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# The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights

*William F. Felice\**

## I. INTRODUCTION

Simplified racial categories can be misleading and dangerous, since individuals are not only a race, but also a class, gender, and sexuality. Thus, broad generalizations about race can be deceptive and groundless in individual cases. In the real world, a person does not exist only as a racial category.<sup>1</sup>

According to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>2</sup> race encompasses color, descent, and national or ethnic origin. "Descent" suggests social origin, such as heritage, lineage, or parentage. "National or ethnic origin" denotes linguistic, cultural, and historical roots. Thus, this broad concept of race clearly is not limited to objective, mainly physical elements, but also includes subjective and social components. The ingredients considered central to a

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1. See WILLIAM F. FELICE, *TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS* (1996).
2. International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965, 660 U.N.T.S. 195 (entered into force 4 Jan. 1969), reprinted in 5 I.L.M. 352 (1966) [hereinafter CERD].

person's "race" may, in fact, vary from place to place. Some may emphasize linguistic and cultural factors while others emphasize social determinants. Certain castes, for example, are discriminated against for social reasons, but not ethnic reasons. Furthermore, nothing is permanent about all these aspects of race. Anthropologists have shown that environmental influences can profoundly change even the physical appearance of a human being in a relatively short time.<sup>3</sup>

Recent scientific research on the human genome—the aggregate of genetic material encased in the heart of almost every cell of the body—has confirmed that the racial categories recognized by society are not reflected on the genetic level. Most of the scientists studying the human genome are convinced that the standard labels used to distinguish people by race have little or no biological meaning. The human species does not divide itself into separate biological groups or races. Dr. J. Craig Venter, head of the Celera Genomics Corporation concludes: "Race is a social concept, not a scientific one. We all evolved in the last 100,000 years from the same small number of tribes that migrated out of Africa and colonized the world."<sup>4</sup> Dr. Harold P. Freeman, the chief executive, president, and director of surgery at North General Hospital in Manhattan, who has studied the issue of biology and race, states, "If you ask what percentage of your genes is reflected in your external appearance, the basis by which we talk about race, the answer seems to be in the range of .01 percent. This is a very, very minimal reflection of your genetic makeup."<sup>5</sup>

Therefore, race, most certainly, cannot be understood simply in terms of skin color. Racial classifications, racist bigotry, and racial hatred often have not relied on skin color. Historical examples abound. The German Nazis' belief that the Russians (as white as the Germans) were subhuman led to a massacre of millions of Russian citizens. The white Irish farmers looked like the white British landlords in Ireland in the 1840s. Yet, the white British elite exported food and gave no concessions to the white Irish farmers and laborers after crop failures in 1846–1847, and thus, "imposed" the Irish potato famine. The issue here was not skin color, but political power. The white Irish farmers had no political or economic power. The powerful white British elite exported the food that could have saved hundreds of thousands of Irish lives. It was easier for the British to justify these policies by classifying the Irish as a backward and inferior people.<sup>6</sup>

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3. UNITED NATIONS: LAW, POLICIES AND PRACTICE 1005–06 (Rüdiger Wolfrum ed., 1995).

4. Natalie Angler, *Do Races Differ? Not Really, Genes Show*, N.Y. TIMES, 22 Aug. 2000, at F1.

5. *Id.*

6. Kevin Danaher, *Getting at Hunger's Roots: The Legacy of Colonialism and Racism*, in THE COLOR OF HUNGER: RACE AND HUNGER IN NATIONAL AND INTERNATIONAL PERSPECTIVE 89–91 (David L. Shields ed., 1995).

The genocide in Rwanda in the mid 1990s was led by black Hutus against black Tutsis. In fact, ethnographers have come to agree that Hutus and Tutsis cannot properly be called distinct ethnic groups. The two groups spoke the same language, followed the same religion, intermarried, and shared the same social and political culture. Rwanda was one of the few nations that shared one language, one faith, and one law. Yet the leaders of "Hutu power" mobilized their people around the idea that the Tutsis were "scum" and "cockroaches" who had to be destroyed.<sup>7</sup> Hutu power attempted the organized extermination of an entire people and succeeded in killing between 800,000 to 1 million Tutsi.<sup>8</sup> The program of massacres that decimated the Tutsi of Rwanda in 1994 cannot be understood through a lens of skin color or ethnicity.

A definition and understanding of race and racial discrimination analysis should, therefore, include more than a mere difference of skin color. Race is also tied to power differentials, social status, and other distinctions. Differences in power give one group the ability to declare the less powerful group "inferior." In fact, those in power may share the same skin color and ethnic characteristics as those they oppress, yet use "race" and "ethnic" differences to consolidate their rule.<sup>9</sup>

Those most vulnerable to economic and social deprivations (hunger, illiteracy, disease, and so on) are those groups without wealth and political power, the majority of whom are women and children. Skin color alone will not tell who will suffer. For example, the majority of US citizens living in poverty are white,<sup>10</sup> the color of most US policy makers.

Yet, most of the people in the world who experience a life of severe destitution are people of color. Suffering clearly continues to be related to the politics of race. According to the administrator of the United Nations Development Programme (UNDP), among the 4.4 billion people in developing countries around the world at the end of the twentieth century, three-fifths lived in communities lacking basic sanitation; one-third went without

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7. PHILIP BOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 47–48 (1998).

8. *See id.*

9. *See* Centre for Human Rights, *Report of the Seminar on the Political, Historical, Economic, Social and Cultural Factors Contributing to Racism, Racial Discrimination and Apartheid*, U.N. Doc. HR/PUB/91/3 (1991).

The Seminar affirms that racial discrimination means 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.

*Id.* at 23.

10. Danaher, *supra* note 6, at 91. For statistics on the racial dimensions of child poverty, see Marc Miringoff & Marque-Luisa Miringoff, *THE SOCIAL HEALTH OF THE NATION: HOW AMERICA IS REALLY DOING* 83 (1999).

safe drinking water; one-quarter lacked adequate housing; and one-fifth were undernourished.<sup>11</sup> In addition, nearly one-third of the people in the poorest countries, mostly in sub-Saharan Africa, could expect to die by age forty.<sup>12</sup> According to the World Bank, of the world's 6 billion people, 2.8 billion—almost half—live on less than \$2 a day, and 1.2 billion—a fifth—live on less than \$1 a day; with 44 percent living in South Asia.<sup>13</sup> Overwhelmingly, these impoverished people are people of color. A glance at a map of global hunger, for example, graphically shows that the preponderance of the chronically undernourished are peoples in Africa, Asia, and parts of Latin America and the Caribbean.<sup>14</sup> In early 2001, the UN World Food Program distributed a map calling attention to “hot spots” where hunger is most severe.<sup>15</sup> The map identifies huge areas in Asia and sub-Saharan Africa, where tens of millions of people of color, most of them women and children, cannot get enough to eat. The UN agency estimates that of the 830 million undernourished people in the world, 791 million live in developing countries.<sup>16</sup>

Racial minorities inside the US also continue to suffer a lack of economic security compared to their white counterparts, despite a “booming” economy at the end of the twentieth century. The following statistics from the 1990s reveal the economic divide between black and white Americans. According to Census Bureau statistics, there was a stark \$14,000-per-household income gap between blacks and whites (\$25,050 a year vs. \$38,970; income stated in 1997 US dollars).<sup>17</sup> The unemployment rate for young black men at all education levels was more than twice that for young white men.<sup>18</sup> In addition, twice the number of young black men between the ages of sixteen and twenty-four were not in school or working.<sup>19</sup> One out of every three black men in their twenties was under the supervision of the criminal justice system, either imprisoned or on probation or parole.<sup>20</sup> Blacks in the US were six times more likely than whites to be

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11. James Gustave Speth, *The Plight of the Poor: The United States Must Increase Development Aid*, 78 FOREIGN AFF. 14 (May/June 1999).

12. See *id.*

13. THE WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 3 (2001).

14. Christopher S. Wren, *U.N. Report Maps Hunger “Hot Spots,”* N.Y. TIMES, 9 Jan. 2001, at A8; see also Map of Global Hunger, Figure 1.1, in HUNGER IN A GLOBAL ECONOMY 11 (1997).

15. See *id.*

16. See *id.*

17. *Blacks Lead the Way in Income Growth*, ST. PETERSBURG TIMES, 10 Oct. 1998, at E1.

18. Sylvia Nasar & Kirsten B. Mitchell, *Booming Job Market Draws Young Black Men Into Fold*, N.Y. TIMES, 23 May 1999, at 11.

19. See *id.*

20. Fox Butterfield, *More Blacks in Their 20s Have Trouble With the Law*, N.Y. TIMES, 5 Oct. 1995, at A18.

held in jail.<sup>21</sup> This vast disparity in economic opportunity between blacks and whites in the US continues in the new century.<sup>22</sup>

The same disparity in economic security exists between white and Hispanic Americans. The National Council of La Raza reports that Hispanic workers were disproportionately concentrated in low-wage jobs that offered few benefits throughout the 1990s.<sup>23</sup> As a result, married Hispanics with children continued to have higher poverty rates compared to black and white families. In 1997, for example, 21 percent of Hispanic married couples with children were poor, compared with 6 percent of white and 9 percent of black families.<sup>24</sup> That same year only 55 percent of Hispanics twenty-five and older had graduated from high school, and 7.4 percent had graduated from college.<sup>25</sup>

Any serious program for the protection of economic and social rights must address this reality. These conditions are the result of history, especially the heritage of four major historical processes: conquest, state building, migration, and economic development. Modern states have been built by powerful groups at the expense of the less powerful, with racial prejudice underlying the entire process. For those concerned with economic justice, the questions to be confronted today include the following: How is it possible to overcome and reverse this historical record of racial bias? What political and economic structures perpetuate racial bias in economic outcomes? What policies can be implemented at the national and international levels to create real economic opportunity for all races?

This article will first examine how the United Nations (UN) has approached these issues of economic injustice and race. The work of the Committee on the Elimination of All Forms of Racial Discrimination (hereafter CERD Committee)<sup>26</sup> will be a particular focus. The UN also recently concluded a World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance held in South Africa in September 2001. Thus, it seems like an appropriate time to evaluate how the CERD

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21. Fox Butterfield, *Number of Inmates Reaches Record 1.8 Million*, N.Y. TIMES, 15 Mar. 1999, at A14.

22. MARC MIRINGOFF & MARQUE-LUISA MIRINGOFF, *THE SOCIAL HEALTH OF THE NATION: HOW AMERICA IS REALLY DOING* 66–71; 80–85 (1999).

23. *Report: Low Pay, Benefits Still Plague U.S. Hispanics*, ST. PETERSBURG TIMES, 5 July 2000, at A3.

24. *See id.*

25. *See id.*

26. Throughout the article, I will use the standard acronym to refer to each of the treaties and, when the acronym for the relevant Committee is similar or identical, add the word Committee to avoid confusion. Thus, the *International Convention on the Elimination of All Forms of Racial Discrimination* becomes CERD and the committee established under it becomes the CERD Committee.

Committee and the UN can address more fully the economic and social human rights of racial minorities.

The second section of this article examines Amartya Sen's "capabilities approach" as a means to address racial discrimination in the economic and social realm. Such an approach can both simplify and strengthen the work of the CERD Committee and the UN in this area. I argue that the UN human rights system has paid inadequate attention to these issues of racial injustice. The capabilities approach not only shines a bright light on the crux of the problem, but also provides policy makers with tools to address these issues. This article concludes with four clear steps for the CERD Committee to implement in order to incorporate the capabilities approach in their work.

## II. THE UN AND THE ECONOMIC AND SOCIAL RIGHTS OF MINORITIES

A committee of experts was established under the CERD, which entered into force on 4 January 1969.<sup>27</sup> Article 8 of CERD calls for the committee to consist of eighteen "experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals."<sup>28</sup> Members of the CERD Committee are not representatives of the states whose nationality they bear.<sup>29</sup> They are elected by secret ballot of those states party to the convention, and serve in their personal capacity.<sup>30</sup>

Despite its growth from forty-one to 159 states parties, the CERD Committee continues to meet for just two sessions a year, each of three weeks.<sup>31</sup> With two three-hour meetings each day, there are thirty meetings possible in one session. The CERD Committee roughly divides up these thirty sessions as follows: twenty-two sessions for the consideration of new state reports; two sessions for the review of the implementation of the convention in states whose reports are overdue by five years or more; two sessions to review urgent and early warning procedures regarding the prevention of racial discrimination; and four sessions for other business, including individual communications.<sup>32</sup>

Economic and social rights are covered extensively in these CERD

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27. See CERD, *supra* note 2.

28. See *id.* art. 8.

29. See *id.*

30. See *id.*

31. Michael Banton, *Decision-Taking in the Committee on the Elimination of Racial Discrimination*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 60 (Philip Alston & James Crawford eds., 2000).

32. See *id.*

sessions. Article 1(1) includes bigotry in the definition of racial discrimination, which effectively nullifies economic and social human rights.<sup>33</sup> The CERD Committee asks governments to report on “legislative, judicial, administrative and other measures” that give effect to Article 5(e).<sup>34</sup> This article of the CERD obliges states parties “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone” to economic and social rights, including the following: the right to work; free choice of employment; just and favorable conditions of work; protection against unemployment; equal pay for equal work; the right to housing; the right to public health; medical care, social security, and social services; and the right to education and training.<sup>35</sup> Thus, CERD does not oblige a state party to protect these rights, but obliges them to make sure that discrimination, with respect to the enjoyment of these rights, does not occur.

Hence, the CERD Committee is concerned with discriminatory practices only, and not the absence of economic or social rights in general terms. Therefore, the absence of an economic or social right in the country as a whole is not a focus of the CERD Committee. The CERD Committee is troubled, however, if these rights are given to one racial group as opposed to another; if, for example, the majority racial/ethnic group receives higher health care benefits compared to the minority group.<sup>36</sup>

In fact, Karl Josef Partsch asserts that the CERD Committee has been very cautious in its application of Article 5.<sup>37</sup> The CERD Committee has asked “reporting States whether the rights listed in the article are guaranteed by their national legal systems, but it has not indicated that the absence of such guarantees constitutes a failure to comply with the Convention.”<sup>38</sup> Thus, the CERD Committee seeks to establish whether these rights are protected in the state’s legal order.

The CERD, however, does not stop there. It also advocates state action in order to eliminate disparities and secure *de facto* equality.<sup>39</sup> Such affirmative action programs are authorized in both Articles 1 and 2(2) of CERD. Article 2(2) states:

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33. See CERD, *supra* note 2, at art. 1(1).

34. See *id.*

35. See *id.* art. 5(e).

36. Interview with Cecilia Möller, Human Rights Officer, Committee on the Elimination of All Forms of Racial Discrimination, in Geneva, Switz. (6 June 2000).

37. Karl Josef Partsch, *The Committee on the Elimination of Racial Discrimination*, in THE UNITED NATIONS AND HUMAN RIGHTS 360 (Philip Alston ed., 1992).

38. *Id.*

39. See Drew Mahalic & Joan Gambia Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 HUM. RTS. Q. 74, 82–83 (1987).



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.<sup>40</sup>

However, as with the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), there is a tension here between equal treatment (obligation of means) and equal outcome (obligation of result). According to Theodor Meron, the CERD Committee regards equality of result as the principal objective of the Convention. In a major policy statement, the CERD Committee states that CERD aims “at guaranteeing the right of everyone to equality before the law in the enjoyment of fundamental human rights, without distinction as to race, colour, descent or national or ethnic origin, and *at ensuring that the equality is actually enjoyed in practice.*”<sup>41</sup>

CERD intends to address *de facto* as well as *de jure* equality. Legal equality is only the first step toward authentic social equality. The Preamble refers to the enjoyment of human rights “without distinction of any kind”; Article 5 demands the right to equality before the law; and Article 1(4) allows for distinction for the purpose of affirmative action “to ensure . . . groups or individuals equal enjoyment or exercise of human rights.”<sup>42</sup> Combined with the Article 2(2) endorsement of affirmative action, this demonstrates that the CERD promotes not just *de jure* but *de facto* equality, not just color-neutral values but racial equality. States are required in Article 2(1) to take policy measures and eliminate any laws or regulations that have the effect of creating or perpetuating racial discrimination.<sup>43</sup>

Economic and social policies that have the effect of perpetuating the disadvantaged position of certain racial groups must be remedied. The costliness or burdensome nature of such actions cannot be used as excuses for inaction. The goal is the equal development of all citizens.

States parties are required to submit an initial report within one year of the entry into force of the Racial Discrimination Convention, and periodic

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40. See CERD, *supra* note 2, at art. 2.

41. Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination*, 79 AM. J. INT'L L. 287 (1985) (emphasis added).

42. CERD, *supra* note 2.

43. See Meron, *supra* note 41, at 288–89.

reports at two year intervals.<sup>44</sup> Since 1988, the CERD Committee has nominated one of its members to serve as a country rapporteur for each report.<sup>45</sup> The country rapporteur thoroughly evaluates the state report, and prepares a comprehensive list of questions to put to the representative of the reporting state.<sup>46</sup> The CERD Committee makes final recommendations and concluding observations, to a great extent, on the basis of its examination of country reports.<sup>47</sup> Since 1972, the CERD Committee has invited states to send representatives to respond to questions by Committee members.<sup>48</sup> This procedure, not foreseen in the treaty, has subsequently been adopted by all treaty bodies. The intent is to open a “constructive dialogue” between the reporting state and the CERD Committee. Through such a dialogue, the CERD Committee hopes to exert a positive influence on states’ policies to ameliorate racial discrimination.

Article 14 of CERD establishes an individual complaints system.<sup>49</sup> However, as of 7 November 2001, of the 158 parties to the Racial Discrimination Convention, only thirty-six states had accepted this complaints system.<sup>50</sup> Cecilia Möller, Human Rights Officer with the CERD Committee, notes that states are hesitant to endorse the complaint system because of the perceived “vagueness” of the issues.<sup>51</sup> Racial discrimination is not as clear-cut as torture. Discrimination is often hard to define, and the issues frequently hard to prove. For example, proving employment discrimination in the interview process, or verifying a bank’s discrimination in the denial of a loan, are both very difficult. Additionally, Möller noted that the CERD Committee had received a total of only twenty individual complaints since the system has been in operation.<sup>52</sup> The low number is partially the result of the fact that individuals must first exhaust all local procedures before submitting a complaint to the CERD Committee. Once it is submitted, the complaint does go to the CERD Committee as a whole body.

Obvious weaknesses in this structure include the focus on self-reporting, and the lack of enforcement or “power” to bring about positive change. The CERD Committee relies on states parties to follow through on

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44. The CERD Committee decided in 1990 that after the submission of an initial comprehensive report, states should submit further comprehensive reports every four years and brief updating reports in the intervening two-year periods.

45. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *MANUAL ON HUMAN RIGHTS REPORTING* 267–304 (1997).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See CERD, supra* note 2, at art. 14.

50. Ratification information for the principle human rights treaties is available at <<http://www.unhcr.ch/pdf/report.pdf>> (visited 7 Nov. 2001).

51. Möller, *supra* note 36.

52. *See id.*

their commitments under the CERD, and remedy racial injustice in this area of economic and social rights. But if states parties are not willing to address these issues, there is, in fact, little that the CERD Committee can do. Public pressure and the mobilization of shame may have an impact in dramatic (often media exposed) cases of abuse, such as apartheid, ethnic cleansing, and torture. But it has been less effective in pressuring policy change to address ongoing, systemic abuse and structural factors (e.g., terms of trade, interest rates, commodity prices, market access, and so on) that lead to a denial of economic and social rights to the world's racial and ethnic minorities.

Some states parties to CERD claim that it is contrary to their national law to provide data requested by the CERD Committee; in particular, the demographic composition of the population.<sup>53</sup> Several African states declared the act of gathering data based on ethnicity to be a form of discrimination and contrary to policies of nation-building.<sup>54</sup> This can provide a convenient way for majority groups to hide the information which would reveal racial bias.

Many states parties do not even bother to report. The CERD Committee has the ignominious distinction of having the largest number of "late" reports compared to the other treaty bodies. As of 31 March 2000, there were 430 "overdue" reports to the CERD Committee among the states parties to CERD.<sup>55</sup> "Overdue" means nonexistent; these states will not be submitting these past-due reports. The most that can be hoped for at this point is that these delinquent states try to get back on schedule, submit updated reports, and meet future deadlines.<sup>56</sup>

When states parties do not fulfill their reporting obligations, the CERD Committee examines the states' practices anyway. The CERD Committee waits at least five years before proceeding on its own.<sup>57</sup> It then must gather information concerning the state on its own.<sup>58</sup> For example, if previous states reports exist, it will look at them. The CERD Committee also will invite the noncomplying state to participate, which may push them to produce a report.<sup>59</sup> Furthermore, outside sources do provide data and, when

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53. See *id.*

54. Banton, *supra* note 31, at 67.

55. Recent Reporting History Under the Principal International Human Rights Instruments as of 31 March 2000, Office of the United Nations High Commissioner for Human Rights, U.N. Doc. HRI/GEN/4, at 332 (27 Apr. 2000).

56. It should be noted that the CERD Committee is the oldest treaty body committee, which partially explains its large number of overdue states parties reports in comparison with the other treaty body committees. The treaty body committee with the second most overdue reports is CEDAW Committee with 236 late as of 31 March 2000.

57. Möller, *supra* note 36.

58. See *id.*

59. See *id.*

they do, the committee must then determine the credibility of this information.<sup>60</sup> Likewise, nongovernmental organizations (NGOs) submit “shadow reports” on many countries. All of this becomes part of the data that the committee examines.

On 10 October 1994, the United States ratified CERD (with reservations), and it entered into force on 20 November 1994.<sup>61</sup> The initial report from the United States was due on 20 November 1995, the second periodic report on 20 November 1997, and the third periodic report on 20 November 1999.<sup>62</sup> The United States did not submit any of these reports. It is perhaps understandable when a small country, which lacks the required technical expertise and resources, submits its report late to the CERD Committee. But it is impossible to justify late reports from the United States.

Finally, in September 2000, the US government submitted the *Initial Report of the United States of America to the CERD Committee*.<sup>63</sup> The report documents the many ways minority groups in the United States face economic disadvantage and are disproportionately at the bottom of the income distribution curve.<sup>64</sup> US government statistics disclose that members of minority groups are more likely to be poor than are non-minorities, a consequence of persistent discrimination in employment and labor relations, especially in the areas of hiring, salary and compensation, tenure, training, promotion, layoffs, and in the work environment generally.<sup>65</sup> The report also documents violations of minorities’ social rights, including the lack of educational opportunities and inadequate access to health insurance and health care.<sup>66</sup> The report notes, for example, that in 1998 the poverty rate among blacks was more than triple the poverty rate of white non-Hispanics.<sup>67</sup> And the poverty rate among Hispanics was not statistically different from that of blacks.<sup>68</sup>

Thus, the US government clearly acknowledges the vast disparities in economic and social rights fulfillment that exist between ethnic and racial groups in the United States. The well-documented report is a useful tool for exposing the effects of ongoing discrimination and bigotry in the United

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60. See *id.*

61. See Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 317–29 (Philip Alston & James Crawford eds., 2000).

62. See *id.*

63. Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, Sept. 2000, at 17–18, 76; available on <<http://www1.umn.edu/humanrts/usdocs/cerdinitial.html>> (visited 8 Nov. 2001).

64. See *id.* at 17–18.

65. See *id.* at 18.

66. See *id.* at 18–19.

67. See *id.* at 76.

68. See *id.* at 66.

States. However, in the report, the US government sidesteps its responsibility to respect, protect, and fulfill economic, social, and cultural rights.

The US government makes two key points in its discussion of these human rights. First, it makes clear that it does not view these claims as human rights claims at all.<sup>69</sup> Concerning CERD Article 5, the US government writes: "Some of these enumerated rights, which may be characterized as economic, social and cultural rights, are not explicitly recognized as legally enforceable 'rights' under U.S. law."<sup>70</sup> By denying their legal status, the United States does not have to accept the state obligations and duties that correspond to these categories of human rights. Within this limited view of human rights, the United States is not legally required to develop strategies to respect, protect, and fulfill the economic, social, and cultural rights of minorities. And, since the CERD does not require states parties to provide for these rights, but only to prohibit discrimination in their enjoyment, the United States argues it is, in fact, in full compliance with the requirements of the Convention.<sup>71</sup>

Second, while the United States does acknowledge severe problems in the economic and social well-being of its minority citizens, it dodges its duty under international law to enact policies to ameliorate this situation. While acknowledging that "significant disparities continue," the US government writes that "the sources or causes of socio-economic differences are complex and depend on a combination of societal conditions, such as the state of the national and local economies, continued racial and ethnic discrimination in education and employment, and individual characteristics, such as educational background, occupational experiences, and family background."<sup>72</sup>

Clearly all of these areas must be examined. Yet, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of economic and social human rights. It is the state's responsibility to utilize the maximum of its available resources to meet the "right of everyone to an adequate standard of living," including rights to "adequate food, housing, and clothing."<sup>73</sup> It is unfortunate that the US government doesn't accept this legal responsibility. The United States has the wealth and prosperity to fulfill its legal and moral duty to protect the vulnerable, and provide a basic level of economic security for all its citizens.

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69. *See id.*

70. *See id.*

71. *See id.* at 40–41, 66.

72. *See id.* at 75–76.

73. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 11, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976).

### III. ASSESSING THE CERD COMMITTEE

It is important to note that the CERD Committee is not a judicial body with the power to determine state violations of international law governing economic and social rights of racial minorities. The CERD Committee's function is to assist states in their efforts to fulfill their obligations under CERD. The point is not to focus on the issue of the compliance or non-compliance of a state with its obligations under CERD. Rather, committee members see their role as helping states recognize and ameliorate racial discrimination within their borders.

The "concluding observations" of the CERD Committee to the states reports provide a record of the opinions and actions of the committee. These observations summarize the CERD Committee's evaluation of the state party report and contain recommendations the committee hopes the state will follow. The country rapporteur drafts the concluding observations for the committee, which are normally adopted by consensus. The concluding observations represent the most definitive record of the CERD Committee's approach to its mandate.

A review of the CERD Committee's concluding observations for the past five years reveals a glaring meekness in their approach to the economic and social rights of minority racial groups. Economic and social rights clearly have not been a priority for the committee. The language employed is mild, and there appears to be little pressure placed on states to change policy.

For example, in March 1997, the CERD Committee considered the periodic reports from Panama, and adopted the following as part of its concluding observations:

Concern is expressed that some groups living in Panama, such as indigenous people and members of the black and Asian minorities, do not fully benefit from the rights recognized under the Convention. In the light of article 5 of the convention, it is noted with concern that the issue of land rights of indigenous people has remained unsolved in a great majority of cases. These land rights seem also to be threatened by the mining activities which have been undertaken—with the approval of the central authorities—by foreign companies, and also by the development of tourism in these regions.<sup>74</sup>

To overcome these problems, the committee recommends that Panama: take appropriate measures to allow full enjoyment by different groups of society, such as indigenous people or members of the black and Asian minorities, of the rights enumerated by the Convention . . . [and] strongly

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74. Committee on the Elimination of Racial Discrimination, 50th Sess., *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Panama*, U.N. Doc. CERD/C/304/Add.32 (23 Apr. 1997) (on file with author).

recommends that the State party actively pursue its current efforts to implement fully the right of indigenous people to own property and land. It especially recommends that State party investigate and monitor the impact of the work of mining companies, including foreign ones, as well as the impact of the current development of tourism, on the enjoyment of basic rights by indigenous peoples.<sup>75</sup>

It is hard to see how these comments are very helpful to Panama. The CERD Committee has not identified any new specific measures for Panama, and merely endorses the government's current efforts regarding property and land rights. The CERD Committee recommendations for "investigating" and "monitoring" corporate activities are superficial and safe.

Keep in mind, the Panamanian government reports one of the worst distributions of income in the world, with very high rates of unemployment, and estimates that about half the population of the country lives in poverty.<sup>76</sup> The proportion of the Panamanian population that is undernourished has skyrocketed from 12 percent in the early 1970s to 19 percent in the 1990s.<sup>77</sup> The indigenous population, which is composed of five ethnic groups, accounts for between 8 and 10 percent of the population.<sup>78</sup> According to the Committee on Economic, Social and Cultural Rights, these ethnic groups are among the poorest and most vulnerable sectors of Panamanian society.<sup>79</sup>

Yet the CERD Committee does not address the economic plight of these racial minorities. The CERD Committee does not help Panama develop policies that can protect the economic and social rights of these indigenous peoples. The CERD Committee's recommendations can be better informed and specific. It is not useful just to "express concern" or call for more "monitoring" of the problem. These flimsy and ineffectual reports from the CERD Committee contribute to the sense of futility and cynicism concerning UN human rights efforts.

In 1999, the CERD Committee held its fifty-fourth session (1–19 March)

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75. See *id.*

76. The Committee on Economic, Social and Cultural Rights states: "In a document prepared for the World Summit for Social Development, the [Panamanian] Government reports one of the worst distributions of income in the world and very high rates of unemployment and underemployment, estimating that about half the population of the country lives in poverty." Committee on Economic, Social and Cultural Rights, 12th Sess., *Concluding Observations: Report on the Technical Assistance Mission: Panama*, para. 18, U.N. Doc. E/C.12/1995/8 (20 June 1995) [hereinafter *Concluding Observations/Comments*].

77. Food and Agriculture Organization (FAO), *Mapping Undernutrition—An Ongoing Process* (1996); see also BREAD FOR THE WORLD INSTITUTE (BWI), *HUNGER IN A GLOBAL ECONOMY: HUNGER 1998, EIGHTH ANNUAL REPORT ON THE STATE OF WORLD HUNGER 100* (1997).

78. See *Concluding Observations/Comments, supra* note 76.

79. See *id.*

and its fifty-fifth session (2–27 August).<sup>80</sup> During these meetings, the committee considered reports, comments, and information submitted by twenty-eight states parties, independent organizations, and knowledgeable individuals.<sup>81</sup> It is instructive to analyze the CERD Committee’s twenty-eight “concluding observations” in response to these state reports. Appendix 1 documents all of the references to economic and social rights made by the CERD Committee during their 1999 sessions.<sup>82</sup> In almost every case, the CERD Committee “expresses its concern” about a given problem, and then makes “suggestions and recommendations” for the state party to follow.<sup>83</sup>

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#### APPENDIX ONE

##### 54th and 55th Sessions of CERD 1–19 March 1999 2–27 August 1999

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#### *Concluding Observations Relating to Economic and Social Rights of Minorities/Indigenous Peoples (Principal Subjects of Concern & Suggestions and Recommendations)*

##### **Austria**

“34. The Committee expresses its concern that, seven years after it drew the attention of the State party to the absence of sanctions against racial discrimination in the private sector, little progress has been made in fully implementing the provisions of articles 5(e) and (f). In addition, the Committee expresses its concern that non-citizens are not currently eligible for participation in work councils.”

##### **Republic of Korea**

“61. While acknowledging the fact that the State party has recently taken measures to improve the status of foreign ‘industrial trainees’ and other foreigners working in the country, the Committee suggests that the Government of the Republic of Korea take further measures against discrimination in the labor conditions of foreign workers. The Committee also recommends that measures be taken to improve the situation of all migrant workers, particularly those with irregular status.”

##### **Finland**

“80. The Committee recommends that the State Party redouble its efforts towards the resolution of the land dispute concerning the Sami as soon as possible, in a manner that does justice to the claims of the Sami.”

“81. Additional measures should be taken at the state and municipal levels to alleviate the situation of the Roma minority and of immigrants with respect to housing, employment and education.”

##### **Portugal**

No specific mention of economic or social human rights of minority populations.

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80. Report of the Committee on the Elimination of Racial Discrimination, U.N. Committee on the Elimination of Racial Discrimination, 54th Sess. & 55th Sess., U.N. Doc. A/54/18 (29 Sept. 1999).

81. See *id.*

82. See *id.*

83. See *id.*



**Congo**

No state report submitted to the Committee.

No specific mention of economic or social human rights of minority populations.

**Italy**

"126. In light of reports indicating discrimination against persons of Roma origin, including children, in a number of areas, in particular housing, concern is expressed at the situation of many Roma who, ineligible for public housing, live in camps outside major Italian cities. In addition to a frequent lack of basic facilities, the housing of Roma in such camps leads not only to physical segregation of the Roma community from Italian society, but to political, economic and cultural isolation as well."

"130. The Committee also recommends that State authorities give more attention to the situation of Roma in Italy, with a view to averting discrimination against them."

**Peru**

"148. The Committee notes with concern the close relationship between socio-economic underdevelopment and the phenomena of ethnic or racial discrimination against part of the population, chiefly the indigenous and peasant communities. In this respect, the Committee regrets the absence in the periodic report of information on the socio-economic indicators relevant to the situation of populations of indigenous, peasant or African origin. It nevertheless notes that the report acknowledges shortcomings in areas such as housing and health."

"156. With regard to the right to employment, the committee takes note with concern of the reports that access to jobs and promotions is often influenced by racial criteria, while certain minor or disparaged jobs are left to persons of indigenous or African origin."

"158. The Committee is concerned about reports that the 1993 Constitution no longer totally guarantees that the communal property of indigenous populations is inalienable and unavailable for use."

"160. Measures should be taken to guarantee the right of the most underprivileged members of the population to benefit from all the rights listed in article 5 . . . "

"164. In its next report, the State party should provide information on, inter alia: . . . (b) socio-economic indicators relevant to the situation of populations of indigenous, peasant or African origin . . . "

**Syrian Arab Republic**

"177. The Committee encourages the State party to continue to explore ways of providing protection to all ethnic or national groups living in the Syrian Arab Republic and recommends that the State party include in its next report data on the ethnic composition of the population and on persons residing in the Syrian Arab republic who are non-Palestinian refugees. Information on their socio-economic situation would also be appreciated."

**Costa Rica**

"193. . . . the Committee also expresses its concern about the vulnerable status of refugees and clandestine immigrants, who often live and work in the country in precarious conditions, and who frequently become victims of discrimination in the terms of article 5 of the convention, in particular paragraph 5 (e)."

"194. The committee remains concerned at the situation with regard to the land rights of indigenous peoples in the State party. Despite the efforts made, problems relating to the allocation of land and/or compensation persist. Of special concern have been confrontations arising over the ownership of property, in the course of which indigenous people were killed and vandalism occurred, as in the case of Talamanca."

"201. It is also recommended that the State party take immediate and appropriate measures to ensure the enjoyment of the provisions of article 5 of the Convention also by thye indigenous populations, the black minority, refugees and immigrants."

"202. The Committee recommends that the State party intensify its efforts to ensure a fair and equitable distribution of land, taking into account the needs of the indigenous population."

**Kuwait**

No specific mention of economic and social human rights of minority populations.

**Mongolia**

"246. . . . The Committee further recommends that the State party include in its next report statistical data on the socio-economic situation of the different ethnic minority groups."

**Haiti**

"264. The Committee recommends that the State party in its next periodic report provide full information on the demographic composition of the population . . . together with socio-economic indicators on the situation of the various ethnic communities."

**Romania**

"286. Measures of affirmative action should be adopted in favour of the Roma population, especially in the areas of education and vocational training, with a view, inter alia, to placing Roma on an equal footing with the rest of the population in the enjoyment of economic, social and cultural rights, removing prejudices against the Roma population and enhancing its capacity in asserting its rights. A coordinated effort by the various State bodies competent in this area, working in conjunction with representatives of the Roma population, is required."

**Antigua and Barbuda**

No state report submitted to the Committee.

No specific mention of economic or social human rights of minority populations.

**Islamic Republic of Iran**

"307. The Committee recommends that the State party continue to promote economic, social and cultural development in areas inhabited by disadvantaged ethnic and tribal minorities and groups, and to encourage the participation of these minorities in such development."

**Maldives**

No state report submitted to the Committee.

No specific mention of economic or social human rights of minority populations.

**Mauritania**

"329. With regard to article 5 of the Convention, allegations are noted to the effect that some groups of the population, especially the black communities, are still suffering from various forms of exclusion and discrimination, especially where access to public services and employment is concerned. While the Committee notes with satisfaction that Mauritanian legislation has abolished slavery and servitude, it also notes that in some parts of the country, vestiges of practices of slavery and involuntary servitude could still persist, despite the State party's efforts to eradicate such practices."

"332. The Committee recommends that the State party include information in its next report on legislative measures and practices introduced by the authorities to give effect to the provisions of article 5 of the Convention, especially with a view to promoting the struggle against discrimination affecting the most vulnerable groups of the population, in particular the black communities, and to eradicating vestiges of practices of slavery and involuntary servitude."

**Iraq**

The Committee appealed to the Security Council of the UN to lift the economic embargo due to the loss of lives resulting from the economic sanctions.

"348. Concern is also expressed over allegations that the non-Arab population living in the Kirkuk and Khanaquin areas, especially the Kurds, Turkmen and Assyrians, have been subjected by local Iraqi authorities to measures such as forced relocation, denial of equal access to employment and educational opportunities and limitations in the exercise of their rights linked to the ownership of real estate."

"353. Allegations concerning discrimination against members of ethnic minorities in the Kirkuk and Khanaquin areas, as mentioned above, should be examined by the State party. The Committee requests to be informed about the result of such investigations."

### Central African Republic

No state report submitted to the Committee.

No specific mention of economic or social human rights of minority populations.

### Chile

"375. The Committee is concerned about land disputes which occurred during the period under examination between the Mapuche population and national and multinational private companies, resulting in tension, violence, clashes with law enforcement officials and, allegedly led to arbitrary arrests of members of the indigenous population."

"376. The Committee expresses its concern about the situation of migrant workers, in particular of Peruvian nationality."

"381. In its forthcoming report, the State party should include detailed information relating to the following: the work and activities of the Indigenous Development Corporation; the system of land distribution; the judicial system in place for the indigenous population; the situation of migrant workers, the implementation of articles 4 and 5 of the convention and, ongoing legislative reforms."

### Latvia

"397. Concern is also expressed about reports that there are still unjustified differences of treatment between citizens and non-citizens, mostly members of minorities, in the enjoyment of the rights provided for in article 5 (e) of the Convention."

"406. It is also recommended to the State party to review the differences of treatment between citizens and non-citizens, mostly persons belonging to ethnic groups, in the light of the provisions of article 5 (e), so as to eliminate any unjustifiable differences."

### Uruguay

"423. The Committee remains concerned about the insufficient information on the situation of ethnic groups living in the State party's territory. Concern is also expressed about the lack of information on special measures, such as affirmative action programmes, taken for the protection of the rights of disadvantaged ethnic groups such as Afro-Uruguayans and indigenous groups."

"424. The Committee remains concerned about the lack of information on the effective enjoyment of the rights provided for in, especially, article 5 (c) and (e), and in particular by members of the Afro-Uruguayan and indigenous communities. In addition, concern is particularly expressed about the situation of women belonging to the Afro-Uruguayan community, who are victims of double discrimination on grounds of both their gender and race."

"429. The Committee also recommends that the State party take immediate and appropriate measures to ensure the enjoyment of all the rights enumerated in article 5 of the Convention in particular by members of the Afro-Uruguayan and indigenous communities and provide further information on this subject. With respect to employment, education and housing, the Committee recommends that the State party take steps to reduce present inequalities and adequately compensate affected groups and persons for earlier evictions from their houses."

"430. The Committee recommends that the State party establish special programmes aimed at facilitating the social enhancement of women belonging to the Afro-Uruguayan community, who suffer double discrimination on grounds of both their gender and race."

### Mozambique

No state report submitted to the Committee.

No specific mention of economic or social human rights of minority populations.

### Kyrgyzstan

"447. The Committee wishes to receive further information regarding the practical enjoyment by persons belonging to ethnic and national minorities of the rights listed in article 5(e) of the Convention, in particular the right to work, including the right to equal opportunities of promotion and career development, the rights to health, education and to housing."

**Colombia**

"475. Recognizing that many Afro-Colombians live in extreme poverty in urban slum areas, the Committee recommends that the State party take steps to address de facto racial segregation in urban centres. The Committee also requests additional information in the next periodic report on housing patterns in urban areas and on legislation that may address discrimination in the housing sector."

"476. The Committee recommends that the State party implement affirmative and effective measures to ensure increased employment opportunities for minority and indigenous communities in both the public and private sectors and to advance the social, political, economic, and educational status of historically marginalized communities."

**Azerbaijan**

"491. Although the Committee notes that the State party's Constitution guarantees the enjoyment, without discrimination, of most of the rights mentioned in article 5 of the Convention, it remains acutely concerned about the effective enjoyment of these rights by persons belonging to ethnic groups, in particular by persons belonging to the Armenian, Russian and Kurdish minorities when seeking employment, housing and education."

"497. The Committee recommends that the State party utilize all available means, including international cooperation, to ameliorate the situation of displaced persons and refugees, especially regarding their access to education, employment and housing, pending their return to their houses under conditions of safety."

**Dominican Republic**

"514. The Committee recommends that the State party take urgent measures to ensure the enjoyment by persons of Haitian origin of their economic, social and cultural rights without discrimination. Efforts should be made, in particular, to improve their living conditions in the *bateyes* (shanty towns)."

**Guinea**

"533. Concern is expressed about the lack of information regarding the practical implementation of article 5 of the convention. In this connection, the Committee is concerned about the destruction by the State of more than 10,000 homes in the Conakry Ratoma neighborhood, belonging mainly to members of the Puhlar ethnic group; the resulting riots which led to the death of eight persons; and the inter-ethnic tension which remains in that area. The Committee is also concerned about the lack of compensation for those persons whose property was expropriated."

"538. . . . the State party is invited to provide further information on the effective enjoyment of the political, economic and social rights enumerated in article 5 of the Convention, in particular by persons belonging to ethnic groups."

The expressions of concern deal with issues of critical importance, such as the absence of sanctions against racial discrimination in the private sector (Austria), discrimination against the Roma (Italy, Romania), the close relationship between socio-economic underdevelopment and racial discrimination (Peru), the vulnerable status of refugees and immigrants (Costa Rica), and disadvantaged ethnic and tribal minorities (Iran, Mongolia, Uruguay). The committee often exposes a critical issue of economic and social injustice within the state party. This is a critical first step since exposure can help identify the path forward.

Where the CERD Committee is weak, however, is in helping to find solutions. Its suggestions and recommendations are uniformly unsubstantial. To address these violations of the economic and social human rights of

minorities, the committee calls for state parties to “redouble their efforts,” take “additional measures,” “give more attention” to the issue, “provide information,” “take immediate and appropriate measures,” “intensify its efforts,” adopt “measures of affirmative action,” “continue to promote” economic development, “take steps to address” economic discrimination, and so on.<sup>84</sup> These “recommendations” are void of any content. What measures should state parties take? What types of policies are effective in addressing economic discrimination? How can a program of economic growth also incorporate policies to address the needs of the most vulnerable minority groups?

Thus, the CERD Committee is adept at identifying the economic and social issues confronting racial minorities within the states party to the CERD, but it is not very resourceful in identifying the actions that these nations need to take to address these issues. The CERD Committee’s role could be strengthened by spending more time assisting nations in the formulation of effective policy in these areas. It is difficult to construct an appropriate and workable policy to ameliorate racial bias in economic development. Yet, as will be seen below, there is now a history of successful programs that can guide policy-makers.

These criticisms of the work of the CERD Committee are directed at the complacency of the state parties to CERD, and not the expert members of the committee. These individuals receive no payment for the work they do on the committee, and have no research or secretarial assistance.<sup>85</sup> Other difficulties include translation delays and a lack of access to sources of information beyond the state’s report. Most members have full-time jobs elsewhere, which limits the amount of committee work they can undertake. Overall, committee members’ efforts to breathe life into this process have been stymied by a lack of support from nation-states.

The CERD Committee has even had difficulties getting its minimal budget funded. To overcome the committee’s financial difficulties resulting from the non-payment of contributions by states parties, the committee approved an amendment to Article 8(6) of the Convention, which was later adopted by the General Assembly of the UN.<sup>86</sup> The amendment calls for expenses of the members of the committee to be borne by the regular UN annual budget.<sup>87</sup> However, this amendment is not in force as it awaits the prescribed number of ratifications by states parties.

In addition, the CERD Committee is set up and funded to meet only

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84. See *id.* at paras. 61, 80, 130, 164, 201, 286, 307, and 514.

85. See Banton, *supra* note 31, at 71.

86. MANUAL ON HUMAN RIGHTS REPORTING, *supra* note 45, at 293–95.

87. See *id.*

twice a year, in the spring and summer.<sup>88</sup> It is hard to imagine how a committee that meets for only three weeks twice a year can effectively monitor the practices of the 159 parties to the Convention. This problem is widely acknowledged at the Office of the High Commissioner for Human Rights.<sup>89</sup> Yet, due to a lack of adequate resources, such as a small staff and a small budget, there has been no serious effort made to expand the work of the committee.

In fact, there is a large degree of complacency concerning the weaknesses in the human rights reporting mechanisms. For example, staff members recognize that the only reason the reporting system as a whole has not collapsed is because all states do not report.<sup>90</sup> If these states did report, the small staff at the High Commissioner's Office could not cope. As a result, privately there is an acknowledged "sense of relief" that all states do not report, and there is no serious political push to get states to report on time.<sup>91</sup> The result is that the reporting system remains ineffectual.

These are serious issues. The CERD Committee gives states the opportunity to say that they are not only concerned with discrimination and racial injustice, but are doing something about it. Yet, what the committee has set up is underfunded and understaffed, and thus, ineffective.

The next section argues that the work of the CERD Committee can be enhanced through the adoption of the "capabilities approach." This strategy can both clarify and simplify the reporting process on economic and social rights, and provide policy direction and focus. This approach provides the committee with the tools to help states formulate clear policies in order to achieve economic and social human rights for all.

#### IV. THE CAPABILITIES APPROACH AND RACE

The High Commissioner for Human Rights, Mary Robinson, acknowledged the impact of Amartya Sen's "capabilities approach" in her remarks to the delegates attending the United Nations "Copenhagen Plus Five" Conference in June 2000.

A new dialogue is taking place between development and human rights experts which has brought about convergences and given added depth to the

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88. See *id.* at 294.

89. Interviews at the Office of the High Commissioner for Human Rights, June 2000.

90. See *id.*; see also Philip Alston, *Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*, U.N. Doc. E/CN.4/1997/74 (7 Mar. 1997). Alston estimates that somewhere between four and twenty-four years would be required to review all state reports overdue, if they were to be submitted forthwith.

91. See *id.*

law-based approaches of traditional human rights thinking. It has been enriched by Amartya Sen's work on capability rights. This approach recognises that human development and human rights are mutually reinforcing in that they expand capabilities by protecting rights. This dialogue has contributed to the development of people-centred sustainable development.<sup>92</sup>

The link between human development and human rights was also clearly articulated in the recent *Human Development Report 2000*, published for the UNDP.

If human development focuses on the enhancement of the capabilities and freedoms that the members of a community enjoy, human rights represent the claims that individuals have on the conduct of individual and collective agents and on the design of social arrangements to facilitate or secure these capabilities and freedoms.<sup>93</sup>

Amartya Sen's capabilities approach provides a framework for the realization of economic and social human rights. Sen cogently argues that an adequate way of considering "real" equality of opportunities is through equality of capabilities.<sup>94</sup> The focus is not on outcomes, but on the *ability* to function, the *freedom* to achieve. He argues that a person's *capability to achieve functions* that he or she has reason to value provides us with a general approach to assess equality and inequality.<sup>95</sup> Functions include the following: "being well-nourished, avoiding escapable morbidity and premature mortality, . . . having self-respect and being able to take part in the life of the community."<sup>96</sup>

Capability is directly related to the freedom to achieve valuable functions. Sen believes that by concentrating directly on freedom as such rather than on the means to achieve freedom, we can better identify the real alternatives we have.<sup>97</sup> Capability reflects a person's freedom to achieve well-being. "In the capability-based assessment of justice, individual claims are not to be assessed in terms of the resources or primary goods the persons respectively hold, but by the freedoms they actually enjoy to choose the lives that they have reason to value."<sup>98</sup> Capability is thus distinguished from both the distribution of primary goods (and other resources) and final achievements.

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92. Mary Robinson, *Development and Rights: The Undeniable Nexus*, United Nations Office of the High Commissioner for Human Rights, 26 June 2000, available at <[http://www.pcpafg.org/organizations/Human\\_rights/nexus.htm](http://www.pcpafg.org/organizations/Human_rights/nexus.htm)> (visited 14 Nov. 2001).

93. UNDP, *HUMAN DEVELOPMENT REPORT 2000*, at 20 (2000).

94. See AMARTYA SEN, *INEQUALITY REEXAMINED* 4–5, 39 (1992).

95. See *id.*

96. *Id.* at 39.

97. See *id.* at 49.

98. *Id.* at 81.

Why is this important? A person who is disabled could have more primary goods, yet less capability and freedom than a non-disabled individual. Or, take another example from Sen:

A person may have more income and more nutritional intake, but less freedom to live a well-nourished existence because of a higher basal metabolic rate, greater vulnerability to parasitic diseases, larger body size, or simply because of pregnancy. Neither primary goods, nor resources more broadly defined, can represent the capability a person actually enjoys.<sup>99</sup>

What a person needs to achieve this freedom may vary.

To have the “freedom to achieve” means having certain needs met in one way or another. Sen mentions well-nourishment and avoidance of escapable morbidity.<sup>100</sup> Poverty is a result of a deprivation of “some minimum fulfilment of elementary capabilities.”<sup>101</sup> As a result, equality does not refer to equal incomes or even equal resources. Rather, equality is based on the equal freedom to achieve. Everyone equally should have freedom of choice and freedom to achieve. One cannot assume the same results would be obtained by looking at the resources a person commands. Valuing freedom imposes more “exacting claims.”<sup>102</sup> Being able to live as one would value, desire, and choose is linked to freedom from hunger, malaria, and other maladies. Inequalities across the world lead to a loss of basic freedoms, such as preventable morbidity and escapable hunger.

The relationship between income and capability is affected by age, location, race, gender, and other social factors. Sen believes that “no matter what foundational structure we opt for, the reorientation from an income centered to capability-centered view gives us a better understanding of what is involved in the challenge of poverty.”<sup>103</sup> An African-American male in Harlem may have more “resources” and live in a country with a higher overall standard of living than a citizen of the state of Costa Rica. Yet, due to social achievements in Costa Rica (or Kerala, India, or Sri Lanka), the citizen from the “less-developed country” may have more freedom to achieve and capability to function.<sup>104</sup> These relatively “poor” countries may

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99. *Id.* at 81–82.

100. *See id.* at 33, 38.

101. *Id.* at 9.

102. *See id.* at 38.

103. *Id.* at 151.

104. Sen notes, for example, that the capability deprivation of African Americans cannot be explained solely through an examination of income figures. It is rather the result of a variety of factors, including: problems of health care, education, and urban crime. Residents of Harlem have a higher income than the average Bangladeshi citizen. Yet, according to *The New England Journal of Medicine*, men in the Harlem region of rich New York City have less of a chance to reach the age of forty than Bangladeshi men. Information on incomes doesn't explain this phenomena. Nor does it explain for the



suffer income poverty, yet their focus on communal health services, medical care, and basic education has led to remarkable life expectancy rates. These insights can inform public policy on development and poverty alleviation. A country, even with a relatively low income, which guarantees health care and education to all, can actually achieve remarkable results in terms of the length and quality of life of the entire population.

Policy makers interested in achieving economic and social human rights can find direction through the capabilities approach. Theories of international political economy can be evaluated through this lens: which theory provides for the equal distribution of resources to provide for the opportunity for adequate functioning for all peoples, including all racial minorities? The phrase “equal distribution of resources” leads us to issues of inequality. Sen makes an important distinction here between income inequality and economic inequality. He believes that policy debates have been distorted by an overemphasis on income poverty and income inequality “to the neglect of deprivations that relate to other variables, such as unemployment, ill health, lack of education, and social exclusion.”<sup>105</sup> Many of the criticisms of egalitarian schemes for income equality do not apply to the broader notions of economic equality.

For example, giving a larger share of income to a person with more needs—say, due to a disability—can be seen as militating against the principle of equalizing *incomes*, but it does not go against the broader precepts of economic equality, since the greater need for economic resources due to the disability must be taken into account in judging the requirements of economic equality. Economic equality is contingent on “public policy issues with strong economic components: the financing of health care and insurance, provision of public education, arrangements for local security, and so on.”<sup>106</sup>

In sum, Sen’s “capabilities approach” gives us the tools necessary for policy formation to address racial discrimination in the economic and social arena. It helps us focus on what individuals need for adequate functioning. Sen asks us not to look merely at low income to determine “poverty,” but rather examine the “deprivation of basic capabilities,” reflected in “premature mortality, significant undernourishment (especially of children), persis-

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country as a whole why African Americans in the age group thirty-five to fifty-five year-olds have 2.3 times the mortality rate as do whites in the US. Low income is just one factor among many explaining these conditions. Sen points to other aspects of the social environment, including the inadequacy of health facilities, the violent modes of inner-city living, and the absence of social care. SEN, *supra* note 94, at 114–15; see also Colin McCord & Harold P. Freeman, *Excess Mortality in Harlem*, 332 *NEW ENG. J. MED.* n. 3 (Jan. 1990).

105. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 108 (1999).

106. *Id.*

tent morbidity, widespread illiteracy and other failures."<sup>107</sup> This shift in focus allows us to examine differences among racial groups within countries.

The capabilities approach allows us to look at the actual ways in which racial minorities are given the freedom to achieve adequate functions. What are the variations in the social climate? What are the differences in social conditions, including public education, crime and violence, health care and infectious disease, public facilities, and community relations? In a situation where a particular racial minority faces a social climate that hinders basic functioning, public policy can then address these issues.

## V. STEPS FOR THE CERD COMMITTEE TO IMPLEMENT THE CAPABILITIES APPROACH

There are policies and programs that states can follow to protect, respect, and fulfill economic and social human rights. These actions are no longer a mystery, and thus, states have no excuse for allowing needless suffering to continue. The economic and social rights of racial minorities can be achieved through a focus on improving individual capabilities. These economic policies of social development include: expanding basic education, access to clean water and sanitation, and improvements in nutrition. The "success stories" of the 1980s and 1990s were those low-income states or countries (Sri Lanka, Kerala (India), Botswana, Zimbabwe, Barbados, and Costa Rica) that achieved levels of health and education comparable to the industrialized states. The economic accomplishments of these nations are directly related to the implementation of public policy to provide for health care and education for all citizens. The following recommended steps for the CERD Committee are based on the progress of these places in confronting poverty and suffering.<sup>108</sup>

- 1) The development of accurate social indicators reflecting the degree of racial bias in economic and social development;
- 2) Investments in health care for all peoples lacking in adequate medical care;
- 3) Investments in education for all peoples lacking adequate schooling opportunities;

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107. *Id.*

108. Santosh Mehrotra, *Social Development in High-Achieving Countries: Common Elements and Diversities*, in *DEVELOPMENT WITH A HUMAN FACE* 29, 32 (Santosh Mehrotra & Richard Jolly eds., 1997).

- 4) A commitment to the 20/20 compact between the developed and underdeveloped nations as a means of mobilizing investments.

### A. The Development of Accurate Social Indicators

The CERD Committee could benefit by incorporating the reports from the Committee on Economic, Social and Cultural Rights into their standard operating procedures. The Commission on Human Rights (CHR) urged treaty bodies to consider ways of reducing the reporting burden on states, including “considering the utility of single comprehensive reports and of replacing periodic reports with specifically tailored reports and thematic reports.”<sup>109</sup> Economic and social rights are primarily the domain of the *International Covenant on Economic, Social, and Cultural Rights* (CESCR)<sup>110</sup>, and its treaty body (the CESCR Committee). States reports to the CESCR Committee address the social and economic concerns of the CERD Committee. A single report to both of these treaty bodies ought to suffice.

The CESCR Committee has effectively specified and defined the content of economic and social human rights, and established reporting guidelines that pay attention to issues of racial discrimination. The data from the CESCR Committee can provide the CERD Committee with the information needed to formulate effective policy options to implement the capabilities approach. States parties would not have to report twice, but merely refer to the relevant sections in their report to the CESCR Committee. The current reporting guidelines allow for such practices to avoid duplication of effort.

The CESCR Committee has focused on issues of race and discrimination in the fulfillment of all the articles of the CESCR. For example, CESCR Article 6 recognizes the right to work “which includes the right of everyone to the opportunity to gain his [her] living by work which he [she] freely chooses or accepts.”<sup>111</sup> In its reporting guidelines to states parties, CESCR Committee requests the following:

Please indicate whether there exist in your country any distinction, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships between persons or groups of persons, made on the basis of race, color, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or

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109. Commission on Human Rights Resolution 1995/92, ¶ 8(d), available at <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/9def7b169149c162802566f00039c284?Opendocument>> (visited 14 Nov. 2001).

110. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 73.

111. *MANUAL ON HUMAN RIGHTS*, *supra* note 45, at 93.

exercise of equality of opportunity or treatment in employment or occupation. What steps are taken to eliminate such discrimination?<sup>112</sup>

Similar data requests are made by the CDESCR Committee for all articles, including: Article 7, the right to just and favorable conditions of work; Article 9, the right to social security; and Article 11, the right to an adequate standard of living, including adequate food, clothing, and housing.<sup>113</sup> Detailed information, for example, is requested on the right to adequate food. States parties must report on the extent to which hunger and/or malnutrition exists in their country. This information should include the situation for especially vulnerable or disadvantaged groups, including landless peasants, marginalized peasants, rural workers, rural unemployed, urban unemployed, urban poor, migrant workers, indigenous peoples, children, elderly people, and other especially affected groups.<sup>114</sup>

These reports, combined with information provided by NGOs, should give the CERD Committee an accessible picture of racial discrimination in the fulfillment of economic and social human rights.

## **B. Investments in Health Care for All Peoples Lacking in Adequate Medical Care**

The CERD Committee could monitor the degree to which states parties ensure basic medical care to their entire populations, including all racial minorities.

The plight of the aboriginal people in Canada is illustrative. Aboriginal people have seven years less life expectancy than the overall Canadian population and almost twice as many infant deaths.<sup>115</sup> The link here between social conditions and health could not be more stark. The poor health of indigenous people in Canada is directly related to the social environment. Canada as a nation is proud of its number one ranking on the UNDP Human Development Index. Yet, aboriginal people are among the poorest of Canadians. If on-reserve native peoples of Canada were a nation ranked on the UNDP Human Development Index they would place a shocking sixty-third.<sup>116</sup>

The less-developed and least-developed countries have the ability to address basic medical needs. "It is estimated, for example, that almost half

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112. *Id.* at 93.

113. *Id.* at 99, 109, 120.

114. *Id.* at 120.

115. Roberto Bissio, *SOCIAL WATCH* 1999, at 125 (1999).

116. *See id.*

of the preventable deaths of under five-year-olds in poor countries are the result of diarrheal and respiratory illness, exacerbated by malnutrition."<sup>117</sup> These conditions can be dealt with most effectively through preventive measures at lower level facilities. The CERD Committee can examine if a nation is implementing cost-effective strategies for serving the entire population, rather than only the well-off, or only a particular racial group.

In some countries, for example, a single teaching hospital can take 20 percent or more of the government's health budget.<sup>118</sup> Almost all developing countries can point to examples of major hospitals whose operational costs resulted in the curtailment of health clinics and preventive services. The right to health involves access to standard or primary medical care, which must be taken to be more basic than the "freedom" to receive costly surgical procedures. Vulnerable populations in poor countries have the right to insist on access to basic medical care. The CERD Committee could examine the distribution of health benefits and the provision of health services for all racial and ethnic groups.

The policies of non-state actors, however, will also have to be examined by the CERD Committee. In Brazil, for example, IMF-mandated cuts of 40.5 percent in social expenditures led to reductions of 12.3 percent in education, 6.6 percent in health, 83.1 percent in the Social Action Sanitation Program, and 50 percent in the retraining programs for unemployed workers.<sup>119</sup> These forced cuts make it difficult for Brazil to meet its economic and social obligations under international law. It becomes difficult for Brazil to achieve universal and equitable access by all people to primary health care. The poorest sectors of the population do not have access to the expensive, technologically complex health care in the urban areas. Inequality and social exclusion is the result as a double network of social services is created—one for the rich and the other for the poor. The solution to these dilemmas will only come about with an understanding of the causes. Therefore, the role of the IMF in the creation of these conditions must also be addressed.

### **C. Investments in Education for All Peoples Lacking Adequate Schooling Opportunities**

The CERD Committee could monitor the degree to which states parties ensure basic education to their entire populations, including all racial minorities.

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117. Santosh Mehrotra, *Health and Education Policies in High-Achieving Countries: Some Lessons*, in *DEVELOPMENT WITH A HUMAN FACE*, *supra* note 108, at 64.

118. *See id.*

119. Bissio, *supra* note 115, at 118.

International human rights law requires states to ensure basic education for its citizens. Again, poverty is not an excuse for failing to implement policies and practices toward these ends. UNICEF has documented the ways in which poor countries can achieve remarkable results with commitment and far-sightedness. In Asia, for example, the state of Kerala, India has achieved a 90 percent literacy rate.<sup>120</sup> This is far in excess of the 58 percent rate in Punjab, which has more than double Kerala's per capita income.<sup>121</sup> Or compare Vietnam and Pakistan. Pakistan, with a much greater per capita, has a 38 percent literacy rate compared to Vietnam's 94 percent.<sup>122</sup> Pleas of poverty ring particularly false when military spending in South Asia continues unabated (approximately \$13.6 billion a year for the region).<sup>123</sup>

It is within the CERD Committee's charge to regulate state parties' compliance with the provisions of CERD requiring access to education without discrimination. Indigenous and racial minorities consistently face unequal educational opportunities around the world. In Peru, for example, the national average illiteracy rate is 13 percent, but among the indigenous population it reaches 33 percent, and in the case of indigenous women, 44 percent.<sup>124</sup> In Uruguay, the black population has a greater dropout rate at all levels of schooling, and overall, average a year and a half less schooling than white people.<sup>125</sup> In 1984, in Slovakia, 80 percent of Roma children attended kindergarten, but only 15 percent did so in 2000.<sup>126</sup> In the 1990s, in India, the adult literacy rate among women of established tribes was 24 percent, compared with 39 percent for all Indian women.<sup>127</sup> The CERD Committee can push Peru, Uruguay, Slovakia, and India to confront these issues and correct these inequities in educational opportunities.

National governments have far more resources to devote to education than are allocated. Governments need to be pushed to recognize the priority of education. For many states, education just is not a priority. Only fourteen of the seventy African countries (20 percent) participating in the European Community's Lomé IV aid agreement ranked education and training a high priority.<sup>128</sup> The overwhelming majority, forty-five countries, saw it as a low priority, and six had no education or training programs at all.<sup>129</sup>

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120. UNICEF, *THE STATE OF THE WORLD'S CHILDREN* 1999, at 80 (1999).

121. *See id.*

122. *See id.*

123. *See id.*

124. Bissio, *supra* note 115, at 178, 210.

125. *See id.*

126. HUMAN DEVELOPMENT REPORT 2000, *supra* note 93, at 33.

127. *See id.*

128. *STATE OF THE WORLD'S CHILDREN* 1999, *supra* note 120, at 81.

129. *See id.*

Yet the value of investing in basic education now is almost universally acknowledged. The role of UN Treaty Bodies is to hold nations accountable to their words. The CERD Committee can push states parties to practice what they preach.

#### D. Focus on the 20/20 Proposal

The 20/20 compact calls for 20 percent of aid budgets and 20 percent of national budgets to be allocated to the provision of basic needs for all.<sup>130</sup> The CERD Committee could use the reporting system of the Treaty Bodies to hold states accountable to implement the 20/20 agreement. The economic and social rights of minority populations can be protected through 20/20.

Almost all the signatories to the CERD agreed to the final Declaration from the World Summit for Social Development in Copenhagen in 1995, which adopted the UNDP proposed 20/20 compact for human development.<sup>131</sup> These nations pledged to ensure the provision of at least the very basic human development levels for all their people.<sup>132</sup> Most nations can achieve minimal levels of eliminating malnutrition, safe drinking water, primary health care, population stabilization, and provide access to basic education by adjusting existing developmental priorities.

However, some of the poorer countries will require international assistance, in addition to their own domestic efforts. At Copenhagen, the UNDP estimated that these additional costs would be \$30 to \$40 billion (USD) a year over ten years.<sup>133</sup> It is presently estimated that the global shortfall is between \$70 to \$80 billion a year.<sup>134</sup> The fulfillment of these basic social services is now estimated at \$206 to \$216 billion, while current funds channeled to these areas total about \$136 billion.<sup>135</sup> As a result, an increase of at least \$70 to \$80 billion annually is needed to provide full coverage.<sup>136</sup>

The 20/20 compact illustrates how most of these funds can be found

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130. UNDP, HUMAN DEVELOPMENT REPORT 1994, at 7.

131. See COPENHAGEN DECLARATION ON SOCIAL DEVELOPMENT AND PROGRAM OF ACTION OF THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, available at <<http://www.un.org/esa/socdev/wssd/agreements/decparti.htm>> (visited 7 Nov. 2001).

132. See *id.*

133. Felice, *supra* note 1, at 85–86; see also HUMAN DEVELOPMENT REPORT 1994, *supra* note 130, at 7, 50, 77 (1994).

134. HUMAN DEVELOPMENT REPORT 2000, *supra* note 93, at 9.

135. Caroline Wildeman, *The 20/20 Initiative and the Hanoi Consensus*, SOCIAL WATCH 1999, at 98 (1999).

136. HUMAN DEVELOPMENT REPORT 2000, *supra* note 93, at 9; see also UNDP, UNESCO, UNFPA, UNICEF, WHO, WORLD BANK, IMPLEMENTING THE 20/20 INITIATIVE: ACHIEVING UNIVERSAL ACCESS TO BASIC SOCIAL SERVICES 1 (UNDP et al. eds., 1998).

within existing budgets. Currently developing countries devote on average of only 13 percent of their national budgets to these basic human development concerns.<sup>137</sup> Raising this figure to 20 percent will produce additional billions. This money would be diverted primarily from wasteful military spending and prestige development projects. This restructuring is doable; achieving the budgetary goal of 20 percent is feasible. Developed donor countries, on the other hand, currently allocate only 8.3 percent of their aid to these human priorities (health care, basic education, mass-coverage water supply systems, etc.).<sup>138</sup> If these donors would readjust their aid allocation for these human priority goals, this would provide additional billions to these human rights priorities. Combined, the 20/20 compact could potentially provide significant funding for the provision of these basic human needs for all. It should be emphasized that these funds are already there, and no new taxes are envisioned. These needs can be met through a restructuring of existing budget priorities.

In developing countries, average spending on these social services unfortunately remains very low. A recent study indicated that spending averaged between 12 percent to 14 percent in these critical areas for thirty developing countries.<sup>139</sup> Defense spending and debt service continue to be given priority.<sup>140</sup> Few developing countries currently allocate the minimum 20 percent to basic social services.<sup>141</sup> Some are astonishingly low: 4 percent in Cameroon, 7.7 percent in the Philippines, and 8.5 percent in Brazil.<sup>142</sup>

The CERD Committee and the CDESCR Committee together can pressure states to implement 20/20. The abolition of racial discrimination in economic and social policy hinges upon prioritizing the human development preferences of 20/20. As noted above, the vast majority of the destitute and impoverished are people of color. Guaranteeing these basic economic and social human rights for all will be of most benefit to those minorities who have suffered from systematic discrimination.

## VI. CONCLUSION

The CERD Committee needs to break out of the cumbersome traditions that now plague its functioning. Bold and progressive thinking and action can

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137. HUMAN DEVELOPMENT REPORT 2000, *supra* note 93, at 9.

138. *See id.*

139. *See id.*

140. For statistics on defense spending and the role of government in the economy, see THE WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY, *supra* note 13, at 306–07.

141. *See id.*

142. *See id.*



revitalize its work and increase its relevance. The proposal outlined here greatly simplifies the work of the committee. It gathers data on economic and social rights of racial minorities in conjunction with the CESCRC Committee. It then focuses on only three items: 20/20, health, and education. Each state should be required to report on how it is addressing these three areas.

These priorities are essential to the capabilities approach to human development. Clear guidelines become apparent for public policy. The CERD Committee will then be doing more than merely calling for state parties to “redouble their efforts,” or take “additional measures,” or “give more attention” to the issue, or “intensify its efforts,” or “take steps to address” economic discrimination, and so on.<sup>143</sup> Instead the CERD Committee will be recommending specific policies to end racial discrimination in the areas of health and education.

This proposal is also based on the clear limitations confronting the CERD Committee. Unfortunately, it does not appear realistic to believe that the member-states of the UN will provide either significantly more staff or additional financial resources to the CERD Committee. Thus, the committee must focus its attention on where it can be most effective. The CERD Committee could have a significant impact if it called the states parties’ attention to these indisputable priorities.

The UN held a World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in South Africa in September 2001. In its contribution to the preparatory process for the conference, the CESCRC Committee noted: “The full realization of the substantive rights enumerated in the Covenant [on Economic, Social and Cultural Rights]—the rights to education, housing, food, employment, and so on—will go a long way towards the elimination of racism, racial discrimination, xenophobia and related intolerance.”<sup>144</sup> Working in conjunction with the CESCRC Committee, a CERD Committee focus on 20/20, education, and health care for all could significantly contribute towards ending the marginalization and social exclusion of disadvantaged and vulnerable groups.

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143. CERD, *Fifty-fourth and Fifty-fifth Sessions*, *supra* note 80.

144. *Preparatory Committee, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, First Session, Contribution of the Committee on Economic, Social and Cultural Rights to the Preparatory Process for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/CONF.189/PC.1/14 (29 Feb. 2000).