

# Human Rights Racism

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## ABSTRACT

*International human rights law seeks to eliminate racial discrimination in the world through treaties that bind and norms that transform. Yet law's impact on eradicating racism has not matched its intent. Racism, in all of its forms, remains a massive cause of discrimination, indignity, and lack of equality for millions of people in the world today. This Article investigates why. Applying a critical race theory analysis of the legal history and doctrinal development of race and racism in international law, Professor Spain Bradley identifies law's historical preference for framing legal protections around the concept of racial discrimination. She further exposes that international law has neither explicitly defined nor prohibited racism. In response, Professor Spain Bradley advances a long-overdue claim: racism should be affirmatively and explicitly recognized as a human rights violation under international law. She argues that addressing racism in the world today requires understanding how human rights are violated by racial ideologies in addition to discriminatory acts. Insights from neuroscience about racial bias deepen these understandings. By naming "human rights racism" as the central challenge, this Article calls upon the international community to affirmatively recognize racism's extensive harm and to take more seriously its eradication.*

*"[O]ur complaint is mainly against a discrimination based mainly on color of skin, and it is that that we denounce as not only indefensible but barbaric."*

-W.E.B. DU BOIS, (1947)<sup>1</sup>

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1. The National Association for the Advancement of Colored People, *An Appeal to the World! A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress* 12 (W.E. Burghardt Du Bois ed., 1947).

## INTRODUCTION

Racism, in all of its forms, is the underacknowledged human rights problem of our day. Various defined, racism threatens the lives and rights of millions of people around the world.<sup>2</sup> Despite outlawing racial discrimination through a multilateral treaty in 1965, governments continue to perpetuate and permit racism with impunity and individual acts of racism are commonplace.<sup>3</sup> Its elimination remains an unrealized promise of universal human rights. This Article critically examines why.

The United States offers a sad example where, despite anti-discrimination laws and equal protection rights, the government has failed to protect its people from racism.<sup>4</sup> Police continue to racially profile and murder African Americans at alarming rates, prompting public outcry but little remedy.<sup>5</sup> Law enforcement efforts to curb rape and sexual assault have failed to protect Alaskan Native women, who experience disproportionately high rates of sexual crimes and murder.<sup>6</sup> Latinxs report encountering discrimination by landlords and employers in their efforts to rent homes or interview for jobs, and a recent poll reports that 37 percent have been the target of racial slurs.<sup>7</sup> Islamophobia against Muslims persists across racial groups.<sup>8</sup> In June 2018, the National Association for the Advancement of Colored Peo-

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2. Though the precise origin of the word racism is unknown, the Oxford English Dictionary traces its use to 1902 at the 12th Annual Meeting of the Lake Mohonk Conference of Friends of the Indian in New York. *Racism*, OXFORD ENGLISH DICTIONARY (2019), <http://www.oed.com/view/Entry/157097?redirectedFrom=racism&print> [<https://perma.cc/E36A-7S92>]. The term was used and defined in UNESCO, *THE RACE QUESTION* 3 (1950); WEBSTER'S COLLEGIATE DICTIONARY (1947) contains a definition of "racialism" as "racial prejudice, race hatred," but not racism. By 1974, racism was defined in Webster's Collegiate Dictionary. This Article addresses race, racial discrimination, and racism, which are not universally defined by or within nations. In Part II.A, I discuss various definitions and introduce my own conceptualization of racism for purposes of this Article.

3. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S.94-1120 (hereafter ICERD), art. 1 ("1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

4. Act of Sept. 14, 2017, Pub. L. No. 115-58, 131 Stat. 1150 (joint resolution of Congress acknowledging the "growing prevalence" of "hate groups that espouse racism, extremism, xenophobia, anti-Semitism, and White supremacy").

5. Between 2014 and 2016, for example, Eric Garner, Michael Brown, Tamir Rice, Alton Sterling, Laquan McDonald, Freddie Gray, Sandra Bland, and Philando Castile were among the disproportionate number of African Americans killed by police or who died in police custody. See, e.g., Jasmine C. Lee and Haeyoun Park, *15 Black Lives Ended with Confrontations with Police*, 3 *Officers Convicted*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html> [<https://perma.cc/6494-ZEEJ>]; Alvin Chang, *There are huge racial disparities in how US police use force*, VOX (Nov. 14, 2018), <https://www.vox.com/cards/police-brutality-shootings-us/us-police-racism> [<https://perma.cc/NXR6-ZY4B>] (reporting that black people make up 62.7 percent of all the unarmed people killed by police based on available FBI data).

6. *Ending Violence Against Native Women*, INDIAN LAW RESOURCE CENTER (2019), <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/E77D-7YV5>].

7. "Latinx" is a gender-neutral term to describe people of Latin American origin who can belong to any race. Joe Neel, *Poll: 1 In 3 Latinos Report Discrimination Based On Ethnicity*, NPR (Nov. 1, 2017),

ple (“NAACP”) documented the rise in racially-motivated hate crimes in America.<sup>9</sup> In New York City, hate crimes against Jewish people were up by approximately 6 percent in 2018.<sup>10</sup> Racist-motivated voter suppression, race-baiting speech by politicians, and pro-Nazi symbols have experienced a resurgence.<sup>11</sup> Notably, 60 percent of Americans say the election of Donald Trump as president has worsened race relations.<sup>12</sup>

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<https://www.npr.org/sections/thetwo-way/2017/11/01/561185815/poll-1-in-3-latinos-report-discrimi-nation-based-on-ethnicity> [<https://perma.cc/9CHV-9C6D>].

8. This highlights perceptions conflating racial difference with religion, ethnicity, nationality and national origin. *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream: Findings from Pew Research Center's 2017 Survey of U.S. Muslims*, PEW RESEARCH CENTER (July 26, 2017), <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/> [<https://perma.cc/P9AW-2KCJ>] (reporting that 75 percent of the respondents found that there is a lot of discrimination against Muslims in the U.S.; 68 percent report that Donald Trump makes them feel worried).

9. Press Release, NAACP, NAACP Sees Continued Rise in Hate Crimes, Legacy of Trump's Racism (June 28, 2018), <https://www.naacp.org/latest/naacp-sees-continued-rise-hate-crimes-legacy-trumps-racism/> [<https://perma.cc/4734-WMQF>].

10. *Hate Crime Reports, Complaints by Bias Motivation, Third Quarter 2018*, NEW YORK CITY POLICE DEPARTMENT (2018), <https://www1.nyc.gov/site/nypd/stats/reports-analysis/hate-crimes.page> [<https://perma.cc/V2H8-8P2K>] (finding that anti-Jewish hate crimes in New York City were the highest category of hate crime in this reporting quarter).

11. Adam Serwer, *America's Problem Isn't Tribalism—It's Racism*, THE ATLANTIC (Nov. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/racism-not-tribalism/575173/> [<https://perma.cc/M3D5-Q9XU>] (“In Georgia, the Republican Brian Kemp appears to have defeated the Democrat Stacey Abrams after using his position as secretary of state to weaken the power of the black vote in the state and tying his opponent to the New Black Panther Party. In Florida, the Republican Ron DeSantis defeated the Democrat Andrew Gillum after a campaign in which DeSantis’s supporters made racist remarks about Gillum. The Republican Duncan Hunter, who is under indictment, won after running a campaign falsely tying his Democratic opponent, Ammar Campa-Najjar, who is of Latino and Arab descent, to terrorism. In North Dakota, Democratic Senator Heidi Heitkamp lost reelection after Republicans adopted a voter-ID law designed to disenfranchise the Native American voters who powered her upset win in 2012. President Trump spent weeks claiming that a caravan of migrants in Latin America headed for the United States poses a grave threat to national security, an assessment the Pentagon disagrees with. In Illinois on Tuesday, thousands of Republicans voted for a longtime Nazi who now prefers to describe himself as a ‘white racist’; in Virginia, more than a million cast ballots for a neo-Confederate running for Senate.”)

12. *Most Americans Say Trump's Election Has Led to Worse Race Relations in the U.S.*, PEW RESEARCH CENTER (Dec. 19, 2017), <http://www.people-press.org/2017/12/19/most-americans-say-trumps-election-has-led-to-worse-race-relations-in-the-u-s/> [<https://perma.cc/9X9R-FZQT>]. See also Tom Embury-Dennis, *UN calls Donald Trump's '\*\*\*hole immigrants comments' racist*, THE INDEPENDENT (Jan. 12, 2018), <https://www.independent.co.uk/news/world/americas/un-donald-trump-shithole-immigrants-ha-iti-africa-racist-huamn-rights-united-nations-a8155186.html> [<https://perma.cc/3YZN-5S6D>] (“‘If confirmed these are shocking and shameful comments from the President of the United States,’ spokesperson Rupert Coleville said. ‘There is no other word you can use but ‘racist.’”); Katherine Faulders, *White House Appears Unfazed by Trump's 's—hole countries' Comment*, ABC NEWS (Jan. 11, 2018), <https://abcnews.go.com/Politics/white-house-appears-unfazed-president-trumps-hole-countries/story?id=52302852> [<https://perma.cc/4C69-Q9K9>]; *African Ambassadors to the UN Condemn Trump over 'Shithole' Comment*, GHANAWEB (Jan. 14, 2018), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/African-Ambassadors-to-UN-condemn-Trump-over-shithole-comment-617282> [<https://perma.cc/2QZD-FUYX>].

Of course, racism is not isolated to America. It harms people around the world.<sup>13</sup> Widespread accounts of racism documented by United Nations (“UN”) human rights groups evidence “the rise of racist hate speech and incitement to violence against the Igbo people” in Nigeria, the killing of “60 human rights defenders. . . many of who were engaged in the fight against racial discrimination and in monitoring the situation of indigenous peoples, and at the low level of investigation, prosecution and conviction in such cases” in the Philippines, and the fact that “black men from sub-Saharan countries are being sold in slave markets in Libya.”<sup>14</sup> In December of 2018, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Professor E. Tendayi Achiume, visited Morocco and urged leaders there to take “immediate action on domestic racial inequality.”<sup>15</sup> Unsurprisingly, racism is a global problem. Its harms know no national boundaries.

International human rights law began to address such challenges over fifty years ago. That moment of reckoning arrived in 1963, amid the escalating Civil Rights Movement in the United States and deepening independence movements throughout Africa, when the United Nations General Assembly (“UNGA”) adopted the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.<sup>16</sup> Two years later, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) treaty was adopted by the United Nations.<sup>17</sup> The treaty furthered the purposes of earlier international laws banning slavery.<sup>18</sup> Yet, a half-century later, international law’s impact in eliminating racial discrimination has not matched its intent.

Courts struggle with the meaning of racial discrimination under ICERD and how to interpret it. Take, for example, the International Court of Justice’s (“I.C.J.”) responses to the three cases alleging violations under that

13. See, e.g., G.A. Res. 58/159, The incompatibility between democracy and racism (Mar. 2, 2004) (condemning “political platforms and organizations based on racism, xenophobia or doctrines of racial superiority and related discrimination,” and more).

14. Rep. of the Comm. on the Elimination of Racial Discrimination, at 7, 9, 10, U.N. Doc. A/73/18 (2018).

15. Press Release, UN Human Rights: Office of the High Commissioner, UN expert commends Morocco’s international leadership on migration but urges immediate action on domestic racial inequality (Dec. 21, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24044&LangID=E> [<https://perma.cc/8A9Q-DJ37>] (“She urged Morocco to adopt a comprehensive anti-racial discrimination legislative framework.”).

16. G.A. Res. 1904 (XVIII), art. I, UN Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963) (stating that “[d]iscrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.”).

17. ICERD, *supra* note 3.

18. See *infra* Part II.C describing the doctrinal sources of international law that address race and racial discrimination, e.g., the Declaration on the Elimination of All Forms of Racial Discrimination (1963), *supra* note 16, and ICERD, *supra* note 3.

treaty that have been brought before it. In the first case, *Georgia v. Russia*, the Court was asked to make decisions about racial discrimination on the basis of ethnicity and, although the case did not proceed to the merits stage, the Court's order on provisional measures was vague in its discussion of the relationship between ethnicity and race.<sup>19</sup> Similar interpretational challenges have arisen in a pending case by Qatar against the United Arab Emirates ("UAE") where, in its order on provisional measures, the Court has struggled with the meaning of racial discrimination on the basis of nationality (which is not named in the treaty) as compared to national origin (which is).<sup>20</sup> In the Court's order and dissenting opinions, the judges disagreed on how to interpret the definition provided in Article 1.1 of ICERD as to the meaning of racial discrimination on the basis of national origin.<sup>21</sup>

Governments struggle with addressing racial discrimination, too.<sup>22</sup> At the recent meeting of the 9th Ad Hoc Committee on the Elaboration of

19. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), 2008 I.C.J. 353, 396 ("Whereas States parties to CERD 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms'; whereas in the view of the Court, in the circumstances brought to its attention in which there is a serious risk of acts of racial discrimination being committed, Georgia and the Russian Federation, whether or not any such acts in the past may be legally attributable to them, are under a clear obligation to do all in their power to ensure that any such acts are not committed in the future;") The Court ordered provisional measures but found the case could not proceed to the merits for Georgia's lack of engaging in negotiation prior to bringing its case before the Court.).

20. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. UAE*), 2018 I.C.J. 1 (This case marks the third time the I.C.J. has granted provisional measures under ICERD). See also Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), 2017 I.C.J. 104; *Georgia v. Russian Federation*, *supra* note 19, at 353.

21. *Qatar v. UAE*, *supra* note 20, at 11 ("In the Court's view, the acts referred to by Qatar, in particular the statement of 5 June 2017—which allegedly targeted Qataris on the basis of their national origin—whereby the UAE announced that Qataris were to leave its territory within 14 days and that they would be prevented from entry, and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal treatment before tribunals, are capable of falling within the scope of CERD *ratione materiae*. The Court considers that, while the Parties differ on the question whether the expression "national . . . origin" mentioned in Article 1, paragraph 1, of CERD, encompasses discrimination based on the "present nationality" of the individual, the Court need not decide at this stage of the proceedings, in view of what is stated above, which of these diverging interpretations of the Convention is the correct one."); *Id.* Joint Declaration of Judges Tomka, Gaja and Gevorgian, ¶4 ("When the Convention considers "national origin" as one of the prohibited bases for discrimination, it does not refer to nationality. In our view, the two terms are not identical and should not be understood as synonymous."); *Id.* Dissenting Opinion of Judge Crawford, ¶1 ("Qatar's request for provisional measures faces two principal difficulties, one legal, the other evidential. The legal difficulty is that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (equated to racial discrimination and prohibited *per se*) and differentiation on grounds of nationality (not prohibited as such)."; *Id.* Dissenting Opinion of Judge Salam, ¶3 ("The aim of CERD is thus to bring an end, in the decolonization and post-decolonization period, to all manifestations and governmental policies of discrimination based on racial superiority or hatred; it does not concern questions relating to nationality.").

22. See, e.g., U.N. Human Rights Council, Reps. Submitted by States Parties under Article 9 of the Convention: Third Periodic Reports, United States of America CERD/C/351/Add.1 (2000) (ICERD was

Complementary Standards,<sup>23</sup> Professor Achiume articulated the tension between ICERD's Article 1 designation of an obligation that nations regulate "policies whose effect is to nullify or impair the equal exercise of human rights on account of differentiation on account of race, colour, descent or national or ethnic origin" with national criminal laws that often require a showing of intent.<sup>24</sup> The representative from Bulgaria, Mr. Kanev, remarked that criminalization of racial discrimination has not worked in Bulgaria "except in cases when private individuals are involved in severe forms of racial discrimination when there may be criminal prosecution."<sup>25</sup> The representative from the United Kingdom acknowledged that hate crimes have no place in British society and discussed the problem of bias against black defendants in the criminal justice system.<sup>26</sup> The South African representative stated that "racism was not defined in the ICERD. . . and yet [she believed] its meaning was understood"<sup>27</sup> amid additional questions about how best to conceptualize racism and its relationship to xenophobia.<sup>28</sup> Many members of the Committee affirmed the importance of better understanding the meaning and causes of racism in order to combat it.<sup>29</sup>

It is to this very call for a deeper understanding of racism and its relationship to international human rights law that this Article responds.<sup>30</sup> My examination of racism in human rights aims to prompt explicit inquiry into and examination of the relationship between international human rights law and racism (not just race or racial discrimination). First, I analyze the

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not ratified by the U.S. Senate until 1994. In its initial report to ICERD, the U.S. noted "even though U.S. law is in conformity with the obligations assumed by the United States under the treaty, American society has not yet fully achieved the Convention's goals.")

23. This committee was established by the U.N. Human Rights Council in 2007 to elaborate on the meaning and application of ICERD. See *The Ad Hoc Comm. on the elaboration of complementary standards*, UN HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (2019).

24. UN Human Rights Council, Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on its Ninth Session, U.N. Doc. A/HRC/37/76, at 41 (2018) (on "Structural Xenophobia Discrimination against Refugees").

25. *Id.*

26. *Id.* at 22–23.

27. *Id.* at 23.

28. *Id.*

29. *Id.* at 8 ("Nigeria remained committed to constructive participation in the discussions within the Ad Hoc Committee and called for genuine cooperation in order to address the substantive gaps identified in the existing normative framework and the reservations to the Convention maintained by some States parties. States could also play a significant role by strengthening existing legislation that promoted social harmony.")

30. I do not claim to offer a definitive interpretation of racism, in international law or elsewhere, in this Article, and I acknowledge that the ideas presented here will necessarily benefit from further scholarly engagement and refinement in the future. I also note that just prior to the publication of this Article, and subsequent to the horrific attacks Al Noor and Linwood mosques in Christchurch, New Zealand, on March 15, 2019, the UN Office of the High Commissioner for Human Rights did make a statement on March 21, 2019, saying "[r]acism is the opposite of everything we stand for" and, in the days prior, the UN started posting on Twitter with the hashtag #fightracism. See Video Statement for the 2019 International Day for the Elimination of Racial Discrimination, statement by UN High Commissioner for Human Rights Michelle Bachelet, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24381&LangID=E>.

development of international law through a critical race theory lens and survey relevant sources of international law to reveal historical preference for framing legal protections around the concept of racial discrimination. I demonstrate that international law neither explicitly defines nor prohibits racism in a treaty. Second, I critique as overly narrow international human rights law's conceptualization of the harm as one of racial discrimination. It does not reach the root causes of racism nor recognize the extent of its harms. Third, I argue that the international community should explicitly name, define, and recognize *racism*, alongside racial discrimination, as a violation of human rights, worthy of protection under international law. Fourth, I investigate racism's various meanings, its conceptualization through insights from neuroscience, and its framing in relation to international human rights. I argue that we need to move beyond the framing of racial discrimination to also account for racism, race as a form of human identification, and racial ideologies in our analysis. Although these concepts share important intersectional dimensions with xenophobia, class, color, ethnicity, national origin, and more, engaging those literatures is beyond the scope of this Article.<sup>31</sup> By naming racism as a violation of human rights, this Article advances an explicit race-consciousness approach in human rights law that calls upon the human rights community to recognize its own relationship to racism's continued and extensive harm and to take more seriously racism's eradication.

Finally, I offer the following author's note. Legal scholars tend to avoid exposing personal views in our work, though our feelings and convictions nonetheless shape our scholarship. Here, I take a necessary departure from this norm. This Article arises from my research and thought as a scholar of human rights and international law. It also arises from my lifetime of experiences with racism as an African American woman whose family endured slavery and Jim Crow segregation. Writing about racism as a scholar and as a person who has suffered racism's effects is therefore inherently personal. Here, I explicitly acknowledge that.

Based on these experiences and because of them, I say this: If you are not outraged by the prevalence of racism in today's world, consider the depth of its harms. There's something particularly inhumane, morally reprehensible,

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31. See, e.g., Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on its Ninth Session, *supra* note 24, at 30 ("Ms. Achiume described the phenomenon of xenophobia as illegitimate anti-foreigner acts or attitudes, and further elaborated that xenophobia was compounded by foreignness (on account of their nationality or national origin) and other intersectional social categories including race, ethnicity, religion, class and gender. She added that racism and xenophobia were overlapping when race is often an explicit or implicit basis for xenophobic discrimination and anxiety. At the same time, she stated that there existed a distinction between the two when race is not always salient in the construction of foreignness where migrants are concerned, including when non-citizenship can amplify the negative impact of racism, and addressing racism alone may not appropriately address the circumstances of non-citizens experiencing racial discrimination."). See generally RACE, NATION, CLASS (Étienne Balibar & Immanuel Wallerstein eds., 1991) (discussing the intersectionality between race, nationality, and class).

and egregious about racism. Racism is a tool of oppression that has global reach. It works by dehumanizing individuals and communities not only by denying their inherent equality and dignity but doing so on the basis of a constructed category of race designed for the very purpose of separating humans into a hierarchy meant to permanently elevate some and suppress many. Racism's very nature is insidious. It is often rendered invisible by those who benefit from the social capital, economic power, and political currency that comes from exercising it, even as they use it to maintain their place of power within societal hierarchies. Given all of this and more, racism should be named, alongside racial discrimination, as a violation of human rights under international law.

This Article is organized into four Parts. Part I provides a critical race theory analysis of the origins and doctrinal development of international law and human rights, reviews the relevant treaty-based sources of international law, and recalls the drafting history of ICERD (and the difficulty nations had in naming and agreeing upon specific forms of racial discrimination). This analysis documents international law's historical preference for framing legal protections around the concept of racial discrimination and reveals that international law has neither explicitly defined nor prohibited racism. Part II argues that it should. The Article's signal claim is that racism should be explicitly named as a violation of international human rights. This section deepens definitional, conceptual, and theoretical understandings of racism and how its presence constitutes a violation of human rights. Part III analyzes how international law might reach the problem of racism in the 21st century and identifies the challenges and limitations therein. Part IV analyzes some advantages and anxieties that arise by recognizing racism as a violation of human rights worthy of protection under international law.

## I. RACE AND RACISM IN INTERNATIONAL LAW

Today, the ills from centuries of harms from slavery, genocide, colonialism, apartheid, and racism are coming to light as new voices replace old histories. Critical race theory, Third World Approaches to International Law ("TWAAIL"), and other schools of thought have shown how race, racism, and racial ideology have played critical jurisgenerative roles in the development of human rights and of international law more broadly.<sup>32</sup> An accurate

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32. For critical race theory scholarship, see generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (1973); KIMBERLÉ WILLIAMS CRENSHAW, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1996); Angela Harris, *Foreword in RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DEN. U. L. REV. 329 (2006); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497 (2009).



view of the history of human rights and international law requires recognizing the history of those people who contributed to its development, even as the law perpetuated the very abuses it proposed to eradicate—namely slavery, colonialism, and apartheid—upon them.<sup>33</sup> Law was definitively shaped by these tragedies and an appropriate historiography includes them as part of the diverse history of international human rights law.<sup>34</sup> This section aims to trace the contours of this broad and rich history of international law over several centuries, covering the rise of sovereignty, the prohibition of slavery, the persistence of colonialism, and the banning of apartheid, while recognizing that the story that follows is neither linear nor complete. Doing so reveals that international law, and international human rights law therein, are not racially neutral.<sup>35</sup>

### A. *A Brief Critical Race History of International Human Rights Law*

Racial discrimination is antithetical to the central tenants of international human rights law, which aim to advance the cause of human dignity. The prohibition against racial discrimination is a recognized preemptory norm in international law, expressed in the United Nations Charter, in ICERD, and in customary international law.<sup>36</sup> It affirms the principles of non-discrimination and equality in the application of international law.<sup>37</sup> It stands as a guarantor that universal human rights protections should be applied by nations to their people equally and that states must take affirmative measures to address racial discrimination.

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For TWAIL scholarship, see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); MAKAU MUTUA, *HUMAN RIGHTS STANDARDS: HEGEMONY, LAW AND POLITICS* (2016); James Thuo Gathi, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE & DEV. L.* 26 (2011).

33. Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 54 *VILL. L. REV.* 841, 842 (2000).

34. See JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012); Philip Alston, *Book Review: Does the Past Matter? On the Origins of Human Rights*, 126 *HARV. L. REV.* 2043, 2045 (reviewing JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012) and discussing the polycentric nature of the historiography of human rights).

35. ANGHIE, *supra* note 32 (recalling that in international law “special doctrines and norms . . . [are] devised for the purpose of defining, identifying and placing the uncivilized.”).

36. See generally UN CHARTER (1945), <http://www.un.org/en/sections/un-charter/chapter-i/index.html> [<https://perma.cc/7V37-EKZJ>]; ICERD, *supra* note 3 (“Convinced that the existence of racial barriers is repugnant to the ideals of any human society,” *id.* at Preamble); DANIEL COSTELLOE, *LEGAL CONSEQUENCES OF PREEMPTORY NORMS IN INTERNATIONAL LAW* 16 (2017) (“The lists of preemptory norms typically include the prohibition of genocide, the prohibition of aggression, the prohibition of slavery, the prohibition of apartheid or racial discrimination, the prohibition of torture and the prohibition of infringing upon a people’s right to self-determination.”); Responsibility of States for Internationally Wrongful Acts, 84–5 (2001) (identifying the prohibition of racial discrimination as a preemptory legal norm along with prohibitions against aggression, genocide, slavery, crimes against humanity, torture, and the right of self-determination).

37. For a comparative analysis of the principle of non-discrimination, see generally MPOKI MWAKAGALI, *INTERNATIONAL HUMAN RIGHTS LAW AND DISCRIMINATION PROTECTIONS* (2018).

However, these core norms and rights were not always widely accepted or enforced by nations around the world. For centuries, wars raged and atrocities were normal. The idea of human rights, that people are entitled to certain basic rights inherent to being human, aimed to change these horrid circumstances, albeit slowly. The origins of human rights through law can be traced back to ancient Egyptian laws that restricted the use of force<sup>38</sup> and to Roman laws that introduced the concept of “*humanitas*.”<sup>39</sup> However, most histories of international law discuss seventeenth century Europe as the birthplace of international law and human rights, noting the importance of Hugo Grotius’ 1625 treatise *On the Laws of War and Peace*.<sup>40</sup> The resulting “Grotian Moment,”<sup>41</sup> alongside the Peace of Westphalia in 1648, marked the paradigm shift among European nations that launched the foundations of international law.<sup>42</sup>

Less discussed, however, are the racial ideologies present in this shaping. One example arises from Grotius’ early role as an attorney before the Dutch courts.<sup>43</sup> He argued that his client and cousin Captain Van Heemskerck was legally right in waging war against Portuguese ships in order to protect his own ship and crew.<sup>44</sup> He justified this argument of a right of private war, in part, by characterizing the Portuguese traders as brutish and uncivilized in their murderous treatment of the indigenous peoples of Indonesia.<sup>45</sup> Thus,

38. See, e.g., S. Langdon & Alan Gardiner, *The Treaty of Alliance between Hattusili, King of the Hittites, and the Pharaoh Ramesses II of Egypt*, 6 J. OF EGYPTIAN ARCH. 179 (1920); ARISTIDE THEODORIDES, THE CONCEPT OF LAW IN ANCIENT EGYPT, IN THE LEGACY OF EGYPT 291 (J.R. Harris ed., 1971); J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 YALE J. L. & HUM. 111 (2012).

39. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, 43 TRANSACTIONS OF THE AM. PHIL. SOC. 333–808 (1953) (defining “*humanitas*” as “the human tendency as an ethical commandment, benevolent consideration for others”).

40. HUGO GROTIUS, DE JUR BELLO AC PACIS 55 (1625) (Francis W. Kelsey trans., 1925) (“The disputes arising from those who are held together by no common bond of civil laws to decide their dissensions, who formed no national community, or the numerous unconnected communities. . . all bear a relation to the circumstances of war and peace”). See also Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L. L. 1 (1946).

41. Grotius, *supra* note 40, at 35. See generally Martin Van Gelderen, *The Challenges of Colonialism: Grotius and Vitoria on Natural Law and International Law*, 14 GROTIANA 3 (1993); THE GROTIAN MOMENT IN INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al, eds., 1985).

42. See Boutros Boutros-Ghali, *The Role of International Law in the Twenty-First Century: A Grotian Moment*, 18 FORDHAM INT’L L. J. 1609 (1995); RICHARD TRUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999); B.S. Chimni, *The Eighth Annual Grotius Lecture: A Just World Under Law: A View from the South*, 22 AM. U. INT’L L. REV. 199, 202 (2007); Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Change*, 43 CORNELL INT’L L. J. 439 (2010).

43. OONA A. HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 8–9 (2018).

44. *Id.* at 11 (“According to Grotius, all human beings are born with the right to defend their life and property, enforce their agreements, and punish crimes with violence. This right of ‘private war,’ as Grotius called it, was conferred on all individuals by the moral law, or to use Grotius’s terminology again, by the ‘law of nature.’”).

45. *Id.* at 10–13 (“To substantiate these accusations, Grotius cited a letter found by Van Heemskerck’s men aboard a captured Portuguese frigate. . . [describing] a Dutch expedition to the Chinese town of Macao in September 1601. . . . The Portuguese threw the captives in a cave and tortured them. The letter reported that seventeen were hanged on the orders of the Portuguese magistrate. . . .”).

according to Grotius, not only was his cousin's seizure of a Portuguese trading vessel legally permissible but it was also morally defensible in its alleged protection of the indigenous people from horrid Portuguese atrocities.<sup>46</sup> Grotius glossed over details about Van Heemskerck's own engagement in holding captives aboard his ships, purportedly for purposes of slave trading.<sup>47</sup> This example illustrates how racial ideologies shaped international law's foundations.

Almost a century later, the rise of Rights of Man movements took place amid the lucrative and atrocious Trans-Atlantic slave trade. Both the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and Citizen of 1789 are praised for their role in marking the beginning of a new era in which law was intended to secure basic rights and protections.<sup>48</sup> The noble ideas of life, liberty, and justice for all remain with us today. Yet, these documents and the new governments that sprung from them did little for the rights of the millions of enslaved women, men, and children or oppressed indigenous peoples deemed racially inferior and unworthy of such inherent rights.

We also hear little of the all-important Haitian Revolution of 1791–1804 that resulted in the end of slavery and French colonial rule in Haiti.<sup>49</sup> Instead of being lauded as the hallmark for human rights that it is,<sup>50</sup> the Haitian Revolution is often omitted from histories of international law.<sup>51</sup> Moreover, Haiti was punished egregiously for seeking its independence and it took 122 years for it to pay off debts levied by France and enforced by the United States.<sup>52</sup>

46. *Id.* at 6–11.

47. It is not known from where those enslaved aboard the ship were taken. See, e.g., Peter Borschberg, *The Seizure of the St. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Jobor Alliance (1602-c.1616)*, 33 J. SOUTHEAST ASIAN STUDIES 31, 43 (2002) ("Second, the presence of women and possibly children can also be taken as evidence that the Portuguese were actively involved in shipping human cargo out of China."); HATHAWAY & SHAPIRO, *supra* note 43, at 3.

48. THE DECLARATION OF INDEPENDENCE (U.S. 1776); THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (FR. 1789).

49. *The Haitian Revolution*, ENCYCLOPEDIA BRITANNICA (2019), <https://www.britannica.com/topic/Haitian-Revolution> [<https://perma.cc/33CC-7EPP>].

50. Sabelo J. Ndlovu-Gatsheni, *Nelson Mandela and the Decolonial Paradigm of Peace*, in THE ROUTLEDGE HISTORY OF WORLD PEACE SINCE 1750 155–56 (Christian Philip Peterson et al. eds., 2019) ("The foundation for these decolonial struggles is the Haitian Revolution of 1804 which was spearheaded by the enslaved black people and produced the first black republic of Haiti.")

51. See, e.g., HATHAWAY & SHAPIRO, *supra* note 43, at 558, 564 (referencing the American Revolution and the French Revolution respectively but omitting coverage of the Haitian Revolution); ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017) (discussing how the law of nations and customary international law shaped the U.S. Constitution and omitting coverage of the Haitian Revolution, illustrating how it is not typically included in the traditional telling of how state practice shaped the behavior of nations).

52. Kim Ives, *Haiti: Independence Debt, Reparations for Slavery and Colonialism, and International "Aid"*, CENTRE FOR RESEARCH ON GLOBALIZATION (May 10, 2013), <https://www.globalresearch.ca/haiti-independence-debt-reparations-for-slavery-and-colonialism-and-international-aid/5334619> [<https://perma.cc/4LCR-MNTD>]. For the history of the Haitian Revolution, see generally C. L. R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION (1989).

The juxtaposition of these three early human rights movements evidences the racialized oppression present within human rights movements themselves. Such new rights were for some, but not for all, especially not for people deemed racially inferior. An accurate framing of the history of international human rights requires acknowledging this reality.

The next historical moment that played a critical jurisgenerative role in the shaping of international law and human rights concerns efforts to abolish the Trans-Atlantic slave trade and slavery.<sup>53</sup> For centuries, international law or its predecessors protected the legal rights of private citizens to import and export human beings as property, and the economies of participating nations benefitted greatly from this international trade regime. In 1807, this state practice changed, as both the United States and the United Kingdom passed legislation prohibiting the importation of slaves, although slavery itself remained legal.<sup>54</sup> Because enforcement of the banned slave trade was so poor, international tribunals were set up in Sierra Leone, Brazil, and elsewhere, establishing an early example of the peaceful resolution of international disputes through law.<sup>55</sup> The abolition of the slave trade helped establish slavery as one of the first *jus cogens* norms under international law, paving the way for the idea of preemptory norms.<sup>56</sup>

Despite these gains, challenges remained. The United States was reluctant to let go of the slave trade and, later, slavery. In 1820, Congress passed an amendment to the 1819 Act to Protect the Commerce of the United States and Punish the Crime of Piracy.<sup>57</sup> Section 5 provides the seminal language linking slavery to the crime of piracy, stating that

“if any citizen of the United States, being of the crew or ship’s company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship’s company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto not held to service by the laws of either of the states or territories of the United States with intent to make such negro or mulatto a slave or shall on board any such ship or vessel, offer or attempt to

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53. See generally MARTINEZ, *supra* note 34 (demonstrating how tribunals set up in Cuba, Brazil, and Sierra Leone during the slave trade formed the first international adjudicative bodies designed to hear human rights cases).

54. Act Prohibiting Importation of Slaves, 2 Stat. 426 (1807); Abolition of the Slave Trade Act, An Act of the Parliament of the United Kingdom (1807).

55. MARTINEZ, *supra* note 34.

56. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 68 (1996).

57. 3 STAT. 510 (1819). An Act to continue in force “An act to protect the commerce of the United States, and punish the crime of piracy,” and also to make further provisions for punishing the crime or piracy, Stat. I, Chap. CXIII, 17th Cong. § 4 (1820).

sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or any where on tide water, transfer or deliver over, to any other ship or vessel, any negro or mulatto not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate; and, on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death.”<sup>58</sup>

To avoid detection under the new law, American slave traders used foreign vessels and imported slaves to Cuba to smuggle them into the United States.<sup>59</sup> U.S. courts and juries were reluctant to criminalize violations against their white brethren for the benefit of slaves they viewed as property.<sup>60</sup> The end of the Civil War and the legal abolition of slavery through the 13th Amendment to the U.S. Constitution formally marked the end of slavery in America.<sup>61</sup> It also ushered in a new era of racism.

Abolishing slavery under domestic and international laws was only the beginning of the legal battles to come. In the United States, the Thirteenth Amendment cases sought redress for continued discrimination against African Americans in the law, economy, and society.<sup>62</sup> In *Plessy v. Ferguson*, the Supreme Court determined that racial segregation and the use of racial categories was legally permissible. The Court reasoned that “[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.”<sup>63</sup> This historic case is remembered as a cardinal example of law upholding racial discrimination by means of racial segregation.

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58. *Id.* § 5.

59. HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870* 763 (1997).

60. *Id.* The law was tested during the 1854 trial of James Smith, who was convicted of bringing hundreds of slaves from Angola to Trinidad.

61. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”). The Civil Rights Act of 1866 followed providing citizenship rights and equal protection rights to African Americans.

62. See, e.g., *U.S. v. Rhodes*, 27 F. Cas. 785 (1866); *Blyew v. U.S.*, 80 U.S. 581 (1872); *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Hodges v. United States*, 203 U.S. 1 (1906).

63. *Plessy v. Ferguson*, 163 U.S. at 543.

By the early twentieth century, the Trans-Atlantic Slave Trade and slavery were banned under international law.<sup>64</sup> But racist practices used by governments against people, such as the British Empire's atrocities in its colonies in India and Africa, remained commonplace. Such practices were rooted in and justified by ideologies of racial superiority that also shaped the making of the modern international legal order and the United Nations itself. The San Francisco round of negotiations would serve as home for such discussions. At question was how the UN Charter would frame equal rights and self-determination.<sup>65</sup> This discussion of self-determination influenced the subsequent negotiations on how to address the principle of trusteeship of non-self-governing territories and colonial rule. Tasked with drafting this part of the Charter, the Coordination Committee stated that it "understands that the principle of equal rights of the peoples and that of self-determination are two complementary parts of one standard of conduct."<sup>66</sup> China, Iraq, and the Soviet Union wanted the Charter to reference independence, whereas the British argued for liberty instead; if the Charter asserted a right to independence, that would be disastrous for their colonial rule.<sup>67</sup> Herein, the issue of racial superiority was directly raised by the delegate from The Netherlands who discussed the "humiliation caused by the assertion of racial superiority."<sup>68</sup> Dr. W. E. B. Du Bois, who led the National Association for the Advancement of Colored People's ("NAACP") delegation to the San Francisco conference, urged the United Nations to expressly address the problem of racism against African Americans.<sup>69</sup> The fight to apply newly established international human rights to African Americans' struggle against racism during the founding of the United Nations was not met with great support.<sup>70</sup> In the end, the UN Charter and the Universal Declaration of Human Rights ("UDHR") solidified what would become the new, post-war world order. But these foundational documents also solidified a renewed commitment among nations to maintaining the status quo of ra-

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64. Slavery Convention, Sept. 25, 1926, 60 U.N.T.S. 253.

65. RUTH B. RUSSELL & JEANNETTE E. MUTHER, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945* (1958). See generally SUSAN BUTLER, *ROOSEVELT AND STALIN: PORTRAIT OF A PARTNERSHIP* (2015).

66. RUSSELL & MUTHER, *supra* note 65, at 812.

67. *Id.* at 815-16.

68. *Id.* at 823 n.27.

69. W.E.B. DU BOIS AND THE NAACP, *A STATEMENT ON THE DENIAL OF HUMAN RIGHTS MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS* (Oct. 23, 1947), <https://www.aclu.org/appeal-world> [<https://perma.cc/PWG3-SK3V>].

70. *Id.* (1947). See generally Henry J. Richardson, *Dr. Martin Luther King, Jr. as an International Human Rights Leader* 52 *VILL. L. REV.* 471, 473-475 (2007) (recalling the history of the 'Black International Tradition' and the efforts of W.E.B. DuBois, the NAACP, Thurgood Marshall, Dr. Martin Luther King Jr., and other civil rights leaders in shaping international human rights and the creation of the United Nations); CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN-AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* 108 (2003).

cial superiority. Those who hoped that the United Nations would do more to protect people from racism were greatly disappointed.

The end of the war and the birth of the United Nations marked a new era of human rights movements across the world. In the United States, after the war, and because of the war, African American soldiers returning home faced renewed racism even as they had risked their lives for their country abroad. This, along with other complex factors, helped to spur the series of political protests, economic boycotts, and organized cultural resistance that would become the Civil Rights Movement in the United States.<sup>71</sup> The NAACP and other groups called for human rights in addition to civil rights. Dr. Martin Luther King Jr.'s policy of non-violent resistance was deeply rooted in the early works of Mahatma Gandhi and other human rights leaders.<sup>72</sup> Just before his assassination, Dr. King spoke out about the link between international human rights and the African American struggle for civil rights.<sup>73</sup> Adam Clayton Powell, who led the Harlem civil rights marches in the 1940s, also drew inspiration from and gave inspiration to the decolonization movement in Africa.<sup>74</sup>

The end of World War II also brought about the beginning of the end of colonial rule in many countries as colonizing nations' economies and their hold over their colonies weakened. With seventeen countries gaining independence, 1960 was deemed the "year of independence" for Africa.<sup>75</sup> This would raise controversies about the foundations of international law. Why should sovereignty protect a government that was violating the foundational right to self-determination and perpetuating numerous human rights abuses that international law had begun to prohibit?

Decades later, in the mid-1990s, apartheid finally came to an end. Since its creation in 1948, the Union of South Africa had legalized a system of institutional racial segregation and discrimination called apartheid.<sup>76</sup> This practice was known and tolerated by the international community and under international law for years. As early as 1949, the UN General Assembly requested that the I.C.J. issue an advisory opinion on the international legal status of the territory of South-West Africa and any arising international obligations of the Union of South Africa.<sup>77</sup> The I.C.J. found unani-

71. CNN Library, *1965 Selma to Montgomery March Fast Facts*, CNN (Feb. 28, 2018), <https://www.cnn.com/2013/09/15/us/1965-selma-to-montgomery-march-fast-facts/index.html> [<https://perma.cc/42VP-3NUR>].

72. See Henry J. Richardson III, *Two Treaties, and Global Influences of the American Civil Rights Movements, Through the Black International Tradition*, 18 VA. J. SOC. POL. & L. 59, 64 (2010) (further recalling the long history of blacks shaping international law and international relations).

73. See generally TOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2007).

74. Richardson, *supra* note 72, at 64 (noting Clayton Powell's attendance at the 1955 Bandung Conference of "third world" peoples).

75. France 24, *1960: The year of independence* (Feb. 14, 2010), <https://www.france24.com/en/20100214-1960-year-independence> [<https://perma.cc/RSC2-D2FD>].

76. POPULATION REGISTRATION ACT, No. 30 (1950) (S. Afr.).

77. International Status of South-West Africa, 1950 I.C.J. 128.

mously that "South-West Africa is a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920" and its opinion failed to discuss the problem of apartheid.<sup>78</sup> The issue came up again in 1966, but the Court determined that Ethiopia and Liberia lacked standing to bring the matter before the Court.<sup>79</sup> In 1971, the UN Security Council asked the I.C.J. to issue an advisory opinion on the legality of South Africa's presence in Namibia, once again raising the ongoing tensions surrounding South Africa's continuation of apartheid.<sup>80</sup> The I.C.J. held that South Africa's involvement in Namibia was illegal and it upheld that racial discrimination constitutes a violation of the UN Charter.<sup>81</sup>

When peaceful democratic elections were successfully held there in 1994, South Africa's human rights victory was celebrated around the world. Apartheid came to an end, marking the triumph of decades-long efforts by Nelson Mandela and other African National Congress ("ANC") leaders and countless other South Africans.<sup>82</sup> In 2002, apartheid was defined as a crime under the Rome Statute.<sup>83</sup> This definition built upon the earlier one provided in the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, which had declared it a crime against humanity.<sup>84</sup>

These stories stand as a necessary reminder that an accurate historiography of human rights and international law must be inclusive of many histories. In celebrating human rights' remarkable achievements, we must also acknowledge its failures. Adopting a critical race theory analysis of the history of human rights is all the more necessary given that it has largely been constructed by nations, leaders, and scholars who are overwhelmingly from Western Europe and North America and who overwhelmingly identify racially as white.

78. *Id.* at 143.

79. South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), 1966 I.C.J. 5; *cf.* U.N. Charter art. 77 (stating that the trusteeship system applies to territories under mandate).

80. Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 58 ("by 13 votes to 21. that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory.").

81. *Id.* at 62. Declaration of President Sir Muhammad Zafrulla Khan ("The policy of *apartheid* was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination.") See David Weissbrodt and Georgina Mahoney, *International Legal Action Against Apartheid*, 4 L. & INEQ. 485 (1986).

82. *The End of Apartheid*, U.S. DEPARTMENT OF STATE ARCHIVE (2009), <https://2001-2009.state.gov/t/pa/ho/time/pcw/98678.htm> [<https://perma.cc/ZD9V-E4LD>].

83. The Rome Statute established the first permanent court for the prosecution of international crimes, the International Criminal Court. See Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 3 (defining apartheid as an inhumane crime "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime").

84. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 (defining the crime of apartheid).



### B. Sources of International Law Prohibiting Racial Discrimination

After World War II ended, treaties, international courts and tribunals, and diplomatic exchanges between nations proliferated, marking a new era of international cooperation. As a result, international law now governs hundreds of aspects of our lives, including establishing universal time and allowing us to watch television from around the world.<sup>85</sup> This section lists the modern international legal framework governing racial discrimination by identifying, in chronological order, the central declarations and treaties that form the basis for the prohibition of racial discrimination.<sup>86</sup> None of the treaties use or define the term racism. Two declarations do.

#### UNITED NATIONS CHARTER (1945)<sup>87</sup>

The UN Charter, the foundational source of treaty-based international law, does not include the term racism in its text.<sup>88</sup> Nor does it discuss slavery, colonialization, or apartheid, all of which were politically salient topics at the time of the Charter's creation. Here is what the Charter does clarify with regard to the subject. In Article 1.3, the Charter encourages "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>89</sup> Article 13.1.b authorizes the General Assembly to study and to make recommendations on international cooperation, again, without distinction to race and other factors. Similar language is found in Article 55.c discussing international economic and social cooperation and in Article 76.c in discussing the human rights objectives of the trusteeship system.

#### UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)<sup>90</sup>

Adopted in 1948 by the UN General Assembly, the Declaration specifies for the first time a set of human rights intended to be universal in scope. Article 4 prohibits slavery and sets forth the right to be free from slavery. Article 7 sets forth the right to equal protection under the law against discrimination. The Declaration is not a treaty and, although some have argued it is now a form of customary international law, it is generally not viewed as creating binding legal obligations.<sup>91</sup>

85. AMERICAN SOCIETY OF INTERNATIONAL LAW, *INTERNATIONAL LAW: 100 WAYS IT SHAPES OUR LIVES 2* (2018), <https://www.asil.org/sites/default/files/100Ways/100Ways.pdf> [<https://perma.cc/D48R-LXG5>] ("By establishing the prime meridian and Greenwich Mean Time, later updated to 'universal time' (Final Act of the International Meridian Conference, 1884)."); *Id.* at 3 ("By providing equal access to the international satellite communications network, as stated in UN General Assembly Resolution 1721 of 1961.").

86. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

87. U.N. CHARTER.

88. *Id.* at art. 1, ¶1 (identifying the maintenance of peace as the United Nations' first purpose).

89. *Id.* at art. 1, ¶3.

90. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (hereinafter UDHR) (48 votes in favor, 8 abstentions, 2 did not vote, 0 no votes). For an overview of the UDHR, see generally Hilary Charlesworth, *Universal Declaration of Human Rights (1948)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008), <http://opil.ouplaw.com/view/10.1093/law:epil/978019231690/law-978019231690-e887> [<https://perma.cc/52FL-EQ2G>].

91. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 55, 76 (June 21) <https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-02-EN.pdf> [<https://perma.cc/RG78-XB77>] ("the affirmations of the Declaration . . . can bind States on the basis of custom . . . because they constituted a codification of customary law . . . or because they have acquired

**SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE, AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY (1956)<sup>92</sup>**

The United Nations Economic and Social Council convened a conference of Plenipotentiaries that adopted this Convention, as a supplement to the 1926 Convention to Suppress the Slave Trade and Slavery, on September 1, 1956 and it entered into force on April 30, 1957. Article 7 refers to the 1926 Convention on the Abolition of Slavery and defines it as such: "(a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status." The Convention further defines the slave trade and practices similar to slavery, covering debt bondage, serfdom, and slavery through marriage. Article 9 prohibits reservations to this Convention.

**DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES (1960)<sup>93</sup>**

Adopted by the UN General Assembly in Resolution 1512, it declares that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." Article 5 calls for the immediate transfer of power to the peoples to end colonization without distinction to race, creed, or colour.

**DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1963)<sup>94</sup>**

Adopted by the UN General Assembly in Resolution 1904, in its preamble, this resolution states that "any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination either in theory or in practice."

**INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965)<sup>95</sup>**

This treaty entered into force in 1969 and has 88 signatories and 177 parties. Pursuant to Article 2, the treaty condemns and defines racial discrimination and obligates state parties to "pursue by all appropriate means" measures to eliminate racial discrimination and requires state parties not to "sponsor, defend or support" racial discrimination. This includes prohibiting racial segregation and apartheid (Article 3) and criminalizing hate groups (Article 4). Notably, Article 1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

the force of custom through a general practice accepted as law. . . . One right which must certainly be considered a pre-existing binding customary norm which the [Declaration] codified is the right to equality").

92. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

93. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

94. G.A. Res. 1904 (XVIII), United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963).

95. ICERD, *supra* note 3. See also Comm. on the Elimination of Racial Discrimination, General Recommendation no. 32, U.N. Doc. CERD/C/GC/32 at ¶¶21–22 (2009).

<p><b>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)<sup>96</sup></b></p> <p>Articles 2, 4, 24, and 26 reference provisions that shall be undertaken without discrimination on the basis of race (and other factors). Article 2 provides: "Each State Party to the present Covenant 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." Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The treaty does not reference racism.</p>
<p><b>DECLARATION ON RACE AND RACIAL PREJUDICE (1978)<sup>97</sup></b></p> <p>Adopted by the General Conference of the UN Educational, Scientific and Cultural Organization ("UNESCO") on November 27, 1978, it provides detailed and nuanced reference to race and racism. It unequivocally states in Article 1 that "all human beings belong to a single species and are descended from a common stock." Article 1.2 names a "right to be different." Article 2.2 defines racism as including "racist ideologies, prejudiced attitudes, discriminatory behavior, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable. . . ."</p>
<p><b>DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS OR LINGUISTIC MINORITIES (1992)<sup>98</sup></b></p> <p>Adopted by the UN General Assembly on December 18, 1992, this declaration protects "national or ethnic, cultural, religious and linguistic identity of minorities" pursuant to Article 1.1. It further advances specific protections for minorities and calls upon states to achieve those ends.</p>
<p><b>DURBAN DECLARATION AND PROGRAM OF ACTION (2001)<sup>99</sup></b></p> <p>A declaration drafted and adopted by governments attending the World Conference Against Racism (Durban I) in 2001 that was the result of the UN General Assembly's Resolution 52/111. The text of the declaration contains numerous uses of the term racism and links it with racial discrimination, xenophobia, and related intolerance. It addresses compensation for colonialism and for slavery. A draft text of the declaration named Zionism in connection to racism causing the delegations from Israel and the U.S. to withdraw.</p>
<p><b>DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007)<sup>100</sup></b></p> <p>Adopted by the UN General Assembly on September 13, 2007, this declaration affirms that indigenous peoples are equal to all other peoples pursuant to Article 2 and advances their civil, political, social, economic, and cultural human rights.</p>

96. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. See also Human Rights Comm., General Comment 18, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

97. UNESCO Twentieth Session of the General Conference, *Declaration on Race and Racial Prejudice*, 3/1.1/2 (Nov. 27, 1978).

98. G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992).

99. Rep. of the Durban Review Conference, A/CONF.211/8 (Apr. 20-24, 2009).

100. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (The U.N. Declaration was adopted by a majority of 143 states in favor, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).).

### C. ICERD – A Missed Opportunity?

In April 1963, Dr. Martin Luther King Jr. issued his *Letter from Birmingham Jail*.<sup>101</sup> In August of that same year, he delivered his famed *I Have a Dream* speech during the March on Washington.<sup>102</sup> It was the height of the Civil Rights Movement in the United States and the same spirit of freedom and anti-racism was exerting itself around the world. That year, Kenya gained independence from British colonial rule and there was a growing international consensus against the use of apartheid in South Africa.<sup>103</sup> Against this historical backdrop, the UNGA adopted the Declaration on the Elimination of All Forms of Racial Discrimination.<sup>104</sup> The world was beginning to acknowledge that racism, whether manifested through colonialism or apartheid or xenophobia, was a harm that international law must address.<sup>105</sup> Drafted two years later, on December 21, 1965, ICERD became the first universal human rights treaty to directly address racial discrimination. It entered into force on January 4, 1969.<sup>106</sup> During the drafting period, Representative Morozov of the U.S.S.R., stated that “[r]acism and racial discrimination are such shameful and odious products of imperialism and colonialism that all peoples and all decent human beings are resolutely demanding that they be ended.”<sup>107</sup> Motivated by racist events of the day, namely swastika paintings, anti-Semitism, and racial hatred against non-white peoples prevalent in the late 1950s, the Convention today has 179 states parties.<sup>108</sup>

The Convention’s objective, further explained in its Preamble, was nothing less than the “elimination of all forms of racial discrimination.”<sup>109</sup> Its legitimacy and authority were directly linked to the legally binding obligations all nations undertook to uphold regarding human rights as expressed in the UN Charter.<sup>110</sup> The representative from Poland in the Commission on Human Rights viewed the preamble as a “sort of *ratio legis* of the instru-

101. Martin Luther King, Jr., *Letter from a Birmingham Jail*, 27 NEGRO HISTORY BULLETIN (1964).

102. Keynote speech at the “March on Washington” (Aug. 28, 1963), reprinted in Martin Luther King, Jr., “I Have a Dream,” in TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 218–19 (James M. Washington ed., 1986).

103. The UN Security Council (UNSC) adopted a resolution calling for a voluntary embargo for South Africa. See S.C. Res. 182 (Dec. 4, 1963).

104. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, *supra* note 94.

105. PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 72 (2016). (The author served as a member of CERD for thirteen years.)

106. ICERD, *supra* note 3. ICERD entered into force January 4, 1969. It was adopted with 106 votes in favor, none against, and one abstention by Mexico. U.N. GOAR, 20th Sess., 1406th plen. mtg. at 60 U.N. Doc. A/PV.1406 (Dec. 21, 1965).

107. THORNBERRY *supra* note 105, at 1 (citing A/PV1406, *supra* note 106, ¶113).

108. ICERD, *supra* note 3.

109. *Id.* at Preamble.

110. A/PV.1406, *supra* note 111, ¶¶14, 11 (“What can be reiterated also is the correlative consensus of the Committee that these fundamental freedoms should not be employed to violate the purposes and objectives of this Convention.”).

ment which it preceded, the preamble was an important factor in interpretation."<sup>111</sup> The Canadian representative remarked that the draft preamble rested on "its strength and not its length."<sup>112</sup> Representative Willis from the U.S. characterized ICERD as a "lofty statement of ideals."<sup>113</sup>

Consisting of twenty-five articles, the treaty defines racial discrimination in Article 1.1 as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."<sup>114</sup> Here, racial discrimination is linked to an act (distinction, exclusion, restriction or preference) that is connected to either a purpose or an effect. The treaty's vague language does not define race and, instead, expands its contextual reference to include color, descent, national origin, or ethnic origin. Thus, the violation prohibited by international law is linked to discrimination on the basis of race without clarity about what that means.

This wording of the treaty is a product of disagreement that begat its creation, as revealed by the *travaux préparatoires*. In writing a treaty that would outlaw racial discrimination, the drafters struggled to define the harm and conceptualize what that meant. There was disapproval that the preamble only referenced racial discrimination "in some parts of the world," which gives plausible deniability to governments.<sup>115</sup> The discussion turned to various forms of racial discrimination. Jordan proposed a list: "fascist, colonial, tribal, Zionist."<sup>116</sup> Western states stressed the racial discrimination that emanated from Nazi ideology and anti-Semitism.<sup>117</sup> African nations and the U.S.S.R. discussed racial discrimination as a component of colonialism and apartheid.<sup>118</sup> Some sought to name racial discrimination more specifically, whether as anti-Semitism, Nazism, or fascism. The representative from Saudi Arabia argued that "there were countless 'isms' which would have to be enumerated if any one was."<sup>119</sup> He inquired if anti-Semitism was best understood as religious intolerance not racial, raising the question of whether the animus against Jewish people aims at religion or at Semitic origin.<sup>120</sup> The representative from Israel responded that "[t]he Jewish people

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111. THORNBERRY, *supra* note 105, at 72 (quoting the Representative of Poland in the Commission on Human Rights, U.N. Economic and Social Council, Twentieth Session of the Comm. on Human Rights, E/CN.4/SR.777, 9 (Apr. 7, 1964)).

112. *Id.* at 72, at n.1.

113. A/PV.1406, *supra* note 106, ¶¶109–10.

114. ICERD, *supra* note 3, art. 1.1.

115. THORNBERRY, *supra* note 105, at 74.

116. *Id.* at n.19.

117. *Id.* at 2.

118. *Id.*

119. *Id.* at 74 n.20 (citing G.A.O.R. Twentieth Session of the General Assembly, 1300th Meeting of the Third Committee, A/C.3/SR. 1300, ¶6 (Oct. 12, 1965)).

120. *Id.* at 75.

knew exactly what anti-Semitism was, for it had too long been its victim, whether for racial, religious or other reasons; to those who had suffered from racial discrimination, qualifiers were not important.”<sup>121</sup> Representatives from many countries asserted that racial discrimination was either not present in their country or did not apply to their minorities or indigenous peoples.<sup>122</sup> Ultimately, the proposal by Greece and Hungary during the 1311th meeting, that the Convention should not reference specific forms of racial discrimination in the treaty, almost prevailed.<sup>123</sup> As specifically cited in Article 3 of ICERD, apartheid proved to be an exception on the basis, as argued by Nigeria, that it was an official policy of a UN member state, and that the Union of South Africa had denied that apartheid was racially discriminatory.<sup>124</sup> Racial segregation was another.<sup>125</sup> As is often the case, an effort to reach agreement among divergent views came at the cost of adopting specific commitments and definitions.

In the end, the final text of the 1965 treaty, for all of its groundbreaking ideas, failed to name or to define forms of racial discrimination beyond apartheid and segregation. Its uncertainty about how rigorously it intended to constrain state behavior is apparent in its framing. For example, the final language of the Convention says “any doctrine of superiority based on racial differentiation” not “any doctrine of racial differentiation or superiority” as appears in the Declaration.<sup>126</sup> As Keane argues, this construction of the language in the Convention suggests that there may be separate races instead of repudiating the entire concept of race, as science has now done.<sup>127</sup> He says this “departure from the position expressed by the signatories to the Declaration is similar to the difference between the first and second UNESCO statements on race, the second of which refused to deny the existence of . . . race in line with its predecessor, . . . condemning only the notion of racial superiority.”<sup>128</sup> This, in many ways, repeats the drafting of the UN Charter, which does not reference racism or racial discrimination. Instead, in four instances, it refers to state commitment that shall be under-

121. *Id.* (citing G.A.O.R. Twentieth Session of the General Assembly, 1301st Meeting of the Third Committee, A/C.3/SR 1301, ¶38 (Oct. 12, 1965)).

122. *Id.* at 2.

123. *Id.* at 74 (“This was despite an earlier decision to include references to segregation and apartheid in Article 3 of the Convention, an inconsistency that troubled some delegates.” Greece and Hungary proposed a draft resolution A/C.3/L.1244 that the Convention not include any specific references regarding racial discrimination that was adopted by 82 to 12 with 10 abstentions.)

124. *Id.*

125. ICERD, *supra* note 3, art. 3 (“States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”)

126. ICERD, *supra* note 3, Preamble. *See also* United Nations Declaration on the Elimination of All Forms of Racial Discrimination, *supra* note 94, Preamble.

127. THORNBERRY, *supra* note 105, at 87.

128. DAVID KEANE, CASTE-BASED DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW 176–77 (2007).

taken “without distinction as to race.”<sup>129</sup> ICERD, as interpreted through the context of its preamble, links the meaning of racial discrimination as understood by the drafters to the contexts of colonialism and apartheid in South Africa. The Convention did not go as far as to name racism, only “racist doctrines and practices” in the Preamble and “racist activities” in Article 4.<sup>130</sup> It does not discuss ethnic minority rights, which were also omitted from the UN Charter and the UDHR.<sup>131</sup> As Thornberry remarks, “[i]t is not abundantly clear from the *travaux* how the experts and delegates involved in the drafting, who perceived racial discrimination as necessitating an enduring instrument to combat it, reflected on the fit between the title and the elusiveness of the target.”<sup>132</sup>

All of these historical and legal observations point to a central challenge: that the lack of definitional clarity plagues nations’ attempts to eliminate racial discrimination to this day. Here, state interests and the power of certain states to protect their interests above others frustrated attempts to move forward a treaty that directly named racism. If countries could maintain the view that racism was only a problem in certain places because of certain state-sponsored practices, there would be no need for a universal treaty against racism.<sup>133</sup> In short, it remained the case in 1965 that while most countries readily acknowledged the most disturbing examples of international legal wrongs arising from slavery, colonialism, apartheid, and segregation, many were unwilling to accept that racism was a matter of common concern to be governed by international law.

The ICERD treaty established the Committee on the Elimination of Racial Discrimination (“the Committee”), which carries out the treaty’s charge.<sup>134</sup> States that are party to ICERD must submit regular reports to the Committee on how they are fulfilling their treaty commitments. In 2011, the Committee published selected decisions from 1988–2011.<sup>135</sup> Covering claims by individuals submitted directly to the Committee pursuant to Article 14 of ICERD, the report documents allegations of racial discrimination in employment, inability to apply to a legal bar association, bias by jurors during trial, and reluctance to enforce laws preventing racial discrimination against renting or buying a home.<sup>136</sup> Each of these cases rests

129. U.N. Charter art. 1.3, art. 13.1.b, art. 55.c, art. 76.c.

130. *Id.*, Preamble, art. 4.

131. THORNBERRY, *supra* note 105, at 3.

132. *Id.* at 73.

133. *Id.* at 29 (noting the same conditions for the creation of the Declaration: “The Declaration is hesitant on the ubiquity of racial discrimination, referring to its ‘manifestations’ in certain areas of the world’, some of which are imposed by certain governments by means of legislative, administrative, or other measures, in the form, *inter alia*, of apartheid, segregation, and separation, as well as by the promotion and dissemination of doctrines of racial superiority and expansionism.”).

134. Press Release, Office of the High Comm’r for Human Rights, Committee on the Elimination of Racial Discrimination Concludes its Ninety-Seventh Session (Dec. 14, 2018).

135. ICERD, *Selected Decisions of the Comm. on the Elimination of Racial Discrimination*, Vol. 1 (2012).

136. *Id.*

upon a state's obligation to create and enforce laws preventing racial discrimination. In many of the cases, the alleged violation of human rights is also caused by private individuals who were allegedly thinking and behaving in racist ways. The Committee's response ranged from inviting a state to provide an update to the Committee in the future to suggesting how the state should improve the application of its laws and policies. There are eight mentions of the word "racism" in the report and, other than referring to an organization with the term in its name, the term is exclusively used by those individuals who submitted the facts as they recall their experiences.<sup>137</sup> Herein, we see how a person experiences Islamophobia "as a form of racism."<sup>138</sup> This kind of example once again begs the question as to the definition of racism and its relationship to anti-Semitism, Islamophobia, and xenophobia. However, the Committee, as author of the report, does not itself use the term racism or signal that its decisions addressed the complaints of racism.<sup>139</sup>

By comparison, another United Nations human rights body has taken up discussion about racism more directly. The Ad Hoc Committee on the Elaboration of Complementary Standards, established by the UN Human Rights Council in 2007, has a mandate to

elaborate, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination, filling the existing gaps in the Convention, and also providing new normative standards aimed at combating all forms of contemporary racism, including incitement to racial and religious hatred.<sup>140</sup>

At its ninth session, which focused on xenophobia, the Ad Hoc Committee experts expressed meaningful concerns about the rise of racism, citing the term several times in their discussion of xenophobia. They noted the need to better define xenophobia and had some disagreement about the inclusion of Islamophobia.<sup>141</sup>

This demonstrates, once again, the continued challenges surrounding the definition of racism and its relationship to other forms of harm based on racial ideology. In terms of solutions, ideas abound about strengthening national measures, such as laws on discrimination, or the criminalization of

137. *Id.*

138. *Id.* at 204.

139. *Id.*

140. *The Ad Hoc Comm. on the elaboration of complementary standards*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2019), <https://www.ohchr.org/EN/Issues/Racism/AdHocCommittee/Pages/AdHocIndex.aspx> [<https://perma.cc/QJ82-YMG6>].

141. Human Rights Council, Rep. of the Ad Hoc Comm. on the Elaboration of Complementary Standards on its ninth session, U.N. Doc. A/HRC/37/76 ¶17 (Feb. 9, 2018).



hate speech via an Additional Protocol.<sup>142</sup> There were also calls for public education to raise awareness. The representative from Tunisia, speaking on behalf of the African Group, recalled that “[t]he contemporary manifestations of racism included xenophobia, Islamophobia, anti-Semitism, propagation of racism and xenophobic attacks through cyberspace, racial profiling and incitement to racial, ethnic and religious hatred. She said that victims of profiling required better protection from these manifestations. Maximum remedies should be applied and impunity for perpetrators of acts of racism should be eliminated.”<sup>143</sup> The statement of support by the EU centered around its commitment to two core human rights principles: equality and non-discrimination<sup>144</sup> and there was discussion about legislation adopted by the EU to prohibit racial discrimination.<sup>145</sup> In its final report, the Ad Hoc Committee explicitly names racism, concluding:

The fight against racism, racial discrimination, xenophobia and related intolerance was a collective imperative that required the support and contributions of all Member States, if peaceful global coexistence was to be achieved. The way forward was for all to work together at all levels to combat the growing trend of xenophobia and racial profiling. Efforts must be redoubled to limit the contemporary forms of racism that were on the increase, particularly those forms targeting, among others, persons of African descent, immigrants and refugees. Those countries currently plagued by growing racism must take the Durban Declaration and Programme of Action seriously and ensure that it guided domestic policies.<sup>146</sup>

Overall, the inner workings of these human rights bodies reveal important and enlightening truths. Among them is the reality that victims of racism often use the word racism, and not just racial discrimination, to describe their experiences. One reason for this may be because racism signifies a connection to the person doing the racist act whereas racial discrimination can depersonalize the experience. When a person has been

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142. *Id.* ¶59 (“The representative of the European Union said that she had not yet received comments from all members of her regional group on the Chairperson’s text. Nevertheless, certain points must be clarified regarding the 2008 European Union Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. In particular, she said that the Framework Decision did not define the term “xenophobia” per se but criminalizes certain acts that respond to certain criteria, which notably have to be crimes punishable by law. Hence, the Framework Decision criminalized hate speech but not xenophobic fears and attitudes.”).

143. *Id.* ¶15.

144. *Id.* ¶20.

145. *Id.* ¶23 (“The European Union was of the view that the development of comprehensive anti-discrimination legislation was relevant and it stated that it would continue to engage in the promotion of equality and non-discrimination.”).

146. *Id.* ¶37.

dehumanized by another who is racist, there is a corresponding need to name not just the harmful act but also the person(s) responsible for that act.

## II. NAMING HUMAN RIGHTS RACISM

In the twenty-first century, the word racism is well-known and is used throughout the world. Those who have suffered its pernicious harm understand what it is, as the South African Representative recently affirmed in the Ad Hoc Committee on the Elaboration of Contemporary Standards proceedings.<sup>147</sup> Despite its common usage, the meaning of racism in international law remains elusive. Racism should be named, defined, and recognized as a violation of human rights worthy of international legal protection. It is time for the international legal community to take up this challenge. This section aims to build the foundations for doing so by examining how to define, understand, and conceptualize racism as a violation of international human rights. I first analyze current definitions of racism before deepening current understandings of what racism is through a discussion of research from neuroscience about racial bias in the brain. Finally, I examine ways to frame racism in human rights law.

### A. Defining Racism

Acknowledging that there is no single, universally-accepted meaning of racism, this section examines existing definitions in order to sketch racism's current definitional architecture. As revealed in Part I, there was certainly a paucity of legal engagement with racism in international law and human rights spaces in earlier eras, in part, because for some of the time the word did not even exist or was not in common usage. However, the origins of the word in English date back to at least 1902 and, by 1950, it was defined in a UNESCO publication, *The Race Question*.<sup>148</sup> Therein, the report provides that: “[r]acism is a particularly vicious and mean expression of the caste spirit. It involves belief in the innate and absolute superiority of an arbitrarily defined human group over other equally arbitrarily defined groups”<sup>149</sup> and “[a]s an ideology and feeling, racism is by its nature aggressive.”<sup>150</sup>

Today, English language dictionaries define racism as “a distinctive doctrine, cause or theory,” or “an oppressive and especially discriminatory attitude or belief,”<sup>151</sup> or a “prejudice, discrimination or antagonism directed against someone of a different race based on the belief that one’s own race is

147. *Id.* ¶23 (“racism was not defined in the ICERD either, and yet its meaning was understood.”).

148. See *supra* note 2. See also UNESCO, *supra* note 2, at 3. See generally GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 5 (2002).

149. UNESCO, *supra* note 2, at 3.

150. *Id.*

151. MERRIAM-WEBSTER DICTIONARY, definition of “racism,” <https://www.merriam-webster.com/dictionary/ism> [<https://perma.cc/66HR-BGU5>].

superior.”<sup>152</sup> The concept contains an aspect of animus or “motive or intent to interfere with the exercise of a right.”<sup>153</sup> This can result in an action or behavior such as hate speech, physical violence, or violating someone’s rights that may take the form of racial discrimination. Racism also connotes “[t]he belief that all members of each race possess characteristics, abilities or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races.”<sup>154</sup> Thus, the definition of racism varies.

There are a few instances where nations have adopted or permitted legal definitions of racism in certain regional agreements and bodies that provide important guidance. For example, the European Commission against Racism and Intolerance (“ECRI”) distinguishes racism as “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons,” the emphasis here being on belief.<sup>155</sup> The Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance defines racism as “any theory, doctrine, ideology, or set of ideas that assert a causal link between the phenotypic or genotypic characteristics of individuals or groups and their . . . traits, including the false concept of racial superiority” and acknowledges that racism leads to “racial inequalities, and to the idea that discriminatory relations between groups are morally and scientifically justified.”<sup>156</sup> These sources provide important examples of how to define racism as a legal concept.

A central challenge that arises in defining racism is that its meaning is conceptually connected to one’s understanding of race.<sup>157</sup> Race has no basis in human genetics or biology. Instead, it is a sociological construct that has context-dependent meaning. Race is not a universal concept and has different meanings in Zambia than it does in Japan or the Dominican Republic.

152. OXFORD DICTIONARY, *supra* note 2.

153. DUHAIME’S LAW DICTIONARY, definition of “animus,” <http://www.duhaime.org/LegalDictionary/A/Animus.aspx> [<https://perma.cc/8HG8-W3RL>].

154. OXFORD DICTIONARY, *supra* note 2.

155. ECRI Mandate, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (2019), <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/ecri-s-mandate> [<https://perma.cc/9UU6-MRK7>].

156. Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance art. 1, June 5, 2013, O.A.T.S. A-68 (“4. Racism consists of any theory, doctrine, ideology, or sets of ideas that assert a causal link between the phenotypic or genotypic characteristics of individuals or groups and their intellectual, cultural, and personality traits, including the false concept of racial superiority. Racism leads to racial inequalities, and to the idea that discriminatory relations between groups are morally and scientifically justified. All the theories, doctrines, ideologies, and sets of racist ideas described in this article are scientifically false, morally reprehensible, socially unjust, and contrary to the basic principles of international law; they therefore seriously undermine international peace and security and, as such, receive the condemnation of the States Parties.”).

157. A similar challenge comes from the lack of a definition of xenophobia. For a detailed analysis, see E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. INT’L L. 333 (2018); see also Human Rights Council, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. DOC. A/HRC/32/50 ¶¶36–67 (May 13, 2016).

In the United States, race has been defined via the U.S. Census Form since 1790.<sup>158</sup> On the 2010 census form, the available racial categories were: White; Black, African American or Negro; American Indian or Alaska Native; Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; Native Hawaiian; Guamanian or Chamorro; Samoan; Other Asian; Other Pacific Islander; or some other race, and such races are distinct from a separate category where people can identify as Hispanic, Latino or Spanish origin.<sup>159</sup>

Racism is both conceptually dependent upon the meaning of race and independent as a manifestation of racial ideology that operates through thought, behavior, action, and inaction.<sup>160</sup> UNESCO captured this in their 1950s construction of racism as “[a]n ideology and feeling.”<sup>161</sup> By contrast, racial discrimination, as conceptualized by ICERD, requires an action taken with “purpose or effect” of “nullifying or impairing” one’s human rights.<sup>162</sup> But defined in this way, the concept of racial discrimination misses the deeper root causes of racism, namely the racial ideologies and the biases some hold that influence their actions and behaviors.

Combating racism, therefore, requires understanding it as a manifestation of racial ideology.<sup>163</sup> The common feature that connects racism across countries and spaces is its role in advancing a social hierarchy that places some people at the bottom and others at the top based on constructed racial categories. This hierarchy of racial ideology perpetuates a power structure that becomes embedded in law, politics, economic activity, and culture.<sup>164</sup> In turn, racism’s harm stems not only from an offensive action taken but

158. The 1790 Census categorized people as “free White males, free White females, other free persons, and slaves.” *Index of Questions*, U.S. Census Bureau (1790), [https://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/1790\\_1.html](https://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html) [<https://perma.cc/5ZW6-6TEP>]. For the current census form, see *Index of Questions*, U.S. Census Bureau (2019), [https://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/1790\\_1.html](https://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html) [<https://perma.cc/F9JF-DQG9>].

159. 2010 U.S. CENSUS FORM, <https://www.census.gov/2010census/about/interactive-form.php> [<https://perma.cc/97WG-WV4Y>].

160. This can be seen in racial ideology as evidenced during the Nazi Party and Holocaust. See *Victims of the Nazi Era: Nazi Racial Ideology*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/victims-of-the-nazi-era-nazi-racial-ideology> [<https://perma.cc/SQ8N-N67P>]. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (2018); Lawrence D. Bobo, *Somewhere between Jim Crow and Post-Racialism: Reflections on the Racial Divide in America Today*, 140 *DAEDALUS* 11 (2011); David O. Sears & P.J. Henry, *Over Thirty Years Later: A Contemporary Look at Symbolic Racism*, 37 *ADVANCES IN EXPERIMENTAL PSYCHOL.* 95 (2005).

161. UNESCO, *supra* note 2, at 3.

162. ICERD, *supra* note 3, art. 1 (“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”).

163. UNESCO, *supra* note 2.

164. See generally Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991); Camille Gear Rich, *Marginal Whiteness*, 98 *CALIF. L. REV.* 1497 (2010); Nancy Leong, *Racial Capitalism*, 126 *HARV. L. REV.* 2152 (2013).

also from the indignity suffered when a person or group acts with the belief that they are superior to another group on the basis of racial identity.

### B. Understanding Racism (through Neuroscience)

I recall an incident years ago when a white man that I worked with told me he was racist. He said he believed he was inherently better than I was because he was white and I was black.<sup>165</sup> Most people do not go around admitting to others, or even to themselves, that they are racist. But racism's existence is sustained by people who are racist<sup>166</sup> and/or who have racial bias.<sup>167</sup> Racism is also perpetuated by institutions including legal systems that deny people equal protection under the law because they are deemed racially inferior.<sup>168</sup> For example, scholars have identified "shooter bias" where people associate a criminal act such as robbery with black men,<sup>169</sup> the prolific reality of racial profiling in police stops,<sup>170</sup> and incidents of racial bias by judges and other legal decision makers.<sup>171</sup> These studies add veracity to the many human rights claims documenting people's experiences with racism around the world.<sup>172</sup>

But defining racism and documenting its existence is not enough. We also need to better understand why it occurs in order to combat it. This is where neuroscience offers invaluable insights to the discourse.<sup>173</sup> Neuroscience, broadly speaking, is the study of the brain, its organization, and its functions.<sup>174</sup> Neuroscientists study how the brain and the nervous system

165. See, e.g., Touré, *Inside the Racist Mind: Bias is the complex neural interplay between emotions and beliefs*, TIME, May 7, 2012, at 20.

166. BONILLA-SILVA, *supra* note 160.

167. Project Implicit has been tracking data about race and implicit bias since 2002 and provides a list of valuable publications on racial bias and other forms of bias. See *Published Papers using Project Implicit Demo Site Data*, PROJECT IMPLICIT (2011) <https://www.projectimplicit.net/demopapers.html> [<https://perma.cc/J54R-BVAW>].

168. See generally PROJECT IMPLICIT (2011), <http://projectimplicit.org> [<https://perma.cc/69XJ-KEV3>]. See also Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 NYU J. LEGIS. AND PUB. POL'Y 681 (2015); David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L. J. 1053 (2009); and Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

169. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERS. & SOC. PSYCHOL. 876 (2004); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERS. & SOC. PSYCHOL. 181 (2001) (identifying "shooter bias").

170. Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 J. PERS. & SOC. PSYCHOL. 1139 (1995).

171. See, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

172. ICERD, *supra* note 135.

173. For my previous research on neuroscience and decision-making documenting appropriate methodology, use, and limitations see Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1, 17–22 (2018).

174. For an overview of the fundamentals of neurons, see Annabelle M. Belcher & Adina Roskies, 'Neuroscience Basics' in A PRIMER ON CRIMINAL LAW AND NEUROSCIENCE 4 (Stephen Morse & Adina Roskies eds., 2013); JAMES SCHWARTZ ET AL., PRINCIPLES OF NEURAL SCIENCE (5th ed. 2013); MICHAEL

work and the relationship between brain activity and our behavior.<sup>175</sup> Neuroscience provides evidence about brain activity involved in choices, risk-taking, and other cognitive functions at the neural level. When you make a choice or take an action, there is neurobiological activity in your brain associated with doing so. When we meet a stranger, for example, we immediately decide whether or not we think that person is a threat or not. In making such a choice, our brains may invoke past experiences, memories, emotion, and more.<sup>176</sup> Some aspects of memory, perception, knowledge, and emotion can be implicit, meaning that their influence on our behavior occurs at the unconscious level of which we are not aware.<sup>177</sup> Thus, our choices and actions are influenced by these “[h]idden internal events.”<sup>178</sup> Aspects of our higher cognition include the mental activity we engage in when we formulate decisions, assess information, and make judgements. Various regions of our brain, and the neural circuitry that connects them, engage each other when we make a choice or change our mind.<sup>179</sup> Generally speaking, this is the reason why our biases can influence our cognition at the neural level. Understanding human choice at this level helps us to acknowledge the full array of influences that shape such choice.<sup>180</sup>

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S. GAZZANIGA, RICHARD B. IVRY, & GEORGE R. MANGUN, *COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND* (4th ed. 2013); LARRY SQUIRE ET AL., *FUNDAMENTAL NEUROSCIENCE* (3rd ed. 2013); MICHAEL S. GAZZANIGA, RICHARD IVRY, & GEORGE MANGUN, *COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND* (3rd ed. 2008) (providing a general overview of the field).

175. For additional research on neuroscience and decision making, see generally Antoine Bechara, *Human Emotions in Decision Making: Are they Useful or Disruptive?*, in *THE NEUROSCIENCE OF DECISION MAKING* 73, 76 (Oshin Vartanian & David R. Mandel eds. 2009) (“This mechanism for selecting good from bad options is referred to as decision making, and the physiological changes occurring in association with the behavior selection constitute part of *somatic states* (or somatic signals)”); S. M. McClure et al., *Conflict Monitoring Cognition-Emotion Competition* in *HANDBOOK OF EMOTION REGULATION* 205, 222 (J.J. Gross ed., 2007) (concluding that there are at least three types of decision making where emotions discernibly influence behavior). GAZZANIGA ET AL., *COGNITIVE NEUROSCIENCE* (3rd ed.) *supra* note 174.

176. For a general overview of neuroscience and its use in international law, see Anna Spain Bradley, *Advancing Neuroscience in International Law*, in *INTERNATIONAL LAW AS BEHAVIOR* (Harlan Cohen & Tim Meyer eds., forthcoming 2020).

177. *IMPLICIT MEMORY: NEW DIRECTIONS IN COGNITION, DEVELOPMENT AND NEUROPSYCHOLOGY* (Peter Graf & Michael E. J. Masson eds., 1993). See PATRICIA CHURCHLAND, *TOUCHING A NERVE: THE SELF AS BRAIN* 197–98, 201 (2013) (describing the concept of “hidden cognition” from a psychological perspective and discussing the distinctions between conscious, unconscious, subconscious and nonconscious at 197–198); TIAN E. McMULLIN, *THE NEW HANDBOOK OF COGNITIVE THERAPY TECHNIQUES* 68 (2000) (“The third cognition between emotion and behavior is a belief I call the hidden cognition. It is hidden because most clients are not aware of its existence. The [hidden belief] occurs after clients feel an emotion, but immediately before they engage in a behavior. Most clients don’t notice this cognition because it is so rapid They experience it as a vague impression, an undigested conception often occurring before they can put it into words.”).

178. Joo-Hyun Song & Ken Nakayama, *Hidden Cognitive States Revealed in Choice Reaching Tasks*, 13 *TRENDS IN COGNITIVE SCI.* 360, 360 (2009) (“Recent studies measuring continuous hand movements during target choice reaching tasks reveal the temporal evolution of hidden internal events.”).

179. See generally Kitty Xu et al., *Neural Basis of Cognitive Control over Movement Inhibition: Human fMRI and Primate Electrophysiology Evidence*, 96 *NEURON* 1147 (2017); Bret Stetka, *The Neuroscience of Changing Your Mind*, *SCIENTIFIC AMERICAN*, Dec. 7, 2017 <http://www.scientificamerican.com/article/the-neuroscience-of-changing-your-mind> [<https://perma.cc/4PYM-BCVQ>].

180. See generally DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2009).

This is where bias involving preference for or aversions to a person because of her race (and other identity factors) becomes relevant. We can be aware of such preferences (explicit bias) or completely unaware (implicit bias).<sup>181</sup> Here, an area of our brain associated with fear and other emotions, the amygdala, has particular relevance.<sup>182</sup> Studies on racial bias evidence neural activity in the amygdala.<sup>183</sup> For example, a 2014 review of neuroimaging studies investigating the “neural correlates of prejudice” suggests, once again, that the amygdala is of high importance.<sup>184</sup> The study goes further to argue that activity in this area of the brain may be attributed to a person perceiving a threat that arises from negative cultural associations with black men and other groups.<sup>185</sup>

One early, yet important, implication of this work is the significance of neural activity associated with in-group and out-group behavior.<sup>186</sup> Here, race, sex, gender, age, and more all become factors in how we perceive and evaluate a person. Where a person’s identity is of an out-group to our own and one that has historically or culturally been associated with negative traits, we process such perceptions and biases in our amygdala, which is where we also process fear.<sup>187</sup> Such insights into the neural mechanisms responsible for racial bias demonstrate that it is linked to fear.<sup>188</sup> There are caveats and conditions to these findings and future evidence will help refine

181. Kang et al., *supra* note 171, at 1127–31. See also Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

182. J. LeDoux, *The Amygdala*, 17 CURR. BIOL. 868 (2007).

183. For a review of recent studies, see J.T. Kubota, M.R. Banaji MR, & E.A. Phelps, *The Neuroscience of Race*, 15 NAT. NEUROSCI. 940 (2012). See generally Joshua Gowin, *The Neuroscience of Racial Bias*, PSYCHOL. TODAY (Aug. 20, 2012), <https://www.psychologytoday.com/us/blog/you-illuminated/201208/the-neuroscience-racial-bias> [<https://perma.cc/H267-9VH5>]; Chris Bergonzi, *Understanding Bias and the Brain*, KORN FERRY INSTITUTE (May 11, 2015), <https://www.kornferry.com/institute/understanding-bias-and-brain> [<https://perma.cc/AQ3V-TE3E>].

184. Adam Chekroud et al., *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, 8 FRONT. HUM. NEUROSCI. 179 (2014), <https://www.frontiersin.org/articles/10.3389/fnhum.2014.00179/full> [<https://perma.cc/S7FX-PQYL>].

185. *Id.* (“We suggest that differential amygdala activity may best be considered in terms of threat, and we correspondingly highlight studies demonstrating bilateral amygdala modulation by threat. More specifically, we then argue that negative culturally-learned associations between black males and potential threat may better explain the data than does a general ingroup–outgroup explanation.”).

186. See Kubota, Banaji, & Phelps, *supra* note 183.

187. We may also process such activity in other regions of the brain, simultaneously or sequentially.

188. See, e.g., T.A. Ito, *Perceiving social category information from faces: Using ERPs to study person perception in SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND* 85 (A. Todorov, S.T. Fiske, & D. Prentice eds., 2011); I.V. Blair et al., *An Assessment of Biases Against Latinos and African Americans Among Primary Care Providers and Community Members*, 103 AM. J. OF PUB. HEALTH 92 (2013); S.T. Fiske, *Stereotyping, Prejudice, and Discrimination at the Seam between the Centuries: Evolution, Culture, Mind, and Brain*, 30 EUR. J. OF SOC. PSYCHOL. 299 (2000); Gowin, *supra* note 183. See generally Bergonzi, *supra* note 183.

or extend earlier work, but neuroscience proves an essential tool to understanding and addressing racial bias.

### C. *Recognizing Racism as a Violation of International Human Rights*

Racism ought to be recognized as a violation of human rights on the same grounds that racial discrimination is. The basis for outlawing racial discrimination in international law rests upon the idea that it negates the core human rights of dignity, self-determination, and equality.<sup>189</sup> This frame imposes a duty on states not to discriminate on the basis of race because doing so will inhibit certain individual positive rights, including equality and dignity. The Commission on Human Rights, which prepared the original draft of the Declaration on the Elimination of Racial Discrimination for the UN General Assembly,<sup>190</sup> justified the Declaration's purpose on the basis of the rights affirmed by the earlier UN Charter and UDHR.<sup>191</sup> Doing so extended the same legitimacy enjoyed by the Charter to the Declaration and to ICERD.

But framing the problem as one of racial discrimination does not recognize the entirety of the problem. The focus is on the discriminatory act that robs a person of her dignity or equality. However, a loss of dignity can also occur due to the racist hatred to which one person subjects another person. Reframing the problem as one of racism focuses not only on the discriminatory act but also on the harm as experienced by the victim. The concept of racism captures the experience of a victim, not just the act of the perpetrator. It encompasses ideology, thought, and feeling, in addition to outward, observable acts of racial discrimination.

Naming racism as a violation of international human rights is critical to the project of universal human rights that depends on dignity and equality for all. The problem with laws that only prohibit racial discrimination was pointed out by Derrick Bell in his seminal work, *Faces at the Bottom of the Well*:

A preference for whites makes it harder to prove the discrimination outlawed by civil rights laws. This difficulty, when combined with lackluster enforcement, explains why discrimination in employment and in the housing market continues to prevail more than two decades after enactment of the Equal Employment Opportunity Act of 1965 and the Fair Housing Act of 1968.<sup>192</sup>

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189. See e.g., UDHR, *supra* note 90, art. 1 ("All human beings are born free and equal in dignity and rights."); THORNBERRY *supra* note 105, at 97 ("Equality and non-discrimination are intrinsic to the architecture of human rights law.")

190. See THORNBERRY *supra* note 105, at 29. See also WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 154 (1983).

191. See THORNBERRY, *supra* note 105, at 29. See also U.N. Charter, Preamble.

192. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 32.



The same challenge plagues human rights protections in international law. The international legal and political processes designed to create and enforce human rights were not designed by or for those who are the targets of racism. Because of this gap between those who shape international law and those for whom it acts upon, it is necessary for the law to better clarify the protections it provides.

Finally, acknowledging racism as a violation of human rights presents an opportunity for international law to reaffirm the problematic nature of race as a concept.<sup>193</sup> First, race is a sociological construct that has no basis in science.<sup>194</sup> Second, as a construct, it is not merely a neutral, benign tool for classifying people within the human species. Instead, race has been and continues to be used as a tool for oppression and subjugation. As such, race exists for the very purpose of discrimination and upholding inequality.<sup>195</sup>

In conclusion, the universal prevalence of racism challenges the universal ambitions of international human rights law, whose foundational purpose is to affirm that all humans are entitled to basic rights inherent to their very existence. These rights, variously defined, are absolute in nature. The notion that a person can be denied rights or have her rights violated because another person deems herself racially superior is antithetical to these first principles.

### III. REACHING RACISM THROUGH INTERNATIONAL LAW

If racism were a recognized violation of international human rights law, what mechanisms would exist for its protection and what would be the limits? This section imagines some of the possibilities and challenges through a three-part schema that looks at the relationship between racism and human rights by states, international organizations, and individuals under international law.

#### A. *State-Based Racism*

Nations are not supposed to engage in racial discrimination. Nations have committed to uphold the rights of equality, dignity, and self-determination embedded in the UDHR and the UN Charter. The UN Charter and subsequent sources of international law detailed in Part I.B evidence the widespread state obligation to apply law equally without distinction on the

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193. See UNESCO, *supra* note 2, at 3.

194. See, e.g., JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETIES OF MANKIND (3d ed. 1795), reported in THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH 145 (Thomas Bendyshe ed. & trans., 1865) (1775) (creating a five-part division of human races: Caucasian, Mongolian, Malay, Ethiopian, and American).

195. See, e.g., ANGHIE, *supra* note 32, at 36 (“... special doctrines and norms had to be devised for the purposes of defining, identifying and placing the uncivilized”). As an example, see the Nuremberg Race Laws of 1935, discussed in SOURCE BOOK ON EUROPEAN GOVERNMENTS 77–83 (William Rappard et al., eds., 1937).

basis of race. Furthermore, 179 nations have undertaken the more specific obligations required by ICERD of eliminating racial discrimination.<sup>196</sup> Normatively speaking, permitting racism is antithetical to core *jus cogens* in international law, namely the prohibition of slavery, apartheid, and genocide, which all share racism as a root cause.<sup>197</sup> Understanding racism as a component of existing preemptory norms means that states have already committed to not violating those norms.<sup>198</sup> Thus, whether a state has consented to undertake specific obligations with regard to eliminating racial discrimination or not, all states have an obligation not to engage in state-based racism, as it would violate both core human rights recognized as customary international law and preemptory norms. As Hersch Lauterpacht advised about the fundamental nature of human rights, there is no room for “reservations of any kind or description.”<sup>199</sup>

The reality, however, is that for centuries nations around the world have engaged and continue to engage in acts of racism against their own people and against foreigners. Slavery, segregation, apartheid, Jim Crow laws, anti-miscegenation laws, and more are evidence of this. Indigenous peoples in the United States, for example, have long faced government-imposed racial criteria in order to be recognized by the federal government as a tribe (in addition to being the victims of genocide).<sup>200</sup> When a government targets a group of people on the basis of race or fails to provide that group with equal protection under the law, this constitutes state-based racism.

How might international law address racism that occurs at the hands of a state? International law provides that states are responsible for internationally wrongful acts or omissions that “constitute a breach of an international obligation . . . attributable to the state under international law.”<sup>201</sup> Where a

196. *Status of Ratification*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2014), <http://indicators.ohchr.org/> [<https://perma.cc/XL9V-Y3TX>].

197. For a discussion of the meaning of *jus cogens*, see Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES (2015), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml> [<https://perma.cc/9H58-WUV7>].

198. M. Cherif Bassiouni, *International Crimes: 'Jus Cogens' and 'Obligatio Erg Omnes'*, 59 L. AND CONTEMP. PROBS. 63 (1996).

199. HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 390 (1950) (“The dignity and effectiveness alike of the Bill demand that there should be no room in it for reservations of any kind or description. The Bill of Rights is a Bill of the fundamental ‘rights of man.’ The idea of any reservations to them is, prima facie, objectionable . . . if reservations were to be appended in large numbers they would lend substance to the charge that governments hope to contrive to become parties to a basic international enactment without undue sacrifice.”).

200. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 493 (2017) (“Since the arrival of Europeans, American Indian tribal formation has been a distinctly political process, one that also reflects the ways that U.S. laws and policies imposed racial characteristics on American Indian individuals and tribes. To the extent that tribes have membership requirements that include lineage or blood quantum, they are part and parcel of that process of racial/political formation.”). See generally Kristen A. Carpenter & Angela Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173 (2014); Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

201. Int’l Law Comm’n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, art. 2 (2001).

state, through its body, organs, or agents, engages in acts or creates harms amounting to racism, such acts may invoke state responsibility under international law if they meet the internationally wrongful criteria. The International Law Commission's ("ILC") 2001 Draft Articles on the Responsibility of States for Intentionally Wrongful Acts,<sup>202</sup> provide that:

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also . . . the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."<sup>203</sup>

But it is not always clear when racism is directly caused by the state. For example, in 2017 UN Special Rapporteur on Extreme Poverty and Human Rights, Professor Philip Alston, led an investigation of human rights abuses in the United States<sup>204</sup> Referring to his visit to an area of rural Alabama predominantly home to African Americans, Alston reported on the lack of plumbing and related health risks caused by raw sewage. "I think it's very uncommon in the First World," he said of the abject conditions. "This is not a sight that one normally sees. I have to say that I haven't seen this."<sup>205</sup> Here, poverty and the violation of economic rights are causing a distinct racial group harm. There is a case to be made that this is state-based racism on the grounds that the state is distinguishing where it provides key public services (water, sewage, etc.) on the basis of race. Ought, then, international human rights law mandate the state to pay compensation in a case like this, and would that provide adequate remedy?<sup>206</sup>

A second inquiry concerns when a state has responsibility for failing to take measures to prevent or to punish racism by other actors. The Inter-American Commission for Human Rights' 2011 Report on the Situation of People of African Descent in the Americas provides one example.<sup>207</sup> The report first acknowledges and documents the racial discrimination that re-

202. *Id.*

203. *Id.*

204. Statement on Visit to the USA, Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights (Dec. 15, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533&LangID=E> [<https://perma.cc/4N35-G46J>].

205. Carlos Ballesteros, *Alabama has the Worst Poverty in the Developed World*, U.N. Official Says, NEWSWEEK (Dec. 10, 2017), <http://www.newsweek.com/alabama-un-poverty-environmental-racism-743601> [<https://perma.cc/4YC3-924H>]; *United Nations Poverty Investigation Finds Shocking Conditions in Alabama*, EQUAL JUSTICE INITIATIVE (Dec. 15, 2017), <https://eji.org/news/united-nations-poverty-investigation-finds-shocking-conditions-alabama> [<https://perma.cc/KP9L-KE4T>].

206. Eugene Mason, *UN Panel Says the U.S. Owes Reparations to African-Americans*, PBS NEWS HOUR (Sept. 29, 2016), <https://www.pbs.org/newshour/nation/reparations-african-americans-un> [<https://perma.cc/E6Z5-G7MX>].

207. Inter-American Comm'n on Human Rights, *The Situation of People of African Descent in the Americas* (2011).

sults in inequality, limited access to justice, racial profiling by police, abuse in criminal justice systems, and sub-standard living conditions.<sup>208</sup> It then recommends actions states should take to remedy “the narrow link between racism and discrimination, and how . . . ongoing stereotypes and prejudices, contributes to perpetuate historical situations of segregation and exclusion.”<sup>209</sup> This is a recommendation, however, not a legally-enforceable obligation.

Similarly, the UN General Assembly’s Third Committee reported in 2004 on ‘Afrophobia’ and the pervasiveness of racism and recommended actions states should take.<sup>210</sup> Mireille Fanon-Mendès-France, Chair of the Working Group on People of African Descent, stated that “[p]eople of African descent have been historically and continue to be victims of ‘Afrophobia’.”<sup>211</sup> The representative of Belize, speaking on behalf of the Caribbean Community (“CARICOM”), described the historic and extreme suffering endured by people of African descent, including extreme human rights violations and their forced and uncompensated labor.<sup>212</sup> The Committee discussed remedies, including regional approaches to reconciliation, reparations, and an acknowledgement by former slave-holding countries of the remaining work needed to eradicate such racism.

For violations that arise under ICERD, there are recourses individuals can take through the Committee on the Elimination of Racial Discrimination, which consists of ten independent experts.<sup>213</sup> Here, individuals can complain about violations of human rights protected by the treaty. The Committee makes findings and issues recommendations and reprisals to a state. In the searchable database on the Committee’s website, there are over 67 pages of individual claims. The Committee also issues general guidance that aims to develop Convention requirements to assist states with meeting their obligations. In its report on combating hate speech, for example, the Committee recommends “that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law.”<sup>214</sup> Yet, given the Committee’s limited authority and resources, it is ill-suited for addressing imminent and egregious threats

208. *Id.*

209. *Id.* ¶256.

210. UN Meetings Coverage, *Flouting International Law, Racism Pervades All Countries, Third Committee Hears at Start of Debate*, GA/SHC/4115 (Nov. 3, 2014).

211. *Id.*

212. *Id.*

213. U.N. Comm. on the Elimination of Racial Discrimination, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R., 2019, [https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx/t\\_blank](https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx/t_blank) [<https://perma.cc/32WB-68G2>].

214. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating Racist Hate Speech*, ¶12, CERD/C/GC/35 (Sept. 26, 2013).

caused by racism, such as Myanmar's discriminatory practices against the Rohingya people.<sup>215</sup>

Although its jurisdiction is limited to disputes between nations that can be settled on the basis of international law, the International Court of Justice has recently been called upon to decide an alleged violation of state-based racism against another state under ICERD as previously discussed.<sup>216</sup> In August of 2008, Georgia brought an application against the Russian Federation to the I.C.J. on the grounds that the defendant violated its obligations under ICERD during its military interventions in South Ossetia and Abkhazia between 1990-2008.<sup>217</sup> Specifically, Georgia claimed that the Russian Federation violated Article 2.1.a of ICERD by "engaging in acts and practices of 'racial discrimination against persons, groups of persons or institutions' and failing 'to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.'"<sup>218</sup> In response, the I.C.J. ruled on provisional measures calling upon both parties to "refrain from any act of racial discrimination against persons, groups of persons or institutions; abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations."<sup>219</sup> The I.C.J. never decided this case on the merits because it ruled that it lacked jurisdiction on the grounds asserted by Russia's preliminary objection that Article 22 of ICERD had not been met. Practically speaking, the Court determined that Georgia had not met its requirement of genuinely attempting negotiation with the Russian Federation, as required by ICERD, and therefore determined Georgia did not meet the precondition of fulfilling negotiations prior to seeking remedy at the Court.<sup>220</sup>

This raises important questions about what constitutes negotiations about allegations of racial discrimination under international law. Based on prior jurisprudence, "an obligation to negotiate does not imply an obligation to reach an agreement."<sup>221</sup> Whether or not the parties meet such a precondition rests upon the idea that their negotiations were meaningful, wherein the I.C.J. has previously considered the "attitude and views of the

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215. See generally Eleanor Albert & Andrew Chatzky, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELATIONS (Apr. 20, 2018), <https://www.cfr.org/backgrounder/rohingya-crisis> [<https://perma.cc/2F8P-B6A4>].

216. See *infra* Introduction.

217. Georgia v. Russian Federation, *supra* note 19.

218. *Id.* at 44.

219. *Id.*

220. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation): Overview of the Case, ICJ (2019), <https://www.icj-cij.org/en/case/140> [<https://perma.cc/8YQB-ZNQQ>].

221. Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys), Advisory Opinion, 1931 P.C.I.J. 108, 116 (Oct. 15). See also North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. 3.

Parties on the substantive issues of the question involved.”<sup>222</sup> In interpreting what level and kind of negotiation Article 22 of ICERD required Georgia and Russia to do, the I.C.J. adopted an ordinary meaning of the treaty language, putting aside the *travaux préparatoires*, and found Article 22 to “establish preconditions to be fulfilled before the seisin of the Court.”<sup>223</sup> Therein, citing numerous I.C.J. cases, the Court determined that “the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”<sup>224</sup> and that determining whether negotiations have occurred according to this standard was a question of fact.<sup>225</sup>

This, in turn, requires analyzing what a substantive negotiation about racial discrimination would actually entail. In this case, Georgia argued that it tried to negotiate with Russia about racial discrimination when it raised its concerns about Russian forces killing and forcibly displacing over 300,000 people of ethnic Georgian background in what it called ethnic cleansing.<sup>226</sup> Russia argued the opposite, that “[a]t no occasion in their bilateral relations did Georgia articulate any claim of racial discrimination by Russia, and Georgia and Russia did not engage in negotiations in respect of any such claim.”<sup>227</sup> The Court determined that “although the claims and

222. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, 1962 I.C.J. 212. See also *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, 1962 I.C.J. 317 (Dec. 21).

223. *Georgia v. Russian Federation*, *supra* note 19, ¶141. See also ICERD, *supra* note 3, art. 22 (“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”).

224. *Georgia v. Russian Federation*, *supra* note 19, ¶159 (citing *Mavrommatis Palestine Concessions (Greece v. Britain)*, Judgment, 1924 P.C.I.J. 13; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, 1962 I.C.J. 345; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 1980 I.C.J. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. 33; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, 1998 I.C.J. 122).

225. *Georgia v. Russian Federation*, Judgment on Provisional Measures *supra* note 19, at ¶¶160, 162 (“In the present case, the Court is therefore assessing whether Georgia genuinely attempted to engage in negotiations with the Russian Federation, with a view to resolving their dispute concerning the Russian Federation’s compliance with its substantive obligations under CERD. Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations as far as possible with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations failed, became futile, or reached a deadlock before Georgia submitted its claim to the Court.”)

226. *Georgia v. Russian Federation*, *supra* note 19, at Application 6.

227. *Georgia v. Russian Federation*, Judgment, *supra* note 21, ¶166. *Id.* at Provisional Measures ¶97. The Court determined earlier in its judgment at ¶104 that “On 19 April 2008 the Georgian Foreign Ministry in a press statement referred to the *de facto* annexation of Georgia’s integral parts . . . and neglect of human rights of an absolute majority of the regions’ population — victims of ethnic cleansing. The statement is primarily about the status of the two regions and Russian Federation policies and practices relevant to those regions and makes no claim against the Russian Federation about racial discrimination.” (“The Court considers that the reference to ethnic cleansing may again be read as

counter-claims concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, they do not constitute attempts at negotiation by either party.”<sup>228</sup> The Court summarized its finding that Georgia failed to meet negotiation preconditions on the grounds that both parties’ communications about issues of ethnic cleansing and extermination “attest to the existence of a dispute between them on a subject-matter capable of falling under CERD. However, they fail to demonstrate an attempt at negotiating these matters.”<sup>229</sup>

In their Joint Dissenting Opinion, Judges Owada, Simma, Abraham, Donoghue, and Judge ad hoc Gaja argued that the Court should have “found that it had jurisdiction to entertain the Application.”<sup>230</sup> They persuasively argued that the Court’s finding that Article 22 of ICERD requires a precondition to negotiate prior to seizing the I.C.J. on the matter is erroneous and inconsistent with the Court’s recent jurisprudence.<sup>231</sup> They found that “the Court has never conditioned its jurisdiction on the existence of prior negotiations between parties, except on the basis of an express provision to that effect.”<sup>232</sup> The judges further noted that “[n]o reason can be found for such a surprisingly narrow approach, one at odds with the thrust of the Court’s most recent jurisprudence in respect of its consideration of the conditions for jurisdiction and, specifically, at odds with a Judgment as recent — and as clear on this point in its reasoning — as that which the Court handed down on the preliminary objections in the *Croatia v. Serbia* case.”<sup>233</sup> The Joint Dissenting Opinion helpfully addressed what the Judgment on Provisional Measures does not, namely linking a meaningful attempt to negotiate to Georgia’s claims that it raised the issue of ethnic cleansing and that the Russian Federation was at liberty to respond to them. The Joint Dissenting Opinion found that “it is surprising to see the

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relating to the events of the early 1990s. This reference is to be understood in the context of the principal theme of the press release, that is, the concern of Georgia in relation to the status of Abkhazia and the territorial integrity of Georgia. In light of the record it remains unclear whether the press release came to the attention of the Russian Federation. In any case, the press release raised the issue of the proper fulfilment of the mandate of the CIS peacekeeping force, and not the Russian Federation’s compliance with its obligations under CERD.”)

228. *Georgia v. Russian Federation*, Judgment, *supra* note 19, ¶178.

229. *Id.* ¶181.

230. *Id.* Joint Dissenting Opinion ¶2.

231. *Id.* ¶16.

232. *Id.* ¶¶24, 25. (“It omits to quote the dictum, in our view much more important, in the Judgment handed down by this Court in 1998 in the case concerning Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*): ‘Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.’ Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*), Preliminary Objections, Judgment, 1998 I.C.J. Reports 303. It is clear that while diplomatic negotiations concerning a dispute may be helpful before judicial proceedings are brought, particularly in clarifying the terms of the dispute and delimiting its subject-matter, they as a general rule are not a mandatory precondition to be satisfied in order for the Court to be able to exercise jurisdiction. There is such a requirement only if, and to the extent that, it is embodied in the clause or declaration on which the jurisdiction of the Court is founded.”)

233. *Id.* ¶37.

Court dismiss the numerous statements in which the Georgian authorities, well before 9 August 2008, accused Russia of encouraging ethnic cleansing or attempting to 'legalize' the results of ethnic cleansing, on the grounds that those statement are unrelated to CERD, or that they do not contain any allegations of racial discrimination aimed at Russia."<sup>234</sup>

One cannot presume to know what the Court's motivation was behind this reasoning, but it does raise the question about whether the Court was uncomfortable with analyzing inter-state claims of racial discrimination on the merits. ICERD defines racial discrimination, in part, as a distinction, exclusion, restriction, or preference on the basis of race or ethnicity. Ethnic cleansing has been defined by a UN Commission of Experts as "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."<sup>235</sup> Even this general definition constitutes a form of racial discrimination envisioned by ICERD in that it is a form of exclusion on the basis of ethnicity that would violate several of the protected rights enumerated in Article 5.<sup>236</sup> Given this, the I.C.J.'s decision in this case is confounding.

Certainly, in the twenty-first century, it should not be permissible for nations to use the tools of statehood to violate peoples' human rights on the basis of their race. This is a minimum standard. In outlawing racial discrimination, international human rights law has worked to obligate states to stop acts that directly cause racial discrimination. However, despite the creation of ICERD, which has been adopted nearly universally by nations, and other forms of positive international law addressing racial discrimination, state-based racism against other states and against people within a state remains a significant problem. The central challenge, again, is that racial discrimination remains ill-defined as a legal concept and disconnected from the people responsible for the harm and racism has not been established as an internationally wrongful act in treaty law. Furthermore, meaningful efforts to eliminate state-based racism require effective enforcement of the existing positive law. On both accounts, there is much work to be done.

### B. *International Organizational Racism*

A second category of racism in international law occurs by the actions or inactions of international organizations and their agents. How might international law conceptualize racism by the United Nations, the International Criminal Court (ICC), the World Bank, the World Trade Organization, or other international organizations? Institutional racism, which occurs when

234. *Id.* ¶80.

235. Letter to the U.N. Security Council from the Secretary-General, S/1994/674 (May 27, 1994), <https://undocs.org/S/1994/674> [<https://perma.cc/C56Z-SGHR>].

236. ICERD, *supra* note 3, art. 5.



an institution perpetuates racism through its policies and practices, is well recognized. Slavery in America, apartheid in South Africa, and racial profiling by police are well-known examples. International organizations, whether they be inter-governmental or international non-governmental (“INGO”) in nature, are capable of proliferating institutional racism.

The United Nations is not immune. One concerning area involves the United Nations Security Council’s authorization of the use of force. Pursuant to the UN Charter, and derived from the very foundation of the United Nations, only the Security Council can legally authorize the use of force.<sup>237</sup> The only other case where force is legally permissible is a nation’s inherent right to use self-defense under particular circumstances.<sup>238</sup> Over the years, the Security Council has authorized the use of force many times, primarily throughout Africa and in the Middle East.<sup>239</sup> Notably, the use of force has never been authorized against any of the Permanent Five countries.<sup>240</sup> The geographic disparities in where force has been used and where it has not raise doubt about the racial neutrality of the Security Council’s decision making and the application of its authority under international law.<sup>241</sup>

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237. U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”)

238. UN Charter art. 51.

239. S.C. Res. 2098, ¶9 (Mar. 28, 2013) (creating the “Intervention Brigade”); *id.* ¶12, (“Authorizes MONUSCO, through its military component, in pursuit of the objectives described in paragraph 11 above, to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate. . . .”); S.C. Res. 2085, ¶9, (Dec. 20, 2012) (“Decides to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures, in compliance with applicable international humanitarian law and human rights law and in full respect of the sovereignty, territorial integrity and unity of Mali to carry out the following tasks . . . .”); S.C. Res. 1973, ¶4 (Mar. 17, 2011) (“Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack . . . .”); S.C. Res. 1769 (July 31, 2007) (peacekeeping force authorized); S.C. Res. 1706 (Aug. 31, 2006) (peacekeeping force authorized but lacked consent); S.C. Res. 1701 (Aug. 11, 2006); S.C. Res. 1546 (June 8, 2004); S.C. Res. 1545 (May 21, 2004); S.C. Res. 1528 (Feb. 27, 2004); S.C. Res. 1497 (Aug. 1, 2003); S.C. Res. 1493 (July 28, 2003); S.C. Res. 1272 (Oct. 25, 1999); S.C. Res. 1270 (Oct. 22, 1999); S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1244 (June 10, 1999); S.C. Res. 1127 (Aug. 28, 1997); S.C. Res. 1101 (Mar. 28, 1997); S.C. Res. 1080 (Nov. 15, 1996); S.C. Res. 940 (July 31, 1994); S.C. Res. 929 (June 22, 1994); S.C. Res. 836 (June 4, 1993); S.C. Res. 794 (Dec. 3, 1992); S.C. Res. 717 (Oct. 16, 1991); S.C. Res. 688 (Apr. 5, 1991); S.C. Res. 678 (Nov. 29, 1990); see Anna Spain, *Deciding to Intervene*, 51 HOUS. L. REV. 847, 857–69 (2014) (describing the history of Council resolutions regarding intervention since its inception).

240. For an explanation of the UN Security Council’s legal mandate, practice, and procedures, see generally Anna Spain, *The U.N. Security Council’s Duty to Decide*, 4 HARV. NAT’L SECURITY J. 320 (2013).

241. Rosalyn Higgins, *Intervention and International Law*, in INTERVENTION IN WORLD POLITICS 29, 40 (Hedley Bull ed., 1984) (cautioning against conflating the terms aggression and intervention as a legal matter); *id.* at 38 (“One thus has constantly the problem of identifying the reality, and measuring it against the rhetoric.”); Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?*,

Another international organization that has been criticized for being racially biased is the International Criminal Court.<sup>242</sup> Established by the Rome Statute in 2002, it stands as the only permanent international court with the authority to prosecute individuals for committing international crimes. Most of the people the ICC has prosecuted have been of African descent and, for this reason, the Court has been criticized for perpetuating institutional racism.<sup>243</sup> The overwhelming majority of defendants that the ICC has prosecuted have been from African nations.<sup>244</sup> In 2017, in response to the ICC's unpopularity, Burundi became the first nation to withdraw from the Court.<sup>245</sup>

At present, rules governing the responsibility of international organizations for breaches of international law provide a framework for analyzing internationally wrongful acts.<sup>246</sup> In 2011, the International Law Commission finalized Draft Articles on the Responsibility of International Organizations ("DARIO").<sup>247</sup> According to DARIO, international organizational responsibility requires three elements: a) an internationally wrongful act, b) attribution of conduct to the international organization or its agent, and c) no circumstances, such as consent, self-defense, or necessity, that would preclude wrongfulness.<sup>248</sup>

One of the clearest cases of international organizational responsibility concerns wrongful acts taken by the United Nations during peacekeeping operations. Starting in 1996, the UN has taken responsibility for all acts

in HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE 179, 182–83 (Philip Alston & E. MacDonal eds., 2008).

242. See, e.g., Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> [<https://perma.cc/7NSZ-VFLF>]; see also Adam Taylor, *Why so many African leaders hate the International Criminal Court*, THE WASH. POST (June 15, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?noredirect=on&utm\\_term=.232e87383ed3](https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?noredirect=on&utm_term=.232e87383ed3) [<https://perma.cc/6J7N-MH9M>].

243. David Hoile & Angela Mudukuti, *Is the International Criminal Court Racist?*, NEW INTERNATIONALIST (Dec. 1, 2014), <https://newint.org/sections/argument/2014/12/01/international-criminal-court-racist> [<https://perma.cc/PTJ9-Y5SW>]. But see Awol K. Allo, *The ICC's problem is not overt racism, it is Eurocentrism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html> [<https://perma.cc/LYR9-SP6Z>].

244. *Situations and Cases*, THE INTERNATIONAL CRIMINAL COURT (2019), <https://www.icc-cpi.int/> [<https://perma.cc/EDM9-PE3A>]. The exception is Georgia.

245. Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html> [<https://perma.cc/K2US-8EG2>].

246. See generally HIGGINS, ET AL, OPPENHEIM'S INTERNATIONAL LAW UNITED NATIONS, Vol. 1 430–41 (2017).

247. U.N. Draft Articles on the Responsibility of International Organizations (2011) [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) [<https://perma.cc/LLM4-TGZK>]. See also U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, Annex XI, art. 5; Convention on the International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S.187.

248. HIGGINS, ET AL, *supra* note 246, at 430–43.

conducted by UN Peacekeepers in their official duties.<sup>249</sup> Since then there have been claims and findings of peacekeepers engaging in sexual assault and child abuse and being responsible for cholera epidemics and lead poisoning.<sup>250</sup> When a peacekeeper engages in an internationally wrongful act, the UN bears international organizational responsibility and the consequences of such a finding may include compensation, damages, or *ex gratia* payments.<sup>251</sup> Such acts that imply international organizational responsibility may also include omissions.<sup>252</sup> Since racism is not, per se, an internationally wrongful act, there could be no finding of international organizational responsibility. If the act was racial discrimination, ICERD and other treaties establish it as an internationally wrongful act.<sup>253</sup> One would then have to show that the employee or agent engaged in conduct that was racially discriminatory and that such conduct is attributable to the UN.

### C. Individual Racism

International law has long addressed the rights of individuals in certain contexts. From the laws of war, to the protection of diplomats abroad, to state responsibility for injury to foreigners, international law has within it protections for individual people.<sup>254</sup> The United Nations Charter captures this rationale that international law is for the benefit of people and not just for nations.<sup>255</sup> Similarly, the UN Declaration of Human Rights enumerates the key human rights afforded to peoples that nations agreed upon at that time. Among them, the right of equality (the “right to be born free and equal in dignity and rights” (Art. 1)), and of non-discrimination (“these rights are to be held without discrimination of any kind” (Art. 2)) form the basis upon which later laws addressing racial discrimination would be founded.<sup>256</sup> Starting with the UN Charter and the UN Declaration of

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249. U.N.G.A. Report of the Secretary-General, Financing of the United Nations Protection Force (Sept. 20, 1996), U.N. Doc A/51/389, ¶¶17–18.

250. HIGGINS, ET AL, *supra* note 246, at 430 (discussing UN Peacekeeper violations in the Central African Republic with sexual assault, in Haiti regarding cholera, and in Kosovo regarding lead poisoning).

251. *Id.* at 444.

252. United States of America v. Iran, *supra* note 224, ¶¶63, 67 (the Court found Iran responsible of internationally wrongful acts because of its *inaction*, namely failing to take appropriate measures with regard to the hostages). See also, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Comm’n on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (“The United Nations may be required to bear responsibility for the damage arising from such acts.”).

253. It is less clear whether international customary law or fundamental principles of international humanitarian law create responsibility. HIGGINS, ET AL, *supra* note 246, at 432 (“[T]he UN has only expressly declared its willingness to be bound by” non-treaty sources.). Secretary-General’s Bulletin, Observance by United Nations forces of international humanitarian law (Aug. 6, 1999), U.N. Doc ST/SGB/1999/13.

254. See generally SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 389–98 (3rd ed., 2018).

255. UN Charter, Preamble (“We the peoples of the United Nations . . . are determined to reaffirm faith in fundamental human rights.”).

256. UDHR, *supra* note 90, art. 1, 2.

Human Rights, modern international law governing human rights has sought to create obligations owed by states to each other, to individuals, between individuals, and to the international community as a whole.<sup>257</sup> Later human rights treaties created specific legally binding obligations upon states.<sup>258</sup>

When indigenous people in North Dakota are targeted by laws that seek to limit or remove their right to vote, their rights are affirmed by Article 7 of the UDHR.<sup>259</sup> When the Myanmar military targets Rohingya people through expropriation of lands and forced labor, their rights are affirmed by Articles 4 and 17.<sup>260</sup> However, state-sponsored or supported racism belies an additional, deeper problem: the acceptance of racism within societies and by individuals. For all of its successes in promoting dignity, legal rights, and normative shifts in the world, the international human rights movement has not, to date, effectively reached the problem of racism by and between people. But it is difficult to imagine a world in which racism is effectively eliminated through state obligations alone.

Here, international law is presently ill-equipped to provide remedy as it only creates obligations owed by the state, not by individuals therein. Yet, the challenge of racism must also be met by and between individuals. When the United States ratified ICERD in 1994, it acknowledged this in its admission that “[r]acial discrimination by public authorities is prohibited throughout the United States, and the principle of non-discrimination is central to governmental policy throughout the country”<sup>261</sup> but “. . . even though U.S. Law is in conformity with the obligations assumed by the United States under the treaty, American society has not yet fully achieved the Convention’s goals.”<sup>262</sup> How, then, might international law shape individual behavior regarding racism?

The prevailing model is found in international criminal law, which has established that aggression, genocide, crimes against humanity, and war crimes are illegal.<sup>263</sup> Herein, international law establishes that states owe certain obligations to prevent and punish these crimes, namely establishing legal mechanisms to investigate and adjudicate alleged perpetrators at the

257. MURPHY, *supra* note 254, at 398–404.

258. These include the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, Dec. 6, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 93 U.N.T.S. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; and Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

259. UDHR, *supra* note 90, art. 7.

260. *Id.* art. 4, 17.

261. U.S. Dept. of State, Initial Report of the United States of America to the UN Committee on the Elimination of Racial Discrimination (2000), ¶6.

262. *Id.* ¶8.

263. See, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 258, Rome Statute, *supra* note 83.

domestic level or international level.<sup>264</sup> In *Belgium v. Senegal*, for example, the I.C.J. found that Senegal had an international responsibility to fulfill its obligations under the Convention Against Torture to investigate and prosecute allegations of crimes against humanity and torture without delay.<sup>265</sup> International criminal law also creates individual responsibility for these crimes, to varying degrees. Here, law governs not only the behavior of states but also the behavior of individuals wherever they reside. Individual responsibility for the crime of genocide is well-recognized.<sup>266</sup> For example, in *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda (“ICTR”) found that Mr. Akayesu bore individual responsibility for committing the crime of genocide and crimes against humanity.<sup>267</sup> There is evidence, albeit less strong, of individual responsibility with regard to crimes against humanity.<sup>268</sup>

One path forward would be to link racism to an existing international crime, as was done with apartheid. The International Convention on the Suppression and Punishment of the Crime of Apartheid, which entered into force on July 18, 1976,<sup>269</sup> names apartheid as a crime against humanity.<sup>270</sup> The Convention defined apartheid to include “acts of racial segregation and racial discrimination committed for the purpose of establishing and maintaining domination by one racial group over people of other racial groups.”<sup>271</sup> In this way, the Convention offers early guidance on the criminalization of racism under international law.

264. Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J. 419.

265. See *Overview of the Case*, INTERNATIONAL COURT OF JUSTICE (2019), <https://www.icj-cij.org/en/case/144>, [http://perma.cc/BL5W-YT8A].

266. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. OF INT’L L. 302, 309 (1999) (“Thus, the traditional triad of sources clearly confirms that individual criminal responsibility for genocide is part and parcel of international law.”).

267. The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A, Appeals Chamber (June 1, 2001) (The judgment formed the first interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by an international court.); see also The Prosecutor v. Dusko Tadić, IT-94-1, Trial Chamber II, Judgement (May 7, 1997) (Mr. Tadić was charged with individual responsibility for 31 counts and found guilty on 11 counts. His case represented “the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by an international tribunal (. . .). The international military tribunals at Nürnberg and Tokyo. . . , were multinational in nature, representing only part of the world community”).

268. Simma & Paulus, *supra* note 266, at 310 (“Applying modern positivist criteria, one may conclude that sufficient practice and *opinio juris* are present for customary law to emerge.”).

269. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, arts. 1-3, 1015 U.N.T.S. 243 [hereafter ICSPCA].

270. *Id.* art. 1 (“The States Parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.”).

271. *Id.*

Should racism be understood, like apartheid, as an international crime? The Tadić test, applied by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to determine the existence of an international crime, offers a potential, albeit imperfect, model. There are four criteria: “(1) the infringement of a rule of international humanitarian law, (2) the customary or treaty law character of the crime, (3) the ‘seriousness’ of the violation of humanitarian law, and (4) the establishment of individual criminal responsibility by the rule in question.”<sup>272</sup> A good case can be made that racism infringes upon the preemptory norm against racial discrimination and constitutes a serious violation of humanitarian law. However, at present, I do not advise this path. Racism has elements both criminal and not. It occurs in peacetime and war time. It is exercised by states and by individuals. It poses a grave risk to international peace and security. It is antithetical to the fundamental purpose of international law and the purposes of the United Nations, as established by Article 1 of the Charter.<sup>273</sup> It is morally reprehensible. It is politically dangerous. Racism ought to be, as a normative matter, illegal under international law. But, at present, there are no legal pathways to allow for its prosecution and punishment as an international crime.

To push the law in such a bold direction, the Convention linked its purpose, authority, legitimacy, and validity to the prior expressions of state consent found in the UN Charter, UDHR, ICERD, the Genocide Convention, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the practice of the UN General Assembly and the UN Security Council.<sup>274</sup> Article III assigns international criminal responsibility to individuals in addition to states and their representatives. The 109 state parties to the Convention agreed to prevent and to punish apartheid as well as to abide by any Security Council resolutions on the matter.<sup>275</sup> No one has ever been prosecuted for the crime of apartheid.<sup>276</sup> However, accusa-

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272. Simma & Paulus, *supra* note 266, at 311. See Prosecutor v. Tadić Appeal on Jurisdiction, No. IT-94-1-AR72, ¶119 (Oct. 2, 1995), 35 ILM 32 (1996) ¶94. See also Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. OF INT’L L. 649 (2007).

273. UN Charter, art. 1 (“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and To be a centre for harmonizing the actions of nations in the attainment of these common ends.”).

274. ICSPCA, *supra* note 269.

275. *Id.* art. 4, 6.

276. See John Dugard, *Introductory Note to the Convention on the Suppression and Punishment of Apartheid*, AUDIOVISUAL LIBRARY OF INT’L L. (2019), <http://legal.un.org/avl/ha/cspca/cspca.html>

tions of apartheid have been made by the Han people against the Chinese government and by the Zaghawa people against the Sudanese government.<sup>277</sup> In addition, writing about Israeli occupation of Palestine, then-UN Special Rapporteur for Palestine John Dugard named Israeli activities as a form of apartheid contrary to international law.<sup>278</sup>

A different approach would be to push for national laws that criminalize racism. An imperfect example of such is the Matthew Shepard and James Byrd Jr. Federal Hate Crimes Prevention Act under U.S. law.<sup>279</sup> Take, for example, a recent case involving ten white teenagers in Mississippi who murdered a forty-seven-year-old black man named James Craig Anderson in June 2011.<sup>280</sup> The teenagers attacked Mr. Anderson in the parking lot of his workplace and stole his valuables before fatally hitting him with their truck, all while yelling “White Power.”<sup>281</sup> The accused teens were prosecuted under the Federal Hate Crimes Prevention Act.<sup>282</sup> This federal law provides more robust authority to prosecute crimes motivated by racial hatred, in addition to crimes motivated by discrimination based on religion, gender, disability, and sexual orientation.

The idea of criminalizing racism in this way has been raised at the Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards.<sup>283</sup> The Committee has focused on xenophobia, national mechanisms, special measures including affirmative measures, prevention and education, protection for migrants and for refugees, and remedies for victims. In 2017, the Committee was tasked by the UN General Assembly and the UN Human Rights Council with ensuing “the commencement of the negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobia nature. . .”<sup>284</sup>

In conclusion, when human-to-human behavior is the cause of mass injustice or threatens international peace and security, it has entered the do-

[<https://perma.cc/CM3R-QBAK>] (noting that the Convention applies to all instances of apartheid not just South Africa and noting original disagreement by states on this matter.).

277. *Id.*

278. U.N. Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, A/HRC/2/5 (Sept. 5, 2006).

279. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. §249 (2009).

280. Adeel Hassan, *Before Jailing a Young Woman, a Judge Puts Her Mother's Racist Views on the Stand*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/james-craig-anderson-mississippi-hate-crime.html> [<https://perma.cc/CJ4E-5F2B>].

281. *Id.*

282. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, *supra* note 279. See generally *Hate Crime Laws*, THE UNITED STATES DEPARTMENT OF JUSTICE (2018), <https://www.justice.gov/crt/hate-crime-laws> [<https://perma.cc/5STG-TWPY>].

283. Human Rights Council, Elaboration of international complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/HRC/RES/6/21 (Sept. 28, 2007).

284. *The Ad Hoc Comm. on the elaboration of complementary standards*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2019), <https://www.ohchr.org/EN/Issues/Racism/AdHocCommittee/Pages/AdHocIndex.aspx> [<https://perma.cc/47YF-GZ23>].

main of international law.<sup>285</sup> Yet international law provides few tools for regulating the private behavior of a nation's citizens. The challenge international law now faces is how to govern and constrain the behavior of individuals, not just states. Nations and their governments get stuck in eliminating racism in society and among individuals. Here, employing international law's normative power as a force for change is the tool best fit for attending to the problem of individual racism. International law can address racism between individuals through its norms when they prompt socio-economic and cultural shifts. Naming racism as a violation of human rights under international law would offer both legal and symbolic protection to those threatened by racism around the world. It would increase normative pressure on institutions, public and private, to pursue real solutions and on individuals to recognize our role in perpetuating racism. Thus, naming the problem—human rights racism—is deeply connected not only to manifesting and enforcing legal rights and dismantling old structures but also to promoting individual self-awareness and change.

#### IV. ADVANTAGES AND ANXIETIES

##### A. *On the Normative Power of Naming*

I have argued in this Article that racism should take its place as one of the recognized ills to be prohibited by international law. I have further elaborated as to why doing so would create the space for law to conceptualize and understand the problem as one that includes both discriminatory acts and also the racial ideologies that motivate people's behavior. Herein, there are limitations and need for further research that I have acknowledged. Putting these caveats aside, here I highlight the importance of naming the harm.

Naming is a powerful tool that international law has employed to raise awareness of prior harms and increase international political motivation to address them. Take, for example, the 2007 creation of the UN Declaration on the Rights of Indigenous Peoples.<sup>286</sup> Although it is not a legally binding treaty, it sets forth the core rights owed to indigenous peoples by states around the world and applicable standards. Moreover, it has normative significance in its symbolic manifestation that indigenous people are a vital and vibrant part of our global society, entitled to the full protections afforded under international law. The Declaration's promise is its power. So, too, was the symbolism of the Civil Rights Movement in America. A 2016 study of over 400 African Americans, black Brazilians, Arab Palestinians,

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285. JULIUS STONE, *VISIONS OF WORLD ORDER: BETWEEN STATE POWER AND HUMAN JUSTICE* 92 (1984) ("There is, of course, no sharp line between the difficulties of intrastate and humanitywide tasks of doing justice.").

286. G.A. Res. 61/295 (Dec. 13, 2007).



and Ethiopian and Mizrahim peoples living in Israel explored these communities' diverse responses to discrimination, finding important variations across groups and countries.<sup>287</sup> The study's most striking finding is that, of all the groups, African Americans were most comfortable in standing up for their rights because there was general societal recognition that they were entitled to such rights by virtue of the Civil Rights Movement—both what the movement achieved and what it represented.<sup>288</sup> Thus, naming and establishing racism as a human rights violation under international law promises powerful impacts beyond those expected of binding forms of international law. It lifts up the capacity of people in all nations to identify and to assert their right to be free from racism as afforded to them under international human rights law.

From the abolition of slavery, to decolonization, to naming genocide and crimes against humanity, to human rights movements like the Civil Rights Movement and the Arab Spring, international law is full of naming moments.<sup>289</sup> It is time to add human rights racism to the list. To do so, law must sufficiently define that prohibited act or the right to be protected. At present, the concept of racism in international law is ill-defined and variously understood. It derives its meaning both from a literal interpretation of understandings about race and racial discrimination found in existing international legal doctrine and from its broader socio-cultural meanings that draw upon moral and political ideologies.

The challenge with this vagueness is that it mitigates against a positivist reading of racism in international law. It cannot be said, for example, that states have specifically manifested a collective will to outlaw racism. In our modern era, there is a need to establish positive law, where the legal rule is objective, valid, and directly linked to state consent.<sup>290</sup> As a formal matter, translating racism from concept to human right enforceable under international law requires the consent of many nations and the enumeration of specific rights and corresponding obligations.<sup>291</sup> At the state level, nations

287. MICHELE LAMONT ET AL, *GETTING RESPECT: RESPONDING TO STIGMA AND DISCRIMINATION IN THE UNITED STATES, BRAZIL, AND ISRAEL* (2016).

288. *Id.* at 277 (finding that "confrontation is highly legitimized in the United States by civil rights narratives and by more frequently enforced antidiscrimination laws" as compared to Brazil: "[I]n Brazil respondents are less readily exposed to repertoires of black disadvantage and often state that they run the risk of being viewed as paranoid if they point to the racial character of an incident and confront it as such – except when incidents are blatantly racist.").

289. See generally PHILLIP SANDS, *EAST WEST STREET* (2016) (documenting the history behind the naming of genocide and of crimes against humanity).

290. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); HANS KELSEN, *PURE THEORY OF LAW* (1969) (trans. Max Knight) (articulating a theory of positive law holding that law is created by its emanation from valid and verifiable sources of state consent devoid of political or moral ideologies); Simma & Paulus, *supra* note 266, at 316 ("For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.").

291. See Brunno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTR. Y. B. INT'L L. 82, 89 (1992).

could adopt a new treaty or modify an existing one, such as ICERD. Arguments can be made that this right already exists as a general principle of international law expressed in international customary law. Either way, cementing racism as a human rights violation under international law requires robust and significant state participation. Establishing the illegality of racism in international law so it may be meaningfully enforced requires a positivist approach rooted in strong state consent and recognition. However, such participation seems politically unrealistic at present.

Thus, we need to look to international law's normative force to change minds and shape human behavior. Although the onus to establish racism as antithetical to the fundamental purposes of international law should not rest upon international law's normative power alone, this venue offers the most viable way forward. The project is to imagine how international law can promote a norm shift with regard to racism. Outlawing racism calls for international law to reach individuals in addition to states.

In Australia, for example, the Racial Discrimination Act protects citizens from being refused employment or fired from a job on the basis of race. To better advance these rights, the government has recently named a Race Discrimination Commissioner as a part of its Australian Human Rights Commission.<sup>292</sup> The law requires that employers take "all reasonable steps" to prevent racial discrimination.<sup>293</sup> In theory, this means that a person should be able to report a colleague who refuses to work with her or calls her a racial slur and have the employer take effective action to prevent those behaviors from continuing. But the law also aims to protect freedom of speech, so it does not prohibit a comment that is deemed to be fair and to express a genuine belief. Here, decision makers, such as managers, must necessarily interpret the difference between speech that is fair and that which is racist. They will do so through their own cognitive lens. Here, we run into the limits of law. As this example illustrates, legal reform can only do so much in combating racism. People must also change, and that requires cultural, social, and structural shifts in a society.<sup>294</sup> But, here, law can play an essential role in prompting broader human change within societies by creating and naming new human rights.

### *B. On Explicit Race Consciousness in International Human Rights*

In order to name, and ultimately to define, human rights racism in international law, the people of international law and of human rights move-

292. *Race Discrimination Commissioner*, AUSTR. HUMAN RIGHTS COMM'N, Oct. 5, 2018, <https://www.humanrights.gov.au/news/media-releases/race-discrimination-commissioner> [https://perma.cc/Y553-65PK].

293. See *Racial Discrimination: Know Your Rights*, AUSTR. HUMAN RIGHTS COMM'N (2014).

294. Makau W. Mutua, *Book Review, Exporting American Dreams: Thurgood Marshall's African Journey* by Mary L. Dudziak, 31 HUM. RTS. QUARTERLY 1146, 1148 (2009) (describing how removing legalized racism from capitalist societies is not the complete solution and noting "race cannot constitute a complete theoretical basis for full liberation.").

ments must have a reckoning about our own relationship to race and racism. A powerful way to proceed along this path is through the adoption of explicit race consciousness.<sup>295</sup> This means recognizing harms unique to racism, alongside other harms of discrimination on the basis of other features of identity including national origin, religion, sexual orientation, gender, and more. All of these forms of discrimination threaten international human rights. But this does not provide a meaningful rationalization for subsuming the problems arising from racism into a broader set of problems and, in doing so, negating the harms specific to racism.

Derrick Bell described the unique pain that racism inflicts. He writes that “[b]lack people are the magical faces at the bottom of the society’s well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us.”<sup>296</sup> His words reconstruct a narrative of social hierarchy that is centered on a social construct of race. In America, this hierarchy places black people at the bottom. The hierarchy exists in alternate forms in Algeria, Brazil, Korea, The Netherlands, and beyond. A common bond among these racial hierarchies, however, is that whiteness, however defined, is at the top. As Professor Kimberlé Crenshaw argues, whiteness becomes a form of property that has legal, social, and economic value in society.<sup>297</sup> Explicit race consciousness in international human rights means recognizing how such racial ideologies pervade the world politically, economically, and culturally.<sup>298</sup> Here, I offer a few ideas about how to begin that work of recognition.

First, outlawing racism means acknowledging that many people are racist. This leads us to Bell’s second bold insight. He puzzles over how we can acknowledge the truth about racism and not fall into “disabling despair.”<sup>299</sup> Here, the work of human rights must reach individuals, not just institutions. This Article has helped advance this cause by showing how people make choices and exhibit behaviors that are not racially neutral. My argument has exposed some of the neurological and cognitive bases for connecting the prevalence of racism in human rights spaces (and elsewhere) to the beliefs and choices individuals make. We can start with ourselves, becoming more aware of our explicit biases against certain people and reflecting

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295. Gary Peller, *Race Consciousness*, DUKE L. J. 758, 759 (1990) (“The commitment to a race-conscious perspective by many critical race theorists is dramatic because explicit race consciousness has been considered taboo for at least fifteen years within mainstream American politics and for far longer within the particular conventions of law and legal scholarship.”).

296. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 32.

297. Harris, *supra* note 164, at 1724.

298. GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914* (1971) (adopting a model for studying the history of racism that was influenced by the post-civil rights era period); John A. Powell, *A Minority-Majority Nation: Racializing the Population in the Twenty-First Century*, 29 *FORDHAM URB. L. J.* 1395, 1401 (2002) (arguing that the U.S. Census categories are constructed to maintain white supremacy).

299. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 32, at Preface (asking this essential question).

upon where those biases come from. We must also accept that we have implicit biases of which we are unaware. Deepening our understandings of how individual choice shapes legal outcomes in human rights through neuroscience permits a new conversation about racism and bias as a reality of human behavior. New knowledge assists in redirecting the conversation from one that merely shames to one that supports meaningful discourse and, ultimately, change.

Second, combating racism means taking up the need to shift and to share power. Those with power – from nations, to multinational corporations, to security and police powers – rarely share it voluntarily. As nationalism and xenophobia surge, nations are under renewed pressures to reconsider previously settled human rights. And even as governments and societies affirm their commitment to human rights laws that protect civil rights, enforce political and religious freedom, and promote basic economic welfare, the fights on the ground reflect a different reality. We are currently experiencing a world where human rights abuses arise most frequently from people with power acting upon people without power. It is only when the ills of racism harm the interests of the powerful that sharing power becomes possible. Therefore, the links between the harms of racism and threats to international peace and security must be made more specific.

Third, outlawing racism in international law means being honest about law's assumptions and presumptions.<sup>300</sup> As a first step, this requires a more meaningful acknowledgement that international law was built on a racist world order and those historical roots still permeate every level of international law today. Here, TWAIL and critical race theorists rightly call for recognizing that the law is not racially neutral.<sup>301</sup> We should therefore abandon race-neutral notions of meritocracy in law.<sup>302</sup> Alternatives might include adopting a race-power intersectionality view.<sup>303</sup> The task ahead is to bring the practices of human rights organizations into alignment with human rights principles.<sup>304</sup>

300. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 1 (1999); Mutua, *supra* note 33; Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989); ADRIEN WING, *CRITICAL RACE FEMINISM: A READER* (1998).

301. See Kimberlé Williams Crenshaw, *Race Liberalism and the Deradicalization of Racial Reform*, 130 HARV. L. REV. 2298, 2298 (2017) (“[T]hey challenged the deepest pretense of liberal sensibility—that universities themselves are apolitical arbiters of neutral knowledge rather than participants in the struggle over how social power is exercised.”).

302. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1806–7 (1989). *But see* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. J. 705 (1990).

303. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1257 (2011). See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935).

304. See Crenshaw, *supra* note 301; Crenshaw, *supra* note 303; Peller, *supra* note 295.

Fourth, given the severity of human rights harms that arise from racism, the paucity of treatment of racism in mainstream international legal scholarship is confounding and must be addressed.<sup>305</sup> The international human rights curriculum in many places is devoid of meaningful engagement with racism and many of the leading human rights law casebooks do not include it in their coverage.<sup>306</sup> Race also remains a neglected topic within international legal scholarship<sup>307</sup> as “issues of race have not been significantly addressed in international law discourse.”<sup>308</sup> Sadly, the paucity of such scholarship is taken by some as a sign of its unimportance, even as race and the law, in the words of Professor Kimberlé Crenshaw, is an “endlessly renewable narrative in American history.”<sup>309</sup>

For international law scholarship, TWAIL has proven to be the foundation for critically engaging racism, by engaging how “international law [i]s a medium for the creation and perpetuation of racialized hierarchies.”<sup>310</sup> Professor Henry Richardson, who began writing in the 1970s about how black traditions in America and Africa have shaped and advanced international law, has, for example, exposed the racialized politics of the UN Security Council and has identified the “International Black Tradition.”<sup>311</sup>

305. Anna Spain Bradley, *Book Review: Oona Hathaway and Scott Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017) 112 AM. J. OF INT'L L. 330 (2018) (stating that “the book, at times, glosses over topics involving race and racism where deeper engagement would have been warranted to achieve the book’s aim of offering an inspiring message for all.”).

306. The following leading casebooks on international human rights do not reference racism in their indexes: PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS (2013) (references racial discrimination); HURST HANNUM ET AL, INTERNATIONAL HUMAN RIGHTS PROBLEMS OF LAW, POLICY AND PRACTICE (2018) (references minority rights); SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW (2018) (no reference); JENS DAVID OHLIN, INTERNATIONAL LAW EVOLVING DOCTRINE AND PRACTICE (2018) (no reference); LORI F. DAMROSCH ET AL, INTERNATIONAL LAW CASES AND MATERIALS (2009) (no reference).

307. There are noteworthy exceptions. Martti Koskenniemi has offered several important contributions on how race has been a significant factor in shaping key concepts in international law, such as equality, and how racism has justified acts of aggression. See generally MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2002); Martti Koskenniemi, *Race, Hierarchy and International Law: Lorimer’s Legal Science*, 27 EUR. J. INT’L L. 515 (2016) (herein, he recalls the openly racist ideology of Scotsman James Latimer, an international lawyer of the late nineteenth century, who believed that “[t]he recognition of the equality of the negro with the white races in America is a case where law has outrun fact and for the present, at least, it furnishes no precedent of which international law can take cognizance.”); JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 158 (1883).

308. Ediberto Roman, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519, 1520 (2000); Jerry Kang, *Trojan Horses of Race*, HARV. L. REV. 1495 (2005) (from the perspective of race theory scholars in the American tradition, “[r]ace talk in legal literature feels like it is at a dead end. No new philosophical argument or constitutional theory seems to persuade those sitting on one side of the fence to jump to the other.”).

309. Crenshaw, *supra* note 301, at 2319.

310. See Antony Anghie, *What is TWAIL?: Comment*, 94 PROCEEDINGS OF THE AM. SOC. OF INT’L L. ANNUAL MEETING 31, 39 (2000).

311. See Henry J. Richardson, *Speculations on the Relevance of International Law to the Needs of Black Southern Africa*, 1 UFAHAMU: A J. OF AFR. STUD. 22 (1970); Henry J. Richardson, *International Law and the Continuation of Sanctions Against South Africa*, 3 TEMP. INT’L. & COMP. L. J. 249 (1989); Richardson, *supra* note 72 (naming the “Black International Tradition”); Henry J. Richardson, *Dr. Martin Luther*

Professor Antony Anghie's work calls into question the very real and powerful role that international law's colonial origins have embedded structural inequality into the core of the international legal order.<sup>312</sup> In 2000, Professor Adrien Wing's edited volume on *Global Critical Race Feminism* established a new foundation for considering the intersectionality between race and gender to account for the oppression of women of color around the world<sup>313</sup> and pioneered women and women-forward perspectives at the center of international legal theory, structure, and practice.<sup>314</sup> Professor Makau Mutua's work has stimulated robust discussion on how Western domination is present in the very structures of the international legal system and called for new theoretical ways to conceptualize human rights based on different values.<sup>315</sup> Thus, TWAIL, as described by Professor James Gathii, is a "historically aware methodology" for international legal scholarship.<sup>316</sup>

The TWAIL scholarly tradition advances ideas put forth in Derrick Bell's expositions of the ubiquity of how racism is perpetuated by law as well as the critical race scholarship that has followed.<sup>317</sup> As Professor Angela Harris explains,

[a]t the social level, race and racism are 'essentially contested' concepts, to the point that there is widespread disagreement even as to the definition of these terms. Yet evidence suggests that race

King, Jr. as an International Human Rights Leader, 52 VILL. L. REV. 471, 470 (2007) ("Many people see these as two separate discourses: civil rights vs. human rights. Part of Dr. King's leadership, however, was to insist that they comprise the same irreplaceable rights discourse.").

312. ANGHIE, *supra* note 32.

313. ADRIEN WING, *CRITICAL RACE FEMINISM: A READER* (1998).

314. Mosope Fagbongbe, *The Future of Women's Rights from a TWAIL Perspective*, 10 INT'L COMM. L. REV. 401 (2008); Athena Mutua, *Gender Equality and Women's Solidarity Across Religions, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 13 WM. & MARY J. WOMEN & L. 1 (2006); Adrien Katherine Wing & Tyler Murray Smith, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shifi?* 13 TRANS. L. & CONTEMP. PROB. (2003); Adrien Wing & Tyler Smith, *The New African Union and Women's Rights*, 13 TRANS. L. & CONTEMP. PROB. 33, 35 (2003); Berta Esperanza Hernandez-Trujol, *Women's Rights as International Human Rights: Concluding Remarks at Making Women Visible: Setting an Agenda in the Twenty-First Century*, 69 ST. JOHN L. REV. 231 (1995).

315. Mutua, *supra* note 314, at 852; MAKAU MUTUA, *HUMAN RIGHTS STANDARDS: HEGEMONY, LAW AND POLITICS* (2016). See also *AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW* (Jeremy Levitt ed., 2010).

316. James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE & DEV. L. 26, 26 (2011); Antony Anghie, *TWAIL: Past and Future*, 10 INT'L CON. L. REV. 479 (2008); Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401 (2007); James T. Gathii, *Rejoinder: TWAIL-ing International Law*, 98 MICH. L. REV. 2066 (2000); INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE (Richard Falk, Jacqueline Stevens, & Balakrishnan Rajagopal, eds., 2008).

317. See, e.g., BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note 32; DERRICK BELL, *CONSTITUTIONAL CONFLICTS* (1997); BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 32; Vinay Harpalani, *Professor Derrick Bell: "Radical Humanist"*, 464 BLACK COMMENTATOR (2012). See generally CRENSHAW, *supra* note 32; PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR* (1991). Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 140 U. CHI. LEGAL F. 139 (1989).

and racism continue to pervade societies around the world. The law reflects the contradiction as well. Because race and racism have played, and continue to play, such a pivotal role in law, political economy, and social stratification, law's commitment to racial equality is conflicted and ambiguous. As a result, laws prohibiting racial discrimination or mandating racial equality often have the unexpected effect of preserving racial hierarchy.<sup>318</sup>

In her groundbreaking work *Whiteness as Property*, Cheryl Harris adds that "[t]he legacy of slavery and of the seizure of land from Native American Peoples in not merely a regime of property law that is (mis)informed by racist and ethnocentric themes. Rather, the law has established and protected an actual property interest in whiteness itself."<sup>319</sup> Together with critical race theory, TWAIL includes a variety of scholarly voices that critique the purported interests behind widely-accepted international legal norms such as economic development, security, or peace.<sup>320</sup> Such perspectives should form the foundations of our human rights discourses.

### C. *On Human Identity, Demographic Shifts, and the World to Come*

Given recent advancements in human genetics that use DNA analysis to chart the diversity of the human species, it might seem a strange time to call for the international legal community to address a concept like racism. We must, therefore, acknowledge a fundamental tension. On the one hand, we are conditioned to see one another through the lens of race, however false and problematic a typology; and dismantling racism requires working through such inherited and learned views of race and hierarchy. On the other hand, race is a problematic way for human beings to identify ourselves and one another. Relying on race as a category for social and legal identity has severe limitations. First among them is the fact that, scientifically speaking, race does not exist. Instead, our DNA is the best evidence of our shared complex and global ancestry. As we learn more about our genetic history through tests such as 23andMe, we find that there are more credible ways to trace where we come from through our DNA and that our genetic identities are more interconnected and more complex than racial categories allow.<sup>321</sup> Second, racial categories are not uniform across countries. Third, racial categorization creates and perpetuates a social hierarchy

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318. Angela P. Harris, *Foreword*, in *CRITICAL THEORIES OF RACE AND RACISM IN WORLD PERSPECTIVE* (2011).

319. Harris, *supra* note 164.

320. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); R. PAL, *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGEMENT OF JUSTICE* 115 (1993).

321. See generally Wendy Roth, *Genetic Ancestry Tests Don't Change Your Identity, but You Might*, *THE CONVERSATION* (July 4, 2018), <https://theconversation.com/genetic-ancestry-tests-dont-change-your-identity-but-you-might-98663> [<https://perma.cc/5AGT-Y2A9>] (discussing how people use genetic tests, accurate interpretations of the findings, and the concept of racial identity).

that often puts whiteness at the top. White supremacy impacts legal, political, economic, civil, social, and cultural spaces and is a tool for perpetuating racism, slavery, apartheid, and a host of other harms.

It is heartening to know that the drafters of ICERD recognized this very tension between eradicating racial discrimination and eliminating race as a category for human identification. For example, Mr. Verret, the representative from Haiti, said during the drafting of ICERD that “we have produced a document of which the least that can be said is that it is reasonably reassuring. We applaud it, and . . . to intone in all solemnity the hymn of reconciliation among the races which fantastic theories tend to divide, vaunting the supremacy of some peoples over others regarded as inferior and hence despised and held in servitude, if not indeed destined for utter annihilation.”<sup>322</sup> His observations raised the contradiction that in outlawing racial discrimination, the UN was verifying the very concept of race, which includes its purpose as a tool to separate and discriminate.

Since then, others have continued to recognize that the troublesome nature of categorization on the basis of race has spread.<sup>323</sup> A report by the Inter-American Commission on Human Rights states that it “uses the term ‘racial’ not because it adheres to theories claiming the existence of different races in the human species, but rather in line with the nomenclature of Article 1 of the American Convention on Human Rights.”<sup>324</sup> That treaty, adopted on November 22, 1969, required state parties to “respect the rights and freedoms herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political, or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>325</sup> The UN Office of the High Commissioner for Human Rights’ *Developing National Action Plans against Racial Discrimination* also cautions that “[t]he use of the term ‘race’ in this publication does not imply the acceptance of theories which attempt to determine the existence of separate human races.”<sup>326</sup> But even as skepticism about using race in human rights law spreads, harms caused by supremacy and dominion on the basis of race remain.<sup>327</sup>

322. A/PV.1406, *supra* note 106, ¶¶79–87. THORNBERRY, *supra* note 105, at 5.

323. See, e.g., MANFRED NOWAK, CCPR COMMENTARY 49 (2nd ed., 2010); U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, DEVELOPING NATIONAL ACTION PLANS AGAINST RACIAL DISCRIMINATION: A PRACTICAL GUIDE 1 (2014) (“The question of when human beings differ from one another on account of their race and/or colour has been extensively investigated by different scientific disciplines, but there is no conclusive answer. The only settled aspect is that this involves personal qualities that are congenital, unchangeable, and externally recognizable.”).

324. IACHR, THE SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS, OEA/Ser.L/V/II, (Dec. 5, 2011).

325. American Convention on Human Rights, art. 1, Nov. 22, 1969.

326. DEVELOPING NATIONAL ACTION PLANS AGAINST RACIAL DISCRIMINATION, *supra* note 323.

327. See, e.g., Mutua, *supra* note 294, at 1146 (describing the connection and differences between the civil rights movement in the United States and the independence movement in Kenya, noting that a “key common denominator of both struggles is anti-racialism: the struggle of blacks against white



Looking to the future, how should humanity organize itself in the world to come? The future world is one of great diversity amid great numbers. According to the World Bank, the present human population of 7.53 billion is expected to reach 11.2 billion by 2100.<sup>328</sup> People in Asia and Africa are contributing to this population explosion at higher rates than other regions, and by 2100, it is projected that 80 percent of the total world population will live in those regions.<sup>329</sup> Referring to groups of people as “African” or “Asian,” as members of a single race or even several races, will fail to capture important political alliances, language distinctions, cultural affiliations, and other means of human identification. If the use of race is under scrutiny today, the predicted demographic shifts of the future will make this matter all the more pressing.

In 1999, Thomas Franck argued that “nationalism is in retreat” and that, in its place, “*individualism*” had emerged.<sup>330</sup> His book raises the vital question, then and now, about self-determination and the right to individuality in a global world. Today, young people around the world are raising their voices to be heard – not as citizens of a particular nation or as a racial category placed upon them, but as people who get to define their own identities. I expect this rising preference for self-definition to continue to grow. But will it clash with governments programmed to label and politicians bent on dividing? Thomas Franck thought that the modern world was “*not* simply a world of sovereign states” and that such “Vattelian . . . assumptions ha[d] become untenable.”<sup>331</sup> One manifestation of this is that states cannot be the sole guarantors of rights nor the repository of duties. To eliminate racism and a host of other ills, people must be directly involved in the business of rights and duties. States must accept new visions of social unity that are inclusive of the complex realities of human identity.<sup>332</sup> Doing so helps translate human rights law into human rights behavior.

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domination,” but cautioning against conflating the struggle for political independence with the struggle for equality in law); Krakoff, *They Were Here First*, *supra* note 200, at 42 (“Alternatively, the troublesome racial aspects of individual Native Americans could be eradicated through forced assimilation; Indians, unlike Blacks, could become white through processes of civilization.”).

328. *Population, total*, WORLD BANK (2017), <https://data.worldbank.org/indicator/SP.POP.TOTL> [<https://perma.cc/7HME-96V6>]; Tari Khokhar & Haruna Kashiwase, *Future world population in 4 charts*, WORLD BANK, THE DATA BLOG (2015), <https://blogs.worldbank.org/opendata/future-world-s-population-4-charts> [<https://perma.cc/PRR5-9ZLF>].

329. *Id.* *Future world population*, WORLD BANK, Chart: U.N. Regional Population Projections (billion, 2015–2100) (“By 2100, over 80% of the world will live in Africa or Asia.”).

330. THOMAS FRANCK, *THE EMPOWERED SELF* 1 (1999).

331. *Id.* at 5.

332. For an analysis of current human rights challenges, see Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RIGHTS. PR. 1 (2017) (“The populist agenda that has made such dramatic inroads recently is often avowedly nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda.”).

## CONCLUSION

The international human rights movement has helped create a world in which slavery, genocide, apartheid, and segregation are repudiated and, with the adoption of ICERD, racial discrimination is prohibited. Together, these milestones move the dream of universal human rights closer to reality. However, racism remains a barbaric and pervasive truth for too many people and is the underacknowledged human rights violation of our day. In response, nations must recommit themselves to upholding international legal obligations to prevent racial discrimination and to undertaking meaningful measures to promote equality and dignity. Nonetheless, combating racism requires something more. International human rights institutions and nations alike must acknowledge the deeper problems embedded in racism, including the use of race as a means for categorizing humans, racial ideology that promotes racial supremacy, and racial bias. Naming the challenge as human rights *racism* aims to illuminate the depth of the problem and to reveal the ways that international human rights law is not racially neutral. Just as societies and communities continue to grapple with understanding and ending racism, the places and spaces that promote human rights must do the same. If it is to be true that all people are equal in dignity and rights, we must not shy away from the hard and often uncomfortable work of addressing racism by its name.