

Background

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The Inequities of the U.N. Committee on the Elimination of Racial Discrimination

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The United States of America has done more than almost any other country to eliminate racial and ethnic discrimination within its borders. In the 1860s, an agonizing Civil War ended the institution of slavery at the cost of over 600,000 American lives. The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee equal protection and due process under the law to all persons, regardless of race or ethnicity. Other constitutional protections prohibit discrimination in voting and elsewhere, and Congress and the courts have been particularly active in the past 50 years in ensuring that the ideal of equality of opportunity is realized in fact.

In a series of landmark decisions in the 1950s and 1960s, the U.S. Supreme Court held that racial segregation in public schools and other government facilities was unconstitutional, and the Court has a strong history of protecting the rights of racial minorities since then. The Civil Rights Acts of 1964 and 1965 were among the watershed laws that helped to enforce the prohibition against racial discrimination in public places and schools, public and private employment, voting, housing, government contracting, and government programs.

These laws created a number of specialized civil rights enforcement agencies and new divisions within the Justice, Housing and Urban Development, Education, and other departments, with thousands of employees dedicated to enforcing these non-discrimination guarantees. Each of the 50 states and the territories have enacted similar prohibitions and created

Talking Points

- The U.N. Committee on the Elimination of Racial Discrimination is attempting to erode American sovereignty by imposing on the U.S. its own brand of morality in legal, social, and cultural matters.
- Rather than engaging the U.S. delegation regarding measures taken to eliminate racial disparities, the CERD Committee has pursued an agenda unrelated to discrimination that includes restoring voting rights to convicted felons, promoting multiculturalism, and restricting the activities of transnational corporations.
- The committee largely ignored official U.S. reports during its latest review and instead embraced dubious allegations made in a report submitted by a non-governmental organization that condemned the celebration of Columbus Day as a “historically racist event” and characterized America as a “racist society.”
- Barring a major improvement in the CERD Committee’s process for reviewing the U.S. record on racial discrimination, the U.S. must seriously reconsider the level of its future engagement with the committee.

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civil rights agencies. Though the need for vigilance remains, over the past several decades, minorities have risen to the top of public life in the United States, including government, business, academia, the law, sports, and entertainment.

The United Nations, however, has found U.S. efforts regarding racial discrimination to be seriously deficient. The U.N.'s opinion of the U.S. record on racial discrimination—as pronounced by the Committee on the Elimination of Racial Discrimination (CERD Committee)—is the result of a skewed and biased review process and demonstrates that the U.N. is not a legitimate partner for improving the state of race relations in the U.S. The CERD Committee has breached the obligations it owes to the U.S. by ignoring the reports submitted to it by the U.S. and by repeatedly attempting to erode American sovereignty by imposing on the U.S. its own brand of morality with respect to legal and social issues.

Barring a major improvement in the CERD Committee's process for reviewing the U.S. record on racial discrimination, the U.S. must seriously reconsider the level of its future engagement with the committee.

The U.N. System and Racial Discrimination

Most nations with sizable minority populations have had recurring periods of tribal, ethnic, or racial strife, and ending racial discrimination has long been a part of the United Nations' official human rights mission. The Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948, enumerated the civil and political rights and

fundamental freedoms held universally by mankind.¹ Together with the Declaration, two other multilateral human rights treaties—the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966)—constitute the “International Bill of Rights,” which collectively guarantees the enjoyment of all human rights regardless of one's race, color, or national origin.²

In 1965, the General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³ CERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, 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.”⁴

Parties to CERD make specific commitments to review government policies, rescind those that create or perpetuate racial discrimination, encourage integrationist multiracial organizations, and condemn racial segregation and apartheid.⁵ Parties also make a sweeping, general commitment to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”⁶ Affirmative action measures are specifically permitted under the terms of the treaty.⁷

For the purpose of reviewing each party's compliance with its treaty obligations under CERD, the

1. Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), December 10, 1948, at <http://www.un.org/Overview/rights.html> (July 25, 2008).
2. International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), Art. 2(1), December 16, 1966, and International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI), Art. 2(2), December 16, 1966.
3. International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), December 21, 1965, at <http://www2.ohchr.org/english/law/cerd.htm> (July 25, 2008) (hereinafter cited as CERD).
4. CERD, Art. 1(1).
5. CERD, Art. 2(1), 3.
6. CERD, Art. 2(d).
7. CERD, Art. 1(4). “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination....”

treaty established a committee composed of “eighteen experts of high moral standing and acknowledged impartiality.” Any country that is a party to CERD may nominate one of its citizens to sit on the CERD Committee. Committee members need not come from free countries or countries with a record of striving to attain racial equality. Indeed, five of the 18 countries represented on the committee—Algeria, China, Egypt, Pakistan, and Russia—are classified as “not free” by Freedom House⁸ and are sorely lacking when it comes to human rights. Over half of the committee’s members are classified as “not free” or “partly free.”

The CERD Committee’s Biased Review of the U.S. Record

The U.S. Senate ratified CERD in 1994, and since that time, the U.S. has undergone two reviews by the CERD Committee, one in 2001 and one in 2008. The committee’s reviews of the U.S. record have bordered on the farcical. Rather than pursuing the noble goal of ending racial discrimination, the committee’s members have used their position as a platform to dictate social policy to the U.S.—while ignoring evidence of U.S. compliance with the treaty.

In May 2007, the United States went to great pains to report to the CERD Committee regarding its compliance with the terms of the treaty. The U.S. report was more than a hundred pages long and detailed—article by article—U.S. compliance with each of the substantive provisions of the treaty.⁹ The U.S. report described executive decisions, judicial

opinions, and legislative and administrative enactments that furthered the cause of racial equality. Actions to combat discrimination taken by the Equal Employment Opportunity Commission, the Civil Rights Division of the Department of Justice, the Department of Labor’s Office of Federal Contract Compliance Programs, the Department of Housing and Urban Development, and various state agencies were set forth in great detail.

After the initial U.S. report was submitted, a committee country expert (who serves as an interlocutor and is responsible for presenting draft comments and recommendations to the CERD Committee) submitted 32 additional written questions to the U.S. inquiring on a wide range of matters, many of which are wholly unrelated to racial discrimination. Included were questions related to sexual and reproductive health, the enemy combatants held at Guantanamo Bay, the protection of “undocumented migrants crossing the borders between Mexico and the United States,” and violence against women.¹⁰ Despite the dubious nature of these questions, the U.S. dutifully replied to each one, again at great length (the response was more than 110 pages long).¹¹ Then, in February 2008, the U.S. sent a delegation of 25 officials to appear before the committee, which questioned members of the delegation at length regarding the U.S. report.¹²

Yet when the CERD Committee issued its report on U.S. compliance, only a fraction of the report (one-half of a page of a 13-page report) took note of the lengthy and detailed U.S. submissions.¹³ The

8. Freedom House, *Freedom in the World: 2008*, at <http://www.freedomhouse.org/template.cfm?page=363&year=2008> (July 29, 2008). Pierre-Richard Prosper of the United States currently sits on the CERD Committee.
9. “Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination,” CERD/C/USA/6, May 1, 2007.
10. Committee on the Elimination of Racial Discrimination, “Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America,” 72nd Sess., February 18–March 7, 2008, ¶¶ 18, 19, 25, and 29, at http://www2.ohchr.org/english/bodies/cerd/docs/72LOI_USA.pdf (July 25, 2008). CERD Committee expert Linos-Alexandre Sicilianos served as the country rapporteur to the U.S. for purposes of the 2008 CERD review and was responsible for providing draft comments and recommendations to the committee.
11. U.S. Responses to “Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America,” 72nd Sess., February 18–March 7, 2008, at <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/wrusa72.pdf> (July 25, 2008).
12. Press release, “Committee on Elimination of Racial Discrimination Considers Report of United States,” United Nations, February 22, 2008, at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/8A5C79433152120AC12573F7005B68FC?opendocument> (July 25, 2008).

original U.S. report, the U.S.'s answers to the committee's 32 additional written questions, and the U.S. delegation's responses to the committee's oral inquiries were entirely ignored.

Instead, most of the text of the committee report is taken directly from a "shadow report" submitted to the CERD Committee by the U.S. Human Rights Network (HRN), a nongovernmental organization (NGO) that coordinated the reports of multiple NGOs in connection with the 2008 CERD review of the U.S. record.¹⁴ Of the 36 substantive "concerns and recommendations" made in the CERD Committee report, at least 19 echo statements or recommendations made in the HRN report. Indeed, it appears that many of the allegations made in the committee's report were lifted directly from the HRN report. (See Table 1.)

Such heavy reliance by the CERD Committee on an NGO "shadow report" deserves scrutiny, especially since the HRN report is laced with allegations, claims, and characterizations that do not reflect reality and are well outside the mainstream of U.S. public opinion regarding the current state of race relations in the United States. For example:

- The HRN report characterizes the U.S. as a "racist society" that "is experiencing unprecedented levels of intolerance, racism, xenophobia, anti-Semitism, nationalism, bigotry and homophobia as the ideologies of white supremacists gain greater public acceptance" and further claims that "white supremacist ideologies of racial hate

and intolerance have moved into the mainstream of the body politic, furthering a climate of hate in America."¹⁵

- Moreover, "there remains an insidious form of racism tearing at the core of the fabric of this nation. An ideology espousing hatred of non-whites belies a dangerous undercurrent ready to rise and destroy our common goal of 'life, liberty and the pursuit of happiness.'"¹⁶
- The HRN report condemns the celebration of Columbus Day, which it characterizes as a "historically racist event" (meaning that the discovery of America was a racist event, which in turn implies that the founding of the United States was a racist event).¹⁷
- The U.S. criminal justice system is characterized as "central to perpetuating" the ongoing effects of "colonialism, chattel slavery, racial segregation, racialized gender and sexual norms, and selective immigration policies." Additionally, the U.S. has established so-called supermax security prisons for the purpose of incarcerating "Black militants and Muslims."¹⁸
- The report decries the under-representation of racial minorities in the legal profession and blames this disparity on the requirements that law school applicants take an entrance examination and that law school graduates take a bar examination in order to be licensed as attorneys.¹⁹
- Hurricane Katrina is characterized as a "racialized disaster."²⁰

13. "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," CERD/C/USA/CO/6, February 2008. The committee's concluding observations in 2008 in many respects mirror its concluding observations in 2001 in regard to the U.S.'s initial report, including the committee's opinions on prohibiting hate speech, placing a moratorium on the death penalty, and restoring voting rights to convicted felons. See "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America," A/56/18, August 14, 2001, ¶¶ 391, 396, and 397, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.380-407.En?Opendocument) (July 25, 2008).

14. U.S. Human Rights Network, "Executive Summary: A Summary of U.S. NGO Responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination," February 2008, at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/0_Executive%20Summary.pdf (July 25, 2008).

15. *Ibid.*, ¶¶ 48, 49, and 87.

16. *Ibid.*, ¶ 45.

17. *Ibid.*, ¶ 50.

18. *Ibid.*, ¶¶ 51 and 87.

19. *Ibid.*, ¶ 23.

Carbon-Copied Allegations

In several instances, allegations made against the U.S. by the Committee on the Elimination of Racial Discrimination closely match allegations from a 2008 report by the Human Rights Network.

Human Rights Network Allegation	CERD Committee Allegation
<p>"While the U.S. Constitution has been construed to provide a right to counsel at state expense for those accused of a crime, there is currently no such federal constitutional right for litigants in civil cases, even when the litigant is indigent and even when the case involves critical needs such as child custody, housing, food or health." (Paragraph 58)</p>	<p>"The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake." (Paragraph 22)</p>
<p>"In fact, because the practice of disenfranchising persons convicted of a felony has a well-documented racially disparate impact, the U.S. government is in violation of its obligations under Article 1 to review and eliminate all laws and policies that result in racially discriminatory impact." (Paragraph 80)</p>	<p>"The Committee remains concerned about the disparate impact that existing felon disenfranchisement laws have on a large number of persons belonging to racial, ethnic and national minorities, in particular African American persons, who are disproportionately represented at every stage of the criminal justice system." (Paragraph 27)</p>
<p>"Moreover, youth of color are disproportionately tried and sentenced as adults and held in adult detention facilities, in violation of international norms. Additionally, youth of color represent the vast majority of juveniles condemned to die in prison under sentences of life without the possibility of parole." (Paragraph 52)</p>	<p>"The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole." (Paragraph 21)</p>
<p>"Despite its illegality, the practice of 'steering,' in which real estate agents direct people towards homes in buildings or neighborhoods in which their presence will not disturb the prevailing racial pattern, is becoming more rather than less, common." (Paragraph 40)</p>	<p>"[E]nsure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of 'steering' and other discriminatory practices carried out private actors." (Paragraph 16)</p>
<p>"A particularly egregious example of this type of rights violation is experienced by Native people. They are subject to disproportionate impacts of toxic industries, including gold and uranium mines, sited near or on reservation lands." (Paragraph 124)</p>	<p>"The Committee is concerned about reports relating to activities—such as nuclear testing, toxic and dangerous waste storage, mining or logging—carried out or planned in areas of spiritual and cultural significance to Native Americans." (Paragraph 29)</p>
<p>"Indeed, the continued racial inequities and segregation of U.S. schools is evidenced in large gaps in achievement and access, high rates of suspension, expulsion, and criminal sanctions, and low graduation rates for minority and English Language Learner ('ELL') students." (Paragraph 135)</p>	<p>"[T]he Committee remains concerned about the persistent 'achievement gap' between students belonging to racial, ethnic or national minorities, including English Language Learner ('ELL') students, and white students." (Paragraph 34)</p>
<p>"The efforts cited by the U.S. government as evidence of its compliance with its obligations under the Convention in the arena of health care are grossly under resourced, and focus on almost exclusively on individual behaviors while failing to address systemic factors driving health disparities, including obstacles to access to health care such as lack of health insurance, unequal distribution of health care resources, and poor quality public health care." (Paragraph 121)</p>	<p>"The Committee recommends that the State party continue its efforts to address the persistent health disparities affecting persons belonging to racial, ethnic and national minorities, in particular by eliminating the obstacles that currently prevent or limit their access to adequate health care, such as lack of health insurance, unequal distribution of health care resources, persistent racial discrimination in the provision of health care and poor quality of public health care services." (Paragraph 32)</p>

Sources: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6, February 2008, at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement>; U.S. Human Rights Network, "Executive Summary: A Summary of U.S. NGO responses to the U.S. 2007 Combined Periodic Reports to the International Committee on the Elimination of All Forms of Racial Discrimination," February 2008, at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/0_Executive%20Summary.pdf.

It is disturbing, to say the least, that the CERD Committee relied on—and in many cases adopted wholesale—an NGO report that makes such outrageous accusations, not one of which is backed by any evidence whatsoever. The committee accepted the claims made in the HRN shadow report seemingly without deliberation or scrutiny, while the report submitted by the U.S.—all of which was verifiable and supported by documentation—was mostly dismissed.

The CERD Committee's reliance on information provided by an NGO is not necessarily improper. Many parties to CERD submit incomplete or evasive submissions to the committee or fail to provide any report at all. In such cases, it is necessary for the committee to rely on NGO submissions as its primary or even sole source of information. In the case of the 2008 review of the U.S. record, however, the CERD Committee ignored the detailed submissions made by the U.S. and based a substantial portion of its report on allegations made in the HRN report.²¹

By becoming a party to CERD, the United States agreed to report periodically to the CERD Committee on U.S. compliance with the terms of the treaty. It stands to reason that the CERD Committee is concomitantly obligated to review the U.S. submissions fully and to base its comments and recommendations regarding U.S. compliance with the treaty primarily on those submissions. By failing to act as contemplated by the terms of the treaty, the committee has breached its obligations to the U.S. as a state party.

Undermining U.S. Sovereignty

The CERD Committee has also breached its obligations to the U.S. by repeatedly attempting to erode U.S. sovereignty. The U.S., by becoming a party to CERD, invited the CERD Committee to comment on the state of racial equality in the U.S. It did *not*, however, invite the U.N. to interfere with aspects of American social and legal traditions unrelated to racial discrimination.

The committee has demonstrated a clear effort to impose its own specific views of social values and individual rights on the American people. These views are based not on social traditions in America or the U.S. Constitution and Bill of Rights, but on criteria formulated in Geneva by international jurists, NGOs, various U.N. human rights experts, and other unelected individuals and organizations completely unaccountable to the American people.

Imposing a Far-Left Agenda. Instead of using the CERD review as an opportunity to engage U.S. officials regarding what may be accomplished to further the cause of racial equality, the CERD Committee has repeatedly used the process to force its own views on various social and legal causes unrelated to racial discrimination on the U.S. The comments and recommendations made by the committee reflect the agenda of liberal international human rights NGOs, various U.N. special rapporteurs, and other special U.N. causes that are only tangentially related or utterly unrelated to racial discrimination.

Specifically, the 2008 Committee report urges the United States government to do the following:

- Ensure that enemy combatants held in Guantanamo Bay, Cuba, have the right to judicial review to challenge the lawfulness and conditions of their detention;
- Prevent U.S. corporations from negatively affecting the rights of indigenous people living outside of the United States;
- Place a moratorium on the imposition of the death penalty;
- Restore voting rights to all convicted felons, regardless of the heinousness of their crimes;
- Promote multiculturalism by providing information to the committee on the extent to which grade school and high school textbooks and curricula “reflect the multiethnic nature” of the U.S. and whether the texts “provide sufficient information on the history and culture of the different racial, ethnic, and national groups”;

20. *Ibid.*, ¶ 28.

21. Only seven paragraphs of the committee's report mention any “positive aspects” of the U.S. record. “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” February 2008, ¶¶ 3–9.

- Protect “undocumented migrant workers” from discrimination in the workplace;
- Prohibit the practice of sentencing criminal defendants who committed a crime while under the age of 18 to life without the possibility of parole, regardless of the heinousness of the crime; and
- Provide free legal counsel to indigent minorities not only in criminal cases, but in all civil legal proceedings as well. (Why these benefits should not extend to non-minority indigents is left unexplained.)²²

In each of these examples, the CERD Committee has rendered judgment on a series of highly complex and controversial issues and has found the U.S. record to be wanting. The committee’s recommendations stray into areas of American life that are far outside the committee’s mandate and supposed competence. The following examples are illustrative of the committee’s attempt to encroach upon U.S. constitutional, legal, and social policy.

Free Speech. The CERD Committee continually disregards the U.S. definition of free speech under the U.S. Constitution and has attempted to impose its own notion of “hate speech” on the U.S. legal system. Article Four of CERD expressly prohibits “the dissemination of ideas based on racial superiority” and requires treaty parties to make such acts punishable by law.²³ That requirement, however, runs directly counter to the broad protection of free speech guaranteed in the U.S. Constitution—specifically, the First Amendment in the Bill of Rights. While U.S. law provides protection against the most brazen forms of racial intimidation,²⁴ statements of racial superiority—as well as other repugnant proclamations—are protected under the First Amendment.

At the time of ratification in 1994, the U.S. Senate recognized that Article Four of CERD was in direct conflict with the Constitution and took an affirmative step to file a reservation to the treaty indicating that the U.S. would take no steps to restrict free speech. Specifically, the Senate stated that its ratification was subject to the recognition by all parties to the treaty:

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.²⁵

The CERD Committee, however, has repeatedly ignored the U.S. reservation to Article Four and has emphatically expressed its discontent with the U.S.’s refusal to agree with the committee’s interpretation of free speech. The committee has reviewed U.S. compliance twice and has criticized the U.S. for its broad interpretation of free speech rights on both occasions.

- In 2001, the committee directed the U.S. to “review its legislation in view of the new requirements of preventing and combating racial discrimination, and adopt regulations extending the protection against acts of racial discrimination, in accordance with article 4 of the Convention.”²⁶
- In 2008, it requested that the U.S. “consider withdrawing or narrowing the scope of its reservations to article 4 of the Convention.”²⁷

22. *Ibid.*, ¶¶ 21, 22, 23, 24, 27, 28, 30, 33, and 38.

23. CERD, Art. 4(a). Article 4 also declares illegal all organizations “which promote and incite racial discrimination.”

24. See *Virginia v. Black*, 538 U.S. 343 (2003) (Court-upheld statute banning cross burning where there is a specific intent to intimidate).

25. International Convention on the Elimination of All Forms of Racial Discrimination, “Declarations and Reservations: United States of America,” March 7, 1966, at <http://www2.ohchr.org/english/bodies/ratification/2.htm> (July 25, 1966). Article Seven of CERD requires states parties to “adopt immediate and effective measures” to propagate the purposes of the convention.

26. “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” August 14, 2001, ¶ 391.

Indeed, the CERD Committee has its own interpretation of free speech, formulated by a panel of international experts in Geneva in 1993: A “citizen’s exercise of [the right to freedom of opinion and expression] carries special duties and responsibilities...among which the obligation not to disseminate racist ideas is of particular importance.”²⁸

While hate speech is a complex subject about which there is honest disagreement, the CERD Committee’s disregard of the U.S. reservation and its repeated attempts to impose its own judgment on the U.S. as to what is and is not acceptable speech is presumptuous. The U.S. is an independent and sovereign nation with a long (and thoroughly litigated) legal tradition illuminating the First Amendment and demarcating the constitutional boundaries of free speech. The CERD Committee is not a democratically elected body and is accountable to no constituency, much less the American people. It is not empowered by the terms of the CERD treaty to formulate its own definition and interpretation of free speech, but it has chosen to do just that. The committee’s stated agenda to erode free speech protection in the U.S. constitutes a violation of national sovereignty. Furthermore, the committee’s disregard for the reservation expressed by the U.S. Senate in 1994 regarding Article Four demonstrates that it is acting outside the bounds of the treaty in clear breach of its obligations to the U.S.

The Death Penalty. In both 2001 and 2008, the CERD Committee criticized the U.S. for allowing the imposition of the death penalty, which it alleges—baselessly—is imposed as a result of racial biases. On both occasions, the committee has called

on the U.S. to place a moratorium on the death penalty. However, the committee’s displeasure with the U.S. because of its tolerance of the death penalty has nothing to do with any alleged racial disparity in its application.

The U.N. as an organization has long been opposed to the death penalty in any form. Indeed, in 1989, the U.N. General Assembly enacted a Second Optional Protocol to the International Covenant on Civil and Political Rights aimed specifically at abolishing the death penalty (the U.S. is not a party to the Second Optional Protocol).²⁹ As recently as December 2007, the General Assembly passed a resolution calling for a worldwide moratorium on the death penalty (the U.S. voted against the resolution).³⁰

The CERD Committee’s criticism of the U.S. record on the death penalty is a rather transparent attempt to impose its and the U.N.’s own brand of morality upon America. In the committee’s opinion, it is apparently not up to the citizens of California, Florida, or Texas to decide whether the death penalty is moral, but up to a committee of U.N. experts. The committee’s collective conscience also does not reflect U.S. public opinion: Fully 63 percent of Americans polled in February 2008 support the use of the death penalty.³¹ Moreover, the committee’s opinion conflicts with the opinions of the U.S. Supreme Court, which has repeatedly upheld the constitutionality of the death penalty.

Finally, multiple studies indicate that racial disparities in death row populations at both the federal and state levels are caused by the heinousness of the murders committed by the offenders and are not the result of systemic racial discrimination.³² The

27. “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” February 2008, ¶ 18.

28. Office of the High Commissioner for Human Rights, “General Recommendation No. 15: Organized Violence Based on Ethnic Origin (Art. 4),” A/48/18, 1993, ¶ 4, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?OpenDocument) (July 25, 2008). Participation in organizations that promote racial discrimination “is, of itself, to be punished.” *Ibid.*, ¶ 6.

29. “Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty,” General Assembly Resolution 44/128, December 15, 1989, at <http://www2.ohchr.org/english/law/ccpr-death.htm> (July 25, 2008).

30. General Assembly, Department of Public Information, “General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty,” December 17, 2007.

31. “Over Three in Five Americans Believe in Death Penalty,” The Harris Poll, March 18, 2008, at http://www.harrisinteractive.com/harris_poll/index.asp?PID=882 (July 25, 2008).

CERD Committee is apparently not to be dissuaded by facts that do not fit its views of the death penalty or the U.N.'s broader anti-death penalty agenda.

Guantanamo Bay. Another subject on which the U.N. has formed a “consensus” ideological position is its opposition to the U.S. prosecution of the war on terrorism. The CERD Committee perpetuates the U.N. agenda by expressing its disapproval of the treatment of enemy combatants detained at Guantanamo Bay in Cuba. The detention of suspected Taliban and al-Qaeda terrorists, however, is entirely irrelevant and inconsequential to U.S. compliance with its obligations under CERD.

However immaterial it may be with respect to the U.S. record on race relations, Guantanamo Bay is a well-established plank in the U.N.'s human rights platform. Indeed, in February 2006, a committee of U.N. special rapporteurs called on the U.S. to provide enemy combatants with legal rights equivalent to those held by U.S. citizens (and called for the closure of the detention facility altogether), citing numerous “violations” of international law.³³ Their call for additional legal rights for detainees was echoed in July 2006 by the U.N. Committee Against Torture, which also called on the U.S. to close the detention facility.³⁴

The CERD Committee's attempt to inject itself into the situation at Guantanamo Bay is clear evidence that it is pursuing an agenda unrelated to racial discrimination and outside the terms of CERD. Perhaps if there were a scintilla of evidence that U.S. forces captured and detained enemy combatants in Afghanistan based on their race, the committee would be justified in broaching the subject. There is, however, no hint of such evidence. The enemy combatants at Guantanamo Bay were detained for attacking U.S. armed forces and for aiding the Taliban or

al-Qaeda, not because of their race or ethnicity, but that did not prevent the committee from exhorting the U.S. to provide special, unprecedented legal rights to the enemy combatants.

By deciding—in by far the largest portion of its report—to stray from an impartial review of racial equality in the U.S. and instead pursue an agenda completely unrelated to that important goal, the CERD Committee has attempted to affect U.S. legal policy and social norms and thereby has infringed on American sovereignty.

What the U.S. Should Do

Notwithstanding a change in the CERD Committee's behavior, the U.S. has little or nothing to gain from continued involvement in the CERD review process. The committee has failed in the execution of its mandate and has overreached the treaty's essential terms of reference, effectively breaching its part of the mutual obligations that exist between the committee and the U.S.

While CERD does not constitute a binding contract between the U.S. and the CERD Committee, it is reasonable to hold that treaty members and the committee have concomitant obligations to one another. The U.S. is obligated to submit a comprehensive and accurate report on its compliance with the treaty, and the committee is obligated to exercise due diligence in its review of racial discrimination in the U.S. and to report fairly on the U.S. record.

The committee has failed to meet that obligation. It has ignored U.S. efforts to comply with the actual—not imagined or newly crafted—terms of CERD and has instead adopted wholesale spurious allegations made by an unaccountable NGO. Moreover, the committee has demonstrated disdain for U.S. law, settled Supreme Court civil rights jurispru-

32. Stephen P. Klein, Richard A. Berk, and Laura J. Hickman, eds., “Race and the Decision to Seek the Death Penalty in Federal Cases,” RAND Corporation, 2006, at http://www.rand.org/pubs/technical_reports/TR389 (July 25, 2008), and John Blume, Theodore Eisenberg, and Martin T. Wells, “Explaining Death Row's Population and Racial Composition,” *Journal of Empirical Legal Studies*, March 2004.

33. U.N. Commission on Human Rights, “Situation of Detainees at Guantanamo Bay,” February 27, 2006. The U.S. Supreme Court recently (and mistakenly) extended *habeas corpus* rights to the Guantanamo detainees. *Boumediene v. Bush*, 553 U.S. (2008).

34. U.N. Committee Against Torture, “Conclusions and Recommendations of the Committee Against Torture: United States of America,” July 25, 2006.

dence, the U.S. Constitution, the First Amendment, U.S. public opinion, the war on terrorism, and the U.S. criminal justice system. In so doing, it has attempted to impose its own values on U.S. citizens in areas that are wholly outside CERD's purview in a blatant infringement on American sovereignty.

Based on the actions of the CERD Committee, the U.S. should carefully rethink its future cooperation with the next treaty review process. Prior to the next CERD review in 2012:

- The next Administration should file a protest with the U.N. High Commissioner of Human Rights to communicate its displeasure with the inequitable treatment that the U.S. received during both the 2001 and 2008 review process and remind the commissioner and the CERD Committee that the statements of NGOs should supplement the reports of treaty members, not the other way around.
- The U.S. Senate Foreign Relations Committee should hold a hearing to explore whether the CERD Committee is acting within the bounds of the treaty as contemplated by the Senate at the time of ratification, the effect that actions by the CERD Committee could have on American sovereignty in legal and social matters if left unchecked, the nature of the relationship between the CERD Committee and U.S. NGOs, and the utility of future cooperation with the CERD review process to further the elimination of racial discrimination in the U.S.
- The next Administration should treat the 2012 CERD review—the next U.S. periodic report is due by November 20, 2011—as a “last best chance” for the CERD Committee to conduct a fair and impartial review of the U.S. record on racial discrimination. The U.S. Department of State should heavily lobby the members of the CERD Committee and the committee's country expert to thoroughly vet all NGO submissions rather than taking them at face value.
- If the CERD Committee's behavior at the U.S.'s 2012 review repeats the committee's past performances, the U.S. should heavily scrutinize the qualifications and impartiality of the indi-

vidual committee members and voice its objections regarding members who have shown a clear bias against the U.S. Future delegations to the CERD Committee should be scaled back, and treaty compliance should be limited to the bare reporting requirements, since U.S. resources need not be spent to engage in a wholly inequitable process.

- In the event that all efforts to attain a fair review from the CERD Committee fail, the U.S. should consider its rights under Article 21 of CERD, which permits treaty members to “denounce” the treaty by written notification to the U.N. Secretary General.

Conclusion

The noble goals set forth in the International Convention on the Elimination of All Forms of Racial Discrimination are not being advanced in the United States by the U.N. Committee on the Elimination of Racial Discrimination. It is the behavior of the CERD Committee—and not the terms of the treaty—where the problems lie. By ignoring the reports and submissions of the U.S. in favor of adopting the baseless accusations of a highly ideological NGO, the CERD Committee has demonstrated that it is not a legitimate partner in the effort to address racial discrimination in the U.S.

If the CERD Committee continues to insist that the U.S. accept the committee's interpretation of free speech, repeats its denunciation of the death penalty, promotes its view of multiculturalism, unjustifiably criticizes the U.S. justice system, or persists in pursuing any other cultural, social or legal agenda unrelated to racial discrimination, the next Administration should forge and follow its own path to attaining racial equality in America without the “assistance” of an unaccountable U.N. panel of international experts.

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