

Essay

The Durban Conference Against Racism and Everyone's Responsibilities

By J.A. LINDGREN ALVES*

"Yo soy yo y mi circunstancia y si no la salvo a ella no me salvo yo."¹

WHEN DELEGATES AND observers to the third United Nations conference against racism left the premises in Durban, South Africa, exhausted and still stunned by the difficulties they had faced, they did not have a hint of what was soon to happen. They knew that only by means of accommodation and last minute procedural maneuvers had they managed to reach a "consensus" on the final documents. This should have been enough to tone down any possible enthusiasm. Nevertheless, for most of them, results had undoubtedly had positive aspects. There were reasons to believe the Conference had been worthwhile.

Participants could not have predicted that just three days afterwards, while many of them were still in transit on their way back home, the largest terrorist strikes in History would make Durban's difficulties look totally derisory, its final documents buried under the ruins of New York's World Trade Center. They would have never imagined that, in their catastrophic proportions, the September 11, 2001 attacks in the United States, as if underlining the apparent irrelevance of discursive diplomatic quarrels, would create conditions for re-establishing a Hobbesian and frightening "state of nature" in the world, in substitution for international law.

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1. I JOSÉ ORTEGA Y GASSET, *MEDITACIONES DEL QUIJOTE, OBRAS COMPLETAS* 322 (6th ed. 1914). The quotation from the Spanish philosopher could translate roughly as "I am myself plus the circumstances that surround me; if I don't save them, I don't save myself."

I. Introduction

Let it be clear, however, that the aim of this article is neither to analyze terrorism, nor to criticize the combat launched against it. Its scope is completely different.

It is understandable that the tremendous violence of the attacks, by setting the whole world in a catatonic trance followed by panic and feelings of general insecurity, should thwart the exhilaration that might result from the achievements of the Conference. Although these achievements were smaller than desired, they were nevertheless constructive and useful in many specific areas. Because those terrorist acts seemed to bear an irrational relationship with some problems discussed in the meetings, one cannot even deem absurd, though in an evidently wrong and superficial manner, the association of ideas between the suicidal kidnappers of the aircraft transformed into bombs and certain attitudes kept in the discussions. It was also natural that, after September 11, priority should be given in the United States and elsewhere to anti-terrorism measures. What did not make sense then, nor now, is to look at the 2001 Conference on Racism as a despicable and harmful international gathering. Nor did it make sense to envisage its final documents as things to be sent straight to the dustbin of History.

Criticism of that first global meeting of the new century is abundant and frequent. Some complaints are ideological and simply mirror long-standing positions that nothing seems able to alter. Others stem from naïve assumptions that do not take into consideration the complex nature of the Conference itself, or from simplistic approaches that separate the fact from its circumstances. The first sort of criticism does not look for, and would certainly not accept, counter-arguments of any kind. The second, provided it is *bona fides*, might perhaps be addressed by a little deeper, unprejudiced, reflection. After all, few contemporary events remain as misunderstood, or surrounded by as much misinformation, as that world conference held in post-apartheid South Africa on a subject that shortly before would have been inconceivable to discuss in that country.

Durban's effects remain dependent upon the will of those who are politically responsible and upon the political use their social beneficiaries may make of its final documents. Unfortunately, the worst causes of disagreement seen at the Conference now appear to have grown still worse in the world as a whole.

Since the idea of a conference on contemporary racism originally came from myself as a member of the main subsidiary body of the

United Nations Commission on Human Rights in 1994, some scholars and militants have inquired of me whether its problems had been foreseen from the beginning. The answer is, of course, no. Some difficulties were surely counted upon, but not in the intensity or in the shape they ultimately took. Others followed later, by the evolution of circumstances and modifications made to the original proposal. Despite these inevitable difficulties, the idea of the Conference was coherent and timely.

II. The Origins of the Conference

When the suggestion of a new United Nations conference on racism was presented at the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now Sub-Commission on Promotion and Protection of Human Rights), which had in its very name the obligation to give priority to the fight against discrimination, the world was living in very different circumstances. Probably because of it, the proposal was promptly subscribed by all but one of the twenty-six members of that body,² and adopted by real consensus (not as one says at the U.N. simply “without a vote”).

The 1992 conference in Rio de Janeiro on the environment, and the 1993 conference in Vienna on human rights, took place shortly before in a satisfactory manner.³ They seemed to confirm the emergence of a new phase of confidence in parliamentary diplomacy that had recently emerged out of the “crisis of multilateralism,” an expression widely used in the 80s when the existence of a Cold War dominated everything. The new vitality shown by the United Nations as an essential forum for the search of solutions for worldwide problems had enabled it to schedule a series of world meetings on the so-called “global issues.” In August 1994 the series extended until 1996 with the Istanbul Conference on Human Settlements (Habitat-II), to be preceded by the Cairo Conference on Population, in September 1994, the Copenhagen Summit on Social Development, in March 1995, and

2. The only expert who did not co-sponsor the draft resolution (by adding his signature to those of the other 25 members when it was being tabled), Mr. Ahmed Khalifa, immediately vowed, however, his unconditional support.

3. See, e.g., *Report of the United Nations Conference on Environment and Development*, U.N. GAOR, Annex I, U.N. Doc. A/CONF.151/26 (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last accessed Aug. 3, 2003); *Report of the World Conference on Human Rights*, U.N. GAOR, U.N. Doc. A/CONF.157/24 (1993), available at [http://193.194.138.190/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://193.194.138.190/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) (last accessed Aug. 3, 2003).

the Beijing Conference on Women, in September 1995.⁴ It was, thus, only natural that the U.N. should try something of that kind to deal with racism, a subject that had already given rise to two international "Decades" of plans, projects, and programs, as well as two conferences, held in very unfavorable circumstances.⁵ Besides that, a Third Decade of Combat to Racism and Racial Discrimination was just starting at that juncture.⁶

It is true that the first two conferences on racism and racial discrimination, held in 1978 and 1983 as part of the First Decade, had very limited impact (among other reasons, because, convened in the main United Nations Office in Europe, in Geneva, they looked too much like routine meetings of U.N. human rights bodies, which excluded *ipso facto* attention of the media), thereby offering little encouragement for a third one. However, the fact is that those two meetings had not been real precedents, nor had their disappointing results been enough to dissuade a new attempt. For, while proscribed by an international convention, racism and racial discrimination had never been addressed seriously as a worldwide phenomenon. Any previous meeting on that question had invariably been diverted by the South African apartheid regime, a malignant tumor that monopolized international attention. Added to this overwhelming hurdle, the situation in the Middle East was brought to the discussions on the matter

4. Information regarding the "Rio Cluster" of U.N. Proceedings and Conferences is available at <http://habitat.igc.org/un-proc/>. See, e.g., *Report of the United Nations Conference on Population and Development*, U.N. GAOR, U.N. Doc. A/CONF.171/13 (1994); *Report of the World Summit on Social Development*, U.N. GAOR, U.N. Doc. A/CONF.166/9 (1995); *Report of the Fourth World Conference on Women*, U.N. GAOR, U.N. Doc. A/CONF.177/20 (1995); *Report of the United Nations Conference on Human Settlements—Habitat II*, U.N. GAOR, U.N. Doc. A/CONF.165/14 (1996).

5. Just as the United Nations chooses some years to celebrate and call attention to one specific issue—like 1975, the International Year of Women, and 1979, the International Year of Children—the "Decades" are launched by the United Nations in order to mobilize world opinion to the seriousness of a subject, like the one of racism, or the "Decade for Education on Human Rights," which started in 1994. See, e.g., *The Vienna Declaration and Programme of Action in the Report of the World Conference on Human Rights*, *supra* note 3. Each resolution adopted within the "Decades" brings a series of proposals of national and international events, measures to be implemented on different levels and many other conscience-raising activities. Conferences are normally a sort of culmination of these efforts, mostly because the documents they adopt become an important normative reference for the issue, a type of soft law with which all states, international and regional organizations, as well as organizations within civil society are expected to comply. See, e.g., *Report of the United Nations Conference on Population and Development*, *supra* note 4.

6. The Third Decade was launched by UNGA Resolution 48/91, of Dec. 20, 1993, to start on Jan. 1, 1994. G.A. Res. 48/91, U.N. GAOR, 48th Sess., 84th plen. mtg. at 1, U.N. Doc. A/RES/48/91 (1994).

with irrefutable "legitimacy," for it was based on documents, in force since 1975, that qualified Zionism as a brand of racism.⁷

In 1994, the end of the apartheid regime, crowned by Nelson Mandela's inauguration as President of the Republic of South Africa, opened up the way for dealing with racism in its truly general incidence. In addition, equalization of Zionism to racism had been abolished by the U.N. General Assembly since 1991.⁸ While those two developments seemed to demonstrate the feasibility of a world conference inspired by a new, constructive spirit, other aspects of the question, old and new, strengthened the need for such an event.

With strong help from the U.N., the abnormal constitutional system that had enthroned racial segregation as the essence of the most powerful State in Sub-Saharan Africa was eliminated. At a time when formal equality among races had already been established by law in almost every country, it was time the "globalized" world paid attention, first and foremost, to the structural manifestations of contemporary racism. This is the kind of insidious racism, be it conscious or unconscious, that keeps non-white—or non-dominant (as in some Asian countries)—populations in a situation of social inferiority under legal conditions of equality.

The persistence of racism in this form has been strongly denounced in Brazil, which had long presented itself as a true "racial democracy," because since the abolition of slavery, it did not have legal segregation of any sort. This racism has also been denounced in many other countries, by the black movement and by members of academia, and is nowadays one of the main sources of concern for the Committee on the Elimination of Racial Discrimination (CERD), the treaty body based in Geneva that oversees the implementation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. It is so widely disseminated as to warrant the interpretation by some acclaimed American authors that, in the United States, after the achievements of the Civil Rights Movement, there has been a process of "Brazilianization" of the racial question, a so-called

7. G.A. Resolution 3379 (XXX) of Nov. 10, 1975 had established that Zionism was a form of racism. After its adoption, almost all other international documents referred to it that way, or at least so implied.

8. See G.A. Res. 46/86, U.N. GAOR, 46th Sess., 74th plen. mtg. at 1, U.N. Doc. A/RES/46/86 (1991) (deciding simply "to revoke the determination contained in its resolution 3379 (XXX) of 10 November 1975," thereby invalidating every repetition of that qualification of Zionism in any other document).

"Brazilianization of America" (and of South Africa).⁹ Dissimulated under equal "civil rights" for all, but applied with bias, in a prejudiced, distorted manner, this form of racism is more difficult to combat. Precisely because it is not institutional, nor clearly apparent, its very existence is quite often denied by national authorities, thereby relegating racial segments of the population to the concrete, non-legal status of second class citizens.

Besides the omnipresent structural forms of racism (that should by themselves represent a solid justification for a new conference on racism), new, violent surges of discrimination, xenophobia, and other related contemporary forms of intolerance were proliferating the world over. These surges could be seen *inter alia* in acts of aggression against immigrants in Europe; in the resurgence of white supremacist doctrines that inspired armed "militias" in the United States; in intertribal killings in Africa which had reached a level of genocidal frenzy in the case of Rwanda; in aggravated Asian ethnic-religious conflicts, with killings and desecration of temples; in the violence and hooliganism of skinheads and growing neo-Nazi groups on both sides of the Atlantic (Brazil was no exception); in the expansion of Fascist-like micro-nationalism which often translated into practices of "ethnic cleansing" and bloody wars, most visibly in the case of the former Yugoslavia. Furthermore, all of this was accompanied by the electoral growth, in long-established "model" democracies, of populist far-right parties that used "the national pride of the common man of the people" together with racism, xenophobia, and anti-Semitism as demagogic underpinnings of political platforms.

Therefore, that was a period in which, on the one hand, multilateralism was viewed positively as a necessary instrument to solve global problems (the very eradication of apartheid proved that, in the long run, multilateral efforts bore fruit). On the other hand, it was a period where, contrary to the ideas of "the end of History"¹⁰ or of democracy as the new "unsurpassable horizon"¹¹ of politics, the end

9. MICHAEL LIND, *THE NEXT AMERICAN NATION* 14, 215-216 (1996); BELLAH ET AL., *HABITS OF THE HEART* 24 (1996) (quoting LIND, *supra*); ANTHONY W. MARX, *MAKING RACE AND NATION—A COMPARISON OF THE UNITED STATES, SOUTH AFRICA AND BRAZIL* 273 (1998). A. Marx is the only one who, to my knowledge, has already mentioned the "Brazilianization of South Africa."

10. "The end of History" is a reference to a famous Francis Fukuyama article. Francis Fukuyama, *The End of History?*, *THE NAT'L INTEREST*, Summer 1989. The article was later developed into a book, FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

11. The "unsurpassable horizon" was the widely known (and criticized) expression used by French philosopher Jean-Paul Sartre to describe the teachings of Karl Marx.

of strategic bipolar competition had given rise to an endless amount of tension and civil wars, caused by acts of discrimination that fell almost entirely within the definition of racial discrimination found in Article 1 of the International Convention on the Elimination of All Forms of Racism and Racial Discrimination, of 1965:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹²

Perception of the need for a conference to try to deal with those problems was clear to the eyes of the members of the Sub-Commission, who exercise their functions in that U.N. body in their personal capacity, therefore acting, at least in principle, according to their own convictions. The distant origin of the Durban Conference thus emerged on August 12, 1994, in the form of Resolution 1994/2, entitled "A world conference against racism, racial and ethnic discrimination, xenophobia and other related contemporary forms of intolerance,"¹³ to take place in 1997, giving sequence to the series of large meetings already held or scheduled since the end of the Cold War.¹⁴

The need for an event on contemporary racism and xenophobia also looked clear to the United Nations Commission on Human Rights, which endorsed the proposal in its first session subsequent to

12. International Convention on the Elimination of All Forms of Racism and Racial Discrimination, 1965, art. 1, 660 U.N.T.S. 212, 216.

13. It is important to notice that the title of the resolution—and of the conference—expressly referred to contemporary forms of those phenomena. E.S.C. Res. 1994/2, U.N. ESCOR Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., 17th mtg., U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994).

14. *Id.* Resolution 1994/2, which I had the honor to draft for consideration by the Sub-Commission, reflected in a succinct way most of the facts and trends mentioned here. It did so in the preamble, by recalling both the two preceding conferences on racism and the Vienna World Conference on Human Rights. It also noted "that millions of human beings continue to this day to be the victims of varied forms of racism and racial and ethnic discrimination," and "[b]earing in mind the sequence of world conferences programmed by the United Nations to take place before the year 2000," recommended to the Commission on Human Rights, in the only operative paragraph, that it suggest to the General Assembly, through the Economic and Social Council, "the possibility of convening a world conference against racism, racial and ethnic discrimination, xenophobia and other related contemporary forms of intolerance, to take place in 1997." *Id.* The year 1997 was indicated because the last programmed conference of the series was Habitat-II, in 1996. The specific mention to ethnic discrimination was aimed at the "ethnic cleansings" in full swing in the former Yugoslavia. Finally, xenophobia was included in the title to make sure the conference would not avoid one of the worst social byproducts of economic globalization.

that of the Sub-Commission, in 1995, as well as to the Economic and Social Council (ECOSOC) which approved and sent the proposal that same year to the General Assembly. There, within the decisive body for an initiative of such magnitude, the reaction was different. Developed Western countries expressed great doubts about the idea of such a conference. Though the initial idea was not to incriminate them, a serious discussion on such a subject, no matter how global it proved to be, would fatally address issues particularly unpleasant to former colonial powers. Further, although in the present circumstances of economic globalization, social exclusion is an expected, natural byproduct, racial iniquity is a field in which, contrary to what had happened with other global issues (destruction of the environment, violations of human rights, population growth, and discrimination against women), the West would not be able to place elsewhere the preferential locus of the problems. Neither would it be able to throw on somebody else's shoulders the burden of its deepest causes.

The U.N. General Assembly only approved the idea of the conference in its 1997 session, among the initiatives of the "Third Decade to Combat Racism and Racial Discrimination."¹⁵ In Article 28 of Resolution 52/111, the General Assembly decided to convene "a world conference on racism and racial discrimination, xenophobia and related intolerance."¹⁶ It should be noted that the original mention to "other related contemporary forms of intolerance," had been replaced by the new expression "related intolerance," already used by the Commission on Human Rights when designating a Special Rapporteur on Contemporary Racism, which has always retained an imprecise meaning.¹⁷ Besides its more common objectives (e.g. reviewing progress and reappraising obstacles; increasing awareness; formulating recommendations, etc), it was supposed "[t]o review the political, historical, economic, social, cultural and other factors leading to racism, racial discrimination, xenophobia and related intolerance."¹⁸ This was followed by a desire "[t]o formulate concrete recommendations to further action-oriented national, regional and international measures" to combat those problems.¹⁹ By modifying the original title "and other related contemporary forms of intolerance" into "related intolerance," the Assembly, probably with good reason, expanded the scope

15. G.A. Res. 52/111, U.N. GAOR, 70th mtg., U.N. Doc. A/RES/52/111 (1997), available at www.un.org/ga/documents/gares52/res52111.htm (last accessed Aug. 3, 2003).

16. *Id.* at 5.

17. *Id.*

18. *Id.* at 6.

19. *Id.*

of the conference to undefined areas (some of which, no matter how deserving, would not be accepted even in the Sub-Commission).²⁰ By including the review of historical factors of racism, Resolution 52/111 opened up the way to accusations that might go back to antiquity, as well as to present day claims (i.e., the famous “reparations”) which are understood in contradictory ways even among their very proponents. Furthermore, the Resolution decided, in Article 29, that the world conference would be convened “not later than the year 2001.”²¹

Envisioned by the Sub-Commission as an event dedicated to problems of the present (whether inherited from the past or not), facing the future, the Conference had been originally proposed as an appropriate closure for the final series of world meetings of the twentieth century. As approved by the General Assembly, engulfing in its scope every sort of discrimination, as well as reparations for acknowledged evils of the past, it became too ambitious. A complex but not unrealistic undertaking in the circumstances of 1994, the Conference against Racism seemed too dreamlike, rather than simply naïve, in the somber situation of the beginning of the twenty-first century—already quite pessimistic before September 11.

III. The Main Difficulties

For someone who looks from afar, the main difficulties of the Durban Conference may seem to be, at first sight, the implicit yet obvious insistence of Arab countries in reestablishing the equalization of Zionism with racism, and the resulting withdrawal of the United States and Israel. On the other hand, difficulties were also visible in the categorical rejection by the West of the idea of reparations for slavery and apologies for colonialism. Such a vision is correct, but is not comprehensive enough.

Still used to the period in which the Non-Aligned Movement²² easily made its positions prevail in U.N. documents, the Arab delegations’ proposals in Durban regarding the Middle East situation sounded offensive to the Jews in general (though one cannot neglect the fact that the new Government of Israel gave them motivation, by

20. *Id.* at 5.

21. *Id.* at 6.

22. The N.A.M. was established by the leaders Nehru, of India, Sukarno, of Indonesia, Nasser, of Egypt, and Tito, of Yugoslavia, since the late fifties, to find ways of development different and independent from both American capitalism and Soviet communism. In the United Nations, until the end of the cold war, the Non-Aligned—more than 100 countries—acted as a bloc and since they were the majority at the general assembly, won every vote.

re-initiating the provocative policy of establishing Israeli "settlements" in Palestinian territory). Besides reintroducing the idea that Zionism is racism in indirect ways,²³ some of the draft paragraphs implied that the suffering of the Muslims in general, and Palestinians in particular, under the policies of Israel was a sort of new "holocaust,"²⁴ or declared that the policies of Tel-Aviv towards the Palestinians were acts of "ethnic cleansing," "a new kind of apartheid," and "a crime against humanity."²⁵

In fact, the simple labeling of Israeli practices as another Holocaust, by the mention of "holocausts" in the plural, if accepted, would sound still more offensive than the old formula of Zionism as racism, for it would put Israel on the level of Hitler's Germany. By making use of one of the most painful memories of the twentieth century, the proposed language would diminish the cold cruelty of the methodical extermination of Jews in the Nazi camps by making it sound non-exceptional, and therefore banal. Nevertheless, it is important to note that already in the Preparatory Committee, many delegations from different regional groups had expressed adamant opposition to such language, showing that it would never be accepted in either of the final documents.²⁶

As for the withdrawal of the United States and Israel from the negotiations in Durban, it was nothing new or unexpected. Washington's withdrawal from international meetings and agreements had already become commonplace under the administration of George W. Bush. In fact, it was a policy towards multilateral institutions that had been clearly endorsed by his assistants during the presidential campaign. Examples could already be observed with regard to the Kyoto Protocol, the International Criminal Court, the First International Conference for Control of Light Weapons, and the Geneva negotiations to create a regime of effective inspections for the Convention on Biological Weapons (not to mention the bilateral ABM treaty with

23. See, e.g., U.N. Doc. A/CONF.189/PC.3/7 (2001) (at draft ¶¶ 60, 62, 63).

24. *Id.* at ¶ 29. The polemical wording, which was rejected even before the Conference, at the Third Session of the Preparatory Committee, in Geneva, stated that the Holocaust and the ethnic cleansing of the Arab population in historic Palestine and in Bosnia and Herzegovina and Kosovo must never be forgotten.

25. *Id.* at ¶ 30.

26. Besides the Western Group, almost all of the Latin-American as well as many African countries rejected such wording. I, personally, on behalf of Brazil, in a meeting between the Latin-American and Caribbean Group (GRULAC) with States of the Islamic Conference, told the Arab Group that, if they wanted a reference to some ritual sacrifice by fire, they should use an Arabic expression, not the Latin word that was universally understood to refer to one of the saddest moments in the History of the twentieth century.

Moscow). In spite of those withdrawals, multilateral efforts and international treaties did not become *ipso facto* neglected by the rest of the world. In fact, worse had already happened at preceding meetings specifically devoted to the issue of racism. In 1978, all of the Western delegations (not only Israel and the United States) had abandoned together the First World Conference to Combat Racism and Racial Discrimination for similar reasons.²⁷ At the Second Conference in 1983, only the United States along with Israel and South Africa withdrew, but the final Declaration was adopted by a vote of 101 in favor, with 12 against.²⁸ This means that those 12 countries never recognized the 1983 Declaration.

The fundamental difference in Durban, to which the Governments of Washington and Tel-Aviv did not pay attention because they did not want to, was that in contrast to what happened during the first and second conferences, the entrenched cohesion of the Non-Aligned on the Middle East question (and many other issues) had vanished by 2001. No longer counting on the support of the former Socialist bloc, since 1991 the Non-Aligned were led to revoke the assimilation of Zionism into a form of racism. Besides that, and the wide opposition voiced to the draft paragraphs, the highest authorities of the United Nations, from Secretary-General Kofi Annan to the High Commissioner for Human Rights Mary Robinson, often recalled in public that the matter of Zionism had already been settled and should not be reopened.²⁹ Therefore, provided there was real political will to do so, it would not have been too difficult to overcome, via constructive negotiations, the vehement position of those who persisted in trying to label the essentially religious Israeli-Palestinian conflict as a question of human rights.³⁰

27. See Michael Banton, *Lessons from the 2001 World Conference Against Racism*, 28 J. ETHNIC & MIGRATION STUD. 355, 356, 360 (2002).

28. See *id.*

29. See, e.g., Press Release, United Nations, World Conference Against Racism to Open in Durban, South Africa on 31 August (Aug. 27, 2001) (on file with U.N., U.N. Doc. RD/918), available at <http://www.un.org/News/Press/docs/2001/rd918.doc.htm> (last accessed Aug. 3, 2003). In addition, the Secretary General adopted an extremely conciliatory approach to this question. Secretary General Kofi Annan, Speech at the Opening of the Durban Conference (Aug. 2001), in *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/CONF.189/12 (2001).

30. I do not intend to deny, with this criticism, the well-known and well-documented violations of human rights by Israeli forces against the Palestinians, violations that have been properly condemned by the United Nations and almost all governments in the world. What sounds unacceptable for me is the generic incrimination of one of the sides in conflict with erroneous arguments. Many Zionist Jews do favor peace and negotiations for the establishment of two independent, cooperating states—Prime Minister Rabin was even

The question of reparations for slavery, which came together with the insistence on apologies for colonialism, was also problematic because it involved conflicting claims. Within black movements of the American continent, proposals already varied from the adoption of effective public policies such as the quotas and preferences established by the United States in the aftermath of the Civil Rights Movement of the fifties and sixties to the payment of money indemnities to the living descendants of slaves (it was never clarified who would pay how much to whom).³¹ For the States of the African Group, however, reparations were a totally different conception. Compensation was to be effected by inter-State donations, pardon of the foreign debt, or increased economic assistance. With a non-domestic, South-North bias, these claims of African States revealed not only an essential distinction vis-a-vis the positions of the African diaspora, but also a fundamental difference in the way they interpreted the Conference. Whereas the African descendants abroad envisaged Durban as a human rights event, the Group of African States saw it as an economic forum.

As expected, the Western Group³² opposed all those claims as strongly as they rejected the Arab positions about the Middle East. What had not been expected was their radical inflexibility and their frequent obstructionist attitude to even the simplest paragraphs, on virtually every subject. Contrary to their behavior at the Vienna Conference of 1993, where they generally helped draft wording that looked for consensus, in Durban the Western Group often assumed "Byzantine" positions, proposing irrelevant changes to the most unimportant texts, as if wanting to show antipathy for the Conference as a

killed because of this—or, in the specific Durban draft paragraphs, the attempt to "routinize" an historic genocidal horror like the Holocaust.

31. See Bruce Bartlett, *Reparations Clamor of Dubious Design*, WASH. TIMES, Sept. 10, 2001, available at <http://www.washtimes.com>; Samson Mulugeta, *Racism Conference Stalls Over Slavery*, S.F. CHRON., Sept. 6, 2001, at A9.

32. In the United Nations, countries are assembled in five geographic—or regional—Groups: the Latin-American and Caribbean Group (GRULAC), the Western Group (Western Europe plus the U.S., Canada, Australia and New Zealand), the African Group, the Asian Group and the Central and Eastern European Group (previously the Socialist Group). Members of these Groups often get together to decide upon many matters, especially candidacies. In the elections for most U.N. bodies, places are allocated to the membership of the different Groups, which may have more candidates than the number of vacancies available. This is why the United States was not elected for the Commission on Human Rights in 2001. There were three places available for the Western Group, and four candidates: the United States, France, Sweden and Austria. The United States lost to those three other members of the Western Group, not to Libya or Sudan, as some people and most American newspapers insisted on saying.

whole. With regard to the really difficult questions, one of their tactics was to spread rumors that they were also going to withdraw *en bloc*, always leaving for “the following day” the last decision on the matter. But as was soon noticed in the negotiations, such tactics proved counter-productive; instead of obtaining the desired concessions, the rumors sounded provocative, leading the others to increase their level of defiance. Thus, there is no denying that, as much as the aggressive Arab speeches regarding Israel and Zionism, or the African or Afro-descendant insistence on reparations for slavery and colonialism caused disagreement and tension among participants, at the same time the rigidity and provocation of Western countries engendered the feeling that the whole exercise of negotiation was hopeless.³³

In order to have a realistic view of the amount of difficulties encountered at the Conference, it is useful to look at the list of “themes” intended to be dealt with therein. All of them were controversial, sometimes surprisingly so. The themes, as approved in Durban, were:

1. Sources, causes, forms and contemporary manifestations of racism, racial discrimination, xenophobia and related intolerance;
2. Victims of racism, racial discrimination, xenophobia and related intolerance;
3. Measures of prevention, education and protection aimed at the eradication of racism, racial discrimination, xenophobia and related intolerance at national, regional and international levels;
4. Provision of effective remedies, recourse, redress, compensatory* and other measures at the national, regional and international levels [the asterisk was explained in a footnote that read “The use of the word ‘compensatory’ is without prejudice to any outcome of this conference”];
5. Strategies to achieve full and effective equality, including international cooperation and enhancement of the United Nations and other international mechanisms in combating racism, racial discrimination, xenophobia and related intolerance, and follow-up.³⁴

Even the first two seemingly innocent themes concerning sources and victims of racism were subjected to so much controversy that they

33. Of course, not every Western country had the same negative attitudes. I would be unfair if I didn't underline the extraordinary work of Belgium, in its capacity as President of the European Union and thus coordinator of the “fifteen” in Durban. Thanks to the willful patience of their delegates—sometimes misunderstood by delegates of other countries (myself included)—Belgium succeeded in keeping the fifteen united and present until the end of the Conference, thereby avoiding a block withdrawal that would bury all hope. It was also Belgium in the person of Professor Marc Bossuyt, a member of CERD (and former member of the Sub-Commission, who co-sponsored the original draft resolution), who chaired, at Durban, with ability and dedication, the Working Group in charge of drafting the Declaration.

34. U.N. Doc. A/CONF.189/1/Rev.1 (2001).

had to be amalgamated into one group of “difficult questions” and entrusted to the delegation of Mexico at the Preparatory Committee, prior to the Conference. The Mexican delegation was thus supposed to act as a “facilitator,” engage in consultations, listen to the different views, and try to offer consensus language. Contrary to first appearances, these problems were substantial. India, for instance, did not accept that the dalits or pariahs should be included in the list of victims, arguing that castes do not stem from race (while outside of the Conference Center a crowd of pariahs from the Indian subcontinent along with sympathizers from the whole world demonstrated and held vigils for the situation of the “untouchables” not to be set aside). Women, encouraged by achievements in the Cairo and Beijing conferences, insisted, through the voice of several delegations, that “gender” should be included among the sources of multiple or aggravated discrimination. Making use of the expression “related intolerance,” Western countries *lato sensu*, in that case under the initiative of Brazil, brought to the scene the problem of discrimination based on sexual orientation, faced by homosexuals universally. However, acknowledgement of such an issue is still taboo in different sectors and societies which do not recognize such discrimination as a problem. Indeed, in many places homosexuality is still banned as a crime, out of prejudice or religion.³⁵

Only the day before the formal closing date of the Conference did an exhausted Mexican delegation manage to announce the agreement it had reached on the “theme” of the “victims,” as well as a minimalist formula for the “sources” or “grounds” of primary discrimination. It did so by reproducing *ipsis litteris* Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination, mentioning as additional sources of multiple or aggravated discrimination the accommodating expression “other related grounds,” followed by terms extracted from the Universal Declaration of Human Rights cited as examples. The agreed texts submitted by Mexico are found in Articles 1 and 2 of the Durban Declaration,³⁶ as follows:

35. As is the case, inter alia, of all Islamic countries, and of countries that adopt Catholicism as the official religion.

36. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, U.N. Doc. A/CONF.189/12 (2001). The Durban Declaration and Programme of Action can be found therein. All the quotations reproduced in this text follow the original version in British English, as used by the United Nations. This is why the name of the second document of the Durban Conference is here called Programme—not Program—of Action.

1. We declare that for the purpose of the present Declaration and Programme of Action, the victims of racism, racial discrimination, xenophobia and related intolerance are individuals or groups of individuals who are or have been negatively affected by, subjected to, or targets of these scourges;

2. We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status[.]³⁷

With no intent to cover here all of the controversies and circumstances that almost impeded the adoption of final documents in Durban, it is pertinent to call attention to the fact that, when dealing with the themes of “[m]easures of prevention, education and protection aimed at the eradication of racism” and “[s]trategies to achieve full and effective equality,”³⁸ today’s current expression affirmative action was banned. However much defended by organized movements and governments, it was banned by the very country that had invented both the expression and the practice, the United States. This somewhat surprising opposition was apparently due to the fact that some States of the American Union, such as California, had already abolished it.³⁹ Even after the departure of the United States delegation, their most faithful allies took over, with zeal, the “Orwellian 1984 new-speak” task of making sure that this harmless, universally employed expression did not reappear.

Another fact worth mentioning, for its irony, was the amount of times that, amidst difficult negotiations on very delicate subjects, some

37. *Id.* arts. 1 and 2. Note that not even the term “gender,” (with a sociological connotation, contrary to “sex” which is merely biological), as proposed by the women’s movement and previously accepted in Beijing, could be included. In order to clarify any doubts about the few times the word may appear in the Durban documents, a footnote to the thirty-third paragraph of the preamble (concerning the need to adopt a gender perspective in order to protect the human rights and fundamental freedoms) makes sure that the term gender “refers to the two sexes, male and female, within the context of society,” and excludes any other meaning. *Id.* at n.1.

38. *Id.* arts. 76, 107 (the language is contained in the headings preceding these articles).

39. *See, e.g.*, CAL. CONST. art. 1, § 31(a). The people of the state of California adopted the California Civil Rights Initiative as an amendment to their constitution on Nov. 5, 1996. The initiative, Proposition 209, states in relevant part that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696 (9th Cir. 1997) (quoting CAL. CONST. art. 1, § 31(a)). In simpler terms, it declared affirmative action illegal.

European delegations came up with declarations that they did not accept the very notion of "race." These obviously awkward declarations were brazenly made as if Ernest Renan, Le Bon, Lapouge, Gumplowicz, Franz Gall, the Count of Gobineau, not to mention Spencer and Galton, let alone, on a more sinister tone, the doctrines of the "Third Reich," had not all been European! Further, as if they had not been sources of support and stimuli for consequential policies extended beyond Europe! However worthy the refusal to recognize "race" (maybe justified by so-called scientific "Bell curves" and the likes that sometimes still crop up in Western countries), its repetition at Durban worked, most of the time, to sow confusion within already stalled negotiations. Moreover, it is necessary to bear in mind that, if extended to its limits, such rejection might *ad absurdum* void the very rationale of the Conference. Out of sheer logic, the non-existence of races might signify that racism does not exist, thereby nullifying the need to combat it, a position, fortunately, no one dared to advocate.

Every reasonably conscious person knows that race is, above all, a social construct (an expression that the West also refused, probably because it sounded too "Marxian"), that can be either negative or positive according to the use one makes of it. It may or may not involve physical traits, skin color, language, religion, or traditions, which are "racialized" on purpose. In a romanticist community sense, the idea of "race" was the foundation for the formation of the European nation-States,⁴⁰ and explained colonial expansion as a "mission to civilize inferior races" (the famous, or rather infamous, "white man's burden"). With the same identity meaning, but now in opposite direction, "race" has also been used by the Left, as a foundation for self-assertion of those who were or still are neglected or offended by social majorities. The concept serves, at the same time, differentialist positions of the racist Right, which rejects the immigrant as culturally incapable of assimilating "national values."

The problem is not the existence or non-existence of races, but the meaning one gives to the term. If one confers an inherent, essential, inescapable natural character to physical, psychic, linguistic, ethnic, or religious differences of any group of people, one will be a racist, almost always for evil. As explained by Wiewiorka, racism today is more cultural and "differential," whereas in the past it was more

40. Most ostensibly exemplified by Germany and Italy when unified in the nineteenth century, but even the much older Portugal calls its National Day "The Day of Race," which celebrates poet Luis de Camões.

scientific and instrumental.⁴¹ Be it on a universalistic “scientific” basis that looks at the other as inferior, or on a basis that emphasizes cultural differences in order to exclude, the truth is that racism exists, segregates, discriminates, and kills. A socio-economic and political phenomenon, racism ravages first and foremost its objective victims, both the aimed individual and the affected group. But it also deeply harms society as a whole, where even those who are not racist, accommodated or not, tend to become targets of retributed hatred.

Apart from the ridicule of the moment at which some of these Western assertions were made, it is positive that the Durban Conference reaffirmed in Article 7 of the Declaration, stating that “[a]ny doctrine of racial superiority is scientifically false, morally condemnable, socially unjust and dangerous, and must be rejected along with theories which attempt to determine the existence of separate human races.”⁴²

It is also positive that the European Union, soon followed by Switzerland, took the floor in the closing session to spell out again their rejection of the idea of “different human races,” adding that such rejection did not imply the denial that the concept of race has been used as a cause of discrimination, nor that racism and racial discrimination “as defined by Article 1 of the Convention” (of 1965) still exist the world over. In light of collective attitudes of refusal adopted a little earlier by the European Union when a semi-Nazi political party won the elections in one of its member-States, and in view of the popularity of “fronts,” “leagues,” and ultra-nationalist parties with programs based on chastising immigrants, such declaration of the “fifteen” sounded more than a generic statement. It sounded rather like a sort of self-criticism, or a sign of early warning. As confirmed in elections held in Europe along 2002, as had already been seen in some parts of Asia, rebuke of foreigners for the evils one suffers from different sources, but above all from the negative “side-effects” of economic policies that are so fashionable nowadays, has become a political constant.

41. For a description of the old “scientific” racism and its evolution to the “new racism” of today, see MICHEL WIEVIORKA, *LE RACISME, UNE INTRODUCTION* (1998); WIEVIORKA ET AL., *RACISME ET XÉNOPHOBIE EN EUROPE—UNE COMPARAISON INTERNATIONALE* (1994) (discussing contemporary racism in Europe).

42. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, art. 7, U.N. Doc. A/CONF.189/12 (2001).

IV. The Search for Solutions

Stressing once again that the divergences alluded above were serious but do not cover the whole list of problems at Durban, it seems now fit to give an idea of the processes through which were "solved" the main difficulties, to wit: the wording of all paragraphs related to the Arab-Israeli conflict and the substance of those concerning the so-called "historical questions," which included the proposal of reparations for slavery.

For both, the same kind of procedure that had been adopted for the "sources" and "victims" was taken since the last session of the Preparatory Committee all paragraphs dealing with these issues were grouped into two sets to be negotiated by designated "facilitators." These were South Africa (because it was the host country of the Conference) to deal with the question of the Middle East, and Brazil (probably because of its large black population, and also because of the good job done in 1993 by Ambassador Gilberto Saboia as Chairman of the Drafting Committee that negotiated the Vienna Declaration and Programme of Action) for the "themes of the past." It was impossible to achieve anything at the Preparatory Committee, in Geneva, for the States involved directly did not even want to hold meetings to that aim.

In Durban, the President of the Conference, Ms. Nkosazana D. Zuma, South African Minister for Foreign Affairs, decided to re-establish the same informal "Working Groups," keeping Mexico and Brazil (again in the person of Ambassador Saboia, Deputy Head of the Brazilian delegation, assisted by the Ambassador of Kenya in Geneva) as coordinators of the same subjects, while Norway (because of the "Oslo Agreements") would coordinate the paragraphs dealing with the Middle East, with assistance from Namibia.

To the extent that in the case of the Middle East feelings were more exacerbated than in any other instance, and due to the lack of progress of the respective Working Group when the Conference was already otherwise advanced, the South African Minister decided to call to herself the task of coordinator, with an "auxiliary body" of five representatives from the regional groups. After listening to many long, irreconcilable, repetitions of each one's positions on each respective issue, the Brazilian and the South African coordinators adopted the same line of action: based on the conflicting views they had heard, quite often till dawn, they rewrote the contentious paragraphs in new, simplified wording. This wording was to replace

the old in every part of the draft Declaration and Programme of Action.

The new texts on the Middle East and on the “historical questions” were directly presented to the General Committee, at the very last moment, on September 8.⁴³ These new texts were accepted, but then a sequence of procedures almost destroyed all of the work.

Displeased by the moderate tone of the new paragraphs on the Middle East, Syria, on behalf of the members of the Organization of the Islamic Conference, chose some of the old paragraphs theoretically superseded and submitted them to the General Committee for consideration as if they were new proposals. There resulted general surprise, much confusion, new delays, and consultations addressed to the U.N. Juridical Counsel. When the session was reconvened, Brazil moved, on the basis of the rules of procedure, that no action be taken on the Syrian proposal. This was done with the aim of salvaging the documents from a vote that would set the Conference in the same situation as the two previous ones. New confusion was created, since the stunned Western delegates did not realize that the Brazilian motion needed to be seconded by two other delegations, while Syria and Algeria formally objected. Isolated by the others’ lack of knowledge or lack of attention, Brazil was forced to withdraw its motion. When the Western Group finally understood the opportunity they had lost, Belgium, on behalf of the European Union, repeated the motion of non-consideration. Since it was then presented on behalf of fifteen countries, there was no need for anyone else’s support. The Belgian motion was thus submitted to a vote and approved by 51 in favor, 37 against and 11 abstentions. The non-consideration of the controversial paragraphs was, therefore, approved by a vote (which means they were definitively rejected), but not the alternative texts presented by the “coordinators.” This enabled the General Committee and afterwards the Plenary to adopt the Declaration and Programme of Action without a vote,⁴⁴ which made *ipso facto* the results of Durban more positive and legitimate than those of 1987 and 1983.

Whereas there is no place in this essay to repeat the whole two series of alternative texts (they were all inserted in the Durban Decla-

43. The Conference was originally scheduled to end on September 7.

44. This is a very simplified version of the confusion that marked the last moments of the Conference. For a thorough description of every move, surprise, response, measure and counter-measure of the meetings on September 8, see Marc Bossuyt, *Procedural Confusion at the Main Committee of the Durban Conference Against Racism*, 56 HUM. RTS. MONITOR 12, 15 (2001).

ration after new controversies that emerged between the end of the Conference and their endorsement by the U. N. General Assembly), it is worth quoting some self-explanatory samples:

a) concerning the Arab-Israeli conflict and its by-products (the so-called question of the Middle East):

58. We recall that the Holocaust must never be forgotten;

.....

61. We recognize with deep concern the increase in anti-Semitism and Islamophobia in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas against Jewish, Muslim and Arab communities;

.....

63. We are concerned about the plight of the Palestinian people under foreign occupation. We recognize the inalienable right of the Palestinian people to self-determination and to the establishment of an independent State and we recognize the right to security for all States in the region, including Israel, and call upon all States to support the peace process and bring it to an early conclusion;

64. We call for a just, comprehensive and lasting peace in the region in which all peoples shall co-exist and enjoy equality, justice and internationally recognized human rights, and security;

65. We recognize the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge all States to facilitate such return[.]⁴⁵

b) on the "historical questions":

13. We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences;

14. We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and prac-

45. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, arts. 58, 61, 63-65, U.N. Doc. A/CONF.189/12 (2001).

tices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today;

....

100. We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies. We further note that some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and massive violations committed;

101. With a view to closing those dark chapters in history and as a means of reconciliation and healing, we invite the international community and its members to honour the memory of the victims of these tragedies. We further note that some have taken the initiative of regretting or expressing remorse or presenting apologies, and call on all those who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so and, to this end, appreciate those countries that have done so[.]⁴⁶

Although the articles here reproduced in a non-sequential way already make up a rather long list, the total of texts rewritten is much longer still. As finally adopted by the Conference, these new texts did not entirely please any of those who held extreme positions. But this is diplomacy in the best meaning of the term: the art of finding minimum common denominators that will not allow any State to present itself as the absolute winner, nor to be pointed at as totally defeated. Thus, it is normal that, in events of this kind, some delegations should register reservations or interpretations on specific points in the closing session.

With regard to the paragraphs on the Middle East, some Western delegations expressed reservations to the Article that now bears the number 65 (quoted above), because they considered that the right of return of refugees that it expresses would represent an additional difficulty to the "Oslo Agreements," by justifying rejection of the State of Israel. But it is also true, in that context, that Article 65 could be read as simply meaning the right of the Palestinians recently expelled from their houses in the settlement policy of the new Israeli authorities to safely return home. The Arabs, on their part, together with other Muslim delegations, essentially declared that the paragraphs on the question did not correctly reflect the gravity of the situation (the near future would unfortunately prove them to be right, *vis-à-vis* both the Palestinians and the Israeli population). With regard to the "historical questions," solved in a remarkably constructive manner, reparations

46. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, arts. 13-14, 100-01, U.N. Doc. A/CONF.189/12 (2001).

or apologies for slavery and colonialism were not imposed on any State, for they simply could not be. However, countries that have taken those initiatives are praised, and those which have not are urged to find adequate means of "restoring the dignity of the victims." The way the qualification of slavery as a "crime against humanity" was made also did not fulfill the wishes of those who proposed it (according to what was said, if it had been qualified as a "crime against humanity" in a way that covered both the present and the past, that would lead to a flood of litigation).⁴⁷ Regardless, history proves that while slavery was a common and sadly legal practice, the concept of crime against humanity was only defined after the Second World War, by the Nuremberg and Tokyo tribunals.⁴⁸ For those reasons the formula adopted in Article 13 declares that slavery and the slave trade are now a crime against humanity, and that they "should always have been so."⁴⁹ Many African and Caribbean delegations made declarations supporting those formulations, stressing, however, once again, their original opinions, pointing at the human suffering caused by slavery now and in the past.⁵⁰ Finally, with regard to the question of sources and victims, defined, as explained, in minimalist ways, even Brazil, in its final statement, considered that results had remained below the expectations. The reason for this was that they did not explicitly include gender, personal handicaps, and social orientation as causes of multiple or aggravated discrimination.⁵¹

V. The Most Positive Achievements

For those who took part in the Durban negotiations, the most positive aspects of the final documents might be precisely those difficult paragraphs which had been arrived at, if not by consensus, at least

47. *Id.* art. 13.

48. *See, e.g.*, GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY—THE STRUGGLE FOR GLOBAL JUSTICE* xiv (2000) (explaining the logic of crimes against humanity, as first defined in Article 6(c) of the Nuremberg Charter). For an interesting criticism of the application of that notion in Nuremberg and Tokyo, see David Cohen, *Beyond Nuremberg: Individual Responsibilities for War Crimes*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 53 (Carla Hesse & Robert Post eds. 1999).

49. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, art. 13, U.N. Doc. A/CONF.189/12 (2001).

50. Kenya's declaration on behalf of the whole African Group can be found at the beginning of Chapter VIII of the Report of the Conference. *See id.* ch. VIII, ¶ 2. Barbados' declaration (also on behalf of Belize, Cuba, Guyana, Haiti, Honduras, Jamaica, St. Vincent and the Grenadines, and Trinidad and Tobago) may be found in Chapter VII of the report. *See id.* ch. VII, ¶ 13.

51. *See id.* ch. VII, ¶ 22.

with non-objection. Their almost unexpected acceptance seemed to have rescued the Conference from the same destiny of oblivion as the previous ones in the 70s and the 80s. To a certain extent they would be right.

If it is inadequate to speak of “agreement” regarding the paragraphs on the Arab-Israeli conflict, which only prevailed due to procedural maneuvers, the same could not be said about the “questions of the past.” No doubt less incisive and less affordable to use in judicial claims, they were, notwithstanding, the most progressive texts internationally adopted to condemn colonialism, slavery, and the slave trade, all of which are also held to bear the original responsibility for much of the present suffering of indigenous people and African descendants.

The indigenous peoples—or rather those autochthonous peoples that envisage the right of self-determination as the way to the total political independence they want—may have been frustrated by the caveats of the Declaration, which state that the acknowledgement of their rights is “consistent with the principles of sovereignty and territorial integrity of States,” and explains that the use of the very expression “indigenous peoples” is “without prejudice to the outcome of ongoing international negotiations on texts that specifically deal with this issue.”⁵² Yet, the expression “indigenous peoples” with an “s” was formally adopted by consensus, a fact that has important implications on the rights of these peoples to their culture, lands, traditions, and participation in the political life. It is even a subtitle in the part of the Programme of Action dealing with victims of racial and racial discrimination. It recommends diverse measures to the States in order to ensure the recognition of the rights of indigenous peoples in those areas, starting with their cultural rights and with their participation in any decision that concern them.⁵³ In this area even the dimension of gender is mentioned expressly (with use of that controversial word), as a frequent cause of multiple and aggravated discrimination: against indigenous women and girls.⁵⁴

While the advancements in the area of indigenous peoples sound minor, especially in light of the attention they have received for several years from the United Nations, the acknowledgement of the plight of Africans and people of African descent in their diaspora, as

52. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, arts. 23–24, U.N. Doc. A/CONF.189/12 (2001).

53. *See id.* Programme of Action ¶¶ 15–23.

54. *See id.* Programme of Action ¶ 18.

well as the great number of articles and recommendations destined to correct the disparities they suffer in present day societies, represent important innovations. For this reason, the first subtitle of the chapter on victims within the Programme of Action is dedicated to them.⁵⁵ The subtitle contains many recommendations for the States.⁵⁶ These recommendations aim at their legal protection, respect for their culture, and suppression of discrimination against their traditions and religions. They further propose a series of measures in the areas of education and participation in public life which, without employing the expression "affirmative action," clearly are in line with its function. The Declaration itself underlines, in the chapter on "victims," the need to adopt "affirmative measures or special measures" to promote the full integration of those discriminated persons and groups in society, stressing the necessity for:

[S]pecial measures or positive actions . . . (which) should include measures to achieve appropriate representation in educational institutions, housing, political parties, parliaments and employment, especially in the judiciary, police, army and other civil services, which in some cases might involve electoral reforms, land reforms and campaigns for equal participation[.]⁵⁷

In a parallel to the priority accorded to Africans and people of African descent, Asians and people of Asian descent, indigenous persons and peoples, the Durban Declaration is the first document of the kind to recognize "with deep concern the ongoing manifestations of racism" and violence against Roma/Gypsies/Sinti/Travellers—all of which are self-given names of nomadic communities in Europe, known before under the generic term of Gypsies, a term now often considered degrading—and the consequent need to develop policies and mechanisms to protect them.⁵⁸ For reasons already explained, it was not possible to deal in Durban with the question of castes and discrimination against the dalits or pariahs, relegated to the most humiliating tasks in society.⁵⁹ On the other hand, it is undeniable that Durban, in conformity with the original motivations of the Sub-Com-

55. *See id.* ¶¶ 4–14.

56. *See id.*

57. *Id.* art. 108.

58. *See id.* art. 68.

59. It is important to note that, although the government of India refused mention of the problem in Durban, the caste system is banned by the Indian Constitution and affirmative action is adopted in the country to try to improve the situation of the "untouchables." If results have been insufficient, they are not an exclusivity of India. Brazil, the United States, Mexico, Ecuador and many other states that have adopted specific measures to improve the lot of their respective racial minorities (sometimes real powerless majorities) also face similar difficulties to ensure equal conditions of existence for all of their citizens.

mission when suggesting the Conference in 1994, paid appropriate attention to xenophobia as one of the gravest problems in today's world. Article 16 of the Declaration says, "[w]e recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices."⁶⁰

Consequently, recommendations of measures were made to the States in the Programme of Action. These were designed to combat simple or aggravated discrimination against migrant workers, refugees, and other foreigners, which may be either legally or illegally in their respective jurisdiction. The recommendations are quite detailed, and extend for many paragraphs.

Other contemporary subjects which had also motivated the original proposal at the Sub-Commission can be found in the following paragraphs of the Declaration here transcribed as examples:

27. We express our concern that, beyond the fact that racism is gaining ground, contemporary forms and manifestations of racism and xenophobia are striving to regain political, moral and even legal recognition in many ways, including through the platforms of some political parties and organizations and the dissemination through modern communication technologies of ideas based on the notion of racial superiority;

. . . .

83. We underline the key role that political leaders and political parties can and ought to play in combating racism, racial discrimination, xenophobia and related intolerance and encourage political parties to take concrete steps to promote solidarity, tolerance and respect;

84. We condemn the persistence and resurgence of neo-Nazism, neo-Fascism and violent ideologies based on racial prejudice, and state that these phenomena can never be justified in any instance or in any circumstances[.]⁶¹

There is no room for an in-depth analysis of how economic globalization without social orientation or counterweights has been responsible for the resurgence of religious, ethnic, racial, and nationalist fundamentalism. Literature on the subject is already abundant and convincing.⁶² In any case, even if one refuses to blame globaliza-

60. *Id.* art. 16.

61. *Id.* arts. 27, 83–84.

62. *See, e.g.*, BENJAMIN BARBER, *JIHAD VS. McWORLD* (1995); GEORGE SOROS, *THE CRISIS OF GLOBAL CAPITALISM* (1998); ZYGMUNT BAUMAN, *GLOBALIZATION—THE HUMAN CONSEQUENCES* (1998); MARK JUERGENSEMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF*

tion for these phenomena, no one will deny that globalization is the background from which stem all the “instances” and “circumstances” referred to in Article 84.⁶³ It is important that Durban did not ignore this fact, otherwise it would simply address symptoms. It addressed globalization at the very beginning of the Declaration, in Article 11, where it says, among other things:

While globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. . . . These effects [of globalization] could aggravate, *inter alia*, poverty, underdevelopment, marginalization, social exclusion, cultural homogenization and economic disparities which may occur along racial lines, within and between States, and have an adverse impact. . . . Only through broad and sustained efforts to create a shared future based upon our common humanity, and all its diversity, can globalization be made fully inclusive and equitable[.]⁶⁴

With the same kind of structural concern with present realities, Article 18 stresses that “poverty, underdevelopment, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance, and contribute to the persistence of racist attitudes and practices which in turn generate more poverty.”⁶⁵

Moving from the general to the particular, Article 74 of the Declaration deals with child labor, strongly condemned nowadays through the optics of human rights. However, this condemnation is often urged with such a simplistic approach as to make the condemnation counterproductive—as if child labor resulted only from exploitative ambition on the part of parents or their respective governments (whereas it is clear it stems from economic misery). As opposed to adopting the superficial approach, the Durban text appears more realistic, with extremely careful language:

74. We recognize that child labour is linked to poverty, lack of development and related socio-economic conditions and could in some cases perpetuate poverty and racial discrimination by disproportionately denying children from affected groups the opportunity to acquire the human capabilities needed in productive life and to benefit from economic growth[.]⁶⁶

RELIGIOUS VIOLENCE (2000); JEAN-CLAUDE GUILLEBAUD, *LA TRAHISON DES LUMIÈRES* (1995); IGNATIO RAMONET, *GÉOPOLITIQUE DU CHAOS* (1997); JOSÉ A. LINDGREN ALVES, *RELAÇÕES INTERNACIONAIS E TEMAS SOCIAIS—A DÉCADA DAS CONFERÊNCIAS*, (2001).

63. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. ESCOR, art. 84, U.N. Doc. A/CONF.189/12 (2001).

64. *Id.* art. 11.

65. *Id.* art. 18.

66. *Id.* art. 74.

It is a small step, no doubt, and too full of precautions that do not make sense for those who know the phenomenon well, sometimes in their own skin. However, it is the most that has ever been said about a visibly growing problem with roots that go against the neo-liberal blind faith in uncontrolled markets.

Evaluation and Conclusion

In an article published while the Conference was still running, as if to justify the defection of the American official delegation, journalist Bob Herbert wrote in *The New York Times* that the Durban meeting was “doomed to irrelevance” from its conception.⁶⁷ Herbert asserted that the problems of ethnic, religious, and gender intolerance are “much too big and much too complex and intractable to be seriously addressed by a U.N. conference.”⁶⁸ If the author were not normally so sagacious and constructive on dealing with racial violence in the United States, one could ask him: if not the U.N., who? However, the article explains a little further the reasons for his misgivings: “Organizers of the U.N. conference may have had the highest motives, but you can’t launch a global fight against racism from a base of bad faith and hypocrisy.”⁶⁹

Critics of the Durban Conference abound, of different natures and levels. While critics always tend to blame some specific position(s) for the defects they perceive in the organization of the Conference and in its final documents, the truth is that it is not possible to point out one particular country or group of countries as responsible for the provocations and failures that occurred. Nor does it make sense to note only the limitations and lack of success of the event, without underlining the positive aspects that it also had.

In the sphere of States, as explained in this article, governments who opposed the Conference obviously did nothing to help it be convened. When, at last, the Conference was approved by the U.N. General Assembly, thereby becoming theoretically irreversible, those governments did not change their minds to prepare themselves for it with a constructive spirit. On the other hand, those who favored the Conference because they had claims to formulate, or because they wanted to insist on political positions, also didn’t make any effort to ensure its success. On the contrary, almost to the very end, they stuck

67. Bob Herbert, *Doomed to Irrelevance*, N.Y. TIMES, Sept. 6, 2001, at A23.

68. *Id.*

69. *Id.*

to their demands with a rigidity that rested on the belief that they were, or had been, the uncontested offended party. The offenders, on their side, refused the accusation, asserting that the offenses, at the times they occurred, were not considered offensive. There was thus a vicious circle that wove a Gordian knot. Delegations with balanced positions, like those who acted as “facilitators” for the most difficult issues, were those who managed to avoid the total tightening of the snarl, or acted as a sharp sword to undo its entanglement. Either way, they surely did their best to salvage the event.

It is curious to note that, contrary to what happened in other countries with large racial “minorities,” like Brazil, where preparations for the Conference were enthusiastically undertaken by the Government and civil society in useful interaction, in the United States (the country that most inspired movements for civil rights) the world saw no enthusiasm. The best known American newspapers, the mainstream communication media, influential NGOs, and even parts of academia devoted to social studies (of course with some very expressive exceptions) seemed to show very little interest in the Durban Conference. Symptomatically, fifteen days before its opening in South Africa, the African-American participants in a seminar on race relations in the United States and Brazil, held on the Sacramento campus of the State University of California, co-sponsored by the University of Bahia, unlike their fully aware Brazilian counterparts, didn’t look as if they even knew that a world gathering against racial discrimination was soon to take place in the land of Nelson Mandela.⁷⁰

In spite of that, besides the 2,300 official delegates from 163 countries, including 16 Heads of State or Government, 58 Ministers of Foreign Affairs and 44 Ministers of other portfolios, almost 4,000 representative of NGOs and 1,100 “media people” were registered by the United Nations in Durban. Not to mention the countless parallel events that took place before and after the Conference (the NGO Fo-

70. I was astounded by that fact because as Consul General of Brazil in San Francisco, I was invited to the seminar in that capacity, and accepted. When trying to find out the reason for such a lack of information, I was told that the black movement in the United States was divided about the Conference, apparently around the question of reparations. Had it been united, I believe it would have been more difficult for the official United States delegation to withdraw as it did, with almost no criticism on the part of the media. Some of the African-American militants who went to Durban and, of course, stayed till the end, said to members of the Brazilian black movement that, from the moment the American delegates left onwards, they considered themselves to be officially represented by the Brazilian delegation—which is in my view another aspect, positive in this case, of the “Brazilianization of America” described by Michael Lind. See LIND, *supra* note 9, at 14, 215–216.

rum alone had 8,000 participants, representing 3,000 NGOs of all the continents—obviously including many of the United States, very active, as usual). It seems safe to say that a gathering of such proportions can be anything but irrelevant. The mobilization is itself a form of conscience-raising.

Of all criticisms addressed to the Durban Conference the one that shocked me most was made by Professor Michael Banton, a former member of the Committee on the Elimination of Racial Discrimination—CERD. Precisely because of his experience, and the respectability he enjoys, Mr. Banton was not entitled to be so naïve, let alone so negative. Professor Banton conceded, at least, that for the objective of raising the level of “awareness about the scourges of racism and racial discrimination,” Durban was successful.⁷¹ However, he then wrote that “[i]f the first world conference was a disaster, the third was a calamity that has damaged the UN and attitudes towards international cooperation.”⁷² On presenting such a peremptory judgment, Professor Banton repeats well-known criticism to double standards of countries and groups of countries, as well as the Western critique of the parts of the documents dealing with Israel (as if the final text had not been extremely modified, looking now, in fact, too mild in face of the violence that is going on both sides in a seemingly uncontrollable Middle East). However, most of his displeasure stems from his excessively juridical point of view. He blames the Conference for not having opted to press States to implement their treaty obligations as members of the CERD, and for not having given due value to CERD and its experience in dealing with difficult issues such as that of reparations (I wonder if these tactics would yield better results; but this does not matter). Although he knows it is not the case, Professor Banton criticizes the Conference as if it were an autonomous entity, capable of acting beyond the will of its participants and isolated from the world context in which it took place. He does not seem to realize that the “calamity” was not the Conference itself, but the “circumstances” under which it was finally convened, very different from the ones under which it was devised.

In spite of all its defects, Durban was indeed the best conference that could have occurred such comprehensive and delicate themes under such adverse circumstances. In addition to the more than ten years of market economics radically opposed to social concerns, and raised to the level of universal dogma from the standpoint of the pow-

71. BANTON, *supra* note 27, at 360.

72. *Id.*

erful, the times had already become unsuitable for real U.N. multilateralism (not the multilateralism of military alliances) and parliamentary diplomacy to deal with global problems. It is wrong to blame only the United States, or the George W. Bush Administration alone, as responsible for the general downgrading of world fora. After the post-Cold War period of multilateral optimism, the clear turning point took place in 1999, justifiably or not, in the NATO war against Milosevic's Yugoslavia, in the name of human rights and humanitarian law, on the question of Kosovo.

The simple fact that the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance had its final documents adopted without a vote (it is again worth noting that a vote was taken only to reject the untimely submission of texts that had been overcome) is evidence of progress with regard to the conferences of 1978 and 1983. Much more than that, however, its documents bring new concepts and commitments that can be useful to combat structural racism. Apart from aspects on which reservations were made and which are not expected to be followed by those who denounced them, the final documents of Durban ought to function as guides for state action, and soft-law for demands of civil society on its respective government. Wouldn't this, perhaps, be the real reason for the strong condemnation to Durban heard from governments that had always posed as champions of human rights?

No conference solves, by itself, the problems it proposes to tackle. At the utmost they suggest ways through which we can try "to save our circumstances." As Ortega y Gasset prophetically taught, in the early twentieth century, if we do not save them, we cannot save ourselves.⁷³

Responsibilities for the flaws of Durban belong to different actors. Responsibility for the implementation of its recommendations—like those concerning "special measures or positive actions" that started to be put to practice in Brazil after the Conference—as is the case of any other international document emerging from multilateral bodies, depends on the seriousness each State attaches to the collective decisions in which they themselves took part (and except for Israel and the United States, all the others were participants in the results achieved). It depends as well on the capacity of civil society to appropriately wield these recommendations in support for their causes. Finally, it depends, in a most definitive manner, on a general consciousness—today virtually impossible—that, as stated in the Dur-

73. See Ortega y Gasset, *supra* note 1, at 322.

ban Declaration, only by creating a future with more equitable conditions, “based upon our common humanity, and in all its diversity,” will globalization bring forth anti-discriminatory effects.

