



To: Patricia Gatling, Commissioner and Chair, New York City Commission on Human Rights
From: Human Rights Project at the Urban Justice Center
Cc: Members of the UN Committee on the Elimination of Racial Discrimination;
Abraham May, Jr., Executive Director, Equal Employment Practices Commission
Date: July 2, 2009
Re: New York City Compliance with the International Convention on the Elimination of All
Forms of Racial Discrimination (also submitted to UN as: March 2008 Concluding
Observations by CERD Committee to the United States)

Background

The International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) is a legally binding international agreement to eliminate discrimination and racism and codify the Universal Declaration of Human Rights (UDHR). The United States officially became a State Party to ICERD when the United States Congress ratified it in 1994. However, the United States ratified the treaty with a reservation that the United States Congress would have to take a further step and pass legislation to formally execute the treaty in order for ICERD to actually become United States domestic law. The United States Congress has still not done this. Thus the United States federal, state, and local governments have international legal obligations associated with this treaty, yet the people of the United States may not be able fully enforce the rights and protections offered by the treaty in domestic courts because it is a matter of standing debate whether a treaty with this type of reservation provides an independent basis for litigation.¹

All States Parties to ICERD, including the United States, are required to submit an initial report to the Committee on the Elimination of Racial Discrimination (CERD Committee) within one year of signing and ratifying, as well as a periodic report every two years thereafter to report on the extent of a State Party’s on-going compliance with ICERD.² Each report is evaluated by the committee, which then issues recommendations tailored to address the unique situation of each submitting party in the form of ‘concluding observations.’

Although an initial report was due to the CERD Committee a year after the United States officially became a State Party in 1994, the United States submitted the initial, second and third periodic reports together as one document on September 21, 2000.³ In April 2007, the United States submitted its fourth, fifth and sixth periodic reports together as one document to the CERD

¹ Restatement (Third) of Foreign Relations Law of the United States § 111 (“a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation”). The United States nevertheless has an international obligation to adjust its laws as necessary to give legal effect to international agreements. *Id.* at comment h.

² The Secretary-General, *Compilation of Guidelines on the Form and Content of Reports To Be Submitted by States Parties to the International Human Rights Treaties*, ch. 4, ¶ 1, at 32, delivered to the General Assembly, U.N. Doc. HRI/GEN/2/Rev.3 (May 8, 2006), available at <http://www.unhchr.ch/tbs/doc.nsf>.

³ See generally United Nations Human Rights, Office of the High Commissioner for Human Rights, Full List of Documents in the Treaty Database for United States, available at <http://tb.ohchr.org/default.aspx?country=us>

Committee. In its concluding observations adopted in March 2008, the CERD Committee requested that additional information be submitted by the United States within one year, and recommended that the seventh, eighth and ninth periodic reports be submitted in a single report, due on 20 November 2011.⁴ The Bush administration submitted a timely response in compliance with the CERD Committee's request for additional information on January 13, 2009. This memo, is a follow-up to that response.

Specifically, this memo is responding to the CERD Committee's recommendation in paragraph 36 of its March 2008 concluding observations that the United States "organize public awareness and education programmes on [ICERD] and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance." In its response to the CERD Committee submitted on January 13, 2009, the United States Department of State (State Department) stated that they have requested that federal agencies with oversight over U.S. laws that implement obligations under ICERD including the Equal Employment Opportunity Commission (EEOC), the Department of Homeland Security (DHS), and the Department of Justice (DOJ), examine ways in which they can provide training on ICERD as part of their ongoing training including with their state and local partners. To aid these training efforts, the Human Rights Project at the Urban Justice Center has analyzed the New York City Human Rights Law (NYC HR Law), and makes the following recommendations to bring it in compliance with ICERD. We are submitting the memo to the CERD Committee in the hopes that it will also serve as a guidance template for other local human rights commissions on bringing their laws in compliance with ICERD. We are also submitting a copy of this memo to the Equal Employment Practices Commission, which monitors the hiring and employment practices of City agencies and enforces the Equal Employment Opportunity Act.

The New York City Human Rights Law

New York City has a very comprehensive human rights law.⁵ The realms protected by the NYC HR Law - public accommodations, employment, and housing - have been interpreted broadly to offer legal protection in nearly every corner of public life. In some respects, the breadth of the New York City law even surpasses that of ICERD. For instance, compared to the four protected classes enumerated by ICERD, there are eighteen enumerated protected classes in the NYC HR Law.⁶ The NYC HR Law sets forth substantive regulations and procedural details for enforcement, including a private right of action and the availability of injunctive relief as well as compensatory, punitive, and civil damages.⁷ More significantly, the NYC HR Law also creates the New York City Commission on Human Rights (Commission) to work in conjunction with the city Law

⁴ *Id.*

⁵ N.Y.C. Admin. Code §§ 8-101 et seq. [hereinafter NYCHR Law].

⁶ *Id.* at §8-101, International Convention on the Elimination of All Forms of Racial Discrimination art. 1(2), entered into force January 4, 1969 [hereinafter ICERD].

⁷ N.Y.C. Admin. Code §8-502; Punitive damages will be available when a person has engaged in intentional discrimination and there is malice or reckless indifference to the statutory rights of the aggrieved person. See *Bracker v. Cohen*, 204 A.D.2d 115 (1st Dep't 1994).

Department to enforce the law.⁸ The Commission is situated to mediate between parties, allow victims to file complaints of discrimination, investigate those complaints, and award damages when the situation demands.⁹ The law also directs the Commission to refer a case to the New York City Law Department when a pattern or practice of discriminatory conduct is evident.¹⁰

The Commission is concurrently charged with overseeing the law and ensuring that its ultimate aims and goals are realized by fostering mutual understanding and respect; encouraging equality and preventing discrimination; cooperating with governmental and non-governmental organizations; and initiating investigations and studies in the field of human relations as needed to effectuate the general purposes of the NYC HR Law.¹¹ The statute enumerates eleven powers and duties of the commission as a roadmap to successfully and affirmatively carry out these functions.¹² The Commission has two main bureaus to implement its functions: the Law Enforcement Bureau and the Community Relations Bureau; the latter conducts educational and intervention programs targeting specific issues for different communities.¹³ Given its mandate, it follows that the task of implementing ICERD, and educating the public about it, falls with the Commission.

However, the existing New York City human rights law is ultimately based on a civil rights framework. Enforcement of anti-discrimination laws is a vital part of the equation, but affirmative tactics aimed at viewing the problem holistically, shedding light on complex institutional and systemic failings, and stopping discrimination before it happens must also be properly implemented. Implementing ICERD in New York City would have a cognizable value because in practical terms, it would strengthen the relatively robust NYC HR Law, allowing it to effectively employ positive measures to uncover and address systemic discrimination, and adopt modern methodologies, practices, and ideological support that would facilitate its success.

Bringing NYC HR Law into Compliance with ICERD

1. **Adopt the ICERD Definition of Discrimination:** New York City should adopt the definition of discrimination in ICERD which is tested and well-defined, and which has a meaningful application outside of the litigation/post-hoc enforcement context. ICERD defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* [emphasis added] 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.”¹⁴ The NYC HR Law definition also includes purposeful discrimination as well as policies or laws that have no discriminatory purpose yet have a discriminatory effect or

⁸ N.Y.C. Admin. Code §8-103.

⁹ See generally NYCHR Law.

¹⁰ N.Y.C. Admin. Code §8-402.

¹¹ *Id.* at §8-104(1)-(4).

¹² *Id.* at §8-105.

¹³ See generally New York City Commission on Human Rights website available at <http://www.nyc.gov/html/cchr/home.html>.

¹⁴ ICERD art. 1(1).

‘disparate impact.’¹⁵ At first glance the two definitions do not seem to be very different, yet there are significant consequences attached to the differences that exist.

The CERD Committee has interpreted the definition listed in Article 1(1) of ICERD to include practices and legislation that may not be discriminatory in purpose, yet are discriminatory in effect – this type of disparate impact discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular group at a disadvantage compared with other persons, *unless* that provision, criterion or practice is objectively justified by a *legitimate aim* and the *means of achieving that aim are appropriate and necessary*.¹⁶

The NYC HR Law, on the other hand, will not recognize disparate impact as unfair discrimination if the policy or practice in question *bears a significant relationship to a significant business objective* of the covered entity and, should the complainant be able to provide evidence of a less discriminatory alternative policy, the entity must prove that the *alternative policy is either not available to them or prove that such alternative policy or practice would not serve them as well*.¹⁷

There are two primary points of distinction between these definitions: 1) the term of art ‘significant business objective’ has not been well-defined by courts while the ICERD standard has, making the ICERD standard more desirable; and 2), the ICERD standard, unlike the New York City standard, has a meaningful application outside of the litigation/post-hoc enforcement context, so it can be used more effectively in the proactive sphere.

The limits of the NYC HR Law’s definition of discrimination have not been sufficiently interpreted by authoritative entities such as courts. As it stands, courts will tolerate discrimination if the victim cannot prove that the practice was intended to be discriminatory or if the defendant, who usually has more resources, can justify his or her actions by mischaracterizing the discriminatory practice as necessary for meeting a certain objective. Whether this type of mischaracterization will be effective will depend on the judge’s interpretation of the legal term of art “significant business objective.” This ambiguity could be avoided by switching to the already developed ICERD “legitimate aim” standard. It should be noted here that while the State Department asserts that federal laws comply with the “effect” standard in the ICERD definition, it offers examples limited largely to employment, voting rights, and programs funded by the federal government, and does not clarify that recent court decisions have prevented victims of racial discrimination from obtaining remedies from entities that receive federal funds.¹⁸

¹⁵ N.Y.C. Admin. Code §8-107(17).

¹⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, 03/05/2008, at ¶ 10 available at <http://www.hrujic.org/documents/CERDConcludingComment2008.pdf>.

¹⁷ N.Y.C. Admin. Code §8-107(17).

¹⁸ Questions put by the Rapporteur of the Committee on the Elimination of Racial Discrimination, Seventy-second session, Geneva, 18 February - 7 March 2008. in connection with the consideration of the combined fourth, fifth and sixth periodic reports of the United States of America, (CERD/C/USA/6); *Alexander v. Sandoval*, 532 U.S. 273 (2001).

The ICERD definition has been developed and interpreted over time.¹⁹ In other words, because the ICERD definition has been tested and its terms have been defined and applied to many situations, adopting the ICERD definition would breathe much-needed life into the New York City discrimination litmus test. This switch would provide a more solid legal foundation that would serve to better protect those who are vulnerable and deter those who would rather test the limits of the letter of the law than comply with its spirit.

The second major point of distinction is that the very nature and structure of the NYC HR Law necessarily means that there is no practical use for the definition of discrimination outside of the litigation/post-hoc enforcement context. Because the definition exists in the realm of litigation, the jurisprudence surrounding it must be conscientiously narrowed so as not to throw an excessively wide net of blame and accountability. Outside of the litigation/post-hoc enforcement context, a broad definition is extremely useful as a guiding light for tracing systemic discrimination from its auxiliary effects to root causes. When those charged with eliminating discrimination are provided with a framework that recognizes actual, de facto disparities as a problem amounting to unfair discrimination, they are better equipped to affirmatively deal with institutional problems – confronting discrimination before harm occurs, restoring a natural balance to society, and realizing the ideals of justice and peace.

For example, using a broad interpretation of the definition of discrimination, the CERD Committee has acknowledged that the mere overrepresentation of people of color in the United States criminal justice system is indicative of discrimination and thus imposes an affirmative obligation on the state to thoroughly investigate and appropriately address inconsistencies based on that investigation.²⁰ If the definition were being interpreted from a litigation/post-hoc perspective it would inevitably be narrower because the fact-finder would be seeking to prove guilt from innocence of identified perpetrators, rather than focusing on the actual problem presented by the identified disparity. A strong definition that takes effects-based discrimination seriously is needed to support a strong affirmative program of action. The New York human rights framework should utilize the ICERD definition of discrimination because it is already well defined, and it has been interpreted with the goal in mind to make it workable in both the post-hoc and ex-ante spheres.

Beneficial ICERD Methodologies

The benefits of the progressive definition of discrimination developed by ICERD are best realized if implemented in the context of the ICERD methodological approach. The success of the ICERD framework relies on holistic problem-solving and proactive measures aided by the collection of disaggregated data, consideration of intersectionality of race and gender, meaningful participation of affected peoples in dialogue, and the creation and implementation of action plans with real benchmarks by a quasi-independent body.

¹⁹ Because the CERD Committee holds regular reviews, it has recurring opportunities to further illuminate on the full meaning of the ICERD definition.

²⁰ CERD General Recommendation No. 31: Prevention of racial discrimination in the administration and functioning of the criminal justice system, CERD/A/60/18 (2005) at ¶ 20, available at <http://www2.ohchr.org/English/bodies/cerd/comments.htm> ; Concluding Observations, *supra* note 13 at ¶ 20, 21.

2. **Disaggregated Data Collection:** New York City, and in particular the Commission should promote the development of uniform methods to collect data across local agencies that can be disaggregated by race, color, national or ethnic origin, descent, and gender. The CERD Committee’s General Recommendations IV and XXIV discuss the value and need for data collection on race to be as disaggregated as possible in order to be optimally informative and useful. The CERD Committee invites State Parties to endeavor to include all relevant information on the demographic composition of the populations in their reports including disaggregated information on race, color, descent, national or ethnic origin, and gender. It is difficult to identify the source or extent of a problem unless the requisite information is compiled and made publicly available. New York City is one of the most diverse and multi-ethnic cities in the world, and New Yorkers often defy broad racial categories. Oftentimes, race data collected by government agencies is not easily attainable by the public, including non-governmental organizations. When race data is available, it is often disaggregated according to overly broad racial definitions used by the US Census.²¹ The categorical system used by the Census Bureau blatantly omits important racial and ethnic groups, making it difficult, if not impossible, to obtain an accurate picture of racial disparity. According to the 2000 Census, New York City is home to approximately 200 ethnic groups who speak some 115 languages, yet disaggregated data provided by the City is mostly confined to five major racial groups – Caucasian, Latino/Hispanic, African American, Asian, and Native American.²² There are often no sub-categories for the four largest Asian ethnic groups in New York City—Chinese, Indian, Korean, and Filipino. This means it is needlessly difficult to assess the impact of policies on one Asian ethnic group compared to another. One of the most serious data omissions is that the Census Bureau defines “White” as people “having origins in any of the original peoples of Europe, the Middle East, or North Africa,” so even those who choose to write in Arabic, Iranian, Near Easterner, or Lebanese are considered part of the White racial category.²³ Even though discrimination against Middle Easterners in New York City and the rest of the nation has intensified since 9/11, becoming a major human rights concern, there is no systematic way to measure such discrimination effectively since Middle Easterners are still officially classified as White. The CERD Committee noted this omission in its Concluding Observations to the first report submitted by the United States in 2001.²⁴ Disaggregation of data is a simple methodological tool that is lacking in the New York City system, yet it is invariably useful in the analysis and synthesis of information required to practically confront systemic discrimination.
3. **Consideration of Intersectionality between Race and Gender:** The NYC HR Law should be revised to recognize that discriminatory policies and practices include those based on one or more protected classes or prohibited grounds of discrimination, or on the effect of a

²¹ The Human Rights Project at the Urban Justice Center, *Race Realities in New York City*, at 15, (2007), available at http://www.hrpujc.org/documents/RaceRealities_001.pdf [hereinafter Shadow Report].

²² Equal Employment Practices Commission (EEOC), 2005 Report, at 5.

²³ Elizabeth Grieco, *The White Population: 2000*, Census 2000 Brief, US Census Bureau, 1 Aug. (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-4.pdf>.

²⁴ Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001, ¶ 403, Aug., 2001, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18,paras.380-407.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18,paras.380-407.En?Opendocument).

combination of prohibited grounds of discrimination. New York City should promote the adoption of procedures to analyze and publish data that explores relationships between protected classes in discrimination trends, including the intersection of race and gender.

The CERD Committee's General Recommendation XXV recognizes that racial discrimination does not always affect women and men in the same way and that certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups. Also, racial discrimination may have consequences that affect primarily women, and in particular women of color, such as the separation of children from their families by child welfare agencies where a majority of households in communities of color are headed by single mothers.²⁵

Recognizing that some forms of racial discrimination have a unique and specific impact on women, the CERD Committee encourages taking into account gender factors, which may be interlinked with racial discrimination. The purpose of this practice is to develop a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their human rights. As is the case with the collection of disaggregated data, the practice of recognizing the significance of the intersection between race and gender as a presupposition and precondition to analysis of data is virtually absent from the existing New York City framework and courts have been reticent to consider intersectionality when ruling on discrimination claims.²⁶ Implementing an approach that considers intersectionality of race and gender would facilitate a more comprehensive understanding of current conditions, provide early warning mechanisms for the path ahead, and offer a more accurate context for adjudicating discrimination cases.

- 4. Participation of Affected Peoples in Dialogue:** New York City should aim to create and institutionalize mechanisms for real collaboration and meaningful participation by affected parties and community stakeholders in the effort to identify discriminatory practices, develop solutions, and shape policy. The ICERD framework encourages the genuine participation of those affected by discrimination in discussions and resolutions regarding their rights. For example, in its concluding observations to the United States in March 2008, the CERD Committee called on the United States to ensure the "genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them."²⁷ Likewise, the CERD Committee's General Recommendation XXIII applies this principle to indigenous peoples in recognition of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their land, human rights, and fundamental freedoms based on decisions made by an overarching state. The Committee calls upon States Parties to ensure that members of indigenous peoples are afforded an opportunity to effectively participate in public life and that no decisions directly relating to their rights and interests are taken without their informed

²⁵ See Shadow Report at 69, (2007), available at http://www.hrpuij.org/documents/RaceRealities_001.pdf

²⁶ See *DeGraffenreid v. General Motors Assembly Division, St. Louis*, 558 F.2d 480 (8th Cir.1977).

²⁷ Concluding observations *supra* note 13 at ¶ 31

consent.²⁸ Currently, New York City utilizes public hearings as a mechanism for community involvement including in policy assessment. Public hearings can be a constructive platform for community interaction with legislators, yet they are largely ineffective for truly engaging the community since community input offered at public hearings remains just outside of the law and policy making process rather than being a constituent part of it. Community members generally do not have an opportunity to directly engage with city agencies at public hearings. Not only are these hearing passive in terms of involvement, but they also tend to be adversarial rather than collaborative. The ICERD method fosters a sense of real fairness, collaboration, and legitimacy in policy-making and problem solving by calling for meaningful participation at all stages of the assessment process.

5. **Implementation of Action Plans with Real Benchmarks:** New York City should focus more of its efforts on addressing systemic discrimination by adopting and implementing proactive action plans, with benchmarks and timelines that interpret and resolve problems of discrimination holistically. The NYC HR Law is a strong mandate but it lacks an accompanying accountability mechanism that an action plan with clear benchmarks and timelines would provide. ICERD and other human rights mechanisms such as the Durban Declaration and Programme of Action (DDPA) encourage governments to adopt such action plans. Article 9 of ICERD requires States Parties to comply with a comprehensive reporting scheme including the submission of a periodic report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of ICERD. The reporting scheme serves as an accountability mechanism that the CERD Committee can base its review on. The CERD Committee's General Recommendation V emphasizes the need for detailed information including benchmarks for how a State Party is complying with its positive obligations under Article 7.²⁹ The DDPA adopted at the United Nations World Conference Against Racism in 2001, and reaffirmed by the outcome document of the Durban Review Conference in 2009, also emphasizes the importance of developing an action plan with benchmarks to combat discrimination.³⁰ The proactive obligations in the NYC HR Law lack benchmarks that would encourage the success of proactive policies by providing structure and fostering a climate of accountability. New York City should adopt and implement an action plan with benchmarks and an incorporated periodic reporting scheme on its effort to combat all forms of discrimination.
6. **Establishment of a Quasi-Independent Body:** New York City should adopt measures to ensure the independence of the Commission to fully apply its mandate to both private and other government entities. The CERD Committee's General Recommendation XVII encourages States Parties to establish commissions or other appropriate bodies to promote respect for the holistic enjoyment of all human rights without any discrimination; monitor legislative compliance with the provisions of the Convention; educate the public about the obligations of States parties under the Convention; and assist the Government in the

²⁸CERD General Recommendation No. 23: Indigenous Peoples, CERD/A/52/18, annex V (2007) at ¶ 4(d), available at <http://www2.ohchr.org/English/bodies/cerd/comments.htm>.

²⁹ CERD General Recommendation No. 5: Reporting by States parties, CERD A/32/18, (1977), available at <http://www2.ohchr.org/English/bodies/cerd/comments.htm>.

³⁰ See http://www.un.org/durbanreview2009/pdf/DDPA_full_text.pdf

preparation of reports submitted to the Committee on the Elimination of Racial Discrimination.³¹ The Committee also advises that such a commission should review government policy towards protection against racial discrimination, which practically *requires a baseline level of independence from the government's influence*. The CERD Committee's 2008 Concluding Observations to the United States recommends that the United States consider the establishment of an independent national human rights institution in order to more successfully meet the goals of ICERD.³² The establishment of an independent Commission on Human Rights at the local level is equally important, and can be supported by allocating appropriate funding for the agency and adopting safeguards ensuring its ability to act independently of the Mayor's office. The New York City Commission on Human Rights lacks the independence required to fulfill the responsibilities set forth in General Recommendation XVII, which is evidenced by the lack of prosecution of other city agencies.³³ More independence for the Commission would create a separation between the Commission's activities and their funding, which would act to de-politicize the agency and encourage action based on principle.

Attachments:

1. U.S. Report to the CERD Committee 2007
2. Concluding Observations of the CERD Committee 2008

³¹ CERD General Recommendation No. 17: Establishment of national institutions to facilitate implementation of the Convention, CERD A/48/18, (1993), available at <http://www2.ohchr.org/English/bodies/cerd/comments.htm>.

³² Concluding observations *supra* note 13 at ¶ 12

³³ See generally Craig Gurian, Anti-Discrimination Center of Metro New York, At the Crossroads: Is There Hope for Civil Rights Law Enforcement in New York? available at <http://www.antibiaslaw.com/sites/default/files/files/crossroads.pdf>.