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COMPLEMENTARY INTERNATIONAL STANDARDS

Report on the study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance*

* The annex has not been edited and is being circulated in the language of submission only.

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Summary

The present report is being submitted pursuant to a request made by the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action at its fourth session (Geneva 16 - 20 January 2006). The request was endorsed by the Human Rights Council in its resolution 1/5 of 30 June 2006.

The introduction to the report provides an overview of the background to the establishment of the group of experts. The mandate of the experts to study "the content and scope of the substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance" and to "produce … concrete recommendations on the means or avenues to bridge these gaps" is also discussed. As to the methodology of the study, the experts reached agreement regarding the meaning which is to be attached to the concepts of racism, racial discrimination and xenophobia and related intolerance and the notion of substantive normative gaps. The introduction also covers measures to address substantive normative gaps and the process and structure of the study.

The body of the report dealing with complementary international standards is divided into three chapters as follows: chapter I concerns the positive obligations of States parties; chapter II examines possible gaps with regard to groups requiring special protection against racism, racial discrimination, xenophobia and related intolerance; and chapter III addresses possible gaps with regard to manifestations of racism, racial discrimination, xenophobia and related intolerance.

In chapter I the experts focus on normative gaps concerning norms which set out (a) the obligations of States to promote tolerance and (b) the obligations of States to adopt national anti-discrimination legislation. In chapter II, the experts consider the following categories as formulated by the Chair of the Working Group at its fourth session: (a) religious groups; (b) refugees; (c) asylum-seekers; (d) stateless persons; (e) migrant workers; (f) internally displaced persons; (g) descent-based communities; (h) indigenous peoples; (i) minorities; and (j) people under foreign occupation.

In chapter III, the experts consider the following phenomena as formulated by the Chair of the Working Group: (a) multiple discrimination or aggravated forms of racial discrimination; (b) ethnic cleansing; (c) genocide; (d) religious intolerance and defamation of religious symbols; (e) racial discrimination in the private sphere; and (f) incitement to racial hatred and dissemination of hate speech and xenophobic and caricatural pictures, through traditional mass media and information technology, including the Internet.

The experts provide an assessment and recommendations at the end of each thematic section.

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Introduction

Article 2 of the Universal Declaration of Human Rights provides that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Establishment of the Group of experts

1. The Durban Declaration and Programme of Action (DDPA) adopted in 2001 at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance considered the need to expand the human rights normative framework to appropriately cover manifestations of racism and xenophobia. In this context, the DDPA recommended "that the Commission on Human Rights prepare complementary international standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance in all their aspects."[1] In its resolution 2002/68 the Commission entrusted this task to the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action (Intergovernmental Working Group).

2. The Intergovernmental Working Group at its fourth session held a high level seminar on complementary international standards which further informed the Group as to areas where there may be a need for complementary standards. It is in this context that the Intergovernmental Working Group requested the Human Rights Council to establish a group of experts to prepare a base document that would contain concrete recommendations on the means or avenues to bridge gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance; and for the Committee on the Elimination of Racial Discrimination (CERD) to prepare a base document on the procedural aspects of the issue. Both documents are to be submitted to the fifth session of the Working Group.[2]

3. Following the request of the Intergovernmental Working Group, the Human Rights Council (HRC) in its resolution 1/5 adopted on 30 June 2006 decided to establish the group of experts. To that end, the resolution recommended that the Group of experts carry out consultations with human rights treaty bodies, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and other relevant mandate-holders.

4. Consistent with resolution 1/5, the United Nations High Commissioner for Human Rights, in consultation with the regional groups, invited the following experts to conduct the study: Mr. Syafi'i Anwar (Indonesia, Group of Asian States), Ms. Jenny Goldschmidt (the Netherlands,

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[1] Paragraph 199 of the Durban Programme of Action.

[2] See fourth report of the Working Group E/CN.4/2006/18 and Commission on Human Rights resolution 2005/64.

Group of Western European and other States); Mr. Tiyanjana Maluwa (Malawi, Group of African States); Ms. Dimitrina Petrova (Bulgaria, Group of Eastern European States); and Mr. Waldo Luis Villalpando (Argentina , Group of Latin American and Caribbean States).

Methodology of the study

1. Definition of the concepts of racism, racial discrimination and xenophobia and related intolerance

5. The notions of racism and xenophobia are well established. For the purpose of this report, the experts will rely on the DDPA which states inter alia that: "We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status."[3] It is also to be noted that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[4] defines the term racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[5]

6. The term xenophobia is understood as a type of prejudice combined with a negative sentiment towards persons perceived as alien and different in a significant way. The term related intolerance is understood as any intolerance connected in some way with racism and racial discrimination.

2. The notion of substantive normative gaps

7. A normative gap exists when a recurring event (or act or structural factor) deprives human beings of their dignity and is not effectively countered by a normative standard. In such a case, a new or more comprehensive provision or instrument may be the necessary step to redress this situation.[6] A normative gap may occur as a consequence of one of the two following situations:

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[3] Para. 2 Declaration.

[4] Adopted in 1965, ICERD entered into force on 4 January 1969. As of 13 December 2005, 170 States had ratified the treaty, making it one of the most widely ratified human rights treaties. The ICERD provisions remain the most important normative basis upon which international efforts to eliminate racial discrimination should rely.

[5] Article 1.

[6] International Council on Human Rights Policy co-published with the International Commission of Jurists and International Service for Human Rights, *Human Rights Standards: Learning from Experience*, 2006, p. 7-10. The experts' classification of gaps is based on this publication.

lack of adequate norms addressing a given phenomenon, in general - a normative gap proper - and/or absence of an instrument, enabling the application of existing standards to a given category/ies of subjects and/or specific circumstances. Such a normative gap is in the application.

8. In identifying normative gaps, the experts noted that a gap exists not only when there is a complete absence of norms addressing the problem. A gap can also be identified when a standard does not provide sufficient specificity so as to impose clear obligations on the duty-bearers, thereby rendering effective protection of rights illusory.

9. The distinction between “normative gap proper” and “application gap” is helpful in the consideration of recommended measures to be taken to fill a gap. While in the first case, setting or developing a standard to address a specific phenomenon may be the best solution; in the second, the extension of the application of an existing standard may be sufficient.

10. Normative gaps can further be divided into substantive and procedural (supervisory) gaps, depending on whether the gap in question relates to the content of a right or the procedure of its protection. A procedural gap exists when a right has been included in an instrument, but no mechanism exists to monitor and enforce compliance thereto, or the mechanism is insufficient to ensure compliance or provide remedy to victims.

11. The experts understand their mandate as focusing on studying substantive normative gaps, while procedural (supervisory) gaps are being addressed in a parallel study by the Committee on the Elimination of Racial Discrimination (CERD).

12. The diagnosis of gaps is based on analysis of international human rights law and current facts. Bearing in mind the impact of implementation gaps on the functional assessment of the existing legal framework, the experts recognized certain findings concerning implementation gaps as an integral part of their analysis and assessments.

3. Measures to address substantive normative gaps

13. Practical steps that may be considered to fill the gaps are the following: (a) new standard setting - in the form of a separate convention and/or optional protocol/s to the existing ones; and (b) standard development through extended application of the existing standards as to the substance or circle of addressees, including by the following means: (i) authentic interpretation of the existing treaty norms by States parties, (ii) general comments by treaty bodies, adopted by human rights treaty bodies individually or jointly; (iii) incorporation of the extended interpretation into the reporting guidelines adopted by human rights treaty bodies; and (iv) incorporation of the extended interpretation into the rules of procedure adopted by human rights treaty bodies.

14. The experts recognize the need to correlate the recommended measures with the nature of the normative gaps that have been identified. While analyzing specific gaps, they have been guided by the extent to which the proposed measure/s can improve the situation of victims of

discrimination and/or counter or deter manifestations of racism, racial discrimination, xenophobia and related intolerance, and by the consideration of not undermining current international standards.

The study process

15. The assessment leading to the identification of substantive normative gaps and the recommendations regarding measures to be taken to fill these gaps rely on a variety of sources, including (a) international human rights instruments and treaties, general comments and recommendations, as well as other relevant documents adopted by human rights treaty bodies, (b) comparative legal and quasi-legal materials both universal and regional (e.g. resolutions of intergovernmental bodies), (c) basic policy documents, such as the DDPA, the 2005 World Summit Outcome, the conclusions and recommendations of the Intergovernmental Working Group and the other Durban mechanisms, and (d) selected professional publications.

16. The experts carried out extensive consultations on the subject. To that end, they adopted a questionnaire, annex to this report, to solicit views and comments from various stakeholders. The questionnaire was sent to all relevant actors, and posted on the Internet site established by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and made accessible to the general public.

17. Oral consultations were also held. The organs, bodies and individuals consulted included: (a) the human rights treaty bodies, in particular the Committee on the Elimination of Racial Discrimination; (b) special procedures mandate holders of the Human Rights Council (HRC), in particular the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; (c) the Intergovernmental Working Group; (d) intergovernmental regional groups; (e) individual Governments, (f) non-governmental organizations (NGOs); and (g) experts from OHCHR.

The structure of the study

18. In conducting the study the experts were guided by the conclusions formulated by the Chair of the Intergovernmental Working Group at its fourth session which list (a) manifestations of racism and xenophobia and (b) protection of victims or groups and persons at risk.[7] In addition, the experts identified other subjects for inclusion in their study, in particular promotion of tolerance and specific obligations of States. The experts agreed on the subjects to be included in the study and adopted their recommendations by consensus. However, the experts did not reach consensus on the inclusion of any discussion and/or reference to sexual orientation in relation to racism, racial discrimination, xenophobia and related intolerance in the study. Mr. Anwar specifically requested that his dissenting position on this matter be recorded.

19. Under manifestations of racism, racial discrimination, xenophobia and related intolerance, the experts considered the following phenomena, as formulated by the Chair of the Intergovernmental Working Group: (a) multiple or aggravated forms of racial discrimination;

[7] See E/CN.4/2006/18, paras. 76-77.

(b) ethnic cleansing; (c) genocide; (d) religious intolerance and defamation of religious symbols; (e) racial discrimination in the private sphere; and (f) incitement to racial hatred and dissemination of hate speech and xenophobic and caricatural pictures, through traditional mass media and information technology, including the Internet.

20. Under protection against racism, racial discrimination, xenophobia and related intolerance, the experts considered the following categories, as formulated by the Chair of the Intergovernmental Working Group: (a) religious groups; (b) refugees; (c) asylum-seekers; (d) stateless persons; (e) migrant workers; (f) internally displaced persons; (g) descent-based communities; (h) indigenous peoples; (i) minorities; and (j) people under foreign occupation.

21. The experts also decided to include a third thematic area in the study, namely positive obligations of States. In this part the experts focussed on normative gaps regarding (a) obligations of States to promote tolerance; and (b) obligations of States to adopt national anti-discrimination legislation.

22. In light of the above, the experts agreed on a set of recommendations which mark the conclusion of each area examined. In this endeavour, the experts were guided by the following considerations:

(a) Overall, the experts believe that enhanced coherence in the anti-racism comments and recommendations issued by the treaty bodies in the field of equality and combating racial discrimination would contribute to consistency in implementation at the national level and serve to facilitate the tasks of States parties concerned in developing legislation, policies and programmes;

(b) The incorporation of the DDPA recommendations and those issued by the Durban mechanisms and ICERD into domestic constitutional and legal systems, policies and programmes would enhance the ability of individuals to assert and claim their rights to equality and non-discrimination and help alleviate the scourge of racism. The experts encourage training and the holding of workshops at the national level as part of Durban follow-up activities to enhance the implementation of the Durban Programme of Action.

I. COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO POSITIVE OBLIGATIONS OF STATES PARTIES

23. The notion of positive obligations with regard to human rights denotes those obligations that impose upon the State a duty to undertake some positive action in order to ensure the effective enjoyment of the protected rights. A significant number of human rights norms entail positive obligations for the States bound by them.[8] For instance, with regard to the positive

[8] See Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paras. 6, 7 and 8.

obligation to protect the right to non-discrimination, the International Covenant on Civil and Political Rights (ICCPR), article 26 requires States to "guarantee to all persons equal and effective protection against discrimination."

24. Article 2(1) (d) of ICERD requires States to prohibit and bring to an end "racial discrimination by any persons, group or organisation."[9] In its general comment No. 3 (1981) on article 2 (Implementation at the national level) of the ICCPR, the Human Rights Committee "recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights."[10]

25. Regarding the nature of States parties' obligations under article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights (CESCR) considers that States' "obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result … while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties' obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination ...'".[11]

26. CESCR general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), interprets article 2, paragraph 2 of ICESCR, which provides for a guarantee of non-discrimination on the basis of sex among other grounds. Here, the Committee asserts that the equal right of men and women to the enjoyment of

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[9] See also ICERD art. 2, para. 1 (c) and (d); ICCPR arts. 2, 4, para. 1; 20, para. 2; 24, para. 1, and 26; ICESCR arts. 2, para. 1 and 10, para. 3; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art. 2, paras. (a), (b) and (f); Convention on the Rights of the Child (CRC) art. 2, paras. 1 and 2; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) art. 7; and Convention on the Rights of Persons with Disabilities (CRPD) art. 4, paras. 1 (a) and (b) and 5, para. 2.

[10] Paragraph 1.

[11] CESCR general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 1.

economic, social and cultural rights is a mandatory and immediate obligation of States parties. Similarly to all human rights, equality of rights imposes three levels of obligations on States parties - "the obligation to respect, to protect and to fulfil".[12]

27. According to CESCR, the obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality.[13] The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights.[14] The obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women.[15]

28. The experts believe that progress in ensuring protection against racism, racial discrimination, xenophobia and related intolerance is hampered by the lack at present of legally binding norms which impose on States the obligation to introduce mandatory human rights education in their educational systems. Further, the provisions which require that States adopt anti-discrimination legislation are often too general and abstract, leaving States without guidance as to minimum legal standards to be met in their domestic laws, in the absence of which protection against racial discrimination may be rendered illusory.

Assessment and recommendations

1. The role of human rights education

29. The DDPA underlines the importance of human rights education as a key to changing attitudes and behaviour and to promoting tolerance and respect for diversity in societies[16] and, therefore as crucial in the struggle against racism, racial discrimination, xenophobia and related intolerance.[17] The importance of human rights education is also underlined in several other human rights documents. The Vienna Declaration and Programme of Action assert that "human rights education, training and public information are essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding,

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[12] Paragraph 17.

[13] *Ibid.*, para. 21.

[14] *Ibid.*, para 18.

[15] *Ibid.*, para. 19.

[16] Para. 95 of the Declaration.

[17] See para. 97 of the Declaration; and paras. 125-139 of the Programme of Action.

tolerance and peace."[18] The World Programme for Human Rights Education identifies the promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups as one of the constitutive elements of human rights education that aims at building a universal culture of human rights.[19] The 2005 World Summit Outcome calls for the implementation of the World Programme for Human Rights Education and encourages all States to develop initiatives in this regard.[20]

30. ICERD commits States parties "to undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups."[21]

31. Human rights treaty bodies dedicate much attention to the role of education in the promotion and protection of human rights. In its general recommendation No. 27 (2000) on discrimination against Roma, CERD recommended that States parties take "the necessary measures, in cooperation with civil society, and initiate projects to develop the political culture and educate the population as a whole in a spirit of non-discrimination, respect for others and tolerance, in particular concerning Roma."[22]

32. The World Programme for Human Rights Education provides a common framework for action for all relevant actors. However, it is not a legally binding document. In the view of the experts, the adoption of a comprehensive binding instrument establishing the duty to promote non-discrimination, tolerance and equality of rights irrespective of race, ethnicity, and other related grounds through human rights education has important merit. Such an instrument would essentially contribute to the promotion of tolerance and the countering of racism and xenophobia through instruction at all levels of formal and informal education, in public and private school curricula, as well as schools the ethos of which is based on religion or belief. This goal should also be pursued in other educational frameworks, such as training in detention facilities.

33. In conclusion, the experts acknowledge the existence of a normative gap in the area under discussion, the filling of which should be recognized as one of the priorities on the agenda of the international community.

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[18] Part I para. 33 and Part II para. 80.

[19] General Assembly resolution 59/113B and Commission on Human Rights resolution 2005/61. See in particular the revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education, A/59/525/Rev.1, para. 3.

[20] General Assembly resolution 60/1, para. 131.

[21] Article 7. See also ICESCR article 13, para. 1 and CRC, article 29, para. 1 (b).

[22] Paragraph 11.

2. The role of comprehensive anti-discrimination legislation

34. The DDPA identifies lack of political will, weak legislation and lack of implementation strategies and overall concrete action by States as the major obstacles to overcoming racial discrimination and achieving racial equality. The DDPA stresses unequivocally that the faithful implementation of human rights norms and obligations, including enactment of laws and political, social and economic policies are crucial in this regard.[23] It is in light of the nature of these obstacles that States should be specifically required to adopt and implement anti-discrimination legislation and equality policies as a matter of highest priority and urgency.

35. Several treaties, including ICCPR and ICERD contain provisions with positive obligations to adopt laws against racial and related discrimination. ICCPR in article 2, paragraph 1, requires States to ensure to all persons within its jurisdiction the rights recognized in the Covenant without distinction of any kind. Article 2, paragraph 2, requires, "where not already provided for by existing legislative or other measures", the necessary steps to be undertaken "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Read together with ICCPR articles 26 and 27, this provision constitutes a positive obligation of States to put into place domestic laws as necessary to ensure freedom from discrimination on the basis of, inter alia, race, colour, national or social origin. Article 2, paragraph 1 (d) of ICERD also provides that "Each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."

36. Apart from the positive obligation of States to protect against racial discrimination the question arises as to whether ICERD and other international human rights instruments provide a sufficiently firm foundation for the positive obligation of States parties to adopt not just any general legal provisions prohibiting racial discrimination, but comprehensive anti-discrimination legislation. In addition, it is important to consider the minimum standards which are to be met for the State to have the appropriate legal regime to ensure and fulfil Convention rights regarding the equal enjoyment of all human rights by all without any discrimination on the basis of race.

37. CERD in its concluding observations frequently recommends to States parties to adopt national anti-discrimination legislation, in fulfilling their obligations under the Convention. However, the analysis of the experts as regards discriminatory practices and the situation of various categories of victims demonstrate that among the obstacles preventing the elimination of all forms of racial discrimination is the lack of comprehensive and detailed national anti-discrimination legislation in the majority of States parties to this Convention.

38. From the general comments, the case law and the concluding observations of treaty bodies we can garner the following minimum requirements which would make national legislation

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[23] Paras. 79-80 of the Declaration.

efficient: provide legal definitions of the concept of discrimination, including direct and indirect discrimination;[24] set out clear and detailed provisions as to what conduct, actions, measures, policies, or criteria would be considered discriminatory; provide for a substantive, asymmetric approach to non-discrimination, as opposed to a merely formal understanding of non-discrimination as "same treatment"; prohibit discrimination in all spheres of public life whether by State or non-State actors; prohibit incitement to discrimination, harassment, and segregation; incorporate specialized bodies which would be empowered to assist victims and to promote a culture of equal rights; provide for effective judicial remedy, including as necessary through criminal, civil or administrative processes, to victims of discrimination and ensure that sanctions in place are efficient, dissuasive and proportional; allow the procedural possibility for proving discrimination through appropriate rules and criteria of evidence and burdens of proof, deriving from the understanding that the victims of discrimination are usually at a disadvantage and would not be able to defend their rights in the courts unless special care is taken as to their procedural rights; and establish clear obligations related to the duty to promote equality in a proactive way through appropriate policies.

39. The experts believe that there exists a gap in the sense that thin and abstract norms in international human rights instruments can perpetuate a normative vacuum at the national level, leaving certain manifestations of racism unaddressed and certain victims unprotected, especially when the lack of explicit obligatory standards is combined with weak political will of the State to ensure and fulfil Convention rights. However, the experts also believe that these problems could be addressed by rendering the positive obligations of States more explicit through means other than standard-setting.

3. Recommendations

40. **The experts recommend that a convention on human rights education be adopted, to define positive obligations of States regarding the incorporation of human rights education in their educational systems, including in private, religious, and military schools.**

41. **The experts recommend that the treaty bodies consider adopting general comments which would clarify the positive obligations of States parties regarding the adoption of comprehensive anti-discrimination legislation and provide relevant guidance for States.**

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[24] Direct discrimination on the basis of race and related characteristics is defined as less favourable treatment based wholly or in part on the person's race, ethnicity, colour, descent, ethnic or national origin, without objective and reasonable justification. Indirect discrimination is defined as a neutral measure, criterion or practice which would put persons of a particular race or related characteristic at a particular disadvantage, when there is no objective and reasonable justification.

II. COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO GROUPS REQUIRING SPECIAL PROTECTION AGAINST RACISM, RACIAL, DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Religious groups

42. International concern raised by the recent increase in violence and discrimination based on religion or belief in many countries is justified. It is also a contemporary phenomenon that discrimination on various grounds such as race, colour, descent, national or ethnic origin is frequently aggravated by the closely related ground of religion or belief. The Durban Declaration and Programme of Action (DDPA) notes with particular concern "the existence in various parts of the world of religious intolerance against religious communities and their members, in particular limitation of their right to practice their beliefs freely, as well as the emergence of increased negative stereotyping, hostile acts and violence against such communities because of their religious beliefs and their ethnic or so-called racial origin."[25] The DDPA urges States to adopt legislative and other measures to protect religious minorities from any form of racism, racial discrimination, xenophobia and related intolerance.[26] It also calls on States to implement policies and programmes in their educational institutions that promote respect and tolerance for religious diversity as human rights education is an effective means for combating racism, racial discrimination, xenophobia and related intolerance.[27]

43. Under international law, the right to freedom of religion, which includes "freedom to change his religion or belief" and freedom "to manifest his religion or belief", was first articulated in article 18 of the Universal Declaration of Human Rights. With regard to the core human right treaties, freedom of religion is primarily guaranteed under the International Covenant on Civil and Political Rights (ICCPR).[28]

44. Proclaimed under article 18 of ICCPR, freedom of thought, conscience and religion, which includes freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching religion, is a non-derogable right even in

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[25] Para 60 of the Declaration. See further references to religious groups and communities in paras 2, 8, 34, 59, 60, 66, 67, 71, 73 and 108 of the Declaration and paras. 14, 46, 47, 49, 79, 124, 136, 171, 172 and 211 of the Programme of Action.

[26] Para. 172 of the Programme of Action.

[27] Ibid., para. 136.

[28] Articles 18 and 27.

time of public emergency.[29] Consequently, in the view of the Human Rights Committee, freedom from coercion to have or to adopt a religion or belief and the freedom of parents and guardians to ensure religious and moral education cannot be restricted.[30] The Committee also points out that article 18 of ICCPR protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed and article 18 is not limited to traditional religions or to religions and beliefs.

45. The Covenant permits, however, limitations on the freedom to manifest one's religion or beliefs "as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[31] In the view of the Human Rights Committee, States parties are not free to establish limitations on the exercise of rights and freedoms: "Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18."[32] The Committee also emphasizes that no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

46. In addition, article 26 of the Covenant guarantees equality before the law and the equal protection of the law. It establishes the obligation of States parties to prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including race and religion. Article 27 of ICCPR provides for the rights of members of religious minorities by ensuring their right "to profess and practice their own religion".[33] Other core human rights treaties indicate both race and religion as prohibited grounds for any differentiation between people as far as their human rights are concerned.[34] Although the definition of the racial discrimination formulated in article 1, paragraph 1 of ICERD does not encompass religion, it is listed under article 5, paragraph (d) (vii). ICESCR identifies education as a tool for the promotion of "understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups."[35]

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[29] See article 4 of ICCPR and Human Rights Committee general comment No. 22 (1993) on article 18 (Freedom of thought, conscience or religion), para. 1.

[30] General comment 22, para. 8.

[31] ICCPR, article 18, para. 3. See also CRC, article 14 and ICRMW, article 12.

[32] General comment No. 22, para. 8.

[33] See also CRC, article 30.

[34] See e.g. ICESCR, article 2, para. 1; ICCPR, articles 2, para. 1, 4, 24 and 26; CRC, article 2, para. 1; ICRMW, arts. 1, para. 1, and 7.

[35] Article 13, para. 1.

47. The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief defines intolerance and discrimination in this context as "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." Human rights bodies and Governments should rely on the provisions thereof. Article 2 of the Declaration underlines that "no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief" and article 4 calls on States to take effective measures and "make all efforts" to prevent and eliminate discrimination on the grounds of religion or belief. According to the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs ...".[36]

Assessment and recommendations

48. The nexus between racism and religion poses complex and sensitive issues which are not adequately addressed under international law. The experts believe that the reference to the right to freedom of religion in article 5, paragraph (d) (vii) of ICERD should be further developed to cover the complexity of the connection between religion and race, racial discrimination, xenophobia and related intolerance. In light of the increasing incidents of Islamophobia, anti-Semitism and Christianophobia in the aftermath of the events of 11 September 2001, it is necessary that human rights bodies update accordingly their general comments or recommendations, reporting guidelines, and rules of procedures.

49. **It is recommended in particular that CERD adopt a general recommendation addressing concerns which have emerged in the area of racial discrimination and religion or belief.**

50. **In addition, the experts recommend that the Human Rights Committee revise general comment No. 22 (1993) on article 18 (Freedom of thought, conscience or religion) in order to address present challenges. The experts stress that in addressing problems linked to the nexus between racism and religious, it is vital that human rights bodies and Governments rely on the provisions of the 1981 Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion and Belief.**

B. Refugees, asylum-seekers, migrant workers and stateless persons

1. Refugees, asylum-seekers, migrant workers

51. There is an intrinsic connection between racism and the situation of refugees, asylum-seekers and migrants. Racism, sometimes accompanied with violence, continues to be

[36] Article 4, para. 2.

responsible for the flight of hundreds of thousands of people from their countries. Subsequently, such people very often become targets of racism and violence in the host countries where they have been forced to seek sanctuary. There is a lot of documented evidence for this.

52. The DDPA calls on the international community, Governments, NGOs and the private sector to undertake specific action to address problems associated with the vulnerability of persons falling into the aforementioned categories and to identify prompt and adequate solutions to ensure their protection.[37] The DDPA also underlines the urgency of addressing the root causes of displacement and reiterates that the international response and policy towards refugees should be free of discrimination on the grounds of race, colour, descent, or national or ethnic origin of the refugees concerned.[38]

53. ICERD does not specifically refer to the status of refugees, asylum-seekers, and migrant workers. However, the general provisions of this Convention and other core human rights treaties prohibiting discrimination are also applicable to these categories of persons.[39] Several treaty bodies have addressed this issue in their general comments.

54. CERD in its general recommendation No. 22 (1996) on article 5 of the Convention on refugees and displaced persons recalled that the 1951 Convention and the 1967 Protocol relating to the Status of Refugees are the main sources of the international system for the protection of refugees in general; and emphasized, inter alia, that: "All refugees and displaced persons have the right to return to their homes of origin under conditions of safety" and that "States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees."[40] CERD general recommendation No. 30 (2005) on discrimination against non-citizens also includes these groups.

55. In its general comment No. 13 (1999) on the right to education (art. 13), CESCR states that "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status."[41]

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[37] See paras. 16, 38, 46 - 55, 65, 89 and 111 of the Declaration and paras 24 - 36, 50, 67, 69, 78, 80, 81, 97, 105, 138, 144, 182 - 186 and 196 of the Programme of Action.

[38] Para. 111 of the Declaration.

[39] See ICERD, articles 1 - 7 and also e.g. ICCPR, articles 2, para. 1, 4, 14, para. 1, 25, 26 and 27 and ICESCR articles 2, para. 2, 7, para. (c), 13, para. 1.

[40] Paras. 2 (a) and (b).

[41] Paragraph 34.

56. In its general recommendation No. 24 (1999) on article 12 of the Convention (women and health), the Committee on the Elimination of Discrimination against Women urges States to pay special attention "to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women …."[42]

57. Several other international instruments are of great relevance in this context. In particular, attention should be paid to the: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); Convention relating to the Status of Refugees of 1951, and its 1967 Protocol; the relevant ILO Conventions; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949; United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention; Convention relating to the Status of Stateless Persons of 1954; Convention on the Reduction of Statelessness of 1961; and Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live of 1985. The experts are seriously concerned by the exceptionally low rate of ratification of the ICRMW.

Assessment and recommendations

58. The experts do not discern any substantive gaps as regards the protection of refugees, asylum-seekers and migrant workers from racism and racial discrimination. States parties should, however, be enjoined to take the necessary legislative and administrative measures to implement their obligations arising from ICERD with respect to these specific categories as well as from other related international instruments. The experts note the absence of an explicit incorporation of acts of xenophobia and related intolerance in international instruments and recommend that CERD adopt a general recommendation to rectify this lacuna.

2. Stateless persons

59. In the absence of protection by the State by virtue of citizenship, the situation of stateless persons is particularly fragile in many respects. If racial prejudice and xenophobic attitudes are widespread in a given society, one can assume with great probability that they will affect primarily this group of people. Strengthening the protection of stateless persons is, therefore, an important aspect of the struggle against racism, racial discrimination, xenophobia and related intolerance.

60. The DDPA does not specifically refer to stateless persons but many of its stipulations are mutatis mutandis of great relevance to them. Racism faced by stateless persons prompted the development of international standards that link the general protection of the human rights of

[42] Paragraph 6.

stateless persons with the prohibition of distinctions made on the grounds of race, ethnic or national origin. Article 3 of the 1954 Convention relating to the Status of Stateless Persons stipulates that the provisions of this treaty should be applied to stateless persons without discrimination as to race, religion or country of origin while article 9 of the 1961 Convention on the Reduction of Statelessness prohibits the deprivation of one's nationality on racial, ethnic, religious or political grounds. Finally, the 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live extends the principles of protection laid down therein to all aliens without difference, including nationals of other States and stateless persons. Article 7 of this Declaration specifically makes illegal individual or collective expulsion of aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin.

61. In its general recommendation No. 30 (2005) on discrimination against non-citizens, CERD asserts that article 1, paragraph 2 of ICERD, which permits differentiation between citizens and non-citizens, "… must be construed so as to avoid undermining the basic prohibition of discrimination;"[43] CERD further confirms that although some of the rights pronounced in article 5 of the Convention may be confined only to citizens, "… human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[44] In the same general recommendation, CERD also urges States parties to take a number of actions to protect the human rights of non-citizens, including inter alia by ensuring that non-citizens enjoy equal protection and recognition before the law and access to citizenship or naturalization.

62. The Human Rights Committee in its general comment No. 15 (1986) on the position of aliens under the Covenant, reconfirms that aliens are protected under ICCPR by emphasizing that "in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[45] In general comment No. 17 (1989) on article 24 (Rights of the child), the Human Rights Committee asserts that, "no discrimination with regard to the acquisition of nationality should be admissible under international law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents."[46] General comment No. 27 (1999) on article 12, paragraph 4 (Freedom of movement) specifies that the right of a person to enter his or her own country recognizes the special relationship of a person to that

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[43] Paragraph 2.

[44] Paragraph 3.

[45] Paragraph 1.

[46] Paragraph 8.

country. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). The language permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.[47]

Assessment and recommendations

63. The experts recognize that fundamental human rights are guaranteed to stateless persons under international law. However, they wish to draw the attention of the international community to the uncertain status of this group of people in the context of the right to return to one's own country. It is clear that arbitrary expulsion is prohibited under international law in relation to every person, but the right to return benefits prima facie only citizens of a given country. The situation of stateless persons is less favourable. Indeed, their right to return to the country of residence or the country of origin is questioned and the grounds of race and/or ethnic origin play an important role. Therefore, it is important that this problem be effectively addressed primarily by the Human Rights Committee in the context of article 12, paragraph 4 of ICCPR, essentially through some supplementary inputs to general comment No. 27.

64. Most experts in the field agree that today de jure statelessness is overshadowed by the even greater crisis caused by de facto statelessness resulting from irregular migration, which contributes to the evolution of a "grey zone of de facto statelessness."[48] The experts are of the opinion that this problem should be examined by the human rights treaty bodies, both in their general comments and concluding observations.

65. The experts are also seriously concerned by the exceptionally low rate of ratifications of the 1954 Convention relating to the Status of Stateless Persons,[49] and the still lower number of ratifications of the 1961 Convention on the Reduction of Statelessness.[50]

C. Internally displaced persons

66. Internal displacement is a worldwide phenomenon causing suffering for at least 22 million people who have been forced to flee or leave their homes within their own countries. According to Francis M. Deng, former Representative of the Secretary-General on internally displaced

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[47] Paragraphs 19 and 20.

[48] See e.g. Carol A. Batchelor, "Statelessness and the problem of resolving nationality status", *International Journal of Refugee Law*, vol. 10, Nos. 1-2 (January 1998), p. 156.

[49] As of 2007 the number of ratifications stands at 62.

[50] As of 2007 the number of ratifications stands at 30.

persons (IDPs),[51] internal displacement "breaks up families, cuts social and cultural ties, terminates dependable employment relationships, disrupts educational opportunities, denies access to such vital necessities as food, shelter and medicine, and exposes innocent persons to such acts of violence as attacks on camps, disappearances and rape."[52] IDPs relocated in an unfamiliar environment are particularly vulnerable to racism, racial discrimination and xenophobia that serve to make their situation even worse.

67. The DDPA recognizes with concern instances of various forms of racism, xenophobia and related intolerance against internally displaced persons.[53] None of the human rights instruments includes provisions specifically related to internal displacement. Nevertheless, their general provisions prohibiting discrimination based on race, colour, descent, or national or ethnic origin are fully applicable to IDPs as holders of human rights. In its general recommendation No. 22 (1996) on article 5 of the Convention on refugees and displaced persons, CERD addresses the rights of displaced persons to return to their homes of origin under conditions of safety; to have the right to participate fully and equally in public affairs at all levels; and to have equal access to public services and to receive rehabilitation assistance.[54] In its general recommendation No. 24 (1999) on article 12 of the Convention (women and health), the Committee on the Elimination of Discrimination against Women urges States to pay special attention to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as inter alia internally displaced women.[55]

68. The situation of IDPs is extensively addressed by the Guiding Principles on internal displacement prepared by Mr. Francis Deng.[56] The Commission on Human Rights expressed its appreciation of this document and welcomed the fact that an increasing number of States, United Nations agencies and regional and NGO organizations are applying it as a standard.[57] The

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[51] Mr. Francis Deng (Sudan) served as Representative of the Secretary-General on internally displaced persons from 1992 to 2004. Mr. Walter Kälin (Switzerland) has been serving as the Representative of the Secretary-General on the human rights of internally displaced persons since 2004.

[52] E/CN.4/1998/53/Add.2, para. 1.

[53] Para. 53 of the Declaration. See also paras. 54 - 55, 111 of the Declaration and paras 34 - 36, 185 of the Programme of Action.

[54] Paragraph 2.

[55] Paragraph 6.

[56] E/CN.4/1998/53/Add.2.

[57] Commission on Human Rights resolution 2004/55, para. 6.

Guiding Principles cover a broad range of the human rights of displaced persons and proclaim that the Principles shall be applied without discrimination of any kind. They address protection from displacement, the situation during displacement, humanitarian assistance, as well as return, resettlement and reintegration. The reporting guidelines adopted by CERD only refer to the situation of displaced persons.[58]

Assessment and recommendations

69. Although the conventional mandate of the United Nations High Commissioner for Refugees (UNHCR) was established to deal with the situation of refugees, in practice, on the basis of relevant resolutions of the General Assembly and directives of the Executive Committee, UNHCR has extended its operational mandate and field of competence to cover IDPs as well.

70. **Normatively, the Guiding Principles have been accepted as a set of standards by an increasing number of States, United Nations agencies, as well as regional organization, and are applied as such. This and the interpretation by CERD of its mandate as also covering the situation of IDPs prompt the experts to the conclusion that for the time being there is no need for further standard setting in this regard. However, with a view to strengthening the protection of IDPs, the experts recommend the General Assembly to uphold the call of the Commission on Human Rights for the observance and implementation of the Guiding Principles as standards. In such a resolution, the General Assembly may wish to stress the importance of the protection of IDPs against racism and xenophobia.**

D. Descent-based communities

71. Descent-based discrimination has historically been a feature of societies in different regions of the world and is manifested in various forms of injustice. It is estimated that 260 million people worldwide are affected by such discrimination. Its persistence and the urgent need to remedy its consequences have resulted in Governments of many countries recognizing the complexity of this problem and adopting legislation and policies to confront it.

72. The DDPA recognizes in several provisions that racism and xenophobia based on descent constitute major contemporary human rights challenges.[59] Following on the recommendations of the DDPA, the Commission on Human Rights established in its resolution 2002/68 a Working Group of Experts on People of African Descent composed of five independent experts to study the problems of racial discrimination faced by people of African descent.

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[58] CERD/C/70/Rev.5.

[59] Para. 103 of the Durban Declaration. See also paras 2, 13, 14, 32 - 38, 103 and 111 of the Declaration and paras 4 - 14, 45, 50, 72, 81, 123, 163, 171 of the Programme of Action. See specifically, paragraphs 32-35 of the Declaration concerning Africans and people of African descent, and paragraphs 36 - 38 concerning Asians and people of Asian descent.

73. CERD in its general recommendation No. 29 (2002) on article 1, paragraph 1 of the Convention (Descent) confirms its view that the "term 'descent' in article 1, paragraph 1 of the Convention does not solely refer to 'race' and has a meaning and application which complement the other prohibited grounds of discrimination" and that "discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights."[60] CERD attempted to identify various factors that may point to the existence of descent-based communities who suffer from discrimination, including the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality.

74. In general recommendation No. 29, CERD issued a series of detailed recommendations which if implemented would serve to alleviate the problems resulting from discrimination based on descent. Although CERD made the adoption of the proposed measures subject to the assessment of their appropriateness under particular circumstances by States parties, the relevant recommendations serve the development of the existing standards, in particular with regard to their application. Forty-eight recommendations are grouped into eight chapters: (a) measures of a general nature; (b) multiple discrimination against members of descent-based communities; (c) segregation; (d) dissemination of hate speech including through the mass media and the Internet; (e) administration of justice; (f) civil and political rights; (g) economic and social rights; and (h) right to education.

75. At the level of the Sub-Commission for the Promotion and Protection of Human Rights (the Sub-Commission), the latter adopted a resolution calling for a study on discrimination based on work and descent to be undertaken.[61] The Commission endorsed the request and entrusted two Special Rapporteurs with the task of preparing a comprehensive study on discrimination based on work and descent. The Special Rapporteurs submitted their progress report to the Human Rights Council in 2006.[62] It contains a set of principles and guidelines highlighting the international standards prohibiting discrimination based on work and descent.[63]

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[60] Preambular paragraphs 6 and 7.

[61] Sub-Commission resolution 2004/17.

[62] Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled "Human Rights Council", all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council.

[63] A/HRC/Sub.1/58/CRP.2.

Assessment and recommendations

76. The experts share the cohesive view of international bodies that descent-based discrimination constitutes one of the greatest challenges to the efforts aimed at countering racism and xenophobia. Considering, however, the steps taken by CERD to extend the applicability of ICERD to descent-based communities, and in particular its general recommendation No. 29, the experts discern no substantive gaps as regards the protection of members of descent-based communities from racism, racial discrimination, xenophobia and related intolerance. Similarly to other forms of discrimination, inadequate implementation and lack of political will remain among the basic barriers impeding the elimination of this form of discrimination. It would be equally important if other human rights treaty monitoring bodies paid appropriate attention to problems faced by descent-based communities during the examinations of States parties' reports and individual communications.

E. Indigenous peoples

77. According to United Nation estimates, approximately 300 million indigenous people live in more than 70 countries worldwide. The situation of indigenous peoples in various parts of the world is characterized by a high degree of vulnerability to discrimination on the grounds of race or ethnic origin. The Durban Conference expressed its "concern that in some States political and legal structures or institutions, some of which were inherited and persist today, do not correspond to the multi-ethnic, pluricultural and plurilingual characteristics of the population and, in many cases, constitute an important factor of discrimination in the exclusion of indigenous peoples."[64] The DDPA further specifies the required measures for guaranteeing the fundamental rights of indigenous peoples and their protection against racism. It also recognizes the challenges being faced by indigenous peoples in the contemporary world, particularly as regards their special relationship with the land as the basis for their spiritual, physical and cultural existence.[65]

78. The 2005 World Summit Outcome firmly reiterated the commitment of the international community to protect the human rights of indigenous peoples, linking them directly with sustainable development, and in particular with the fight against hunger and poverty.[66]

79. At present, the most comprehensive international instrument concerning indigenous peoples is ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries and which so far has been ratified by only eighteen countries: thirteen Latin American, four European, and one Asian.

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[64] Para 22 of the Declaration.

[65] Paras. 42 and 43 of the Declaration. See also paras. 13, 14, 22-24, 39 - 45, 73 and 103 of the Declaration and paras. 15 - 23, 50, 78, 117 and 202 - 209 of the Programme of Action.

[66] General Assembly resolution 60/1, paras. 46, 56 and 127.

80. The core human rights treaties do not specifically refer to indigenous peoples (with the exception of the Convention on the Rights of the Child (CRC).[67] Nevertheless, there is no doubt that article 1, paragraph 1 of ICERD, and other norms of human rights treaties prohibiting discrimination also apply.

81. The plight of indigenous peoples was the focus of CERD general recommendation No. 23 (1997) on the rights of indigenous peoples, which inter alia states that "discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination".[68] Committee on the Elimination of Discrimination Against Women general recommendation No. 24 (1999) on article 12 of the Convention (women and health) pays special attention to the health needs and rights of women belonging to vulnerable and disadvantaged groups, including indigenous peoples.[69] Article 30 of the CRC proclaims the right of a child of indigenous origin to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language. The reporting guidelines adopted by CERD only mention the situation of indigenous peoples.[70]

82. The 2005 World Summit Outcome called upon States to conclude negotiations on and approve as soon as possible the United Nations draft declaration on the rights of indigenous peoples, under discussion by the Working Group on Indigenous Populations of the Commission on Human Rights since 1995.[71] The draft was eventually adopted by the Human Rights Council in 2006 but it is still pending on the agenda of the General Assembly.[72]

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[67] The CRC was adopted in 1989, and entered into force in 1990. With 192 States parties as of 7 October 2005, it is the United Nations human rights instrument enjoying the most universal ratification.

[68] Paragraph 1.

[69] Paragraph 6.

[70] CERD/C/70/Rev.5.

[71] It is worth noting that the second World Conference on Human Rights in 1993 called on the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of the declaration on the rights of indigenous people that had been on its agenda for several years.

[72] On 30 January 2007, the Assembly of the African Union adopted a decision (Assembly/AU/ Dec. 141 (VIII)) on the draft declaration, maintaining a united position in the negotiations on amending the declaration and finding a solution to the concerns of African States, amongst the most important of which are questions about: (a) the definition of indigenous peoples; (b) self-determination; (c) ownership of land and resources; (d) establishment of distinct political and economic institutions; and (e) national and territorial integrity.

Assessment and recommendations

83. The experts share the opinion expressed by CERD in its general recommendation No. 23 and consider that ICERD covers protection against racially motivated discrimination towards indigenous peoples. They are of the opinion that an effective countering of racism affecting indigenous peoples requires a strengthening of the overall protection of their human rights. In this context, the experts support a swift approval of the aforementioned declaration on the rights of indigenous peoples.

84. In addition, the experts believe that the universal ratification of ILO Convention No. 169 can also be a significant step towards the protection of the human rights of indigenous peoples. Therefore, the experts wish to encourage Member States to consider this step as a matter of priority.

F. Minorities

85. Persons belonging to minorities amount to perhaps 30 per cent of the world population.[73] The overall vulnerability of minorities is significantly enhanced in the context of racism, racial discrimination, xenophobia and related intolerance. The dramatic record of recent genocides and crimes against humanity provides evidence of the terrible potential of large scale violations of minority rights. Equally convincing is the observation that protection of minorities is presently one of the most effective ways to prevent conflicts or ensure sustainable peace. In other words, protection of minorities is not only a basic guarantee for the rights holders but also one of the fundamental tools to resolve social problems. Not surprisingly, the rights of minorities is one of the major concerns addressed throughout the DDPA[74] which inter alia "Urges States to take, where applicable, appropriate measures to prevent racial discrimination against persons belonging to national or ethnic, religious and linguistic minorities with respect to employment, health care, housing, social services and education, and in this context forms of multiple discrimination should be taken into account."[75]

86. Article 1, paragraph 1 of ICERD does not specifically address minorities but according to CERD it "relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples. If the Committee is to secure the proper consideration of the periodic reports of States parties, it is essential that States parties provide as far as possible the Committee with information on the presence within their territory of such groups."[76] In its general

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[73] See A/HRC/Sub.1/58/19, annex IV, p. 22.

[74] See paras 66, 71 and 73 of the Declaration and paras 46 - 49, 74, 124 and 172 of the Programme of Action.

[75] Para. 49 of the Programme of Action.

[76] General recommendation No. 24 (1999) concerning article 1 of the Convention, para. 1.

recommendation No. 4 (1973) concerning reporting by States parties (article 1 of the Convention), CERD invited States parties to include in their periodic reports relevant information concerning the demographic composition of the population. CERD further acknowledged that there is an international standard concerning the specific rights of people belonging to ethnic groups, together with generally recognized norms concerning equal rights for all and non-discrimination, including those incorporated in the International Convention on the Elimination of All Forms of Racial Discrimination. At the same time, CERD took a position against arbitrary treatment of minority groups in recognizing their existence and pointing to the need for applying the same criteria to all of them, in particular with regard to the number of persons, their being of a race, colour, descent or national or ethnic origin different from the majority, or from other groups within the population.[77]

87. Article 27 of ICCPR guarantees that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." In its general comment No. 23 (1994) on article 27 (Rights of minorities), the Human Rights Committee states that "the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language."[78] Further, these rights apply to all individuals within the territory of the State party and not just to citizens alone.[79] Lastly, States parties are under an obligation to take positive measures of protection "not only against the acts of the State party itself … but also against the acts of other persons within the State party."[80]

88. The most comprehensive United Nations instrument dealing with the protection of minorities is the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This document, which lays down specific rights of persons belonging to minorities and defines the related obligations of States, is however of a non-binding nature.

Assessment and recommendations

89. The Working Group on Minorities of the Sub-Commission in its recent report indicated "that addressing the rights of minorities remains one of the most marginalized issues within the

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[77] Ibid, para. 2.

[78] Paragraph 5.1.

[79] Idem.

[80] Para 6.1. See also CRC, article 30.

human rights mechanisms in the United Nations."[81] In this context, the experts welcome the establishment of the mandate of the Independent expert on minority issues[82] and call on the United Nations mechanisms to address minority issues, always when appropriate.

90. The experts have found no substantive normative gaps in the protection of persons belonging to cultural or ethnic, religious, or linguistic minorities from racism, racial discrimination, xenophobia and related intolerance. However, in this context, comments made in the section on religious groups in chapter II should also be taken into account.

91. This assessment in no way contradicts the need for further determined efforts at the national and international levels to fully implement the relevant standards.

G. People under foreign occupation

92. The protection of the civilian population under foreign occupation has been on the agenda of the international community for a long time. The history of armed conflicts shows that the particular vulnerability of this group is dramatically enhanced if it is connected to racial or ethnic distinction from the occupying power. The Durban Declaration expresses concern about the plight of the Palestinian people under foreign occupation.[83]

93. In the area under discussion, two branches of international law offer protection against racism, xenophobia and related discrimination, namely human rights law and humanitarian law. Although the situation of people under foreign occupation has not been spelled out under any of the international human rights treaties, there is no doubt that States parties to them are responsible for their implementation, not only within their own territories but also within all territories under their control.

94. General comment No. 31 (2004) of the Human Rights Committee on the nature of the general legal obligation imposed on States parties to the Covenant provides a clear interpretation in this regard. In interpreting article 2, paragraph 1 of ICCPR, it underlines inter alia that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party … . This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or

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[81] A/HRC/Sub.1/58/19.

[82] In accordance with Commission on Human Rights resolution 2005/79, Ms. Gay McDougall was appointed by the United Nations High Commissioner for Human Rights on 29 July 2005 for an initial period of two years.

[83] Paragraph 63.

effective control was obtained …."[84] These comments are directly relevant only to States parties of ICCPR. However, since they tackle the nature of States parties obligations under a human rights treaty they seem to also clarify the applicability, mutatis mutandis, of other human rights treaties to people under foreign occupation. Hence, States parties who occupy a territory are obliged to counter racism and xenophobia affecting all parts of the population under their control and bear full responsibility in this respect under the respective human rights treaties to which they are party.

95. People under foreign occupation are protected also by international humanitarian law. Article 2 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War stipulates that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Article 4 states that, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Common article 3 to all four Geneva Conventions as well as Additional Protocols I relating to the Protection of Victims of International Armed Conflicts and II relating to the Protection of Victims of Non-International Armed Conflicts, contain provisions that establish the obligation of States parties to treat humanely all persons under their control and prohibit distinctions made on the basis of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.[85] All these instruments specify various specific minimum standards which must be respected by each party to a conflict.[86]

96. It is important to note that the protection extended to people under foreign occupation by international human rights law and international humanitarian law should be considered in an integrated way. General comment No. 31 of the Human Rights Committee rightly observes that: "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both

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[84] See paras. 10-12. See also HRC general comment No. 15 (1986) on the position of aliens under the Convention that stresses that the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.

[85] Protocol I, articles 9, para. 1 and 75, para. 1; Protocol II, article 2.

[86] Although common article 3 to the Geneva Conventions specifies that the conflict must be of a non-international character, the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) ruled that article 3 applies as well to international armed conflicts. ICJ reports (1986), para. 218.

spheres of law are complementary, not mutually exclusive."[87] Thus, in order to counter racism and xenophobia under foreign occupation it is necessary to draw on both branches of law, looking for the most effective means.

Assessment and recommendations

97. The experts agree, of course, that foreign occupation significantly heightens the risk of racial and xenophobic discrimination against the affected population. While examining the modalities of an appropriate response to such a situation, the experts arrived at the conclusion that normatively it is covered by both international humanitarian and human rights law. The problem is, however, that it is precisely under foreign occupation that international mechanisms, as experience shows, have limited impact, if any, and thus, an effective protection against racism and xenophobia is particularly problematic.

98. The experts hope that the proclamation of the responsibility to protect in the 2005 World Summit Outcome, reiterated by the Security Council, opens a new avenue to combat the most severe human rights violations, including under foreign occupation. This approach can contribute to countering racism and xenophobia and ensure the accountability of perpetrators of related crimes include those involving genocide and ethnic cleansing.

99. The experts consider it appropriate that CERD assess the need for recommendations concerning the issue of racial and xenophobic discrimination under foreign occupation.

III. COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO MANIFESTATIONS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Multiple discrimination or aggravated forms of racial discrimination

100. It is widely recognized that groups most exposed to racism, racial discrimination, xenophobia and related intolerance frequently suffer multiple discrimination.[88] The experts understand the language "multiple or aggravated forms of discrimination" within the meaning of paragraph 2 of the Durban Declaration which recognizes "that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status." Also in the Durban Programme of Action numerous references are made to multiple or aggravated forms of discrimination.[89]

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[87] Paragraph 11.

[88] See E/CN.4/2006/WG.21/BP.2.

[89] Paragraphs 14, 18, 31, 49, 79, 104, 172 and 212.

101. All human rights treaties and instruments proclaim the principles of equality and non-discrimination, with explicit (but not exclusive) reference to several grounds such as gender, race, language, religion, disability. In the decisions and comments of the treaty bodies several other grounds, such as age and sexual orientation have been covered and included as prohibited grounds of discrimination.

102. All core instruments of international human rights law apply to various grounds of discrimination. Linking different provisions of those instruments which concern different grounds of discrimination can give birth to a functional approach in addressing multiple discrimination.

103. The international instruments concerning the protection of specific categories of rights holders, such as children, migrants, people with disabilities, address the issue of multiple discrimination in a direct way through their non-discrimination clauses in connection with specific substantive provisions. They can be fully applied with a view to countering multiple discrimination. Two of the core human rights treaties exclusively mention those grounds of discrimination, the countering of which was the overall purpose of their adoption, namely ICERD and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and, more recently, the Convention on the Rights of Persons with Disabilities (CRPD).

104. ICERD refers only to race, colour, or national or ethnic origin; however, CERD in several general recommendations leaves no doubt that this body is aware of the phenomenon of multiple discrimination and is determined to address its various manifestations.[90] To illustrate the CERD approach, one can take the example of the protection of women. General recommendation No. 25 (2000) on gender-related dimensions of racial discrimination states that "… racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men."[91] CERD points out that racial discrimination may have consequences that affect women only or primarily such as pregnancy resulting from racially motivated rape.[92] In its general recommendation No. 29 (2002) on article 1, paragraph 1 of the Convention (Descent), CERD urges States parties to take into account the situation of women members of descent-based communities as victims of multiple discrimination, sexual exploitation and forced prostitution.[93]

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[90] See e.g. general recommendations No. 22 (1996) on article 5 of the Convention on refugees and displaced persons, No. 23 (1997) on the rights of indigenous peoples, No. 24 (1999) concerning article 1 of the Convention, No. 25 (2000) on gender-related dimensions of racial discrimination and No. 30 (2005) on discrimination against non-citizens.

[91] Paragraph 1.

[92] Paragraph 2.

[93] Paragraph 2 (k).

105. The scope of article 1 of CEDAW is wide enough to embrace instances where women are victims of multiple grounds of discrimination. This view is reinforced by article 2 (c), which places an obligation on States parties to condemn discrimination against women in all its forms and undertake to establish legal protection of the rights of women on an equal basis with men, and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination. Regarding article 2 (e) States parties are to eliminate discrimination against women by any person, organization or enterprise. Further, under article 6 States parties are to suppress all forms of trafficking in women.

106. In its general recommendation No. 19 (1992) on violence against women, the Committee on the Elimination of Discrimination against Women stated that "The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."[94] The Committee also pointed out that States must take all positive measures to eliminate gender violence, taking into account "the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms."[95] In its General Recommendation 24 (1999) on article 12 of the Convention (women and health), the Committee calls for special attention to be paid "to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women …".[96]

Assessment and recommendations

107. Numerous studies and publications establish that the diversity in manifestations of multiple discrimination seems to demand a further elaboration. The purpose of this endeavour should be to address the phenomenon under discussion from different angles because its complex nature requires diversified and complementary approaches. In this context, there is no justification for restricting protection against multiple discrimination to the grounds that are explicitly mentioned in the DDPA. Here, as in the case of international human rights treaties, the list of prohibited grounds of discrimination is open-ended. Despite the fact that some characteristics, including nationality, age, health status, HIV-positive status, marital status, sexual orientation and gender identity when combined with race render certain categories of persons particularly vulnerable to discriminatory practices, they have not been to date universally recognized as factors aggravating racial discrimination. It is important that international protection against racism embraces these factors which create the phenomenon of multiple discrimination and result in the exclusion of people falling into the combined categories.

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[94] Paragraph 6.

[95] Paragraph 4.

[96] Paragraph 6.

108. The underlying question is whether the existing legal standards sufficiently counter these phenomena. It is clear that the prohibition of multiple discrimination is already well established in law since various forms of discrimination are prohibited. The existing standards provide sufficient basis for protection against multiple discrimination at the national level in terms of responsibility and remedies. However, multiple discrimination is not only a sum of specific manifestations of discrimination, but it creates a new class of discrimination, whereby discrimination on the basis of several grounds creates a new form.

109. It is this phenomenon which amounts to aggravated victimization and marginalization of large groups of people. In order to combat this phenomenon, it is important to capture its contours through a definition which would take into account its complex nature.

110. The experts believe that a methodology of diagnosis of the phenomenon under discussions is still missing. While some of the well-recognised grounds of discrimination are extensively addressed and developed through law and jurisprudence others have only recently been recognised. The assessment of multiple discrimination is lacking a coherent and integrated approach. This leads to accountability gaps, since the legal basis is missing that would enable competent organs, in particular domestic courts, tribunals and commissions, to draw consequences adequate to the severity of multiple discrimination. Finally, the available tools to react effectively to multiple discrimination, including early warning mechanisms, seem to be inadequate.

111. Therefore, the experts are inclined to conclude that the phenomenon of multiple discrimination needs to be addressed, with a particular focus on: the recognition of its diversified characteristics; definition of linkages between different grounds of discrimination; and an understanding of the consequences of their combined manifestations. To that end, it would be most appropriate for the treaty bodies, in particular CERD, to analyse the issue of multiple discrimination and aggravated forms of discrimination with racial aspects and adopt general comments on the methodology for countering this phenomena.

B. Ethnic cleansing

112. According to the Secretary-General the term “ethnic cleansing” came to be known as a process the central objective of which was using military means to terrorize civilian populations with the goal of forcing their flight from a certain territory.[97] Similarly, according to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, ethnic cleansing refers to “the shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed.”[98]

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[97] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, S/25704.

[98] *Prosecutor v. Dusko Tadic,* Appeals Judgment, 15 July 1999, para. 204.

113. The DDPA does not use the term ethnic cleansing but in several places links the forced displacement and the movement of people from their countries of origin as refugees and asylum-seekers with racism and xenophobia.[99] Equally important are the provisions that refer to the protection of ethnic minorities.[100]

114. Similarly, the Rome Statute of the International Criminal Court does not explicitly refer to ethnic cleansing. However, under its article 7 crimes against Humanity include inter alia extermination; deportation or forcible transfer of population; and persecution against any identifiable community or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this article or any other crime falling within the jurisdiction of the Court.[101]

115. None of the international human rights treaties directly mentions the concept of ethnic cleansing but several provisions of these instruments are relevant in this context. In particular, one should refer here to the non-discrimination clauses, stipulations or treaty interpretations concerning protection of minorities and provisions prohibiting any advocacy of national, racial or religious superiority or hatred that constitutes incitement to discrimination, hostility or violence.[102]

Assessment and recommendations

116. The underlying question is whether ethnic cleansing as a manifestation of racism is adequately countered and persecuted persons or groups are sufficiently protected by existing legal standards. Despite the lack of a legal definition of ethnic cleansing under international law, the experts are of the opinion that it is sufficiently covered by human rights treaties on the one hand, and the stipulations of international criminal law concerning crimes against humanity on the other. Nevertheless, the experts would welcome efforts towards the development of a legal definition for ethnic cleansing. Such a definition would be helpful in developing a more targeted approach to this particular manifestation of racism and pave the way to more resolute preventive action.

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[99] See e.g. para. 52 of the Durban Declaration. See also the sections related to refugees and IDPs in this report.

[100] See the section related to minorities in this study.

[101] The crime of persecution has been recognized as a particularly serious crime since a discriminatory intent is one of its basic elements. See *Prosecutor v. Todorovic*, Trial Chamber Judgement of 31 July 2001, para 32.

[102] See the relevant parts of this report on minorities. See inter alia ICERD, articles 1 and 4ICERD and ICCPR, articles 2, 20 and 27.

117. At present, special emphasis should be placed in this respect on CERD early warning measures and urgent procedures and United Nations early warning mechanisms, including interaction between the Department of Peacekeeping Operations and other concerned United Nations agencies.[103]

C. Genocide

118. The crime of genocide and its links to discrimination based on ethnicity, race and religion is defined by the 1951 Convention on the Prevention and Punishment of the Crime of Genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[104] This Convention has been recognized as part of customary international law[105] and the statutes of the International Court of Justice, the International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) all reiterate the definition of the crime of genocide as contained in the Convention.

119. The DDPA recognizes "that apartheid and genocide … constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and acknowledge the untold evil and suffering caused by these acts."[106] The DPPA also affirms that wherever and whenever these acts occur, they must be condemned and their recurrence prevented.[107]

120. The definition of genocide under the aforementioned Convention and the jurisprudence of the ICTY and ICTR provide clearly that in the case of genocide, victims are targeted by reason of their membership in a national, ethnic, racial or religious group. ICERD does not contain specific clauses referring to genocide but emphasizes that States parties are to "condemn all

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[103] See para. 153 of the Durban Programme of Action, which calls for strengthening coordination between DPKO and other United Nations agencies.

[104] Article 2 of the Convention.

[105] See the opinion of the International Court of Justice on the provisions of the Convention, S/25704.

[106] Paras. 15 and 100 of the Declaration.

[107] See para. 99 of the Declaration.

propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form…".[108] In this way the principle of prevention is highlighted. Recognizing the importance of punishing genocide and crimes against humanity, as well as war crimes in the context of racism and racial discrimination, CERD decided to issue general recommendation No. 18 (1994) on the establishment of an international tribunal to prosecute crimes against humanity.

Assessment and recommendations

121. The experts have concluded that no normative substantive gap exists in protection against racism and racial discrimination when these escalate to the level of genocide.

122. **However, the experts would like to reiterate the recommendation made in the section of the report which addresses ethnic cleansing, that emphasis be placed on CERD early warning measures and urgent procedures and United Nations early warning mechanisms, including interaction between the Department of Peacekeeping Operations and other concerned United Nations agencies. While re-emphasizing the need for the ratification of human rights and other relevant international treaties, the experts would also like to stress the importance of a prompt universal ratification of the Rome Statute in this context.**

D. Religious intolerance and defamation of religious symbols

123. The experts acknowledge that religious intolerance often constitutes an essential part of contemporary manifestations of racism. The numerous assaults on religious symbols and attacks on places of worship are particularly severe and dangerous expressions of racism. Moreover, defamation of religious symbols can lead to incitement to religious intolerance.

124. The subject discussed here has already been largely addressed in other parts of this report, namely Chapter II, section A and chapter III, sections A and F. The analysis and recommendations contained therein are mutatis mutandis applicable to religious intolerance. Therefore, the experts will limit their views in this chapter to some specific additional comments.

125. In recent times, an alarming increase in violence and discrimination based on religion or belief can be observed. As a contemporary phenomenon, discrimination based on various grounds, such as race, colour, and descent, national or ethnic origin, is frequently aggravated by the closely related ground of religion or belief. The DDPA notes with particular concern the existence in various parts of the world of religious intolerance against religious communities and their members.[109] In this regard, the DDPA urges States to adopt legislative and other measures

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[108] Article 4.

[109] Para. 60 of the Declaration. See also references to religion in paras. 2, 8, 34, 59, 60, 66, 67, 71, 73, 108 of the Declaration; and paras. 14, 46, 47, 49, 79, 124, 136, 171, 172, 211 of the Programme of Action.

to protect minorities, including religious minorities, from any form of racism, racial discrimination, xenophobia and related intolerance.[110] The DDPA also calls on States to implement policies and programmes in their educational institutions that promote respect and tolerance for religious diversity, as human rights education is an effective means for combating racism.[111]

126. States are urged to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief[112] and to promote and protect the exercise of the rights set out in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[113] Finally, the DDPA stresses that religion, spirituality and belief can contribute to the eradication of racism, racial discrimination, xenophobia and related intolerance.[114]

127. The 1981 Declaration is the central piece of international legislation in the area under discussion. It asserts inter alia that: "Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations."[115]

128. It is, however, not a binding document. In this context, it is becoming even more important that United Nations intergovernmental bodies attach sufficient importance to its implementation. In resolutions referring to the implementation of the Declaration, the Commission on Human Rights urged States to take "all appropriate measures", in conformity with international standards for human rights, to guarantee freedom of religion and belief and to combat religious intolerance and acts of violence.[116] In a number of resolutions, the Commission also called on States to ensure that all public officials, including members of law enforcement bodies, in the course of their official duties respect different religions and beliefs and do not discriminate on the grounds

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[110] Para. 172 of the Programme of Action.

[111] Ibid., para. 136.

[112] Ibid., para. 14.

[113] Ibid., para. 79.

[114] Para. 8 of the Declaration.

[115] Article 3.

[116] Resolutions 1994/18 and 1998/18.

of religion and belief, and that they are trained and educated accordingly.[117] With regard to implementation measures, States were urged "to ensure that religious places, sites and shrines are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction."[118] In its resolution 55/254, the General Assembly highlighted the fact that religious sites "represent an important aspect of the collective heritage of humankind."

129. The Commission specified "that in the context of the fight against terrorism and the reaction to counter-terrorism measures, defamation of religions becomes an aggravating factor that contributes to the denial of fundamental rights and freedoms of target groups, as well as their economic and social exclusion."[119] In its resolution 61/61, the General Assembly also stated that equating any religion with terrorism must be avoided, as this may have adverse consequences on the enjoyment of the right to freedom of religion or belief of all members of religious communities concerned. Finally, the General Assembly stated that dialogue and education are the means to cultivate greater respect, tolerance, and understanding with regards to religion or belief.[120]

Assessment and recommendations

130. The experts are of the view that there is an increase in religious intolerance, and incitement to religious hatred. Equally well-founded is the observation that religious intolerance and violations of the right to freedom of religion have increased substantially in the aftermath of 11 September 2001. These developments give rise to serious concerns, which need to be addressed in a thoughtful and effective way. From the perspective of their mandate, however, the experts are of the opinion that religious intolerance combined with racial and xenophobic prejudices is adequately covered under international human rights instruments. Yet, it is in light of the concerns of the international community regarding the rise in religious intolerance that CERD may wish to consider adopting a recommendation stating explicitly the advantages of multicultural education in combating religious intolerance.

E. Racial discrimination in the private sphere

131. Manifestations of racism and racial discrimination within the private sphere, such as in the relationships between individuals/groups and non-State subjects, constitute a cause for concern. It has been widely recognized that on the one hand it is the obligation of the State under human rights law to effectively address racism and racial discrimination and protect individuals against their impact in the private sphere (horizontal effect); on the other hand, non-State actors bear the responsibility not only to refrain from racist conduct but also to ensure respect for the principles of equality and non-discrimination within their own realms of activity.

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[117] Resolutions 1994/18, 1998/18, 2001/42, 2002/40, 2003/54 and 2003/4.

[118] Resolutions 2002/40 and 2003/54.

[119] Resolution 2005/3.

[120] General Assembly resolutions 57/208, 58/184, 59/199, 60/166 and 61/161.

132. This twofold scope of responsibility within the private sphere is endorsed in the DDPA. In several of its provisions, it calls on private actors to counter racism and xenophobia and stresses the importance of the elimination of these phenomena by Member States not only from public but also from private life.[121] The experts follow the same approach while examining the recommendation of the Intergovernmental Working Group regarding racial discrimination in the private sphere.[122]

133. In literal terms, article 1, paragraph 1 of ICERD suggests that the subject of the Convention is racial discrimination in the public sphere, since it prohibits racially motivated distinction, exclusion, restriction or preference occurring "in the political, economic, social, cultural or any other field of public life."[123] However, the extension of the prohibition of racial discrimination beyond the public sphere is already evident in article 2 which imposes an obligation on States parties to pursue all means and without delay to eliminate racial discrimination in all its forms and to promote understanding among races. This article explicitly provides that "(c) Each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;" and "(d) Each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."

134. In this connection, States are obliged to address racism and racial discrimination originating from other than State-individual relationships. Moreover, article 3 provides for States parties to condemn racial segregation and apartheid and article 4 outlaws racial incitement as well as racist organizations. States parties are to outlaw propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin. Further, public authorities or institutions are not to promote or incite racial discrimination. Article 5 imposes an obligation on States parties to guarantee equality before the law and the security of person and protection by the State against violence, whether perpetrated by government officials or by any other person. This article also guarantees equality in the enjoyment of political, civil, social, economic and cultural rights. Finally, article 7 imposes an obligation on States parties to adopt immediate and effective measures, particularly in the field of teaching, education, culture and information with a view to combating prejudices that lead to racial discrimination.

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[121] See paragraphs 35, 36 of the Declaration and paras 11, 53, 57, 74, 93, 95, 104, 110, 112, 113, 127, 135, 144, 215 of the Programme of Action.

[122] See fourth report of the Intergovernmental Working Group E/CN.4/2006/18, para. 106.

[123] In at least one communication CERD remarked that statements made squarely in the public arena are the central focus of the Convention. See communication No. 33/2003, paragraph 6.3.

135. CERD has specifically declared that the reach of the Convention extends to acts beyond the public sphere.[124] In its general recommendation No. 19 (1995) on article 3 of the Convention, CERD affirmed that "… a condition of partial segregation may also arise as an unintended by-product of the actions of private persons" and that "… a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities".[125]

136. Article 17, paragraph 1 of ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Paragraph 2 further provides that everyone has the right to the protection of law against such interference or attacks. The provisions of article 17 should be read in the context of article 2 which provides that "Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

137. In this context, general comment No. 31 (2004) of the Human Rights Committee on the nature of the general legal obligation imposed on States parties to the Covenant, is of great relevance since it deals with the applicability of the entire Covenant to private actors as duty bearers. The Committee stresses that "The article 2, paragraph 1, obligations are binding on States [parties] and do not, as such, have direct horizontal effect as a matter of international law." The Committee goes on to state that "The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities." The Committee further specifies that "There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights …".[126]

138. Some other international human rights instruments include similar provisions on the right to privacy, namely CRC in article 16, and ICRMW in article 14. Three other international treaties are also relevant in this regard, notably the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, ILO Convention No. 111 of 1958 on Discrimination (Employment and Occupation), and the 1960 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education.

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[124] See also communication 17/1999.

[125] Paragraphs 3 and 4.

[126] Paragraph 8.

Assessment and recommendations

139. The question arises as to whether by taking into account the aforementioned comments concerning the applicability of international human rights treaties, in particular ICERD and ICCPR, to the private sphere, there is in this regard a need for complementary human rights standards. The experts are not convinced and consider that there is rather an application gap in the effective protection against discrimination by private actors. However, since the wording of article 1 of ICERD has given rise in the past to some contradictory interpretations concerning the scope of protection granted by this Convention, in the interest of clarity the States parties may wish to consider adding the words "or private" after "public" in the definition in article 1, paragraph 1 of the Convention in an effort to help eliminate ambiguity in this regard.

140. The experts consider that general comment No. 31 of the Human Rights Committee provides a good starting point for addressing the problems of racism and xenophobia in the private sphere. Hence, CERD may wish to further elaborate on this issue specifically in the field of racial discrimination. The experts suggest that other treaty bodies examine the problem under discussion and provide some clarity on the theme through their recommendations and comments. An important step would also be to include the topic in reporting guidelines adopted by human rights treaty bodies.

F. Incitement to racial hatred and dissemination of hate speech and xenophobic and caricatural pictures, through traditional mass media and information technology, including the Internet

141. The recent rise in racial attacks, hate speech, xenophobia and acts of disrespect for religions, culture and traditions, as well as an increase in racial platforms in traditional and modern media are cause for alarm. The experts consider the recent debate on caricatural pictures as part of a broader discussion on incitement to racial and religious hatred and the dissemination of hate speech.

142. The DDPA expresses concern at the progression of racism, racial discrimination, xenophobia and related intolerance, including their contemporary forms and manifestations, such as through the use of new information and communications technologies, including the Internet, to disseminate ideas of racial superiority. The Programme of Action specifies actions which could be undertaken to counter these developments on the Internet while taking fully into account the existing international and regional standards on freedom of expression.[127] It also highlights the importance of human rights education and urges States "to introduce and, as applicable, to reinforce anti-discrimination and anti-racism components in human rights programmes in school curricula …".[128]

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[127] See paras 62 and 86-94 of the Declaration and paras 3, 43, 56, 63, 86, 88, 108, 111, 117, 119, 136 and 140-147 of the Programme of Action.

[128] Para. 129.

143. The World Summit on the Information Society stressed in its Declaration of Principles that "All actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs [information and communication technologies], such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence, all forms of child abuse, including paedophilia and child pornography, and trafficking in, and exploitation of, human beings."[129]

144. Article 4 of ICERD requires States parties to penalize four categories of misconduct: the dissemination of ideas based upon racial superiority or hatred; incitement to racial hatred; acts of violence against any race or group of persons of another colour or ethnic origin; and incitement to such acts. Article 7 obliges States parties to undertake to adopt immediate and effective measures, particularly in the field of teaching, education, culture and information with a view to combating prejudices that lead to racial discrimination.

145. In its general recommendations No. 7 (1985) relating to the implementation of article 4 and No. 15 (1993) on article 4 of the Convention, CERD explained that the provisions of article 4 are of a mandatory character. In order to comply with the obligations under this article, States parties need to enact appropriate legislation as well as ensure that such legislation is effectively enforced. CERD was fully aware of the related problems and stressed in general recommendation No. 15 that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression." It further pointed out that it wished "to draw to the attention of States parties to article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[130] Despite these specificities, 19 States have entered reservations and/or interpretative declarations with respect to article 4 of ICERD.

146. Similar obligations have been established under article 20 of ICCPR which compels States parties to outlaw any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Moreover, the Human Rights Committee stressed in its general comment No. 11 (1983) on article 20 that "For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation." To this end, the Committee further stated that it "therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy."[131]

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[129] Para. 59.

[130] See para. 4.

[131] Paragraph 2.

147. The UNESCO Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War states that "the exercise of freedom of opinion, expression and information, recognized as an integral part of human rights and fundamental freedoms, is a vital factor in the strengthening of peace and international understanding".[132]

148. In accordance with article 25, paragraph 3 of the Rome Statute "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: … (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted", and with regard to genocide directly and publicly incites others to commit it.

149. In one of its first decisions, the Human Rights Council expressed "concern over the increasing trend of defamation of religions, incitement to racial and religious hatred and its recent manifestations" and requested its Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, as well as the United Nations High Commissioner for Human Rights, to report on this phenomenon, in particular its implications for article 20, paragraph 2, of ICCPR."[133] The relevant reports contain several important recommendations.[134] In this context, the report from a high level seminar on Internet and racism, organized by the Intergovernmental Working Group at its fourth session, which explored the impact of communication technologies on both dissemination and countering propaganda of racial hatred, racial violence, and xenophobia around the world, needs also to be mentioned.[135] All of the reports referred to above highlight the importance of multicultural education, including education on the Internet, aimed at promoting understanding, tolerance, peace and friendly relations between communities and nations.

Assessment and recommendations

150. The experts are convinced that the implementation of national legislation harmonised with human rights treaty obligations could serve effectively to prevent, monitor and sanction acts of incitement to racial and religious hatred and the dissemination of hate speech. Effective cooperation between Governments, NGOs and civil society-based organizations in the identification of good practices could help curb both incitement and dissemination. Practical initiatives could include the creation of a model anti-racism network for educational institutions; the inclusion of anti-racism messages on websites accessed by young people; training courses for

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[132] Art II, para. 1.

[133] Decision 1/107 of 30 June, 2006.

[134] See A/HRC/2/3.

[135] See E/CN.4/2006/18 and E/CN.4/2005/20.

teachers on the use of the Internet; the sharing of good practices; the promotion of digital inclusion; the ethical use of the Internet; and the development of critical thinking skills for children.

151. It goes without saying that particular attention should be paid to the Internet because of its outreach and the decentralized nature of its architecture. The emerging approach of self-regulatory governance of the Internet offers an important opportunity that needs to be further explored. This could prove to be most effective in tackling incitement to racial and religious hatred and the dissemination of hate speech through this medium. States should continue the dialogue on this subject as it will lead to political agreement on how to prevent the Internet from being used for racist purposes and how to promote its use to combat racism.

152. In addressing the underlying question as to whether there is a gap in international human rights law pertaining to combating incitement to racial and religious hatred and the dissemination of hate speech, the experts discern a gap in application and consider that while there are provisions from various treaties addressing the issue, further guidance from treaty bodies as to the interpretative scope of these provisions and their threshold of application would be most useful.

Annex

QUESTIONNAIRE

ON COMPLEMENTARY STANDARDS ON RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

In the follow-up to the recommendations of the 2001 World Conference against racism, racial discrimination, xenophobia and related intolerance, the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action, established by Commission on Human Rights (resolution 2002/68), has addressed at its meetings the issue of the relevant complementary normative standards. On its initiative, a High Level Expert Seminar on complementary international standards was organized on 16 - 20 January 2006 (see the report of the Working Group E/CN.4/2006/18 at www.ohchr.org).

In its conclusions from the seminar, the Working Group *inter alia* considered three directions of action that could be additionally instrumental in countering racism and xenophobia through means of law, namely, by:

(a) More effective application of the existing relevant human rights standards at the national and international levels;

(b) Identifying substantive gaps in binding international law and filling them by appropriate means;

(c) Identifying gaps in relevant procedures established by international law and introducing complementary solutions in this area.

The Working Group specifically concluded that "a successful strategy to combat racism and racial discrimination on a global scale, should direct relevant attention to the need to reinforce the implementation of existing international instruments and the elaboration of complementary international standards to address substantive and procedural gaps in those instruments."

Following on the Working Group's recommendations, the Human Rights Council in its resolution 1/5 (30 June 2006) requested a Group of five Experts and the Committee on the Elimination of Racial Discrimination to prepare studies, on substantive and procedural issues respectively, for the discussion on complementary standards at the fifth session of the Working Group. The selection of the Group of Experts has been entrusted to the Office of the High Commissioner for Human Rights.

According to the HRC resolution, the Group of Experts:

- [should] "study the content and scope of the substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance, including but being not limited to the areas identified in the conclusions of the Chair of the high-level seminar that took place during the fourth session of the Intergovernmental Working Group," and

- "in consultation with human rights treaty bodies, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and other relevant mandate-holders, should produce a base document that contains concrete recommendations on the means or avenues to bridge these gaps, including but not limited to the drafting of a new optional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination or the adoption of new instruments such as conventions or declarations."

The purpose of this questionnaire is to facilitate the study by the Group of Experts. The questionnaire has been formulated on the basis of the existing documents, in particular the outcome of the High Level Seminar on complementary international standards, including conclusions of the Chairperson and of the Working Group (see the aforementioned report of the Working Group), as well as the discussions among the Experts.

Hence, the questionnaire has been developed around four basic areas: 1) manifestations of racism, racial discrimination, xenophobia and related intolerance, 2) the protection of victims of racism, racial discrimination, xenophobia and related intolerance, 3) responsibilities (positive obligations), 4) means and avenues to address possible substantive gaps in international law.

The stakeholders participating in this exercise are kindly requested to focus on areas of their particular expertise and experience. In order to facilitate the formulation of contributions, the Experts are open to receiving replies that cover areas IV (means and avenues) with the responses to the previous areas or to respond to the area IV separately.

QUESTIONS

I. MANIFESTATIONS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

1. Please provide your comments on the question as to whether there are normative gaps in the existing international legal instruments to combat racism, racial discrimination, xenophobia and related intolerance with regard to:

(i) Multiple or aggravated forms of racial discrimination;

(ii) Ethnic cleansing;

(iii) Genocide;

(iv) Religious intolerance and defamation of religious symbols;

(v) Racial discrimination in the private sphere;

(vi) Incitement to racial hatred and dissemination of hate speech and xenophobic and caricatural pictures, through traditional mass media and information technology, including the Internet;

(vii) Racial profiling;

(viii) Other?

2. If you have identified any gaps, can you please propose normative contents that should be incorporated into the system of international legal instruments to fill these gaps?

II. PROTECTION OF VICTIMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

1. Please provide your comments on the question as to whether there are normative gaps in the existing international legal instruments to combat racism, racial discrimination, xenophobia and related intolerance with regard to the protection of:

(i) Religious groups;

(ii) Refugees;

(iii) Asylum-seekers;

(iv) Stateless persons;

(v) Migrant workers;

(vi) Internally displaced persons;

(vii) Descent-based communities;

(viii) Indigenous peoples;

(ix) Minorities;

(x) People under foreign occupation;

(xi) Other specific groups?

2. If you have identified any gaps, can you please propose normative contents that should be incorporated into the system of international legal instruments to fill these gaps?

III. RESPONSIBILITIES (POSITIVE OBLIGATIONS) OF STATES PARTIES

1. Please provide your comments on the question as to whether there are normative gaps in the existing international legal instruments to combat racism, racial discrimination, xenophobia and related intolerance with regard to the establishment of related responsibilities, in particular in the context of:

(i) Adopting and implementing comprehensive anti-discrimination legislation;

(ii) Introducing legal definitions of types of discrimination in national legislation;

(iii) Providing for special measures to ensure equality (equal opportunity and equal enjoyment);

(iv) Binding non-State actors and holding them accountable for discrimination;

(v) Ensuring effective remedy to victims of racial discrimination and related abuses;

(vi) Applying appropriate rules of standard and burden of proof in discrimination cases;

(vii) Promoting equality and tolerance through policies including education on human nights, pluralism and multiculturalism;

(viii) Establishing and empowering specialised national bodies.

2. If you have identified any gaps, can you please propose normative contents that should be incorporated into the system of international legal instruments to fill these gaps?

IV. MEANS AND AVENUES TO ADDRESS THE POSSIBLE GAPS

Please provide your comments on the suitability of the following ways to address the possible substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance:

1. Standard-setting

(a) Adoption of complementary international standards:

(i) Amendment of the ICERD;

(ii) Protocol to the ICERD;

(iii) Adoption of other new instruments (conventions, declarations) on issues such as e.g. human rights education or religious intolerance, as proposed during the discussions in the Working Group;

(b) Adoption of regional standards;

(c) If the answer(s) is (are) positive what should be the substantive scope of a given form of standard setting?

2. Standard-development

(a) Adoption of general recommendations/comments by:

(i) CERD;

(ii) Other treaty bodies;

(b) Updating CERD' guidelines for State reporting to encourage Parties to report on specific aspects of racial discrimination and xenophobia, not addressed explicitly by treaty norms;

(c) Updating of reporting guidelines adopted by other treaty bodies;

(d) Updating OHCHR model anti-discrimination law to assist States in adopting adequate anti-discrimination legislation complying with their obligations under the ICERD and reflecting concerns raised in the Durban Declaration and Programme of Action and in the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action;

(e) If you have identified any gaps, can you please propose the substantive scope of a given form of standard development?
