



Topic: Human Rights and Racism: An Approach to reparations

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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.

Keywords: International human rights, discrimination, international community, racism, legal protections.

Introduction: Racism, in all of its forms, is the under acknowledged human rights problem of our day. Various defined, racism threatens the lives and rights of millions of people around the world. 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.' 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. Police continue to racially profile and murder African Americans at alarming rates, prompting public outcry but little remedy.' 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.⁶ 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.

Of course, racism is not isolated to America. It harms people around the world. 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 subSaharan countries are being sold in slave markets in Libya." 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." 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. Two years later, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") treaty was adopted by the United Nations. The treaty furthered the purposes of earlier international laws banning slavery.' Yet, a half-century later, international law's impact in eliminating racial discrimination has not matched its intent.

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.³ " 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.

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. 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.

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.' Therein, the report provides that: 'racism 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' and "[a]s an ideology and feeling, racism is by its nature aggressive.

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. 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, justified the Declaration's purpose on the basis of the rights affirmed by the earlier UN Charter and UDHR. 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.

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.

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 ("TWAIL"), 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. An accurate 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. Law was definitively shaped by these tragedies and an appropriate historiography includes them as part of the diverse history of international human rights law. 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.

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. It affirms the principles of non-discrimination and equality in the application of international law. 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.

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." 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.⁸⁶ None of the treaties use or define the term racism. Two declarations do.

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 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.

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. The United Nations Charter captures this rationale that international law is for the benefit of people and not just for nations. 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.

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 under acknowledged 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.

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