

WHY IS RACIAL INJUSTICE STILL PERMITTED IN THE UNITED STATES?:

AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE ON THE UNITED STATES' INADEQUATE COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION.

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INTRODUCTION

“Racism has always been America’s Achilles heel in international relations.”¹ Black Americans have had a long and remarkable history of calling on the international community to obtain redress for racist practices in the United States. From the days of slavery and Jim Crow to more modern issues of racial discrimination, the plight of Blacks in the United States has continually received world-wide attention. W.E.B. Du Bois eloquently addressed the international dimension of America’s race relations by explaining that “no matter how desperately and firmly we may be interested in the settlement of the race problem in Boston, in Kansas and in the United States, it cannot ultimately be settled without consultation and cooperation with the whole civilized world.”²

¹ Gay J. McDougall, Introduction, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 *HOW. L.J.* 571, 571 (1997).

² *Id.*

Internationally, race has played a significant role in the human rights regime; respect for fundamental freedoms without distinction of any kind has always been an essential rule of international human rights law. Likewise, race has been a part of the United Nations' ("U.N.") human rights framework from the beginning. With the adoption of the U.N. Charter in 1945,³ followed shortly after by the U.N. Universal Declaration of Human Rights ("UDHR") in 1948,⁴ a strong commitment to equality and nondiscrimination within the international human rights system began to emerge. Accordingly, the U.N. General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") in 1965⁵ and thereby committed its signatories to eliminate racial discrimination and promote understanding among all races.⁶

Domestically, these international standards renewed the hope of Black Americans by directly recognizing the rights and freedoms that had been long sought after. They also coincided with notable domestic achievements like the Civil Rights Act of 1964⁷ and the Voting Rights Act of 1965.⁸ In 1966, the United States signed the CERD.⁹ For many, these landmark achievements and the end of the civil rights movement optimistically marked the end of racial inequality and the imminent beginning of the so-called post-civil rights era.

Despite these important accomplishments, a significant gap exists between the goals the United States has set and the efforts made to meet those goals. As a result, Americans have struggled to recognize the promises and rights of the CERD's international standards. For example, although the CERD was signed soon after its adoption, the United States waited nearly thirty years to ratify it in 1994.¹⁰

³ U.N. Charter.

⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965) [hereinafter CERD].

⁶ See *id.* at pmb1. (explaining the purpose and background of CERD).

⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

⁹ Robin H. Gise, Note, *Rethinking McClesky v. Kemp: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, 22 FORDHAM INT'L L.J. 2270, 2289 (1999).

¹⁰ *Id.*

This has created a large “disparity between the rhetoric and reality of the United States’ early human rights involvement.”¹¹ “[T]he reality for African Americans was the complete antithesis of the principles being advanced on the international level.”¹² With racial segregation extending through the 1960s, combined with white resistance and violence, the possibility for equal opportunities was not realized for most Black Americans despite the international promises contained in the CERD. Further, despite ratification, the United States created several loopholes in the implementation of the CERD through a list of reservations, an understanding, and an alarming declaration that the CERD would not be self-executing.¹³

Hypocrisy is a common thread emerging in the discourse of the United States within the international human rights arena. While the United States likes to consider itself a leader in advocating for freedom and equality around the globe, it continually fails to give meaning to human rights at home. For “while upholding the banner of human rights on the international stage, the United States has repeatedly asserted its sovereignty regarding human rights within its own borders”¹⁴ by failing to acknowledge or fulfill its own human rights obligations.

While the United States has certainly made numerous commendable advances in the area of racial justice, international obligations like the CERD have fallen to the wayside due to the United States’ lack of commitment in adhering to international norms. As a result, the United States lags behind the rest of the world when it comes to racial equality. Racial problems remain in the United States by means of hate crimes, police brutality, employment and housing discrimination, and more. Further, these problems often go unreported or unpunished, which is a clear CERD violation. These violations persist not only because human rights treaties often have weak monitoring and enforcement mechanisms, but also because the United States remains ambivalent about its treaty obligations.

This article argues that the United States has failed to comply with the CERD. In light of historical and contemporary racial problems, it is apparent that the United States deviates from international standards

¹¹ Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 151 (2008) (reviewing BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo, Catherine Albisa, & Martha Davis eds., 2007)).

¹² McDougall, *supra* note 1, at 575.

¹³ *Id.* at 587–88.

¹⁴ Kaufman, *supra* note 11, at 153–54.

due to American narratives of exceptionalism and the politics that surround race. These political problems are exacerbated by the fact that human rights treaties often have weak monitoring and enforcement mechanisms. This article analyzes the underlying shortcomings and structural failures of the United States Government to comply with and enforce the CERD, thus allowing human rights violations and racial discrimination to develop, persist, and go unreported or unpunished.

Part I of this paper explores the international scrutiny and history of American race relations. Part II introduces the background and main substantive provisions of the CERD. Part III examines the United States' adoption of the CERD and the scope of its obligations under the treaty. Part IV addresses the violations of those obligations by highlighting the structural domestic problems that allow the violations to occur. Finally, Part V concludes by addressing ways by which the United States can come into compliance with the CERD and why it is essential that it does so.

I. BLACK RIGHTS AT HOME AND ABROAD: A HISTORICAL TIMELINE

A. SLAVERY

The enslavement of Blacks began long before the establishment of the United States in 1776, as Africans were first brought to the English colony of Virginia to be sold as slaves as early as 1607.¹⁵ By the early eighteenth century, slave codes were created that incorporated the principle of Black inferiority.¹⁶ For example, slaves were not allowed to own property, assemble without a white person present, testify against a white person in court or serve on a jury.¹⁷ By the end of the nineteenth century, an estimated twelve million Blacks had been shipped as slaves to the United States.¹⁸

As the population of Blacks in the United States increased, the salience of race increased as well. Consequently, notions of race were

¹⁵ Lisa Rein, *Mystery of Va.'s First Slaves Is Unlocked 400 Years Later*, WASH. POST (Sept. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090201097.html>.

¹⁶ Independence Hall Ass'n, *Slave Codes*, USHISTORY.ORG, <http://www.ushistory.org/us/6f.asp> (last visited July 3, 2013).

¹⁷ *Id.*

¹⁸ *Abolitionism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/blackhistory/article-9003373> (last visited July 3, 2013).

intricately woven throughout the United States Constitution during its drafting in 1787.¹⁹ Perhaps the most well-known racist provision of the Constitution was Section 2 of Article I, or the “three-fifths clause,” which defined Black slaves as merely three-fifths of a person for the purposes of calculating population.²⁰

B. POST-1865: BLACK FREEDOM AND DOMESTIC RESPONSES

The historic Emancipation Proclamation, the end of the Civil War, and the subsequent passage of the Thirteenth Amendment marked the end of slavery in 1865.²¹ This notable yet long-overdue accomplishment was only the beginning of an uphill battle for Black rights in the United States.

Domestically, federal law began to provide some civil rights to newly freed Blacks. For example, Black men gained the right to vote in 1869 under the passage of the Fifteenth Amendment.²² However, these newfound rights were met with opposition and hostility. For example, some southern whites advocated white supremacy by turning to the intimidation and brutality of white terror groups like the Ku Klux Klan.²³

Concerned about violence and disenfranchisement, Black civil rights organizations like the National Association for the Advancement of Colored People (“NAACP”) formed in the early 1900s and served as a counterforce to the prevalent white supremacy mentality.²⁴ The NAACP was instrumental in early advocating efforts for the equality of Black Americans, arguing that “where the discrimination and denial of human rights reach a national level or where the national government either cannot or will not afford protection and redress for local aggression against colored peoples, the national policy of the United States itself

¹⁹ U.S. CONST. art. I, § 9, cl. 1 (allowing the continued importation of persons for the purposes of slavery); U.S. CONST. art. IV, § 2, cl. 3 (making it illegal to evade slavery by escaping the state in which one is enslaved).

²⁰ U.S. CONST. art. I, § 2, cl. 3. See generally Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 WM. & MARY Q. 563 (1971).

²¹ ENCYCLOPÆDIA BRITANNICA, *supra* note 18; U.S. CONST. amend. XIII, § 1.

²² *Timeline: A History of the Voting Rights Act*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/timeline-history-voting-rights-act> (last visited July 3, 2013).

²³ *Jim Crow and the Ku Klux Klan*, LIBR. VA., <http://www.lva.virginia.gov/exhibits/mitchell/jimcra.htm> (last visited July 3, 2013).

²⁴ *NAACP: 100 Years of History*, NAACP, <http://www.naacp.org/pages/naacp-history> (last visited July 3, 2013).

becomes involved.”²⁵ Beyond the domestic sphere, the NAACP foreshadowed the issue of race on the international agenda by asserting that “[a] national policy of the United States which permits disenfranchisement in the South is just as much an international issue as elections in Poland or the denial of democratic rights in Franco Spain.”²⁶

C. POST-WORLD WAR I AND ONWARD: INTERNATIONAL HUMAN RIGHTS FOR BLACKS

Internationally, the movement for Blacks’ human rights took off post-World War I when Black American leaders such as W.E.B. Du Bois joined other activists at events such as the Versailles Peace Conference and the forming of the League of Nations.²⁷ Black American leaders were present at the founding of the U.N. itself at the end of World War II.²⁸ The NAACP commented that U.N. discourses on race were “far ahead of Versailles when President Wilson and the British would not even permit race to be discussed formally even in a committee meeting.”²⁹ Further, President Franklin D. Roosevelt’s famous “Four Freedoms” were woven into the preamble of the U.N.’s UDHR,³⁰ which states that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”³¹

The U.N. Charter was signed in 1945.³² The Charter stressed the importance of equality and thus required that the U.N. promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race.”³³ This unprecedented international treaty was seen as a significant accomplishment and

²⁵ McDougall, *supra* note 1, at 574 (quoting Charles H. Houston, General Counsel of the NAACP).

²⁶ *Id.*

²⁷ *Id.* at 572.

²⁸ *Id.*

²⁹ *Id.* at 573.

³⁰ Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 FORDHAM L. REV. 555, 556–57 (2008); Universal Declaration of Human Rights, *supra* note 4, at pmb1.

³¹ Universal Declaration of Human Rights, *supra* note 4, at pmb1.

³² U.N. Charter.

³³ *Id.* at art. 55.

restored hope for human rights activists.³⁴ Du Bois desired that the momentous new human rights provisions in this agreement “could be the source from which new rights for African-Americans would be recognized, and that the U.N.’s organs could provide the fora in which those rights would be appealed.”³⁵ Accordingly, Malcolm X powerfully stated,

The American black man is the world’s most shameful case of minority oppression. . . . How is a black man going to get ‘civil rights’ before first he wins his *human* rights? If the American black man will start thinking about his *human* rights, and then start thinking of himself as part of one of the world’s greatest peoples, he will see he has a case for the United Nations.³⁶

In 1946, the National Negro Congress of the United States called on the U.N. to study racial discrimination in the United States and to enforce compliance with international human rights obligations.³⁷ This was the first non-governmental body to petition the U.N. to examine domestic human rights offenses by a U.N. member state.³⁸ In 1951, the American Civil Rights Congress presented documents to the U.N. asserting that the United States had breached its treaty obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for the infringements on the rights of Black Americans.³⁹ These calls drew international attention to the widespread racism in the United States.

However, the domestic realization of international human rights treaties proved difficult. The Truman Administration informed the Senate that the human rights presented in the U.N. Charter did not establish a legal obligation in the United States without the creation of domestic law, but instead served only as “moral principles.”⁴⁰ Similarly, the Eisenhower Administration disregarded many human rights obligations, including the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights.⁴¹

³⁴ McDougall, *supra* note 1, at 572.

³⁵ *Id.* at 573.

³⁶ MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 182–83 (Ballantine Books 1999) (1964).

³⁷ McDougall, *supra* note 1, at 573.

³⁸ *Id.* at 573–74.

³⁹ *Id.* at 574.

⁴⁰ *Id.* at 573.

⁴¹ Kaufman, *supra* note 11, at 153.

D. 1950S AND 1960S: JIM CROW AND THE CIVIL RIGHTS MOVEMENT

Despite the above-mentioned domestic and international efforts for racial equality and human rights, a mandated system of racial segregation known as “Jim Crow” persisted into the 1960s.⁴² Adhering to the so-called “separate but equal” philosophy, Jim Crow laws typically prohibited interracial marriage and segregated public facilities.⁴³ This form of de jure segregation further encouraged social, educational, and economic disadvantages for Blacks, and confined them as second-class citizens by preventing social mobility.⁴⁴

In response to this long-standing discrimination, the civil rights movement began. Starting sometime in the mid to late 1950s or early 1960s and ending by the late 1960s,⁴⁵ the civil rights movement was a transformational and widespread development aimed at promoting racial equality and justice by eliminating segregation and other racial remnants of slavery.⁴⁶ It started as “a more-or-less organized campaign of civil disobedience aimed at desegregating business and public facilities in the deep South” and ended with an iconic status.⁴⁷

A series of extraordinary domestic efforts characterize this time in the United States. In 1954, the United States Supreme Court struck down racial segregation in public schools as unconstitutional in *Brown v. Board of Education*.⁴⁸ In 1955, Rosa Parks was arrested for famously refusing to give up her bus seat for a white passenger.⁴⁹ In the same year, Martin Luther King Jr. led the Montgomery Bus Boycott.⁵⁰ In 1957, President Eisenhower ordered federal armed troops to escort Black

⁴² *Jim Crow Laws*, NAT’L PARK SERV., http://www.nps.gov/malu/forteachers/jim_crow_laws.htm (last updated May 20, 2013).

⁴³ *Id.*

⁴⁴ See Kenneth R. Janken, *The Civil Rights Movement: 1919–1960s*, NAT’L HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/crm.htm> (last visited July 3, 2013).

⁴⁵ Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences*, 18 VA. J. SOC. POL’Y & L. 44, 44 (2010). This temporal definition is not to shorten the centuries-long Black fight for equality in the United States. *Id.* at 48.

⁴⁶ *Id.* at 44–45.

⁴⁷ *Id.* at 44.

⁴⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴⁹ *December 1, 1955: Rosa Parks Arrested*, CNN.COM (Mar. 11, 2003), <http://www.cnn.com/2003/US/03/10/sprj.80.1955.parks/>.

⁵⁰ *The Civil Rights Movement*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/67474/African-Americans/285195/The-civil-rights-movement#ref1118998> (last visited July 3, 2013).

students into Central High School in Little Rock, Arkansas.⁵¹ In addition, a series of demonstrations and protests, such as sit-ins and freedom rides, actively and successfully breached segregation laws for the purpose of defying white supremacist social norms.⁵²

The remaining Jim Crow laws were legally wiped out by the Civil Rights Act of 1964⁵³ and the Voting Rights Act of 1965.⁵⁴ Those two landmark pieces of legislation were hailed as achievements for the Black community because they each assured greater racial equality and justice.⁵⁵

Despite formal legislation, progress was not instantaneous. A reality of the civil rights movement was that “[s]egregation readily continued in the presence of formal racial neutrality.”⁵⁶ Although *Brown* theoretically ended segregation in schools, it “was more a proclamation than a harbinger of social change—and is reflected as such in the fraction of Southern school districts which have desegregated, with Federal officials doing little to spur the process.”⁵⁷ Further, a judicial mentality began to emerge, suggesting that “[t]he Constitution does not require integration,” but “merely forbids discrimination.”⁵⁸ From this point onward, the realization of Blacks’ human and civil rights is marked with achievement as well as setbacks.

E. POST-1960

The influence of Black civil rights groups peaked in the 1960s.⁵⁹ Progress was visible in that Blacks were admitted into white institutions

⁵¹ Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1645–46 (1997).

⁵² Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 813 (2011).

⁵³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁵⁴ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

⁵⁵ Perea, *supra* note 45, at 47.

⁵⁶ López, *supra* note 52, at 810.

⁵⁷ Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn’t (with Notes on Martin Luther King, Jr. and Malcolm X)*, 1995 U. ILL. L. REV. 191, 199 (1995).

⁵⁸ López, *supra* note 52, at 810 (quoting *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam)).

⁵⁹ *The Rise and Decline of Civil Rights Groups*, WASH. POST (Apr. 5, 2008), http://articles.washingtonpost.com/2008-04-05/news/36802525_1_civil-rights-groups-sncc-james-chaney.

from which they had been banned up to that point.⁶⁰ Black candidates were elected to political positions where they previously had been prohibited from voting.⁶¹ Schools that had formerly proscribed Blacks started to admit them.⁶² In 1964, Martin Luther King Jr. won a Nobel Peace Prize for being the “first person in the Western world to have shown [the international community] that a struggle can be waged without violence.”⁶³ The year after, the U.N. General Assembly adopted the CERD.⁶⁴ In 1967, Thurgood Marshall became the first Black American appointed to the United States Supreme Court.⁶⁵

At the same time, opposition and resistance were still prevalent. Structurally, although the Civil Rights Act created significant gains in many areas, it failed to deliver in extensive ways.⁶⁶ For “[e]ven as the Civil Rights Movement struck down legal barriers, it failed to dismantle economic barriers” and “[e]ven as it ended the violence of segregation, it failed to diminish the violence of poverty.”⁶⁷ The assassination of Martin Luther King Jr. in 1968 resulted in riots in cities with large Black populations.⁶⁸ In the same year, civil rights advocate and racial minority supporter Robert F. Kennedy⁶⁹ was assassinated after winning the California presidential primary.⁷⁰

As the twenty-first century drew near, ups and downs remained. On one hand, progress was noted in 1972 when the famous Tuskegee

⁶⁰ Nancy MacLean, *The Civil Rights Movement: 1968–2008*, NAT’L HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/crm2008.htm> (last visited July 3, 2013).

⁶¹ *Id.*

⁶² *See id.*

⁶³ Gunnar Jahn, Chairman of the Nobel Committee, Nobel Peace Prize 1964 – Presentation Speech (Dec. 10, 1964), available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/press.html.

⁶⁴ CERD, *supra* note 5.

⁶⁵ *Thurgood Marshall Nominated: First Black Supreme Court Justice*, NEWS IN HISTORY.COM (June 13, 2012), <http://www.newsinhistory.com/blog/thurgood-marshall-nominated-first-black-supreme-court-justice-0>.

⁶⁶ Beth Potier, ‘Failed Promise’ of Civil Rights Movement, HARV. GAZETTE (Mar. 11, 2004), <http://www.news.harvard.edu/gazette/2004/03.11/09-litwack.html>.

⁶⁷ *Id.*

⁶⁸ D.L. Chandler, *The Assassination of Dr. Martin Luther King, Jr. Occurred on This Day in 1968*, NEWSONE (Apr. 4, 2013), <http://newsone.com/2351392/martin-luther-king-jr-assassination/>.

⁶⁹ *Robert F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <http://www.jfklibrary.org/JFK/The-Kennedy-Family/Robert-F-Kennedy.aspx> (last visited July 3, 2013).

⁷⁰ Scott Harrison, *The Assassination of Robert F. Kennedy*, L.A. TIMES (Aug. 10, 2010, 3:00 AM), <http://framework.latimes.com/2010/08/10/the-assassination-of-robert-f-kennedy/>.

syphilis experiment ended after forty years.⁷¹ Additionally, in 1983, President Ronald Reagan signed a bill creating a federal holiday in honor of Martin Luther King Jr., which became effective in 1986.⁷²

On the other hand, a turbulent period began in 1991 after four white Los Angeles police officers were videotaped beating Rodney King, a Black citizen.⁷³ Riots began when the officers were acquitted of this crime in 1992.⁷⁴ While the CERD first opened for signature in 1965,⁷⁵ the United States sat silently on this issue for nearly thirty years, delaying its ratification until 1994.⁷⁶ In 1998, a Black man in Texas was murdered by being chained to the back of a car that was driven for over three miles by white supremacists.⁷⁷ Thus, the achievements and setbacks of the post-1960s era demonstrate the complexity in the development of race relations in the United States and provide an interesting groundwork for a contemporary analysis.

F. RACE RELATIONS TODAY: POST-RACIALISM?

Today, some assume that the 2008 election of the nation's first Black president signified the end of racism and the beginning of the so-called "post racial" era.⁷⁸ Post-racialism is "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress."⁷⁹ According to post-racialism, Black Americans have "made it" and racial barriers to equal opportunities no longer exist.⁸⁰ Thus, declaring the United States as post-racial is equivalent to "declaring victory over all of

⁷¹ *U.S. Public Health Service Syphilis Study at Tuskegee*, CTDS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/tuskegee/timeline.htm> (last updated June 15, 2011).

⁷² *Making of the King Holiday*, KING CTR., <http://www.thekingcenter.org/making-king-holiday> (last visited July 3, 2013).

⁷³ *LA Riots*, S. CENT. HIST., <http://www.southcentralhistory.com/la-riots.php> (last visited July 3, 2013).

⁷⁴ *Id.*

⁷⁵ CERD, *supra* note 5.

⁷⁶ Hadar Harris, *Race Across Borders: The U.S. and ICERD*, 24 HARV. BLACKLETTER L.J. 61, 63 (2008); McDougall, *supra* note 1, at 586.

⁷⁷ *10 Years Later, Dragging Death Changes Town*, NBCNEWS.COM (June 6, 2008), http://www.nbcnews.com/id/25008925/ns/us_news-life/t/years-later-dragging-death-changes-town/#.UV-nkaJwrAl.

⁷⁸ López, *supra* note 52, at 807.

⁷⁹ Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010).

⁸⁰ *Id.* at 1004.

the problems that are the continuing legacies of America's racist past."⁸¹ Accordingly, post-racialism deems race and racial problems as a "relic of the past."⁸²

Although racial progress is undeniable, "it is not as broad or as deep as post-racialists would like to assert."⁸³ Contrary to post-racialism, it is unmistakable that racism still remains a major phenomenon in the United States today. Historic racial stratification can be seen in statistics that show that Blacks fare far worse than their white counterparts in terms of poverty, income, wealth, homeownership, employment, education, and criminal justice.⁸⁴

Further, negative attitudes about Blacks continue to present themselves in multiple areas of life. For example, many contend that Blacks experienced racism during the humanitarian disaster of Hurricane Katrina, where Blacks were not only prevented from evacuating the city when whites were not,⁸⁵ but were also portrayed differently than whites in the media.⁸⁶ For example, when showing a photograph of a Black man carrying groceries through flood waters, the media described him as a criminal, savage, or looter; in contrast, a white couple carrying food in a nearly identical photograph was described as innocently finding food from a local grocery store.⁸⁷ Another clear example that racism is still prevalent in today's society lies in the firestorm of racist tweets that surfaced after President Obama was elected to a second term in 2012.⁸⁸

Post-racialists may argue that race is still an issue merely because Blacks begrudgingly refuse to let go of race and want to use it as an excuse for today's contemporary problems.⁸⁹ However, considering America's historic struggle with race, ignoring or downplaying the plight of Blacks today will likely exacerbate or create problems in the future.

The historical exploration of how racism has developed in the United States shows the centuries-old and deep-seated nature of the type of racial discrimination that the CERD seeks to eradicate. In light of the

⁸¹ *Id.* at 976.

⁸² *Id.* at 979.

⁸³ *Id.* at 1004.

⁸⁴ *Id.* at 983–92 (looking at statistical data).

⁸⁵ Sherrie Armstrong Tomlinson, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153, 1154 (2006).

⁸⁶ *Id.* at 1170.

⁸⁷ *Id.*

⁸⁸ *Post-Election Racist Tweets Raise Questions*, NPR (Nov. 19, 2012), <http://www.npr.org/2012/11/19/165482374/post-election-racist-tweets-raise-questions>.

⁸⁹ Mario L. Barnes et al., *supra* note 79, at 976.

historic and current racial landscape in the United States, it is clear that an international standard could be beneficial in ensuring racial equality to Black Americans. The next part of this article will introduce the background and main substantive provisions of the CERD.

II. THE INTERNATIONAL CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

A. CONVENTION HISTORY AND OVERVIEW

Prior to the CERD, equality norms were already important cornerstones of the international human rights regime through the U.N. Charter of 1945 and the UDHR of 1948. The CERD gave additional weight to these fundamental freedoms. Its genesis occurred during the Cold War disputes over colonialism⁹⁰ and the anti-Semitism of the 1960s.⁹¹ As a result of these disputes, the U.N. General Assembly was prompted to adopt a draft resolution on “Manifestations of Racial Prejudice and National and Religious Intolerance.”⁹² While the Assembly considered this resolution, delegations from African states began pushing for an international convention.⁹³ The Assembly’s Third Committee unanimously approved the CERD in 1965 after forty-three meetings.⁹⁴ It entered into force in 1969.⁹⁵

The CERD was the first international human rights treaty to successfully codify the UDHR.⁹⁶ It “drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against Black and other nonwhite persons.”⁹⁷ As of 2008, there were 173 member states party to the CERD.⁹⁸

⁹⁰ McDougall, *supra* note 1, at 582.

⁹¹ Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 341 (2008).

⁹² *Id.*

⁹³ *Id.* at 341–42.

⁹⁴ *Id.* at 342.

⁹⁵ Harris, *supra* note 76, at 62.

⁹⁶ *Id.*

⁹⁷ de Leeuw, *supra* note 91, at 342 (quoting Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination*, 79 AM. J. INT’L L. 283, 284 (1985)).

⁹⁸ Harris, *supra* note 76, at 62.

The CERD contains a preamble and twenty-five articles, divided into three parts.⁹⁹ Part I (Articles 1–7) contains the seven main substantive articles of the CERD.¹⁰⁰ Part II (Articles 8–16) governs the reporting requirements and monitoring of state parties (“State Parties”), dispute resolution procedures, and the CERD’s general manner of implementation.¹⁰¹ It establishes the Committee on the Elimination of Racial Discrimination (the “Committee”) to oversee this process and monitor the implementation of the CERD.¹⁰² This section also establishes a dispute resolution mechanism that allows the Committee to hear complaints about violations of the rights protected by the Convention.¹⁰³ Lastly, Part III (Articles 17–25) governs the ratification, accession, and entry into force of the CERD.¹⁰⁴ This section comments on reservations to, and denunciations of, the treaty.¹⁰⁵

B. MAIN SUBSTANTIVE ARTICLES OF THE CERD

This section will briefly outline the main points of each of these articles.

1. Article 1

Article 1 discusses the basic application of the CERD. It begins with the definition of racial discrimination:

[A]ny 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.¹⁰⁶

⁹⁹ CERD, *supra* note 5. It also has thirty-four General Comments, which “expand on the treaty language by articulating the CERD Committee’s understandings and interpretation of the treaty obligations.” Harris, *supra* note 76, at 62; *Committee on the Elimination of Racial Discrimination – General Recommendations*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (last visited July 3, 2013).

¹⁰⁰ See CERD, *supra* note 5, arts. 1–7; Harris, *supra* note 76, at 62.

¹⁰¹ See *id.* at arts. 8–16.

¹⁰² *Id.* art. 8(1).

¹⁰³ *Id.* at arts. 11–13.

¹⁰⁴ *Id.* at arts. 17–19.

¹⁰⁵ *Id.* at arts. 20–21.

¹⁰⁶ *Id.* at art. 1(1).

The broadness of this definition¹⁰⁷ reflects the drafters' intent to have all manifestations of racial discrimination fall within the CERD's scope.¹⁰⁸ This is evidenced by the inclusion of many signifiers of racial difference, such as race, ethnicity, color, nationality, and descent.¹⁰⁹ Notably, rather than focusing exclusively on consistent patterns of racial discrimination in terms of state practice, this definition makes states accountable for the acts of individuals and groups as well.¹¹⁰ Furthermore, the definition reaches beyond acts committed with discriminatory intent; it also includes acts that have the "effect" of discrimination.¹¹¹ Thus, discrimination includes acts with a discriminatory impact, even absent discriminatory intent.¹¹²

2. Article 2

Article 2 focuses on the elimination and prevention of discrimination. Section 2(1) obliges all State Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"¹¹³ Thus, State Parties must refrain from engaging in racial discrimination against individuals, groups, and institutions,¹¹⁴ and must not sponsor, defend, or support racial discrimination.¹¹⁵ State Parties are to review existing policies and amend or revoke those that cause or perpetuate racial discrimination.¹¹⁶ They must encourage anything that eliminates barriers between races, and must discourage racial division.¹¹⁷ Section 2(2) commands State Parties to implement affirmative action policies in social, economic, cultural, and other fields, provided that such policies do not engender an indefinite regime of unequal rights once their objectives are reached.¹¹⁸

¹⁰⁷ Harris, *supra* note 76, at 62.

¹⁰⁸ Cindy Galway Buys, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), 103 AM. J. INT'L L. 294, 298 (2009).

¹⁰⁹ CERD, *supra* note 5, at art. 1(1).

¹¹⁰ McDougall, *supra* note 1, at 582.

¹¹¹ Harris, *supra* note 76, at 62.

¹¹² *Id.*

¹¹³ CERD, *supra* note 5, at art. 2(1).

¹¹⁴ *Id.* at art. 2(1)(a).

¹¹⁵ *Id.* at art. 2(1)(b).

¹¹⁶ *Id.* at art. 2(1)(c).

¹¹⁷ *Id.* at art. 2(1)(e).

¹¹⁸ *See id.* at art. 2(2).

3. Article 3

Article 3 condemns racial segregation and apartheid.¹¹⁹ It obliges State Parties to prevent and eradicate these practices.¹²⁰

4. Article 4

Article 4 contains a prohibition against incitement. It condemns propaganda and organizations that are based on notions of racial superiority¹²¹ and denounces any justification or promotion of racial hatred.¹²² Under Article 4, State Parties must adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination with due regard to the principles in the UDHR.¹²³ These include criminalizing the dissemination of ideas whether based on racial superiority or hatred, or on the incitement to racial discrimination.¹²⁴ Such measures also include the criminalization of all acts of racial violence and the incitement to such acts, as well as the punishment of any entity that assists in racist activities.¹²⁵

5. Article 5

Article 5 creates a specific obligation to guarantee the right of equality before the law regardless of race, color, or national or ethnic origin.¹²⁶ This includes equal treatment before tribunals and courts,¹²⁷ “security of the person and protection by the state against violence,”¹²⁸ the right to vote, and the right to political participation.¹²⁹ Article 5 also illuminates two broad groups of rights: civil rights and economic, social, and cultural rights.¹³⁰ For example, civil rights include, but are not limited to, the right to freedom of movement and residence within the

¹¹⁹ *Id.* at art. 3.

¹²⁰ *Id.*

¹²¹ *Id.* at art. 4.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at art. 4(a).

¹²⁵ *Id.*

¹²⁶ *Id.* at art. 5.

¹²⁷ *Id.* at art. 5(a).

¹²⁸ *Id.* at art. 5(b).

¹²⁹ *Id.* at art. 5(c).

¹³⁰ *Id.* at art. 5(d)–(e).

state,¹³¹ the right to nationality,¹³² and the right to own property alone.¹³³ Economic, social, and cultural rights include, but are not limited to, the right to work,¹³⁴ the right to join trade unions,¹³⁵ the right to housing,¹³⁶ and the right to public health, medical care, social security and social services.¹³⁷

6. Article 6

Article 6 obliges State Parties to guarantee effective protection against, and remedies through national tribunals and institutions for, any act of racial discrimination.¹³⁸ These include a right to a legal remedy and to damages for injury suffered due to discrimination.¹³⁹

7. Article 7

Article 7 requires State Parties to adopt “immediate and effective measures, particularly in the fields of teaching, education, culture and information” to combat prejudices that lead to racial discrimination.¹⁴⁰ These measures are not only necessary for “promoting understanding, tolerance and friendship among nations and racial or ethnical groups,” but they are also important for upholding the principles established under other human rights treaties.¹⁴¹

C. THE COMMITTEE AND DISPUTE RESOLUTION

1. Reporting to the Committee and Concluding Observations

The CERD is the first human rights treaty to establish an oversight mechanism through a treaty monitoring committee.¹⁴² The

¹³¹ *Id.* at art. 5(d)(i).

¹³² *Id.* at art. 5(d)(iii).

¹³³ *Id.* at art. 5(d)(v).

¹³⁴ *Id.* at art. 5(e)(i).

¹³⁵ *Id.* at art. 5(e)(ii).

¹³⁶ *Id.* at art. 5(e)(iii).

¹³⁷ *Id.* at art. 5(e)(iv).

¹³⁸ *Id.* at art. 6.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at art. 7.

¹⁴¹ *Id.*

¹⁴² Harris, *supra* note 76, at 62.

Committee consists of eighteen independent experts elected by State Parties.¹⁴³ Within one year of becoming a party to the CERD, State Parties must submit reports to the Committee showing the measures they have taken to give effect to the CERD's provisions.¹⁴⁴ Parties must submit these reports biannually or as often as the Commission requests.¹⁴⁵ The Committee reviews the submitted reports and is empowered to address any concerns or suggestions they raise for better compliance with the CERD.¹⁴⁶ The Committee's response to a State Party's report is called a Concluding Observation.¹⁴⁷

2. Dispute Resolution

The Committee also adjudicates complaints against State Parties. According to Article 11, if one State Party believes that another is not giving effect to certain CERD provisions, it may bring the matter to the attention of the Committee.¹⁴⁸ The Committee then transmits the communication to the complained-about State Party, who then has three months to reply with a report explaining or clarifying the matter and the remedy if necessary.¹⁴⁹ If the matter is not resolved within six months, either State Party can refer the matter again to the Committee.¹⁵⁰ In addition to State Party complaints, the CERD allows individuals to bring claims of racial discrimination against a State Party, but only on the condition that such State Party has first declared that it "recognizes the competence of the Committee to receive and consider" such claims of individuals.¹⁵¹ Allowing individuals to seek redress for the violation of their rights in an international setting brings true meaning to the rights illuminated in the CERD.¹⁵²

¹⁴³ *Id.*

¹⁴⁴ CERD, *supra* note 5, at art. 9(1).

¹⁴⁵ *Id.* at art. 9(1)(b).

¹⁴⁶ *Id.* at art. 9(2).

¹⁴⁷ David Weissbrodt, *The Approach of the Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law*, 19 MINN. J. INT'L L. 327, 334 (2010).

¹⁴⁸ CERD, *supra* note 5, at art. 11(1).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at art. 11(2).

¹⁵¹ Weissbrodt, *supra* note 147, at 332; CERD, *supra* note 5, at art. 14(1).

¹⁵² Weissbrodt, *supra* note 147, at 332.

3. Early Warning and Urgent Procedures

In addition to reporting and dispute resolution procedures, the Committee has adopted early warning measures and urgent procedures to help prevent CERD violations.¹⁵³ “Early warning measures are directed at preventing existing problems from escalating into conflicts,” especially in the aftermath of violence.¹⁵⁴ In contrast, urgent procedures are designed to “respond to situations requiring immediate attention in order to prevent or limit the magnitude” of a CERD violation.¹⁵⁵

D. SUMMARY

The CERD is an international human rights treaty aimed at eliminating racial discrimination. It begins by defining racial discrimination.¹⁵⁶ It goes on to condemn racial discrimination and obliges all State Parties to eliminate it in all its forms and to promote understanding among all races.¹⁵⁷ State Parties must review their laws to ensure that they do not discriminate on the basis of race and must commit to amending or repealing those that do.¹⁵⁸ Further, State Parties must ensure effective protection and judicial remedies for any act of racial discrimination.¹⁵⁹ Finally, State Parties must adopt immediate and effective measures to combat prejudices and to promote understanding, tolerance, and friendship among nations and racial or ethnic groups.¹⁶⁰

The CERD has a monitoring body called the Committee on the Elimination of Racial Discrimination that reviews and issues state reports.¹⁶¹ Importantly, the CERD also has a dispute resolution mechanism for State Parties and individuals to bring complaints.¹⁶² It employs early warning measures to prevent discrimination from escalating and urgent warning measures to mitigate violations that are occurring or have already occurred.¹⁶³ With these provisions in mind, the

¹⁵³ *Id.* at 351.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 351–52.

¹⁵⁶ CERD, *supra* note 5, at art. 1(1).

¹⁵⁷ *Id.* at art. 2(1).

¹⁵⁸ *Id.* at art. 2(1)(c).

¹⁵⁹ *Id.* at art. 6.

¹⁶⁰ *Id.* at art. 7.

¹⁶¹ *Id.* at arts. 8–9.

¹⁶² *Id.* at art. 11.

¹⁶³ Weissbrodt, *supra* note 147, at 351.

remaining portion of this paper will examine the adoption of the CERD by the United States and the scope of its treaty obligations, and will also discuss the structural domestic problems that have caused the U.S. to violate those obligations.

III. THE UNITED STATES' OBLIGATIONS UNDER THE CERD

A. OPPOSITION TO THE CERD: RESERVATIONS, AN UNDERSTANDING, AND A DECLARATION

Like all State Parties, the United States undertook nonnegotiable treaty obligations when it ratified the CERD and is thus required to ensure the elimination of all forms of racial discrimination. However, the Clinton Administration and Senate held a far less admirable view of the CERD; both saw its ratification as a gesture with little potential to effect any meaningful change to domestic civil rights litigation.¹⁶⁴ The United States conditioned its ratification of the CERD with reservations, an understanding, and a declaration ("RUDs") submitted by the Clinton Administration.¹⁶⁵ The Senate adopted the RUDs during floor debates in 1994.¹⁶⁶

RUDs are caveats to treaties.¹⁶⁷ A reservation means that a state will not apply one or more provisions of the treaty.¹⁶⁸ An understanding conveys a "state's belief that a provision of a treaty has a certain generally accepted meaning."¹⁶⁹ A declaration is a statement giving notice that a treaty provision "has a particular meaning in relation to that state."¹⁷⁰ While states are free to make RUDs, the Human Rights Committee has expressed the view that international law forbids RUDs that are incompatible with the object and purpose of a given treaty.¹⁷¹

¹⁶⁴ McDougall, *supra* note 1, at 586–87.

¹⁶⁵ *Id.* at 586.

¹⁶⁶ *See generally* 140 CONG. REC. S7634-02 (daily ed. June 24, 1994).

¹⁶⁷ *See id.*

¹⁶⁸ CURTIS F.J. DOEBBLER, INTERNATIONAL HUMAN RIGHTS LAW: CASES AND MATERIALS 279 (2004).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ McDougall, *supra* note 1, at 589; *see* CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., 52nd Sess., Nov. 4, 1994, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.6 [hereinafter CCPR General Comment No. 24].

Thus, RUDs are an underhanded way for states to appear to adopt international treaties while still maintaining an implicit opposition. However, the United States dismisses this notion by insisting that it completely complies with the human rights treaties that it has ratified.¹⁷² The United States holds three reservations, one understanding, and one declaration regarding the CERD.¹⁷³ These RUDs qualify the extent to which the United States adheres to the treaty¹⁷⁴ and ensure that those CERD provisions that are in conflict with existing domestic law will not be binding in the United States.¹⁷⁵

B. THREE RESERVATIONS

The United States' reservations to the CERD (1) limit the treaty's ability to restrict racist speech under Articles 4 and 7, (2) protect private behavior from government authority, and (3) impair the treaty's ability to subject the United States to the jurisdiction of the International Court of Justice ("ICJ") in state-to-state disputes.¹⁷⁶

1. Freedom of Speech

While the Committee regards Article 4's restrictions on racist speech as consistent with the right to freedom of opinion and expression affirmed in both the UDHR and ICCPR,¹⁷⁷ the United States rejected both Article 4 and Article 7 in its first reservation.¹⁷⁸ Specifically, the U.S. Senate asserted a supremacy argument, contending that the individual freedoms of speech, expression, and association guaranteed by

¹⁷² Harris, *supra* note 76, at 63.

¹⁷³ McDougall, *supra* note 1, at 587.

¹⁷⁴ Gise, *supra* note 9, at 2272.

¹⁷⁵ *Id.* at 2295. Critics also note that the Clinton Administration's guarantee that CERD would not have any significant domestic influence was a compromise designed to win favor with conservative members of the Senate Foreign Relations Committee. *Id.* at 2295–96. Because the Clinton Administration wanted to obtain the Senate's consent for ratification of CERD, it aimed to ensure the absence of conflicts between CERD and domestic law. *Id.* at 2303. The reservation thus operated as a loophole that facilitated CERD's ratification.

¹⁷⁶ Gise, *supra* note 9, at 2296.

¹⁷⁷ See General Recommendation No. 15: Organized Violence Based on Ethnic Origin (Art. 4), Office of the U.N. High Comm'r for Human Rights, Human Rights Comm., 42nd Sess., Mar. 23, 1993, ¶ 4, U.N. Doc. A/48/18, available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e51277010496eb2cc12563ee004b9768?OpenDocument>.

¹⁷⁸ 140 CONG. REC. S7634-02 (daily ed. June 24, 1994), at I(1) [hereinafter RUDs].

the U.S. Constitution withstand the CERD's restrictions.¹⁷⁹ Wade Henderson, who was then the Director of the Washington Bureau of the NAACP, testified before the Senate Foreign Relations Committee in support of the reservation.¹⁸⁰ He testified,

[F]ree speech and protection of the first amendment has been essential to the NAACP, and to the civil rights movement as a whole, because without that capability under our own law, we would not have been able to challenge the status quo effectively, and we would hate to see that provision, in fact, eliminated in our own country.¹⁸¹

This reservation, though often deemed the most understandable out of the United States' RUD package,¹⁸² nevertheless carries strong implications. Article 4 condemns all racist propaganda and organizations.¹⁸³ Correspondingly, Article 7 requires State Parties to adopt measures in the fields of teaching, education, culture and information, and to combat prejudices that lead to racial discrimination.¹⁸⁴ By not adhering to these standards, the United States lessens the CERD's effectiveness and sends the message that it does not take its treaty obligations seriously.

2. Private Conduct

Article 1 discusses racial discrimination in public life.¹⁸⁵ The U.S. Senate viewed this language as making a distinction between public and private spheres, and accordingly argued that whereas public conduct is customarily the subject of governmental regulation, private conduct is not.¹⁸⁶ The Senate further contended that the U.S. Constitution and laws already provide extensive protection against discrimination that reaches to areas of non-governmental activity.¹⁸⁷ It noted that "[i]ndividual privacy and freedom from governmental interference in private conduct . . . are also recognized as among the fundamental values which shape our free and democratic society."¹⁸⁸

¹⁷⁹ *Id.*

¹⁸⁰ McDougall, *supra* note 1, at 588.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ CERD, *supra* note 5, at art. 4.

¹⁸⁴ *Id.* at art. 7.

¹⁸⁵ *Id.* at art. 1(1).

¹⁸⁶ RUDs, *supra* note 178, at I(2).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Thus, the United States' position appears to be that certain CERD protections extend too far and would infringe on the individual liberties and private rights of American citizens. It therefore does not accept the obligation to enact legislation or take other measures with respect to private conduct except as mandated by the Constitution and laws of the United States.¹⁸⁹ While the private sphere in the United States has traditionally enjoyed a degree of autonomy by remaining unburdened by governmental intervention, the implications of preventing CERD protection involving private conduct suggest that the United States has a policy of cabining the fight against racial discrimination to public life. This leaves the private areas of the home, the family, and employment at private organizations unprotected.

3. Dispute Resolution Mechanism

The Senate's final reservation to the CERD is an objection to Article 22, which allows for disputes to be settled in the ICJ.¹⁹⁰ Specifically, the reservation states that "before any dispute to which the United States is a party may be submitted to the jurisdiction of the ICJ under this article, the specific consent of the United States is required in each case."¹⁹¹ By failing to recognize ICJ compulsory jurisdiction, the United States is immune from being taken to court. This serves as an active shield against liability, which is a clear problem for redressing racial discrimination.

C. ONE UNDERSTANDING

The Senate submitted one understanding that states that the CERD "shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments."¹⁹² The Senate further provided that "[t]o the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this

¹⁸⁹ *Id.* at I(1)–I(2). This includes limitations to Paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5. *See id.*

¹⁹⁰ CERD, *supra* note 5, at art. 22; RUDs, *supra* note 178, at I(3).

¹⁹¹ RUDs, *supra* note 178, at I(3).

¹⁹² *Id.* at II.

Convention.”¹⁹³ This understanding essentially means that the government is in charge of CERD implementation.

D. ONE DECLARATION

Within its RUD package, the Senate submitted a declaration stating that it did not ratify the CERD as a self-executing treaty.¹⁹⁴ Similar to the reservations, the rationale behind this declaration was that the United States does not need to enact additional legislation to comply with the CERD because its own domestic laws provide adequate protections and remedies against racial discrimination.¹⁹⁵ Given the widespread discouragement among human rights experts of non-self-executing declarations in human rights treaties because of their nullifying effect,¹⁹⁶ this is often considered the most troubling of the United States’ RUD package.¹⁹⁷

The implications of the failure to fully ratify the CERD as self-executing are multifaceted. First, the Human Rights Committee has suggested that it would find the United States’ non-self-executing declaration to be in violation of the object and purpose of the CERD itself.¹⁹⁸ The second problem involves domestic versus international law. Since Article VI of the Constitution contends that treaties are the supreme law of the United States, a non-self-executing declaration that derogates from this notion could be inconsistent with Article VI and therefore unconstitutional.¹⁹⁹

The third problem exists with the courts. A claim of discrimination alleged under the Equal Protection Clause generally requires proof of discriminatory purpose.²⁰⁰ In contrast, the CERD allows evidence of mere discriminatory effect to support a claim of racial discrimination.²⁰¹ Thus, by making the CERD a non-self-executing treaty,

¹⁹³ *Id.*

¹⁹⁴ *Id.* at III.

¹⁹⁵ Gise, *supra* note 9, at 2299.

¹⁹⁶ *Id.* This is despite the Committee’s position against declarations that seek “to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.” CCPR General Comment No. 24, *supra* note 171, ¶ 19.

¹⁹⁷ See McDougall, *supra* note 1, at 588.

¹⁹⁸ *Id.* at 589.

¹⁹⁹ Gise, *supra* note 9, at 2307.

²⁰⁰ *Id.* at 2273.

²⁰¹ *Id.*

U.S. citizens are not only prevented from bringing lawsuits on the basis of discriminatory effect, but they are also restricted from seeking additional remedies for claims not redressed in U.S. courts.²⁰² Therefore, this declaration nullifies the effect of CERD provisions because it prevents U.S. citizens from commencing private causes of action in U.S. courts that would otherwise enable them to invoke their rights under the treaty.²⁰³

IV. THE UNITED STATES' COMPLIANCE (OR LACK THEREOF) WITH THE CERD

A. OPPOSITION AND HYPOCRISY

Visible opposition to international human rights treaties is ostensibly common in the United States. For example, it is clear that the sweeping nature of the RUDs render CERD rights ineffective, which essentially equates to non-acceptance of the treaty.²⁰⁴ Another illustrative example of the United States' resistance to international treaties is that the United States remains one of only two countries (the other being Somalia) that has not ratified the Convention on the Rights of the Child.²⁰⁵ Further, as with the CERD, the United States ratified the ICCPR and the Convention Against Torture with non-self-executing declarations.²⁰⁶ Apparently, many American leaders are opposed to subscribing to any kind of international obligation.²⁰⁷

The reason behind this resistance is complex. The United States generally lacks the political motivation or incentive to adopt international treaties and "play along," whereas smaller countries may see the adoption of international treaties as a tool of foreign policy promising improved recognition on the world stage.²⁰⁸ Further, the United States frequently asserts that its own domestic legislation is sufficient to comply

²⁰² *Id.* at 2272–73.

²⁰³ *Id.* at 2272, 2298. Furthermore, since the non-self-executing declaration prevents American courts from addressing the substantive provisions of CERD, the judiciary is unable to make any valuable contribution to the jurisprudence concerning the interpretation and application of CERD obligations. McDougall, *supra* note 1, at 588.

²⁰⁴ McDougall, *supra* note 1, at 589.

²⁰⁵ Harris, *supra* note 76, at 63.

²⁰⁶ Gise, *supra* note 9, at 2298.

²⁰⁷ Harris, *supra* note 76, at 63.

²⁰⁸ *See id.*

with international treaties,²⁰⁹ and that its laws already satisfy the CERD and should proudly serve as an example to the rest of the world.²¹⁰ This “is a rather odd way to approach treaty implementation, a core principle of which is to adapt domestic law to comply with international norms (rather than the other way around).”²¹¹

This apparent backwardness exposes the United States’ seemingly open commitments to international human rights as mere rhetorical commitments and empty promises. It also reveals the United States’ hypocrisy in promoting and implementing international human rights. For example, the United States consistently encourages rogue states to sign on to international human rights treaties like the CERD, yet at the same time, it refuses to extend CERD protections directly to its citizens.²¹² While the United States appears to be a leader by advocating for human rights around the globe, “minorities and disenfranchised people in this country have known all along that what the U.S. has said to others is not what the U.S. has done at home.”²¹³

B. SPECIFIC VIOLATIONS AND THE COMMITTEE’S CONCERNS

Beyond political and structural problems, the United States has made technical errors in CERD compliance by failing to submit its required biennial reports to the Committee.²¹⁴ In fact, since ratifying the CERD in 1994, the United States has only submitted two reports,²¹⁵ one of which had significant omissions.²¹⁶ In 2008, the Committee gave its Concluding Observations report and indicated several problem areas for the United States, including its reservations, its criminal justice system, education, and more.²¹⁷

In terms of reservations, the Committee urged the United States to consider withdrawing or narrowing the scope of its private conduct

²⁰⁹ *Id.*

²¹⁰ *See, e.g.,* McDougall, *supra* note 1, at 587.

²¹¹ Harris, *supra* note 76, at 63.

²¹² McDougall, *supra* note 1, at 588.

²¹³ Harris, *supra* note 76, at 64.

²¹⁴ de Leeuw, *supra* note 91, at 347–48.

²¹⁵ *Id.*

²¹⁶ *Id.* at 350 (discussing problems with the report).

²¹⁷ *See generally* Comm. on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2000), available at <http://www.state.gov/documents/organization/107361.pdf>.

reservation in order to broaden the protection against discriminatory acts perpetrated by private individuals or groups.²¹⁸ Similarly, the Committee requested that the United States withdraw or narrow the scope of its free speech reservation, explaining that the prohibition of ideas based on racial superiority is compatible with the freedom of expression “given that the exercise of this right carries special duties and responsibilities, including the obligation not to disseminate racist ideas.”²¹⁹

In terms of criminal justice, the Committee recommended strengthening efforts to combat racial profiling²²⁰ and to ensure that public legal aid systems are adequately funded and supervised.²²¹ The Committee further suggested adopting measures to guarantee that the denial of voting rights is used only on persons convicted of the most serious crimes and that the right to vote is automatically restored after the completion of a criminal sentence.²²² For education, the Committee recommended that the United States undertake further studies to identify the underlying causes of de facto segregation and racial inequalities in education,²²³ as well as adopt all appropriate measures to reduce the persistent achievement gap between white students and students of color.²²⁴

Several other notable recommendations cover a wide array of contemporary issues and structural problems within the United States. For example, the Committee recommended aiding persons displaced by Hurricane Katrina by returning them to their homes or guaranteeing access to adequate and affordable housing.²²⁵ The Committee also urged the United States to reduce race-based residential segregation²²⁶ and to eliminate obstacles that currently prevent or limit minorities’ access to

²¹⁸ *Id.* ¶ 11.

²¹⁹ *Id.* ¶ 18.

²²⁰ *Id.* ¶ 14.

²²¹ *Id.* ¶ 22.

²²² *Id.* ¶ 27.

²²³ *Id.* ¶ 17.

²²⁴ *Id.* ¶ 34.

²²⁵ *Id.* ¶ 31.

²²⁶ *Id.* ¶ 16.

adequate health care.²²⁷ Additionally, the Committee encouraged the United States to review its own definition of racial discrimination in light of the CERD's definition, to affirm that racial discrimination in all its forms is prohibited.²²⁸ Finally, the Committee recommended that the United States establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the CERD at the federal, state, and local level.²²⁹

CONCLUSION

Plagued with a history of systemic racial discrimination against Blacks, the United States' compliance with the CERD should be of the utmost importance. However, the gap between the human rights goals the United States sets out to achieve and the effort made to meet those goals has created a significant problem in the realization of international human rights in the United States. During Senate proceedings to ratify the CERD, Senator Claiborne Pell asserted that "[a]s a nation which has gone through its own struggle to overcome segregation and discrimination, we are in a unique position to lead the international effort. Our position and the credibility of our leadership will be strengthened immeasurably by ratification of this convention"²³⁰ Yet, more than forty years after signing the CERD and over a decade since its ratification, racial disparities persist in all areas of American society.²³¹

Though the United States often portrays itself as a leader in the human rights movement by advocating for equality throughout the world, it has consistently failed to acknowledge or fulfill its own treaty obligations. The United States' lack of willingness to participate in international human rights treaties has impacted its credibility.²³² "While the United States' credibility in the international community rises and falls with each initiative that [it] endorses or fails to endorse, perhaps of

²²⁷ *Id.* ¶ 32.

²²⁸ *Id.* ¶ 10.

²²⁹ *Id.* ¶ 13.

²³⁰ de Leeuw, *supra* note 91, at 342–43.

²³¹ *Id.* at 343.

²³² *Id.* at 345.

greater importance is the United States Government's ability to live up to the principles to which it has ostensibly committed itself."²³³

In looking toward the future, the United States must seriously reevaluate its RUDs to the CERD as well as take active measures to follow the Committee's recommendations. Since the United States imposes international human rights upon other nations, it should not avoid the enforcement of such international norms within its own borders. This is because "[t]he United States cannot expect to reap the benefits of internationally recognized human rights without being willing to adhere to them itself."²³⁴

²³³ *Id.* at 345–46.

²³⁴ *Id.* at 346 (quoting *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.2d 51 (2d Cir. 2003)).