

# THE NEGLECTED PILLAR: THE "TEACHING TOLERANCE" PROVISION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

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As we celebrate the fiftieth anniversary of the Universal Declaration of Human Rights<sup>1</sup> this year, I would like to take particular note of the first of the core human rights treaties developed since adoption of the Universal Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>2</sup> Adopted in 1965 by unanimous vote of the United Nations General Assembly, the Convention was followed in 1966 by adoption of the two Covenants: the Covenant on Economic, Social and Cultural Rights,<sup>3</sup> and the Covenant on Civil and Political Rights.<sup>4</sup> As other writers have pointed out, the Race Convention soon became the most widely ratified of the core human rights treaties. It was only in 1993 that it was passed in number of ratifications by the Convention on the Rights of the Child.<sup>5</sup>

One reason the Racial Discrimination Convention had such widespread support is that many states viewed it as being primarily a statement against apartheid; others saw it as targeting both apartheid and colonialism. But they did not view it as being applicable, or even needing application, within

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1. Universal Convention of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948).

2. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660, U.N.T.S. 195, *entered into force* Jan. 4, 1969.

3. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No.16, U.N. Doc. A/6316, 999 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

4. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

5. Convention on the Rights of The Child, U.N. Doc. A/RES/44/49, 28 I.L.M. 1448 (1989), *entered into force* Sept. 2, 1990. As of this writing, the Child Convention has been ratified by every state in the world except Somalia, which has no functioning government, and the United States.

their own territory. The Committee on the Elimination of Racial Discrimination has seen to it to disabuse states of that notion when reviewing their periodic reports,<sup>6</sup> and the change of government in South Africa has forced some states to finally acknowledge that racial discrimination is a problem of global dimensions.

The Convention addresses discrimination on the basis of "race, color, descent or national or ethnic origin."<sup>7</sup> Discrimination on these grounds is what lies at the foundation of many other human rights violations. This is amply evident, for example, in the report that Amnesty International issued in October at its launch of a year-long, world-wide campaign on human rights violations in the United States.<sup>8</sup> It is significant that not only conscious but also unconscious discrimination falls within the purview of the Convention, whose definition of "discrimination" includes measures that have the "purpose or effect" of nullifying or impairing the full enjoyment of human rights.

Despite the pervasiveness of racial discrimination in the United States and elsewhere in the world, the textbooks used to teach international human rights law in the United States pay scant attention to the Race Convention. Often, the only mention of the Convention is in a list of existing human rights treaties. This inattention is why I organized this panel: to help bring attention to an important treaty and its untapped potential.<sup>9</sup>

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6. See, e.g., CERD, General Recommendation II (Fifth session, 1972), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 60 (1994).

7. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.

8. See Amnesty International, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998). For the Amnesty International press release launching the campaign against human rights violations in the United States, see <[http://www.amnesty.org.uk/news/press/releases/6\\_october\\_1998-0.shtml](http://www.amnesty.org.uk/news/press/releases/6_october_1998-0.shtml)>.

9. The other speakers on the panel were: Prof. Lisa Crooms of Howard Law School, speaking on the intersection of race and gender; Prof. Crooms' important work in this area is contributing to the integration of a gendered perspective into the work of all human rights treaty bodies; see, e.g., Lisa Crooms, *Indivisible Rights and Intersectional Identities: What Do Women's Rights Have to Do With the Race Convention?*, 40 HOW. L.J. 619 (1997); Douglas Scott, Esq., Director, International Human Rights Law Group Project on "Racial Discrimination: International Obligations and Domestic Strategies," speaking on the Law Groups' project of introducing the Convention to activists in the United States; for more information on the Initiative, contact the Law Group at (202) 822-4600; and Neil Popovic, Esq., of Heller Ehrman White & McAuliffe, and Director, U.N. Program, Earthjustice Fund, addressing how to use the Race Convention to combat environmental racism, a subject on which he has written extensively; see, e.g., *pursuing Environmental Justice With International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338 (1996); *Environmental Racism in the United States and the Convention on the Elimination of Racial Discrimination*, 14 NETHERLANDS QTLY HUM. RIGHTS 277 (1996).

My own remarks focus on one provision of the Race Convention, Article 7, which requires that states take certain steps to combat “the prejudices which lead to racial discrimination.”<sup>10</sup> This is just one of a series of measures set forth in the Convention that are designed to eliminate racial discrimination on the basis of race, color, descent or national or ethnic origin. The Convention specifies that temporary special measures taken to ensure the equal enjoyment of rights, called “affirmative action” in the United States, do not constitute prohibited “discrimination” within the meaning of the Convention (Article 1(4)). The treaty directs governments not only to abolish discriminatory laws and refrain from engaging in discriminatory acts, but also to encourage mass movements to eliminate racial barriers and “discourage anything which tends to strengthen racial division” (Article 2). In addition, states are to take measures in the social, economic, cultural and other fields to ensure adequate development of racial groups in order to guarantee full and equal enjoyment of rights (Article 2(2)).

In a provision recognizing the power of hate propaganda to foster prejudice, states must prohibit hate speech and outlaw organizations that promote racial hatred (Article 4).<sup>11</sup> In addition, states must guarantee the right to equal treatment before the law, to security of the person from violence whether at the hand of the state or a private individual, and to equality in such areas as voting, employment, housing schooling and the like (Article 5). Article 6 guarantees effective remedies against and compensation for acts of racial discrimination that violate the Convention. Finally, under Article 7, states are to combat prejudices that lead to racial discrimination, in particular, by adopting measures in the fields of “teaching, education, culture and information.”

We see, therefore, that the drafters of the Convention recognized that laws alone will not suffice in reducing discrimination. It is not that

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10. Article 7 provides in full:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination, and to promoting understanding, tolerance and friendship among nations and racial or ethnical (sic) groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Discrimination, and this Convention.

11. The hate speech provision, Article 4, has received perhaps the most attention among commentators. See, e.g., MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 202-209 (1996), (pointing out the view that Article 4 is “the key article of the Convention”); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 *BERKELEY J. INT’L L.* 1, 48-62 (1996); Thomas David Jones, *Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination and the First Amendment*, 23 *HOW. L.J.* 429 (1980).

legislation plays an unimportant role. As Dr. Martin Luther King, Jr. remarked: "It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."<sup>12</sup> Racial discrimination will not be reduced in the long run, unless "we change the heart." This is what led to the inclusion of Article 7 of the Race Convention, which requires states to take measures to combat prejudices that lead to racial discrimination, as well as measures to promote racial tolerance and understanding.

During the United Nations General Assembly debate in 1963 on the draft Convention, the United Kingdom delegate, Lady Gaitskill, expressed it well when she said she doubted whether legislation alone was a sufficient response to the problem of racial discrimination: "Using legislation by itself was like cutting down a noxious weed above the ground and leaving the roots intact."<sup>13</sup>

Given the importance of destroying the root causes of racism, it is particularly disheartening that Article 7 has been virtually ignored by commentators and states alike. One of the scholars involved in drafting the Convention has no section on Article 7 in his publication giving an article-by-article elaboration on the Race Convention.<sup>14</sup> Natan Lerner's book on the Convention barely mentions Article 7.<sup>15</sup> A book recently published by a member of the Committee on the Elimination of Racial Discrimination, Michael Banton, states the following in the section entitled "The Structure of the Convention": "In Article 1 the term 'racial discrimination' is defined . . . . Articles 2-6 list what states parties must do in order to eliminate racial discrimination."<sup>16</sup> In short, he does not seem to consider Article 7 to include any state obligations.

12. Martin Luther King, Jr., *An Address Before the National Press Club, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 99, 100 (James Melvin Washington, ed., 1986).

13. MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 59 (1996).

14. Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966). In addition, Theodor Meron's important article, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 A.J.I.L. 283, 297 (1985), makes but a single reference to Article 7 as mentioning "various educational measures." He then points out that CERD "has emphasized, correctly, that '[f]ar from being concerned solely with combating acts of racial discrimination after they have been perpetrated, the national policies of the State parties must also provide for preventive programmes, which seek to remove the sources from which those acts might spring - be they subjective prejudices or objective socio-economic conditions.'" *Id.*, citing 33 U.N. GAOR Supp. (No. 18) at 109, UN Doc. A/33/18 (1978).

15. NATAN LERNER, *THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (2d ed. 1980).

16. MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* (1996).

A welcome exception to the lack of interest in Article 7 appears in the Hague Academy lectures of George Tenekides, former CERD member. Portions of his lectures on "United Nations Action against Racial Discrimination" are devoted to states parties' obligations under Article 7 of the Convention.<sup>17</sup>

The Committee on the Elimination of Racial Discrimination has referred to Articles 4 and 7 as the pillars on which the Convention rests.<sup>18</sup> In doing so, the Committee noted that the Convention aims at "prevention rather than cure" by means of education, "particularly in Article 7, through teaching, information, education and acculturation, to combat prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups."<sup>19</sup>

Given the reservation to the substance of Article 4 entered by the United States when it acceded to the Convention,<sup>20</sup> the obligations under Article 7 are all the more important in achieving the goals of the Convention in the United States. Just what are a state's obligation under Article 7, and what led the drafters to include them?

The roots of Article 7 can be traced to Article 26 of the Universal Declaration of Human Rights, which proclaims the right to education. "Education," the Universal Declaration states, "shall be directed to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups . . . ."<sup>21</sup> An identical clause appears in the

17. George Tenekides, *L'Action des Nations Unies Contre la Discrimination Raciale*, in 168 *Recueil de Cours*, Collected Courses of the Hague Academy of International Law 350-57 and 465-66 (1980) (the latter with a section entitled "Mieux vaut prévenir que guérir").

18. See CERD, *Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination, Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4*, U.N. Doc. CERD/2 (1985).

19. *Id.* The Committee also noted the potential educative effect of Article 4 when it added: "But it is also recognized that penal legislation is educative as well as punitive." *Id.*

20. The United States ratified the Convention in 1994, with several reservations including the following:

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.

140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).

21. An earlier proposal had taken the opposition approach: "Education shall be directed to contain the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere." See Pentti Arajärvi, *Article 26*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 408 (Asbjørn Eide et al eds., 1992) [hereinafter UDHR]. This approach was changed to take the positive approach, specifying what education was to

UNESCO Convention Against Discrimination in Education, at Article 5(1).<sup>22</sup> Similarly, the Convention on the Rights of the Child provides that

[T]he education of the child shall be directed to . . . the development of respect for human rights and fundamental freedoms, . . . [and] the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.<sup>23</sup>

State are not only to ensure access to education, but also "as appropriate, [to] include instruction in minority languages at least at primary, and possibly at secondary levels."<sup>24</sup> This is in part to help preserve minority cultures as well as to promote understanding and tolerance of diverse cultures in the society.<sup>25</sup>

Article 7 is not directed solely at the education children receive. The Convention specifies four fields in which states parties are to adopt measures to combat prejudice and promote understanding "teaching, education, culture and information." Guidelines on implementation that explore each of these areas have been developed by CERD in collaboration with UNESCO.<sup>26</sup>

State reporting on implementation of Article 7 has tended to focus on the education of school children.<sup>27</sup> Given this focus, CERD has

promote rather than combat. The elimination of racial discrimination is nonetheless understood to be a goal of Article 26 of the UDHR.

22. Convention Against Discrimination in Education, Mar. 23, 1976, 429 U.N.T.S. 93, entered into force May 22, 1962.

23. Convention on the Rights of the Child, *supra* note 5, art. 29(1).

24. *Joint working paper on article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. Doc. E/CN.4/Sub.2/1998/4, at 41, para. 172 (10 June 1998) [hereinafter *Joint working paper*].

25. See, e.g., *id.* at 25-26, paras. 90-92 (noting "the right of national and ethnic minorities to education in their mother tongues").

26. U.N. Doc. CERD/C/70/Rev.3 (23 July 1993). See also *Implementation of Article 7 of the Convention*, U.N. Doc. CERD/C/69 (2 June 1980) (presenting survey of legal literature on and states parties' implementation of Article 7); *Draft Guidelines Proposed by UNESCO*, U.N. Doc. CERD/C/69/Add.1 (9 April 1981) (detailed guidelines for states parties to use in reporting on measures taken under Article 7), adopted by CERD in 1982. U.N. Doc. CERD/C/SR.570 (16 March 1982) at 201. CERD has issued a General Recommendation on the implementation of Article 7, but rather than specifying the types of steps states should take, it simply implores states to report on measures they have taken. CERD, *General Recommendations V* (15<sup>th</sup> sess. 1977), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/Gen/1/Rev.1 at 62 (1994).

27. See *Joint working paper*, *supra* note 24, at 15, paras. 42-48; "Most of the information is confined to school teaching and rarely includes other categories such as law

emphasized the importance of the education of teachers with Article 7 in mind, so that they might be prepared to meet their proper role in educating against prejudice. CERD clearly recognized the important role teachers play in shaping opinions when it referred to the need to educate “teachers and other opinion leaders.”<sup>28</sup>

As for the content of education, CERD has asked states to make more concerted efforts to promote intercultural and multicultural education.<sup>29</sup> Teaching of young people outside the classroom setting is also important. One area in which this has come up is in the review of states’ periodic reports, when the Committee has asked states parties whether they have made any effort to re-educate young adults imprisoned for committing racist acts, and whether these peoples’ behavior is monitored after release.<sup>30</sup>

Despite the emphasis on education of young people, states should also be required to fulfil their obligations under the “teaching” and “education” segments of Article 7 through the education of others who hold power over individuals in society, so that they do not exercise that power in a discriminatory manner: police, judges, prosecutors, administrators and enforcers of regulations, and the like. CERD’s General Recommendation on the training of law enforcement officials in the protection of human rights reflects this aspect of Article 7.<sup>31</sup> “[I]n the implementation of article 7,” CERD notes, states parties are “to review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented.” States are also urged to include information on implementation of this recommendation in their periodic reports.

The third area listed in Article 7 in which states are to act to promote tolerance and combat prejudice is in the field of culture. The inclusion of this category demonstrates an understanding of the impact on attitudes of such activities as theater performances, shows, concerts, cultural events, sports competitions, films and the like. In its guidelines on

enforcement officials, magistrates, prosecutors, public figures, institutions, out-of-school activities, etc.” *Id.* para. 46.

28. *Id.* at 12, para. 32 (referring to seminars “for education and training experts. . . aimed at the development of educational materials and training courses for teachers and other opinion leaders on eliminating prejudice and fostering tolerance”).

29. *Id.* at 15. In addition, CERD has indicated its support for the UN General Assembly resolution inviting UNESCO “to expedite the preparation of teaching materials and teaching aids to promote teaching, training, and educational activities on racism and racial discrimination, with particular emphasis on activities at the primary and secondary levels of education.” *Id.* at 10, para. 22.

30. *See, e.g.*, U.N. Doc. A/48/18 (1993) (reviewing periodic report of Germany).

31. CERD, General Recommendation XIII on the training of law enforcement officials in the protection of human rights (Forty-second session, 1993), in *Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 67 (1994).

implementation, CERD has indicated that states should report on "the role of institutions or associations working to develop national culture and traditions to combat racial prejudices" and to promote intra-national and inter-cultural understanding and tolerance.<sup>32</sup> To improve what it has noted are rather paltry efforts to implement this section of Article 7, CERD has called for "strategies involving different channels of culture and information," including "the direct and active involvement of ministries for education, social affairs, health care [and] justice."<sup>33</sup>

The fourth field in which states are to take measures to combat prejudice and promote understanding is in the field of information, which has been interpreted to be the media. CERD has urged states to "encourage. . . the mass media to take into account in their wide-ranging activities the provisions of article 7, including educational action and other programmes against racism, racial discrimination, xenophobia, anti-Semitism and intolerance."<sup>34</sup> Among other things, CERD would have states parties encourage the involvement of journalists from minority groups and communities in the mass media. In a recent report, CERD quoted a United Nations' Programme of Action targeting racism and xenophobia in which the General Assembly recommended

that Member States encourage the participation of journalists and human rights advocates from minority groups and communities in the mass media. Radio and television programmes should increase the number of broadcasts produced by and in cooperation with racial and cultural minority groups. Multicultural activities of the media should also be encouraged where they can contribute to the suppression of racism and xenophobia.<sup>35</sup>

The United States would meet its obligation under the "information" section of Article 7 through programs such as those of the Federal Communications Commission (FCC) that would provide minority set-asides for broadcast license ownership. In implementing this and other affirmative action programs, the FCC determined that by increasing ownership among minorities, it would be promoting viewpoint diversity.<sup>36</sup> However, each of

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32. U.N. Doc. CERD/C/70/Rev.3 (23 July 1993) at 7.

33. *Id.* at 42, para. 176.

34. *Joint working paper, supra* note 24, at 42, para. 177.

35. *Id.* at 13, para. 33.

36. In one such program, the FCC would take race and gender (as well as other factors, such as potential licensee's character, and involvement in management of the station) into account when deciding to whom to grant a broadcast license. Leonard M. Baynes, *An Investigation of the Alleged "White Man's Burden" in the Implementation of an Affirmative Action Program in Telecommunications Ownership*,     RUTGERS L.J.     (1999). In implementing these affirmative action programs, the FCC observed:



its affirmative action programs has been repealed, overturned, or held in abeyance, in large part because the Supreme Court heightened the standard of review necessary to determine these programs' constitutionality.<sup>37</sup>

As stated earlier, the United States entered a reservation to the substance of Article 4, the "hate speech" provision, when it acceded to the Race Convention. One of the main arguments put forward in the United States for opposing the regulation of hate speech is that the response should not be penalization of "bad" speech but instead, should be "more speech" in the so-called marketplace of ideas. Without access to that marketplace, however, one cannot counter with more speech.<sup>38</sup> To fulfil its obligations under the Convention, the United States has a particular obligation to ensure access to that marketplace through measures adopted under Article 7 so that speech targeting racial prejudice is available in the media.

I would like to end with a brief recommendation to the government of the United States. Having ratified the Race Convention, the United States should be sure not to ignore its obligations under Article 7, but instead should implement it by developing, as recommended by CERD, "an action-oriented national plan" on education "with an emphasis on racial discrimination and the provisions of Article 7."<sup>39</sup> The national plan should require the adoption of curricula in the classroom that educate against racial prejudice; make similar education part of the training of teachers "and other opinion leaders," and include among those opinion leaders the media, given the powerful role the media play in shaping perspectives and hence opinions in today's society. The United States should also be sure to include in its first report to CERD those measures it has taken to implement its obligations under Article 7, as well as those measures it plans to take. Given the United States reservations to Article 4 on hate speech, a failure to implement the other pillar of the Convention, Article 7, could render United States ratification of the treaty nearly meaningless.

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Full minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And of course, we have long been committed to the concept of diversity of control because "diversification ... is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

*Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978), cited in Baynes, *id.*

37. See *Metro Broadcasting v. FCC*, 497 U.S. 564, 565; *Adarand v. Peña*, 515 U.S. 200 (1995).

38. For further analysis of this concept, see Baynes, *supra* note 36.

39. *Joint working paper*, *supra* note 24, at 41, para. 171.