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## Article

# The Approach of the Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law

David Weissbrodt\*

The four Geneva Conventions<sup>1</sup> and the two Additional Protocols of 1977<sup>2</sup> generally lack authoritative mechanisms for interpretation. Interpretation and application of these treaties are principally left to the judgment of the states that are parties to the Geneva Conventions and Protocols<sup>3</sup> and, increasingly, to

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1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

3. See Geneva Convention I, *supra* note 1, art. 49 (“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention . . .”); see also Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 MCGILL L.J. 285, 305 (2005) (“With regard to the enforcement of the Geneva Conventions more broadly, all contracting parties are required by article 1 to respect the Conventions, but the only external enforcement mechanism in the treaty is article 49 of the First Convention, which requires high contracting parties to enact penal legislation so as to prosecute grave breaches of the Conventions.”); Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT’L ENVTL. L. REV. 67, 77 (1995) (“Much of the responsibility for compliance with the Geneva Conventions and Protocols is

the International Criminal Court and international tribunals.<sup>4</sup> The International Committee of the Red Cross (ICRC) encourages states parties to comply with their obligations under humanitarian law, but it is not an adjudicative body<sup>5</sup> and rarely publishes its authoritative interpretations of the Geneva Conventions and Protocols.<sup>6</sup> Article 90 of Additional Protocol I authorizes the establishment of the International Humanitarian Fact-Finding Commission.<sup>7</sup> While seventy states have accepted the competence of the Commission—which has been ready for activities since Article 90 came into force in 1991—the parties to armed conflicts have yet to call upon it.<sup>8</sup>

At the same time, the eight human rights treaty bodies, the thirty thematic mechanisms of the U.N. Human Rights Council (formerly Commission), and three regional human rights commissions/courts have responded to various situations involving humanitarian law violations.<sup>9</sup> Some of these decision-

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left to the parties themselves, aided or cajoled by the International Committee of the Red Cross (ICRC).”). The ICRC has also convened scholars from around the world to gather customary international law as to the content of humanitarian law. See generally 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005).

4. Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598, 1600 [hereinafter Statute of the Rwanda Tribunal]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, 32 I.L.M. 1192 [hereinafter Statute of the Yugoslavia Tribunal].

5. See Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT'L L.J. 621, 641 (2003) (noting that the ICRC lacks adjudicative powers).

6. See, for example, Int'l Comm. of the Red Cross [ICRC], Reg'l Delegation for U.S. and Can., *ICRC Report on the Treatment of Fourteen “High-Value” Detainees in CIA Custody*, Feb. 14, 2007, for an exceptional publication of an ICRC report.

7. Geneva Protocol I, *supra* note 2, art. 90.

8. Konstantin Meljnik & Stefan Weiss, *Conference Report—30 Years Additional Protocols To The 1949 Geneva Conventions: Past, Present and Future, 18th Conference of the Legal Advisors to the German Army and of the Representatives of the German Red Cross*, 9 GERMAN L.J. 1355, 1360 (2008) (noting that “as yet no single application for investigation by the Commission has been filed”). The establishment of the International Humanitarian Fact-Finding Commission would, in principle, afford a mechanism for authoritative interpretation of humanitarian law, but the reluctance of governments to use the Commission renders its existence of little practical consequence.

9. See, e.g., U.N. Comm'n Human Rights, Res. 2002/34, ¶ 13(a), U.N. Doc. E/CN.4/RES/2002/36 (Apr. 22, 2002) (expressing Commission's “grave concern over the continued occurrence of violations of the right to life highlighted in the report of the Special Rapporteur [on Extrajudicial, Summary or Arbitrary Executions] as deserving special attention [including] violations of the right to life during armed

making institutions, such as the Committee on the Rights of the Child and the Inter-American Court and Commission on Human Rights,<sup>10</sup> have interpreted and applied humanitarian law in their respective domains.<sup>11</sup> Some treaty bodies (including the U.N. Human Rights Committee)<sup>12</sup> have generally responded to requests referring to the Geneva Conventions using only their

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conflict"); see also Philip Alston, Jason Morgan-Foster & William Abresch, *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror,"* 19 EUR. J. INT'L L. 183, 196–97 (2008) ("Finally, the recent study on customary international humanitarian law produced under the auspices of the International Committee of the Red Cross concluded that '[t]here is extensive State practice to the effect that human rights law must be applied during armed conflicts.'").

10. Article 64 of the American Convention provides that any member state of the OAS may consult the Inter-American Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American states. Inter-Am. Ct. of Human Rights, *General Information, Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L./VII.82, doc. 6 rev. 1 at 13 (1992). *But see* Las Palmeras v. Colombia (Judgment on Preliminary Objections), 2001 Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 34 (Feb. 4, 2000) ("[I]t can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (*cf.* Articles 33, 44, 48.1 and 48)."). The Inter-American Court of Human Rights has thus far rejected the *lex specialis* application of humanitarian law on jurisdictional grounds, but continues to refer to and consider humanitarian law provisions. The Commission continues to apply humanitarian law as *lex specialis*. See Letter from Juan E. Méndez, President, Inter-Am. Comm'n on Human Rights, to Attorneys for Those Requesting Provisional Measures (Mar. 13, 2002), available at <http://www1.umn.edu/humanrts/cases/guantanamo-2003.html> (quoting letter notifying the United States of the imposition of provisional measures).

11. See, e.g., U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Israel*, ¶ 51, U.N. Doc. CRC/C/15/Add.195 (May 23, 2003) (recommending "with reference to international humanitarian law, notably the Geneva Convention relative to the Protection of Civilian Persons in Time of War, that the State party fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians)"); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Iraq*, ¶ 15, U.N. Doc. CRC/C/15/Add.94 (Oct. 9, 1998) (recommending that "the State party raise the legal minimum age of voluntary enlistment into the armed forces in the light of international human rights and humanitarian law").

12. See, e.g., Julian v. New Zealand, U.N. Human Rights Comm., Commc'n No. 601/1994, ¶ 2.9, U.N. Doc. CCPR/C/59/D/601/1994 (1997) (responding to a complaint citing "the Third Geneva Convention of 1949, Protocol I of the Geneva Convention and the legal commentaries prepared by the International Committee of the Red Cross"); Atkinson v. Canada, U.N. Human Rights Comm., Commc'n No. 573/1994, ¶ 2.7, U.N. Doc. CCPR/C/55/D/573/1994 (1995) (considering the same authorities); T.W.M.B. v. Netherlands, U.N. Human Rights Comm., Commc'n No. 403/1990, ¶ 3.1, U.N. Doc. CCPR/C/43/D/403/1990 (1991) (alleging violations of, inter alia, 1949 Geneva Convention (IV) on the Protection of Civilian Persons in Times of War).

own treaty.<sup>13</sup> Other mechanisms (such as the U.N. Working Group on the Enforced and Involuntary Disappearances) have deferred to the ICRC.<sup>14</sup>

The International Criminal Court,<sup>15</sup> the International Tribunal for the Former Yugoslavia (ICTY),<sup>16</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>17</sup> and several other international or mixed national-international tribunals have a role in establishing and interpreting international humanitarian law. Further, national courts have been asked to apply humanitarian law for some time, particularly in the context of the post-2001 "war on terror."<sup>18</sup> National military courts have consistently applied humanitarian law.<sup>19</sup> Some national civilian courts have refused to apply humanitarian law,<sup>20</sup> while others have demonstrated their reluctance to explore the contours of this relatively complex domain of

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13. For example, all three of the communications cited in the preceding footnote were ruled inadmissible.

14. See OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, ENFORCED OR INVOLUNTARY DISAPPEARANCES, FACT SHEET NO. 6 REV. 3, at 11–12 (2009), available at <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> ("The Working Group does not deal with disappearances in the context of international armed conflicts, in view of the competence of the International Committee of the Red Cross (ICRC) in such situations, as determined by the Geneva Conventions of 1949 and their Additional Protocols of 1977.").

15. Rome Statute of the International Criminal Court, *opened for ratification* July 17, 1998, 2187 U.N.T.S. 90.

16. Statute of the Yugoslavia Tribunal, *supra* note 4.

17. Statute of the Rwanda Tribunal, *supra* note 4.

18. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (finding Common Article 3 of the Geneva Conventions applicable).

19. See HENCKAERTS & DOSWALD-BECK, *supra* note 3, at 4 n.12, 165 n.30 (providing examples of national military courts that have applied humanitarian law, including Germany, Israel, the United Kingdom, and the United States); Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 GEO. WASH. INT'L L. REV. 1, 18 (2004) (noting that United States military courts were exclusively authorized to prosecute war crimes until 1996).

20. See, e.g., *Hamdi v. Rumsfeld (Hamdi I)*, 316 F.3d 450, 468–69 (4th Cir. 2003) (declining to apply the Geneva Conventions on the grounds that they are not self-executing), *rev'd on other grounds*, 542 U.S. 507 (2004); see also Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 605 n.25 (2008) ("The lower courts are divided on whether the Geneva Conventions are self-executing."). Compare *United States v. Khadr*, CMCR Case No. 07-001, at 4 n.4 (Ct. Mil. Comm'n Rev. 2007) (Geneva Conventions "generally viewed as self-executing treaties"), and *United States v. Lindh*, 212 F. Supp. 2d 541, 553 n.20 (E.D. Va. 2002) (Geneva Conventions are self-executing), with *Hamdi I*, F.3d at 468 (Geneva Conventions are non-self-executing).

international law.<sup>21</sup>

For some legal issues, human rights mechanisms and national courts can use humanitarian law to interpret international human rights or national law. For example, humanitarian law may be useful in assessing whether a prisoner qualifies as a prisoner of war with the associated privileges;<sup>22</sup> what procedural protections are applicable to an “enemy combatant”;<sup>23</sup> and whether a killing<sup>24</sup> or a detention is arbitrary.<sup>25</sup>

This Article reviews the jurisprudence of one of the principal human rights treaty bodies, the Committee on the Elimination of Racial Discrimination (CERD, Committee, or Race Committee).<sup>26</sup> It examines CERD’s general approach to interpreting the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention), and addressing the relevant issues of international law and rules of international humanitarian law. Parts I through IV consider all relevant decisions and recommendations that CERD has

21. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality opinion) (invoking the Third Geneva Convention but declining to engage petitioner’s specific argument that his detention violated Article 5). *But see id.* at 549–51 (Souter, J., concurring in the judgment) (discussing petitioner’s Article 5 argument). See also *Hamdan*, 548 U.S. at 562–63 (2006) (offering only an abbreviated analysis to support its holding that Common Article 3 is applicable to the war against al Qaeda).

22. See, e.g., *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (finding that Panamanian General Manuel Noriega is a prisoner of war).

23. See, e.g., *Hamdan*, 548 U.S. at 613 (holding that military tribunals must comply with Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions).

24. See, e.g., *Disabled Peoples’ Int’l v. United States*, Case 9213, Inter-Am. C.H.R., OAS Doc. OEA/Ser.L/V/II.67, doc. 6 (1987), available at <http://www.cidh.oas.org/annualrep/86.87eng/EUU9213.htm> (declaring that Disabled Peoples’ International demonstrated a prima facie human rights violation in its complaint against the United States after an insane asylum in Grenada was bombed by military aircraft of the United States).

25. See, e.g., Inter-American Comm’n on Human Rights, *Decision on Request for Precautionary Measures (Detainees at Guantánamo, Cuba)*, 41 I.L.M. 532 (Mar. 12, 2002) (noting that doubt exists as to “whether and to what extent the Third Geneva Convention and/or other provisions of international humanitarian law apply to some or all of the detainees [held at Guantánamo Bay] and what implications this may have for their international human rights protections”).

26. CERD is the body of eighteen independent experts established by the International Convention on the Elimination of All Forms of Racial Discrimination for the application and interpretation of the Race Convention. International Convention on the Elimination of All Forms of Racial Discrimination art. 8, *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Race Convention].

produced to date, including its decisions on Individual Communications (or individual complaints), General Recommendations, Concluding Observations, and the Decisions and Recommendations issued through its early warning measures and urgent procedures, respectively.

## I. CERD JURISPRUDENCE: INDIVIDUAL COMPLAINTS

The Race Convention establishes a procedure that makes it possible for an individual claiming to be the victim of racial discrimination to lodge a complaint with the Committee against the state concerned.<sup>27</sup> This procedure applies to the fifty-three states parties to the Convention that have declared that they recognize the competence of CERD to receive such complaints.<sup>28</sup> Under Article 14, a state party may declare that it recognizes the competence of the Committee to receive and consider complaints from individuals or groups of individuals within the state's jurisdiction who are claiming to be victims of a violation by that state party of any of the rights set forth in the Race Convention.<sup>29</sup> The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the Race Convention.<sup>30</sup>

International humanitarian law receives little discussion in the individual complaints. There are only two instances of individual complaints where the Committee considered international human rights instruments outside of the Race Convention. In one instance, CERD stated that all international instruments guaranteeing freedom of expression provide for the possibility of limiting the exercise of free expression under certain circumstances.<sup>31</sup> The Committee went on to conclude

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27. *Id.* art. 14.

28. Office of the U.N. High Comm'r for Human Rights, Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, Overview of Procedure, <http://www2.ohchr.org/english/bodies/cerd/procedure.htm> (last visited Mar. 8, 2010); U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Report of the Committee on the Elimination of Racial Discrimination*, Annex I, U.N. Doc. A/63/18 (Aug. 15, 2008) (listing the states parties to CERD).

29. Race Convention, *supra* note 26, art. 14.

30. Office of the U.N. High Comm'r for Human Rights, Human Rights Bodies—Petitions, <http://www2.ohchr.org/english/bodies/petitions/index.htm> (last visited Mar. 8, 2010).

31. See *Jewish Cmty. of Oslo v. Norway*, CERD, Comm'n No. 30/2003, ¶ 10.5, U.N. Doc. CERD/C/67/D/30/2003 (2005) (“The Committee notes that the ‘due regard’ clause relates generally to all principles embodied in the Universal Declaration of Human Rights . . . all international instruments that guarantee freedom of

that racially discriminatory statements of exceptionally or manifestly offensive character violate Articles 4 and 6 of the Race Convention.<sup>32</sup> In another instance, CERD cited the International Covenant of Economic, Social and Cultural Rights to support its decision that Article 5(c) of the Race Convention mandates non-discrimination in regards to housing.<sup>33</sup>

These two instances represent the only examples of CERD using international law outside of the Race Convention when assessing individual complaints. In contrast to the Human Rights Committee,<sup>34</sup> CERD has not gradually shifted its approach toward evaluating international instruments outside of the Race Convention. Instead, CERD remains focused on complaints alleging violations of the Race Convention, which is the principal focus of CERD under its convention.

In order to be admissible, individual complaints must allege a violation of a right set forth in the Race Convention.<sup>35</sup> One reason CERD seldom considers international instruments outside the Race Convention when assessing individual complaints may be because petitioners do not allege violations of outside instruments when petitioning CERD. Additionally, the Committee may be reluctant to step outside the bounds of the Race Convention when making determinations in response to individual complaints.

expression provide for the possibility, under certain circumstances, of limiting the exercise of this right. The Committee concludes that . . . statements . . . of exceptionally/manifestly offensive character, are not protected by the due regard clause, and [violate] article 4, and . . . article 6, of the [Race] Convention.”).

32. *Id.*

33. See *L.R. v. Slovakia*, CERD, Comm’n No. 31/2003, ¶ 10.7 U.N. Doc. CERD/C/66/D/31/2003 (2005) (“As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5(c) of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights.”).

34. See David Weissbrodt, *The Role of the Human Rights Committee and Other International Human Rights Courts and Treaty Bodies in Interpreting and Developing Humanitarian Law* 13–21 (July 15, 2009) (unpublished manuscript, on file with author) (describing the Human Rights Committee’s recent utilization of international instruments).

35. CERD, *Rules of Procedure of the Committee on the Elimination of Racial Discrimination*, Rule 91, U.N. Doc. CERD/C/35/Rev.3 (Jan. 1, 1989) (“With a view to reaching a decision on the admissibility of a communication, the Committee or its Working Group shall ascertain: . . . (b) That the individual claims to be a victim of a violation by the State party concerned of any of the rights set forth in the Convention.”).



It seems that the Committee would not directly consider a claim based on international humanitarian law unless that claim was framed as an alleged violation of the Race Convention. While opposing arguments do cite international human rights instruments besides the Race Convention for support,<sup>36</sup> the Committee's reluctance to explicitly incorporate other international instruments into its opinions suggests that it likely will not issue decisions in response to alleged violations of international humanitarian law alone.

## II. CERD CONCLUDING OBSERVATIONS

CERD issues Concluding Observations in response to country reports it periodically receives from states parties, pursuant to Article 9 of the Race Convention.<sup>37</sup> States are required to provide information on the legislative, judicial, administrative, or other measures which they have implemented to give effect to the provisions of the Race Convention.<sup>38</sup> CERD often requests additional information regarding specific areas of interest to the Committee.<sup>39</sup>

While CERD's Concluding Observations primarily deal with the implementation of the Race Convention itself, they often discuss other international human rights instruments.<sup>40</sup> CERD has explicitly stated that the reporting requirements are in place not merely to further the purposes of the Race Convention, but also to propagate "the purposes and principles of the

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36. *E.g.*, *Jewish Cmty. of Oslo v. Norway*, CERD, Commc'n No. 30/2003, ¶ 3.2, U.N. Doc. CERD/C/67/D/30/2003 (2005) (citing decisions by the U.N. Human Rights Committee and the European Court of Human Rights).

37. Race Convention, *supra* note 26, art. 9 ("States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.").

38. *Id.*; see also MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES 81-82 (2002) (describing the reporting requirement under Article 9).

39. Race Convention, *supra* note 26, art. 9; see, *e.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Bosnia and Herzegovina*, ¶ 16, U.N. Doc. CERD/C/BIH/CO/6 (Apr. 11, 2006) (requesting that the state party inform the Committee of its implementation of the recommendations contained in its Concluding Observations).

40. See *infra* Part II.A.

Charter of the United Nations, [and] the Universal Declaration of Human Rights . . . .”<sup>41</sup> The Concluding Observations reveal that CERD looks beyond the Race Convention for a more complete picture of the human rights environment in the state party, primarily for the purpose of evaluating compliance with principles of non-discrimination.<sup>42</sup>

The Committee discusses international humanitarian law primarily within the context of war or genocide—situations in which minority groups are particularly vulnerable.<sup>43</sup> CERD interprets and applies international humanitarian law, demands compliance with international humanitarian norms, or condemns gross violations of international humanitarian standards.<sup>44</sup> This Part considers CERD’s approach to reviewing periodic country reports, assesses its resulting treatment of humanitarian law, and finds that while CERD discusses human rights instruments outside of the Race Convention at length, its Concluding Observations rarely offer substantive analysis of international humanitarian law.

#### A. CERD’S APPROACH TO ASSESSING PERIODIC REPORTS

CERD’s Concluding Observations often refer to human rights instruments pertaining to the overall human rights environment in a state party. These references most often come in two forms: (1) a commendation of a state party for its ratification of human rights instruments in addition to the Race Convention<sup>45</sup> or (2) a recommendation that a state party ratify a

41. CERD, 15th Sess., *General Recommendation 5 Concerning Reporting by States Parties (Art. 7 of the Convention)*, at 94, U.N. Doc. A/32/18 (Sept. 13, 1977).

42. See *infra* Parts II.A–B.

43. See *infra* Part II.B.

44. See *infra* Part II.B.

45. E.g., CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Croatia*, ¶ 8, U.N. Doc. CERD/C/HRV/CO/8 (Mar. 24, 2009) [hereinafter *Concluding Observations, Croatia*] (“The Committee notes with satisfaction that the State party has ratified . . . Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms . . .”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Montenegro*, ¶ 7, U.N. Doc. CERD/C/MNE/CO/1 (Mar. 16, 2009) [hereinafter *Concluding Observations, Montenegro*] (“The Committee takes note with appreciation that Montenegro has succeeded to all of the international human rights instruments previously binding upon Serbia and Montenegro. The Committee also notes the ratification of . . . ILO Convention No. 111 on Discrimination (Employment and Occupation) in 2006.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Pakistan*, ¶ 7, U.N. Doc. CERD/C/PAK/CO/20 (Mar. 16, 2009) [hereinafter *Concluding Observations,*

certain human rights instrument.<sup>46</sup> For example, the Race Committee noted with satisfaction that the Dominican Republic had ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>47</sup> The Committee also recommended that the government of Pakistan accede to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>48</sup> Such commendations and recommendations show that the Committee prefers states parties to have additional human rights safeguards in place to guarantee proper implementation of principles of non-discrimination.

In addition to human rights instruments which guarantee basic human rights for all people, the Committee often both commends states parties for the ratification of treaties<sup>49</sup> and

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*Pakistan*] (“The Committee welcomes the ratification by the State party of the International Covenant on Economic, Social and Cultural Rights in 2008. It also welcomes the State party’s signing of the International Covenant on Civil and Political Rights . . .”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Finland*, ¶ 8, U.N. Doc. CERD/C/FIN/CO/19 (Mar. 13, 2009) [hereinafter *Concluding Observations, Finland*] (“The Committee notes with appreciation . . . the State party’s ratification of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Fiji*, ¶ 8, U.N. Doc. CERD/C/FJI/CO/17 (May 16, 2008) [hereinafter *Concluding Observations, Fiji*] (“The Committee commends the ratification by the State party of the International Labour Organization (ILO) Conventions No. 111 on Discrimination in Employment and Occupation . . .”).

46. *E.g.*, *Concluding Observations, Montenegro*, *supra* note 45, ¶ 15 (“The Committee recommends that the State party ratify the Convention on the Reduction of Statelessness adopted in 1961.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Nicaragua*, ¶ 29, U.N. Doc. CERD/C/NIC/CO/14 (June 19, 2008) (“The Committee recommends that the State party facilitate the process of acceding to ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, of 1989.”).

47. CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Dominican Republic*, ¶ 5, U.N. Doc. CERD/C/DOM/CO/12 (May 16, 2008) [hereinafter *Concluding Observations, Dominican Republic*].

48. *Concluding Observations, Pakistan*, *supra* note 45, ¶ 15 (“The Committee recommends that the State party consider acceding to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol . . .”).

49. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Turkey*, ¶ 7, U.N. Doc. CERD/C/TUR/CO/3 (Mar. 24, 2009) [hereinafter *Concluding Observations, Turkey*] (“The Committee welcomes the ratification by the State party of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in September 2004.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Bulgaria*, ¶ 9, U.N. Doc. CERD/C/BGR/CO/19 (Mar. 23, 2009) [hereinafter *Concluding Observations, Bulgaria*] (welcoming ratification of the Council of Europe Framework Convention for the Protection of National Minorities);

recommends the ratification of treaties<sup>50</sup> pertaining to the human rights of minority groups. Concluding Observations also register notes of concern regarding a state party's maintenance of an obsolete treaty limitation, or the absence of accession to or ratification of a particular human rights instrument, either of which may impair its ability to comply with mandates of the Race Convention.<sup>51</sup> The Committee prefers that states parties ratify human rights instruments specifically protecting minority

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*Concluding Observations, Finland, supra* note 45, ¶ 8 (“The Committee notes with appreciation the State party’s accession to the 1961 Convention on the reduction of statelessness . . .”); *Concluding Observations, Dominican Republic, supra* note 47, ¶ 5 (noting with satisfaction the ratification of the Convention on the Elimination of All Forms of Discrimination against Women, its Optional Protocol, and the Convention on the Rights of the Child, and its Optional Protocol on the sale of children, child prostitution and child pornography); *Concluding Observations, Fiji, supra* note 45, ¶ 8 (“The Committee commends the ratification by the State party of the International Labour Organization (ILO) Convention[ ] . . . No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Czech Republic*, ¶ 6, U.N. Doc. CERD/C/CZE/CO/7 (Mar. 9, 2007) [hereinafter *Concluding Observations, Czech Republic*] (“The Committee notes with satisfaction that the State party ratified the European Convention on Nationality and the Convention Relating to the Status of Stateless Persons in 2004, as well as the European Charter for Regional or Minority Languages in 2006, bearing in mind the relevance of these conventions for the implementation of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.”).

50. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Canada*, ¶ 27, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007) (“The Committee recommends that the State party support the immediate adoption of the United Nations Declaration on the Rights of Indigenous Peoples, and that it consider ratifying the ILO Indigenous and Tribal Peoples Convention No. 169.”); *see also supra* notes 46 and 48.

51. *E.g.*, *Concluding Observations, Turkey, supra* note 49, ¶ 15 (“The Committee expresses concern over the fact that the State party maintains the geographical limitation to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which, in turn, reduces the protection offered to refugees from non-European States and may subject them to discrimination.”); *Concluding Observations, Dominican Republic, supra* note 47, ¶ 14 (“The Committee further recommends that the State party consider the possibility of acceding to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, which prohibit deprivation of nationality on discriminatory grounds and stipulate that a State party should grant nationality to persons born on its territory who would otherwise be stateless. The State party should reconsider the status of people who have been in its territory for a long period with a view to regularizing their stay.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Belgium*, ¶ 18, U.N. Doc. CERD/C/BEL/CO/15 (Apr. 11, 2008) (“The Committee recommends that the State party consider ratifying the Framework Convention for the Protection of National Minorities, thus providing its minorities with all the rights recognized in the Convention.”).

groups. For example, in its Concluding Observations on Bulgaria, CERD welcomed the government's ratification of the Council of Europe's Framework Convention for the Protection of National Minorities.<sup>52</sup> This preference illustrates the Committee's awareness of the relationship between the ratification and implementation of human rights instruments protecting minorities and a state party's commitment and ability to implement the Race Convention faithfully.

The Concluding Observations praise states parties for legislative and administrative measures taken to promote and protect human rights in general,<sup>53</sup> and in areas of specific relevance to CERD.<sup>54</sup> Accordingly, CERD often recommends that states parties establish independent national institutions dedicated to promoting and protecting human rights.<sup>55</sup> The Committee understands the need for states parties to establish their own institutions responsible for guaranteeing human

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52. *Concluding Observations, Bulgaria, supra* note 49, ¶ 9.

53. *E.g., Concluding Observations, Turkey, supra* note 49, ¶ 24 ("The Committee also notes the process of establishment of the office of ombudsman and a national human rights institution (NHRI) in accordance with the Paris Principles . . ."); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Tunisia*, ¶ 5, U.N. Doc. CERD/C/TUN/CO/19 (Mar. 23, 2009) [hereinafter *Concluding Observations, Tunisia*] ("The Committee notes with interest that . . . a national institution established in 1991, underwent a reform of its powers, its membership and its working methods with a view to enhancing its effectiveness and its independence in conformity with the Paris Principles . . ."); *Concluding Observations, Montenegro, supra* note 45, ¶ 4 (welcoming the establishment of a range of institutions for the promotion and protection of human rights).

54. *E.g., Concluding Observations, Montenegro, supra* note 45, ¶ 3 ("The Committee welcomes the many legislative and administrative measures taken by the State party to establish a framework for the promotion and protection of human rights, and in particular the elimination of discrimination in areas of relevance to the Convention . . .").

55. *E.g., Concluding Observations, Pakistan, supra* note 45, ¶ 13 ("The Committee encourages the State party to proceed with the envisaged plans to establish a national human rights institution in accordance with the Paris Principles, as scheduled."); *Concluding Observations, Dominican Republic, supra* note 47, ¶ 10 ("The Committee invites the State party to facilitate the prompt establishment of a national human rights institution in accordance with the Paris Principles."); *Concluding Observations, Fiji, supra* note 45, ¶ 11 ("The Committee encourages the State party to take all necessary steps to ensure the independence of its national human rights institution, in accordance with the Paris Principles of 1993 . . ."); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Italy*, ¶ 13, U.N. Doc. CERD/C/ITA/CO/15 (May 16, 2008) ("The Committee recommends that the State party undertake . . . the necessary steps to establish an independent national human rights institution in accordance with the Paris Principles.").

rights in order to implement the principles of the Race Convention successfully.

CERD has also utilized decisions or recommendations from other international human rights bodies and tribunals to add force to its own pleas for states parties to cease, or make reparation for, violations of the Race Convention.<sup>56</sup> Such references demonstrate CERD's willingness to use other sources of international human rights law to bolster its arguments, with the goal of persuading states parties to comply with the Race Convention.

The Concluding Observations give special attention to a few issue areas—specifically, violations of the rights of women, non-citizens, and indigenous peoples.<sup>57</sup> The Committee generally requests both quantitative and qualitative data on factors affecting, and difficulties experienced in, ensuring equal enjoyment of rights for these groups.<sup>58</sup> CERD gives these vulnerable groups special attention both because violations in these human rights areas often have an underlying racial component and such groups generally have little ability to

56. *E.g.*, *Concluding Observations, Belgium*, *supra* note 51, ¶ 17 (“Noting that the European Court of Human Rights, in its judgment of 24 January 2008, found that Belgium had violated article 3 and 5 of the European Convention on Human Rights on ground of inhuman and degrading treatment of asylum-seekers, the Committee shares the concern about the detention of asylum-seekers, the conditions of such detention, and the lack of non-custodial measures applicable to them. The Committee, recalling its general recommendation No. 30 (2004) on discrimination against non-citizens, recommends that the State party adopt all necessary measures to use non-custodial measures for asylum-seekers and, when detention is required, that conditions meet international standards.”) (citation omitted).

57. *E.g.*, *Concluding Observations, Czech Republic*, *supra* note 49, ¶ 14 (noting with concern the coerced sterilizations of women, especially the disproportionate numbers of sterilizations performed on Roma women, the lack of sufficient and prompt action to establish responsibilities and provide reparation to the victims, the state party's positive obligation to impede the illegal performance of forced and coerced sterilizations, and recommending that the state take all necessary steps to facilitate victims' access to justice and reparation); *see O'FLAHERTY*, *supra* note 38, at 83–88 (noting the obligation under International Convention on the Elimination of All Forms of Racial Discrimination to ensure rights to everyone, including non-citizens).

58. O'FLAHERTY, *supra* note 38, at 89–90; *e.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Uzbekistan*, ¶ 15, U.N. Doc. CERD/C/UZB/CO/5 (Apr. 4, 2006) (“The Committee regrets that insufficient information was provided . . . on the number of women of non-Uzbek ethnic origin occupying positions of responsibility within the State party's administrative, political or private sector . . . [t]he State party should provide further information on these issues, including disaggregated statistical data by sex, ethnic origin, occupational sector, and functions assumed.”).

influence government power structures for their own protection.<sup>59</sup> Furthermore, members of such groups often experience complex forms of disadvantage that persist over generations and in which racial discrimination is mixed with other causes of social inequality.<sup>60</sup>

Because of CERD's focus on vulnerable groups in its Concluding Observations, certain human rights instruments are mentioned much more frequently. For instance, the Committee often recommends ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>61</sup> These citations provide further

59. See *supra* notes 56–57; see also CERD, 64th Sess., *General Recommendation 30, Discrimination Against Non Citizens*, ¶ 19, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Mar. 12, 2004) (recommending that states parties ensure the security of non-citizens); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Colombia*, ¶ 11, U.N. Doc. CERD/C/304/Add.76 (Apr. 12, 2001). (“[T]he Committee expresses concern that this climate of impunity may severely impact the rights of indigenous and Afro-Colombian communities, as these minority communities are subjected disproportionately to violations of international human rights and humanitarian norms.”); CERD, 51st Sess., *General Recommendation 23, On the Rights of Indigenous Peoples*, ¶ 3, U.N. Doc. A/52/18, Annex V at 122 (Aug. 18, 1997) (“The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms . . .”).

60. See O’FLAHERTY, *supra* note 38, at 83–88 (noting the importance of several rights relating to social and political freedoms, especially education, that are necessary to combat racial discrimination).

61. See *Concluding Observations, Bulgaria*, *supra* note 49, ¶ 21 (“The Committee encourages the State party to consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.”). The Committee issued similarly worded recommendations to many states parties, including, but not limited to: CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ethiopia*, ¶ 24, U.N. Doc. CERD/C/ETH/CO/7-16 (Aug. 31, 2009); *Concluding Observations, Croatia*, *supra* note 45, ¶ 22; *Concluding Observations, Turkey*, *supra* note 49, ¶ 7; *Concluding Observations, Tunisia*, *supra* note 53, ¶ 21; *Concluding Observations, Montenegro*, *supra* note 45, ¶ 21; *Concluding Observations, Finland*, *supra* note 45, ¶ 20; CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Austria*, ¶ 27, U.N. Doc. CERD/C/AUT/CO/17 (Sept. 22, 2008); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Germany*, ¶ 29, U.N. Doc. CERD/C/DEU/CO/18 (Sept. 22, 2008); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Namibia*, ¶ 26, U.N. Doc. CERD/C/NAM/CO/12 (Sept. 22, 2008); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation*, ¶ 30, U.N. Doc. CERD/C/RUS/CO/19 (Sept. 22, 2008); *Concluding Observations, Nicaragua*, *supra* note 46, ¶ 11; *Concluding Observations, Dominican Republic*, *supra* note 47, ¶ 22; *Concluding Observations, Fiji*, *supra* note 45, ¶ 25; *Concluding Observations, Belgium*, *supra* note 51, ¶ 26; *Concluding Observations, Canada*, *supra* note 50, ¶ 23; *Concluding Observations,*

evidence of CERD's focus on safeguarding the rights of vulnerable groups.

In several Concluding Observations, CERD has mentioned decisions by other international tribunals when assessing compliance with the Race Convention in regards to the human rights of non-citizens. In response to Belgium's 2008 report, the Committee cited a decision of the European Court of Human Rights.<sup>62</sup> The Court had found violations of Articles 3 and 5 of the European Convention of Human Rights on the grounds of inhumane and degrading treatment of asylum-seekers and excessive use of force by police during expulsion of non-citizens.<sup>63</sup> CERD referred to this decision, as well as its own General Recommendation 30, in order to ensure that the state party manages asylum-seekers according to international standards.<sup>64</sup>

In another discussion of the human rights of non-citizens, CERD cited the *Yean and Bosico Children v. The Dominican Republic* decision by the Inter-American Court of Human Rights.<sup>65</sup> The Committee discussed the link between registration of births and the ability of children to enjoy rights protected by Article 5 of the Race Convention, namely, civil, political, economic, social, and cultural rights.<sup>66</sup> CERD cited the *Yean and Bosico Children* decision to support its recommendation that the state party take appropriate

*Czech Republic*, *supra* note 49, ¶ 22.

62. See *Concluding Observations, Belgium*, *supra* note 51, ¶ 17–18 (“Noting that the European Court of Human Rights . . . found that Belgium had violated article 3 and 5 of the European Convention on Human Rights on ground of inhuman and degrading treatment of asylum-seekers . . . [and use of ] excessive force during expulsion of non-citizens . . .”).

63. See *id.*

64. See *id.*

65. The Dominican Republic authorities refused to issue birth certificates for the Yean and Bosico children, two girls of Haitian descent, even though they were born within the state's territory, despite the fact that the “Constitution of the Dominican Republic . . . establishes the principle of *ius soli* [birthright citizenship] to determine those who have a right to Dominican citizenship.” The Court ordered the state to make full amends for the violations of the children's right to citizenship and education. The Court also “requested that the State adopt the legislative and other measures necessary to ensure respect for the rights embodied in the [American] Convention and establish guidelines that contain reasonable requirements for the late registration of births and do not impose excessive or discriminatory obligations, so as to facilitate the registration of Dominican-Haitian children.” *Case of the Girls Yean and Bosico v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 3 (Sept. 8, 2005).

66. See *Concluding Observations, Dominican Republic*, *supra* note 47, ¶ 15.



legislative and administrative measures to ensure equal access to Article 5 rights, especially for the children of non-citizens born within the borders of the state party.<sup>67</sup> Decisions by international human rights tribunals are utilized by the Committee to add weight to its own recommendations and provide concrete evidence of the human rights violations it seeks to remedy.

Refugees, another subcategory of non-citizens, also receive special consideration from CERD. In defense of the rights of refugees, CERD cites the Race Convention and other relevant human rights instruments.<sup>68</sup> The Committee urges states parties to adopt administrative and legislative measures to protect the rights of refugees,<sup>69</sup> and recommends that states parties ratify the Convention relating to the Status of Refugees.<sup>70</sup> CERD also praises states parties for ratification of the Convention and the Protocol Relating to the Status of Refugees,<sup>71</sup> recommends that reservations be reconsidered,<sup>72</sup>

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67. *See id.*

68. *E.g., Concluding Observations, Tunisia, supra* note 53, ¶ 15 (“The Committee invites the State party to elaborate a legislative framework for the protection of refugees in accordance with international standards, to pursue its cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR) and to protect persons who have sought refuge in Tunisia. The Committee also recommends, in accordance with article 5 (b) of the Convention, that the State party should ensure that no person will be forcibly returned to a country where there are substantial grounds for believing that their life or physical integrity may be put at risk.”); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Georgia*, ¶ 17, U.N. Doc. CERD/C/GEO/CO/3 (Nov. 1, 2005) (“The Committee recommends that the State party provide detailed information on the situation of refugees and asylum-seekers, on the legal protection provided to them including their rights to legal assistance and judicial appeal against deportation orders, and on the legal basis for deportation. The Committee also urges the State party to ensure, in accordance with article 5 (b) of the Convention, that no refugees are forcibly returned to a country where there are substantial grounds for believing that they may suffer serious human rights violations. The Committee encourages the State party to ratify the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.”).

69. *See Concluding Observations, Pakistan, supra* note 45, ¶ 17 (“The Committee recommends that the State party . . . enact a comprehensive legal framework governing the reception and treatment of refugees and related categories of persons.”).

70. *E.g., CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Barbados*, ¶ 21, U.N. Doc. CERD/C/BRB/CO/16 (Nov. 1, 2005) (“The Committee strongly recommends that the State party ratify the . . . Convention relating to the Status of Refugees.”).

71. *E.g., CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Kazakhstan*, ¶ 7, U.N. Doc. CERD/C/65/CO/3 (Dec. 10,

and urges proper implementation.<sup>73</sup>

## B. TREATMENT OF INTERNATIONAL HUMANITARIAN LAW

Although other human rights instruments receive greater discussion in the Concluding Observations issued by CERD, issues of humanitarian law do receive consideration from the Committee. CERD often expresses concern over violations of international humanitarian law, while noting parallel violations of the Race Convention.<sup>74</sup> International humanitarian law itself, however, receives little in-depth analysis and discussion. Only a few Concluding Observations discuss the relationship between international humanitarian law and the Race Convention.<sup>75</sup> Such discussions only arise in the context of armed conflict or genocide.<sup>76</sup>

In regards to armed conflict, CERD often recommends that states parties disseminate knowledge and provide training in international humanitarian law for members of the armed forces, law enforcement officers, and other government employees responding to violent clashes.<sup>77</sup> The Committee notes

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2004) ("The Committee also notes with satisfaction that the State party has ratified the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol . . .").

72. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Malawi*, ¶ 9, U.N. Doc. CERD/C/63/CO/12 (Dec. 10, 2003) ("The Committee expresses concern over the State party's reservations to the 1951 Convention relating to the Status of Refugees which, in particular, reduce the protection offered to refugees in the field of employment, access to property, right of association, education and social security. The Committee welcomes the draft Refugee Act, which reflects the intention of the State party to withdraw these reservations, and encourages the State party to give high priority to this process.").

73. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia*, ¶ 17, U.N. Doc. CERD/C/304/Add.101 (Apr. 19, 2000) ("Taking note of some recent statements from the State party in relation to asylum-seekers, the Committee recommends that the State party implement faithfully the provisions of the 1951 Convention relating to the Status of Refugees, as well as the 1967 Protocol thereto, with a view to continuing its cooperation with the United Nations High Commissioner for Refugees and in accordance with the guidelines in UNHCR's 'Handbook on Refugee Determination Procedures'").

74. *See supra* notes 70–73.

75. *See infra* notes 81–82.

76. *See infra* notes 78–82.

77. *E.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 336, U.N. Doc. A/56/18 (Sept. 14, 2001) [hereinafter *2001 Report*] (recommending dissemination of information on international humanitarian law among security forces and law enforcement officers); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 667, U.N. Doc. A/50/18 (Sept. 22, 1995) [hereinafter *September 1995 Report*] ("The Committee considers it to be of the utmost importance to set up a training programme in humanitarian law . . . for

when a state party has taken administrative and legislative measures to investigate violations of international humanitarian law during armed conflict.<sup>78</sup> Furthermore, CERD requests that states parties take adequate measures to ensure that serious breaches of international humanitarian law are punished, victims are afforded just and adequate reparation, and a return to normal conditions of life occurs for displaced persons.<sup>79</sup> CERD will also recommend that the state party ensures that security measures taken in response to ongoing violence are implemented with full respect for the relevant principles of international humanitarian law.<sup>80</sup> The Committee recognizes that armed conflicts represent serious obstacles to the implementation of the Race Convention and, further, that armed conflicts often stem from racially and ethnically motivated violence.<sup>81</sup>

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members of the armed forces, the police, the national gendarmerie and other State employees.”).

78. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation*, ¶¶ 3, 22, U.N. Doc. CERD/C/304/Add.5 (Mar. 28, 1996) (noting “with satisfaction that a parliamentary group has been mandated to investigate human rights and international humanitarian law violations in the Chechen conflict” and reaffirming “that persons responsible for massive, gross and systematic human rights violations, and gross violations of international humanitarian law, should be held responsible and prosecuted”).

79. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Russian Federation*, ¶ 25, U.N. Doc. CERD/C/304/Add.43 (Mar. 30, 1998) (“Measures should be taken in particular to ensure that serious breaches of international humanitarian law do not remain unpunished, that the victims are afforded just and adequate reparation, and to ensure normal conditions of life and return for displaced persons.”).

80. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel*, ¶ 13, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007) [hereinafter *Concluding Observations, Israel*] (“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.”).

81. *E.g.*, *2001 Report, supra* note 77, ¶ 323 (“The Committee recognizes that the serious internal situation faced by the State party has not been conducive to the effective implementation of the Convention. The long-lasting armed conflict in the country has resulted in thousands of persons killed and over half a million internally displaced. It is the view of this Committee that military means will not solve the conflict and that only a negotiated political solution, which includes the participation of all parties, will lead to peace and harmony among ethnic communities in the island.”).

Preventing or ending genocide is also central to the mission of CERD, and international humanitarian law often receives discussion in this context. For example, CERD expresses concern over violations of international humanitarian law, especially in regards to “ethnic cleansing,” stating that such actions also constitute violations of the Race Convention.<sup>82</sup> In the context of the genocide that occurred during the war in Bosnia and Herzegovina, the Committee suggested integration of Articles 4 and 6 of the Race Convention into the statutes of the state party to prevent further ethnic cleansing.<sup>83</sup>

In situations of violence, CERD continues to focus on certain vulnerable groups. The Committee urges states parties to recognize that violations of international humanitarian law and the resulting climate of impunity may severely infringe the rights of minority communities.<sup>84</sup> Minority communities, because of their vulnerability, are disproportionately affected by violations of international humanitarian norms.<sup>85</sup>

Violations of international humanitarian law also receive attention from CERD in regards to refugees and displaced persons. In one instance, the Committee advised Ukraine to harmonize its national legislation with international legal standards concerning refugees. Specifically, CERD noted that the Ukrainian refugee law “does not contain standardized

82. *E.g.*, *September 1995 Report*, *supra* note 77, ¶¶ 218–19 (expressing profound distress over violations of international humanitarian law committed in connection with the systematic policy of “ethnic cleansing” in the areas under the control of the self-proclaimed Bosnian Serb authorities and urging immediate reversal beginning with voluntary return of displaced peoples); *see also* CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 471, U.N. Doc. A/48/18 (Sept. 15, 1993) [hereinafter *1993 Report*] (“The Committee reaffirmed that those responsible for massive, gross and systematic human rights violations and crimes against international humanitarian law should be held responsible and prosecuted.”).

83. *E.g.*, *id.* ¶ 459 (“In the context of ethnic cleansing, members of the Committee stated that article 4 had to be reflected in the Penal Code and that the Civil Code should cover article 6, particularly with regard to war crimes and compensation for victims of ethnic cleansing.”).

84. *E.g.*, CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Colombia*, ¶ 11, U.N. Doc. CERD/C/304/Add.76 (Apr. 12, 2001) (“[T]he Committee expresses concern that this climate of impunity may severely impact the rights of indigenous and Afro-Colombian communities, as these minority communities are subjected disproportionately to violations of international human rights and humanitarian norms.”).

85. *E.g.*, *id.*; *see also* *1993 Report*, *supra* note 82, ¶¶ 306–29 (describing the diverse population and institutions developed to protect the rights of all Nigerians, regardless of their race or minority, while noting concern over continued inter-ethnic conflict).

refugee determination criteria, a definition of temporary humanitarian protection, or safeguards concerning the withholding of personal data from the authorities of the country of origin to which a rejected asylum-seeker might be deported (art. 5 (b)).<sup>86</sup> In other words, the Committee made compliance with Article 5(b) of the Race Convention dependent on national legislation providing a standardized definition of “refugee” and “temporary humanitarian protection.”<sup>87</sup> According to the Committee, fulfillment of a state party’s obligations under Article 5 also depends on maintaining adequate national safeguards concerning personal data about refugees. Such information should not be transmitted back to a country from which a refugee is fleeing because it could be used for discriminatory purposes if refugees are forced to return.<sup>88</sup>

International criminal tribunals also receive some attention from CERD. These bodies are generally tasked with interpreting and applying the law of war and of genocide—issues at the center of international humanitarian law. CERD objects to state party refusals to recognize the jurisdiction of, or cooperate with, an international criminal tribunal.<sup>89</sup> The Committee also registers concern when governments grant impunity for violators of international humanitarian law.<sup>90</sup> CERD has stipulated that all war crimes trials should be conducted in a non-discriminatory manner in order to comply with the Race

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86. CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ukraine*, ¶ 13, U.N. Doc. CERD/C/UKR/CO/18 (Oct. 19, 2006).

87. *Id.*

88. See Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 286 (1997) (“Refugees may want to limit uncontrolled access to personal information about themselves, fearing not only loss of privacy but also reprisals by their state of origin.”). Schuck also notes that “U.S. law protects the confidentiality of asylum applicants by limiting disclosure of the asylum application and identifying details.” *Id.* at n.147; see also 8 C.F.R. § 208.6 (2009).

89. See *supra* note 82; CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Yugoslavia*, ¶ 16, U.N. Doc. CERD/C/304/Add.50 (Mar. 30, 1998) (“It is regretted that the cooperation of the State party with the International Criminal Tribunal for the Former Yugoslavia remains insufficient and that individuals indicted by the Tribunal for war crimes and crimes against humanity are not put at its disposal.”).

90. *E.g.*, *September 1995 Report, supra* note 77, ¶ 241 (deploring “the unwillingness of the State party to recognize the jurisdiction of the International Criminal Tribunal for the former Yugoslavia” and expressing extreme concern “with regard to the apparent policy of the Government to purport to bestow impunity on perpetrators of fundamental violations of international human rights and humanitarian law”).

Convention.<sup>91</sup> The Committee interpreted noncompliance with an advisory opinion of the International Court of Justice to be a violation of Articles 2, 3, and 5 of the Race Convention.<sup>92</sup>

CERD rarely interprets or applies international humanitarian law, yet the Committee has used the Race Convention in an attempt to convince states parties to comply with international humanitarian norms.<sup>93</sup> For example, in its 1995 Report to Sri Lanka, CERD related compliance with the Race Convention to ratification of Protocol II Additional to the Geneva Conventions of 1949.<sup>94</sup> CERD did so by requesting information as to whether Sri Lanka would consider ratification of the Geneva Protocol II in its efforts to combat racial discrimination within the terms of the Race Convention.<sup>95</sup>

The Committee has also interpreted international humanitarian law in relation to the Israeli-Palestinian conflict. CERD stated, “[a]ctions that change the demographic composition of the Occupied Palestinian Territories evoke concern as violations of contemporary international humanitarian law.”<sup>96</sup> This statement evidences that CERD

91. See *Concluding Observations, Croatia*, *supra* note 45, ¶ 15 (“The Committee recommends that the State party strengthen its efforts to ensure that all war crimes trials conducted at the national level are carried out fairly and in a non-discriminatory manner and that all cases of war crimes are effectively investigated and prosecuted, irrespective of the ethnicity of the victims and the perpetrators involved.”).

92. See *Concluding Observations, Israel*, *supra* note 80, ¶ 33 (“The Committee . . . is concerned that the State party has chosen to disregard the 2004 advisory opinion of the International Court of Justice on the legal consequences of the construction of the wall in the Occupied Palestinian Territories. The Committee is of the opinion that the wall and its associated regime raise serious concerns under the Convention, since they gravely infringe a number of human rights of Palestinians residing in the territory occupied by Israel. These infringements cannot be justified by military exigencies or by the requirements of national security or public order. (Articles 2, 3 and 5 of the Convention) . . .”).

93. *E.g.*, *September 1995 Report*, *supra* note 77, ¶ 115 (“Information was requested as to whether, in its efforts to combat discrimination within the terms of article 1 of the Convention, the Government was considering ratification of . . . Protocol II Additional to the Geneva Conventions of 12 August 1949.”).

94. See *id.* Protocol II governs the treatment of civilian populations during internal armed conflict. During the time of the report cited, the Sri Lankan government was battling the insurgency of the Liberation Tigers of Tamil Eelam. *Id.* ¶ 113. CERD’s request for information suggests that Sri Lanka should ratify Protocol II to protect civilian populations affected by the conflict. *Id.* ¶ 115. CERD can recommend the ratification of other human rights treaties, but it did not do so here.

95. *Id.*

96. CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel*, ¶ 10, U.N. Doc. CERD/C/304/Add.45 (Mar. 30, 1998)

interprets actions which have the effect of forcibly changing the demographics of a contested territory to be violations of international humanitarian law.<sup>97</sup> Additionally, the Geneva Conventions of 1949 have been mentioned by CERD in the context of the Israeli settlement of Palestinian occupied territory. In its 1995 Report to Israel, CERD interpreted Article 49 of the Fourth Geneva Convention to prohibit Israeli settlements in the Palestinian Occupied Territories because they constitute a threat to peace and security in the region.<sup>98</sup> These two instances suggest that CERD interprets international humanitarian law to prohibit settlement of an occupied territory.

The Committee has also made requests for adherence to international humanitarian law in the context of the fight against terrorism. In response to the periodic report submitted by the United States, CERD asked the government to “ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.”<sup>99</sup> The Committee expressed regret that the United States did not consider the Race Convention applicable to foreign detainees held as “enemy combatants.”<sup>100</sup> Furthermore, CERD urged the United States to “adopt all necessary measures to guarantee the right of foreign detainees

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(“Actions that change the demographic composition of the Occupied Palestinian Territory evoke concern as violations of contemporary international humanitarian law.”).

97. *E.g., Concluding Observations, Israel, supra* note 80, ¶ 14 (“The Committee reiterates the view that the Israeli settlements in the Occupied Palestinian Territories, in particular the West Bank, including East Jerusalem, are not only illegal under international law but are an obstacle to the enjoyment of human rights by the whole population, without distinction as to national or ethnic origin. Actions that change the demographic composition of the Occupied Palestinian Territories are also of concern as violations of human rights and international humanitarian law.”).

98. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 75, U.N. Doc. A/49/18(Supp) (Jan. 6, 1995). (“The Committee noted that the establishment of Jewish settlements in the occupied territories was illegal under international law (particularly art. 49 of the Fourth Geneva Convention) and constituted a threat to peace and security in the region.”).

99. CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America*, ¶ 24, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

100. *Id.* (stating that the United States did not believe the Race Convention was applicable because “the law of armed conflict is the exclusive *lex specialis* applicable”).

held as 'enemy combatants' to judicial review of the lawfulness and conditions of detention, as well as their right to remedy for human rights violations."<sup>101</sup> The Committee requested that the United States comply with international humanitarian law as it pertains to non-citizens detained or arrested in the war on terror.<sup>102</sup>

### C. SUMMARY AS TO CERD CONCLUDING OBSERVATIONS

CERD utilizes human rights instruments outside of the Race Convention to persuade states parties to comply with the Race Convention. The Committee also cites the ratification, or lack thereof, of various human rights instruments when assessing the actual environment within the state party, with a goal of ensuring that states parties abide by the principles of non-discrimination. In discussing other international human rights treaties and conventions, CERD focuses on vulnerable groups who are most frequently victims of ethnic and racial discrimination or violence.

Although CERD frequently mentions human rights instruments outside of the Race Convention, its Reports and Concluding Observations offer little substantive analysis of international humanitarian law. Mention of international humanitarian norms or instruments generally come in the context of armed conflict, genocide, or terrorism, and concentrate on refugees and displaced persons in attempts to ensure that these groups are protected during times of instability. CERD also places emphasis on cooperation with international tribunals, as they are a primary means by which the principles of the Race Convention can be enforced. Less frequently, the Committee interprets certain actions to be in violation of international humanitarian law. Such occurrences seem to exist primarily to compel states parties to comply with the Race Convention. The Committee should use all means available to make compliance with the Race Convention more certain. Pointing to violations of international humanitarian law may be an effective method to coax states parties into compliance with the Convention because of the additional

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101. *Id.*

102. *See id.* ("The Committee further requests the State party to ensure that non-citizens detained or arrested in the fight against terrorism are effectively protected by domestic law, in compliance with international human rights, refugee and humanitarian law.").



weight international humanitarian law carries.

### III. CERD GENERAL RECOMMENDATIONS

Although the General Recommendations issued by CERD contain many references to international human rights law, they contain only three references to international humanitarian law. In 1994, CERD General Recommendation 18 recommended that an international tribunal with general jurisdiction should be established to prosecute genocide, crimes against humanity, other inhumane acts directed against any civilian population, and breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977.<sup>103</sup> This recommendation for the establishment of an international criminal tribunal came soon after the U.N. Security Council, in Resolution 872 of May 25, 1993, decided "to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia . . ." <sup>104</sup> General Recommendation 18, therefore, anticipated the creation of the International Criminal Court in 2002.<sup>105</sup>

In General Recommendation 22, the Committee noted that ethnic conflicts have resulted in massive flows of refugees and displaced persons in many parts of the world.<sup>106</sup> It goes on to state that "the 1951 Convention and the 1967 Protocol relating to the status of refugees [are] the main source[s] of the international system for the protection of refugees in

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103. CERD, 44th Sess., *General Recommendation 18, On the Establishment of an International Tribunal to Prosecute Crimes Against Humanity*, 118, U.N. Doc. A/49/18 (Jan. 6, 1995) (The committee "[c]onsiders that an international tribunal with general jurisdiction should be established urgently to prosecute genocide, crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, rape[,] persecutions on political, racial and religious grounds and other inhumane acts directed against any civilian population, and grave breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto.") (emphasis in original).

104. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

105. See International Criminal Court, About the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Mar. 8, 2010) (providing background information about the events leading up to the establishment of the International Criminal Court in 2002).

106. CERD, 49th Sess., *General Recommendation 22, On Article 5 of the Convention on Refugees and Displaced Persons*, 126, U.N. Doc. A/51/18(Supp) (Sept. 30, 1996).

general . . .”<sup>107</sup> The Committee also delineated a number of obligations with respect to refugees that states parties must accept.<sup>108</sup>

Further, in General Recommendation 30, CERD outlined its expectations for states parties in regards to non-citizens, a vulnerable group on which the Committee focuses much of its attention.<sup>109</sup> For example, CERD expects that states parties “[e]nsure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards.”<sup>110</sup> CERD also insists that “non-citizens detained or arrested in the fight against terrorism are protected by domestic law that complies with international human rights, refugee, and humanitarian law.”<sup>111</sup>

In sum, CERD’s General Recommendations contain scant references to international humanitarian law. The only three references found involve refugees, non-citizens detained in the fight against terrorism, and international criminal courts. These references advocate for adherence to general human rights and humanitarian norms.

#### IV. CERD EARLY WARNING MEASURES AND URGENT PROCEDURES

In 1993, CERD began to include in its regular agenda “early warning measures and urgent procedures” aimed at preventing serious violations of the Race Convention.<sup>112</sup> Early warning measures are directed at preventing existing problems from escalating into conflicts, particularly in the wake of prior violence.<sup>113</sup> The urgent procedures respond to situations

107. *Id.*

108. *See id.* at 126–27 (requiring, among other things, that states parties prohibit and eliminate racial discrimination as well as ensure that the principle of non-refoulement and non-expulsion of refugees is observed).

109. *See General Recommendation 30, supra* note 59, ¶¶ 6–38 (listing steps states parties should take to ensure that non-citizens are not discriminated against).

110. *Id.* ¶ 19.

111. *Id.* ¶ 20.

112. *See* CERD, Early Warning, <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about> (last visited Mar. 8, 2010) (providing background information on the procedures as well as numerous letters and decisions issued under these procedures).

113. *Id.* (stating that early warning measures could be appropriate when there has been inadequate implementation of enforcement mechanisms or significant

requiring immediate attention in order to prevent or limit the magnitude of violations of the Race Convention.<sup>114</sup> Using these procedures, the Committee has adopted decisions, statements, or resolutions in regards to more than twenty states parties since 1993.<sup>115</sup>

Because the procedural decisions respond to violations, often in the context of armed conflict and genocide, they frequently refer to international humanitarian law. This Part examines how the Committee has addressed international humanitarian law issues raised in early warning measures and urgent procedures. Based on these procedures, this Part finds that the Committee regularly refers to international humanitarian law because violence and genocide often arise from racial and ethnic discrimination. Discrimination can easily lead to racially and ethnically motivated violence, which, in turn, may escalate into genocide.<sup>116</sup>

#### A. CERD'S APPROACH TO INTERNATIONAL HUMANITARIAN LAW IN EARLY WARNING MEASURES AND URGENT PROCEDURES

Violations of international humanitarian law and the Race Convention often occur concurrently in the context of armed conflict or genocide.<sup>117</sup> The Committee, therefore, occasionally

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patterns of escalating racial hatred and violence).

114. See *id.* (listing the presence of persistent patterns of racial discrimination as a possible criterion for initiating an urgent procedure).

115. *Id.*

116. See, e.g., CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Guyana*, ¶ 4, U.N. Doc. CERD/C/64/Dec.1 (May 10, 2004) (“[A] vicious circle of political and ethnic tensions has adversely affected human rights, weakened civil society, increased racial violence and poverty and exclusion among indigenous population groups, and hampered the administration of justice and the application of human rights standards in Guyana.”); CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 4(54) on the Democratic Republic of the Congo*, ¶ 1, U.N. Doc. A/54/18(Supp) (Sept. 29, 1999) [hereinafter *Decision, Democratic Republic of the Congo*] (“The Committee . . . is deeply concerned about the persistence, in flagrant violation of the Convention, of ethnic conflicts which are in general inspired by the policy of ethnic cleansing and may constitute acts of genocide.”); CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 5 (54) on the Sudan*, ¶ 2, U.N. Doc. A/54/18(Supp) (Sept. 29, 1999) [hereinafter *Decision, Sudan*] (“The Committee notes that in the Sudan questions of ethnicity, religion and culture are deeply intertwined and that, in many respects, the ongoing civil conflict is fuelled by this complex interrelationship.”).

117. See, e.g., CERD, *Prevention of Racial Discrimination, Including Early Warning Procedures and Urgent Action Procedures, Decision 1 (65), Situation in Darfur, Sudan*, U.N. Doc. CERD/C/65/Dec.1 (Dec. 10, 2004) (calling for strict

discusses adherence to international humanitarian legal norms, urging states parties to fulfill their obligations, or expresses concern at violations in its early warning measures and urgent procedures.<sup>118</sup> The Committee has stressed that racial and ethnic conflicts can only be brought to an end by “according full and immediate respect to all human rights, including those protecting equality and non-discrimination, as well as to the norms of international humanitarian law and the rule of law.”<sup>119</sup>

Especially in the context of ethnic violence, CERD frequently expresses concern at continuing violations of international human rights and humanitarian law,<sup>120</sup> or calls on a government engaged in a conflict to respect its obligations under such law.<sup>121</sup> The Committee also has expressed concern over reports from other human rights bodies showing serious violations of international humanitarian law, using these decisions to support its own recommendations.<sup>122</sup>

compliance with U.N. Security Council Resolution 1556/2004 in order to ensure the prompt cessation of violations of human rights and the Race Convention in Darfur).

118. *See supra* Part IV.

119. CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 1(54) on Yugoslavia*, ¶ 6, U.N. Doc. A/54/18(Supp) (Sept. 29, 1999).

120. *E.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 3(54) on Rwanda*, ¶ 3, U.N. Doc. A/54/18(Supp) (Sept. 29, 1999) [hereinafter *Decision, Rwanda* (1999)] (citing its concern at the serious violations of human rights and international humanitarian law in Rwanda); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/50/18(Supp), at 6 (Jan. 19, 1996) (finding the disproportionate use of force by the Russian armed forces, massive loss of life in Chechnya, and the destruction of civilian property to be violations of human rights and international humanitarian law).

121. *E.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 5(53) on Rwanda*, ¶ 4, U.N. Doc. A/53/18(Supp) (Sept. 10, 1998) (“The Committee calls on the Government of Rwanda and all parties to these conflicts to respect . . . humanitarian law obligations at all times, in particular the International Convention on the Elimination of All Forms of Racial Discrimination.”).

122. *See, e.g.*, CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 3 (51) on the Democratic Republic of the Congo*, ¶¶ 1–2, U.N. Doc. A/52/18 (Sept. 26, 1997). (“The Committee is disturbed by reports of massacres and other grave human rights violations, including violation of the Convention on the Elimination of All Forms of Racial Discrimination in the Democratic Republic of the Congo. Such reports, in particular the report submitted by the joint mission established by the Commission on Human Rights in its resolution 1997/58 of 15 April 1997, charged with investigating allegations of massacres and other human rights violations occurring in the eastern part of Zaire (now the Democratic Republic of the Congo) since September 1996 were discussed. The findings in that report, according to which there were ‘reliable indications that

The Committee uses reports from other international human rights bodies to reinforce its requests that racial and ethnic violence cease.<sup>123</sup> In connection with the Congolese conflict, CERD cited recommendations from the U.N. Commission on Human Rights (now the Human Rights Council) and communiqués issued by the Organization of African Unity to support its recommendations for an “immediate cessation of all hostilities, an end to the persistent campaign of incitement to racial and ethnic hatred, and the prompt conclusion of the conflict through a negotiated peaceful settlement between the parties.”<sup>124</sup>

In reaction to the crisis in Bosnia and Herzegovina, CERD made general reference to international human rights law and international humanitarian law in an attempt to end the ethnic cleansing occurring in the area.<sup>125</sup> The Committee stated that

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persons belonging to one or other of the parties to the conflict in eastern Zaire, now the Democratic Republic of the Congo, probably committed serious violations of international humanitarian law . . . ; that ‘crimes seem to be sufficiently massive and systematic to be characterized as crimes against humanity’; and that the ‘ethnic identity of most of the victims is a matter of record’ were particularly noted.” (citations omitted).

123. *Decision, Democratic Republic of the Congo, supra* note 116, ¶ 2 (“Having received no information regarding implementation of the measures recommended by various international bodies, the Committee recalls its decisions 3 (51), 1 (52) and 4 (53) and especially the repeated recommendations of the Commission on Human Rights, and supports the communiqué issued by the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity at its fourth ordinary session in December 1998. In this connection, it strongly urges all the participants in the Congolese conflict to ensure the immediate cessation of all hostilities, an end to the persistent campaign of incitement to racial and ethnic hatred, and the prompt conclusion of the conflict through a negotiated peaceful settlement between the parties. It is, moreover, essential for the Government of the Democratic Republic of the Congo to cooperate in the achievement of these goals with the Office of the United Nations High Commissioner for Refugees in Kinshasa.”).

124. *Id.*

125. CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 1(55) on Kosovo (Federal Republic of the Yugoslavia)*, ¶ 2, U.N. Doc. A/54/18 (Aug. 9, 1999) (“In the light of recent events in Kosovo the Committee . . . calls particular attention to the following: (a) Any attempt to change or to uphold a changed demographic composition of an area against the will of the original inhabitants, by whatever means, is a violation of international human rights and humanitarian law . . . .”); CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 26(2), U.N. Doc. A/50/18 (Aug. 17, 1995) [hereinafter *August 1995 Report*] (“The Committee on the Elimination of Racial Discrimination, [c]oncerned at the massive, gross and systematic human rights violations which continue to occur on the territory of Bosnia and Herzegovina . . . [d]ecides: (a) Firmly to re-emphasize that any attempt to change or to uphold a changed demographic composition of an area against the will of the

any attempt to change the demographic composition of an area against the will of the original inhabitants, by whatever means, is a violation of international human rights and humanitarian law.<sup>126</sup>

In response to the genocide in Darfur, CERD requested that the Sudanese authorities perform a number of tasks aimed at ending the ongoing ethnic violence. The Committee urged any police, security, paramilitary, or civil defense forces acting with the support of the Sudanese government or under Sudanese military control, to respect international humanitarian law, including the provisions of the Race Convention.<sup>127</sup> In addition, the Committee recommended that states parties give effect to the Guiding Principles on Internal Displacement of the Special Representative of the Secretary-General.<sup>128</sup> Further, CERD requested that the Sudanese government fulfill its obligations under international humanitarian law in general, and under common Article 3 of the Geneva Conventions in particular.<sup>129</sup>

Because CERD's early warning measures and urgent procedures focus on preventing or ending gross violations of human rights, references to international humanitarian law generally occur in the context of genocide or ethnic violence. It appears that CERD discusses violations of humanitarian norms to assist in preventing and ending gross human rights violations.

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original inhabitants, by whatever means, is a violation of international law . . .").

126. *August 1995 Report*, *supra* note 125, ¶ 26(2).

127. *Decision, Sudan*, *supra* note 116, ¶ 9 ("To ensure that its police and security forces, and any paramilitary or civil defence forces acting with the support of the Government or under Sudanese military command, respect human rights and humanitarian law, including the provisions of the Convention, and that all those responsible for violations of any of the obligations contained therein are brought to justice . . .").

128. *See id.* ("To take effective steps to protect internally displaced communities within the territory of the State party and to address the problems associated with the displacement of significant segments of the country's population due to war. The State party should consider giving effect to the provisions of the Guiding Principles on Internal Displacement of the Special Representative of the Secretary General on internally displaced persons. In particular, the State party must recognize that all displaced persons have the right freely to return to their homes of origin under conditions of safety and that once returned all displaced persons have a right to have any property that was seized in the course of the conflict restored to them and to participate equally in public affairs upon their return . . .") (citation omitted).

129. *Id.* ("To respect its obligations under humanitarian law, particularly article 3 common to the Geneva Conventions of 12 August 1949 and customary international law applicable to internal armed conflicts . . .").

## B. CERD'S FOCUS ON VULNERABLE GROUPS: REFUGEES, DETAINEES, AND DISPLACED PERSONS

The safe repatriation of refugees and return of displaced persons are also primary concerns in CERD's early warning measures and urgent procedures.<sup>130</sup> The Committee has requested that states parties respect norms of international humanitarian law concerning refugees, focusing on the safe and voluntary repatriation of refugees and the return of displaced persons to their places of origin.<sup>131</sup> The Committee has also demanded that states parties ensure the safety of all detained persons under the state's control and disclose any information regarding missing persons.<sup>132</sup> CERD has even gone so far as to call upon the United Nations and the Red Cross for assistance in safeguarding refugees and detainees.<sup>133</sup> Because refugees, displaced persons, and detainees are all groups vulnerable to ethnic violence,<sup>134</sup> CERD pays special attention to their well being.

For example, in response to ethnic violence in the Great Lakes Region of Africa, CERD supported the initiatives of the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees to end the warfare and protect the human rights of all people affected by the violence, especially refugees.<sup>135</sup> CERD also called upon

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130. *E.g.*, *August 1995 Report*, *supra* note 125, ¶ 26(2) ("The Committee . . . demand[s] that persons be given the opportunity to return safely to the places they inhabited before the beginning of the conflict and that their safety be guaranteed, as well as their effective participation in the conduct of public life . . .").

131. *Id.*

132. *Id.* ("To demand that all parties to the conflicts fully ensure the safety of all detained persons under their control and disclose all information concerning all missing persons . . .").

133. *Id.* ("Urgently . . . call[s] upon the international community, in particular all the European States, to render assistance to refugees and detained persons directly and through the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and all other organizations involved in assistance to refugees . . .").

134. *General Recommendation 30*, *supra* note 59, pmbl. (noting 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).

135. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 30(7), U.N. Doc. A/51/18 (Aug. 7, 1996) [hereinafter *1996 Report*] ("Welcoming the initiatives undertaken so far at the global as well as at the regional level, in particular by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees . . .").

states parties to cooperate closely with the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees to provide refugees and displaced persons with the possibility of returning to their homes under their own free will and in safety.<sup>136</sup>

The Committee has reiterated in its decisions and recommendations under the early warning measures and urgent procedures that any attempt to change the demographic composition of an area against the will of the original inhabitants is a violation of international human rights and humanitarian law.<sup>137</sup> Specifically, CERD considers Israeli settlements in the Palestinian Occupied Territories to be illegal under international law and an obstacle to the peace and enjoyment of human rights by the whole population in the region.<sup>138</sup> In this context, the Committee interprets Article 33 of the Fourth Geneva Convention to prohibit the blocking of reimbursement fees and revenues to the Palestinian Authority because it amounts to illegal collective punishment.<sup>139</sup>

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136. *Id.* (“[The Committee] [c]alls upon all the Burundian parties to cooperate closely with the United Nations High Commissioner for Refugees and the United Nations High Commissioner for Human Rights, as well as with the neighbouring countries, and to provide the refugees and displaced persons with the possibility of returning to their homes of their own free will and in safety . . .”).

137. *Id.*

138. CERD, *Report of the Committee on the Elimination of Racial Discrimination, Decision 1(51) on Israel*, ¶ 2, U.N. Doc. A/52/18 (Aug. 18, 1997) (“The Committee confirms its view that the Israeli settlements in the occupied territories are not only illegal under international law but also an obstacle to peace and the enjoyment of human rights by the whole population in the region, without distinction as to national or ethnic origin, in accordance with the Convention. The Committee expresses its serious concern that the continuing policies of expansion of settlements and notably the establishment of an Israeli settlement on Jabal Abu Ghenaïm in East Jerusalem, all of which change the physical character and demographic composition of the occupied territories, including Jerusalem, give rise to increasing tensions in the region and jeopardize the peace process.”).

139. *Id.* ¶ 4 (“The Committee rejects the closures and blocking of reimbursement of fees and revenues to the Palestinian Authority, imposed by the Israeli authorities on the occupied territories in the wake of the dreadful suicide bombings in Jerusalem on 30 July 1997, that amount to collective punishment contrary to article 33 of the Fourth Geneva Convention. Those closures and related measures severely restrict the movement of people and goods in Gaza and the West Bank and result in depriving large numbers of Palestinians from their legal employment and in blocking essential revenues and customs duties owed to the Palestinian Authority. The measures taken by Israel have a devastating effect on the life and well-being of the Arab population of the occupied territories and cause great suffering.”).



### C. IMPLEMENTATION MECHANISMS: CERD'S RELIANCE ON INTERNATIONAL TRIBUNALS

After serious violations of international humanitarian law and the Race Convention have occurred, CERD urges states parties to cooperate fully with international criminal tribunals<sup>140</sup> and pursue appropriate measures at the national level to bring violators to justice.<sup>141</sup> International criminal tribunals provide one of the few enforcement mechanisms for violations of international humanitarian law.<sup>142</sup> Because these violations often occur in the context of racially and ethnically motivated violence, CERD has an interest in ensuring that states parties comply with the tribunals. Cooperation with the tribunals entails bringing to justice all persons guilty of the serious crimes falling within the state party's jurisdiction, promptly executing all warrants of arrest, and expediting the transfer of persons indicted by the tribunal.<sup>143</sup>

Specifically, the Committee urged all parties to the General Framework Agreement for Peace in Bosnia and Herzegovina to cooperate fully with the ICTY.<sup>144</sup> Out of concern over massive, gross, and systematic human rights violations that were occurring in Bosnia and Herzegovina, the Committee emphasized that all those who commit violations of international humanitarian law shall be held individually

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140. See, e.g., *August 1995 Report*, *supra* note 125, ¶ 26(2) ("The Committee . . . calls upon all States to cooperate fully with the International Tribunal for the prosecution of war crimes committed in the former Yugoslavia, and demands that States implement the necessary legislation to ensure their unimpeded and effective cooperation with the International Tribunal . . .").

141. See, e.g., *1996 Report*, *supra* note 135 ("The Committee . . . [u]rges that measures be adopted to enable the Burundian judicial authorities to conduct an efficient investigation of the massacres and other acts of violence, as crimes against humanity . . .").

142. Other implementation mechanisms include regional tribunals, individual complaint mechanisms, economic sanctions, and international embarrassment. For a more complete discussion on human rights enforcement see DAVID WEISSBRODT, ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* chs. 4, 6 (4th ed. 2009).

143. See *supra* notes 141–42.

144. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 4, U.N. Doc. A/51/18 (Aug. 22, 1996) ("The Committee urges all parties to the General Framework Agreement for Peace in Bosnia and Herzegovina to comply with their obligation to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia in fulfilling its major task of bringing to justice all persons guilty of the serious crimes falling within its jurisdiction and in particular to execute forthwith all warrants of arrest and expedite the transfer of the persons indicted by the Tribunal.").

responsible for such acts.<sup>145</sup> In addition, CERD called upon all states to cooperate fully with the ICTY and demanded that states implement the necessary legislation to ensure unimpeded and effective cooperation with the tribunal.<sup>146</sup> When progress towards apprehension of persons indicted by the tribunal stalled, the Committee expressed profound concern and urged all states involved to comply with the tribunal in order to help it fulfill its task.<sup>147</sup>

CERD also encourages states parties to prosecute violations of international humanitarian law at the national level. After the Rwandan conflict, the Committee supported the efforts of the Rwandan government to “prosecute gross violations of human rights and international humanitarian law committed by certain parts of its armed forces . . .”<sup>148</sup> The Committee called for investigation of humanitarian law violations allegedly committed in years past and endorsed recommendations to expand the competence of the ICTR.<sup>149</sup>

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145. *August 1995 Report*, *supra* note 125, ¶ 26(2) (“[The Committee] [e]mphasize[s] that all those who commit violations of international humanitarian law or war crimes shall be held individually responsible for such acts, calls upon all States to cooperate fully with the International Tribunal for the prosecution of war crimes committed in the former Yugoslavia, and demands that States implement the necessary legislation to ensure their unimpeded and effective cooperation with the International Tribunal . . .”).

146. *Id.*

147. CERD, *Report of the Committee on the Elimination of Racial Discrimination, Bosnia and Herzegovina*, ¶ 4, U.N. Doc. A/52/18 (Aug. 18, 1997) (“The Committee is profoundly disturbed that little progress is being made in the apprehension of persons indicted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. The Committee again urges all parties to the Peace Agreement to comply with their obligation to cooperate fully with the Tribunal in fulfilling its task of bringing to justice all persons guilty of the serious crimes falling within its jurisdiction and, in particular, to execute forthwith all warrants of arrests and expedite the transfer of the persons indicted by the Tribunal.”).

148. *Decision, Rwanda* (1999), *supra* note 120, ¶ 4 (“The Committee supports and encourages the efforts of the Government of Rwanda to prosecute gross violations of human rights and international humanitarian law committed by certain parts of its armed forces and stresses the need to increase the capacity of the Rwandan Patriotic Army to conduct internal investigations and bring accused persons to trial with due respect for basic fair trial guarantees.”).

149. CERD, *Report of the Committee on the Elimination of Racial Discrimination, Rwanda*, ¶ 7, U.N. Doc. A/53/18 (Aug. 20, 1998) (“The Committee calls on the State party to investigate allegations of serious ethnic violence and humanitarian law violations that may have been committed in 1996 and 1997 by, or under the command of, the Rwandan Patriotic Army, in Rwanda or in the Democratic Republic of the Congo, as detailed in the report of the Secretary-

## V. SUMMARY

The Committee recognizes the relationship between discrimination and racially and ethnically motivated violence. CERD's statements in its procedural decisions express the realization that ethnic discrimination can be the first step to ethnic cleansing. When attempting to end such conflicts, CERD uses both the Race Convention and international humanitarian law to persuade states parties to end racial and ethnic conflicts. In its procedural decisions, CERD focuses on vulnerable groups such as refugees, detainees, and displaced persons because these groups are especially vulnerable to genocide. Once atrocities have occurred, CERD urges full compliance with international criminal tribunals.

International humanitarian law is cited with much greater frequency in the early warning and urgent procedures of CERD than in any of the other decisions and recommendations of the Committee. The procedural decisions respond to situations of crisis where international humanitarian law is at stake. Accordingly, the Committee refers to international humanitarian law a state party has violated, often with the goal of ensuring proper implementation of the Race Convention.

CERD's decisions and recommendations in response to individual complaints contain very few references to international instruments outside the Race Convention. The Committee rarely has the opportunity to address violations of other human rights instruments because petitioners only bring complaints alleging violations of the Race Convention. Any references to human rights instruments beyond the Race Convention are framed as support for respondent arguments. It appears, therefore, that the Committee would not directly consider a claim based on international humanitarian law unless that claim was framed as a violation of the Race Convention.

In its Concluding Observations, CERD frequently points to human rights instruments other than the Race Convention. The Concluding Observations, however, rarely discuss international humanitarian law in depth. Citations to international

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General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo. The Committee endorses the recommendation in the report of the Investigative Team to expand the competence of the International Tribunal for Rwanda to cover such violations." (citation omitted).

humanitarian norms or instruments occur in the context of ongoing ethnic violence and concentrate on protecting vulnerable minority groups. The Committee treats international humanitarian law primarily as a tool to guarantee proper implementation of the Race Convention.

In its General Recommendations, CERD only discusses international humanitarian law three times. Two of these discussions focus on protecting the rights of refugees and non-citizens—vulnerable groups on which CERD concentrates. In another reference to international humanitarian law, the Committee recommends in General Recommendation 18 that an international tribunal with general jurisdiction should be established to prosecute genocide.<sup>150</sup> General Recommendation 18, therefore, anticipated the creation of the International Criminal Court. These three General Recommendations demonstrate CERD's attempts to employ international humanitarian norms to ensure that susceptible minority groups are protected from discrimination.

Although these references show variability in the Committee's use of international humanitarian law in regards to its Individual Complaints, General Recommendations, Concluding Observations, and its own early warning measures and urgent procedures, a few general themes run throughout the decisions and recommendations of the Committee. CERD applies the principles of the Race Convention to the human rights contained in all the instruments that comprise international human rights and humanitarian law; focuses on protecting vulnerable group such as refugees, displaced persons, non-citizens, and other minority groups; and urges cooperation and compliance with international tribunals.

CERD's use of international humanitarian instruments to implement the Race Convention deserves recognition, but the variability with which it utilizes such instruments does not afford much predictability. It is difficult to anticipate CERD's use of international humanitarian law when issuing a decision or recommendation. CERD, however, generally applies any international instruments at its disposal to protect relatively powerless minority groups, and nearly always recommends cooperation with international criminal tribunals. Still, CERD should attempt a more uniform approach to international humanitarian law in its decisions and recommendations.

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150. *General Recommendation 18*, *supra* note 103, ¶ 1.

Consistent use of international humanitarian norms and instruments by the various U.N. treaty bodies would create a more uniform body of law which could be more readily employed to prevent and end atrocities and human rights violations.