

**THE NEED FOR EFFECTIVE FEDERAL OUTREACH AND MECHANISMS TO
COORDINATE AND SUPPORT FEDERAL, STATE AND LOCAL
IMPLEMENTATION OF THE CONVENTION**

**Response to the Seventh to Ninth Periodic Reports of the United
States to the Committee on the Elimination of All Forms of Racial
Discrimination**

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I. Title

The Need for Effective Federal Outreach and Mechanisms to Coordinate and Support Federal, State and Local Implementation of the Convention¹

I. Reporting Organization(s)

Columbia Law School's Human Rights Institute & the International Association of Official Human Rights Agencies (IAOHRA)

II. Issue Summary

As this Committee has consistently recognized, compliance with the CERD requires effective coordination between federal, state, and local governments. In ratifying the CERD, the United States indicated that state and local governments share authority to implement the treaty.² This includes the over 150 state and local civil and human rights agencies that enforce federal, state and local human and civil rights laws and/or conduct research, training and education, and issue policy recommendations within the United States³ ("Human Rights Agencies"). It also encompasses the full array of state and local officials with decision-making and enforcement authority, including governors, state attorneys general, mayors, state legislators, city council members, law enforcement, city, county and town executives, and boards of supervisors.

While human rights transcend the jurisdictional divides of federal, state and local governments, the federal government is ultimately responsible for treaty compliance throughout and within the United States. Despite increasing recognition of the valuable role of state and local officials, the United States has taken few steps to educate local governments about international human rights obligations or support state and local efforts to implement human rights.

Within the United States, no permanent government entities are tasked to encourage, coordinate and support human rights education, monitoring or implementation at the federal, state and local levels. There is no federal clearinghouse to offer guidance or technical assistance on human rights treaties, or how these treaties, including the CERD, relate to law and policy. No focal points exist to collect and disseminate recent developments or to translate international standards into domestic practice. The United States also lacks a national human rights monitoring body, such as an NHRI.

Because there is no national human rights infrastructure, many state and local officials are unaware of the treaties the U.S. has ratified and their obligations with respect to treaty implementation.⁴ This lack of basic human rights education is compounded by resource and staffing constraints at the state and local level, which further impede the promotion and protection of human rights. State and local governments thus lack the capacity necessary to effectively collect and analyze data on human rights compliance and take other necessary steps to implement human rights.

What does currently exist at the federal level is an ad hoc approach to human rights reporting and implementation without meaningful avenues for state and local government participation.⁵ Thus, U.S. compliance with CERD will continue to fall short.

State and local governments are increasingly expressing interest in promoting and protecting human rights. A number of states and localities have explicitly incorporated international human rights standards into local law, policy and practice.⁶ In 2013, both the IAOHRA – the umbrella organization of Human Rights Agencies – and the U.S. Conference of Mayors, an organization representing cities of 30,000 residents or more, passed resolutions committing to promote and protect human rights locally.⁷ While existing efforts are promising, they, too, are ad hoc and lack the coordination and resources necessary to ensure their sustainability. A more comprehensive and coordinated approach to human rights implementation requires federal guidance and support.

While U.S. law may prevent the federal government from compelling state and local governments to comply with human rights obligations,⁸ it has many tools to encourage and incentivize state and local implementation.⁹ These include educating state and local governments about human rights and providing tangible resources and support for these efforts.

III. Concluding Observations

The 2008 review of the United States addressed numerous human rights issues that fall within state and local jurisdiction, including housing, employment, racial profiling and disparities in sentencing. In 2008, the Committee on the Elimination of Racial Discrimination called on the United States to “consider the establishment of an independent national human rights institution” and “establish appropriate mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels.”¹⁰ These recommendations were coupled with a call for increased human rights education for the public and government officials.¹¹

IV. U.S. Government Report

In its Report, the U.S. “fully agree[d] that mechanisms designed to strengthen coordination are critical,” noting that “The United States continues to examine ways to improve human rights treaty implementation at all levels of government.”¹²

While laudable for recognizing the important role of state and local actors in human rights implementation,¹³ the U.S. Report offers an incomplete picture of the context in which they operate. It fails to acknowledge the challenges that state and local governments face in fully participating in human rights monitoring and implementation. These constraints include – and extend beyond – limited knowledge of international human rights standards to broader structural issues. Even where state and local governments have an awareness of international human rights, they have little capacity to engage in human rights work.

In recent years, the Obama Administration has taken a number of important steps to improve federal coordination around treaty reporting and implementation, including the creation of an inter-agency Equality Working Group to coordinate around human rights.¹⁴ In 2014, the State Department’s Office of the Legal Adviser sent letters to state and local governments, emphasizing the U.S. “commitment to protecting human rights domestically through the operation of our comprehensive system of laws, policies, and programs at all levels of government – federal, state, local, insular, and tribal,” and noting that the U.S. is “proud of this

shared role in upholding and protecting human rights.”¹⁵ Additionally, the U.S. included three state and local government representatives in its delegation for the 2014 ICCPR review.

These are positive steps, and more can be done to foster human rights monitoring and implementation at the state and local level. The Equality Working Group is a welcome development, but it has yet to be institutionalized and, to date, it has not engaged with state and local governments. Further, the State Department’s official communications with state and local governments have focused on treaty reporting, and have not provided substantive guidance on ways to foster state and local compliance with U.S. human rights commitments and obligations.¹⁶

To date, the federal government has not disseminated U.N. Concluding Observations or UPR recommendations to state and local government actors, nor has it offered guidance on how they relate to state and local policy or on effective practices to bolster compliance with these recommendations. And, although the U.S.’s one-year follow-up response to the Committee in 2009 noted that the Equal Opportunity Employment Commission, Department of Homeland Security, and Department of Justice would incorporate CERD into trainings, there is no information available on whether this has actually occurred.¹⁷

While offering a potential infrastructure for human rights implementation, the “complementary [federal, state and local] protections and mechanisms” discussed in the U.S. report are not oriented around international human rights treaty standards or adequately resourced to monitor or promote compliance with these standards.¹⁸ A more comprehensive national approach to human rights implementation will require federal mechanisms to support, incentivize and coordinate state and local efforts to comply with international human rights treaty standards through education, training and other means.

V. Legal Framework

- Articles 2; 5; 7

VI. The CERD Committee General Recommendations

General Recommendation 31 emphasizes the importance of national strategies with benchmarks and objectives to (a) foster human rights education, including among government actors and (b) eliminate structural discrimination. To ensure implementation, it further calls for an independent national entity responsible for assessing progress and identifying next steps.¹⁹ In the context of follow-up from the Durban Review Conference, General Recommendation 33 calls for national mechanisms to ensure that steps are taken to follow-up with Concluding Observations.²⁰ These comments build upon General Recommendation 17, which recommends that parties to the Convention establish appropriate national bodies to foster education of the CERD and promote and monitor compliance nationally.²¹

VII. Other UN Body Recommendations

Most recently, the Human Rights Committee called on the U.S. to “strengthen and expand existing mechanisms mandated to monitor the implementation of human rights...[and] provide them with adequate human and financial resources or consider establishing an independent national human rights institution.”²² In 2006, the Human Rights Committee called for the

creation of mechanisms to facilitate more comprehensive reviews of compliance at all levels of government and foster follow-up with the Concluding Observations,²³ emphasizing that action was needed to ensure that federal and state laws comply with the treaty in a number of areas.²⁴

In its last review of the United States, the Committee on the Rights of the Child similarly voiced concern over the lack of a national human rights institution.²⁵ During the 2010 Universal Periodic Review of the United States, a number of countries called for the U.S. to consider a national human rights institution, improve federal coordination with state and local governments and increase human rights education and training²⁶ – recommendations the U.S. accepted.²⁷ After its 2010 U.S. Country visit, the Working Group of Experts on Peoples of African Descent recommended that the United States create a national human rights monitoring body.²⁸ The Working Group on Business and Human Rights, too, has noted that incentives for human rights compliance from federal, state and local authorities are needed to bolster respect for human rights among businesses.²⁹

VIII. Recommended Questions

We respectfully recommend that the Committee ask the U.S. delegation to:

- Please describe the education, legislative, policy and other measures the United States will take to ensure that state and local agencies and officials have the capacity to respect and implement the United States' commitments under the CERD and to implement the Committee's Concluding Observations. Specifically, how will the United States (a) effectively communicate these recommendations to state and local agencies and officials to foster greater awareness of, and compliance with, human rights standards; and (b) offer guidance and technical assistance to state and local governments on how treaties such as the CERD relate to law and policy at the state and local level.
- Please indicate (a) what measures the United States is taking to create institutionalized, transparent and coordinated mechanisms to monitor and implement human rights at the federal, state and local levels in the long term; and (b) how the federal government, including the federal level Interagency Working Group on Human Rights and the Equality Working Group, coordinate with state and local governments to support and encourage state and local human rights implementation, including through education, training and funding.

IX. Suggested Recommendations

To ensure that state and local governments can reach their full potential to implement the CERD, the United States must:

- **Provide education and training to state and local officials on their obligations under the CERD.** This should include dissemination of Concluding Observations by federal agencies in coordination with the State Department, within one year of the review, along with appropriate guidance on how they relate to state and local policy and effective means of implementation.
- **Ensure dedicated staff responsible for coordinating and liaising with state and local actors regarding human rights reporting and implementation,** including identifying and

developing best practices at the state and local level and communicating recommendations from international bodies to state and local governments.

- **Provide state and local governments with funding to engage in civil and human rights implementation and compliance**, including through grants to Human Rights Agencies, to ensure they have the resources to undertake human rights education, monitoring, reporting and enforcement.
- **Establish institutionalized, transparent and effective mechanisms** to coordinate with state and local officials to ensure comprehensive monitoring and implementation of international human rights standards at the federal, state and local levels, such as a reinvigorated Interagency Working Group on Human Rights and a National Human Rights Institution.

¹ The information in this submission draws heavily from research and recommendations made in the Columbia Law School Human Rights Institute & International Association of Official Human Rights Agencies (IAOHRA) report, *Closing the Gap: The Federal Role in Respecting and Ensuring Human Rights at the State and Local Level: Response to the Fourth Periodic Report of the United States to the United Nations Human Rights Committee* (2013), available at [http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20\(ecopy\).pdf](http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20(ecopy).pdf).

² The U.S. ratified the CERD subject to the following understanding: “this Convention 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. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.” 140 CONG. REC. 14326 (1994).

³ See Kenneth L. Saunders & Hyo Eun (April) Bang, Kennedy School of Government, Harvard University, *A Historical Perspective on U.S. Human Rights Commissions* 5 (2007), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/ExecSessionHumanRights/history_of_hrc.pdf; Risa Kaufman, State and Local Commissions as Sites for Domestic Human Rights Implementation, in *Human Rights in the United States: Beyond Exceptionalism* 89, 91 (Shareen Hertel & Kathryn Libal eds., 2011).

⁴ As one example, in 2008, Human Rights Watch sent letters to the Attorneys General of every state to identify whether they were aware of the International Convention on the Elimination of All Forms of Racial Discrimination and their states’ responsibilities under the treaty. The responses they received were limited but illuminating. The Attorney General of Kansas, for example, responded: “It does not appear that Kansas was a party to any agreement or resolution passed by this body or the federal government” and requested a “cite to the pre-emptive federal law and/or Kansas Statute...creating a legal duty.” Human Rights Watch, *Submission to the Committee on the Elimination of all Forms of Racial Discrimination During its Consideration of the Fourth, Fifth, and Sixth Periodic Reports of the United States of America CERD 72nd Session* 64 (Feb. 2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/HRW.pdf>.

⁵ See *infra* Section V; *Closing the Gap*, *supra* note 1, at 18-19.

⁶ See, e.g., Columbia Law Sch. Human Rights Inst., *Implementing Recommendations from the Universal Periodic Review: A Toolkit for State and Local Human Rights and Human Relations Commissions* (2011), available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/UPR%20Toolkit_0.pdf; Columbia Law Sch. Human Rights Inst. & IAOHRA, *State and Local Human Rights Agencies: Recommendations for Advancing Equality Through an International Human Rights Framework* (2010), available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/45408_HRI-Text%20%5BOnline%5D%20-%202nd%20printing%20%28updated%2010.1.09%29.pdf

⁷ U.S. Conference of Mayors, Res. Promoting and Encouraging International Human Rights, (June 2013), available at http://www.usmayors.org/resolutions/81st_conference/cs15.asp; IAOHRA, Res. To Promote and Encourage Broader Understanding of International Human Rights (August 2013) (on file with Columbia Law Sch. Human Rights Inst.)

⁸ *Medellin v. Texas*, 552 U.S. 491 (2008).

⁹ See, e.g., Risa E. Kaufman, “By Some Other Means”: *Considering the Executive’s Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 at 2009.

¹⁰ Comm. On the Elimination of Racial Discrimination., 72nd Sess., Feb.18-Mar. 7, 2008, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶¶ 12; 13, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

¹¹ *Id.*, ¶ 36.

¹² See Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, ¶ 32 (June 12, 2013), available at http://www.state.gov/j/drl/rls/cerd_report/210605.htm. [hereinafter *U.S. 2013 CERD Report*].

¹³ See *Id.*, ¶ 31 (state and local governments already offer “complementary protections and mechanisms” that “reinforce the ability of the United States to guarantee respect for human rights,” including Human Rights Agencies); *Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights*, ¶ 129 (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>. As part of its report to the Committee on the Elimination of Racial Discrimination, the U.S. included an Annex, which provides a snapshot of state, local,

tribal and territorial human rights organizations and programs and emphasizes that state and local agencies play a “critical role” in human rights implementation. See *Annex A to the Common Core Document of the United States: State, Local, Tribal, and Territorial Human Rights Organizations and Programs, Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, ¶¶ 1-3; 124-26 (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179782.htm>.

¹⁴ See *U.S. 2013 CERD Report*, *supra* note 12, ¶¶ 4; 30 (“the newly established Equality Working Group creates a forum for dialogue between civil society and the federal government on issues of equality and human rights”).

¹⁵ See Letter From Principal Deputy Legal Adviser McLeod to Governors of U.S. State and Territories (Feb. 18, 2014), available at <http://www.state.gov/s/l/releases/2014/223237.htm> (disseminated to the U.S. Conference of Mayors, National Association of Counties, National Governors Association, National Association of Attorneys General and IAOHRA). The 2014 letter followed up on earlier communications seeking input into U.S. treaty reports, see, e.g., Letter from Harold Koh, Legal Adviser, U.S. Dep’t of State, to State and Local Human Rights Commissions (Dec. 21, 2010) (on file with Columbia Law Sch. Human Rights Inst.) (requesting information for U.S. CERD and CAT reports); Letter from Harold Hongju Koh, Legal Adviser to the U.S. Dep’t of State, to State and Local Human Rights Commissions (May 3, 2010), available at http://www.iaohra.org/storage/pdf/human-rights-campaign/Letter_from_HaroldKoh_to_Stateand%20LocalCommissions.pdf; Memorandum from Harold Hongju Koh, Legal Adviser to the U.S. Dep’t of State, to State Governors on U.S. Human Rights Treaty Reports (Jan. 20, 2010), available at <http://www.state.gov/documents/organization/137292.pdf>.

¹⁶ See Letter From Principal Deputy Legal Adviser McLeod, *supra* note 15.

¹⁷ See United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, at 15 (Jan. 13, 2009), available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/us_government_one_year_response_to_cerd_concluding_observations_2009.pdf.

¹⁸ The one known actor responsible for federal to state and local communities is The Special Representative for Global Intergovernmental Affairs. See Transcript of U.N. Human Rights Council Town Hall Meeting, Universal Periodic Review of the United States Human Rights Record, at 11, Nov. 5, 2010, available at <http://www.charityandsecurity.org/system/files/02.05.10%20UPR%20Town%20Hall%20Transcript.pdf>. Yet that office is not mandated to address domestic human rights implementation and has lacked permanent leadership for a year. See Letter from Robin Toma, Exec. Dir., Los Angeles County Human Relations Comm’n, to Reta Jo Lewis, Special Representative for Global Intergovernmental Affairs (May 3, 2011) (on file with Columbia Law Sch. Human Rights Inst.); Office of Intergovernmental Global Affairs, Biography, at <http://www.state.gov/s/srgia/c38305.htm> (last visited June 12, 2014); Mike DeBonis, *Reta Jo Lewis, ex-State Department official, enters D.C. mayor race*, Washington Post, July 2, 2013. Nevertheless, state and local actors interested in participating in treaty reviews have been directed to contact that office. See Letter From Principal Deputy Legal Adviser McLeod, *supra* note 15.

¹⁹ Comm. On the Elimination of Racial Discrimination, 67th Sess., Aug. 2-19, 2005, *General Recommendation No. 31, Recommendation on the Prevention of Racial Discrimination In the Administration and Functioning of the Criminal Justice System*, ¶ 5(b), U.N. Doc. A/60/18 (Aug. 17, 2005). This General Comment calls for coordinated mechanisms responsible for “tracking, monitoring and measuring progress made [to address structural] racial discrimination, identifying undetected manifestations of racial discrimination and submitting recommendations and proposals for improvement” – mechanisms this Committee has called for to implement national strategies to address discrimination.

²⁰ Comm. On the Elimination of Racial Discrimination, 75th Sess., Aug. 3-28, 2009, *General Recommendation No. 33, Follow-up to the Durban Review Conference*, ¶ 1(k), U.N. Doc. CERD/C/GC/33 (Sept. 29, 2009).

²¹ Comm. On the Elimination of Racial Discrimination, 42nd Sess., March 1-19, 1993, *General Recommendation No. 31, Establishment of National Institutions to Facilitate Implementation of the Convention*, ¶ 1(a)-(e), U.N. Doc. A/48/18 (Supp), 116 (March 19, 1993).

²² Concluding Observations of the Human Rights Committee: United States of America, ¶ 4(b);(d), U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), available at <http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf>.

²³ Human Rights Comm., 87th Sess., July 10-28, 2006, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 39, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

²⁴ *Id.*, ¶¶ 22-25; 28 (referring to racial profiling, housing discrimination on the basis of race and employment discrimination on the basis of gender and sexual orientation).

²⁵ Comm. on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States of America*, ¶ 4, U.N. Doc. CRC/C/OPSC/USA/Q/2 (July 25, 2012), available at <http://www2.ohchr.org/english/bodies/crc/crcs62.htm>.

²⁶ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States of America*, ¶¶ 92.72–92.74, 92.87, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011), available at http://www.upr-info.org/IMG/pdf/a_hrc_16_11_add.1_united_states_e.pdf.

²⁷ See United States of America, *Accepted UPR Recommendations*, p.11, available at <http://www.humanrights.gov/wp-content/uploads/2012/03/USAcceptedRecommendations-2010UPR.pdf> (expressing US Support for Recommendation 65 (“Review its laws at the Federal and State levels with a view to bringing them in line with its international human rights obligations”); 74 (“That a human rights institution at the federal level be considered in order to ensure implementation of human rights in all states”); 87 (“Incorporate human rights training and education strategies in their public policies.”)).

²⁸ Human Rights Council, *Report of the Working Group of Experts on People of African Descent*, ¶ 88, U.N. Doc A/HRC/15/18 (Aug. 6, 2010), available at <http://www2.ohchr.org/english/issues/racism/groups/african/docs/A-HRC-15-18.pdf>.

²⁹ See U.N. Working Group on Business and Human Rights, *Statement at the End of Visit to the United States* (May 1, 2013), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13284&LangID=E>.