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The UN's Work on Racial Discrimination: Achievements and Challenges

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Abstract

In 1997, the Commission on Human Rights and the United Nations General Assembly decided to convene the third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa. All the major United Nations treaties protecting individuals from racial discrimination had been adopted prior to 1997 and the mandate of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance had been created in 1993. But the Durban Conference, symbolically held in post-apartheid South Africa, generated new momentum for these political and legal commitments against racial discrimination. This chapter presents an overview of the United Nations mechanisms and initiatives tackling racial discrimination and the thematic developments since 1997. In light of contemporary challenges posed by the use of technology and pandemics, and reflecting on the intersectional nature of discrimination, it concludes with reflections on the strengths and weaknesses of the United Nations response to racial discrimination. The chapter identifies areas for further attention, including racial profiling in law enforcement and border security, racism in sport, and the deepening inequalities caused by global emergencies.

Keywords

United Nations – racial discrimination – institutional discrimination – hate speech – racial profiling – intersectionality – CERD committee

1 Introduction

In 1997, the Commission on Human Rights and the United Nations (UN) General Assembly resolved to convene the third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa.¹ All the major UN treaties protecting individuals from racial discrimination had been adopted prior to 1997 and the mandate of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance had been created in 1993.² But the World Conference, symbolically held in post-apartheid South Africa, generated new momentum for these political and legal commitments against racial discrimination.

In the last quarter-century since the Durban Declaration and Programme of Action (DDPA) were adopted,³ significant progress has been made in tackling racial discrimination, with the UN playing an important role in awareness-raising and the elaboration of international standards through, for example, the Sustainable Development Goals. There are also nascent signs of new avenues to combat racial discrimination with the first inter-State communication procedures before the Committee on the Elimination of Racial Discrimination (CERD Committee).

Contemporary challenges call for updated international responses to different channels and forms of racial discrimination. The world has witnessed the expansion of access to technology that has changed the way in which racial discrimination is inflicted, perceived and addressed. The COVID-19 pandemic, and protests against restrictive measures in response to it,⁴ have exposed the racial profiling practices by law enforcement authorities in many States. Racial discrimination remains ingrained in social and institutional behaviours.

1 UN Commission on Human Rights Res 1997/74 (18 April 1997) ESCOR [1997] Supp 3, 242; UNGA Res 52/111 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa' (12 December 1997). Two previous World Conferences took place in Geneva in 1978 and 1983.

2 UN Commission on Human Rights Res 1993/20 'Measures to Combat Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2 March 1993) ESCOR [1993]; UN Commission on Human Rights Res 1994/64 (9 March 1994) ESCOR [1994] Supp 4.

3 UN, 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban Declaration and Programme of Action' (8 September 2001) UN Doc. A/CONF.189/12.

4 Office of the United Nations High Commissioner for Human Rights, 'Racial Discrimination in the Context of the Covid-19 Crisis' (22 June 2020).

Expressions of racism continue to be widespread against migrants,⁵ women of African descent,⁶ or football players of a specific ethnic origin,⁷ with the internet playing an amplifying role.⁸

The Black Lives Matter movement has demonstrated the power of civil society to call for changes to the law and practice of States and international institutions, and has tested the UN's capacity to influence responses to racial discrimination. The intersectional nature of discrimination has also tested the level of coordination between different UN actors dealing with the rights of individuals and groups suffering racial discrimination.

This chapter presents an overview of the UN mechanisms and initiatives tackling racial discrimination and the thematic developments since 1997. It concludes with reflections on the strengths and weaknesses of the UN response to racial discrimination and on areas that need further attention in the future.

2 Mapping UN Mechanisms and Initiatives against Racial Discrimination

Tackling racial discrimination has been an important priority on the UN agenda since the organisation was established. The prohibition of racial discrimination is entrenched in the Organisation's purpose of achieving international cooperation in 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁹ It was also recognized in the 1948 Universal Declaration of Human Rights (UDHR)¹⁰ and the 1965 International Convention on the

5 UNGA Report of the UN Special Rapporteur on the Rights of Migrants, 'One and a Half Years After: the Impact of COVID-19 on the Human Rights of Migrants' (30 July 2021) UN Doc. A/76/257, at paras 37–40.

6 A.H. Wingfield, 'Women are Advancing in the Workplace, but Women of Color Still Lag Behind' (October 2020) Brookings at <<https://www.brookings.edu/essay/women-are-advancing-in-the-workplace-but-women-of-color-still-lag-behind/>>.

7 UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of the Kingdom of the Netherlands' (16 November 2021) UN Doc. CERD/C/NLD/CO/22-24, at para. 13.

8 J. Gassam Asare, 'Social Media Continues to Amplify White Supremacy And Suppress Anti-Racism' (8 January 2021) Forbes at <<https://www.forbes.com/sites/janicegassam/2021/01/08/social-media-continues-to-amplify-white-supremacy-and-suppress-anti-racism/?sh=5395fd34170>>.

9 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, at Art. 1(3).

10 UNGA Res 217 A (III) 'Universal Declaration of Human Rights' (10 December 1948), at Art. 2.

Elimination of All Forms of Racial Discrimination (ICERD), which defined the term 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'.¹¹

In its first half-century, the UN's main achievements regarding racial discrimination occurred through the inclusion of the prohibition in major human rights treaties. In the last quarter-century, UN efforts have focused on the monitoring, implementation and enforcement of the international standards established in those treaties, using a variety of mechanisms and initiatives to that end.

2.1 *International Human Rights Treaties and Initiatives Pre-1997: Setting International Standards*

The ICERD is the main UN treaty setting up international standards to eliminate racial discrimination.¹² Under Art. 2(1), States parties 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and to its end'. This includes prohibiting racial discrimination through domestic legislation, and reviewing 'governmental, national and local policies', and amending, rescinding or nullifying 'any laws and regulations which have the effect of creating or perpetuating racial discrimination'.¹³

Since the ICERD defined racial discrimination in the 1960s, other international human rights instruments have explicitly included this prohibition in their provisions, creating obligations for States Parties. Under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), States Parties undertake to respect and ensure the rights of the respective Covenants 'without distinction of any kind, such as race',¹⁴ and Art. 26 of the ICCPR enshrines the prohibition

11 International Convention on the Elimination of all Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, at Art. 1(1).

12 T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79(2) *The American Journal of International Law* at <<https://www.jstor.org/stable/2201704>>.

13 International Convention on the Elimination of all Forms of Racial Discrimination, at Art. 2(1) c and d.

14 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, at Art. 2(1); International Covenant on Economic,

of discrimination on grounds of race or colour.¹⁵ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasizes in its preamble that the eradication of all forms of racism and racial discrimination are 'essential to the full enjoyment of the rights of men and women'.¹⁶ The International Convention on the Suppression and Punishment of the Crime of Apartheid considers apartheid as a 'crime against humanity' and declares that 'inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article 11 of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security'.¹⁷

The General Assembly designated the Decade for Action to Combat Racism and Racial Discrimination to begin on 10 December 1973, the anniversary of the adoption of the UDHR. The Decade became the framework for initiatives at the UN level.¹⁸ The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance adopted its first declaration, programme of action and resolutions in 1978 in order to 'promote the implementation of'¹⁹ the legal international instruments tackling racism and racial discrimination, including the Universal Declaration of Human Rights, the International Convention on the Elimination of All forms of Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide.²⁰

The second conference took place in 1983, focusing on the scourge of apartheid and other 'gross violations of human rights emanating from and leading

Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, at Art. 2(2).

15 International Covenant on Civil and Political Rights, at Art. 26.

16 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, at Preamble.

17 International Convention on the Suppression and Punishment of the Crime of Apartheid (entered into force 18 July 1976) 1015 UNTS 243, at Art. 1(1).

18 The General Assembly has also adopted resolutions condemning apartheid and other forms of racial discrimination, see P.D. Kausik and M. Ram Singh, 'The UN General Assembly and Racial Discrimination' (1973) 1(6) *Social Scientist* at <<https://www.jstor.org/stable/3516242>>.

19 UNGA 'World Conference to Combat Racism and Racial Discrimination: Report of the World Conference to Combat Racism and Racial Discrimination' (14–25 August 1978) UN Doc. A/CONF.92/40.

20 *Ibid.* See also UNESCO 'Declaration on Race and Racial Prejudice' (27 November 1978) UN Doc. E/CN.4/Sub.2/1982/2/Add.1, at Annex V.

to serious inequalities'.²¹ Special procedures also evolved under the Decade for Action Programme, with the Special Rapporteur on achievements made and obstacles encountered during the first decade to combat racism and racial discrimination, followed by the creation of the current mandate of the UN Special Rapporteur on Contemporary forms of racism, racial discrimination and xenophobia and related intolerance in 1993. The contribution of the Special Rapporteurs to tackling all forms of racial discrimination has been crucial for advancing protection and raising awareness. Over the years, the mandate has increased scrutiny of the risk of discrimination against specific groups, to new forms of discrimination and to the need for an intersectional approach. For example, the focus of the Special Rapporteur's report to the Human Rights Council in 2021 was concerns regarding digital technologies used to advance the xenophobic and racially discriminatory treatment and exclusion of migrants, refugees and stateless persons.²²

Since the treaties addressing racial discrimination entered into force, the work of the respective treaty bodies contributed to the clarification of definitions and international standards through General Comments and Recommendations, monitoring processes and individual communications. Following the adoption of the ICERD, the Special Rapporteur on Racial Discrimination in the Political, Economic, Social and Cultural Spheres started examining how racial discrimination manifested in these areas.²³ A glance at CERD Committee General Recommendations illustrates some of those developments. In its General Recommendation No. 14, the CERD Committee acknowledged that the reference to 'effect' and 'purpose' in the definition of racial discrimination under Art. 1 of the ICERD 'is meant to refer to the concept of "indirect discrimination", something that it then confirmed through Concluding observations':²⁴

21 UNGA 'World Conference to Combat Racism and Racial Discrimination: Report of the Second World Conference to Combat Racism and Racial Discrimination' (1–12 August 1983) UN Doc. A/CONF.119/26.

22 UNGA, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to the Human Rights Council, 'Racial and xenophobic discrimination and the use of digital technologies in border and immigration enforcement' (22 September 2021) UN Doc. A/HRC/48/76.

23 UN ECOSOC 'Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres' (17 November 1966) UN Doc. E/CN.4/Sub.2/267.

24 K. Henrard, 'The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies' (2007) 14(2/3) *International Journal on Minority and Group Rights*, at 158. See also UN Committee on the Elimination of Racial Discrimination 'Concluding Observations: Denmark' (15 October 1997) UN Doc. CERD/C/304/Add.35, at para. 12.

In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.²⁵

The Human Rights Committee, in the context of the ICCPR, explicitly referred to 'effect' in General Comment No. 18. This could be understood to imply an acknowledgement of indirect discrimination, although the Committee did not fully engage with the concept in its case law until the early 2000s.²⁶

The CERD Committee also examined the obligation of States Parties to undertake to prevent, prohibit and eradicate all practices of racial segregation and apartheid in territories under their jurisdiction, clarifying that conditions of racial segregation may be created by governmental policies, but may also 'arise as an unintended by-product of the actions of private persons'.²⁷ The Committee clarified that States Parties shall ensure that none of the restrictions they may impose under Art. 5 of the ICERD are in purpose or effect contrary to Art. 1.²⁸ The connection between racial discrimination and self-determination was also addressed, acknowledging that 'governments should be sensitive towards the rights of persons belonging to ethnic groups'.²⁹ Special attention was given to the rights of refugees³⁰ and indigenous people.³¹

25 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XIV on the Definition of Discrimination' (17 March 1993) GAOR 48th Session Supp 18, 114, at para. 2.

26 K. Henrard, 'The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies' (2007) 14(2/3) International Journal on Minority and Group Rights at p. 159, citing *Althammer v. Austria*, 8 August 2003, HRC, Communication No. 998/2001, para. 10.2. and *Derksen v. the Netherlands*, 1 April 2004, HRC, Communication No. 976/2001, para. 9.3. See also CESCR, General Comment No. 16 (2005), defining indirect discrimination, para 13.

27 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XIX on the Prevention, Prohibition and Eradication of Racial Segregation and Apartheid' (1995) GAOR 47th Session Supp 18, 140, at para. 3.

28 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XX on the Non-Discriminatory Implementation of Rights and Freedoms' (8 March 1996) GAOR 51st Session Supp 18, 124, at para. 2.

29 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXI on the Right to Self-Determination' (8 March 1996) GAOR 48th Session Supp 18, 125, at para. 5.

30 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXII on Article 5 and Refugees and Displaced Persons' (24 August 1996) GAOR 51st Session Supp 18, 126.

31 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXIII on the Rights of Indigenous Peoples' (18 August 1997) GAOR 52nd Session Supp 18, 122.

2.2 *From Durban to the Future: Enhanced Awareness and the Awakening of a Dormant Mechanism*

In 2001, the Durban Conference resulted in a Declaration and Programme of Action considered as a 'historic, near-universal consensus on a blueprint for implementing human rights commitments in pursuit of the total elimination of racism, racial discrimination, xenophobia and related intolerance'.³² Inspired by the dismantling of apartheid in South Africa and recognizing the impact of colonialism in contemporary forms of racial discrimination,³³ the DDPA stated that 'racism, racial discrimination, xenophobia and related intolerance occur on the ground 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'.³⁴ It declared that 'any doctrine of racial superiority is scientifically false, morally condemnable, socially unjust and dangerous, and must be rejected along with theories which attempt to determine the existence of separate human races'.³⁵

Since 1997, the DDPA has been the roadmap for action at the UN level. It has expanded the scope of the UN agenda to consider historical precedents,³⁶ provided actionable recommendations on how to challenge racism,³⁷ helped coordinate efforts within affected communities,³⁸ encouraged data collection on the situation suffered by those communities,³⁹

32 UNGA 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (22 October 2021) UN Doc. A/76/434, at para. 4.

33 Office of the United Nations High Commissioner for Human Rights, 'Fighting Racism and Discrimination: The Durban Declaration and Programme of Action at 20' (2021) United Nations, at <https://www.ohchr.org/Documents/Issues/Racism/OHCHR_DDPA_Booklet_EN.pdf> at 3.

34 UN 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban Declaration' (8 September 2001) UN Doc. A/CONF.189/12, at para. 2.

35 Ibid., at para. 7.

36 UNGA 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance', at para. 6.

37 Ibid.

38 Ibid., at para. 7.

39 Ibid. The DDPA urged for the collection of statistical data disaggregated by race, ethnicity or nationality. The CERD Committee started receiving disaggregated data in a significantly higher number of State reports than in the past. It also 'showed increasing impatience with States that continued to refuse to collect them', see J. Clark, 'Knowing

and contributed to ‘centering societal reparations within the international human rights framework’.⁴⁰

The DDPA has been controversial in some respects, given the anti-Semitic statements made by a minority of participants in the Conference.⁴¹ As a consequence, a number of UN Member States boycotted the UN high level commemoration of the 20th anniversary of the DDPA.⁴² This, however, does not represent the spirit of the DDPA and should not overshadow the contribution it has made. The UN Special Rapporteur called on ‘States participating in any form of DDPA boycott instead to demonstrate a genuine commitment to racial justice and equality by implementing the DDPA’.⁴³ At the implementation level, concerns have been raised about the difficulties of assessing implementation, without a body in place to evaluate action plans, and the limited financial support that the process has received within the UN system.⁴⁴

Specific aspects of the DDPA were supported by other initiatives, such as the International Decade for People of African Descent (2015–2024),⁴⁵ the Agenda Towards Transformative Change for Racial Justice and Equality⁴⁶ and the Sustainable Development Agenda 2030.⁴⁷ Sustainable Development Goal (SDG) 10 focuses on the elimination of inequalities. Within this goal, Target 10.2 is to empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion

and Doing with Numbers: Disaggregated Data in the Work of the Committee on the Elimination of Racial Discrimination’ in D. Keane and A. Waughray (eds), *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination* (Manchester University Press 2017) at <<https://www.jstor.org/stable/j.ctvnb7p4c.9>>.

40 UNGA ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’ (22 October 2021) UN Doc. A/76/434, at para. 8.

41 Ibid., at para. 10.

42 Ibid., at para. 12.

43 Ibid., at para. 12.

44 Ibid., at paras 71–78. See also the work of the Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, and of the Working Group of Experts on Persons of African Descent, and of the Ad Hoc Committee on the elaboration of complementary standards.

45 UNGA Res 68/237 ‘Proclamation of the International Decade for People of African Descent’ (7 February 2014).

46 Office of the United Nations High Commissioner for Human Rights ‘Report of the UN High Commissioner for Human Rights’ (1 June 2021) UN Doc. A/HRC/47/53. See section 3.2 below on the Black Lives Matter movement and the agenda.

47 UNGA Res 70/1 ‘Transforming our World: the 2030 Agenda for Sustainable Development’ (21 October 2015).

or economic or other status, and Target 10.3 to ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard. In addition to SDG 10, many other SDGs and targets are relevant to tackling racial discrimination, as they address equal access to food (SDG 2), health (SDG 3), education (SDG 4), gender equality (SDG 5), decent work (SDG 8), and the elimination of poverty (SDG 1), among other aims.⁴⁸ SDG 16 is also particularly relevant to racial discrimination as it focuses on access to justice for all and on building effective, accountable and inclusive institutions at all levels, inter alia ensuring equal access to justice for all (Target 16.3) and responsive, participatory and representative decision-making at all levels (Target 16.7).⁴⁹ The SDG Agenda has been the framework for UN initiatives on racial discrimination since 2015,⁵⁰ and has served as a platform for awareness raising and information sharing. Advancements on this front include the collection of data on discrimination,⁵¹ although the disaggregation of data by race and ethnicity, envisaged explicitly in the indicator framework for the 2030 Agenda,⁵² remains weak for certain indicators (e.g., those associated to gender inequality),⁵³ which is a challenge for an informed approach to intersectionality.⁵⁴

48 Office of the United Nations High Commissioner for Human Rights 'Contributions to the 2030 Agenda for Sustainable Development, Submission Form: Combatting Racial Discrimination and Eradicating Poverty' available at <https://sustainabledevelopment.un.org/content/documents/14579OHCHR_Comm_on_the_Elimination_of_Racial_Discrimination.pdf>.

49 UNGA Res 70/1 'Transforming our World: the 2030 Agenda for Sustainable Development' (21 October 2015).

50 See, for instance, 'Checklist to Strengthen UN Work at Country Level to Combat Racial Discrimination and Advance Minority Rights' (19 March 2021) UN Network on Racial Discrimination and Protection of Minorities; UN ECOSOC 'Presidential Statement on the Occasion of the ECOSOC Special Ministerial Meeting on Reimagining Equality: Eliminating Racism, Xenophobia and Discrimination for All in the Decade of Action for the SDGs' (18 February 2021).

51 UN Sustainable Development Goals 'Indicator 1.3.1' gathers evidence about the proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law.

52 UNGA Res 71/313 'Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development' (6 July 2017), at Annex.

53 I.T. Winkler and M.L. Satterthwaite, 'Leaving no one behind? Persistent inequalities in the SDGs' (2017) 21(8) *The International Journal of Human Rights* 1073, at 1097; L. McGill, *How the Sustainable Development Goals Can Help Community Foundations Respond to COVID-19 and Advance Racial Equity* (Charles Stewart Mott Foundation 2020), at 11.

54 See Section 3.3 on intersectionality.

One of the ways in which the contribution of the UN to tackling racial discrimination has evolved over the last 25 years is the use of various mechanisms. Periodic reports before treaty monitoring bodies and individual communications which allow individuals to lodge complaints against committees remain the primary tools for combating racial discrimination.⁵⁵ Those mechanisms come with their limitations: some States Parties fail to submit periodic reports to committees like the CERD Committee,⁵⁶ and when the DDPA was adopted in 2001 only 36 of the 158 States Parties to ICERD had accepted the optional individual complaints system.⁵⁷ Despite the Committee's recommendation that States accept the individual communications procedure, only a limited number have done so. The practice of individual communications, although not abundant, could lead to enhanced and new forms of protection against discrimination, particularly as it allows 'groups of individuals [...] claiming to be victims' to bring a case before the Committee.⁵⁸ Given the strong collective dimension of some forms of racial discrimination, this space will be one to watch in the future development of individual communication procedures.

Since 2018, a new and unprecedented avenue has been explored in practice, with the first three inter-State communication procedures brought before the CERD Committee, which had laid unused for five decades. This procedure, set out in Articles 11 to 13 ICERD, allows a State Party to bring to the attention of the Committee the non-compliance of another State Party to the provisions of the Convention⁵⁹ and may lead to the appointment of an ad hoc conciliation commission which will deal with the dispute and make recommendations to the State.⁶⁰ Articles 11 to 13 of the ICERD were invoked to initiate proceedings

55 K.-L. Tang, 'Combating Racial Discrimination: The Effectiveness of an International Legal Regime' (2003) 33(1) *The British Journal of Social Work*, at 18.

56 *Ibid.*, at 25.

57 W.F. Felipe, 'The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights' (2002) 24(1) *Human Rights Quarterly*, at <<https://www.jstor.org/stable/20069594>>, 213.

58 P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016), at 68.

59 The Committee transmits the communication to the State party concerned, giving it the opportunity to provide written explanations and remedy. If this does not lead to the satisfaction of the parties or the issue is not resolved by negotiation, States have the possibility to refer the matter to the Committee. Articles 11–13 of the ICERD make inter-state communications compulsory for all States parties to the treaty. See D. Keane, 'Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument' (2020) *Human Rights Law Review*, at 261.

60 The CERD establishes a two-stage process. First, the Committee passes on the admissibility of the complaint and gathers all relevant information thereon, examining that

in *State of Qatar vs. Kingdom of Saudi Arabia*, *State of Qatar vs. United Arab Emirates*,⁶¹ and *State of Palestine vs. State of Israel*.⁶²

These are the first procedures at the inter-State level before the CERD Committee since the Convention was adopted in the 1960s,⁶³ in what represents the awakening of a dormant mechanism with great potential for tackling racial discrimination at the UN level. The inter-State communications procedure envisages the appointment of an ad-hoc conciliation commission which will hear the parties' arguments and will adopt recommendations for the settlement of the dispute in accordance with the human rights obligations established in the Convention. Incorporating conciliation as part of the procedure adds a unique character to this avenue, as it is a more flexible and confidential procedure. An illustration of this flexible approach is that the conciliation commission may adopt its own rules of procedure, as the commission for *Palestine v Israel* did in April 2022, adjusting the levels of confidentiality and

all available domestic remedies have been exhausted. Second, an ad hoc Conciliation Commission is established and charged with the task of preparing a report on the dispute and making appropriate recommendations to the States. See International Convention on the Elimination of all Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, at Arts 11–13.

- 61 UN Committee on the Elimination of Racial Discrimination 'Inter-State Communication Submitted by Qatar against the Kingdom of Saudi Arabia' (8 March 2018) UN Doc. ICERD-ISC-2018/1; UN Committee on the Elimination of Racial Discrimination 'Inter-State Communication Submitted by Qatar against the United Arab Emirates' (8 March 2018) UN Doc. ICERD-ISC-2018/2. Qatar submitted communications against Saudi Arabia and UAE, claiming that sanctions imposed in 2017 against Qatari citizens and companies, including expelling Qatari residents and visitors from its territory, violated Saudi Arabia's obligations under Arts 2, 4, 5 and 6 of the Convention. The Committee established it has jurisdiction over the communication, considered it admissible and established an ad hoc Conciliation. The procedure was suspended as a consequence of the Al Ula Agreement (suspension requested in January 2021 by Qatar), leaving *Palestine v Israel* as the only ongoing case before the CERD Committee.
- 62 UN Committee on the Elimination of Racial Discrimination 'Inter-State communication submitted by the State of Palestine against Israel' (23 April 2018) UN Doc. ICERD-ISC 2018/3. Palestine's communication claimed violations of the Convention with regard to Palestinian citizens living in the Occupied Palestinian Territory. The Committee established the ad hoc Conciliation Commission for this procedure in December 2021. See J. Eiken and D. Keane, 'Appointment of the Ad Hoc Conciliation Commissions under ICERD' (13 December 2021) EJIL:Talk!.
- 63 D. Keane, 'Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument' (2020) 20(2) Human Rights Law Review, at 261.

transparency that are appropriate for the case and the relationship between the parties.⁶⁴

The CERD Committee has emphasized the ‘unique nature of the mechanism’,⁶⁵ ‘set up for the common good of all States Parties’⁶⁶ and ‘conciliatory, opposite to adversarial’.⁶⁷ Given that an important part of the efforts at the UN level currently focus on the need to tackle racial discrimination at the systemic level,⁶⁸ dealing with racially biased institutions and policies, the cooperation of States is a necessary component in the advancement towards lower levels of racial discrimination. In that sense, the conciliatory nature of inter-State communication procedures provides a tool with great potential in this area. These are also the first inter-State communication procedures initiated before any of the UN human rights committees, although the procedure is technically available in many UN treaties.⁶⁹ This is partly linked to the fact that inter-State communications have traditionally been seen as an unfriendly and potentially politically motivated act that States continue to be reluctant to use. Developments in the case before the CERD Committee (*Palestine v Israel*) and any inter-State developments before other Committees (including the adoption of more detailed rules) could lead to a wider use of this procedure as a way to tackle racial discrimination, particularly institutional forms of it.

3 Thematic Developments

Racial discrimination continues to be ingrained at various levels of public and private spheres of UN Member States, but its manifestations have changed significantly overtime. The UN has paid particular attention to forms of racial

64 J. Eiken and D. Keane, ‘New Rules of Procedure of the Ad Hoc Conciliation Commission in Palestine v Israel’ (23 May 2022) EJIL:Talk!, at <<https://www.ejiltalk.org/new-rules-of-procedure-of-the-ad-hoc-conciliation-commission-in-palestine-v-israel/>>.

65 UN Committee on the Elimination of Racial Discrimination ‘Decision on Jurisdiction: Inter-State Communication Submitted by the State of Palestine against Israel’ (12 December 2019) UN Doc. CERD/C/100/5, at para. 3.6.

66 *Ibid.*, at para. 3.41.

67 *Ibid.*

68 See Black Lives Matter discussion under Section 3(2).

69 The ICCPR, ICESCR, CAT, CMW, and CED envisage inter-state communication procedures on a voluntary and reciprocal basis, see Keane, ‘Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument’. Inter-state communications have been widely used before the European Court of Human Rights, a procedure that is compulsory under the Convention, see I. Risini, *The Inter-State Application under the European Convention on Human Rights* (Brill 2018).

discrimination through social media and artificial intelligence and sought to respond to the urgent call of civil society through the Black Lives Matter movement. The UN has also started to take steps towards greater recognition of intersectionality. This section analyses the achievements and some of the remaining challenges of the work of the UN in these areas.

3.1 *Protecting against Racial Discrimination in the Era of Technology*

Technology can contribute to human rights advancements in many ways, but can also threaten equal enjoyment of human rights, including the right to be free from racial discrimination.⁷⁰ Social media and artificial intelligence are two examples of the potential and the threats that technology pose to human rights. Social media has great promise as a tool for awareness raising, empowering minorities and facilitating cooperation between actors.⁷¹ Yet, racial hatred is now more audible than ever through the amplifying platform that social media provides.⁷² Artificial intelligence also has great potential to protect against discrimination and is being used to prevent modern slavery, human trafficking and forced and child labour.⁷³ But its use in border control and for national security purposes is raising concerns of racial profiling and biases in the design of algorithms.⁷⁴

3.1.1 Racial Discrimination, Hate Speech and Social Media

Hate speech – expressions that advocate, incite, promote or justify hatred, violence and discrimination against an individual or group – has been a growing concern in recent decades, including speech advocating racial discrimination. While racist speech has unfortunately been a longstanding feature of human interactions, in the last quarter-century, the advent of social media has amplified the volume of such speech, increased the speed of its dissemination,

⁷⁰ UNGA 'Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (7 August 2018) UN Doc. A/73/312, 7 August 2018, at paras 2, 6 and 13.

⁷¹ Z. Baig, 'How Social Media is Changing the Face of Human Rights Activism' (1 December 2020) Human Rights Pulse at <<https://www.humanrightspulse.com/mastercontentblog/how-social-media-is-changing-the-face-of-human-rights-activism>>.

⁷² Z. Laub, 'Hate Speech on Social Media: Global Comparisons' (7 June 2019) Council on Foreign Relations at <<https://www.cfr.org/backgroundunder/hate-speech-social-media-global-comparisons>>.

⁷³ N. Bliss et al., 'AI for Good: Using AI to Prevent Modern Slavery, Human Trafficking and Forced and Child Labour' (24 March 2021) Delta 8.7 at <<https://delta87.org/2021/03/ai-good-using-ai-prevent-modern-slavery-human-trafficking-forced-child-labour/>>.

⁷⁴ UN Committee on the Elimination of Racial Discrimination 'General Recommendation xxxvi on Preventing and Combating Racial Profiling by Law Enforcement Officials' (24 November 2020) GAOR 102nd Session Supp 18, at para. 12.

enabled speakers to hide their identities, and facilitated the sophisticated targeting of individuals and minorities. The first social media site was created in 1997, blogging began in 1999, YouTube went online in 2005, and Facebook and Twitter became available in 2006.⁷⁵ In 2021, 4.88 billion people (62 per cent of the world's total population) use the internet on any given day, with 600,000 new users joining each day.⁷⁶

The UN has responded to racist hate speech in two main ways. First, it has tried to coordinate its approach to preventing and confronting such speech across its areas of operations. Second, and on a more granular level, the CERD Committee has interpreted the ICERD to adapt its provisions to the age of social media.

On coordination, the UN has acknowledged that combating racist hate speech is relevant to many of its functions, including human rights protection; prevention of atrocity crime; preventing and countering terrorism and the underlying spread of violent extremism and counter-terrorism; preventing and addressing race-based violence; enhancing protection of civilians; refugee protection; the fight against all forms of racism and discrimination; protection of minorities; sustaining peace; and engaging women, children and youth. It has sought to implement a coordinated response that 'tackles the root causes and drivers of hate speech, as well as its impact on victims and societies more broadly'.⁷⁷ In 2019, the Secretary-General launched the UN Strategy and Plan of Action on Hate Speech.⁷⁸ It provides a system-wide programme with the objective of identifying, preventing and confronting hate speech. The Strategy provides that the UN system 'should establish and strengthen partnerships with new and traditional media to address hate speech narratives and promote the values of tolerance, non-discrimination, pluralism, and freedom of opinion and expression'.⁷⁹ It also puts emphasis on data collection, addressing root causes and drivers of hate speech, supporting victims and 'using education as a tool for addressing and countering hate speech'.⁸⁰ While the Strategy and Plan of Action provide a holistic approach to hate speech, taking into consideration

75 D. Hendricks, 'Complete History of Social Media: Then and Now' (8 May 2013) Small Business Trends at <<https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>>.

76 'Digital Around the World' Datareportal, at <<https://datareportal.com/global-digital-overview>> (accessed 4 July 2022).

77 A. Guterres, 'UN Strategy and Plan of Action on Hate Speech' (18 June 2019).

78 Ibid.

79 Ibid.

80 Ibid.

traditional and modern media contexts, awareness of international legal standards and their impact at the domestic level is also important.⁸¹

The UN has convened a High-level Panel on Digital Cooperation with members from industry, the private sector, governments, academia, civil society and inter-governmental organisations.⁸² It launched its report on 'The Age of Digital Interdependence' in June 2019, but there is no reference to hate speech or racial discrimination. There is a generic recommendation to urging the Secretary-General 'to institute an agencies-wide review of how existing international human rights accords and standards apply to new and emerging digital technologies. Civil society, governments, the private sector and the public should be invited to submit their views on how to apply existing human rights instruments in the digital age in a proactive and transparent process.'⁸³ Another entity, the UN Internet Governance Forum, has served as a platform for discussions among diverse stakeholders since 2006.⁸⁴ It has intermittently considered hate speech, but serves more as a forum for national and regional initiatives to take place within, such as workshops on discriminatory speech.⁸⁵

A more granular approach has been taken by the CERD Committee, which has elaborated on the provisions of the 1966 Convention as they apply to racist speech expressed online through a series of General Recommendations over the past two decades.⁸⁶ According to Art. 4, States Parties are required to

81 The work of the High Level Panel on Legal Experts on Media Freedom is contributing to that aim since 2019.

82 'UN Chief Urges Top Digital Tech Panel to Come Up with "Bold, Innovative Ideas" for an "Inclusive" Future' (23 January 2019) UN News.

83 UN High-level Panel on Digital Cooperation 'The Age of Digital Interdependence' (June 2019), at <<https://www.un.org/en/pdfs/HLP%2001n%20Digital%20Cooperation%20Report%20Executive%20Summary%20-%20ENG.pdf>>, Recommendations 3A–3C.

84 UN Internet Governance Forum at <<https://www.intgovforum.org/multilingual/content/about-igf-faqs>> (accessed 4 July 2022).

85 See, e.g., '2015 11 10 WS151 Hate and discriminatory speech and FoE online Workshop Room 8 Finished' (10–13 November 2015) Internet Governance Forum, at <<https://www.intgovforum.org/en/content/2015-11-10-ws151-hate-and-discriminatory-speech-and-foe-online-workshop-room-8-finished>> (accessed 4 July 2022).

86 See, e.g., UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)' (19 March 2002) GAOR 57th Session Supp 18, 111, at para. 4; UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXX on Discrimination against Non-Citizens' (1 October 2004) GAOR 59th Session Supp 18, 93, at para. 12; UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXXIV on Racial Discrimination against People of African Descent' (3 October 2011) GAOR 79th Session Supp 18, at para. 29; UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXXVI on Preventing and Combating Racial Profiling by Law Enforcement Officials' (24 November 2020) GAOR 102nd Session Supp 18, at para. 27.

penalize racist hate speech, including dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, acts of racially motivated violence and incitement to such acts. Art. 7 requires measures 'particularly in the fields of teaching, education, culture and information' to combat prejudices that may lead to racial discrimination, and to promote a climate of tolerance.

In 2013, the Committee issued General Recommendation No. 25 on 'Combating Racist Hate Speech'. It observed that

In line with their obligations under the Convention, States Parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them. The principles articulated in the present recommendation apply to racist hate speech, whether emanating from individuals or groups, in whatever forms it manifests itself, orally or in print, or disseminated through electronic media, including the Internet and social networking sites.⁸⁷

The Committee noted that Art. 4 of the ICERD 'does not supply detailed guidance for the qualification of forms of conduct as criminal offences' and therefore recommended that various contextual factors be taken into account, including:

The reach of the speech, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.⁸⁸

In the context of Art. 7 of the ICERD, the Committee stated that '[i]nformed, ethical and objective media, including social media and the Internet, have an essential role in promoting responsibility in the dissemination of ideas and opinion' and States should encourage the media to 'adopt codes of professional ethics and press codes that incorporate respect for the principles of the Convention and other fundamental human rights standards'.⁸⁹ The General

87 UN Committee on the Elimination of Racial Discrimination 'General Recommendation xxxv on Combating Racist Hate Speech' (13 August 2013) GAOR 83rd Session Supp 18, at para. 7 (emphasis added).

88 *Ibid.*, at para. 15.

89 *Ibid.*, at para. 39.

Recommendation concluded by noting that '[t]he prevalence of racist hate speech in all regions of the world continues to represent a significant contemporary challenge for human rights'.⁹⁰

The Committee has also urged States to take measures to prevent, condemn and combat racist hate speech against various groups on the internet and social media, to ensure incidents are effectively investigated and, where appropriate, prosecuted and punished, and to cooperate with social media platforms to curb the dissemination of racist hate speech. It has made such recommendations to States such as Lebanon,⁹¹ Belgium,⁹² and Ireland.⁹³

3.1.2 Racial Profiling through Artificial Intelligence

One of the events marking the beginning of the period analysed in this chapter is 11 September 2001. The shocking attacks on US soil and the US response resulted in a transformation of counterterrorism policies and border control approaches around the world.⁹⁴ As part of that transformation, the use of artificial intelligence (AI) was incorporated into security and border control.⁹⁵ Technology has become since a prevalent way of controlling individuals for these purposes. According to the Carnegie Endowment for International Peace, at least 75 out of 176 States were using AI technologies for surveillance purposes in 2019.⁹⁶ The UN has addressed the impact of the growing use of

⁹⁰ Ibid., at para. 46 (emphasis added).

⁹¹ UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twenty-third and Twenty-fourth Periodic Reports of Lebanon' (1 September 2021) UN Doc. CERD/C/LBN/CO/23-24, at paras 14–15 (speech against migrants and refugees).

⁹² UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twentieth to Twenty-second Periodic Reports of Belgium' (21 May 2021) UN Doc. CERD/C/BEL/CO/20-22, at paras 18-19 (speech about people of Asian origin during the pandemic).

⁹³ UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Fifth to Ninth Reports of Ireland' (23 January 2020) UN Doc. CERD/C/IRL/CO/5-9, at paras 19–20 (speech about travellers, Roma, refugees, asylum seekers and migrants).

⁹⁴ Council of Councils, 'The 9/11 Effect and the Transformation of Global Security' (1 September 2021) at <<https://www.cfr.org/councilofcouncils/global-memos/911-effect-and-transformation-global-security>>.

⁹⁵ W. Wark, 'The New World of Surveillance' (1 September 2021) Council on Foreign Relations at <<https://www.cfr.org/councilofcouncils/global-memos/911-effect-and-transformation-global-security>>.

⁹⁶ S. Feldstein, 'The Global Expansion of AI Surveillance' (17 September 2019) Carnegie Endowment for International Peace at <<https://carnegieendowment.org/2019/09/17/global-expansion-of-ai-surveillance-pub-79847>>.

artificial intelligence on the enjoyment of the right to privacy and other rights,⁹⁷ including the right not to be discriminated against on racial grounds. On racial discrimination, the CERD General Recommendation No. 36 (2020) has noted with concern:

... that racial profiling has increased owing to contemporary concerns about terrorism and migration that exacerbate prejudice and intolerance towards members of certain ethnic groups.⁹⁸

The General Recommendation identifies migrants, refugees and asylum seekers, people of African descent, indigenous peoples and national and ethnic minorities as most vulnerable to racial profiling.⁹⁹ It clarifies the principles and obligations under the Convention, and makes recommendations in various areas, including legislative and policy related measures, human rights education and training, and accountability. Recommendations on accountability are particularly interesting. They emphasize the role of national human rights institutions and civil society in monitoring incidents of racial profiling and assisting victims, as well as the relevance of international and regional human rights mechanisms in this field. One of the recommendations calls for States to create reporting mechanisms for receiving complaints of racial discrimination, racism and racial and ethnic profiling from citizens,¹⁰⁰ although it does not reflect on the risk of duplication or overlapping with existing mechanisms, which should be carefully considered.

Racial profiling was described in the DDPA as 'comprising the practice of police and other law enforcement officers relying to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity'.¹⁰¹ It is one of the areas where intersectionality becomes more apparent (see Section 3.3. below), as discrimination based on race may intersect with other grounds such as religion, sexual orientation, gender identity,

97 Report of the UN High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' (13 September 2021) UN Doc. A/HRC/48/31.

98 UN Committee on the Elimination of Racial Discrimination 'General Recommendation xxxvi on Preventing and Combating Racial Profiling by Law Enforcement Officials' (24 November 2020) GAOR 102nd Session Supp 18, at para. 10.

99 Ibid., at para. 11.

100 Ibid., at para. 52.

101 UN 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban Declaration' (8 September 2001) UN Doc. A/CONF.189/12, at 40 para. 72.

or migration status.¹⁰² Racial profiling is linked to stereotypes and biases, which may be conscious or unconscious, and individual or institutional and structural.¹⁰³ The CERD Committee has analysed the negative and cumulative effects of racial profiling in the individuals subjected to it and in their human rights,¹⁰⁴ as well as the far-reaching consequences this may have for domestic justice systems.¹⁰⁵ The CERD Committee and the Human Rights Committee have issued several observations to States Parties on racial profiling, including the Netherlands,¹⁰⁶ Belgium,¹⁰⁷ Belarus,¹⁰⁸ Hungary,¹⁰⁹ and Australia.¹¹⁰ The Human Rights Committee has also emphasized that 'there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances'.¹¹¹ The CERD Committee has recalled the obligation of States to 'ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin'.¹¹²

The CERD has paid particular attention to the additional challenges of the use of AI, observing that:

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- 102 UN Committee on the Elimination of Racial Discrimination 'General Recommendation xxxvi on Preventing and Combating Racial Profiling by Law Enforcement Officials' (24 November 2020) GAOR 102nd Session Supp 18, at para. 18.
- 103 *Ibid.*, at para. 20.
- 104 *Ibid.*, at paras 26–29.
- 105 *Ibid.*, at para. 30.
- 106 UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twenty-Second to Twenty-Fourth Periodic Reports of the Kingdom of the Netherlands' (16 November 2021) UN Doc. CERD/C/NLD/CO/22-24, at para. 16; UN HRC 'Concluding Observations on the Fifth Periodic Report of the Netherlands' (22 August 2019) UN Doc. CCPR/C/NLD/CO/5, at para. 49.
- 107 UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twentieth to Twenty-Second Periodic Reports of Belgium' (21 May 2021) UN Doc. CERD/C/BEL/CO/20-22, at para. 16.
- 108 UN HRC 'Concluding Observations on the Third Periodic Report of Belarus' (22 November 2018) UN Doc. CCPR/C/BLR/CO/3, at para. 18.
- 109 UN HRC 'Concluding Observations on the Sixth Periodic Report of Hungary' (9 May 2018) UN Doc. CCPR/C/HUN/CO/6, at para. 18.
- 110 UN HRC 'Concluding Observations on the Sixth Periodic Report of Australia' (November 2017) UN Doc. CCPR/C/AUS/CO/6, at para. 20.
- 111 UN HRC 'General Comment No. 29: Derogations from Provisions of the Covenant during a State of Emergency (Art. 4)' (24 July 2001) GAOR 56th Session Supp 40 Vol 1, 202, at para. 8.
- 112 UNGA 'Report of the Committee on the Elimination of Racial Discrimination' (4–22 March and 5–23 August 2002) GAOR 57th Session Supp18, at XI (C(5)).

the increasing use of new technological tools, including artificial intelligence, in areas such as security, border control and access to social services, has the potential to deepen racism, racial discrimination, xenophobia and other forms of exclusion.¹¹³

The Committee considers various ways in which bias could be ingrained into algorithmic profiling systems and makes recommendations to States, including to carefully assess the potential human rights impact of facial recognition or algorithmic profiling,¹¹⁴ to establish independent oversight bodies with a mandate to monitor the use of AI tools by the public sector,¹¹⁵ and to adopt measures to ensure that the private sector comply with human rights in their use of AI.¹¹⁶ States should also ensure that ‘all instances of algorithmic bias are duly investigated and that sanctions are imposed’¹¹⁷ and ‘should document cases of racial discrimination associated with artificial intelligence, as well as prevention measures, sanctions and remedies, and include such information in their reports to the Committee’.¹¹⁸

3.2 *The Black Lives Matter Movement: Revisiting Institutionalised Racial Discrimination and Biases*

The murder of George Floyd in Minneapolis in May 2020 was a turning point in civil society mobilisation against racial discrimination.¹¹⁹ Protests by the Black Lives Matter movement¹²⁰ were held around the world, raising voices

113 UN Committee on the Elimination of Racial Discrimination ‘General Recommendation XXXVI on Preventing and Combating Racial Profiling by Law Enforcement Officials’ (24 November 2020) GAOR 102nd Session Supp 18, at para. 12.

114 Ibid., at paras 59 and 60.

115 Ibid., at para. 62.

116 Ibid., at para. 63.

117 Ibid., at para. 65.

118 Ibid., at para. 68.

119 George Floyd’s murder resulted in the conviction of the police officer who killed him, on charges of murder and manslaughter, see A. Vera and D. Wolfe, ‘Seeking Justice: A Timeline since the Death of George Floyd’ CNN, at <<https://edition.cnn.com/interactive/2021/03/us/george-floyd-case-timeline/>>.

120 The Black Lives Matter movement was founded in 2012 with the mission of ‘eradicating white supremacy and building local power to intervene in violence inflicted on Black Communities by the State and vigilantes, by combatting and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy’. For further information, see the website, available at <<https://blacklivesmatter.com/about/>>. The movement organized protests denouncing a pattern of racial bias against victims of police brutality, not only by the police but also in judicial proceedings, which was also uncovered by investigations led by the US Justice Department, see ‘Ferguson Unrest: From

against racial bias and discrimination,¹²¹ shifting 'the transnational discourse surrounding race and structural inequality'.¹²²

The UN reacted to these claims with a sense of urgency, but could not meet the expectations placed upon it. The CERD Committee was the first UN human rights treaty body to issue a statement in response to the killing of George Floyd¹²³ outside of the United State reporting cycle, making use of its Early Warning and Urgent Action procedure. The pressure of more than 600 human rights organisations and the families of the victims of police brutality led the UN Human Rights Council to hold an 'urgent debate', a special session focusing on 'systemic, anti-Black racism'.¹²⁴ The Group of African States proposed a resolution condemning systemic racism and police brutality in the US and called for a commission of inquiry into US law enforcement.¹²⁵ However, Resolution 43/1 of the UN Human Rights Council had a much more limited scope, defaulting to the UN 'comfort zone' of awareness-raising.¹²⁶ It invited 'treaty bodies, special procedure mandate holders and international and regional human rights mechanisms, within their respective mandates, to pay due attention to all forms of racism, racial discrimination, xenophobia and related intolerance, including against Africans and people of African descent, and to bring them to the attention of the Human Rights Council'.¹²⁷ It also requested the UN High

Shooting to Nationwide Protests' (10 August 2015) BBC News, at <<https://www.bbc.co.uk/news/world-us-canada-30193354>>.

- 121 J. Kirby, "Black Lives Matter" has Become a Global Rallying Cry Against Racism and Police Brutality' (12 June 2020) Vox at <<https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>>.
- 122 E. Tendayi Achiume, 'Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate' (15 December 2020) EJIL: Talk!, at <<https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate/>>.
- 123 UN Committee on the Elimination of Racial Discrimination 'Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures-Statement 1: United States of America' (2020) at <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/EarlyWarning/Statements/USA.pdf>>.
- 124 Ibid.
- 125 UN HR Council 'Draft Resolution by Burkina Faso, Iran and Palestine: The Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent against Police Brutality and other Violations of Human Rights' (17 June 2020) UN Doc. A/HRC/43/L.50.
- 126 Tendayi Achiume, 'Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate' (15 December 2020) at <<https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate/>>.
- 127 UN HR Council 'Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force

Commissioner for Human Rights to prepare a report on 'systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and people of African descent, to contribute to accountability and redress for victims'.¹²⁸ It requested the High Commissioner to 'examine government responses to anti-racism peaceful protests, including the alleged use of excessive force against protesters, bystanders and journalists'.¹²⁹

The report of the UN High Commissioner for Human Rights, adopted in June 2021,¹³⁰ outlined a four-point agenda towards transformative change for racial justice and equality and called upon States to translate the agenda into action. The first component of the agenda focuses on a systemic response to systemic racism, as the way to 'rapidly reverse denial, and alter structures, institutions and behaviours leading to direct or indirect discrimination against Africans and people of African descent in every part of life'.¹³¹ The second component focuses on ensuring 'accountability of law enforcement officials for human rights violations and crimes against Africans and persons of African descent, clos(ing) trust deficits, and strengthen(ing) institutional oversight'.¹³² The third action point aims at ensuring that 'people of African descent and those who stand up against racism are protected and heard, and their concerns are acted on'.¹³³ The fourth action point is to 'recognise that behind contemporary forms of racism, dehumanisation and exclusion lies the failure to acknowledge the responsibilities for enslavement, the transatlantic trade in enslaved Africans and colonialism, and to comprehensively repair the harms'.¹³⁴

The UN High Commissioner for Human Rights, Michelle Bachelet, called on national leaders to 'condemn racism unequivocally [...] to reflect on what has driven people to boiling point, to listen and learn, and to take actions that truly tackle inequalities'.¹³⁵ According to her, 'the anger we have seen in the US

and Other Human Rights Violations by Law Enforcement Officers' (1 June 2021) UN Doc. A/HRC/47/53 at para. 8.

128 Ibid., at para. 3.

129 Ibid., at para. 2.

130 Ibid.

131 Ibid., at para. 22.

132 Ibid.

133 Ibid.

134 Ibid.

135 OHCHR News and Events, 'US Protests: Deep-Seated Grievances must be Addressed – Bachelet' (3 June 2020) at <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25922&LangID=E>>.

[...] shows why far-reaching reforms and inclusive dialogue are needed there to break the cycle of impunity for unlawful killings by police and racial bias in policing'.¹³⁶ She also called for a 'profound examination of a wide range of issues, including socio-economic factors and deep-seated discrimination. To move forward, communities must be able to participate in shaping decisions that affect them and be able to air their grievances'.¹³⁷ Independent experts appointed by the UN Human Rights Council called for 'systemic reform and justice',¹³⁸ a call that adds to the expressions of solidarity and claims for reform from within the UN,¹³⁹ from regional organisations like the African¹⁴⁰ or the European Union,¹⁴¹ and States.¹⁴² The civil society movement and the UN reaction also sent shockwaves to States around the world, some of which started

136 Ibid.

137 Ibid.

138 'UN Experts Condemn Modern-Day Racial Terror Lynchings in US and Call for Systemic Reform and Justice' (5 June 2020) OHCHR News and Events at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933&LangID=E>>.

139 H. Plunkett, 'Citing "Weight of History", Senior UN Officials of African Descent Issue Call to "Go Beyond and Do More" to End Racism' (14 June 2020) UN News at <<https://news.un.org/en/story/2020/06/1066242>>; C. Lynch, 'U.N. Reverses Ban on Staff Participation in Anti-Racism' (8 June 2020) Foreign Policy at <<https://foreignpolicy.com/2020/06/08/united-nations-staff-george-floyd-protests/>>; A. Guterres, 'Protests in New York' (2 June 2020) Twitter at <<https://twitter.com/antonioguterres/status/1267939502326263810>>.

140 C. Anna, 'In Rare Move, U.S. Embassies in Africa Condemn George Floyd Murder' (30 May 2020) at <<https://web.archive.org/web/20200531100719/https://time.com/5845407/us-embassy-africa-condemn-george-floyd/>>.

141 European Parliament Resolution of 19 June 2020 on the Anti-Racism Protests Following the Death of George Floyd [2020] OJ C 362.

142 L. Cecco 'Trudeau: Canadians Watching US Unrest and Police Violence in "Shock and Horror"' (29 May 2020) The Guardian at <<https://www.theguardian.com/world/2020/may/29/justin-trudeau-george-floyd-reaction-racism>>; 'China Urges the US to Eliminate Racial Discrimination in All Forms' (1 June 2020) CGTN News at <<https://news.cgtn.com/news/2020-06-01/China-urges-U-S-to-eliminate-racial-discrimination-in-all-forms-QY4LjpMofe/index.html>>; European Parliament, 'Resolution on the anti-racism protests following the death of George Floyd' (19 June 2020) 2020/2685 (RSP); 'PM Narendra Modi Conveys to Donald Trump His Concern over "Civil Disturbances" in US' (2 June 2020) Deccan Herald at <<https://www.deccanherald.com/national/pm-narendra-modi-conveys-to-donald-trump-his-concern-over-civil-disturbances-in-us-845005.html>>; 'Events in Minnesota Expose Human Rights Problems in US – Russian Foreign Ministry' (30 May 2020) TASS at <<https://tass.com/world/1162073>>; H. Isilow, 'South Africans Protest in Solidarity with George Floyd' (4 June 2020) Anadolu Agency at <<https://www.aa.com.tr/en/africa/south-africans-protest-in-solidarity-with-george-floyd/1864532>>; E. Kossaiyf, 'Interview: Saudi Envoy to UN Abdallah Al-Mouallimi Says US Protests Show Strength of American Society' (7 June 2020) Arab News at <<https://www.arabnews.com/node/1685886/saudi-arabia>>.

considering measures to tackle systemic racial discrimination in their own institutions.¹⁴³

In March 2021, the Human Rights Council adopted the outcome of the Universal Periodic Review of the US, comprising the report of the Working Group on the Universal Periodic Review, the views of the US, and its commitments. The report of the Working Group includes several recommendations for the US to review policies with a view to preventing racism and racial discrimination, and to eliminate racial profiling and racial discrimination in access to justice.¹⁴⁴ In its views on the report and the recommendations, the US stated: ‘we support enforcing laws that prohibit racial discrimination, racial profiling, and excessive use of force in policing’.¹⁴⁵

The CERD will assess these issues in 2022, in its upcoming Concluding Observations to the US, following the submission in June 2021 of the US report, which was overdue since 2018 and refers to previous CERD Concluding Observations on excessive use of force by law enforcement officials and racial profiling.¹⁴⁶ In its 2014 Concluding observations to the US, the CERD Committee had already expressed its concerns at the high number of gun-related deaths and injuries ‘which disproportionately affect members of racial and ethnic minorities, particularly African Americans’.¹⁴⁷ It also reiterated its previous concerns ‘at the brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities, including against unarmed individuals, which has a disparate impact on African Americans and undocumented migrants crossing the US-Mexico border’.¹⁴⁸

143 L. Cecco, ‘Trudeau: Canadians Watching US Unrest and Police Violence in ‘Shock and Horror’ (29 May 2020) *The Guardian* at <<https://www.theguardian.com/world/2020/may/29/justin-trudeau-george-floyd-reaction-racism>>; European Parliament, ‘Resolution on the anti-racism protests following the death of George Floyd’ (19 June 2020) 2020/2685 (RSP).

144 UN HR Council ‘Report of the Working Group on the Universal Periodic Review: United States of America’ (15 December 2020) UN Doc. A/HRC/46/15.

145 UN HR Council ‘Report of the Working Group on the Universal Periodic Review: United States of America, Addendum’ (4 March 2021) UN Doc. A/HRC/46/15/Add.1, at para.7.

146 United States Department of State ‘Submission to the Committee on the Elimination of Racial Discrimination: Tenth, Eleventh, and Twelfth Periodic Reports on the International Convention on the Elimination of All Forms of Racial Discrimination’ (2 June 2021), at <http://www.prrac.org/pdf/cerd_c_usa_10-12_7522_e-1.pdf>.

147 UN Committee on the Elimination of Racial Discrimination ‘Concluding observations on the combined seventh to ninth periodic reports of the United States of America’ (25 September 2014) UN Doc. CERD/C/USA/CO/7-9, at para. 16.

148 *Ibid.*, at para 17. The CERD Committee has also recently referred to racially motivated police violence in its Concluding Observations to Belgium, expressing concerns about reports that such violence has ‘intensified against the backdrop of [...] the recent

The CERD Committee has also observed the relevance of ensuring the right to a fair trial to victims of racism, which is connected to the problems of institutionalised racism in law enforcement. General Recommendation No. 31 (2005) emphasized the need to ensure access to justice¹⁴⁹ and to guarantee that 'the mere fact of belonging to a racial or ethnic group [...] is not a sufficient reason, de jure or de facto, to place a person in pretrial detention'.¹⁵⁰ It also examined the presumption of innocence,¹⁵¹ the right to the assistance of counsel and the right to an interpreter¹⁵² in connection with the situation of victims of racism, and called States to 'strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel'.¹⁵³

The impact of the Black Lives Matter movement in the US at the legislative level remains limited to date.¹⁵⁴ That raises questions about the limited implementation of recommendations by UN mechanisms, including the Universal Periodic Review and decisions of the CERD Committee.¹⁵⁵ In that regard, it is important to note that the UN human rights system relies heavily on the dialogue and cooperation between Member States and the UN, and that is particularly the case in the CERD Committee, which is at the core of the UN action against racial discrimination.¹⁵⁶

anti-racism demonstrations' in the country, see UN Committee on the Elimination of Racial Discrimination 'Concluding Observations on the Combined Twentieth to Twenty-Second Periodic Reports of Belgium' (21 May 2021) UN Doc. CERD/C/BEL/CO/20-22, at para. 13.

149 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System' (2005) GAOR 60th Session Supp 18, 98, at para. 6.

150 Ibid., at para. 26.

151 Ibid., at para. 29.

152 Ibid., at para. 30.

153 Ibid., at para. 31.

154 The George Floyd Justice in Policing Act of 2020 (29 June 2020) 116th Congress 2nd Session H.R. 7120, found at <<https://www.congress.gov/bill/116th-congress/house-bill/7120>>, which proposed enhanced enforcement mechanisms to remedy violations of law enforcement, failed to advance in to the Senate in September 2021, see 'Sweeping George Floyd Police Reform Bill Stalls as Talks Collapse' (23 September 2021) The Guardian at <<https://www.theguardian.com/us-news/2021/sep/22/us-police-reform-bill-congress-bip-artisan-talks>>.

155 W.F. Felipe, 'The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights' (2002) 24(1) Human Rights Quarterly at <<https://www.jstor.org/stable/20069594>>.

156 See P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016), at 64–69 (for an analysis of the functions of the Committee).

3.3 *Intersectionality and Multiple Discrimination: Leaving 'No-One Behind'*

A relatively new dimension to the UN's work on combating racial discrimination is its adoption of intersectionality, a term coined in 1989 by Kimberlé Crenshaw¹⁵⁷ used to refer to 'the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups'.¹⁵⁸

The Durban Conference was a watershed moment in explicitly referring to 'intersectionality' and examining the intersection of gender and race in the events that surrounded the 'Durban moment'.¹⁵⁹ For example, the DDPA noted how race, gender and age can converge in the unlawful practice of human trafficking, affirming the 'urgent need to prevent, combat and eliminate all forms of trafficking in persons, in particular women and children, and recognize that victims of trafficking are particularly exposed to racism, racial discrimination, xenophobia and related intolerance'.¹⁶⁰ Two decades later, in the light of deepening inequalities caused by the pandemic, the High Commissioner for Human Rights emphasised that '[a]nti-racism protests and solidarity movements seen recently around the world had brought attention to how women and girls were heavily affected by institutional racism and other forms of intersectional discrimination'.¹⁶¹ The Special Rapporteur on the human rights of migrants also stressed the need 'to address the multiple intersecting forms of discrimination, such as the ones faced by indigenous migrant women'. States must address the challenges related to the COVID-19 pandemic in a manner that upheld international human rights law.¹⁶²

157 K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

158 Merriam Webster Dictionary's definition.

159 A.B. Bakan and Y. Abu Laban, 'Intersectionality and the United Nations World Conference Against Racism' (2017) 38(1) *Atlantis: Critical Studies in Gender, Culture, and Social Justice* 220, at 221.

160 UN Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 'Durban Declaration' (8 September 2001) UN Doc. A/CONF.189/12, at para. 30.

161 'Human Rights Council Holds Annual Panel Discussion on the Integration of a Gender Perspective in its Work' (28 September 2020) UN Human Rights Council Press Release at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26309&LangID=E>>.

162 *Ibid.*

However, the integration of intersectional perspectives into the UN's work on racial discrimination has been uneven. The statistics reported by Member States to the UN on various indicators often fail to capture 'intersecting inequalities', which requires disaggregating data by sex, age, class, race, location, disability, educational level, migratory status and other characteristics.¹⁶³ For reporting on infections during the pandemic, for example, only 60 of 193 Member States provided data on sex and age, and even fewer included data on race and gender.¹⁶⁴

There has been a divergence in the approach of UN treaty bodies as well. The Human Rights Committee, the body supervising the implementation of the ICCPR, has been criticised as 'unidimensional in its focus'; a study of its jurisprudence 1981–2016 found that the Committee consider discrimination only on the basis of one of the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶⁵ References to 'dual, multiple, combination, overlapping, compound or intersectional discrimination remain scarce' in the Committee decisions.¹⁶⁶ Although restricted though Art. 1(1) of the CERD to examining discrimination through the lens of 'race, colour, descent, or national or ethnic origin', the CERD Committee has made an effort to adopt a more intersectional approach.¹⁶⁷ Key examples are its General Recommendation No. 23 (1997) on racial discrimination affecting indigenous peoples,¹⁶⁸ General Recommendation No. 25 on 'gender-related dimensions of racial discrimination' (2000), General Recommendation No. 27 on 'discrimination against Roma' that included reference to a gender perspective, and General Recommendation No. 29 on Descent (2002) that refers to 'multiple discrimination against women members of descent-based communities'.

163 P. Seck, 'Integrate Intersecting Inequalities to Leave no one Behind' (13 October 2020) UN World Data Forum.

164 Ibid.

165 S. Atrey, 'Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR' (2017) 35(3) *Nordic Journal of Human Rights* 220, at 222.

166 Ibid.

167 N. Ghanea, 'Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination' (2013) 34(4) *Human Rights Quarterly* at <<https://heinonline.org/HOL/License>>.

168 UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXIII on the Rights of Indigenous Peoples' (18 August 1997) GAOR 52nd Session Supp 18, 122.

4 Concluding Remarks

In some ways, the UN's record on combating racial discrimination over the last quarter-century is a microcosm of its strengths and weaknesses as an institution, across all areas of operation. The UN's strengths lie in awareness-raising, the setting of international standards, the launching of initiatives, and the development of a common language around rights and obligations.¹⁶⁹ But it also suffers from weaknesses – implementation and enforcement are hampered by a lack of resources, a lack of cooperation from States, and a mindset that focuses on taking issues 'into account' rather than tackling them head-on.¹⁷⁰ The sprawling nature of the UN system renders coordination difficult and the connections between issues, including intersectionality, are challenging to make.¹⁷¹ Nonetheless, the blueprint created by the Durban Conference in 2001 has led to concrete improvements, and the activation of the inter-State procedure under ICERD gives hope of a new tool for accountability.

The work of the CERD Committee and the Special Rapporteur in the last 25 years has been key to advancing action against all forms of racial discrimination. Working to ensure that the ICERD remains fit for purpose has required these bodies to develop more detailed rules of procedure for some aspects of the Convention, to clarify what racial discrimination means through General Recommendations, and to take an evolving approach to the mandate of the Special Rapporteur in response to changes in, and awareness of, groups that suffer racial discrimination.

Whilst that effort will continue to be required, the lessons learned from the last quarter-century and a forward-looking exercise indicate some challenges ahead. Given the strong connection between the prohibition of racial discrimination and the enjoyment of other human rights, coordination with other human rights treaty bodies and Special Rapporteurs will be the only way forward in addressing all forms of racial discrimination. Connected to this, intersectionality needs to be embraced in the international response to racial discrimination, ensuring that responses to any of its forms focus on protecting victims who may be suffering discrimination on multiple grounds.

One of the challenges requiring further consideration is the risk of bodies merely 'taking into account' issues without demanding more tangible commitments from States. States would benefit from further guidance from the UN on the utility and potential of individual or inter-State communication

169 See Sections 2.1 and 2.2 above.

170 See Sections 3.1 and 3.2 above.

171 See Section 3.3 above.

procedures. That could lead to a wider acceptance of the two mechanisms, and also to their increased use. Advancing the understanding of their procedural features may also contribute to this attempt. As an example, further consideration could be given to how Article 14 ICERD may be used to channel collective complaints, given the strong collective dimension of some forms of racial discrimination.

Cooperation with non-State actors, particularly with civil society, will also be a necessary step to strengthen efforts against racial discrimination. A strategic use of UN platforms designed for strengthening partnerships (e.g., connected to SDGs) and an emphasis on education against racial discrimination will also be essential for creating a less discriminatory world.

In the next 25 years, the UN will have to remain vigilant as to how existing mechanisms are used to their best potential and how to secure effective cooperation with States. Developments in certain thematic areas will need to be carefully assessed and tackled. To remain relevant and to enhance its effectiveness, the UN needs to build on the aforementioned achievements, and to step up to address the challenges posed by technology, racial profiling in law enforcement and border security, racism in sport, and the deepening inequalities caused by unprecedented global emergencies.

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