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International Control Of
Racial Discrimination

Editorial Note: It is particularly appropriate in this "International Year for Human Rights" to publish the results of a joint student-faculty project concerning the new International Committee on the Elimination of Racial Discrimination. A proposed draft of the Committee's procedural rules is introduced by Professor Frank Newman's discussion of the tribunal's organization and purposes, and followed by an appendix containing the text of the Convention establishing the Committee. The latter document has already been published elsewhere, but is reproduced here for the convenience of our readers.

THE NEW INTERNATIONAL TRIBUNAL

Frank C. Newman*

Some months hence, nearly all lawyers will be surprised when they learn that an International Committee on the Elimination of Racial Discrimination has been elected. Its election will mark a great step forward in implementing Article 1 of the United Nations Charter, which declares that "The Purposes of the United Nations are...[inter alia] to achieve international cooperation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race...."

Progress based on those words began 20 years ago when the U.N. General Assembly, in the Universal Declaration of Human Rights, proclaimed that, "[E]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race...." That declaration, however, like the French Declaration of the Rights of Man proclaimed 160 years earlier, said nothing about the enforcement of its commands. Many observers believe that we will soon witness a new era of international

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1. 18th REPORT OF THE COMM'N TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 43 (1968).
2. Id. at 194.
3. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 126 (1950) (discusses "Lord Acton's judgment that the single confused page of the Declaration of 1789 outweighs libraries and is stronger than all the armies of Napoleon").

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enforcement of human rights, notably inaugurated by this Committee on the Elimination of Racial Discrimination.5

The Committee is the creation of a treaty (the Convention on the Elimination of All Forms of Racial Discrimination) unanimously adopted by the General Assembly in December 1965.6 In his statement commending the Assembly, Secretary-General U Thant noted:

Not only does it [the treaty] call for an end to racial discrimination in all its forms; it goes on to the next, and very necessary, step of establishing the international machinery which is essential to achieve that aim. . . . [T]he adoption of this Convention, with its measures of implementation set out in Part II, represents a most significant step towards the realization of one of the Organization's long-term goals. . . .7

The "measures of implementation" that he stressed involve primarily the work of the new Committee. Its members will be "eighteen experts of high moral standing and acknowledged impartiality . . . who shall serve in their personal capacity."8 How are they chosen? Each nation that ratifies the treaty may nominate one of its citizens, and "at a meeting of State Parties convened by the United Nations . . . the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of State Parties present and voting."9 As of this writing the nations that have ratified were:10

<table>
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<tr>
<th>Ghana</th>
<th>Libya</th>
<th>Niger</th>
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<tr>
<td>Iran</td>
<td>Kuwait</td>
<td>Nigeria</td>
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8. Art. 8(1) of the treaty.


The reader will note that the United States and most Western European nations have not ratified. Moslem, East European, and Latin American blocs seem well represented. Among the present members of the U.N. Security Council the only parties to this treaty are Hungary, Pakistan, and Spain.

A. What Racist Acts May Concern The Committee?

The racial discrimination treaty is similar to what the American Law Institute might have produced as a partial restatement of 14th amendment equal protection law. Article 5 provides:

State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by Government officials or by any individual, group or institution;
(c) Political rights, in particular the rights to participate in elections, to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights . . . [e.g., the right to choice of spouse, to own property, to freedom of association, etc.];
(e) Economic, social and cultural rights . . . [e.g., to equal pay for equal work, housing, education, etc.];
(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres, parks.

The Committee proceeds when "a State Party considers that another State Party is not giving effect to the provisions of this Convention" (Art. 11), or when individuals claim they are "victims of a violation
by . . . [a] State Party of any of the rights set forth in this Convention" (Art. 14). The sweep of governmental conduct proscribed and prescribed is gigantic.\[11\]

B. What Are The Committee's Powers?

By no means will this be the first international body to concern itself with racism. Race and related problems that involve apartheid, South West Africa, Rhodesia, Angola, etc. have been on the United Nations' agenda since the first meetings of the General Assembly.\[12\] The new Committee will, however, have unique powers.\[13\] The treaty authorizes action on: (1) Nation vs. nation disputes, (2) citizen vs. nation disputes, and (3) reports to the General Assembly.

1. Nation vs. Nation Disputes

Each party that thinks another party is violating this treaty may so advise the Committee. The nation complained against then has a duty to "submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken."\[14\] Thus, a government's treatment of its racial minorities or racial majorities becomes a proper subject of international concern almost automatically. As to racial discrimination, this treaty once and for all eliminates the doubts and quarrels regarding domestic jurisdiction that have plagued so many international lawyers for so long.\[15\]

What happens if "the matter is not adjusted to the satisfaction of both parties?" Either nation may refer it back to the Committee.

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11. See Art. 1 to 7 of the treaty.

14. Art. 11(1) of the treaty.
which then, after obtaining "all the information it thinks necessary", may set in motion a procedure for an ad hoc conciliation commission "appointed with the unanimous consent of the parties to the dispute." If they disagree "on all or part of the composition of the Commission, the members of the Commission not agreed upon . . . shall be elected by secret ballot by a two-thirds majority vote of the Committee from its own members." The procedure thus is more than hortatory.\textsuperscript{16}

2. Citizens vs. Nation Disputes

The most provocative clauses of the racial discrimination treaty read as follows:

A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention . . . .

. . . .

The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating . . . . Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. . . . [and] shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

The Committee shall include in its annual report a summary of such communications and, where-appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.\textsuperscript{17}

What does all that mean? It means that by accepting those clauses a nation allows an international tribunal to take action on the complaints of individuals who are within the nation's jurisdiction. In effect, this treaty creates ombudsmen for racial discrimination, ex officio experts who have the power to investigate and to criticize what

\textsuperscript{16} See Art. 12 of the treaty.

\textsuperscript{17} Art. 14 of the treaty, the last paragraph of which reads: "The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by the declarations in accordance with paragraph 1 of this article."
governments do about racial discrimination that the people who are governed find objectionable. 

How important is that power? Some may argue that it amounts to not much and that we need courts, sheriffs, and armies if truly we intend to ensure equal protection of the law internationally. Yet there are reasons for believing that these international ombudsmen could be potent and could, for instance, meet the tests Walter Gellhorn has prescribed for ombudsmen generally: "readily accessible, professionally qualified, wholly detached critics to inquire objectively into asserted administrative shortcomings ... advisors, not commanders ... [who] rely on recommendation, not on compulsion." If the Committee on the Elimination of Racial Discrimination is bold and resourceful, if its 18 members insulate themselves from petty compulsions of global politics and display dedication and integrity and courage, then the impact could indeed be significant. They could mightily affect many of the struggles that reflect unlawful racial discrimination in this sadly torn world.

The most persuasive international analogies originate in the work of the European Commission on Human Rights. For interstate disputes 16 nations have accepted its jurisdiction; 11 nations have authorized it to act also on individuals' complaints. Three interstate cases have been decided; four more (all involving Greece) are pending. Nearly 4,000 complaints have been filed by individuals, and the following are illustrative results: The Norwegian Constitution, the Belgian Penal Code, and Austrian criminal procedure statutes have been amended; a complainant named Boeckmans was awarded 65,000 francs because of prejudicial remarks made by an appellate judge; external forays into internal affairs have been allowed as follows:

18. See Newman, supra note 5, at 957; Schweb, supra note 6, at 1041; cf. id. at 1045 ("The Role of the Committee . . . in Regard to Petitions from Dependent Territories").

19. Cf. Panel: Implementation and Enforcement of International Decisions, 1968 PROC. AM. SOC'Y INT'L L. 1-35. Article 22 of the racial discrimination treaty reads, "Any dispute between two or more States Parties over the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall at the request of any of the parties to the dispute be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."


Certain States have accepted the presence of the Commission or of some of its members to carry out investigations in their territory and have given full co-operation for this delicate task. In 1958, members of a Sub-Commission in the first Cyprus case carried out an investigation on the spot for three weeks and, in 1967, the whole Sub-Commission visited a prison and heard evidence in West Berlin in regard to a case (No. 2686/65) where ill-treatment was alleged. In 1966 and 1967, delegated members of two Sub-Commissions heard evidence in Austria and the Commission’s Secretary, at the suggestion of the Federal German Government and with the Commission’s approval, visited in prison the applicant X. . . .

3. Reporting to the General Assembly

The Committee’s non-adjudicative duties are set forth as follows in Article 9 of the racial discrimination treaty:

1. The States Parties undertake to submit to the Secretary-General for consideration by the Committee a report on the legislative, judicial, administrative, or other measures that they have adopted and that give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually through the Secretary-General to the General Assembly on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Other agencies that report to the U.N. General Assembly have had great influence (comparing favorably, say, with the proved influence of the U.S. Commission on Civil Rights). The Article 9(2) directive is of no mean significance.

C. Rules of the Committee

Article 10 of the treaty provides, “The Committee shall adopt its own rules of procedure”, and other clauses affect the content of the rules. Our chief aim here is (1) to present draft rules that implement

24. Id. at 11.

those clauses, and (2) to array types of procedural issues that are likely to confront the Committee.

The draft itself is a project of the 1968 Boalt Hall Summer Seminar in International Legal Studies. The authors were participants in that Seminar and were aided greatly by Dr. Egon Schwebel and Professor Thomas Buergenthal. The documents used as guides included:

- Rules of Procedure of the European Commission on Human Rights
- Statute of the International Court of Justice, and that court's Rules
- U.N. Covenant on Civil and Political Rights, and its Protocol
- Rules of Procedure of the U.N. General Assembly and of its Economic and Social Council
- Provisions of miscellaneous treaties concerning education, investment disputes, etc.

Those documents and several others are pertinent. Yet we warn our readers that there is but a meager jurisprudence which aids officials

26. The excellent articles by Dr. Schwebel that are cited in notes 6 and 7 supra were especially helpful. See also his Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights, 1 HUMAN RIGHTS J. 363 (1968), and Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants in MELANGES OFFERTS A POLYS MODINOS 270 (1968).


Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, ratification, acceptance or approval March 18, 1965, 575 U.N.T.S. 159; text is reproduced in 4 INT'L LEGAL MATERIALS 532-44.
who must finally promulgate rules like these. The administrative law of international, supranational, and transnational bodies is neither comprehensive nor mature. It begs for analysis and critique.\textsuperscript{33}

\textbf{D. Will the United States Participate?}

This treaty was signed and highly praised by Ambassador Arthur Goldberg on September 28, 1966.\textsuperscript{34} It has not been forwarded from the White House to the Senate for advice and consent.\textsuperscript{35} That fact may puzzle some observers who praised the Johnson administration for its aggressive sponsorship of civil rights reform.\textsuperscript{36} Yet a letter from the White House dated January 4, 1968\textsuperscript{37} reads in part as follows:

\begin{quote}
It is our intention to seek ratification of appropriate human rights conventions and to send them forward when conditions appear favorable.

I have noted with interest your view that our inability to participate in the administration of the International Convention on the Elimination of All Forms of Racial Discrimination would jeopardize our national interest. Until such time as the Committee to be elected under this Convention has been formed and has had sufficient time to begin work, we cannot actually determine whether or not United States abstention would significantly affect its work. Nothing presently indicates, however, that our interests would be jeopardized.
\end{quote}

Should not American jurists carefully consider this question: Given the data that show the effect on foreign affairs of racial discrimination in the United States,\textsuperscript{38} and given the range of powers

\begin{footnotes}
\textsuperscript{33} See Newman, \textit{supra} note 7, at 312 n.18.

\textsuperscript{34} See Dept. of State Press Release 6/49a-1066 BT, noting that the U.S. signature was accompanied by this statement: “The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.” \textit{Cf.} Statement by Mr. Goldberg, Committee III, December 14, 1965, 54 \textit{DEPT. STATE BULL.} 212 (1966); Statement by Miss Willis, Plenary Session, December 21, \textit{id.} at 216.


\textsuperscript{36} “Gov. Harriman attended the September 17 meeting [of the President’s Commission for the Observance of Human Rights Year] and cited President Johnson as achieving more progress in human rights than any of his predecessors.” \textit{NEWS OF THE CON’N}, No. 2 (Oct. 1968) at 1.

\textsuperscript{37} Letter to F.C. Newman from E.E. Goldstein, Special Assistant to the President (on file with the \textit{California Law Review}); \textit{cf.} Schwelb, \textit{supra} note 6, at 1058.

\textsuperscript{38} “\ldots Secretary of State Dean Acheson \ldots said, in 1952, that ‘the continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective
and the procedural thrusts of this remarkable new Committee, can it really be argued that "United States abstention" will not drastically affect the Committee's work? Readers are urged once again to examine the list of nations that appears in the opening paragraphs of this discussion. Those nations, as ratifiers of the treaty, will nominate and then elect the new committeemen and massively influence the formative years. Can the United States possibly justify its role as abstainer?

maintenance of our moral leadership of the free and democratic nations of the world." Quoted in Deutsch, Views from Many Bridges on School Segregation and Integration, 51 A.B.A.J. 233, 236 (1965); cf. U.S. Race Problems No Longer a Domestic Affair—Wilkins, Oakland Post, May 8, 1968, at 1.