

RACE ACROSS BORDERS: THE U.S. AND ICERD

*Hadar Harris**

Malcolm X made the case for thinking about “Race Across Boundaries”:

The American black man is the world’s most shameful case of minority oppression How is a black man going to get “civil rights” before first he wins his *human* rights? If the American black man will start thinking about his *human* rights, and then start thinking of himself as part of one of the world’s greatest peoples, he will see he has a case for the United Nations.¹

I do not specialize in the study of a particular racial or ethnic minority group. Rather, I work to utilize international treaties to prevent discrimination and promote equality. I help NGOs, individuals and governments understand how they can use the various human rights mechanisms to help support their claims, and advocate for and implement change.

When we think about “Race Across Boundaries,” we have to think about ICERD – the International Convention on the Elimination of All Forms of Racial Discrimination – and its attempt to set international standards – beyond borders and without boundaries – for the elimination of all forms of racial discrimination.

My original intention was to discuss some of the work I have done with government and NGOs looking at compliance with the ICERD in the sub-Saharan African country of Botswana. I have worked there over the past few years, providing technical assistance to an inter-ministerial committee of government, advising how better to report on and implement the provisions of the various U.N. human rights treaties (including ICERD and the Convention on the Elimination of All Forms of Discrimination Against Women). I also planned to talk about my work in Armenia, Israel, and other countries doing similar things.

Yet as I prepared my remarks, I realized that I had to focus on the remarkable work that was done in the spring of 2008 at the CERD Committee in Geneva by a group of my U.S. colleagues. For the few months prior, I had been closely involved in helping to coordinate the U.S. NGO advocacy coalition, which went to Geneva under the auspices of the U.S. Human Rights Network, working to hold the U.S. accountable for its im-

* Executive Director, American University Washington College of Law Center for Human Rights and Humanitarian Law.

1. MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 195 (Ballantine Books 1992) (1964) (emphasis in original).

plementation (or lack of implementation) of ICERD. I realize that *Race Across Boundaries* is not about geographic barriers, but rather, has much to do with the boundaries that emerge as countries contemplate whether and how to live up to their obligations under the international Race Convention.

In my remarks here I am going to give you a short summary of the ICERD treaty and its importance as the key piece of international treaty law to combat racial discrimination. I will then discuss some of the impediments to implementation of the treaty in the U.S. And finally, I will share some brief comments on the U.S. Review by the CERD Committee in Geneva that took place at the U.N. in spring 2008.

I. BACKGROUND/HISTORY OF ICERD

I will begin with the dry “law stuff.” The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was the first major human rights treaty to enter into force as part of the international effort to codify the Universal Declaration of Human Rights (UDHR). It came into force in 1969 and to date, there are 173 States Parties to the Convention with an additional five states that have signed but not yet ratified it.²

It was the first human rights treaty to set up an oversight mechanism, a treaty monitoring committee made up of 18 independent experts elected by the States that were party to the treaty.³ The CERD Committee is responsible for periodically reviewing reports submitted by each State Party and for recommending ways in which States Parties can better comply with the treaty.

The treaty itself has seven main substantive articles⁴ and a compilation of 31 General Comments that expand on the treaty language by articulating the CERD Committee’s understandings and interpretation of the treaty obligations.⁵

There are a few important points to note about the treaty. First, the definition of racial discrimination is broad. Its conceptualization of race includes race, ethnicity, color, nationality and descent. Even more importantly, the treaty’s understanding of discrimination goes beyond discriminatory intent and includes acts which have the “purpose or effect” of discrimination.⁶ Discrimination includes acts with a discriminatory impact.

The treaty aims to ensure equality in enjoyment of rights which range from classic civil and political rights like voting and equal treatment before tribunals to economic and social rights like the rights to housing,

2. See International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965), available at http://www.unhchr.ch/html/menu3/b/d_icerd.htm [hereinafter CERD].

3. *Id.* art. 8.

4. CERD, *supra* note 2.

5. Committee on the Elimination of Racial Discrimination – General Comments, available at <http://www2.ohchr.org/english/bodies/cerd/comments.htm>.

6. CERD, *supra* note 2 (emphasis added).

education and access to public accommodations.⁷ It also aims to eliminate racist propaganda;⁸ end racial segregation;⁹ provide judicial recourse for wrongs;¹⁰ and ensure that States proactively educate to promote understanding and to end racism.¹¹ All 173 states that have ratified ICERD are obligated under it to comply with all of these points, and more.

II. U.S. ADOPTION OF ICERD

In a small country like Botswana, adoption of an international treaty gives it a place on the world stage. Ratification is more important as a matter of foreign policy than as a matter of domestic application. For the United States, there is less of a political imperative to “play along,” and we have seen, particularly in this Administration, that many are hostile to the U.S. subscribing to any kind of international obligation. Indeed, the U.S. remains one of only two countries in the world (Somalia being the other) which has not yet ratified the Convention on the Rights of the Child (CRC).¹²

The United States ratified the ICERD on October 21, 1994, making it the “supreme law of the land” under Article VI of the U.S. Constitution.¹³ ICERD is one of only three major U.N. human rights treaties ratified by the U.S. Yet despite its ratification, the U.S. used a major loophole for implementation by stating in one of its RUDs (Reservations, Understandings and Declarations) that the treaty would not be self-executing and would thereby require implementing legislation from Congress.¹⁴

The U.S. takes a consistent position that it wholly complies and subscribes to the human rights treaties that it has ratified. The government says that the Constitution, Bill of Rights and domestic law are sufficient to comply with the treaty and where there are differences, the U.S. has reserved upon the treaty to say that U.S. law is the only thing that obligates it.¹⁵ It is a rather odd way to approach treaty implementation, a core principle of which is to adapt domestic law to comply with international norms (rather than the other way around).

7. *Id.* art. 5.

8. *Id.* art. 4.

9. *Id.* art. 3.

10. *Id.* art. 6.

11. *Id.* art. 7.

12. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

13. U.S. CONST. art. VI.

14. CERD, *supra* note 2 (section entitled “Declarations and Reservations”), available at http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

15. For example, the U.S. has made the following reservation to ICERD: “I. The Senate’s advice and consent is subject to the following reservations: (1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.” *Id.*

III. IMPLEMENTATION OF ICERD IN THE U.S.

Here in the United States, we want to think that we are leaders of the human rights movement. We have advocated for human rights and equality all around the world. But minorities and disenfranchised people in this country have known all along that what the U.S. has said to others is not what the U.S. has done at home.

Over the past fifteen years, a growing human rights movement within the United States has been calling for increased accountability of the U.S. with its international obligations – the obligations for which the U.S. holds other countries accountable and yet neglects to implement itself. Over the past two years, as the U.S. has submitted long overdue reports to U.N. treaty monitoring bodies, coalitions have formed to advocate for better U.S. compliance under the auspices of the U.S. Human Rights Network.¹⁶ In July 2006, 13 NGO representatives went to Geneva to advocate for better U.S. compliance with the Convention Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (CAT). In February 2008, over 120 went to Geneva to discuss the ICERD convention.

The U.S. submitted its report¹⁷ to the CERD Committee last April, only the second time that it has reported to the Committee since it ratified the treaty in 1994. The 121-page U.S. report was sorely lacking in its assessment of race in the United States. Indeed, much of it was cut and pasted from previous recent reports to the Human Rights Committee (overseeing the International Covenant on Civil and Political Rights) and the Committee Against Torture. In some sections, there was no mention of race at all. Hurricane Katrina, which encapsulates *so much* of what is going on with race in this country today, was mentioned *twice* in the entire report.¹⁸ Interestingly, the Administration took credit for affirmative action cases, not noting their active opposition to affirmative action.¹⁹ Indeed, to give you a flavor for the report, in a section talking about elimination of racial discrimination through promotion efforts in the media, the government touted the film *Crash*.²⁰

Luckily, there is a mechanism for supplemental information to reach the CERD Committee (and other oversight committees), in the form of “shadow reports” and personal advocacy by NGOs at the Committee meetings.

In February 2008, an unprecedented delegation of over 120 activists from the United States went to Geneva as part of the largest, most closely coordinated coalition of NGO activists ever to advocate at a treaty moni-

16. The U.S. Human Rights Network is an organization that “was formed to promote US accountability to universal human rights standards by building linkages between organizations and individuals.” U.S. Human Rights Network, About Us, http://www.ushrnetwork.org/about_us (last visited Mar. 17, 2008).

17. PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007) available at <http://www.ushrnetwork.org/projects/cerd/shadow>.

18. *Id.* at 85-86.

19. *See id.* at 46.

20. *Id.* at 102.

toring body. Their presence followed the submission of a five hundred page “shadow report” which supplemented the official U.S. report – filling in holes, correcting wrong data and giving a more realistic and vivid picture of the situation of race today in the U.S.²¹ The drafting process involved hundreds of people from around the country under the umbrella of the U.S. Human Rights Network. Large, national organizations like the American Civil Liberties Union and Human Rights Watch participated, together with smaller, local organizations like the New Orleans Workers’ Center for Racial Justice and the Cabrini Green Housing Coalition in Chicago. Indeed, there were so many people present, the Committee had to move the review from their regular meeting room to a special room to accommodate the full delegation.

The NGO delegation had an ambitious, and exhausting, agenda. They had meeting after meeting, lobbying members of the CERD Committee in informal briefing sessions, holding open panel discussions on civil and political rights; economic, social and cultural rights; indigenous rights; and race. They had a special briefing with the U.N. Special Rapporteur on Racism, Doudou Diene, in preparation for his official visit to the U.S. later this year; they held briefings with the Office of the High Commissioner for Human Rights on the new Universal Periodic Review mechanism of the U.N. Human Rights Council; they had meetings with NGOs from Fiji and Italy (whose countries were also being reviewed at this CERD Committee session) to discuss issues of common concern and to brainstorm about successful strategies; and most importantly, they engaged in constant advocacy with Committee members which resulted in many of the issues of concern being raised with the U.S. delegation.

The U.S. delegation consisted of 24 members, making it the largest and deepest delegation ever sent by the U.S. to a U.N. treaty monitoring body. Headed by the U.S. Ambassador to the U.N. in Geneva, Warren Tichenor, it consisted of representatives from the Equal Employment Opportunity Commission; Department of Homeland Security; Departments of the Interior, Justice, Labor, State; and the State of Illinois (bringing a local perspective). Yet, despite the large delegation, the government seemed taken aback by many of the issues raised by the Committee – issues brought to the Committee’s attention by the NGO delegation.

This coordinated advocacy resulted in the Committee raising a variety of issues taken directly from the information supplied to it by the NGO coalition – issues which the U.S. was not terribly pleased to confront and had actively avoided in its official report. These included issues of structural racism; acknowledgement of the Convention’s legal definition of discrimination including discriminatory intent (to which the U.S. subscribes) and the broader standard of impact (which ICERD requires); treatment of indigenous peoples and of non-citizens; and event-specific examples of racial discrimination including 9/11, Hurricanes Katrina and Rita, and the upcoming U.S. elections.²²

21. The shadow report can be found at ICERD Shadow Report 2008, U.S. Human Rights Network, http://www.ushrnetwork.org/cerd_shadow_2008 (last visited Mar. 17, 2008).

22. *Id.*

In the Concluding Observations issued by the Committee following the review, the Committee picked up on many of the areas of concern addressed by the NGO coalition and issued thirteen pages of recommendations to the United States to improve U.S. compliance with ICERD.²³ Among its areas of concern were a variety of issues regarding criminal justice, including concern about racial profiling, police brutality, racial disparities in the application of the death penalty, racial disparities in juvenile life without parole, and the overrepresentation of minorities in every level of the criminal justice system.²⁴ The Committee criticized residential segregation and substandard housing conditions, limitations on affirmative action, the disparate impact of felony disenfranchisement, lack of options for sexual and reproductive health, and the high incidence of rape and sexual violence among women of color.²⁵ The Committee also was concerned about the exploitation of Native American lands by transnational corporations in the U.S., the continuing lack of response to long-standing land claims by the Western Shoshone, and the abuse of Native American lands by nuclear testing and toxic waste storage.²⁶ The Committee recommended measures to expand legal protections for disparate impact claims and criticized the government for lack of instruction of government officials, including the judiciary, law enforcement, and teachers, on treaty rights.²⁷

The Committee specifically asked for information and follow up on issues of racial profiling, juvenile life without parole, the Western Shoshone land claims, the response to Hurricane Katrina, and the instruction of government officials within one year.²⁸ It set a timetable for the next U.S. report to be submitted by November 20, 2011.²⁹

IV. IMPACT OF THE ICERD PROCESS

U.S. NGOs have largely lagged behind our counterparts around the world in terms of advocacy at the U.N. We have much to learn from them. The work performed in February 2008, however, was a great example of what is possible – and what needs to be done in the period between now and the next report due in 2011.

I was on a conference call during the review with my colleagues in Geneva. One of the delegates, Thandabantu Iverson, could barely contain his excitement about the experience. He said that the entire experience of advocating on the world stage with the international experts of the CERD Committee had been politically validating. He said “the opportunity to have our lived experiences of oppression and discrimination validated,

23. U.N. Comm. on the Elimination of Racial Discrimination, 72nd Sess., Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/3 (Feb. 2008).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 13.

29. *Id.*

for someone to say you aren't crazy, that this is real, even in the U.S., has been extremely energizing and moving." In addition, the 120+ NGO representatives who have been working together in an unprecedented highly coordinated and collaborative effort have been organizationally empowered – to come back from Geneva, to share what happened there and to work together to see real change.

A movement is forming. Domestic social justice organizations in the U.S. are now looking to international mechanisms for support and strategies. We are finding new allies on issues like racial profiling or the discriminatory treatment of non-citizens. We are seeing that issues of civil rights are really issues of human rights.

The opportunity to present issues of race in the U.S. *across boundaries* at the U.N. has been groundbreaking. Using the international human rights framework and mechanisms to advocate for change has expanded the fight against discrimination and oppression and has taken the battle for equality to a new level of sophistication, finding new allies and using new strategies. Malcolm X would be proud.

