uncontrolled (but certainly stimulated) demonstrations, involving aggression, arson, and stoning, of Danish embassies and consulates abroad, as well Christian churches in Denmark and other parts of the world. Two of the most brutal acts resulted in the death of a nun in Somalia and clashes against Christians in Nigeria. At the time of this writing, extremist anger had still not been soothed. A plot to assassinate the author of the cartoons, Kurt Westergaard, was allegedly discovered and made public by the Danish police. See Dan Bilefsky, *Danes Hold 3 in Plot to Kill Cartoonist: Artist Who Lampooned Muhammad in 2005 Was the Target, His Paper Says*, INT'L HERALD TRIB., Feb. 13, 2008, at 1, 7. Scenes of violence once again erupted in Denmark, the new bursts of rage allegedly caused by the fact that the *Jyllands Posten* and European television had once again aired the cartoons when breaking the news about the plot and arrest of suspects. Only then was it divulged that the cartoonist had already been living with permanent police escort because of threats he had been receiving since 2005. See *Danish Muhammad Cartoon Reprinted*, BBC NEWS, Feb. 14, 2008, <http://news.bbc.co.uk/1/hi/world/europe/7242258.stm>.

approved by a vote, would represent a strongly divisive factor in an otherwise quite harmonious body. Furthermore, as pointed out on the occasion, the case was raised in a biased way. That sort of gross religious irreverence in publications and works of art of liberal Western states is more common with the figures of Jesus and Christian saints, a fact which, in general terms, excludes the notion of racial propaganda or "Islamophobia." Also the requested prohibition ignored the violent reaction the cartoons had provoked against Christians in many parts, a reaction itself prohibited by article 4. Finally, the acts of violence against innocent people and property seen on TV and described by the press were far more detrimental to the image of Islam than the otherwise unnoticeable drawings.<sup>99</sup>

No CERD member intended to defend the cartoons or the Danish newspaper in which they first appeared. It is even quite possible that the *Jyllands Posten*, as other publications which reproduced the drawings, follow the undeniable Western tendency to vilify the Islamic faith and Muslim immigrants. Nevertheless, for these types of offenses, domestic democratic laws are expected to offer compensation and other remedies.

As far as **Denmark** was concerned, CERD pronounced in the following session later that same year, after examining the scheduled Danish periodic report:

The Committee, while taking note of the State party's efforts to combat hate crimes, is concerned about the increase in the number of racially motivated offenses and in the number of complaints of hate speech. The Committee is also concerned about hate speech by some politicians in Denmark. While taking note of the statistical data provided on complaints and prosecution launched under section 266 (b) of the Criminal Code, the Committee notes the refusal by the Public Prosecutor to initiate court proceedings in some cases, including in the case of publication of some cartoons associating Islam with terrorism.

The State party should increase its efforts to prevent racially motivated offences and hate speech, and to ensure that relevant criminal law provisions are effectively implemented. The Committee recalls that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation

---

99. This opinion is not only mine. It is shared by many Muslims, including the well-known Swiss leader Tariq Ramadan, famous for his "extremist" positions. On February 8, 2006, Ramadan addressed the issue by stating on his website: "The majority of the world populations watch these excesses with perplexity: what sort of madness is going on? It is necessary to break this hellish circle." Oumma.com, <http://www.oumma.com> (last visited Feb. 8, 2006); see also ANNE NIVAT, ISLAMISTES: COMMENT ILS NOUS VOIENT 28 (2006) (Fr.) (quoting other similar, however rare, positions in the Islamic world).

not to disseminate racist ideas, and recommends that the State party take resolute action to counter any tendency to target, stigmatize, stereotype or profile people on the basis of race, colour, descent, and national or ethnic origin, especially by politicians.<sup>100</sup>

### VIII. Dialogue Between CERD and Other Mechanisms Over Religion

In constant efforts to improve its work, CERD regularly tries to coordinate its activities with other treaty bodies, and maintains frequent dialogue with different mechanisms with similar fields of action. In 2007, in order to better assess the interlinkage between religion and racial discrimination, CERD invited the Special Rapporteur on Freedom of Religion and Belief (“Special Rapporteur”), a “thematic rapporteur” established by the former United Nations Commission on Human Rights,<sup>101</sup> with the mandate to examine and make recommendations regarding incidents that violate the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief.<sup>102</sup> Preceded by other personalities from different countries, the Special Rapporteur has been a Pakistani woman, the well-known and respected humanitarian Dr. Asma Jahangir, since July 2004.

In her address and replies to CERD, Dr. Jahangir remarked that she had noticed that the intersectionality of race and religion had been, time and again, brought to the attention of the Committee, which had acted upon it accordingly.<sup>103</sup> She encouraged the Committee to continue this approach if and when the so-called aggravated—or multiple—“discrimination [on racial and religious grounds] could be identified.”<sup>104</sup> But she stressed the need to avoid confusion on the notions of race and religion.<sup>105</sup> For race is not a question of choice:

---

100. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: Denmark*, ¶ 11, U.N. Doc. CERD/C/DEN/CO/17 (Oct. 19, 2006). Advocates of the Danish Muslim communities filed a claim of financial reparation. See *Danish Muslims File Suit over Muhammad Cartoons*, CBC NEWS.CA, Mar. 30, 2006, <http://www.cbc.ca/world/story/2006/03/30/cartoon-060330.html>. The Danish court, however, rejected the suit. See Jan M. Olsen, Associated Press, *Danish Court Rejects Suit Against Paper That Printed Prophet Cartoons*, WASH. POST, Oct. 26, 2006, at A17.

101. Comm’n on Human Rights Res. 1986/20, ¶¶ 2–9, U.N. Doc. E/1986/22, E/CN.4/1986/65 (Feb. 3–Mar. 14, 1986).

102. Declaration of Religion, *supra* note 12.

103. See CERD, 71st Sess., 1826th mtg. at 8, ¶ 39, U.N. Doc. CERD/C/SR.1826 (Aug. 9, 2007) [hereinafter CERD, 71st Session Summary Records].

104. *Id.*

105. *Id.* ¶ 40.

you are born with it and you cannot move out.<sup>106</sup> Religion, on the other hand, according to international human rights law, is supposed to be freely chosen.<sup>107</sup> In contrast with current practice in many countries, and within many communities, Dr. Jahangir properly reverted to the meaning of the full wording of the Universal Declaration of Human Rights to affirm that “[c]hoosing, changing and denying a religion were central to freedom of religion or belief.”<sup>108</sup>

For those unaware of the full implication of such assertion by a person who comes from a Muslim country, it is useful to keep in mind that the Universal Declaration of Human Rights states that the right to freedom of thought, conscience, and religion “includes freedom to change one’s religion or belief,”<sup>109</sup> and this was one of the reasons why, in 1948, Saudi Arabia abstained, instead of voting in favour.<sup>110</sup> In 1966, with many newly-independent states of various regions and religions already members of the United Nations, the same wording could not appear on the ICCPR, nor, a fortiori, in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (“1981 Declaration”). For the change of religion, according to the integrist versions of Islam and the Islamic Shariah, is not only forbidden: the “crime of apostasy” is punished with death. Furthermore, although both the Covenant and the 1981 Declaration do refer to “freely chosen religion or belief,”<sup>111</sup> and while Human Rights Committee General Comment No. 22 asserts that article 18 of the Covenant protects “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief,”<sup>112</sup> the possibility to change or to deny religion is very seldom stated in this “post-secular” twenty-first century.

Apart from that remarkable statement, Dr. Jahangir has consistently alerted the Committee, in the many reports she has submitted to United Nations bodies, that “the perpetrators of acts of religious intolerance, whether Governments or non-State actors, often use re-

---

106. *See id.* ¶ 41.

107. *Id.*

108. *Id.*

109. Universal Declaration, *supra* note 9, art. 18.

110. The Universal Declaration was adopted by the United Nations General Assembly by a vote of forty-eight in favour, none against, and eight abstentions. Besides Saudi Arabia, the other member-States which abstained were “apartheid” South Africa and Communist Bielorussia, Yugoslavia, Poland, the former Czechoslovakia, Ukraine, and the Soviet Union. *See* U.N. GAOR, 3d Sess., pt. 1, 180th–83d plen. mtgs. at 852–933 (1948).

111. ICCPR, *supra* note 11; Declaration of Religion, *supra* note 12.

112. HRC, General Comment No. 22, *supra* note 15.

ligion to justify their actions;”<sup>113</sup> that “like other fundamental rights, the right to freedom of religion remains primarily an individual right;”<sup>114</sup> that “states have an obligation to address acts that are perpetrated by non-State actors and which result in violations of the right to freedom of religion of others;”<sup>115</sup> and that “the right to freedom of religion or belief needs other human rights to be fully exercised, including the right to freedom of association or the right to freedom of expression.”<sup>116</sup>

Of particular importance to what had happened in CERD around the case of the cartoons in Denmark, Dr. Jahangir declared that same year: “Criminalizing defamation of religion can be counterproductive . . . . There are numerous examples of persecution of religious minorities as a result of excessive legislation on religious offences or overzealous application of laws that are fairly neutral.”<sup>117</sup>

In connection with CERD’s March 2002 statement on the side-effects of counter-terrorism measures, Dr. Jahangir reported to the Human Rights Council that she had received “numerous allegations that national counter-terrorism measures adopted in the post 9/11-context have had and continue to show adverse effects on the freedom of religion or belief worldwide,” relating “both to countries where Muslims form a minority of the population and where they are in the majority.”<sup>118</sup> In her dialogue with CERD, she recalled that sometimes State authorities conversely use “racial profiling as a proxy for religious profiling and vice versa.”<sup>119</sup> Moreover, taking into consideration the tremendous negative impact that the available information about the detention of “enemy combatants” in Guantanamo has had not only in the field of her mandate, but for the cause of human rights as a whole, she and other “thematic” monitors requested permission to visit the facilities.<sup>120</sup> Having been refused access, Dr.

113. *Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 4, delivered to the General Assembly, U.N. Doc. A/61/340 (Sept. 13, 2006).

114. *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, ¶ 34, delivered to the General Assembly, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) [hereinafter Jahangir & Diène Report].

115. *Id.* ¶ 35.

116. *Id.* ¶ 41.

117. *Id.* ¶ 42.

118. *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir*, ¶ 40, delivered to the General Assembly, U.N. Doc. A/HRC/4/21 (Dec. 26, 2006).

119. CERD, 71st Session Summary Records, *supra* note 103, ¶ 41.

120. See Press Release, U.N., United Nations Human Rights Experts Request Urgent Closure of Guantanamo Detention Center (June 14, 2006), <http://www.unog.ch/>

Jahangir, together with the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention submitted a report on the applicability of international human rights law to persons held in Guantanamo.<sup>121</sup>

Another thematic human rights monitor with whom CERD has still more frequent exchange of views is, for obvious reasons, the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, a function now commissioned to the Senegalese sociologist Doudou Diène. He also notes that that one of the negative impacts of the events of September 11, 2001

is the trend and sometimes the ideological position of many Governments to consider that the security of the country and its people constitute the sum and substance of all human rights . . . .

. . . .  
[As a result] new forms of discrimination [have emerged] . . . .  
structured around two intellectual and political mechanisms: the collective responsibility for individual acts and the amalgamation of the factors of race, culture and religion.<sup>122</sup>

In its capacity as the main international anti-discrimination body, with a conventional mandate that acquires more complexity in a world of growing entanglement of people and phenomena, it is increasingly necessary that CERD make use of all of its means to address the aggravated, mixed nature of racism and racial discrimination in this century. Bearing in mind the limitations existing in international law, it must, at the same time, make sure that religious beliefs and the right to freedom of religion are not misused as bases or pretexts for violating other equally fundamental human rights.

---

80256EDD006B9C2E/(httpNewsByYear\_en)/  
617B5DF41FB69B2AC125718D00319FA0?OpenDocumentPress.

121. *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt*, ¶¶ 87–88, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006).

122. Jahangir & Diène Report, *supra* note 114, ¶¶ 6, 7.

## IX. Conclusion

In October 2007, the government of the Republic of Macedonia convened a non-governmental “World Conference on Dialogue Among Religions and Civilizations,” in the context of the United Nations-promoted Dialogue Among Civilizations.<sup>123</sup> The third initiative of its kind held in the Balkans since 2003, always in Macedonia, the 2007 event brought to the shores of Lake Ohrid, a large number of Orthodox and Catholic bishops and priests, Islamic imams and ulemas, Jewish rabbis, Protestant pastors, and other clergymen of different faiths, together with lay professors, philosophers, and human rights activists.<sup>124</sup>

In his opening address, the Prime Minister of Macedonia, Nikola Gruevsky, described the character of our times as “post-modern relativism,” with emphasis on “ethnicity” and “fundamentalism.”<sup>125</sup> He hoped, however, that those who had come to Ohrid to attend the conference “would send to the world a message of dialogue and peace.”<sup>126</sup> To that aim, the Prime Minister noted that, while religion is a personal subject, the conference attendees knew that, having all been created in the image of God, they had more in common than they had polarizing differences.

For a country like the Republic of Macedonia, which had been until recently shaken by episodes of violence between its two “ethnicities”—Muslim Albanians and Orthodox Slavic Macedonians—and unrecognized by neighbouring Greece (for whom Macedonia is only the name of one of its provinces), the gist of the Prime Minister’s speech was in another reference of his, typical of our “multiculturalist” times: the right to identity as equal to the right to be recognized. In Prime Minister Gruevsky’s words, “one’s identity is built with the help of the others, requiring mutual tolerance.”<sup>127</sup> However, it was the Prime Minister’s first remarks on the relativism of our post-modern times

---

123. See, e.g., Global Agenda for Dialogue Among Civilizations, G.A. Res. 56/6, U.N. Doc. A/RES/56/6 (Nov. 21, 2001); Promotion of Interreligious and Intercultural Dialogue, Understanding and Cooperation for Peace, G.A. Res. 62/90, U.N. Doc. A/RES/62/90 (Jan. 25, 2008).

124. It was in this last capacity, as a member of CERD, that I was invited and attended the conference. In fact it was on preparing the paper for my address to it that I drafted the basic ideas of this Article.

125. All the information and quotations of the Ohrid Conference are based on my own notes, taken on that occasion. José Lindgren Alves, Personal Notes (Oct. 26–28 2007) (on file with author) [hereinafter Alves Notes].

126. *Id.*

127. *Id.*

that were soon confirmed at the conference, in a rather unexpected way.

After several statements by leaders of different religious communities, all of whom described the teachings on peace and kindness of their respective faiths, a dissonant discourse was voiced by the bishop of the Russian Orthodox Church in Austria, Hilarion Alfeyev. In contrast with previous speakers, Bishop Alfeyev focused on Western liberal humanism as the main source of today's conflict. He argued that Western rationalist thinking counters religious belief in sin and divine law by brandishing the concept of human rights. In other words, he said that the very idea of human rights, devised in Europe by eighteenth century thinkers, is the cause of today's troubles because it undermines Christian teachings. Furthermore, in coincidence with allegations that Western values are "imperialistically imposed" on the rest of the world,<sup>128</sup> Alfeyev declared, as an additional negative aspect of human rights, that, having emerged from the Enlightenment in the context of a historically negative attitude towards religion, they are presented as universal, together with humanist rationalism.<sup>129</sup>

No doubt, this stance sounded shocking in Ohrid, and was strongly opposed by many participants. In reality, however, Bishop Alfeyev (who explicitly accused euthanasia and gay marriage of infringing upon "what had been granted to Man by God"<sup>130</sup>) simply repeated what is being said by others elsewhere.

A few days before, the leader of Bishop Alfeyev's own denomination, Russian Patriarch Alexy II, visited the European Parliament in Strasbourg. There, Alexy II lashed out against legalization of same-sex unions, pointing to a "break between morality and human rights."<sup>131</sup> According to him, "this break threatens the European civilization. We can see it in a new generation of rights that contradict morality, and in how human rights are used to justify immoral behavior."<sup>132</sup> Whether or not motivated by the same or similar specific causes, like abortion and contraception, or deeply dwelling on the break between

---

128. See, e.g., HUMAN RIGHTS IN CROSS CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1992); Alves, *The United Nations, Postmodernity and Human Rights*, *supra* note 5, at 499–501.

129. Alves Notes, *supra* note 125.

130. *Id.* For further information on Bishop Alfejev's position, see *Interview by Robert Moynihan, Editor-in-Chief, Inside the Vatican, with Hilarion Alfeyev, Bishop of Vienna and Austria, Representative of the Russian Orthodox Church to the European Institutions, in the Vatican (Apr. 24, 2005)*, [http://en.hilarion.orthodoxia.org/7\\_2](http://en.hilarion.orthodoxia.org/7_2).

131. Stephen Castle, *Patriarch of Russia Assails Gays in Speech at Council of Europe*, INT'L HERALD TRIB., Oct. 2, 2007, at 3.

132. *Id.*

humanism and Christian morality as a philosopher, the same concerns are expressed by Pope Benedict XVI.<sup>133</sup> Whereas the Pope never disparaged the idea of human rights,<sup>134</sup> the expressions of integrism by these supreme leaders—together with the dissemination of new Evangelic and Pentecostal creeds, as well as the spreading of movements that, for instance, want to ban Darwin's theory of evolution—prove that it is not necessary to turn to Islam to search for fundamentalism.<sup>135</sup> Neither is it necessary to travel East to meet politico-cultural resistance to the universality of human rights or even to find explanations for the violence of today's world in the demise of religion from secular affairs. Is it not well-known that some Protestant preachers in the United States themselves explained September 11 as God's atonement for the dissipation of moral values in America?

If, in the West, the return to religion has been so dramatic as to elicit a recent surge of books that repeat the eighteenth and nineteenth centuries' feat of explaining religion as a delusion;<sup>136</sup> in non-Western cultures, where religion had never left the realm of politics, it should not be surprising that revival of faith has led to increased enforcement of traditional laws and practices. While, on the one hand, the search for tools of security and societal control seriously threaten human rights, it is important to recognize that, on the other hand, in liberal societies one can still, at least, speak, read, and write about fundamental rights as the alternative to repression, or criticize the blind return to faith as a way back into myths that lead to hopeless submission. This fact still distinguishes humanistic liberal States from States with religiously ambiguous regimes and undemocratic theocra-

---

133. For coverage of Pope Benedict XVI's visit to Brazil in May 2007, see Associated Press, *Vatican Combats Abortion Confusion*, INT'L HERALD TRIB., May 11, 2007, at 6; Ian Fisher & Larry Rohter, *Pope's Combative Spirit Surfaces in Brazil Visit – A Return to Conservative Vatican Roots*, INT'L HERALD TRIB., May 15, 2007, at 4. Benedict XVI's most famous philosophical elaboration was during a class at Regensburg on September 12, 2006, which was notorious for his apparent criticism of Islam. Pope Benedict XVI, Meeting with the Representatives of Science Lecture of the Holy Father (Sept. 12, 2006), [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/september/documents/hf\\_ben-xvi\\_spe\\_20060912\\_university-regensburg\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html).

134. On the contrary, his first message in 2008 praised the Universal Declaration not only for the value it acknowledges to the family, but as a "decisive step forward along the difficult and demanding path towards harmony and peace." Pope Benedict XVI, The Human Family, a Community of Peace (Jan. 1, 2008), [http://www.vatican.va/holy\\_father/benedict\\_xvi/messages/peace/documents/hf\\_ben-xvi\\_mes\\_20071208\\_xli-world-day-peace\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html).

135. To have an idea of how this originally American refusal is now widespread, see, for instance, Stephen Castle, *European Lawmakers Condemn Efforts to Teach Creationism*, INT'L HERALD TRIB., Oct. 5, 2007, at 3.

136. See, e.g., SAM HARRIS, THE END OF FAITH (2005).

cies. This is due to one of the most important of all human rights, a right which now also appears to be at risk: the right to freedom of opinion and expression.

Because race and religion often present themselves as intertwined, especially today, in the context of the struggle against terrorism, one does not have to accept all counter-measures proposed, in particular those that intend to limit freedom of expression on behalf of religion. Not every claim by alleged victims of discrimination must be endorsed without balancing pros and cons. Understandable as it was, the attempt made at CERD in 2006 to use the case of some normally unnoticeable cartoons to adopt an illegitimate standard for States Parties was successfully stopped with support from moderate followers of the proponents' religion. The same case seems to inspire current insistence by some religious individuals, countries, and groups of countries on the need for new international norms to cover *lacunae*<sup>137</sup> in ICERD. It is true that the Durban Programme of Action recommends "complementary international standards to strengthen and update international instruments,"<sup>138</sup> but they were contemplated for other issues (like discrimination against immigrants and refugees, rights of indigenous peoples, and double discrimination against native and afro-descendant women) which are already somehow under the umbrella of CERD. Even though *lacunae* may exist in the text of ICERD, a Convention negotiated in the 1960s, they have always been covered by the Committee itself. To open negotiations on new standards now, when tensions are so overheated, can open the possibility for still further damage to international human rights law, already debilitated by terrorism and counter-terrorism measures. If the damage affects fundamental freedoms in a normative document of global range, there will be little left as legitimate reference on which to base the struggle for social progress worldwide.

As the author of this text had the occasion to state at the 2007 Ohrid Conference, the clash of civilizations that seems to be occurring today is not a real clash of cultures and religions. It is a political clash between the radicals and moderates within and without each culture, religion, or "ethnicity." For those religious and non-religious per-

---

137. The word *lacunae* means "gaps."

138. See World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Aug. 31–Sept. 8, 2001, *Durban Declaration and Programme of Action*, ¶ 199, U.N. Doc. A/Conf.189/12 (Jan. 2002).

sons who are still in favour of the modern rational utopia of universal human rights, it is imperative to ensure that the moderates prevail.<sup>139</sup>

---

139. As a final, but necessary clarification, I wish to emphasize that nothing in this Article, not even the concerns described in Part VII, should be interpreted as condoning the allegedly documentary film *Fitna*, produced by Dutch politician Geert Wilder and prepared to be released after this text was concluded. *FITNA* (Scarlet Pimpernel Productions 2008). Based on what I have learned from the media, a film that compares Islam to Nazi-Fascism, and the Koran to Hitler's *Mein Kampf*, not only falls into the category of human rights violations and threats to national security precluded by paragraph 3, article 19, and paragraph 2, article 20 of ICCPR, but also into the purview of the prohibition of propaganda of racial hatred, compounded in this case with religion, provided for in article 4 of ICERD. ICCPR, *supra* note 11, arts. 19, 20; ICERD, *supra* note 1, art. 4; *see, e.g.*, Gregory Crouch, *Dutch Foe of Islam Mince No Words*, INT'L HERALD TRIB., Mar. 22–23, 2008, at 1, 4; Stephen Castle, *Dutch Film on Koran Stirs Scorn and Relief*, INT'L HERALD TRIB., Mar. 29–30, 2008, at 3. Regardless of any reservation that may have been made on these norms, such a specifically targeted racist, anti-religious, and xenophobic initiative can and must be forbidden according to international law in force.