

THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

By Gay McDougall

Senior Fellow and Distinguished Scholar-in-Residence

Leitner Center for International Law and Justice/Center for Race, Law and Justice

Fordham University School of Law

Introduction

The prohibition against racial discrimination is fundamental and deeply entrenched in international law. It has been recognized as having the exceptional character of *jus cogens* which creates obligations *erga omnes*, an obligation from which no derogation is acceptable.

The International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “ICERD” or “the Convention”) is the centerpiece of the international regime for the protection and enforcement of the right against racial discrimination.

The early years of the United Nations were a time of extraordinary hope, energy, and promise. The end of WWII came with enormous lessons for all of humanity and a sense that those lessons could be implemented to save the globe from a repeat of similar calamities. Hopes were invested in the creation of a new institution that would diffuse disputes between countries and redirect them to conference tables for dialogue and negotiations based on principles of sovereign equality.

At the same time, groups of people within countries were seeing the changing world as finally opening the door for their compressed aspirations to be realized. Thus began the next period of extraordinary change throughout the world; a period that called on the United Nations to make real its promise of human rights and equality.

African States newly emerging from colonial rule into independence and gaining membership in the United Nations began setting an agenda for the United Nations that included an increasing focus on decolonization, independence for South West Africa/Namibia, an end to apartheid in South Africa and codification of the customary law against racial discrimination.

While the principle of non-discrimination appears in Article 1 of the Charter of the United Nations and is enshrined in the Universal Declaration of Human Rights, it was felt that this crucial rule of international law should receive due prominence in a legal instrument which elaborated the definitions and obligations in stemming from it.

The Convention

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted in the 1965 and entered into force in 1969. It remains the principal international human rights instrument defining and prohibiting racial discrimination in all sectors of private and public life.

By becoming a party to ICERD, States have declared that racial discrimination should be outlawed and have pledged themselves to abide by the terms of the Convention. ICERD authorizes the establishment of an international committee of experts to oversee Member State compliance with the treaty, the Committee on the Elimination of Racial Discrimination (hereinafter “CERD”) (articles 2 and 8). Parties to ICERD must periodically submit written reports which detail their country’s progress toward fulfilling the goals of ICERD (article 9). During the review period, Member States also send

government officials to answer the questions of committee members. To receive added insight into country conditions, CERD also receives reports provided by United Nations agencies, national institutes of human rights, and international and domestic NGO's.

Based on the country review, CERD issues an analysis and list of recommendations called Concluding Recommendations that are specific to that State party. Additionally, when deemed useful and appropriate, CERD also issues General Recommendations (G.R.) seeking to clarify or elucidate the full and appropriate interpretation of provisions of the Convention. General Recommendations are considered authoritative interpretations of the Convention.

Under its Early Warning and Urgent Action Procedure, CERD is also authorized to address governments concerning matters brought to its attention that are of an urgent nature. The objective is to prevent existing situations from escalating into conflicts and to limit the scale or number of serious violations of the Convention.

The Convention also authorizes CERD to consider Communications from individuals that make claims that they have suffered injuries as a consequence of the failure of the State party to fulfill its obligations under the Convention. Jurisdiction to consider such Communications is dependent on a prior and separate ratification of article 14 of the Convention. Articles 11 to 13 give jurisdiction to CERD to consider Communications by one State party against another State party, a unique procedure which requires no separate ratification by the respondent State party.

This Note will summarize below some of the key provisions of the Convention.

a. Definition of Racial Discrimination

The Convention defines "racial discrimination" as:

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (article 1).

This article makes several important points. First, it describes the prohibited basis for discrimination: "race, colour, descent or national or ethnic origin." Groups or persons who may be perceived as having the traits in this list are protected from discrimination under ICERD. This list is often referred to as the protected groups with reference to ICERD.

CERD has adopted General Recommendations to clarify that the ICERD protections in article 1 include groups not explicitly named but who fall within the Convention's broad criteria, such as women (G.R. 25), indigenous persons (G.R. 23), the Roma (G.R. 27), Dalits (G.R. 29), non-citizens including refugees (G.R. 30), African descendants, particularly those in the diaspora (G.R. 34), Muslims subjected to Islamophobia, and more generally persons whose religious identity has been "racialized," that is used as a basis for discrimination (G.R. 32).

Second, article 1 lists the categories of rights that may not be infringed by discriminatory conduct: human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. These categories of rights are later elaborated on in articles 5 and 6. Article 5 of the Convention lists civil and political rights such as the right to political participation, freedom of speech, and freedom of movement. Article 5 also elaborates economic, social, and cultural rights, such as rights relating to work, housing, health care, and education. This list is not exhaustive. Under the chapeau of article 5, State parties must guarantee "equality before the law, notably in the enjoyment of the

following rights.” [emphasis added] Further, article 2, para.1 (c) requires States to nullify any law or practice which perpetuates racial discrimination. Other provisions the Convention make clear that ICERD seeks to “eliminate racial discrimination in all areas of life.” [emphasis added]

Article 6 guarantees effective protection from discrimination and remedies through equal access to competent and fair tribunals, prompt investigations and prosecutions followed by just and adequate reparations.

Third, article 1 describes the elements of the violation termed “racial discrimination”. The term “purpose or effect” in article 1 refers to the nature of the violation not being dependent on whether the action was taken with discriminatory purpose or rather, unintentionally created a discriminatory impact or effect. Some commentators refer to the distinction between direct and indirect discrimination or between actions that are discriminatory on their face or facially neutral but with disparate negative impact on a protected group. CERD has explained that to determine whether an action is discriminatory it must have “an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin” (G.R. 14).

The fourth important aspect of the definition of racial discrimination is the exception to the definition found in article 1(4). If distinctions between protected and other groups in society are being made for the sole purpose of correcting prior existing inequalities, then those actions shall not be considered discriminatory under the Convention so long as those corrective measures are only temporary re-alignments, as opposed to creating new permanent rights.

The definition in article 1 eliminates from the definition of racial discrimination an element of blame that might generate resistance to acknowledging or identifying a violation. Under the Convention, laws or policies can be considered racially discriminatory even if the initial cause did not have that purpose and might otherwise be totally justified. A State party has an obligation under the Convention to correct the inequity if it exists within the jurisdiction of the State even if it did not create the circumstances that led to the discriminatory situation.

Many of the structural barriers to racial equality are the result of facially neutral laws and policies. They may be policies that appear to meet a standard of “fairness” when measured in a context that excluded, perhaps mindlessly, certain population groups. Viewed from a different perspective or in a changed context, the reality of exclusion may become clear. Then, failure to take measure to change that reality perpetuates racial discrimination. Under article 1, the standard of equality embraced by ICERD is substantive equality, that is, equality of outcomes rather than merely procedural equality of opportunity.

b. State Obligations

The States ratifying the Convention undertake to eliminate racial discrimination through all means, including legislation, policies, educational initiatives, or prosecutions. Each State party must act to end racial discrimination “in all its forms”, to take no action as a State, and to ensure that no public entity does so whether national or local. States must not sponsor, defend, or support racial discrimination in any way. States must immediately review and rescind or nullify existing laws that create or perpetuate racial discrimination.

The prohibition against racial discrimination is absolute. There is no circumstance under which a derogation is allowed, and delays are not tolerated.

States also must take steps to immediately end discrimination by any person or organization and further, must encourage “integrationist multiracial” organizations or movements.

Importantly, the Convention requires that situations of racial inequality be corrected by government initiatives termed “special or concrete measures”. Depending on the country, such measures may also be referred to as affirmative action or positive action. Article 2(2) of ICERD mandates States to implement special measures for the sole purposes of eliminating substantive or de facto discrimination. The use of positive measures is central to addressing ICERD violations (G.R. 32). Those measures may be undertaken by legislation, regulations, tax initiatives or special incentives to private entities like schools or businesses.

Eliminating substantive discrimination often requires paying attention to groups that have suffered historical or persistent prejudice, measuring or assessing the gap in their “full and equal enjoyment of their rights” as against the majority population and then developing programs targeted to close that gap. Such measures are acceptable if they are temporary and proportional to address de facto or substantive discrimination.

Some countries, however, have been reluctant to undertake positive measures. The reluctance may be a fear of potential political backlash. Positive measures to redress discrimination must, by definition, target disadvantaged groups in society for what may appear to be preferential favors. Disadvantaged groups usually lack a prominent political voice. A well-considered strategy, however, should include substantial prior public education about why such measures are fair on the basis of remediation and how equality and full inclusion benefits the entire society. Also, it must be made clear that the programs are of a temporary nature.

Another possible reason for the reluctance of some countries to fulfill their obligation to adopt concrete positive measures may be that aptly crafted measures to address the inequalities must be based on accurate data that reveals the socio-economic inequalities suffered by the protected groups. Population data is especially important in revealing the existence of racial inequalities that violate ICERD. Data that is disaggregated based on identity groups within the population is essential.

CERD has often brought attention to the importance of data collection. Population statistics should be disaggregated by race, color, descent and ethnic or national origin, and sex. It should measure the socio-economic and cultural status of various groups and their participation in the political and economic development of the country (G.R. 32). Once implemented, disaggregated data can be used to assess the effectiveness of a corrective measure. States, however, have been reluctant to collect data for the purposes of addressing racial discrimination.

Some countries have objected that they lack the resources to collect such information on a country-wide level. Yet, most countries conduct a periodic census. Other countries argue that their history or values create difficulties to conduct a statistical survey that asks respondents to declare their racial identity. This issue is of particular sensitivity in Europe because of the history of Nazi Germany. To respond to these sensitivities, States parties are referred to the reports of the United Nations Statistical Commission which have developed methodologies for collecting such data while also protecting the privacy of participants.

While article 3 considers the obligation of States to condemn and prohibit apartheid and racial segregation, at the time that ICERD was adopted, apartheid in South Africa was being more effectively dealt with in other United Nations fora. In the United States, the post-Civil War regimes called Jim Crow laws, had been under sustained attack by the Civil Rights Movement which was resulting in national legislation. Consequently, article 3 principally has been referenced with respect to school segregation and patterns of residential segregation.

Article 3 creates the obligation to eradicate all practices of segregation which CERD emphasizes includes those imposed currently or in the past, by State action or by that of private persons or forces.

Included are financial considerations that may be manipulated, like the practice of “redlining” which restricts or influences the availability of mortgage lending. Also included would be various forms of stigmatization that may mix racial bias with other forms of barriers (G.R. 19).

The situation of the Roma has perpetually presented serious concerns regarding segregation in access to education. In its General Recommendation on discrimination against the Roma, CERD gave a lengthy and nuanced statement of State party obligations to prevent violations of the right to education including bi-lingual and mother-tongue tuition, efforts to raise achievement levels of minority students, recruitment of school personnel from minority communities and the promotion of intercultural education (G.R. 27).

c. Hate Speech

The spread and impact of racist speech and propaganda has been of particular concern to CERD. In recent years there has been an increase in the open and unapologetic dissemination of speech that trumpets notions of white superiority. It has spread unchecked through cyberspace and even mainstream political parties have based national electoral campaigns on thinly veiled racist platforms.

Article 4 of the Convention calls on States to condemn such propaganda based on theories of the superiority of one racial group over another in all forms and encourages national leaders to speak out against it. States must make it an offence punishable by law to disseminate such ideas, to incite racial hatred and acts of violence, as well as to give assistance or financing to such activities. These prohibitions also apply to public authorities or institutions (article 4(a) and (b)). Additionally, States should declare illegal organizations and all organized propaganda activities that promote racial hatred (G.R. 35).

Some have raised concerns about the conflict between article 4 and the guarantees of freedom of speech particularly under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the International Covenant on Civil and Political Rights. But, the careful wording of the chapeau of article 4 locates restrictions on hate speech as an inextricable piece of a body of rights that are indivisible, which must be given “due regard” as such. Additionally, ICERD explicitly recognizes the right to freedom of opinion and expression (article 5(d)(viii)).

d. Measures to Combat Prejudices

Article 7 of the Convention is often overlooked and under-utilized. It could be argued, however, that in its focus on the fields of “teaching, education, culture and information” it goes to the most important approaches to achieving the objectives of the Convention. Under article 7, States parties undertake to adopt measures to short circuit prejudices before they are deeply entrenched in society. The critical role played by misinformation and indoctrination is fully recognized by CERD, which considers it to be a root cause of hate speech (G.R. 35, paras. 30-44).

The States parties have an obligation to undertake effective measures to prevent the formation of prejudices by using positive methods such as public education campaigns, curricula in schools and cross-group cultural programs to promote understanding and the value of diversity. CERD has also recognized the importance of anti-racist training for law enforcement officers (G.R. 13).

At the same time, CERD’s suggestion that the forces of discrimination that have robbed individuals, social groups, and entire societies of the full measure of human potential can be displaced by “understanding, tolerance and friendship” requires more convincing. However, to doubt that is to doubt the potential of the Convention as a whole and perhaps the entire human rights law project.

The Influence and Impact on Subsequent Developments

As of the date of this writing, the Convention has been ratified by 182 States, with an additional 88 States joining as signatories. This means that the Convention reflects the norms of States from across all regions of the world, all legal systems, and religious traditions.

However, in some important ways the Convention was sidelined for many years while the primary item on the United Nations' agenda concerning racial discrimination was the continuing question of apartheid. The provisions of ICERD paid scant attention to apartheid as such. The sole mention of the word, which is in article 3, addresses it as a matter of domestic jurisdiction. However, apartheid in South Africa was treated as a matter of international peace and security not confined to the domestic jurisdiction of South Africa. The principal arena for that struggle within the United Nations was the General Assembly and the Security Council.

The Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001)

With the end of apartheid and particularly with the Third World Conference against Racial Discrimination in Durban held in 2001, ICERD gained renewed attention. Central to the achievements of the Durban Conference was the admission by States that racial discrimination was a reality in all countries despite the defeat of *de jure* racial discrimination. The precedent-setting Durban Declaration and Programme of Action acknowledged the continuing role of historical injustices in creating the contemporary realities of racial inequalities. Attention was also given to the modern manifestations of racial injustices generated by the economies of globalization. Civil society groups from all regions of the globe found their place in the United Nations' vision of ending racism and became new constituencies for the work of CERD.

Non-governmental organizations now attend the sessions of CERD in great numbers in hopes that by applying the provisions of ICERD and dialoging with the States parties, their lived experiences of racial inequality will be unmasked and addressed. And they have found that although ICERD is over 50 years old, its text combines precision sufficient for legal application, while it also permits interpretations that cover realities not at the time foreseeable. In that way, it has been open to dynamic evolution, allowing it to grow and expand as a "living convention," applicable to modern manifestations of racial discrimination. And so, a new generation has found it to be relevant.

The Unique Nature of the Convention

A final point about the expanding influence of ICERD should be mentioned here. On 12 December 2019, the CERD issued its decision on jurisdiction in the Inter-State Communication submitted by the State of Palestine against Israel (the "Decision"). It is among the three first Inter-State Communications ever before human rights treaty bodies and therefore sets numerous precedents.

Israel protested that the CERD had no jurisdiction based on its non-recognition of the State of Palestine. The Decision affirming its jurisdiction rests heavily on the *jus cogens* and *erga omnes* nature of obligations that all States have to combat racial discrimination, which are customary rules codified in the Convention. That places it inherently among those rare treaties which seek to promote and protect the common good.

Such treaties establish an inter-locking web of States parties which have agreed to protect the common good by collective enforcement. They differ from other treaties which seek to protect the interests of individual States by establishing a network of bilateral commitments which are reciprocal

between those States parties, permitting one party to exclude relations with another based on its own individual State interests.

Most modern human rights treaties fall in the former category, and hence are subject to a different legal order (Decision, paras. 3.26-3.30). Further, the Convention is in a special category even among human rights treaties because of the unique status of the norms prohibiting racial discrimination. A State party therefore cannot bar another State party, through unilateral action, from triggering an enforcement mechanism. This point is emphasized by the fact that unlike communication procedures in other human rights treaties, with the singular exception of the Convention on the Prevention and Punishment of the Crime of Genocide, under articles 11 to 13 of the Convention, States parties do not need to grant permission for the CERD to entertain Communications alleging its non-compliance with the Convention. It is an automatic mechanism that applies despite Israel's non-recognition of the State of Palestine as a State.

The obligations which States owe under articles 11 to 13 have the “common purpose of ensuring the effective prohibition of racial discrimination, an *erga omnes* norm, for the common good of the whole international community which cannot be derogated from by the unilateral action of one State party” (Decision, para. 3.43).

Conclusion

The unique character of the Convention and its superior importance as recognized in the Decision will serve to elevate the regard given to the Convention going forward and the importance of the work of the CERD. In emphasizing that modern human rights treaties are not traditional multilateral treaties and are subject to a different legal order that features regimes of collective enforcement, the Decision highlights the possibility of new pathways for human rights enforcement. Additionally, the inter-State complaint mechanism authorized under articles 11 to 13 of the Convention will now be the focus of future efforts to address previously intractable failures of States to fulfill their obligations under the Convention.

This Introductory Note was written in February 2021.

Related Materials

A. Jurisprudence

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B. Documents

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General Recommendation No. 19 (on article 3 of the Convention), para. 3; in Report of the Committee on the Elimination of Racial Discrimination, Annex VII (A/50/18, 22 September 1995).

General Recommendation No. 20 (on article 5 of the Convention), para. 10; in Report of the Committee on the Elimination of Racial Discrimination, Annex VIII (A/51/18, 30 September 1996).

General Recommendation No. 23 (on the rights of indigenous peoples), in Report of the Committee on the Elimination of Racial Discrimination, Annex V (A/52/18, 26 September 1997).

General Recommendation No. 24 (concerning article 1 of the Convention), para. 1; in Report of the Committee on the Elimination of Racial Discrimination, 2–27 August 1999, Annex V (A/54/18).

General Recommendation No. 25 (on gender-related dimensions of racial discrimination), paras. 3-6; in Report of the Committee on the Elimination of Racial Discrimination, 6-24 March 2000, Annex V (A/55/18).

General Recommendation No. 27 (on discrimination against Roma), in Report of the Committee on the Elimination of Racial Discrimination, 31 July-25 August 2000, Annex V (A/55/18).

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General Recommendation No. 31 (on the prevention of racial discrimination in the administration and functioning of the criminal justice system), para. 7; in Report of the Committee on the Elimination of Racial Discrimination, 21 February – 11 March 2005 (A/60/18).

Committee on Economic, Social, and Cultural Rights, General Comment No. 20 (Non-discrimination in economic, social and cultural rights), para. 10 (E/C.12/GC/20, 2 July 2009).

General Recommendation No. 32 (the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination), paras. 7 and 12 (CERD/C/GC/32, 24 September 2009).

General Recommendation No. 34 (racial discrimination against people of African descent), para. 4; in Report of the Committee on the Elimination of Racial Discrimination, 8 August-2 September 2011, Annex 9 (A/66/18) and (CERD/C/GC/34, 3 October 2011).

General Recommendation No. 35 (combatting racist hate speech), para. 21; in Report of the Committee on the Elimination of Racial Discrimination, 12-30 August 2013, Annex 8 (A/69/18) and (CERD/C/GC/35, 26 September 2013).

Note by the Secretary-General, “Contemporary forms of racism, racial discrimination, xenophobia and related intolerance” (A/68/333, 19 August 2013).

General Recommendation No. 36 (preventing and combating racial profiling by law enforcement officials), paras. 4, 13, and 15; in Report of the Committee on the Elimination of Racial Discrimination, 16 to 24 November 2020, and (CERD/C/GC/36, 17 December 2020).

Committee on the Elimination of Racial Discrimination, Inter-State communication submitted by the State of Palestine against Israel (CERD/C/100/5, 12 December 2019). To be read in conjunction with CERD/C/100/3 and CERD/C/100/4.

C. Doctrine

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