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## “Color” in the Non-Discrimination Provisions of the Universal Declaration of Human Rights and the Two Covenants

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# **“COLOR” IN THE NON-DISCRIMINATION PROVISIONS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE TWO COVENANTS**

**STEPHANIE FARRIOR\***

## INTRODUCTION

The United Nations Charter declares in its opening article that one of the purposes of the United Nations is to promote respect for human rights “without distinction as to” any of four grounds: race, sex, language, or religion.<sup>1</sup> The Universal Declaration of Human Rights (“UDHR”), adopted three years later, expands the list of prohibited grounds of discrimination and proclaims that everyone is entitled to human rights “without distinction of any kind, such as” the following: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>2</sup>

Numerous international and regional human rights treaties adopted after the Universal Declaration reproduce the UDHR’s list virtually verbatim in their non-discrimination clauses, and therefore include “color” in addition to “race” among the prohibited grounds of discrimination.<sup>3</sup>

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1. U.N. Charter art. 1, para. 3.

2. Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3d Sess., U.N. Doc. A/810 (1948), Article 2.

3. International human rights instruments containing this list include: International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. DOC. A/6316, at 52 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social, and Economic Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. DOC. A/6316, at 49 (Dec. 16, 1966); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 11, 1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. DOC. A/45/49 (Dec. 18, 1990); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 U.N. DOC. A/RES/61/106 (Dec. 13, 2006). Regional human rights instruments containing this list, some with slight variations in the wording (e.g. “wealth” instead of “property”), include: European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, June, 27, 1981, 1520 U.N.T.S. 217; ASEAN Human Rights Declaration, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Nov. 18, 2012), <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>. In contrast, the International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177 U.N. DOC. A/RES/61/177 (Dec. 20, 2006) does not use this full list, referring just to “sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group.”

These clauses usually appear near the very beginning of the treaty, thereby emphasizing the importance of the non-discrimination principle. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination also includes “color” in the grounds of discrimination at which it is aimed: “race, colour, descent, or national or ethnic origin.”<sup>4</sup>

The non-discrimination principle appears not only in general clauses against discrimination but also in clauses regarding specific rights or situations. Significantly, the International Covenant on Civil and Political Rights specifies in Article 4 that even if a state is facing a public emergency that threatens the very existence of that nation, any measures that limit human rights in the face of the threat to national security may “not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.”

The fact that discrimination can also be an underlying reason for torture is reflected in the Convention against Torture, which contains the broadest non-discrimination clause to appear in an international human rights instrument. Rather than specifying any particular grounds of discrimination, its definition of “torture” includes an act meeting other definitional requirements that is inflicted “for any reason based on discrimination of any kind.”<sup>5</sup> Discrimination based on color would fall within the purview of this clause.

What led the drafters of the Universal Declaration of Human Rights to add “color” to its non-discrimination clause, rather than just adopt the language from the UN Charter? This paper examines the drafting history behind that development. It then addresses “color” in the two treaties that grew out of the UDHR and which, together with that instrument, form the International Bill of Human Rights: the International Covenant on Civil and Political Rights (“ICCPR”)<sup>6</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>7</sup> The Article concludes with an overview of some of the key features of those treaties that can be used to address discrimination on the basis of color.

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4. International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1), opened for signature Dec. 21, 1965 (entered into force Jan. 4, 1969).

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984 (entered into force June 26, 1987).

6. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976).

7. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

## I. "COLOR" IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The United Nations Charter includes the principle of non-discrimination in four of its references to human rights.<sup>8</sup> In fact, non-discrimination is the only human rights principle to appear explicitly in the UN Charter.

The Preamble of the UN Charter opens with ringing words that reflect the importance of human rights in preventing war and the terrible atrocities from which the world had just emerged. "We the Peoples of the United Nations," the preamble proclaims, are "determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ." The Charter then declares in Article 1 that one of the purposes of the United Nations is to "achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." To this end, the Charter states, the UN General Assembly "shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>9</sup>

This theme is continued in Article 55, which stipulates that the United Nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>10</sup> Article 62, which delineates the functions and powers of the Economic and Social Council, specifies that ECOSOC "may make recommendations" to promote "human rights and fundamental freedoms for all."<sup>11</sup> Finally, the Charter declares that one of the purposes of the international trusteeship system it establishes is "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ."<sup>12</sup>

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8. U.N. Charter arts. 1(3), 13(1)(b), 55(c), 76(c).

9. U.N. Charter art.13, para. 1(b).

10. U.N. Charter art. 55, para. c. The subsequent article declares: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. Charter art. 56.

11. The fact that this reference to human rights, unlike others in the Charter, does not include a non-discrimination clause may be attributed to the fact that it is the only reference to human rights in the draft that went to the San Francisco conference. The references to human rights in the preamble and other articles added in San Francisco include the non-discrimination clause. See Paul Gordon Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter*, 5 HUMAN RIGHTS Q. 1, 12-13 (1983).

12. U.N. Charter art.76(c).

Although the references to human rights without discrimination did not appear in the Charter until the final conference in San Francisco at which the treaty was adopted,<sup>13</sup> it is notable that the message of non-discrimination was ultimately understood to be integral to the realization of human rights, so important that it should be explicitly included in the document creating the United Nations. The non-discrimination principle lies at the very heart of international human rights law because the core notion of human dignity it reflects underlies the very concept of human rights, and non-discrimination is so essential to realizing other human rights. The non-discrimination principle reflects the fact that often, people are subjected to human rights violations because of prejudice against them due to some characteristic that identifies them, such as, race, color, religion or sex. Discrimination is an attack on the very notion of human rights—a denial that everyone is equal in dignity and worth.<sup>14</sup>

Though the UN Charter refers to “race” but not “color” in its non-discrimination provisions, both words were used during discussions to draft the Charter,<sup>15</sup> as were references to “colored people,” all terms reflective of usage at the time the UN Charter and Universal Declaration were being drafted.<sup>16</sup> At the Dumbarton Oaks peace talks,<sup>17</sup> an author at the time noted, “only one colored group participated, the Chinese, and the equality and basic problems of Negroes and colonial colored people were not on the agenda.”<sup>18</sup> Human rights were finally brought onto the agenda

13. See Lauren, *supra* note 11.

14. For an analysis and discussion of the equality and non-discrimination provisions in international human rights instruments, see Stephanie Farrior, *Equality and Non-Discrimination under International Law*, in Stephanie Farrior ed., *EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW (VOL. II, LIBRARY OF ESSAYS IN INTERNATIONAL HUMAN RIGHTS LAW)* (2015).

15. Examples from the period preceding the formal drafting sessions include the statement in 1944 by President Franklin D. Roosevelt in which he explicitly links human rights with non-discrimination on grounds of race and color: “The United Nations are fighting to make a world in which tyranny and aggression cannot exist; a world based upon freedom, equality, and justice; a world in which all persons regardless of race, color, or creed may live in peace, honor, and dignity.” Franklin D. Roosevelt, as cited in Commission to Study the Organization of Peace, *INTERNATIONAL SAFEGUARD OF HUMAN RIGHTS 5*, cited in Lauren, *supra* note 11, at 5 n.21 (1983).

16. For a brief history of the use of the terms “color” and “race” in the United States, see Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American,”* 56 *THE PUBLIC OPINION Q.* 496–514 (Oxford Univ. Press, 1992), available at [http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Topical\\_Reports/TR22.pdf](http://publicdata.norc.org:41000/gss/DOCUMENTS/REPORTS/Topical_Reports/TR22.pdf).

17. For a brief overview of the Dumbarton Oaks phase of the drafting of the UN Charter, see United Nations, *History of the United Nations: Dumbarton Oaks and Yalta*, available at [http://www.un.org/en/aboutun/history/dumbarton\\_yalta.shtml](http://www.un.org/en/aboutun/history/dumbarton_yalta.shtml).

18. Ernest Johnson, *A Voice at the Peace Table?*, *THE CRISIS* 345 (Nov. 1944), cited Lauren, *supra* note 11, at 12. A couple of decades earlier, an attempt by Japan to include non-discrimination on the basis of race in the Covenant of the League of Nations had been unsuccessful. Japan had proposed a clause under which states would agree to accord to nationals of member states “equal and just

by religious and civil society organizations as well as certain state delegations including that of the United States, and non-discrimination was a key feature of this effort.<sup>19</sup> As articulated by one delegate urging adoption in the Charter of fundamental human rights without discrimination, Ramaswami Mudaliar<sup>20</sup> of India: “There is neither border nor breed nor color nor creed on which those rights can be separated as between beings and beings.”<sup>21</sup>

Ultimately, the promotion of human rights without discrimination became a cornerstone of the UN Charter. John Humphrey, the Director of the Human Rights Division of the UN Secretariat, who prepared a first draft of the Universal Declaration, wrote that non-discrimination, like human rights, runs through the UN Charter like “a golden thread.”<sup>22</sup> Indeed, Hernán Santa Cruz, the noted Chilean delegate to the UN Commission on Human Rights, once went so far as to say that the “United Nations Organization had been founded principally to combat discrimination in the world.”<sup>23</sup>

treatment in every respect, making no distinction, in law or in fact, on account of their race or nationality.” The League Commission voted in favor of this clause, but due to a highly questionable procedural ruling by President Woodrow Wilson, the clause was considered not to have been adopted, and it did not end up in the Covenant. See MICHAEL BANTON, *INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION* 15 (1996). In the discussions of Japan’s proposal, race and immigration were inextricably linked. The British Foreign Office wrote in a confidential memorandum at the time that “[t]he ‘racial equality’ question . . . primarily concerns the following countries: Japan, China, British India, United States of America (especially California and the Pacific States), Canada, Australia, New Zealand, South Africa.” Lauren, *supra* note 11, at 2. The memorandum then states that:

countries where the white population is in power have determined from a sure instinct for self-preservation that they will never open their doors to the influx of the coloured race, which might eventually become dominant. In this policy the United States of America, taught by the Negro trouble (and especially California, where the Asiatics are most numerous), have taken the lead . . .

*Id.* at 2–3.

19. For an overview of how human rights came to be included in the UN Charter, see Lauren, *supra* note 11. For a more detailed account, see Roger Normand and Sarah Zaidi, *HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE* (Indiana Univ. Press, 2007).

20. Ramaswami Mudaliar represented India in the lead-up to and at the San Francisco conference at which the UN Charter was adopted, and served as the first President of the United Nations Economic and Social Council (ECOSOC); see <http://www.un.org/en/ecosoc/about/>.

21. Lauren, *supra* note 11, at 14, citing Ramaswami Mudaliar, Verbatim Minutes of the Third Plenary Session, 28 April 1945, in UNIO, Documents, 1:245.

22. Quoted in Dinah Shelton, *Prohibited Discrimination in International Law*, in *THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA* 264 n.8 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

23. U.N. Doc. A/C.3/ SR.100 (Oct. 12, 1948), in William Schabas, ed., *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES* 2196 (William Schabas ed., Cambridge Univ. Press, 2013), available at [http://www.un.org/depts/dhl/udhr/docs\\_1948\\_3rd\\_3c\\_ga.shtml](http://www.un.org/depts/dhl/udhr/docs_1948_3rd_3c_ga.shtml) [hereinafter UDHR *Travaux*]. He followed that remark, however, by a reference to “[c]ertain

Once the UN Charter was adopted in 1945, attention turned to the need for an elaboration of just what were the human rights to which the Charter referred. In 1946, the UN Commission on Human Rights was charged with drafting such an instrument; it became the Universal Declaration of Human Rights. The Declaration begins in Article 1 with a principle fundamental to human rights: “All human beings are born free and equal in dignity and rights.”<sup>24</sup> This is followed by the non-discrimination clause in Article 2, and additional non-discrimination provisions appear in several subsequent articles.<sup>25</sup>

In developing the content of the Universal Declaration, the Commission on Human Rights and the Division of Human Rights at the UN Secretariat gathered Constitutional and legislative provisions from countries as well as proposals from civil society organizations. They received 18 proposed International Bills of Rights,<sup>26</sup> several of which included “color” among the prohibited grounds of discrimination, including those submitted by Panama, Cuba and the American Federation of Labor (AFL).<sup>27</sup>

The Commission also received for its consideration provisions from the national Constitutions of a number of states regarding rights, some of which listed “color” in non-discrimination clauses: Cuba, Guatemala, India, and the United States.<sup>28</sup> After stating that “any discrimination by reason of . . . race, color” and other categories is “destructive of human dignity,” the Cuban Constitution declared such discrimination “illegal and punishable.”<sup>29</sup> In a later provision addressing labor rights, the Cuban Constitution provided that in hiring for new positions and in making personnel changes, “it shall be obligatory that opportunities for labour be distributed without distinctions on a basis of race or colour, provided that requirements of ability are satisfactorily met.”<sup>30</sup> The Guatemalan Constitution declared “any discrimination by reason of . . . race, colour”

Latin American countries where discrimination was unknown.” *Id.* The notion persisted for years among numerous states that racial discrimination was limited to apartheid and colonialism.

24. Universal Declaration of Human Rights, *supra* note 2, Article 1.

25. Universal Declaration of Human Rights, *supra* note 2, Article 7 (right of “all” to equal protection of the law “without any discrimination”); Article 16 (right of men and women “without limitation due to race . . .” to marry and found a family); and Article 23 (right of “everyone, without any discrimination” to equal pay for equal work).

26. U.N. Doc. E/CN.4/W.16 (Jan. 23, 1947), in *UDHR Travaux*, *supra* note 23, at 147.

27. See Textual Comparison of the Proposed Drafts of an International Bill of Rights, U.N. Doc. E/CN.4/W.8 (Jan. 20, 1947), in *UDHR Travaux*, *supra* note 23, at 118 *et seq.*

28. See U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 10, 1947), in *UDHR Travaux*, *supra* note 23, at 147.

29. Constitution of the Republic of Cuba, Article 20, in *UDHR Travaux*, *supra* note 23, at 668.

30. Constitution of the Republic of Cuba, Article 74, in *UDHR Travaux*, *supra* note 23, at 669.

and other categories to be “illegal and punishable.”<sup>31</sup> The Constitution of India provided that no one may, on the ground of “religion, place of birth, descent, [or] colour” be ineligible to hold public office, or prohibited from acquiring or disposing of property, holding an occupation or carrying out business.<sup>32</sup> Finally, the Commission noted, under the 15th Amendment of the US Constitution, the right to vote may not be denied or abridged “on account of race, colour, or previous condition of servitude.”<sup>33</sup>

Initially, the Drafting Committee of the UN Commission on Human Rights used the Charter language for the non-discrimination clause of the Universal Declaration, prohibiting discrimination on the basis of “race, sex, language or religion.” One of the first debates over whether to expand that list and include “color” took place in meetings of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which had been asked by the Commission to provide input into the drafting of the Declaration.<sup>34</sup> As the drafting history in the present article shows, the debate centered on two main positions. One was that race and color are two different conceptions and that both should therefore be included in a non-discrimination clause. The other was that “race” was understood to encompass “color.” Some proponents of this position emphasized that since “race” had no scientific meaning, it should be generally understood to refer to color as well as race. Others expressed serious concern that including “color” in addition to “race” in the Declaration would convey the unfortunate message that the UN Charter did not address discrimination on the basis of color, since “color” does not appear in the Charter’s non-discrimination clause.

The path of the debate took a few twists and turns as the drafters worked to craft the all-important non-discrimination provision of the Universal Declaration. The initial proposal to include “color” as well as race in the non-discrimination provision came from the Sub-Commission member from India. He opened by stating that “he did not think it was clear from the text that the idea of colour was included in that of race.”<sup>35</sup> Noting that the American Federation of Labor had deemed it fit “to refer

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31. Constitution of Guatemala, Article 21, in U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 10, 1947), in UDHR *Travaux*, *supra* note 23, at 672.

32. Constitution of India, Article 298, in UN Doc. E/CN.4/AC.1/3/Add.1 (June 10, 1947), in UDHR *Travaux*, *supra* note 23, at 673–74.

33. Constitution of the United States of America, 15th Amendment, in U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 10, 1947), in UDHR *Travaux*, *supra* note 23, at 681.

34. See U.N. Doc. E/CN.4/Sub.2/SR.1 (Nov. 24, 1947), in UDHR *Travaux*, *supra* note 23, at 1010.

35. U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947), in UDHR *Travaux*, *supra* note 23, at 1028.



explicitly to colour as well as race in connection with discrimination,” he proposed that the article on non-discrimination should be made “more explicit by adding the word ‘colour’ after the word ‘race.’”<sup>36</sup>

The first to respond to this proposal was the expert<sup>37</sup> from the United States. He first saw fit to remark that the wording of the Indian proposal was similar to “that adopted in the American Constitution after the War of Secession.”<sup>38</sup> He nonetheless thought it “preferable” to stay with the wording used in the UN Charter, “race, sex, language or religion.”<sup>39</sup> In contrast, the Australian expert suggested that “if there was the slightest doubt it was better to add the word ‘colour’ than risk leaving out certain groups,”<sup>40</sup> a proposition supported by the UK expert.<sup>41</sup> The Belgian expert thought adding “color” was “superfluous” but did not object to adding the word.<sup>42</sup>

Next to weigh in was the expert from Haiti, who expressed a concern that troubled some other Sub-Commission members as well. He was apprehensive that if the Charter’s references to “race” were not understood to include “colour,” then “the whole Charter would have to be revised.”<sup>43</sup> The Iranian expert then gave an additional reason for not including “colour,” remarking that the word “race” should be understood not in a scientific sense but in a general sense, so there was no point in adding “colour.”<sup>44</sup> The Chinese expert was even more direct, stating that “in current usage race meant colour,” so the language proposed by the Indian expert was simply “unnecessary.”<sup>45</sup> The expert from France, on the other hand, said that because “there was no scientific definition of the word ‘race’” it would be “desirable” to add “colour.”<sup>46</sup> This prompted the Indian expert to speak up to say that “race and colour were two conceptions that did not necessarily cover one another.”<sup>47</sup>

The Haitian delegate then elaborated on the point made earlier. He understood what India was trying to express, he said, but there was “a

36. *Id.*

37. The members of the now defunct UN Sub-Commission on Prevention of Discrimination and Protection of Minorities served as independent experts, not as representatives of a state or a government.

38. U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947), in *UDHR Travaux*, *supra* note 23, at 1028.

39. *Id.*

40. *Id.*

41. *Id.* at 1029.

42. *Id.*

43. U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947), in *UDHR Travaux*, *supra* note 23, at 1029.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

certain danger” in including “colour” in addition to “race” when the UN Charter referred only to “race.”<sup>48</sup> He asked: “[W]ould that not imply that the Charter in dealing with race had failed to envisage discrimination based on colour?”<sup>49</sup> He wanted to make sure, he emphasized, that references to “race” in the Charter were understood to include color.<sup>50</sup>

The next to speak was the Iranian expert, who once again stressed his point that because there was “no precise scientific definition of the word ‘race,’” that word must be seen “in a general sense, which included the idea of ‘colour.’”<sup>51</sup> Interestingly, he then added a notion not discussed further in the Sub-Commission, that “the word ‘colour’ in current parlance applied to clearly defined groups and not to all coloured peoples.”<sup>52</sup>

When the UK expert spoke, she made the curious point that if the article included “colour,” it would stray from its very “purpose, i.e. discrimination.” She followed this with an equally curious remark that “[i]n point of fact discrimination only occurred when colour meant race.”<sup>53</sup> The Indian expert quickly pointed out “this was not the case as far as emigration to the United States was concerned. A distinction is made between Caucasian immigrants of the fair type and those of a darker one. The same thing occurred in South America.”<sup>54</sup>

At this point, the Chinese expert, persuaded by these remarks, declared he would withdraw his earlier statement that the word “race” as used meant “colour,” and voiced support for adding the word “colour” in order “to define the term more precisely.”<sup>55</sup> He added: “the authors of the Charter could not blame [the UN Sub-Commission] for that.”<sup>56</sup> The US expert, however, was not persuaded, and said they should not add “colour” unless they also added additional categories, such as “political opinions etc.”<sup>57</sup>

The Haitian expert, once again voicing concern over changing the clause used in the UN Charter, put forward an additional argument to make his point. He noted that in no other international conferences had any words other than the Charter language “ever been used”—not in the conferences of the ILO, WHO, or UNESCO, or at the Pan-American

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48. U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947), in *UDHR Travaux*, *supra* note 23, at 1029.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. U.N. Doc. E/CN.4/Sub.2/SR.4 (Nov. 26, 1947), in *UDHR Travaux*, *supra* note 23, at 1029.

55. *Id.*

56. *Id.*

57. *Id.*

Conference.<sup>58</sup> Adding “colour” at this stage would imply that color was not thought to be included in the term “race” in any of those documents. “The effect of the addition,” he cautioned, “would be to prevent reference to any international documents being made in future in connection with discrimination based on colour.”<sup>59</sup>

At this point the Chair of the Sub-Commission offered a solution. Given the lack of consensus on whether to include “color” or not, he proposed adding a note to Article 6: “It being understood that the term ‘race’ includes the idea of ‘colour.’”<sup>60</sup> The members of the Sub-Commission accepted this proposal, and then moved on to discuss whether to add “political opinion” to the prohibited grounds of discrimination. A little over a week later, the Sub-Commission adopted a non-discrimination clause with the phrase “political opinion” but without “color.” In its report to the Commission on Human Rights, the Sub-Commission stated that “there was no need for a special mention of ‘colour’, as that was included in ‘race’.”<sup>61</sup>

When the full Commission on Human Rights deliberated on this language, the Indian delegate, Hansa Mehta, said she “understood the term ‘race’ to include colour, but if there was any doubt on the subject, ‘colour’ should be inserted in the Declaration.”<sup>62</sup> Charles Malik, representing Lebanon, thought this was an important point, “since ‘race’ and ‘colour’ did not mean the same thing, neither was the conception of colour included in the term ‘race’.”<sup>63</sup>

René Cassin of France explained the thinking behind the decision of the Working Group to follow the approach of the Sub-Commission on this point, stating that it “had considered the term ‘race’ to include colour.”<sup>64</sup> At this point, Ms. Mehta of India said she was changing her proposal so

58. *Id.*

59. UN Doc. E/CN.4/Sub.2/SR.4 (26 November 1947), in *UDHR Travaux*, *supra* note 23, at 1030.

60. *Id.*

61. *Id.* at 1152. The text on non-discrimination of the Drafting Committee of the UN Commission on Human Rights provided: “Everyone is entitled to the rights and freedoms set forth in this Declaration, without distinction as to race, sex, language or religion.” U.N. Doc. E/CN.4/21 (July 1, 1947), in *UDHR Travaux*, *supra* note 23, at 931. After considering this draft and discussing other areas of discrimination the Declaration should mention, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities proposed the following text: “Every one [sic] is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, sex, language, religion, political or other opinion, property status, or national or social origin.” E/CN.4/Sub.2/38 (Dec. 5, 1947), in *UDHR Travaux*, *supra* note 23, at 1151.

62. U.N. Doc. E/CN.4/SR.34 (Dec. 12, 1947), in *UDHR Travaux*, *supra* note 23, at 1258.

63. *Id.*

64. *Id.* at 1258–59.

that the clause would read “‘race including colour’ since colour was not mentioned in the United Nations Charter.”<sup>65</sup> The Belgian delegate, however, opined that it did not seem “scientifically accurate” to include the term “colour,” because “the concept of race included that of colour,” but he added that he would nonetheless vote for the amendment to include the phrase.<sup>66</sup>

At one point the chair of the Commission on Human Rights took note that there were two proposals before the Commission: one from China to add the word “colour” after the word “race,” and that of India to add the parenthetical “(i.e. also colour)” after “race.”<sup>67</sup> The Indian delegate reiterated her argument that an amendment to add “color” would imply it was not covered by “race,” and requested that a vote on her proposed amendment be taken first.<sup>68</sup> The proposal was adopted by a vote of ten in favor, none against, and six abstentions, at which point the chair ruled that no vote need be taken on the Chinese proposal.<sup>69</sup> At this stage, then, the draft non-discrimination clause referred to “race (i.e. also colour),” wording that was adjusted in the Commission’s report to the UN Economic and Social Council to read “race (which includes colour).”<sup>70</sup>

In the ensuing months, states submitted observations and recommendations regarding the draft text. The French included “colour” as a separate category in its proposed non-discrimination clause (“race, colour, sex,” and other categories),<sup>71</sup> as did New Zealand.<sup>72</sup> Ultimately the text that came from the Commission before the Third Committee of the UN General Assembly<sup>73</sup> included both “race” and “color” as distinct categories.

Discussion of the draft text in the Third Committee continued to refer to one or both terms as delegates pointed to the need to address discrimination. The Soviet delegate, for example, took note of “the petition addressed to the Economic and Social Council on behalf of

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65. *Id.* at 1259.

66. *Id.* at 1260.

67. U.N. Doc. E/CN.4/SR.34 (Dec. 12, 1947), in *UDHR Travaux*, *supra* note 23, at 1261.

68. *Id.*

69. *Id.* at 1262.

70. See U.N. Doc. E/600 (Dec. 17, 1947), in *UDHR Travaux*, *supra* note 23, at 1342.

71. U.N. Doc. E/CN.4/82/Add.8 (May 6, 1948), in *UDHR Travaux*, *supra* note 23, at 1503.

72. U.N. Doc. E/CN.4/82/Add.12 (June 3, 1948), in *UDHR Travaux*, *supra* note 23, at 1730.

73. Discussion of the draft Universal Declaration by the Third Committee was the last step before going before the full General Assembly for discussion and a vote. The Third Committee is one of six main committees of the General Assembly, each of which has a delegate from every UN member state. The Third Committee has responsibility for social, humanitarian and cultural matters. See United Nations, *General Assembly of the United Nations: Main Committees*, available at <http://www.un.org/en/ga/maincommittees/index.shtml>.

13,000,000 Negroes of the United States, protesting against the measures of discrimination directed against them,”<sup>74</sup> and remarked that “President Truman himself had admitted that, in the United States, coloured men and women were still suffering as regards their human dignity.”<sup>75</sup> The Chilean delegate to the Third Committee, noting that in an earlier meeting the South African representative “had made a statement in which he defended his country’s right to practise racial discrimination,” remarked that the United States representative “had kept silent, for in that country, also, there was discrimination, especially against coloured races and against women.”<sup>76</sup>

The Third Committee ultimately voted to adopt both “race” and “color” as distinct grounds of discrimination in Article 2.<sup>77</sup> No changes to this text were made by the UN General Assembly, so the Universal Declaration of Human Rights includes both terms in its Article 2 non-discrimination provision.

Discrimination on the basis of both “race” and “color” also came up in debates over the drafting of specific rights in the Universal Declaration. One such area was in the drafting of the equal pay for equal work provision, which generated much debate. A proposed amendment referred to discrimination based on “race,” and the ensuing discussion of what would be covered under this term included references to “race,” “color,” and the combination term, “colored races.”

This discussion initially arose during debate in the Commission on Human Rights over whether this article should specify that “women” were entitled to equal pay. Some thought it should, given how serious a problem unequal pay was for women, but others were concerned that including it in this article but not each of the others could imply that women were not

74. U.N. Doc. E/CN.4/Sub.2/SR.4 (November 26, 1947), in *UDHR Travaux*, *supra* note 23, at 2198. This no doubt refers to the petition submitted to the United Nations in 1946 by the National Negro Congress, outlining inhumane conditions including lynchings, being “trapped in backbreaking, poorly paid manual labor,” living in housing with no electricity or indoor plumbing, having double the infant mortality of whites, miniscule spending on education for blacks in comparison with that for whites, and severe restrictions on the right to vote including through the poll tax. See Carol Anderson, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN-AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* 79–81 (Cambridge Univ. Press, 2003). The petitioners expressed the conviction that the United Nations, unlike the United States, “would understand that blacks had been ‘bound to the soil in semi-feudal serfdom,’ ‘lynched,’ ‘terrorized,’ and ‘segregated like pariahs.’” *Id.* at 81, citing National Negro Congress, *A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States of America* 2–3 (National Negro Congress 1946).

75. U.N. Doc. A/C.3/SR.100 (Oct. 12, 1948), in *UDHR Travaux*, *supra* note 23, at 2198.

76. U.N. Doc. A/C.3/SR.101 (Oct. 13, 1948), in *UDHR Travaux*, *supra* note 23, at 2217.

77. *Id.* at 2221–22.

covered by the other rights, where women were not explicitly mentioned.<sup>78</sup> To resolve this, the Chilean delegate proposed a replacement text stating that “[e]veryone” was entitled to equal pay for equal work.<sup>79</sup> When some reiterated their concern that women should be explicitly mentioned, the Soviet Union suggested that rather than omit mention of women, the clause should provide: “Everyone, regardless of race, nationality or sex, is entitled to equal pay for equal work.”<sup>80</sup> That would cover, the Soviet Union suggested, “discrimination against women, and also discrimination against coloured workers as compared to white, colonial workers as compared to those of metropolitan Powers, etc.”<sup>81</sup>

When some continued to question the need for a non-discrimination clause in this provision in light of the Chilean proposal that the clause begin with “everyone,” the Soviet expert argued that even if larger issues of pay could not be achieved, certain areas of discrimination should be specified in the clause so that “at least it could do away with the injustice suffered by women, coloured races, national minorities etc.” In response, the Uruguayan expert suggested that taking the Soviet argument to the next logical step would mean they would need “to mention every possible ground for discrimination.”<sup>82</sup> Since the Chilean proposal began with “‘everyone’, which included men and women,” he said, the Soviet amendment was “unnecessary.”<sup>83</sup> Ultimately, the Commission rejected the Soviet proposal and accepted the Chilean text.<sup>84</sup>

This issue in the equal pay provision arose again when the draft Universal Declaration came before the Third Committee of the UN General Assembly. The Soviet Union re-introduced its proposal that the clause specify that everyone “regardless of race, nationality or sex” is entitled to equal pay for equal work.<sup>85</sup> Once again, references not just to “race” but also to “color” were made during the discussion. Arguing in favor of adding the non-discrimination clause, Ms. Menon of India remarked that in Asia and elsewhere, “there was still discrimination for reasons not only of sex, but of race and colour.”<sup>86</sup> The Declaration should “clearly condemn” discrimination that “compelled women and certain

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78. U.N. Doc. E/CN.4/SR.66 (June 9, 1948), in *UDHR Travaux*, *supra* note 23, at 1819–20.

79. *Id.* at 1820.

80. *Id.* at 1821.

81. *Id.* at 1822.

82. *Id.*

83. *Id.*

84. *Id.*

85. See Report of Sub-Committee 3 of the Third Committee, UN Doc. A/C.3/363 (Nov. 22, 1948), in *UDHR Travaux*, *supra* note 23, at 2729.

86. U.N. Doc. A/C.3/SR.139 (Nov. 16, 1948), in *UDHR Travaux*, *supra* note 23, at 2603.

coloured races to accept a lower standard of living than other groups,” she stated.<sup>87</sup> Similarly, the delegate from the Ukrainian Soviet Socialist Republic thought it “essential” that the right to work article explicitly state that everyone has this right “without discrimination of race, nationality, or sex, because that discrimination was still being practised in some countries.”<sup>88</sup> He gave the example of South Africa where the average wages of a white worker were about 12 times those of a “colored worker,” as well as “striking examples” of discrimination in the colonies, where, “the wages of a white worker were often as much as fifty times higher than those of a coloured worker.”<sup>89</sup>

The Soviet delegate asserted that the concerns of those who thought its proposal too restrictive because it did not include additional grounds of discrimination, were “unjustified,” and since “the word ‘race’ included colour, all the forms of discrimination relevant to employment had been listed.”<sup>90</sup> Nonetheless, the Belgian delegate persisted in believing the Soviet draft was too limited, as it “did not cover discrimination based on colour—as distinct from the idea of race, as clearly established by the Commission on Human Rights.”<sup>91</sup> Similarly, René Cassin of France expressed concern that including only a partial list in this article would “give the impression that discrimination was permissible in the case of the other” categories listed in Article 2 that were not repeated,<sup>92</sup> among which is “color.”

The Third Committee approved the Soviet proposal referring to “race” in the equal pay provision: “Everyone, without distinction as to race, nationality or sex . . .”<sup>93</sup> However, though the committee approved each clause separately, it ultimately rejected the right to work article as a whole,<sup>94</sup> and so took up discussion of “race” and other grounds of discrimination anew when it later considered a revised draft article. At that point, given the earlier debate over the limited grounds of discrimination mentioned in the Soviet proposal, the United States proposed compromise language: “Everyone, without discrimination.”<sup>95</sup> The USSR countered that

87. *Id.*

88. U.N. Doc. A/C.3/SR.140 (Nov. 16, 1948), in UDHR *Travaux*, *supra* note 23, at 2608.

89. *Id.*

90. *Id.*

91. U.N. Doc. A/C.3/SR.156 (Nov. 1948), in UDHR *Travaux*, *supra* note 23, at 2792.

92. *Id.* at 2793.

93. U.N. Doc. A/C.3/363 (Nov. 22, 1948), in UDHR *Travaux*, *supra* note 23, at 2729–30.

94. The vote was 17 for, 17 against, and 6 abstentions. *Id.* Since the UDHR was now without a right to work provision, the Third Committee appointed a sub-committee to prepare a new draft for consideration. *Id.* at 2732.

95. U.N. Doc. A/C.3/363 (Nov. 22, 1948), in UDHR *Travaux*, *supra* note 23, at 2734.

it “knew of only three kinds of discrimination as regards work: discrimination on the grounds of race, nationality and sex,” but “in a spirit of conciliation” he agreed to add “religion” to the list.<sup>96</sup> Ecuador suggested adding “age,” at which point the United States expressed concern that the resulting clause would still be problematic as it was still restrictive, and would not include, for example, political discrimination.<sup>97</sup> At this point Belgium proposed a broader phrase than any that had come before: “without *any* discrimination” (emphasis in original).<sup>98</sup>

After hearing several states once again complain that the USSR-proposed list of grounds of discrimination was more limited than that in Article 2 and that this would therefore weaken other articles, the Soviet delegation continued to argue for repeating the non-discrimination principle in the equal pay clause, claiming that this would strengthen the provision. “Indeed,” he stated, “there was no field in which there was more discrimination as to race and sex than that of employment.”<sup>99</sup> He further argued that the list was in fact not exhaustive because it ended with “etc.,” but he then expressed willingness to add the word “colour” to the list.<sup>100</sup>

Despite the growing list of prohibited grounds of discrimination in the proposed amendment, Belgium remained concerned that “enumerating as it did certain forms of discrimination might be construed as permitting forms not expressly mentioned.”<sup>101</sup> The Soviet proposal was eventually rejected,<sup>102</sup> and the Third Committee adopted the inclusive text originally proposed by Belgium: “Everyone, without any discrimination, has the right to equal pay for equal work.”<sup>103</sup> This became Article 23(2) of the Universal Declaration of Human Rights.

Debate over the article providing for political rights was another area where non-discrimination on grounds of both “race” and “color” was discussed. This article declares the right to take part in the conduct of public affairs, to vote, and to have access on the basis of equality to public

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96. *Id.* at 2735.

97. *Id.*

98. *Id.* at 2735.

99. U.N. Doc. A/C.3/SR.157 (Nov. 25, 1948), in *UDHR Travaux*, *supra* note 23, at 2799.

100. *Id.* Other delegates either disagreed with this assertion, or did not wish the right to equal pay to be guaranteed without discriminating on the basis of sex. When the Soviet amendment was put to a vote, it stated: “without distinction as to race, nationality, sex, age or religion, etc.” *Id.* at 2802. The Dominican Republic delegate, Minerva Bernadino, requested that the word “sex” be voted on separately. It was defeated by a vote of 22 for and 22 against, with five abstentions. *Id.*

101. *Id.* at 2799.

102. *Id.* at 2803.

103. U.N. Doc. A/C.3/367 (Nov. 25, 1948), in *UDHR Travaux*, *supra* note 23, at 2816–17.



service in one's country.<sup>104</sup> The Drafting Committee of the UN Commission on Human Rights proposed that the article begin with the non-discrimination list found in the UN Charter plus "social origin": "Everyone without discrimination on grounds of race, sex, language, religious belief or social origin and not under any legal disability has the right to take an effective part in the Government of his country."<sup>105</sup> China proposed substitute language to begin this sentence simply with "everyone," without identifying particular areas of discrimination: "Everyone has the right to take part in the affairs of his government directly or through his representatives,"<sup>106</sup> and the Drafting Committee adopted this text.<sup>107</sup>

When the political rights provision came before the Third Committee, the Uruguayan delegate said it should be "clearly established" that adoption of the draft article "would imply . . . a ban on any discrimination in the grant and exercise of political rights on the grounds of race, colour, sex, language or property."<sup>108</sup> He believed the grounds of non-discrimination in Article 2 should therefore be repeated in that provision, but barring this, that the interpretation of the political rights article be "indissolubly linked" with the general non-discrimination provision in Article 2.<sup>109</sup>

However, the working draft continued to begin by stating that "everyone" had the political rights set out in that article, without specifying any particular grounds of discrimination. Ultimately, the drafters accepted that "everyone" meant what it said, and did not add a non-discrimination clause to that article.<sup>110</sup> However, the corresponding article in the International Covenant on Civil and Political Rights, which was drafted by the same bodies, does include such a clause, specifying that citizens have the political rights listed in that article "without any of the distinctions mentioned in Article 2."<sup>111</sup>

The debate over the provision regarding the right to education is another area where references were made to both "race" and "color," and it is apparent that an amendment referring to "race" was proposed with the

104. Universal Declaration of Human Rights, *supra* note 2, art. 21.

105. See U.N. Doc. E/CN.4/102 (May 27, 1948), in UDHR *Travaux*, *supra* note 23, at 1653.

106. *Id.* Similar language appeared in the draft international declaration submitted by Panama to the Commission on Human Rights: "Everyone has the right to take part in the government of his state." UN Doc. E/CN.4/AC.1/3/Add.1 (June 10, 1947), in UDHR *Travaux*, *supra* note 23, at 568.

107. U.N. Doc E/CN.4/SR.62 (June 7, 1948), in UDHR *Travaux*, *supra* note 23, at 1782.

108. U.N. Doc. A/C.3/SR.133 (Nov. 12, 1948), in UDHR *Travaux*, *supra* note 23, at 2567.

109. *Id.*

110. See U.N. Doc. A/C.3/341 (Nov. 13, 1948), in UDHR *Travaux*, *supra* note 23, at 2576.

111. ICCPR, *supra* note 3, Article 25.

understanding that it included “color.” This came up in the context of a proposal by the USSR that access to education “be open to all without any distinction as to race, sex, language, material status or political affiliation.”<sup>112</sup> Turkey said it appreciated the idea behind the Soviet proposal but was concerned that it made the clause restrictive, and “the subject of discrimination was thoroughly covered in article 2.”<sup>113</sup> Poland, however, thought that despite the non-discrimination clause in Article 2, “it was essential to reiterate that principle in [this article], because access to schools in some countries was barred to certain categories of persons.”<sup>114</sup> Ecuador echoed these sentiments.<sup>115</sup>

The United States, however, pointed out that the Soviet amendment would restrict the scope of the right to education because it repeated only some of the grounds of discrimination prohibited in Article 2,<sup>116</sup> and this would therefore “weaken the effect of Article 2 of the declaration.”<sup>117</sup> The Soviet delegate replied that he would be amenable to adding “etc.” to the list so it would not be a restrictive list,<sup>118</sup> but in the end the USSR amendment was defeated.<sup>119</sup>

Later, in response to an assertion by the Soviet delegate that an amendment proposed by the US “would deny coloured people equal rights to education and restrict their right to fundamental education,”<sup>120</sup> Eleanor Roosevelt retorted that “it was clear that the word ‘everyone’ [in the US proposal] included coloured people.”<sup>121</sup> Lakshmi Menon of India, however, felt compelled to say she did not agree with Roosevelt’s remark that “everyone” meant every human being, because “in many countries it

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112. UN Doc. A/C.3/353 (19 Nov. 1948), in *UDHR Travaux*, *supra* note 23, at 2668.

113. UN Doc. A/C.3/SR.146 (19 Nov. 1948), *in id.* at 2673.

114. *Id.* at 2678.

115. *Id.* at 2682.

116. *Id.* at 2683.

117. *Id.* at 2694.

118. UN Doc. A/C.3/SR.146 (19 Nov. 1948), in *UDHR Travaux*, *supra* note 23, at 2694.

119. *Id.*

120. The joint Australia-USA proposed amendment to which the Soviet delegate referred read as follows: “Everyone has the right to education, and access to such education must be open to all without any distinction as to race, sex, language, material status or political affiliation.” UN Doc. A/C.3/352 (19 Nov. 1948), in *UDHR Travaux*, *supra* note 23, at 2668. The working draft that this proposal would amend had included an explicit reference to “fundamental education”: “Elementary and fundamental education shall be free and compulsory . . .” UN Doc. E/800 (28 June 1948), *in id.* at 1972. It appears therefore that it is deletion of an explicit reference to fundamental education to which the Soviet delegate referred. According to UNESCO, “fundamental education” provides those without formal schooling with knowledge and skills that “are an essential condition for attaining a higher standard of living,” for participating effectively in the development of their community, etc. See UNESCO, *Working Paper on the Definition of Fundamental Education*, UNESCO/2 (15 June 1956), available at <http://unesdoc.unesco.org/images/0017/001797/179727eb.pdf>.

121. UN Doc. A/C.3/SR.148 (19 Nov. 1948), in *UDHR Travaux*, *supra* note 23, at 2693.

would still be understood as applying only to men; in others, as only to white men and women.”<sup>122</sup> The text as ultimately adopted did not repeat a non-discrimination clause, but simply declared that “everyone” has the right to education.<sup>123</sup>

Though the UDHR emphasizes that everyone has the rights in the Declaration without discrimination on the grounds listed in Article 2, it has been noted above that some debates centered on whether to repeat a non-discrimination clause in certain substantive articles. The articles on political rights, education, and equal pay for equal work ended up referring to “everyone” or “everyone, without any discrimination,” without spelling out specific areas of discrimination, out of concern that any categories not listed might be considered not covered. One article, however, does explicitly repeat some but not all of the grounds of discrimination: Article 16, which guarantees the right of men and women, “without any limitation due to race, nationality or religion . . . to marry and to found a family.” The text adopted by the Commission on Human Rights contained no non-discrimination clause.<sup>124</sup> In the Third Committee, Mexico proposed adding a non-discrimination clause on “race, nationality or religion,”<sup>125</sup> but the United Kingdom<sup>126</sup> and the Netherlands<sup>127</sup> delegates were concerned that this could weaken Article 2 and give the impression that the provisions of Article 2 did not apply to other articles of the declaration. The United States thought the principle of non-discrimination in relation to marriage was “adequately covered” by Article 2,<sup>128</sup> as did a number of other states,<sup>129</sup> and New Zealand expressed concern about “limiting non-discrimination—a principle established in article 2—to grounds of race, nationality and religion.”<sup>130</sup> A proposal from Uruguay to add “or any other limitation” was voted down, and the clause specifying the right to marry without limitation due to “race, nationality or religion” was adopted.<sup>131</sup> The issue of whether “race” was understood to include “color” simply did not come up during the debate, perhaps because by this time, the Third Committee felt there was no question that it did.

122. UN Doc. A/C.3/SR.157 (25 Nov. 1948), *in id.* at 2798–99.

123. Universal Declaration of Human Rights, Article 26.

124. See UN Doc. A/C.3/287 (16 Oct. 1948), *in UDHR Travaux*, *supra* note 23, at 2252.

125. UN Doc. A/C.3/266, *in id.* at 2253.

126. UN Doc. A/C.3/SR.124 (6 Nov. 1948), *in id.* at 2460.

127. UN Doc. A/C.3/SR.125 (8 Nov. 1948), *in id.* at 2464.

128. *Id.* at 2468.

129. E.g. Bolivia and Greece, UN Doc. A/C.3/SR.125 (8 Nov. 1948), *in UDHR Travaux*, *supra* note 23, at 2471; Belgium, Australia and Canada, *id.* at 2474.

130. UN Doc. A/C.3/SR.125 (8 Nov. 1948), *in id.* at 2475.

131. *Id.* at 2471.

The Universal Declaration of Human Rights was adopted by the UN General Assembly on December 10, 1948, without dissenting vote.<sup>132</sup> Since it was a non-binding resolution of the General Assembly and not a binding treaty, the UN Commission on Human Rights then turned its attention to further developing the two binding treaties that set out in somewhat more detail the rights in the Universal Declaration: the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

## II. "COLOR" IN THE INTERNATIONAL COVENANTS

The Universal Declaration's prohibited bases of discrimination appear verbatim in both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>133</sup> They therefore include both "race" and "color" among the prohibited grounds of discrimination. A review of the reports of the treaty bodies established to monitor compliance with these treaties<sup>134</sup> does not reveal any instances when these bodies have singled out "color" as distinct from race or ethnicity as a basis of the discrimination about which they have expressed concern.<sup>135</sup> Instead, the treaty bodies either refer just to "race," or they group "color" together with race and ethnic origin.<sup>136</sup>

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132. UN Doc. A/PV.183 (10 Dec. 1948), *in id.* at 3090.

133. The International Covenant on Economic, Social and Cultural Rights provides in Article 2(2) that States Parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The International Covenant on Civil and Political Rights provides in Article 2(2) that each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

134. For an overview of these bodies and how they function, see United Nations, Office of the High Commissioner for Human Rights (OHCHR), *The United Nations Human Rights Treaty System*, Fact Sheet No. 30/Rev.1 (2012), available at <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>. See also OHCHR, *NGO Handbook: Human Rights Treaty Bodies*, available at <http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook4.pdf>.

135. In addition, an email from the author to a current member of the Committee on Civil and Political Rights, which monitors compliance with the ICCPR, brought the reply that this member "never thought about a separate violation on grounds of colour, if only because of the almost automatic assumption that colour equals race, as exemplified by the definition in ICERD. Certainly, I don't recall a case based on colour." (Copy on file with author.)

136. *E.g.*, in reviewing the report of China, the Committee on Economic, Social and Cultural Rights urged the state "to ensure that its asylum procedures do not discriminate, in purpose or in effect, against asylum-seekers on the basis of race, colour or ethnic or national origin, as provided for under article 2, paragraph 2, of the Covenant." UN Doc. ICESCR, E/2006/22 (2005) 25 at para. 174.

Since “color” is included in the non-discrimination clauses of both Covenants, advocates can use the treaty monitoring mechanisms<sup>137</sup> to raise awareness of colorism with the treaty body members and draw attention to violations of human rights based on colorism. Although these mechanisms are not a magic wand that will eliminate discrimination in one motion, they can be an effective part of an advocate’s toolkit for raising awareness of problems and for pressing national, state and local governments to make needed change. Those interested in learning more about using international human rights treaties in advocacy for racial justice in the United States are encouraged to contact the US Human Rights Network. This organization is a network of over 300 member and partner organizations that is actively engaged in using the UN human rights mechanisms to advance human rights in the United States.<sup>138</sup>

Although a full discussion of the ICCPR and ICESCR is beyond the scope of this article, the present paper will highlight certain aspects of these treaties that might be of particular use in addressing human rights violations based on colorism.

#### *Affirmative Action Allowed, and Sometimes Required*

The principle of non-discrimination does not mean everyone must receive identical treatment. Policies such as affirmative action, often referred to as “special measures” in human rights law, are entirely consonant with the Covenants, and in some instances may even be required, in order to achieve equality. The treaty bodies of both Covenants have adopted General Comments to this effect. As the Committee on

137. Two main mechanisms exist: (1) the reporting procedure, under which states that have ratified these treaties submit reports to the treaty monitoring body regarding their compliance with obligations under the treaty; the monitoring body then reviews the reports and publishes their observations as well as recommendations they make to the state; and (2) the complaint procedure, under which individuals (and under some treaties, groups) may file a complaint with the treaty body against the state for violating their rights. The complaint procedure exists with respect to several but not all UN human rights treaties, and is available only to those complaining against states that have formally agreed to submit to this procedure. For an overview of the reporting procedure and how to use it, see Stephanie Farrior, *International Reporting Procedures*, in, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 189–215 (Hurst Hannum ed. 4th ed., 2004). For a description of the complaint procedure as well as forms that may be used in submitting a complaint, see Anne Bayefsky, *How To Complain to the UN Human Rights Treaty System*, available at <http://www.bayefsky.com/units/>.

138. Among other things, the US Human Rights Network has helped to organize advocates in using the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture both internationally and domestically, and they conduct regular trainings for local activist groups on using the UN system. For details, see <http://www.ushrnetwork.org/our-work/projects-campaigns>.

Economic, Social and Cultural Rights has stated: “Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.”<sup>139</sup> Thus, formal equality is not the goal; actual equality is, and the drafters of the Covenants aimed to achieve de facto, not just de jure, equality.<sup>140</sup>

The Human Rights Committee has declared that “the principle of equality sometimes *requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”<sup>141</sup> This “may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population,” but “as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”<sup>142</sup>

#### *Discriminatory Intent Not Required*

Importantly, it is well established in international law that discrimination need not be intentional to violate human rights. Though “discrimination” is not defined in either Covenant, the monitoring bodies have adopted the approach taken in the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, and interpret the Covenants to prohibit that which has the “purpose or effect of nullifying or impairing the . . . enjoyment . . . of rights.”<sup>143</sup> Thus, under international human rights law, policies and practices that have the *effect* of depriving people of their rights because of their race or color are human rights violations, even if it was not the intent of the policy-makers or decision-makers to bring about this result. This approach recognizes that just because the racially discriminatory treatment one is experiencing is unintentional, that does not diminish the existence or experience of that racially discriminatory treatment. It also disallows claims of unconscious

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139. See CESCR, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), U.N. Doc. E/C.12/GC/20 (2009).

140. For further discussion of this concept in international law, see Stephanie Farrior, *Equality and Non-Discrimination Under International Law*, in EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW (VOL. II, LIBRARY OF ESSAYS IN INTERNATIONAL HUMAN RIGHTS LAW) (Stephanie Farrior ed., 2015).

141. CCPR, *General Comment No. 18: Non-discrimination*, in U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at para. 10 (emphasis added).

142. *Id.*

143. *Id.* at para. 7.

bias to excuse the state from carrying out its obligations under these treaties.

*Discrimination in Any Area Regulated by the State*

Article 26 of the International Covenant on Civil and Political Rights can be an especially important provision in advocacy against the manifestations of race and color discrimination with respect to all human rights, not just those civil and political rights enumerated in the treaty. Although Article 2 of the ICCPR obligates states parties to protect against discrimination in the enjoyment only of the rights set out in the Covenant, no such limitation applies to the Article 26 obligation to provide equality before the law and equal protection of the law against discrimination. If the state regulates an area, the regulations must provide equality before the law and equal protection of the law.

Since the United States has ratified the ICCPR but not the Covenant on Economic, Social and Cultural Rights, Article 26 of the ICCPR can be of special importance to human rights advocates in the United States. As the Human Rights Committee has declared, this article “prohibits discrimination in law or in fact in any field regulated and protected by public authorities,” and “is not limited to those rights which are provided for in the Covenant.”<sup>144</sup> This reaches such areas as housing, employment, the workplace, and places privately owned but open to the public, such as stores, restaurants and recreation areas. It can also reach discrimination in access to health care and the provision of health care.<sup>145</sup>

The Human Rights Committee, which monitors implementation of the ICCPR, has-, recommended steps to guarantee the right of those belonging to racial minorities of “access to quality health services and education,” as well as steps to ensure greater school enrolment and reduce the incidence of school drop-out among members of racial minorities.<sup>146</sup> De facto discrimination in the areas of private housing, employment and services have also been of concern to the Committee, which has stated that “government agencies [should] be trained to intervene positively to help to overcome racist attitudes and to initiate proceedings where any pattern of discrimination is identified.”<sup>147</sup>

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144. *Id.* at para. 12.

145. The Committee on Economic, Social and Cultural Rights has noted in its General Comment 14 on the Right to Health (2000) that the right to health is closely related to and dependent upon the realization of other human rights, including the right to non-discrimination.

146. U.N. Doc. A/51/40 vol. I (1996) (Brazil), para. 337.

147. U.N. Doc. CCPR/C/79/Add.91 (1998) (Finland), para. 14.

*Measures Required in Addition to Laws and Regulations*

In order to fulfill their obligation to “ensure” (ICCPR) or “guarantee” (ICESCR) that the rights in the covenants will be exercised without discrimination, states must not only enact laws and regulations, but also take other measures to address the root causes of the prejudice or conditions that lead to discrimination. As the Committee on Economic, Social and Cultural Rights has put it: “States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate *the conditions and attitudes* which cause or perpetuate substantive or de facto discrimination.”<sup>148</sup>

The importance of this requirement cannot be emphasized enough. It means that states are obligated to address not only individual acts of discrimination that come to its attention, but also structural and institutional discrimination. They must conduct education with a view to diminishing and eliminating discrimination. They must also ensure that private actors, those other than the state, do not abuse people’s rights.

In reviewing a report submitted to it by the United States, the Human Rights Committee has remarked that the failure to fully eradicate the effects of past discrimination in society makes it more difficult to ensure the full enjoyment of the rights in the Covenant on Civil and Political Rights.<sup>149</sup> It is therefore not just laws but also programs to bring about changes in discriminatory attitudes that the state has an obligation to develop.

Advocates can draw ideas for implementation from a provision in the Racial Discrimination Convention that requires states to take measures in the areas of “teaching, education, culture and information” with the goal of “combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among . . . racial or ethnic groups . . . .”<sup>150</sup> As one delegate in the drafting of this Convention stated, “[u]sing legislation by itself was like cutting down a noxious weed above the ground and leaving the roots intact.”<sup>151</sup>

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148. CESCR, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), U.N. Doc. E/C.12/GC/20 (2009), para. 8(b) (emphasis added).

149. U.N. Doc. A/50/40, Vol. I (1995), para. 270.

150. International Convention on the Elimination of All Forms of Discrimination, Article 7. For an overview of the history, interpretation and application of this article see Stephanie Farrior, *The Neglected Pillar: The ‘Teaching Tolerance’ Provision of the International Convention on the Elimination of All Forms of Racial Discrimination*, 5 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 291 (1999).

151. Quoted in Banton, *supra* note 18.



The Committee on the Elimination of Racial Discrimination has noted that this provision is “aimed at prevention rather than cure” through education.<sup>152</sup> The obligation in the two Covenants to “ensure” or “guarantee” rights would also encompass this goal. Guidelines on implementation that explore each of the areas of “teaching, education, culture and information” have been developed by CERD in collaboration with UNESCO.<sup>153</sup> That states are also to take measures in the fields of culture and the media shows recognition of the powerful impact these fields can have in shaping attitudes, and as consequence, conduct.

### *Education*

Given the persistence and pervasive nature of discrimination, and given how important education is to realizing other human rights, it is vital for states to take measures against discrimination in the area of education. The Universal Declaration of Human Rights proclaims the following in its right to education provision, Article 26: “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups . . . .” This important principle undergirds any references to education in implementing provisions of the two covenants, which grew out of the Universal Declaration.

Given the central importance of education as a human right in and of itself, and the importance of education in fostering human development, states must ensure that children do not experience discrimination in school or in the education system. This obligation would include ensuring against the criminalization of children at school experienced by Black children in the United States,<sup>154</sup> protecting against the over-referral of Black children

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

153. U.N. Doc. CERD/C/70/Rev.3 (July 23, 1993). For additional information regarding CERD’s recommendations for implementing Article 7, see Farrior, *supra* note 150, at 296–98.

154. See, e.g., Daniel J. Losen & Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools* (Overview, Executive Summary and Final Report available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools>). See also NAACP Legal Defense and Educational Fund, *School to Prison Pipeline*, available at <http://www.naacpldf.org/case/school-prison-pipeline> (last accessed Aug. 14, 2015).

The UN Human Rights Committee explicitly addressed the school-to-prison-pipeline when it reviewed the human rights record of the United States in 2014: “The Committee is . . . concerned

to special education,<sup>155</sup> ensuring that educational materials do not reinforce existing racial hierarchies; and ensuring that schoolbooks do not erase a country’s history that includes discrimination.

The obligation to educate against discrimination includes not only education of children, but also of teachers and other opinion-leaders, and of those who hold power over others in society so that they do not exercise that power in a discriminatory manner, such as police, judges, prosecutors, administrators and enforcers of regulations.<sup>156</sup>

### *Disaggregated Data*

Human rights treaty bodies often emphasize to states the importance of gathering data disaggregated by race, color, sex, etc. This is in part to address the denial syndrome, where states deny that discrimination on certain grounds is a problem in their country, or the minimization syndrome, where states minimize the problem of discrimination in their country. States sometimes put forward in their reports to the treaty monitoring bodies a long list of constitutional and legislative provisions regarding discrimination, but fail to provide any information on the actual implementation or enforcement of those provisions. Without data, of course, states do not necessarily know whether people are facing discrimination.

Though treaty bodies have emphasized to states the importance of gathering data disaggregated by race and other factors, the presentations

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about the increasing criminalization of students to deal with disciplinary issues in schools. . . . The [United States] should . . . promote the use of alternatives to the application of criminal law to address disciplinary issues in schools.” Human Rights Committee, *Concluding Observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23 2014), para. 17. The committee cited three articles in the International Covenant on Civil and Political Rights as relevant to this troubling phenomenon: Article 7 on the right to be free from cruel, inhuman or degrading treatment or punishment; article 10 on the right of those deprived of their liberty to be treated with humanity and dignity; and article 24 on the right of children “without any discrimination as to race, colour” or other characteristics to the measures of protection due to them because of their status as minors.

155. As a study prepared by the Association of Black Psychologists notes, over a decade ago “the United States Department of Education identified disproportionate minority representation in special education as a critical problem, chiefly affecting African American boys,” but the problem—and its profound consequences—persist. Jamila Codrington and Halford H. Fairchild, *Special Education and the Mis-education of African American Children: A Call to Action 3* (2012), available at <http://www.abpsi.org/pdf/specialedpositionpaper021312.pdf>. See also T.D. Togut, *Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U. J. GENDER SOC. POL’Y & L. 163 (2011).

156. *Id.*

by other speakers at this conference demonstrate the importance of more nuanced data collection because of differences, for example, in health outcomes based on skin tone. Advocates can raise awareness of these studies with treaty body members and contribute to more nuanced, and therefore more effective, recommendations to states parties to these treaties.<sup>157</sup>

#### *Requirement that Measures be Effective*

If a state has taken some steps to achieve protection of the rights in the Civil and Political Rights Covenant without discrimination but problems persist, the Human Rights Committee urges the state to intensify its efforts or to make its efforts more targeted. To give just one example: In light of the persistence of racism in Germany, the Committee declared that efforts should be intensified “to educate the youth and train the police that racism and xenophobia are violative of basic human dignity, contrary to fundamental values and constitutionally and legally impermissible,” and that this education and training “be placed in the wider context of human rights education and training.”<sup>158</sup> The government was also urged to introduce courses in human rights in schools and in police and defense academies “with a view to strengthening a culture of respect for human rights.”<sup>159</sup>

### CONCLUSION

The drafting history of the Universal Declaration of Human Rights shows somewhat mixed views of whether “color” and “race” were distinct categories of discrimination. The fact the concept of “race” had no scientific basis was used by both sides in the debates over whether to add “color” to the grounds of prohibited discrimination in the UDHR. No one, however, sought to omit “color” in order to exclude a category of people from the protection of the non-discrimination provision. The words “race,” “color,” “colored people” and even the combination term “colored races”

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157. Two ways of engaging the treaty body members is by filing shadow reports, also called alternate reports, on a state’s compliance with treaty obligations or lack thereof, and through informal meetings with treaty body members during the time the treaty body is in session. For information on writing shadow reports and an evaluation of the experience by several NGOs, see *New Tactics in Human Rights, Using Shadow Reports for Advocacy*, available at <https://www.newtactics.org/using-shadow-reports-advocacy/using-shadow-reports-advocacy>.

158. U.N. Doc. A/52/40 vol. I (1997), para. 182.

159. *Id.*

were seemingly used interchangeably, though a few of the drafters remarked specifically on skin color as a reason for the discrimination some people experienced. In the end, by adding “color” in addition to the word used in the UN Charter’s non-discrimination clause, “race,” it appears that the drafters of the Universal Declaration sought to ensure that all those who were the targets discrimination, whether due to some concept of race or of color, were covered.

Though the two binding treaties that emerged from the Universal Declaration both include the UDHR non-discrimination clause, the treaty bodies responsible for monitoring compliance have not differentiated between “race” and “color” in reviewing state reports. Advocates can use the wealth of information provided by speakers at the Colorism Conference regarding discrimination based on skin tone in their interactions with the human rights treaty bodies, so as to help these bodies develop a more nuanced understanding and set of recommendations and help move states toward concrete action against colorism.