Indigenous Peoples’ Rights and the UN Committee on the Elimination of Racial Discrimination

Fergus MacKay, Forest Peoples Programme

The right of all persons to be free from discrimination has been firmly entrenched in the modern human rights regime since its genesis in the UN Charter and the Universal Declaration on Human Rights. The enjoyment of rights without distinction as to race, sex, religion and language has been further elaborated upon in universal and regional human rights instruments and in national laws. The African Charter of Human and Peoples’ Rights, for example, includes not only an individual right to equality and equal protection but also stipulates in Article 19 that “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights.” Equality – de jure and de facto – is thus set forth as a governing principle of law and society.

The prohibition of racial discrimination is widely regarded as a norm of customary international and is deemed to be so fundamental that it has been referred to as a peremptory norm of international law “from which no derogation is permitted.” The elimination of racial discrimination is also the exclusive subject of the first of the so-called ‘core’ human rights instruments, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”). Moreover, we are told that, in the 21st century, diversity of race and culture should no longer be seen as a “limiting factor in human exchange and development” but instead as the basis for the enrichment of all and as a gift rather than a threat.

However, despite the normative and moral stature of the non-discrimination and equality principles, discrimination, particularly against indigenous peoples and minorities, continues to be pervasive and persistent in all regions of the globe. For instance, a review of the conclusions of United Nations human rights treaty bodies issued between 2002-2006 reveals that these bodies found discrimination against indigenous peoples through the violations of their rights to own and control their

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4 This is acknowledged in the Final Declaration of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. See, Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001. UN Doc. A/CONF.189/12, p. 5, at para. 39 (recognizing “that the indigenous peoples have been victims of discrimination for centuries and … stress[ing] the continuing need for action to overcome the persistent racism, racial discrimination, xenophobia and related intolerance that affect them”).
traditional lands and resources in all but one of the states reviewed. Likewise, in all but one state reviewed during the same period the Committee on the Rights of the Child observed that indigenous children were subject to discriminatory laws or practices.

The United Nations Committee on the Elimination of Racial Discrimination (“CERD”) has developed a considerable body of jurisprudence regarding discrimination against indigenous peoples. According to Patrick Thornberry, a present member of CERD, “the concern of the Committee with indigenous issues has become pervasive” in recent years and it “continues to comment regularly on discrimination against indigenous peoples.” Ten years ago, on 18 August 1997, CERD also became the first UN treaty body to adopt a General Recommendation/Comment that is exclusively focused on indigenous peoples: General Recommendation XXIII on Indigenous Peoples (“GRXXIII”). GRXXIII guides CERD with respect to its consideration of indigenous issues and should be viewed as a statement of its “understanding of the non-discrimination norm in this context.” For its part, CERD has been willing to assert that GRXXIII sets out “requirements” incumbent on states parties and routinely refers to it, either wholly or in part, in its reviews of state reports.

While GRXXIII is technically non-binding, it is nonetheless “a significant elaboration of norms” and corresponding state obligations under ICERD. It begins by affirming that ICERD applies to discrimination against indigenous peoples and “that all appropriate means must be taken to combat and eliminate such discrimination.” It then observes that “in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms” and consequently, “the preservation of their culture and their historical identity has been and still is jeopardized.”

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6 Id.


9 See, for instance, Ecuador, 21/03/2003, CERD/C/62/CO/2, at para. 16 (stating that “As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples”).


12 Id. at para 2.

13 Id. at para. 3.
the remainder of GRXXIII comprises a list of specific rights and duties. Paragraph 4 calls "upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

Paragraph 5 addresses a fundamental concern of most, if not all, indigenous peoples. It calls on states parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.” This recognition of indigenous peoples’ collective rights to lands, territories and resources is grounded in Article 5(d)(v) of the Convention, which sets forth the right “to own property alone as well as in association with others.”

To mark the tenth anniversary of the adoption of GRXXIII, this chapter focuses on the practice of CERD as it relates to indigenous peoples. The first section provides an overview of CERD and ICERD, notes some of the relevant features of non-discrimination and equal protection law, and provides examples involving indigenous peoples; the second section concerns various aspects of the treatment of indigenous peoples’ rights by CERD, such as self-identification, property rights, and the right to consent; and the final section offers a few concluding remarks. Particular attention is paid throughout to the norms set forth in GRXXIII and, to the extent that it exists, to jurisprudence pertaining to African countries. With respect to Africa, it should be noted at the outset that pursuant to Article 60 of the African Charter of Human and Peoples’ Rights, CERD’s jurisprudence may be utilized by the African Commission on Human and Peoples’ Rights (“ACHPR”) when that body assesses indigenous peoples’ rights in Africa.

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14 See, inter alia, Philippines, 14/08/1997, CERD/C/304/Add.34, para. 17 and; infra, Section III.B.
15 Article 60 provides that “The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the
I. The Committee on the Elimination of Racial Discrimination

CERD was established in 1970 pursuant to Article 8 of ICERD and is composed of 18 independent experts of high moral standing who are elected to four year-long terms by the states parties. It meets annually in Geneva for two three week-long sessions. Pursuant to ICERD, CERD is competent, inter alia: to receive and review the reports of state parties every two years on their compliance with the Convention and to issue observations (known as concluding observations) with regard to those reports (Art. 9); to request additional reports at any time (Art. 9(1)(b)); to issue General Recommendations (Art. 9(2)) (31 have been adopted to date); to adopt its own rules of procedure (Art. 10); and to receive petitions from individuals or groups of individuals alleging violations of ICERD provided that the state in question has deposited a declaration accepting the jurisdiction of CERD to receive such petitions (Art. 14).

The bulk of CERD’s work concerns reviews of the periodic reports submitted by states pursuant to Article 9 of ICERD, and the adoption of concluding observations in relation to those reports. These concluding observations are adopted after dialogue with the state and a review of any additional information from NGO, UN and other sources. They often contain considerable detail and, although non-binding, are a strong reflection of CERD’s views on states’ obligations under ICERD. A review procedure is also in place for states that are five or more years overdue submitting a report. This procedure allows CERD to examine the situation in such states in the absence of a report. The individual petitions procedure established by Article 14, however, is rarely used. To date, only 51 states have recognized CERD’s competence to receive communications pursuant to Article 14 and of those only four are African states: Algeria, Morocco, Senegal and South Africa. The procedure itself has been invoked only 40 times since 1982 when the complaints procedure entered into force (with acceptance by 10 states), and to date only 12 decisions have been adopted, none of which concerns indigenous peoples’ rights.

In addition to the above mentioned reporting and communications procedures, CERD innovated an Early Warning and Urgent Action (“EW/UA”) procedure in 1993 and amended its Rules of Procedure to establish a ‘Follow Up’ procedure and a ‘follow up coordinator’ in 2004. The Follow Up procedure provides a mechanism for CERD to obtain and act on additional information from provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”

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17 Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination. Available at: http://www.ohchr.org/english/bodies/cerd/stat4.htm

18 Id.

states concerning any measures taken to give effect to the recommendations made in its previously issued concluding observations. Once it has considered any new information, CERD may adopt a formal decision, send a letter to the state in question requesting information, reiterate its prior recommendations, set out further recommendations, or even invite the state party to appear before the CERD to discuss the matter more directly.

The only decision adopted under the Follow Up procedure to date concerns discrimination against indigenous and tribal peoples in Suriname. In this decision, CERD observes that its 2004 concluding observations raised concerns about the compatibility of Suriname’s draft Mining Act with ICERD and states that a “revised version of the draft Mining Act, which was approved by Suriname’s Council of Ministers at the end of 2004, and is likely to be scheduled for adoption by the National Assembly within the next few months, may not be in conformity with the Committee’s recommendations.” It then requests that Suriname comment on this assessment within 60 days and recommends that it “ensure the compliance of the revised draft Mining Act with [ICERD], as well as with the Committee’s March 2004 recommendations.” Suriname failed to respond and CERD ultimately considered the draft Mining Act and other matters under its EW/UA procedure, adopting two decisions in August 2005 and 2006.

CERD’s EW/UA procedure, which has attracted considerable interest from indigenous peoples in recent years, is an amalgamation of two separate measures that are both intended to address serious situations. The two procedures are defined by the Manual on Human Rights Reporting as follows:

**Early-warning measures** are to be directed at preventing existing problems from escalating into conflicts and can also include confidence-building measures to identify and support whatever strengthens and reinforces racial tolerance, particularly to prevent a resumption of conflict where it has previously occurred. **Urgent procedures** are to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. Criteria for initiating an urgent procedure could include, for example, the presence

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21 Letters sent under the Follow Up procedure concerning indigenous peoples have been sent to Guyana 24/08/07 (concerning the discriminatory impact of the Amerindian Act 2006); the United States of America, 19/08/2005 (concerning the situation of the Western Shoshone people); and Botswana 10/03/2005 (concerning discrimination against non-Tswana persons in the Tribal Territories Act, the Chieftainship Act and Sections 77 to 79 of the Constitution). Available at: http://www.ohchr.org/english/bodies/cedr/followup-procedure.htm.


23 Id. para. 5.

24 Id. at para. 6.

25 See, Decision 1(67), Suriname, 18/08/2005, CERD/C/DEC/SUR/2; and Decision 1(69), Suriname, 18/08/2006, CERD/C/DEC/SUR/3.

26 The background to these procedures is described in the 1993 CERD working paper: Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination, UN Doc. A/48/18, Annex III. Available at: http://www.ohchr.org/english/bodies/cedr/docs/A_48_18_Annex_III_English.pdf.
of a serious, massive or persistent pattern of racial discrimination; or a situation that is serious where there is a risk of further racial discrimination.\textsuperscript{27}

In 1993, CERD specified that one of the criteria that could trigger its use of the Early Warning procedure is “encroachment on the lands of minority communities.”\textsuperscript{28} It amended this in August 2007 to specify that “Encroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands, in particular for the purpose of exploitation of natural resources,”\textsuperscript{29} is one of the indicators for invoking the EW/UA procedure depending on “the gravity and scale of the situation, including the escalation of violence or irreparable harm that may be caused to victims...”\textsuperscript{29}

For this and other reasons, in recent years, indigenous peoples have submitted “many sharply argued and well referenced requests” seeking consideration of their situation under the EW/UA procedure.\textsuperscript{30} These requests are reviewed by a sub-committee of CERD and then discussed in the full plenary if action is recommended. Since 2003, 23 of the 29 decisions or letters adopted by CERD under the EW/UA procedure have concerned indigenous peoples; the remainder concern Israel (twice), the situation in Dafur (twice), the situation of displaced persons in Côte d’Ivoire, and the situation in Ethiopia.\textsuperscript{31} Prior to 2003, CERD adopted eight decisions concerning indigenous peoples under the EW/UA procedure: Mexico 1995, concerning conflict in Chiapas; four on Papua New Guinea 1995-2002, all concerning Bougainville; and three on Australia 1998-2000, all addressing amendments to the 1993 \textit{Native Title Act}.\textsuperscript{32}

The subject matter of the EW/UA procedure decisions and letters ranges from the situation of all indigenous peoples in a country to the situation of a particular indigenous people, or a number of similarly situated indigenous peoples in a certain region of a country; and from legislation (both draft and enacted) affecting indigenous peoples to the actual or prospective impact of certain activities on the enjoyment of their rights, particularly the impact of extractive industries. Decisions adopted on Australia (\textit{Native Title (Amendment) Act 1998}),\textsuperscript{33} Suriname (\textit{draft revised Mining Act}

\textsuperscript{29} \textit{Guidelines for the Use of the Early Warning and Urgent Action Procedure. Advanced Unedited Version}. Adopted by the Committee on the Elimination of Racial Discrimination, August 2007, at p. 3.
\textsuperscript{31} See, \texttt{http://www.ohchr.org/english/bodies/cerd/early-warning.htm}
\textsuperscript{33} Decision 2 (54), Australia, 18/03/99, A/54/18, para. 21(2) (recognizing that, “within the broad range of discriminatory practices that have long been directed against Australia’s Aboriginal and
2004)\textsuperscript{34} and New Zealand (\textit{Foreshore and Seabed Act 2004}) all concern the discriminatory aspects of draft or extant legislation, particularly as they relate to land and resource rights and access to remedies.\textsuperscript{35} Decisions on the United States of America and Laos both address the situation affecting a particular indigenous people, the Western Shoshone in case of the United States\textsuperscript{36} and the Hmong in the case of Laos.\textsuperscript{37} The same is also the case with recent letters on Chile, Brazil, the Philippines, Peru, Nicaragua and Belize.\textsuperscript{38} Decisions or letters involving extractive industries (logging, mining, and oil) include Peru, Belize, Suriname, the Philippines and the Democratic Republic of Congo.

Finally, CERD considers that some of the situations raised under the EW/UA procedure are so serious or persistent that they are worthy of additional attention by other UN bodies. In its 2005 decision on Suriname, for example, it urged the UN Secretary General to draw the attention of competent UN bodies to the “particularly alarming situation in relation to the rights of indigenous peoples in Suriname.”\textsuperscript{39} In its 2006 decision on Suriname, it also brought this situation to the attention of the High Commissioner for Human Rights, competent United Nations bodies, and “in particular the Human Rights Council … and invite[d] them to take all appropriate measures.”\textsuperscript{40} A similar request was directed to the Secretary General in CERD’s 2003 decision on Laos, which further requested that United Nations organizations and specialized agencies provide humanitarian assistance to the Hmong taking refuge in that country.\textsuperscript{41}

\textbf{II. The International Convention on the Elimination of All Forms of Racial Discrimination}

ICERD is the primary international instrument to address the issue of racial discrimination.\textsuperscript{42} It was adopted by the UN General Assembly in 1965 and entered into force in January 1969. Today it has 173 state parties, making it one of the most ratified of all the core human rights instruments. As would be expected, ICERD is

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\item Torres Strait Islander peoples, the effects of Australia’s racially discriminatory land practices have endured as an acute impairment of the rights of Australia’s indigenous communities”\textsuperscript{34}; Decision 1(54), Australia, 11/08/98, UN Doc. A/53/18, para. 22; and Decision 1 (53), Australia, 11/08/98, A/53/18, para. II.B1.
\item Decision 1(67), Suriname, 18/08/2005, CERD/C/DEC/SUR/2; and Decision 1(69), Suriname, 18/08/2006, CERD/C/DEC/SUR/3.
\item Decision 1 (66), New Zealand, 27/04/2005, CERD/C/DEC/NZL/1, at para. 6 (observing that ‘the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress…”).
\item Decision 1(68), United States of America, 11/04/2006, CERD/C/USA/DEC/1, at para. 4 (concerning violations of traditional rights to land, and measures taken and “even accelerated lately by the State party in relation to the status, use and occupation of these lands [that] may cumulatively lead to irreparable harm to these communities”).
\item Decision 1(63), Lao People’s Democratic Republic, 10/12/2003, CERD/C/63/Dec.1, at para. 6(a) (urging Laos “to halt immediately acts of violence against members of the Hmong population who have taken refuge” in Laos).
\item See, \texttt{http://www.ohchr.org/english/bodies/cerd/early-warning.htm}
\item Decision 1(67), Suriname, 18/08/2005, CERD/C/DEC/SUR/2, para. 7.
\item Decision 1(69), Suriname, 18/08/2006, CERD/C/DEC/SUR/3, para. 4.
\item Decision 1(63), Lao People’s Democratic Republic, 10/12/2003, CERD/C/63/Dec.1, at para. 7.
\end{itemize}
replete with references to equality throughout its preamble and in its substantive articles, all of which affirm that human beings are free and equal in dignity and rights, equal before the law, and entitled to equal protection of the law against any discrimination or incitement to discrimination. In Article 5 for example, states parties “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” in the enjoyment of all human rights and fundamental freedoms.

The structure of ICERD’s seven substantive articles is relatively simple comprising a definition of racial discrimination; an elaboration of the main state obligations to eliminate and combat racial discrimination; a non-exhaustive catalogue of rights that may not be subject to discrimination; the obligation to establish and maintain effective remedies against racial discrimination; and the establishment of education programmes directed against racial discrimination. This section reviews each of these articles and notes a number of examples of their application in the case of indigenous peoples.

A. Article 1

Article 1(1) of ICERD 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.” In General Recommendation XXIV of 1999, CERD stresses that, according to the definition given in Article 1(1), ICERD “relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples.” This definition is thus broad and transcends a narrow understanding of race.

CERD’s ongoing argument with India about caste-based discrimination illustrates that it does not easily countenance attempts by states to exclude certain groups from scope of ICERD’s protections. Indeed, despite India’s long-standing and strenuous objections, General Recommendation XXIX on Article 1(1) emphasizes that CERD considers caste-based discrimination against Dalits and others

43 General Recommendation XXIV on Article 1, at para. 1. See, also, GRXXIII, at para. 1 (stating that “In the practice of the Committee on the Elimination of Racial Discrimination … the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed 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”).

44 India, 05/05/2007, CERD/C/IND/CO/19, para. 8 (explaining CERD’s disagreement with India as “expressed in general recommendation No. 29 ‘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’”) and; India, 17/09/96, CERD/C/304/Add.13, para. 14. See, also, T. van Boven, Discrimination and Human Rights Law: Combating Racism. In S. Fredman (ed.), DISCRIMINATION AND HUMAN RIGHTS THE CASE OF RACISM. Oxford: OUP 2001, p. 111-33, 117-18 (describing the nature and longevity of the disagreement between CERD and India).
to be discrimination based on descent and thus cognizable under ICERD. Similarly, CERD has also rejected attempts by states to deny the existence within their territories of indigenous peoples and/or minorities.

Article 1(1) makes clear that ICERD prohibits not only intentional racial discrimination but also discrimination in effect. Thus, in the case of India’s 1958 Armed Forces (Special Powers) Act, which is on its face neutral and applies to all persons inhabiting north east India, CERD recommended repeal of the Act in large part because the predominant population in the region consists of indigenous peoples, who are therefore disproportionately affected. CERD’s 2001 observations on Chile illustrate that states parties must also adopt legislative and other measures to prohibit and counteract discrimination in effect, recommending that “the scope of the Indigenous Act be extended to cover discrimination in effect.”

Some states have argued that the equality norm requires homogenous treatment of all persons and groups, a contention that is quickly refuted and dismissed by CERD. For example, noting Botswana’s reluctance to acknowledge the existence of indigenous peoples, CERD observed that ‘the State party’s objective to build a nation based on the principle of equality for all has been implemented in a way detrimental to the protection of ethnic and cultural diversity.’ CERD frequently notes that “the principle of non-discrimination requires [states parties] to take account of the cultural characteristics of ethnic groups.” It also adheres to the principle that discrimination is evident and illegitimate where states treat persons differently in analogous situations without an objective and reasonable justification and where they, without an objective and reasonable justification, fail to treat differently persons

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45 General Recommendation XXIX, Article 1, paragraph 1, (Descent), 01/11/2002, at para. 1 (calling on state parties to “identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status…”).

46 See, infra Section III.A.

47 Inter alia, Australia, 14/04/2005, CERD/C/AUS/CO/14, at para. 19 (expressing concern about the “wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income” and recommending that Australia “intensify its efforts to achieve equality in the enjoyment of rights and allocate adequate resources to programmes aimed at the eradication of disparities…”).

48 India, 05/05/2007, CERD/C/IND/CO/19, para. 12. CERD also considered an NGO submission, which argued that the Armed Forces (Special Powers) Act was also discriminatory in its intent because it was “originally and specifically designed to suppress the self-determination aspirations of the Naga indigenous people,” a fact that the NGOs say is acknowledged by the Human Rights Committee’s reference to Article 1 of the International Covenant in relation to the situation in north east India. See, Request for adoption of a Decision under the Urgent Action/ Early Warning Procedure in Connection with violation of Indigenous Peoples’ Rights in Northeast India. United NGO Mission Manipur/Forest Peoples Programme, 31 October 2006, at para. 12-7. Available at: http://www.ohchr.org/english/bodies/cerd/docs/ngos/fpp.doc.

49 See, inter alia, New Zealand, 15/08/2007, CERD/C/NZL/CO/17, at para. 21 (expressing concern about the “over-representation of Maori in the prison population and more generally at every stage of the criminal justice system” and welcoming “steps adopted by the State party to address this issue, including research on the extent to which the over-representation of Maori could be due to racial bias in arrests, prosecutions and sentences”).


52 Inter alia, Democratic Republic of Congo, id.
whose situations are significantly different.\textsuperscript{53} CERD thus explained to Botswana that “under the Convention, differential treatment constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and/or are not proportional to the achievement of this aim.”\textsuperscript{54} GRXXIII demonstrates that recognition and protection of indigenous peoples’ rights is not only a legitimate aim but also is required under ICERD.

The final point that I will make about Article 1(1) concerns the ‘public life’ limitation. This has been interpreted by some states to preclude obligations to legislate or otherwise adopt measures in relation to private conduct.\textsuperscript{55} CERD however has rejected such interpretations, not the least on the grounds that Article 2(1)(d) of ICERD requires that states “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.”\textsuperscript{56} Additionally, in its General Recommendation XX on Article 5, CERD explains that where private institutions “influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.”\textsuperscript{57} CERD will therefore question reporting states about alleged discrimination in the employment or other private fields. In the case of Australia, for instance, it expressed concern about the high number of incidents of discrimination targeting Aboriginals and people belonging to minorities in the field of employment,” and requested detailed information “on the results achieved to eradicate racial discrimination in the field of employment.”\textsuperscript{58}

In the same vein, states parties have been held responsible for the discriminatory behaviour of private actors in CERD’s case law pursuant to Article 14 of ICERD. In Communication 10/1997, for example, CERD found that Denmark was liable for the discriminatory acts of a private bank in relation to denial of a loan application because it had failed to initiate a proper investigation of the allegations of discrimination by the bank.\textsuperscript{59} CERD, \textit{inter alia}, recommended that Denmark “take measures to counteract racial discrimination in the loan market.”\textsuperscript{60} This decision is

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\item \textsuperscript{53} General Recommendation XIV, Definition of discrimination (Art. 1, par.1), 22/03/93, at para. 2 (stating that “a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. 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”).
\item \textsuperscript{54} Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 8.
\item \textsuperscript{55} See, Multilateral Treaties deposited with the Secretary General, ST/LEG/SER.E/14, at 102 (containing the declaration registered by the United States of America stating that it accepts no obligation under ICERD to enact legislation with respect to private conduct).
\item \textsuperscript{56} See, United States of America, 14/08/2001, UN Doc. A/56/18, paras.380-407, at 392 (rejecting the United States’ interpretation of ICERD).
\item \textsuperscript{57} General Recommendation XX, Non-discriminatory implementation of rights and freedoms (Art. 5) 15/03/1996, at para. 5.
\item \textsuperscript{59} Communication No. 10/1997: Denmark, 06/04/1999, CERD/C/54/D/10/1997, at para. 9.3.
\item \textsuperscript{60} \textit{Id.} at para. 11.1.
\end{itemize}
broadly consistent with the opinion of the Inter-American Court of Human Rights that the prohibition of discrimination not only binds state parties to the American Convention on Human Rights but also ‘give[s] rise to effects with regard to third parties, including individuals.'

The Court further explained that the ‘effects of the obligation to respect human rights in relations between individuals is defined in the context of the private employment relationship, under which the employer must respect the human rights of his workers.’

CERD has also on occasion made recommendations directed at least in part towards the conduct of private transnational corporations and even in relation to the regulation of the extra-territorial activities of such non-state actors. With respect to the former, CERD’s 2004 observations on Suriname recommend ‘the inclusion in agreements with large business ventures - in consultation with the peoples concerned - of language specifying how those ventures will contribute to the promotion of human rights in areas such as education.’

On the latter, the 2007 observations on Canada note ‘reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (article 2.1d), article 4 a) and article 5e)).’ CERD then recommended that:

In light of article 2.1 d) and article 4 a) and b) of the Convention and of its general recommendation 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends to the State party that it explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.

ICERD anticipates that in some cases that positive discrimination may be appropriate or required. Article 1(4) states that ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination…’ Article 2(2) contains similar language and, where circumstances so warrant, requires special and concrete

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62 Id. at para. 146. See, also, id. Concurring Opinion of Judge A.A. Cancado-Trindade, at para. 77 and 85 – “the obligations erga omnes of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations); [and,] [t]he fundamental rights of the migrant workers, including the undocumented ones, are opposable to the public power and likewise to the private persons or individuals (e.g., employers), in the inter-individual relations.”
63 Suriname, 12/03/2004, CERD/C/64/CO/9, at para. 20.
64 Canada, 25/05/2007, CERD/C/CAN/CO/18, at para. 17.
65 Id.
measures to ensure equal enjoyment of rights. Determining if such measures are warranted often requires statistical and other data, both disaggregated and relative, on the situation of various groups within the states parties. CERD, as have other UN treaty bodies, frequently calls for the collection of such data and, more generally, explains that this information is “necessary to evaluate the implementation of the Convention and monitor the policies affecting minorities and indigenous peoples.”

On a number of occasions, CERD has stated that special measures in favour of indigenous peoples may be required to remedy both past and present discrimination. However, it has also cautioned against confusing special measures with recognition and protection of indigenous peoples’ rights per se, rights which stand independent of the special measures paradigm. In its 2007 review of New Zealand, for example, CERD observed that “historical treaty settlements have been categorized [by the state] as special measures for the adequate development and protection of Maori.” As a way of refuting this characterization, it then made a point of drawing the state’s attention to “the distinction to be drawn between special and temporary measures for the advancement of ethnic groups on the one hand and permanent rights of indigenous peoples on the other hand.”

CERD has also rejected the (sometimes perverse) characterization of certain legislative enactments as special measures because the measures in question did not,

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66 Article 2(2) provides that: “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”


68 See, inter alia, Guyana, 04/04/2006, CERD/C/GUY/CO/14, para. 8 (expressing concern “about the lack of disaggregated statistical data on the number and economic situation of indigenous peoples in Guyana and about their equal enjoyment of the rights guaranteed in the Convention”); Argentina, 24/08/2004, CERD/C/65/CO/1, para. 8; Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 11.


70 See, inter alia, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 12 (recommending that “the State party to undertake special measures as provided for in article 2.2 of the Convention in favour of indigenous peoples and persons of African descent, who have historically been subjected to discrimination”); Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 8; Norway, 18/08/2006, CERD/C/NOR/CO/18, at para. 11 (recommending that Norway “adopt special and concrete measures to ensure the adequate development and protection of certain highly vulnerable indigenous groups namely, the East Saami people…”); Bangladesh, 27/04/2001, CERD/C/304/Add.118, para. 4; Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 12 (recommending “that the State party adopt a comprehensive national strategy or plan of action providing for special measures, in accordance with article 2(2) of the Convention, for the purpose of guaranteeing indigenous people the full and equal enjoyment of human rights and fundamental freedoms, and that it allocate sufficient funds for that purpose”); Summary Record of the 1394th Meeting: Australia 09/02/01, CERD/C/1394, 9 February 2001, para. 42 (stating that “the indigenous population was different from other communities: it was so disadvantaged that ‘affirmative action’ in its favour was justified”).


72 Id.
in its view, benefit the recipients.\textsuperscript{73} For example, CERD found that Australia’s 1998 \textit{Native Title (Amendment) Act} is replete with “provisions that extinguish or impair the exercise of indigenous title rights and interests” and creates “legal certainty for Governments and third parties at the expense of indigenous title.”\textsuperscript{74} It thus rejected Australia’s attempt to categorize the amendments as special measures, stating that the amended Act “cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2)...” because the amendments “wind back the protections of indigenous title offered in the Mabo decision of the High Court of Australia and the 1993 Native Title Act.”\textsuperscript{75}

B. Article 2

Article 2 of the Convention defines the obligations of state parties to give effect to the rights set out therein at the domestic level. Article 2(1) states that:

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 this end:
   (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
   (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
   (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;
   (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;
   (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

These obligations are extensive and include adopting, modifying or repeal of legal instruments, adopting, modifying or revoking policy statements, and adopting social, economic, cultural and various other measures to give immediate and full effect to ICERD in domestic law and practice.\textsuperscript{76} As noted above, Article 2(2)

\textsuperscript{73} See, also, \textit{General Recommendation XIV, Definition of discrimination} (Art. 1, par.1), 22/03/93, at para. 2 (explaining that “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”).

\textsuperscript{74} \textit{Decision 2 (54) on Australia}, 18/03/99, at para. 6.

\textsuperscript{75} \textit{Id}. at para. 8.

\textsuperscript{76} \textit{Inter alia}, India, 05/05/2007, CERD/C/IND/CO/19, para. 11 (recommending that the \textit{Habitual Offenders Act} be amended to remove provisions perpetuating stigmatization of tribal people); Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 16 (recommending that national laws be amended to so that “concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory”); and New Zealand, 15/08/2007, CERD/C/NZL/CO/17, at para. 13-14 (observing that the Treaty of Waitangi is not part of domestic law except to the extent that it is incorporated by statute and recommending that “the Treaty of Waitangi is incorporated into domestic legislation where relevant, in a manner consistent with the letter and the spirit of that
provides for the adoption of special measures where circumstances so warrant. According to the UN’s *Manual on Human Rights Reporting*, this provision recognizes “that almost all States Parties have ethnic or minority groups, such as indigenous populations, tribes, nomads, migrant workers, refugees, etc. Consequently, attention must be paid to the socio-economic and political situation of these groups in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population.” This quote highlights an important feature of the Convention: it requires true equality, or equality in fact, in addition to legal equality (that is, equality in the written law): indeed, this “goal of *de facto* equality is central to the Convention.”

The reference to ‘groups’ in Article 2(2) substantiates the conclusion that ICERD offers protection to group or collective rights. This conclusion is further supported by Articles 2(1)(a) and 4(a), which, respectively, provide that states undertake not to engage in any acts “of racial discrimination against persons, groups of persons or institutions” and shall punish incitement to racial discrimination “against any race or groups of persons.” In this respect, Thornberry explains that ICERD “is group-orientated to the extent that ‘advancement’, ‘development’ and ‘protection’ relate to groups as well as individuals, opening up significant possibilities for addressing the collective rights of indigenous groups within the parameters of the Convention.”

**C. Article 3**

Article 3 condemns segregation and apartheid and to a certain extent reflects the era in which ICERD was drafted. However, while apartheid is consigned to history in South Africa, as are certain forms of segregation practiced in other parts of the world, CERD has nonetheless made an effort to ensure that Article 3 remains relevant, particularly with regard to housing and education and *de facto* segregation. For example, in its 2004 observations on Brazil, CERD stated that it was ‘concerned about *de facto* racial segregation faced by some black, mestizo and indigenous peoples in rural and urban areas, such as the commonly known ‘favelas’,” and reminded Brazil that “that racial segregation may also arise without any initiative or direct involvement by the public authorities…. It encouraged Brazil ‘to continue monitoring all trends which may give rise to racial or ethnic segregation and to work for the eradication of the resulting negative consequences.”

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78 *Id.* at 273 (also stating that “One of the main objectives of the Convention is indeed to promote racial equality. As such, the Convention not only aims to achieve *de jure* racial equality, but particularly also *de facto* equality, which allows the various ethnic, racial and national groups to enjoy the same social development”).
80 See, *General recommendation XIX, Racial segregation and apartheid (Art. 3)*, 18/08/95.
81 Brazil, 12/03/2004, CERD/C/64/CO/2, at para. 13.
82 *Id.*
D. Article 4

Article 4 of ICERD requires that state parties, *inter alia*, “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”\(^{83}\) Although this article is usually discussed in the context of perceived tensions with the right to freedom of expression – tensions that are more apparent than real given that Article 4(1) requires implementation “with due regard to the principles embodied in the Universal Declaration of Human Rights,” among others – CERD’s recent jurisprudence demonstrates that it remains disturbingly relevant for many indigenous peoples.\(^{84}\) On 24 August 2007, for example, CERD recommended that Brazil, as a matter of urgency, “Investigate, prosecute and convict persons responsible for the dissemination of ideas based on racial superiority or hatred, as well as for violence or incitement to such acts against the indigenous peoples in the [Raposa Serra do Sol], as required under article 4 of the Convention.”\(^{85}\) Similarly, in its 2006 observations on Guatemala, CERD recommended the enactment of criminal laws to punish violent acts directed against indigenous peoples and persons of African decent.\(^{86}\)

CERD has also cited Article 4 in relation to the political climate surrounding the adoption of legislation. The legislation in question is New Zealand’s 2004 *Foreshore and Seabed Act*, which was enacted subsequent to a divisive and hostile public and political debate about the rights of Maori. A 2005 urgent action decision focused on this law, stated CERD’s concern “about the political atmosphere … which provided the backdrop to the drafting and enactment of the legislation” and, citing Articles 2(1)(d) and 4 of ICERD, expressed the hope “that all actors in New Zealand will refrain from exploiting racial tensions for their own political advantage.”\(^{87}\)

E. Article 5

Article 5 of the ICERD sets out a non-exhaustive list of rights that states parties are required to equally protect and to respect and guarantee without discrimination in accordance with articles 1 and 2 of the Convention. Article 5 includes economic, social and cultural as well as civil and political rights and applies to all human rights recognized in international and domestic laws.\(^{88}\) Among those rights specifically enumerated are the right to equal treatment before tribunals and all other organs administering justice,\(^{89}\) the right to participate in the conduct of public

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\(^{83}\) Article 4(1)(a).

\(^{84}\) See, *General Recommendation XV, Organized violence based on ethnic origin (Art. 4)*, 23.03/93, para. 4. (setting forth CERD’s view that Article 4 is fully compatible with the right to freedom of expression).


\(^{86}\) Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 13.

\(^{87}\) New Zealand, Decision 1 (66), 27/04/2005, CERD/C/DEC/NZL/1, at para. 3.


\(^{89}\) Article 5(a).
affairs; the right to own property alone or in association with others (discussed at greater length in Section III.B); the right to inherit; the right to freedom of thought, conscience and religion; the right to housing; the right to education and training and the right to equal participation in cultural affairs. CERD also adopted a General Recommendation on Gender Related Dimensions of Racial Discrimination in 2000, and since then has addressed indigenous women’s rights pursuant to Article 5, arguably in a more coherent manner than the Committee on Elimination of Discrimination Against Women.

CERD pays considerable attention to the economic, social and cultural rights set forth in Article 5(e) in the case of indigenous peoples. Among others, health and education and the impact of activities that endanger traditional lifestyles and livelihoods are often highlighted. With respect to the construction of dams in northeast India, for instance, CERD notes that these ‘projects result in the forced resettlement or endanger the traditional lifestyles of the communities concerned,” and cited Article 5(e) which contains all of the economic, social and cultural rights listed in ICERD. With respect to the forced evictions of tribal peoples in India in general, it raised concerns specifically under Article 5(e)(iii), the right to housing. Similarly, citing Article 5(e) in toto, CERD recommended in 2007 that Canada “allocate sufficient resources to remove the obstacles that prevent the enjoyment of economic, social and cultural rights by Aboriginal peoples,” while also specifically observing under Article 5(e)(i) that aboriginal people continue to face discrimination “in recruitment, remuneration, access to benefits, job security, qualification

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90 Article 5(c).
91 Article 5(d)(v).
92 Article 5(d)(vii).
93 Article 5(e)(iii).
94 Article 5(e)(v).
95 Article 5(e)(vi).
96 General Recommendation No. XXV, Gender related dimensions of racial discrimination, 20/03/2000, at para. 1 (explaining that ‘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”).
97 See, inter alia, Canada, 25/05/2007, CERD/C/CAN/CO/18, para. 15 and 20; Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 17 and; India, CERD/C/IND/CO/19, 05/05/2007, para. 15.
98 See, inter alia, Costa Rica, id. para. 13 (urging the state to step up its efforts to improve the indigenous peoples’ enjoyment of economic and social rights and citing Articles 5(e) (i), (iii), (iv) and (v)); Democratic Republic of Congo, 17/08/2007, CERD/C/COD/CO/15, para. 19 (encouraging the state to intensify its efforts to improve the indigenous peoples’ enjoyment of economic, social and cultural rights and invites it in particular to take measures to guarantee their rights to work, decent working conditions and education and health); Venezuela, 01/11/2005, CERD/C/VEN/CO/18, (encouraging the state to step up its efforts to improve the economic and social rights situation of Afro-descendants and indigenous people, such as the right to housing, the right to health and sanitation services, the right to work and the right to adequate nutrition, in order to combat racial discrimination and eliminate structural inequalities”); and Australia, 14/04/2005, CERD/C/AUS/CO/14, at para. 20 (expressing concern “over the wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income” and recommending, inter alia, that that Australia “set up benchmarks for monitoring progress in key areas of indigenous disadvantage”).
99 India, 05/05/2007, CERD/C/IND/CO/19, at para. 19.
100 Id. para. 20.
recognition and in the workplace, and are significantly under-represented in public offices and government positions.”

F. Article 6.

Article 6 of ICERD recognizes that effective judicial and other remedies are an indispensable element of the overall human rights protection regime. It reads in pertinent part that states parties shall ensure “effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination … as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” In its General Recommendation on Article 6, CERD explained that it “believes that the degree to which acts of racial discrimination and racial insults damage the injured party’s perception of his/her own worth and reputation is often underestimated.” Consequently, it further explained that the obligations set forth in Article 6 are not necessarily satisfied solely by prosecution of the perpetrator(s), but in addition the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by victims.

CERD has often expressed concern about the myriad forms of discrimination suffered by indigenous peoples in connection with access to justice. This discrimination is sometimes overt and deliberate and remains a fundamental problem in most states, including in those held up as positive examples on general human rights and indigenous rights grounds. New Zealand, for example, is often cited as a positive example of a state seeking to provide justice for historical discrimination against indigenous peoples, in particular through the Waitangi Tribunal. However, and as many Maori tribes have long complained, CERD recently observed that the Waitangi Tribunal recommendations ‘are generally not binding, and that only a small percentage of these recommendations are followed by

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102 Id. at para. 24.
103 General Recommendation XXVI, Article 6 of the Convention, 24/03/2000, at para. 1.
104 Id. at para. 2.
105 In a 2006 separate opinion, the President of the Inter-American Court of Human Rights explains that “The claims of indigenous groups, communities and peoples and their members are a good example—or perhaps we should say a terrible example—of delayed justice. There is abundant enough evidence for it not to be an overstatement to say that in these cases the delay has spanned centuries…”). Separate Opinion of Judge Sergio Garcia-Ramirez in the Judgement rendered by the Inter-American Court of Human Rights on March 29, 2006 in the Case of Sawhoyamaxa Indigenous Community v. Paraguay, at para. 5. Available at: http://www.corteidh.or.cr/docs/casos/votos/vsc_garcia_146_ing.doc
106 See, inter alia, India, 05/05/2007, CERD/C/IND/CO/19, at para. 12 (concerning the Armed Forces (Special Powers) Act), 14 (concerning training for judges and prosecutors about indigenous rights and prosecution of police who commit crimes against scheduled castes and tribes), para. 27 (concerning prosecution of investigation and prosecution of offenders pursuant to the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act); and Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 17 (recommending that the state provide indigenous peoples with an “effective remedy to challenge any decision relating to the compulsory taking of their property”). See, also, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system 2005.
the Government. The Committee considers that such arrangements deprive claimants of a right to an effective remedy, and weaken their position when entering into negotiations with the Crown."  

Similarly, while Canadian jurisprudence pertaining to aboriginal rights is widely cited around the world, CERD correctly observed in 2002 “the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land….” It notes in this respect that “to date no Aboriginal group has proven Aboriginal title,” and recommended that Canada “examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.” Likewise, in the case of Sweden, CERD observes “that in cases of land disputes between Sami and non-Sami in courts of law, the interests of the non-Sami frequently override those of the Sami, and that the latter are allegedly not provided with financial means to support litigation in respect of their rights to land.”

In the case of Suriname, the problem is more fundamental and illustrates the degree of discrimination still experienced by many indigenous peoples. As CERD observed in 2004, that country’s draft Mining Act – approved by the government and pending enactment in the National Assembly – provides non-indigenous persons with judicial remedies yet explicitly denies such remedies to indigenous people, who must appeal to the executive for a binding decision. According to the draft law’s explanatory note, this overt discrimination is warranted because “traditional rights are

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108 New Zealand, 15/08/2007, CERD/C/NZL/CO/17, at para. 18. See, also, New Zealand, Decision 1 (66), 27/04/2005, CERD/C/DEC/NZL/1, at para. 6 (a decision adopted under the urgent action and early warning procedure that highlights the 2004 Foreshore and Seabed Act’s “extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party’s obligations under articles 5 and 6 of the Convention”).

109 Canada, 25/05/2007, CERD/C/CAN/CO/18, at para. 22 (“acknowledging the information that the “cede, release and surrender” approach to Aboriginal land titles has been abandoned by the State party in favour of “modification” and “non-assertion” approaches, the Committee remains concerned about the lack of perceptible difference in results of these new approaches in comparison to the previous approach”); Canada, 01/11/2002, UN Doc. A/57/18, para. 315-343, at para. 331; and Canada, 02/08/94, UN Doc. A/49/18, para. 298-331.

110 Canada, 01/11/2002, UN Doc. A/57/18, para. 315-343, at para. 330; Canada, 25/05/2007, CERD/C/CAN/CO/18, at para. 22 (expressing concern “that claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken by the federal and provincial governments … [and reiterating] its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts”). See, also, Australia, 14/04/2005, CERD/C/AUS/CO/14, at para. 17 (observing that the “high standard of proof required [to meet statutory definitions of native title] is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands”); and, in this respect, Yorta Yorta v. Victoria, 194 ALR 538 (2002) (an Australian case giving preference to the written accounts of white settlers over the oral history of aboriginal peoples in denying the existence of native title rights).

111 Sweden, 10/05/2004, CERD/C/64/CO/8, at para. 14. See, also, El Salvador, 04/04/2006, CERD/C/SLV/CO/13, para. 16 (recommending that the state “consider establishing an exemption for indigenous peoples from high court fees that hindered access to justice”).

not suited to the normal [judicial] procedure, because these concern communal rights and not individual rights.”

This is the case because, as explained by CERD, “indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons.” In other words, indigenous and tribal peoples in Suriname (at least 90,000 persons comprising around 20 percent of the national population) are invisible to the laws and judicial system of Suriname and, thus, incapable of holding and seeking enforcement of their communal rights.

Last but not least, CERD has expressed concern about the failure to recognize indigenous peoples’ legal systems and customs in the administration of justice. Its observations on Guatemala, for example, raise concern “at the problems experienced by indigenous peoples in gaining access to the justice system, particularly because the indigenous legal system is not recognized and applied and because of the lack of interpreters and bilingual counsel available for court proceedings.” In this respect, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system calls on states parties, *inter alia*, to ensure respect for and recognition of the traditional systems of justice of indigenous peoples.

**G. Article 7**

Article 7 of ICERD requires that state parties “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 ....” For the most part, this article does not receive the attention that it deserves and this is true for states, indigenous peoples, NGOs, and perhaps also CERD itself. In my view, it is fundamental to any long-term approach to addressing any form of discrimination.

While CERD focuses mostly on the education system, it also addresses Article 7 in relation to the activities of the media and whether indigenous peoples have access to their own media. For example, it raised both aspects in its 2006 review of Guatemala, expressing its great concern about “attitudes of contempt and rejection displayed by the communication media towards indigenous peoples;” and “at the fact

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114 **Explanatory Note to article 76 of the Suriname’s Draft Revised Mining Act**, November 2004, at p. 28 (unofficial translation).

115 Suriname, 12/03/2004, CERD/C/64/CO/9, at para. 14. See, also, Decision 1(67), Suriname, CERD/C/DEC/SUR/2, 18 August 2005; and Decision 1(69), Suriname, CERD/C/DEC/SUR/3, 18 August 2006 (both adopted under the EW/UA procedure and addressing the draft Mining Act).

116 See, for instance, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at para. 15 (expressing concern “at the problems experienced by indigenous peoples in gaining access to the justice system, particularly because the indigenous legal system is not recognized and applied and because of the lack of interpreters and bilingual counsel available for court proceedings”).

117 **General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system 2005**.

118 With respect to the education system, see, *inter alia*, New Zealand, 15/08/2007, CERD/C/NZL/CO/17, at para. 20 (encouraging New Zealand “to include references to the Treaty of Waitangi in the final version of New Zealand Curriculum. The State party should ensure that references to the Treaty in the curriculum are adopted or modified in consultation with the Maori”); and India, 05/05/2007, CERD/C/IND/CO/19, para. 27.
that community radio stations have a broadcasting range of less than 1 kilometre, thus restricting the enjoyment of this medium by indigenous communities.”

III. Indigenous Peoples’ Substantive Rights under ICERD

CERD views the failure to recognize and protect the individual and collective rights held by indigenous peoples and their members as discriminatory per se under ICERD and, therefore, it does not necessarily employ a comparative or other standard non-discrimination analysis to decide if acts or omissions are discriminatory. As stated above, GRXXIII articulates CERD’s understanding of the application of the non-discrimination and equality norms in the indigenous context and, in turn, its views on the corresponding obligations of states pursuant to ICERD. Article 5 of ICERD extends the reach of these norms to all human rights and fundamental freedoms irrespective of whether their source is international or domestic law.

ICERD also offers protection to group or collective rights and this is manifested in one respect in GRXXIII’s references to ‘indigenous peoples’ as collective entities, and its recognition of their rights to maintain and freely develop their distinct cultural identities. The right of peoples to equality and equal protection is also stated in Article 19 of the African Charter on Human and Peoples’ Rights and in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). The latter provides that: “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”

Victoria Tauli Corpuz explains that the UNDRIP “makes the opening phrase of the UN Charter, ‘We the Peoples...’ meaningful for 370 million indigenous persons all over the world.” In this respect, and consistent with the jurisprudence of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights under common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the UNDRIP recognizes, in Article 3, that ‘Indigenous peoples have the

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119 Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at para. 23.
120 GRXXIII, para. 4.
122 Statement of Victoria Tauli-Corpuz to the UN General Assembly on the Adoption of the UN Declaration on the Rights of Indigenous Peoples, 13 September 2007 (on file with author).
124 See, inter alia, General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2002/11, 26 November
right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”125 Article 4 adds that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

In 1996, CERD adopted a General Recommendation on the right to self-determination. While it does not refer to indigenous peoples directly – it mostly concerns denying that a unilateral right of secession exists in international law – this General Recommendation confirms that the right to self-determination applies to peoples within independent states.126 It also makes an explicit link between self-determination and respect for human rights, recommending that states should be “sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens;” and that states vest “persons belonging to ethnic or linguistic groups comprised of their citizens … with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.”127

UNDRIP in its totality recognizes a significantly expanded conception of self-determination than that set forth in CERD’s 1996 General Recommendation, which focuses in large part on the exercise of individual rights. While it is expected that CERD will begin to make reference to the UNDRIP in its concluding observations, it will be interesting to see if it begins to explicitly reference the right to self-determination, now endorsed in the indigenous context by the UN General Assembly, and, if it does, how. Its prior practice provides strong (and positive) indications that it will place emphasis on the practical attributes of the right to self-determination rather than dogmatic statements.

CERD has addressed issues related to the political and self-governance aspects of self-determination in its concluding observations. For instance, its 2006 observations on Guyana implicitly rejected a legislative scheme providing that “decisions taken by the Village Councils of indigenous communities concerning, inter alia, scientific research and large scale mining on their lands, as well as taxation, are subject to approval and/or gazetting by the competent Minister….”128 In doing so, CERD recommended that Guyana recognize and support indigenous councils that are “vested with the powers necessary for the self-administration and the control of the

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125 The ACHPR’s Working Group of Experts on Indigenous Populations/Communities explains that because Article 1 of the International Covenants is part of international law, ratified by many African states, that “there is an obligation on African states to honour rights granted to indigenous peoples under common Article 1 of the ICCPR and the ICESR as well as Article 27 of the ICCPR.” REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES. Submitted in accordance with “Resolution on the Rights of Indigenous Populations/Communities in Africa” Adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session. Copenhagen: AFCHOM/IWGIA 2005, at p. 78.

126 General Recommendation XXI on the right to self-determination, 1996, para. 5

127 Id.

128 Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 15
use, management and conservation of traditional lands and resources.”  

While some will object to the use of the term ‘self-administration’ in this context, as opposed to self-government or some other stronger terminology, this recommendation does largely address the substance of the complaints raised by Guyanese indigenous peoples.

CERD emphasized the importance it attached to this matter by requiring that Guyana report back within one year, under the Follow Up procedure, on the measures it had adopted to implement its recommendation on the powers of village councils. Guyana failed to do so and in August 2007, CERD wrote to Guyana giving it 90 days to submit the requested information or otherwise it “may decide to consider the relevant issues under its early warning and urgent action procedure at its 72nd session … in the light of information received from other sources.” It also noted that it had received information indicating that Guyana was opposed to implementing its recommendations and that Guyana’s Minister of Amerindian Affairs “had expressed the view that in some cases the Village Councils had too much power.”

More generally, in the case of Indonesia, CERD welcomed “efforts made towards the decentralization of power and consolidation of regional autonomy,” while at the same time regretting that Indonesia had not submitted information about the implementation of the 2001 Papua Special Autonomy Law. In 2007, it urged Costa Rica to remove, without delay, the ‘legislative impediments’ hindering the enactment of the Autonomous Development of Indigenous Peoples Bill, which is “aimed at granting full autonomy to indigenous peoples and recognizing their right to enjoy their own cultures, as well as the right to administer their territories.” CERD also expressed its approval for Nicaragua’s 1987 Autonomy Statute, “which establishes a special regime of autonomy for two regions of the Atlantic coast of Nicaragua where most of the ethnic minorities and the indigenous groups live.”

It is interesting to note in the context of this discussion that Article 235 of South Africa’s 1996 Constitution provides that “The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-


Id. at p. 2.


Nicaragua, 22/09/95, A/50/18, paras. 499-541, at 523 (see, also, para. 524 and, at 526, both expressing approval for provisions of the Autonomy Statute, most notably the ‘conclusion of agreements between the regional and central governments on rational use and exploitation of the regions’ natural resources...’).
determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.”137 In relation to South Africa’s failure to fully acknowledge their identity and particular rights, indigenous peoples in South Africa may in principle invoke this right in reports submitted to CERD – as a matter of domestic law that requires respect without discrimination pursuant to Articles 2 and 5 of ICERD. In its 2006 observations, CERD noted that indigenous peoples in South Africa are “inter alia the Khoi, San, Nama, [and] Griqua communities, and, in particular, hunter-gatherer, pastoralist and nomadic groups.”138 Noting that the state has not provided any information concerning measures adopted in relation to the enjoyment of their rights, it cited GRXXIII and requested that South Africa submit detailed information on the situation of indigenous peoples in its next report.139

The remainder of this section discusses CERD’s jurisprudence as it relates to three important attributes of the right to self-determination: self-identification; rights to lands, territories and resources; and the right to give or withhold consent. Each is addressed in GRXXIII and other general recommendations issued by CERD, as well as in CERD’s concluding observations and decisions or letters adopted under the Follow Up and EW/UA procedures.

A. Self-Identification

GRXXIII states that ICERD applies to indigenous peoples and that states parties are obligated to combat and eliminate discrimination against indigenous peoples.140 It does not however explain who these indigenous peoples are nor does it offer a definition that states parties can rely on in this respect. Nor has CERD otherwise adopted or specified any definition of the term ‘indigenous’, even if it does occasionally refers parties to the definition of indigenous peoples contained in Article 1(1) of International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples (“ILO 169”).141 This is the case despite the fact that CERD is sometimes confronted by states which deny that there are indigenous peoples within their territories – and in some cases minorities also – or argue that for some other reason it is inappropriate to talk about indigenous peoples in their national context.142

137 Section 233 of the Constitution further provides that “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”
139 Id.
140 GRXXIII, para. 1.
142 See, for instance, India’s argument that, while it recognizes that tribal peoples exist and has provisions within its Constitution and laws pertaining to tribal peoples, that tribal peoples are however not “distinct groups entitled to special protection under the Convention.” India, 05/05/2007, CERD/C/IND/CO/19, at para. 10 (also recommending that “the State party formally recognize its tribal peoples as distinct groups entitled to special protection under national and international law, including the Convention, and provide information on the criteria used for determining the membership of scheduled and other tribes…”). See, also, Mexico, 22/09/95, A/50/18, paras.353-398, at 382 (expressing concern that Mexico “does not seem to perceive that pervasive discrimination being suffered by the 56 indigenous groups living in Mexico falls under
Rather than develop or associate itself with a definition of ‘indigenous peoples’, in its 1990 General Recommendation VIII, CERD formally stated that membership in a group “shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.” 143 CERD applies this self-identification principle to collectivities as well as individuals and has reaffirmed its position on numerous occasions, 144 including in the face of vigorous objections by states parties. 145 In its 2007 review of Indonesia, for instance, CERD conveyed its concern about the lack of “appropriate safeguards guaranteeing respect for the fundamental principle of self-identification in the determination of indigenous peoples,” and recommended that Indonesia “respect the way in which indigenous peoples perceive and define themselves.” 146 Note that self-identification is defined here as ‘the fundamental principle’ rather than ‘a fundamental criterion’ as it is in Article 1(2) of ILO 169. 147

CERD has also specifically rejected attempts by states to label certain groups where it is clear that the group in question self-identifies otherwise. In the case of Japan, for example, it noted “with interest the recent jurisprudence recognizing the Ainu people as a minority people with the right to enjoy its unique culture,” but, nevertheless, recommended that Japan “take steps to further promote the rights of the Ainu, as indigenous people.” 148 Perhaps believing that the difference in terminology was less relevant, it took a different approach in the case of Guyana. Noting that “the Amerindian Act of 2006 systematically refers to the indigenous peoples of Guyana as ‘Amerindians’,” CERD recommended that Guyana,

in consultation with all indigenous communities concerned, clarify whether “Amerindians” is the preferred term of these communities, that it consider the criteria laid down in article 1 of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, as well as in the Committee’s General Recommendation No. 8, in defining indigenous peoples, and that it

the definition given to racial discrimination in article 1 of the Convention. The description of their plight merely as an unequal participation in social and economic development is inadequate”).

143 General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention 1990. See, also, Venezuela, 01/11/2005, CERD/C/VEN/CO/18, at para. 15 (recommending that ‘the identity document for indigenous persons be based upon self-identification by the individual concerned’); and Finland: 10/12/2003, CERD/C/63/CO/5, at para. 11 (stating that the definition of Saami is too restrictive and suggesting that Finland “give more adequate weight to self-identification by the individual, as indicated in general recommendation VIII”).

144 See, for instance, Denmark, 21/05/2002, CERD/C/60/CO/5, at para. 18 (concerning “denials by Denmark of the identity and continued existence of the Inughuit as a separate ethnic or tribal entity, and recalls its general recommendation XXIII on indigenous peoples general recommendation VIII on the application of article 1 (self-identification) and general recommendation XXIV concerning article 1 (international standard)’); and Algeria, 27/04/2001, CERD/C/304/Add.113, para. 9 (concerning the Amazigh and referring to General Recommendation VIII concerning the identification of members of particular racial and ethnic groups).


146 Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 15.

147 Article 1(2) reads: “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

recognize the specific rights and entitlements accorded to indigenous peoples under international law.\textsuperscript{149}

State-imposed distinctions between indigenous people were also identified in CERD’s 2006 observations on Guyana. These distinctions are set out in the \textit{Amerindian Act}, which denies indigenous communities the possibility to apply for a land title if they do not have a population of more than 250 persons and cannot prove that they have resided in the exact same location for at least 25 years – a highly problematic condition in a rainforest environment where resource availability dictates that farming lands and ultimately entire villages must move periodically.\textsuperscript{150} It also allows certain indigenous communities to exercise limited self-government powers through a village council, but only if it has a land title issued by the State.\textsuperscript{151} As a general proposition, CERD recommended that Guyana ‘remove the discriminatory distinction between titled and untitled communities.’\textsuperscript{152}

More generally, CERD’s General Recommendation XXIV observes that ‘a number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others,’ and that some states “decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognized and treated as such.”\textsuperscript{153} It continues that CERD believes that there is an international standard concerning the specific rights of people belonging to such groups” and; “that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country’s population.”\textsuperscript{154}

CERD has not shied away for raising concerns about indigenous peoples in Africa, including where the reporting state has refused to acknowledge that indigenous peoples are present in its territory.\textsuperscript{155} In the case of the Democratic Republic of Congo in 2007, CERD noted its regret at the ‘State party’s reluctance to acknowledge the existence of indigenous peoples in its territory.’\textsuperscript{156} Referring to General Recommendation VIII on self-identification, it “remind[ed] the State party that the principle of non-discrimination requires it to take account of the cultural

\textsuperscript{149} Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 10.

\textsuperscript{150} \textit{Amerindian Act} 2006, Act No. 6 2006, Cap. 29:01 of the Laws of Guyana, Sec. 60(1). See, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 16. (expressing deep concern “about the State party’s practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy”).

\textsuperscript{151} Amerindian Act, \textit{id}. Sec. 85-6. See, Guyana, 04/04/2006, \textit{id}. at para. 15 (expressing “deep concern “that indigenous communities without any land title (‘untitled communities’) are also not entitled to a Village Council. (Art. 5 (c))”).

\textsuperscript{152} Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 15.

\textsuperscript{153} General Recommendation XXIV on Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (Art. 1),27/08/99, at para. 2-3.

\textsuperscript{154} \textit{Id}. at para. 3.

\textsuperscript{155} See, South Africa, 22/08/2006, CERD/C/ZAF/CO/3; Botswana, 04/04/2006, CERD/C/BWA/CO/16; Nigeria, 01/11/2005, CERD/C/NGA/CO/18; Uganda, 02/06/2003, CERD/C/Ug/CO/11; Gabon, 10/02/99, CERD/C/304/Add.58; and Cameroon, 20/03/98, CERD/C/304/Add.53.

characteristics of ethnic groups;” and invited it “to review its position on indigenous peoples and minorities, and in that context to take into account the way in which such groups perceive and define themselves.”\textsuperscript{157} Such diplomacy aside, CERD then proceeded to refer to certain groups – the Pygmies (Bambuti, Batwa and Bacwa) – as indigenous peoples throughout the remainder of its concluding observations. CERD used almost the same language and took the same approach in its 2006 observations on Botswana.\textsuperscript{158}

CERD’s approach is consistent with that adopted by the ACHPR’s Working Group of Experts on Indigenous Populations/Communities (“ACWGIP”), which has noted that there is considerable controversy around the concept of indigenous peoples in much of Africa.\textsuperscript{159} Nonetheless, the ACWGIP has determined that the concept of indigenous peoples is valid and necessary in the African context, and that self-identification as indigenous is a “key principle” that should be adopted by and guide further deliberations of the ACHPR.\textsuperscript{160} This is also consistent with the position adopted by the UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People;\textsuperscript{161} in the practice of the Advisory Committee on the European Framework Convention for the Protection of National Minorities;\textsuperscript{162} and Articles 9 and 33(1) of the UNDRIP.\textsuperscript{163}

Finally, while it often challenges states with respect to their claims that indigenous peoples or minorities do not exist, CERD will look beyond the terminology and insist that the applicable rights are recognized and respected. In its 2005 consideration of Laos, for instance, CERD took “note of the delegation’s explanations regarding the reluctance of the authorities to classify ethnic groups in the Lao People’s Democratic Republic as minorities or indigenous peoples” and recommended that the state party “recognize the rights of persons belonging to minorities and indigenous peoples as set out in international law, regardless of the

\textsuperscript{157} Id.
\textsuperscript{158} Botswana, 04/04/2006, CERD/C/BWA/CO/16, para. 9.
\textsuperscript{160} Id. at p. 92-3, 101.
\textsuperscript{161} Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57. UN Doc. E/CN.4/2002/97, at para. 100 (stating that “it has become increasingly accepted that the right to decide who is or is not an indigenous person belongs to the indigenous people alone;” and that in “the design and application of policies regarding indigenous peoples, States must respect the right of self-definition and self-identification of indigenous people”).
\textsuperscript{162} See, inter alia, Views of the Advisory Committee on Norway. ACFC/INF/OPI(2003)003, at para. 9 (taking into account the views of the Saami Parliament with respect to self-identification as an indigenous people rather than as a national minority).
\textsuperscript{163} Articles 9 and 33(1) provide, respectively, that “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned” and, “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” See, also, Proposed American Declaration on the Rights of Indigenous Peoples, Article I(2) (as provisionally in March 2006), which provides that “Self-identification as indigenous peoples will be a fundamental criterion for determining to when this Declaration applies. The States should respect the right to self-identification as indigenous, individually and collectively, in keeping with the practices and institutions of each indigenous peoples.”
name given to such groups in domestic law."\(^{164}\) In doing so, however, CERD also recommended that Laos "take into consideration the way in which the groups concerned perceive and define themselves."\(^{165}\)

### B. Lands, Territories and Resources

For indigenous peoples, secure, effective and collective rights to their lands, territories and resources are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance.\(^{166}\) Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural communities.\(^{167}\) As the Inter-American Court of Human Rights explained in 2005, indigenous peoples’ culture “directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.”\(^{168}\) Protection of these relationships between indigenous peoples and traditional territory therefore transcends mere protection of property rights: a fact that is recognized by CERD’s specification that the “[e]ncroachment on the traditional lands of indigenous peoples” is one of the triggers of its EW/UA procedure\(^{169}\) and its 1999 decision on Australia, which states that “the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.”\(^{170}\)

GRXXIII also recognizes the fundamental nature of indigenous peoples’ rights to maintain and develop the full spectrum of their relationships to their traditional lands, territories and resources. Paragraph 5 includes strong language that calls on states parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.” This language clearly borrows from the (now) UNDRIP, and is the standard used by CERD when considering state reports and requests under the EW/UA procedure.

\(^{164}\) Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 17.

\(^{165}\) Id.

\(^{166}\) For a detailed treatment of indigenous peoples’ rights to lands, territories and resources in international law, see, J. Gilbert, INDIGENOUS PEOPLES’ LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS, Ardsley, New York: Transnational Publishers, 2006.


\(^{170}\) Decision 2 (54), Australia, 18/03/99, UN Doc. A/54/18, para. 21(2).
CERD holds that indigenous peoples’ property rights derive from their own customary laws and forms of land tenure and exist as valid and enforceable rights absent formal recognition by the state. This is consistent with inter-American jurisprudence, which often cites GRXXIII to support the conclusion that a major manifestation of racial discrimination “has been the failure of state authorities to recognize customary indigenous forms of land possession and use.” Elaborating further, the Inter-American Commission explained in a case against Suriname that the lack of constitutional and legislative recognition or protection of indigenous peoples’ collective rights “reflects unequal treatment in the law,” and that this amounts to a failure to provide the necessary protection for full exercise of the right to property, “on an equal footing with the other citizens of Suriname.”

In the same vein, CERD has objected to Guyana’s practice of granting land titles “on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy.” The corresponding recommendation urged Guyana to recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy. … [And.] in consultation with the indigenous communities concerned, (a) to demarcate or otherwise identify the lands which they traditionally occupy or use, (b) to establish adequate procedures, and to define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.

CERD also often holds that legal acknowledgment of indigenous peoples’ rights to own and control their territories – although fundamental to the overall process – by itself does not satisfy ICERD’s requirements: those rights must also be

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171 Contrast this however with the 2001 Final Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration, at para. 43 (stating that “We also recognize the special relationship that indigenous peoples have with the land as the basis for their spiritual, physical and cultural existence and encourage States, wherever possible, to ensure that indigenous peoples are able to retain ownership of their lands and of those natural resources to which they are entitled under domestic law”).


173 Inter alia, Report No. 09/06, Case 12.338, Twelve Saramaka Clans (Suriname), Inter-American Commission on Human Rights, 2 March 2006, at para. 235. See, also, Concurring Opinion of Judge Sergio Garcia Ramirez, in the Judgment on the Merits and Reparations in the Mayagna (Sumo) Awas Tingni Community Case, para. 12-4, at 13 (stating that the failure to recognize and protect indigenous peoples’ property rights, as derived from their customary laws, “would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights”).


176 Id.

177 Inter alia, Sweden, 10/05/2004, CERD/C/64/C0/8, at para. 12 (welcoming the establishment of a “Boundary Commission to formulate proposals for the definition of the boundaries for Sami reindeer-breeding areas by the end of 2004 as an important step towards securing the rights of the
secured in fact and effectively protected. With regard to the Democratic Republic of Congo, CERD’s 2007 recommendations stressed the need for urgent measures to protect the rights of the Pygmies to land, including registration of their “ancestral lands” at the land registry, a moratorium on logging, and the establishment of “domestic remedies in the event that the rights of indigenous peoples are violated”, all in addition to legal recognition of their ownership and other rights. Similarly, with regard to Argentina in 2004, CERD stated its concern about “the inadequate protection in practice of indigenous peoples’ lands and recommended, inter alia, that Argentina adopt effective legal procedures to recognize indigenous peoples’ titles to land and demarcate territorial boundaries and measures to safeguard indigenous rights over ancestral lands, especially sacred sites. In the case of Cameroon, it observed that environmental degradation was affecting indigenous peoples’ right to “live in harmony in their environment” and recommended that the state ‘take all appropriate measures, particularly as regards deforestation that may harm such population groups.”

For the most part CERD has avoided specifying exactly which resources are owned by indigenous peoples and in particular whether subsoil resources fall within the scope of indigenous peoples’ rights. Its 2006 concluding observations on Guyana stand out markedly in this respect however; therein CERD explicitly recommended that the state “recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources…” While it breaks new ground, it is doubtful that this recommendation is indicative of a new found willingness to address the thorny issue of indigenous ownership of subsoil minerals, particularly given the adamant assertions of exclusive state ownership of such resources by the majority of states interacting with CERD. Rather, this recommendation is most likely a result of the application of basic non-discrimination principles because Section 8 of Guyana’s 1989 Mining Act acknowledges that subsoil mineral rights vest in persons who hold title issued prior to 1903, whereas its Amerindian Act 2006 explicitly denies such

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178 Inter alia, Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 15 (stressing the need for delimitation, securing tenure, and recovery of lands lost through improper transfer); India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (recommending that “that bans on leasing tribal lands to third persons or companies are effectively enforced, and that adequate safeguards against the acquisition of tribal lands are included in the Recognition of Forest Rights Act (2006) and other relevant legislation”); Letter to Brazil, Urgent Action and Early Warning Procedure, 24 August 2007, at p. 2 (recommending the removal of illegal occupants and increased protection for indigenous peoples during the removal); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 17 (recommending the “effective implementation of the national land register law so that indigenous community lands can be identified and demarcated”) and; Guyana, 04/04/2006, CERD/C/GUY/CO/14, para. 19 (protection from environmental degradation caused by small-scale mining).


180 Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 16.

181 Cameroon, 20/03/98, CERD/C/304/Add.53, at para. 9 and 17. See, also, inter alia, Suriname, 12/03/2004, CERD/C/64/CO/9, at para. 15 (stressing the need for environmental impact assessments in relation to activities that may affect indigenous peoples’ lands and for health and safety assessments of mining operations).

rights to indigenous communities. If non-indigenous persons can own subsoil minerals then it would be discriminatory to deny the same rights to indigenous peoples solely on the basis of when title deeds were acquired and especially where indigenous peoples do not hold such deeds due to the acts and omissions of the state itself.  

Ownership of the subsoil was not raised as an issue in CERD’s 2006 concluding observations on South Africa despite the fact that private persons may own minerals under South African law. Mineral rights may also vest in groups that self-identify as indigenous in South Africa, such as the Nama people of the Richtersveld area. In this respect, South Africa’s Constitutional Court observed that

We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.

The Constitutional Court further concluded that

In this case, the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights. Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to “spatial apartheid”, its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a significant extent, the rights of registered owners.

South Africa was scheduled to report to CERD under the Follow Up procedure in August 2007. Assuming that this issue is brought to its attention, it will be interesting to see how CERD addresses subsoil ownership rights, particularly in light of the above jurisprudence and as related to land claims settlements presently pending.

183 *Inter alia*, see, S.J. Anaya, Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction. The More Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources. 22 *Arizona Journal of Int’l and Comp Law* 8, 2005, at 10, (“Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners”). Available at: http://www.law.arizona.edu/journals/ajiocl/AJICL2005/vol221/vol221.htm


185 *Alexkor*, id. at para. 99.
under the 1994 Restitution of Land Act, an Act specifically designed to remedy historical racial discrimination.

While CERD has been wary of broaching the subject of subsoil or other resource ownership rights, it has nevertheless made clear to reporting states that their assertions of state ownership of resources or public/national interest declarations with respect to exploitation of resources on or around indigenous territories do not give the state a license to violate indigenous peoples’ rights, including, as discussed below, indigenous peoples’ right to give their informed consent to activities that affect their territories. CERD’s 2004 observations on Suriname, for example, explained that while that country’s Constitution vests ownership of all resources in the state, “this principle must be exercised consistently with the rights of indigenous and tribal peoples.” It added for good measure that “development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population.”

Similarly, observing that the rights of indigenous peoples have been compromised “due to the interpretations adopted by the State party of national interest, modernization and economic and social development,” CERD’s 2007 observations on Indonesia recommend that the state ensure that these concepts “are defined in a participatory way, … and are not used as a justification to override the rights of indigenous peoples.” CERD has also stressed that the use by a state of a “margin of appreciation in order to strike a balance” between indigenous and non-indigenous land and resource rights is limited by the obligations assumed under ICERD.

Considering that indigenous peoples continue to suffer from the legacy of systematic discrimination that has resulted in the loss of vast areas of their traditional

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187 See, also, Report No. 09/06, Case 12.338, Twelve Saramaka Clans (Suriname), Inter-American Commission on Human Rights, 2 March 2006, at para. 241–42 (observing that the public interest doctrine “substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land ab initio, in favor of an eventual interest of the State that might compete with those rights. … In practice, the classification of an activity as being in the “general interest” is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection”).

188 Suriname, 12/03/2004, CERD/C/64/CO/9, at para. 11.

189 Id. at para. 15. See, also, Indonesia, 15/08/2007, CERD/C/IDN/CO/3, para. 17; and Nigeria, 01/11/2005, CERD/C/NGA/CO/18, para. 19.

190 Indonesia, 15/08/2007, id. at para. 16.

191 Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 16. The Human Rights Committee has explicitly stated that a state’s freedom to encourage economic development is strictly limited by the obligations it has assumed under international human rights law rather than by a margin of appreciation. I. Lansman et al. vs. Finland (Communication No. 511/1992), CCPR/C/52/D/511/1992, para. 10. See, also, African Commission on Human and Peoples’ Rights, Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, at para. 58 (stating that the “intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities”).
territories, GRXXIII importantly recognizes a right to restitution in cases “where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent….”192 CERD has raised this issue on a number of occasions in its concluding observations and has explained that where restitution is not possible, compensation, preferably in the form of lands and territories of equal quality, is required.193

The Inter-American Court of Human Rights has also recognized indigenous peoples right to collective reparations and in particular to restitution of their traditionally-owned lands, territories and resources.194 In the 2006 Sawhoyamaxa Indigenous Community vs. Paraguay Case, the Court observed that its jurisprudence holds that indigenous peoples maintain their property rights in cases where they have been forced to leave or have otherwise lost possession of their traditional lands, including where their lands have been expropriated and transferred to third parties without their consent.195 According to the Court, this “means that title is not a pre-requisite that conditions the existence of the right to restitution of indigenous lands.”196

The Court further examined the issue of whether indigenous peoples’ right to restitution of their traditional lands and territories continues indefinitely. Observing that “the spiritual and material base of the identity of indigenous communities is sustained primarily through its unique relationship with its traditional territory,” it held that the right to restitution continues as long as indigenous peoples maintain some degree of spiritual and material connection with their traditional territory.197 Evidence of the requisite connection may be found in “traditional spiritual or ceremonial use or presence; settlement or sporadic cultivation; seasonal or nomadic hunting, fishing or harvesting; use of natural resources in accordance with customary practices; or any other factor characteristic of the culture of the group.”198 The Court further held that if indigenous peoples are prevented from maintaining their traditional

192 Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights (and member of CERD at the time that GRXXIII was adopted), states in his UN study on reparations that a “coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.” Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur. UN Doc. E/CN.4/Sub.2/1993/8, at para. 14.

193 Inter alia, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at para. 17 (reiterating GRXXIII with regard to restitution); Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 15 (stressing the need for recovery of lands lost through improper transfer); and Bolivia, 10/12/2003, CERD/C/63/CO/2, para. 13 (referring the right to restitution in relation to lands allotted to private companies).


196 Id.

197 Id. at para 131.

198 Id.
relationships with their territories, the right to recovery nonetheless continues “until such impediments disappear.”\footnote{Id. at para 132.}

If a state is unable to return indigenous peoples’ traditional lands and communal resources for “concrete and justifiable reasons,” compensation or the provision of alternative lands is required.\footnote{Id. para 138-9.} The Court explicitly stated that the following did not constitute justifiable reasons that would preclude the return of indigenous lands and resources: that the lands in question were in private hands;\footnote{See, also, New Zealand, 22/09/95, A/50/18, para. 399-459, at 410. (admonishing against excluding “claims to land that had been confiscated by private parties” in relation to the provisions of New Zealand’s Treaty of Waitangi (Amendment) Act).} that the lands were being used productively and; due to the application of bilateral trade agreements.\footnote{Sawhoyamaxa Indigenous Community v. Paraguay, at para 140.} With regard to the latter, Paraguay had argued that some of the lands in question were protected from expropriation by a trade agreement with Germany. However, the Court was clear that such agreements must always be interpreted consistently with the American Convention’s guarantees and could not be invoked as grounds for non-compliance with those guarantees.\footnote{Id.}

C. The Right to Participate and to Informed Consent

Article 5(c) of ICERD guarantees the right, without discrimination of any kind, to participate in elections and to take part in government and the conduct of public affairs at any level. The 2005 judgment of Inter-American Court of Human Rights in \textit{Yatama v. Nicaragua} illustrates that violation of these rights continues to be a contemporary reality for indigenous peoples. In that case, the Court found that Nicaragua had violated the right to political participation and the prohibition of racial discrimination because Yatama, an indigenous institution, had been barred from fielding candidates in the Atlantic Coast Autonomous Regional elections of 2000 as it was not constituted as a political party, even though it fulfilled all other requirements of the law.\footnote{Yatama v. Nicaragua, Judgment of the Inter-American Court of Human Rights, 23 June 2005. Series C No. 127, para. 229 (unofficial translation).} The Court held that the requirements of the Election Law forced Yatama to adopt a structure that was alien to indigenous peoples’ customs and traditions and constituted a discriminatory impediment to participation in the elections. The Court ordered, \textit{inter alia}, that Nicaragua must

Adopt all necessary measures to guarantee that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities … and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization, provided that these are compatible with the human rights consecrated in the [American] Convention.\footnote{Id. at para. 225.}
With respect to Article 5(c), GRXXIII\textsuperscript{206} calls on states parties to “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”\textsuperscript{207} The right to give or withhold informed consent (or free, prior and informed consent) has been highlighted by indigenous peoples as a fundamental element of the exercise of their right to self-determination: “Free, prior and informed consent is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.”\textsuperscript{208}

While the inclusion of informed consent in GRXXIII was intensely debated by CERD in 1997, with some members arguing that informed participation was a more appropriate standard, its concluding observations routinely refer to indigenous peoples’ right to informed consent.\textsuperscript{209} Its observations on Ecuador, for instance, state that

As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured.\textsuperscript{210}

CERD emphasizes indigenous peoples’ right to give their informed consent both in general\textsuperscript{211} and in connection with specific activities, including: mining, oil and gas operations;\textsuperscript{212} logging;\textsuperscript{213} the establishment of protected areas;\textsuperscript{214} dams;\textsuperscript{215} agro-

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\textsuperscript{206} GRXXIII, at para. 4(d).
\textsuperscript{207} Inter alia, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 16 (referring to ICERD Article 5(c) and stating that “bearing in mind paragraph 4(d) of its general recommendation 23, recommends that the State party redouble its efforts to ensure the full participation of indigenous peoples, especially indigenous women, in public affairs and that it take effective measures to ensure that all indigenous peoples, particularly the Xinca and Garifuna, participate at all levels”); and Australia, 24/03/2000, CERD/C/304/Add.101, at para. 9 (highlighting indigenous peoples’ right to “effective participation . . . in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the ‘informed consent’ of indigenous peoples”).
\textsuperscript{208} Statement of Les Malezer, Chairman of the Global Indigenous Caucus, 13 September 2007 (on file with author).
\textsuperscript{209} Summary record of the 1235th meeting: Algeria, Democratic Republic of the Congo, Mexico, Poland, 05/08/97. CERD/C/SR.1235, para. 66-86 (debating the inclusion of informed consent in GRXXIII).
\textsuperscript{210} Ecuador, 21/03/2003, CERD/C/62/CO/2, at para. 16.
\textsuperscript{211} Inter alia, Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending that Australia “take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXXIII”); and Mexico, 04/04/2006, CERD/C/MEX/CO/15, at para. 14 (noting with concern “that under Article 2, section VII of the Constitution, the right of the indigenous peoples to elect their political representatives is limited to the municipal level” and reminding Mexico that “article 5 (c) of the Convention, and recommends that it should guarantee in practice the right of the indigenous peoples to participate in government and in the management of public affairs at every level”).
\textsuperscript{212} Inter alia, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana “seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities”); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 19; and Suriname, 18/08/2005, Decision 1(67), CERD/C/DEC/SUR/4, para. 3.
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industrial plantations; resettlement and compulsory takings and other decisions affecting the status of land rights. In August 2007, it observed in a letter to the Philippines under the EW/UA procedure that, although the right to consent was recognized in that country’s 1997 Indigenous Peoples’ Rights Act, CERD was nevertheless concerned that this right has been negatively affected by implementing regulations adopted under the Act. It also expressed concern about alleged manipulation of the right to consent related to a government agency’s “creation of a body with no status in indigenous structure and not deemed representative” by the affected people, and which had “concluded an agreement with a Canadian mining company (TVI Pacific) in order to authorize mining activities” on the indigenous people’s sacred mountain.

CERD’s emphasis on the indigenous peoples’ right to informed consent has informed the jurisprudence of the inter-American human rights system and is also reflected in Article 32(2) of UNDRIP. With regard to extractive industries, for

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213 *Inter alia*, Cambodia, 31/03/98, CERD/C/304/Add.54, at para. 13 and 19 (observing that the “rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations” and recommending that Cambodia “ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent”).


215 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, at para. 19 (stating that the India “should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities”).

216 *Inter alia*, Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 17 (recommending that Indonesia “ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan”); and Cambodia, 31/03/98, CERD/C/304/Add.54, para. 13 and 19.

217 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (stating that the “State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation…”); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12 (recommending that the state “study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned”). See, also, Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 18.

218 Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 17 (recommending that Guyana “confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent…”).

219 Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending “that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land”); and United States of America, 14/08/2001, A/56/18, para. 380-407, at para. 400 (concerning “plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples”).


221 *Id*, at p. 2.

222 Article 32(2) provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other
instance, the Inter-American Commission on Human Rights confirmed in the *Twelve Saramaka Clans Case*, a case involving logging and mining concessions, that “in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people’s consent to natural resource exploitation activities on their traditional territories is always required by law.”

While the Inter-American Court has yet to explicitly affirm indigenous peoples’ right to give or withhold their consent in relation to resource exploitation, it has ordered that states “refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment” of indigenous peoples’ property at least until such time as their property rights are secured in law and fact. Similar orders have been issued in the Court’s provisional measures jurisprudence.

CERD further applies Article 5(c) to indigenous peoples’ right to participate in state institutions and has also raised the right to informed consent in this context. It has raised concerns about the lack of any indigenous representatives on Guyana’s Ethnic Relations Commission even though the Constitutional amendment “establishing the Ethnic Relations Commission does not require the representation of any particular ethnic group.” In the case of Australia, CERD expressed its concern about the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), a government policy-making body comprised of elected indigenous representatives, its replacement by a board of appointed experts, and the transfer of most of ATSIC’s programmes to government departments. Referring to this and others, CERD recommended that Australia ‘reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests.”

In its 2004 review of Argentina, it endorsed the Co-ordinating Council of Argentine Indigenous Peoples, a body established by law to represent indigenous peoples in the National Institute of Indigenous Affairs, and expressed concern about delays in its operationalization.

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226 Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 14 (recommending that “that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee’s General Recommendation No. 23”).

227 Australia, CERD/C/AUS/CO/14, 14 April 2005, at para. 11.

228 Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 18 (referring to the Co-ordinating Council of Argentine Indigenous Peoples envisaged by Act No. 23,302 to represent indigenous peoples in the National Institute of Indigenous Affairs and referring to the right to informed consent).
CERD also has stated its approval for the establishment of *Sameting* (Saami parliaments) in Norway and Sweden, describing these bodies as an important component of protecting Saami culture, language and way of life. In the case of Sweden, members of the Committee “wondered to what extent the Assembly was independent and had genuine powers … [and] why the choice of the Chairman of the Sameting and the determination of the Assembly’s functions fell within the purview of the Government of Sweden.”

Last, CERD has expressed concerns about legislative and constitutional reform processes and whether indigenous peoples participated therein, and whether indigenous people have equal access to political office at all levels. In the case of Mexico, for instance, CERD noted that indigenous peoples did not participate in a constitutional revision process and recommended that Mexico implement “the principles set out in the constitutional reform in relation to indigenous matters in close cooperation with the indigenous peoples.” At the same time, CERD also recommended that Mexico amend its Constitution in light of Article 5(c) to ensure that the right of the indigenous peoples to elect their political representatives is not limited only to the municipal level. With regard to representation in parliament or similar bodies, CERD has expressed concern about the absence of Tuareg persons in Mali’s legislative body and congratulated Colombia on the Constitutional reservation of three seats for indigenous persons in its senate (although it also noted that indigenous people are “under-represented in State institutions, including in the legislature, the judiciary, government ministries, the military, and the civil and diplomatic services”). In 2002, it also welcomed amendments to New Zealand’s electoral role, “in particular the Maori electoral option, which have contributed to an appreciable increase in the representation of Maori in Parliament.”

IV. Concluding Remarks

Former CERD member Michael Banton recalls that CERD began sporadically addressing indigenous peoples’ issues in the late 1970s and 1980s, particularly in Australia, New Zealand and those Latin America countries that had ratified ICERD. For instance, in 1976, issues were raised with regard to Peru’s constitution that confined the right to vote only to literate citizens and how this may have disproportionately affected the political participation rights of indigenous people. He

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229 Sweden, 03/03/94, A/49/18, para.181-208, 185 and; Norway, 18/09/97, CERD/C/304/Add.40, para. 5.
230 Sweden, 03/03/94, id.
231 See, also, Article 19 of the UNDRIP, which provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”
233 Id. para. 14.
234 Mali, 10/03/94, A/49/18, para. 275-283, 278.
235 Colombia, 20/08/99, CERD/C/304/Add.76, at para. 13. See, also, Venezuela, 01/11/2005, CERD/C/VEN/CO/18, at para. 7 (noting “with satisfaction that indigenous peoples are represented in the National Assembly, which has at least three indigenous deputies with their respective alternates, elected by indigenous peoples in keeping with their traditions and customs”).
further recalls how, as late as 1989, many Latin American states – Chile, Colombia, Bolivia, Venezuela, and Mexico are named – denied that there was any racial discrimination whatsoever in their territories, and how they would react, at best, with surprise to CERD’s insistence that ICERD applied to indigenous peoples.\textsuperscript{238} The concluding observations adopted up to the mid-1990’s that deal with indigenous issues are, with a few notable exceptions, largely concerned with addressing these misconceptions. Today, however, CERD raises concerns about the treatment of indigenous peoples in all regions of the world where people self-identify as such, and the periodic reports of many of ICERD’s parties now contain information on indigenous peoples as a matter of course.

GRXXIII marked an important turning point in CERD’s attention to indigenous peoples and it continues to provide a focal point for its dialogue with states parties and its deliberations around indigenous issues. Although it is not entirely free from discussions about whether indigenous peoples exist in a certain state (or similar/related objections), CERD now routinely addresses indigenous peoples’ rights and does so with a degree of detail that far surpasses the other UN treaty bodies responsible for monitoring the implementation of human rights instruments. Indeed, one could argue, for instance, that indigenous women may be better served bringing many of their complaints to CERD rather than to the Committee on the Elimination of Discrimination Against Women. This is because ICERD offers the potential to address a wide range of concerns that are often raised by indigenous women,\textsuperscript{239} whereas the latter, although improving in recent years,\textsuperscript{240} remains reluctant to address questions of ethnicity and sometimes adopts recommendations that run counter to the stated wishes of indigenous women.\textsuperscript{241}

ICERD’s affirmation and protection of indigenous peoples’ collective rights and dignity permits attention to the full spectrum of rights that fall under and give substance to the right to self-determination. The right to self-determination is the framework within which most indigenous peoples view and assert their rights; it is a demand to be treated and protected equally to other peoples. CERD has skilfully addressed some of the important component rights of self-determination while at the same time avoiding unnecessary (and largely rhetorical) confrontations around the terminology. The right to self-determination and related rights are explicitly recognized in the African Charter of Human and Peoples’ Rights and the interpretation thereof may be informed by CERD’s jurisprudence, including in the binding judgments of the African Court of Human and Peoples’ Rights once it becomes fully operational.

\textsuperscript{238} Id. p. 230-31.
\textsuperscript{239} See, General Recommendation No. XXV, Gender related dimensions of racial discrimination, 20/03/2000; Canada, 25/05/2007, CERD/C/CAN/CO/18, para. 15 and 20; Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 17;
\textsuperscript{240} See, for example, India, 02/02/2007, CEDAW/C/IND/CO/3, at para. 46 (expressing “grave concern about the displacement of tribal women owing to the implementation of megaprojects … [and] that the human rights of vulnerable groups such as tribal populations may be adversely affected by large-scale economic projects”); and; Nicaragua, 02/02/2007, CEDAW/C/NIC/CO/6, para. 31 (expressing concern about the multiple forms of discrimination suffered by indigenous women).
\textsuperscript{241} See, id. para. 47 and; Australia, 22/07/97, A/52/38/Rev.1, part II, para. 405 (both recommending that indigenous women are granted individual rights to inherit and own land and property).
The degree of attention to indigenous issues by CERD is greatly influenced and enhanced by whether indigenous peoples themselves choose to report their concerns, either by submitting shadow reports or, increasingly, through invoking the EW/UA procedure. This not only provides information that may not otherwise be obtained, information that is often invaluable in CERD’s dialogue with states parties, but additionally shares indigenous peoples’ perspectives with CERD. This may also be done via CERD’s informal lunch-time briefings conducted during its session periods, during which CERD members can hear directly from indigenous peoples and ask questions. These briefings are usually very well attended and their importance should not be underestimated.

Finally, GRXXIII was undoubtedly influenced by the draft UN Declaration on the Rights of Indigenous Peoples, as it was agreed on by the members of the Working Group on Indigenous Populations in 1993 and endorsed by the then-Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994. Ten years have passed since GRXXIII was adopted and this anniversary almost coincides with the UN General Assembly’s adoption of the 2007 UNDRIP. The 46 articles that comprise the UNDRIP contain a great deal more detail than GRXXIII, although many of the issues addressed therein are also addressed in CERD’s jurisprudence. While it remains to be seen exactly how CERD will incorporate this important declaration into its work, it can be expected that the UNDRIP will begin to feature explicitly in CERD’s jurisprudence and that the norms elaborated in that jurisprudence and in the UNDRIP, at a minimum, will continue to be mutually reinforcing.