

# Whiteness as Contract in the Racial Superstate

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*Despite the United Nations' (UN) ongoing commemoration of the International Decade for People of African Descent and direct calls from UN member states for the body to confront systemic racism in the United States, the United States has with the support of its allies—successfully blocked measures beyond those which gently encourage mere aspiration to racial equity. Moreover, notwithstanding formal guarantees of equal access to justice and accountability for human rights violations, people of African descent and majority Black member states are systematically constructed out of international policymaking authority and legal protections at the UN—leaving them vulnerable to aggression, exploitation, and extraction.*

*This Article contends that the UN and its contemporary public international law regime, created and dominated by settler colonial states, has no ability to combat anti-Black racism because it has no interest in so doing; rather, the regime is both the manifestation of global racial contracting and the mechanism by which such contracting persists. The structure of the UN, along with the substance and procedure of public international law, work together in coordinated fashion to guarantee that the racial contracts in force in individual states are also performed, enforced, and protected within a global Racial Superstate.*

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#### INTRODUCTION

The persistence of anti-Black oppression by and throughout the Global North is an unfortunate testament to the ineffectiveness of the public international law regime in providing legal remedies for peoples of African descent—people who, by and large, cannot count upon their national governments for racial justice. Notable scholars have advanced sophisticated, compelling arguments regarding the failures of the United Nations (UN) and international law to support and protect the rights

of Afro-descendant peoples.<sup>1</sup> This Article joins especially those who have called for a fully synthesized application of Critical Race Theory (CRT) and Third World Approaches to International Law (TWAAIL)<sup>2</sup>—in agreeing that the principles of anti-discrimination and equality upheld by the letter of international law is belied by international law’s colonial foundations and continued privileging of states’ neo-imperial interests over justice.<sup>3</sup> It calls for the abandonment of the prevalent belief that international law intends to advance universal human equality and anti-racism,<sup>4</sup> and it makes the case that international law fails to implement anti-racism because it is inherently and intentionally anti-Black and anti-Indigenous.

This Article’s central argument is that the public international law regime has reinforced the subjugation of people of African descent across nations,<sup>5</sup> and does so because it is premised upon a political commitment to Euro-American superiority, sovereignty, and dominance and an accompanying commitment to Afro-, Asian-, and Indigenous subjection, reception, and degradation.<sup>6</sup> Two

1. See, e.g., E. Tendayi Achiume, *Putting Racial Equality onto the Human Rights Agenda*, 15 SUR INT’L J. ON HUM. RTS. 141 (2018) (contending that racial equality is marginalized within the global human rights agenda); Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019) (contending that international law’s intent to eradicate anti-Black racism is not matched by its actual impact upon racism).

2. According to Achiume, “[a] transnational analysis is essential for assessing emancipatory possibilities for Black people living in the United States.” E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378, 379 (2021). See E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462 (2021). Achiume and Devon Carbado cite James Thuo Gathii’s work, *Writing Race and Identity in a Global Context: What CRT and TWAAIL Can Learn From Each Other*, as scholarship that “successfully takes on the challenge of identifying key lessons CRT might learn from TWAAIL and vice versa.” *Id.* at 1464–65 (citing Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAAIL Can Learn From Each Other*, 67 UCLA L. REV. 1610 (2021)). This Article aims to offer additional contribution to this worthy project.

3. See, e.g., Bradley, *supra* note 1, at 4 (“[I]nternational law’s impact in eliminating racial discrimination has not matched its intent.”); see also ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 193 (2004) (noting of the League of Nations’ Mandate Systems “and in its successors, the BWI [Bretton Woods Institutions], the reproduction of the basis premises of the civilizing mission and the dynamic of difference embodied in the very structure, logic and identity of international institutions.”); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 130 (1990) (“Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism and in basic principles of human rights.”).

4. See sources cited *supra* note 3.

5. See, e.g., Achiume, *supra* note 1, at 142 (discussing that even within human rights law, people bearing the brunt of racist oppression are marginalized).

6. This Article focuses primarily on people of African descent, referred to interchangeably as Black or Afro-descendant people. However, the claims it makes regarding the exclusion of Black people from political proprietorship, contracting authority, and protections under international law are also largely applicable to other nonwhite, Indigenous communities and racial groupings. Because of the global scourge of anti-Black racism, people perceived as nonwhite, and thus, closer to Blackness, are also systematically subjected to racial discrimination. See Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1826–27 (2022) (describing attempts by people of color to achieve White appearance or identity to escape the burdens of racial discrimination). Nations populated and led by Black, Indigenous, and other nonwhite racial

interrelated dynamics support this argument: (1) the employment of international law, via racial contracting among Global Northern powers, to squash or deny human rights claims and complaints by people of African descent; and (2) the perpetuation of racialized geopolitical governance—via social contracting and traditional contracting—through the Global North’s manipulation and selective interpretation and enforcement of international law. The racial contract in force at the national level in racial states such as the United States, Brazil, the United Kingdom, France, South Africa, and beyond is also in force within the global institutional order—and is given force through the UN and the public international law regime.<sup>7</sup>

The operational mechanisms that sustain national racial contracts also support the contracting of white supremacy throughout the public international law regime. Negotiation and binding accords are means through which the racial contract is enforced at the UN, by states seeking to maintain or strengthen racialized geopolitical hegemonies. Thus, despite the noble work of the public servants who dedicate themselves to justice, peace, sustainability, security, and good governance at the institution, the UN thus inevitably replicates and perpetuates anti-Blackness, through both the substance of its laws and its procedures.<sup>8</sup> Because the UN fails to protect Afro-descendant peoples globally, its effectiveness and legitimacy continue to be compromised, and the norms and laws over which it has jurisdiction continue to do a world of harm to people raced as nonwhite.

The Article begins, in Part I, with an explanation of the application of critical contract theory, via the Whiteness-as-Contract framework, to the UN and the public international law regime. In this Part, the Article sets forth the goals of the Racial Superstate and articulates the terms of the UN’s racial contract, explaining how international law perpetuates the contract and protects it from breach. Part II offers up as a case study a description of the Human Rights Council’s June 2020 Special Session, which serves as a case study for the systemic exclusion of Black people from the global body politic despite their physical presence on the Council, active formal participation, and focused anti-racism advocacy. Part III of the Article explores the structure, substance, and procedures of international law, discussing the reliance of dominant states upon the extant systems as structured and applied to exclude people of African descent from the protections of international law and proprietorship within international organizations. In Part IV, the Article proposes the rescission of the global racial contract and dissolution of the Racial Superstate

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groupings are also systematically deprived of sovereignty and decision-making authority on the global stage.

7. See Achiume, *supra* note 1, at 142 (“I want to clarify at the outset that my critique is levelled at the cast of nongovernmental and multilateral actors who through different global platforms (especially the United Nations) produce global knowledge and influence norms and policy regarding what human rights are, and when and how they are achieved.”).

8. See *id.* at 143 (“Although influential actors within the global human rights system have raised the alarm against visceral expressions or acts of racism and xenophobia, these actors fail seriously to engage with the historically entrenched structures of racial oppression, exploitation and exclusion that violate the human rights of many but are largely invisible even in the global human rights discourse.”).

in exchange for an anti-racist social contract. It reiterates calls for the recognition of racism as a violation of international law, and the rejection of racism and race denial within international law scholarship. Thereafter, the Article concludes.

#### I. RACE, LEGAL PERSONHOOD AND CONTRACTING AUTHORITY IN THE RACIAL SUPERSTATE

This Part of the Article analyzes public international law as a racializing system and the UN as an institution plagued by its commitment to post-colonial white supremacy through the lenses of racial contract theory and critical contract theory. It positions the UN as the central governing body of a Racial Superstate, claiming that the many negotiated agreements—treaties, conventions, and funding commitments—promulgated through and within the Superstate support a social contract that perpetuates global white supremacy. In making these claims, this Section of the Article also challenges readers to recognize treaty-making, and other negotiated bilateral and multilateral agreements, as meaningful and enforceable—though not necessarily commercial—contractual bargaining. This Part begins by considering the centrality of contract to public international law, before explaining how the creation and structure of the United Nations was premised upon a Whiteness contract and built to sustain white supremacy through the force of public international law.

##### *A. Considering Contracts in the Context of Public International Law*

In previous work, I have emphasized the exclusion of Black people from commercial contracting and proprietorship.<sup>9</sup> This Article builds upon that work, this time focusing on the use of contract to both sustain and disrupt international law for the purpose of excluding Black, Indigenous, Asian, and other nonwhite peoples from full and reliable legal protection. Here, I make the argument that the racial formations supported through the creation of the UN give sustaining power to racial contracts within individual nation-states in addition to the racial contract undergirding the Racial Superstate.

By critical contract theory, I refer to an approach to the law of contracts that critiques (1) the acceptance of unequal bargaining power in contracting; (2) the prevalent assumption within the field that race, gender, sexuality, coloniality, nationality, creed, and class are not to be given central consideration when judging the quality and enforceability of contracts; (3) and the narrow definitions of what is and can be considered contract.<sup>10</sup> Dylan Penningroth has written about legal

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9. See Marissa Jackson Sow, *Coming to Terms: Using Contract Theory to Understand the Detroit Water Shutoffs*, 96 N.Y.U. L. REV. ONLINE 29 (2021); Jackson Sow, *Whiteness as Contract*, *supra* note 6; Marissa Jackson Sow, *Protect and Serve*, 110 CALIF. L. REV. 743 (2022).

10. See, e.g., Chaumtoli Huq, *Integrating a Racial Capitalism Framework Into First-Year Contracts: A Pathway to Anti-Capitalist Lawyering*, 35 J. C.R. & ECON. DEV. 181, 184 (2022) (criticizing “[e]ntrenched neo-classical values of objectivity and rational choice embedded in contract doctrine, as

scholars' framing of race as "so tangential to the substantive doctrinal rules and concepts"<sup>11</sup> of contract law "that many faculty are expressing concern that they will have to skim on the doctrine to make room."<sup>12</sup> Critical contract recognizes the centrality of race to private law, and it emphasizes the reality that contracts are human constructions that are, over time and jurisdiction, given parameters and the force of law. In my Contracts courses, I explore, with my students, how the notions of what an enforceable agreement is has evolved, and continues to evolve, across time and place.<sup>13</sup> For example, within the United States, definitions and conceptions of consideration have evolved<sup>14</sup> from a standard that judged a valid exchange against the forbearance of rights,<sup>15</sup> to a benefit-detriment analysis,<sup>16</sup> and, finally, to the idea of a bargained-for-exchange<sup>17</sup> that can be satisfied with just a "peppercorn" of good-faith consideration.<sup>18</sup> Contracts are whatever we say they are, and what is important to determine is who "we" includes and who "we" *should* include.

The definition of contract is at least as social and political as it is legal. The theory challenges traditional contract theorists' assumptions that all contractors are essentially equal in freedom and agency,<sup>19</sup> as well as the belief that contracts between actors with wildly disparate amounts of power and agency are a valid feature of a democratic and just society.<sup>20</sup> It seeks to unveil the inequality and injustice prevalent in many contracts, including many of the cases taught to first-year law students and presented to them as banal agreements when they, in fact, were premised in slavery

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well as the presentation of the doctrine as a mechanical application of rules" as a point of departure for exploring ways to equip law students to dismantle racism in their practice).

11. Dylan C. Penningroth, *Race in Contract Law*, 170 U. PENN. L. REV. 1199, 1201 (2022).

12. *Id.*

13. *See id.*; Huq, *supra* note 10.

14. *See* Edmund Polubinski Jr., *The Peppercorn Theory and the Restatement of Contracts*, 10 WM. & MARY L. REV. 201 (1968) (tracking the historical evolution of the concept of consideration in the United States).

15. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

16. *See* Polubinski, *supra* note 14, at 206.

17. *See id.*

18. *See id.*

19. *See* CAROLE PATEMAN, *THE SEXUAL CONTRACT* 39 (1998) (summarizing classical social contract theorists as basing their theories in the "claim . . . that individuals are naturally free and equal to each other" and thus capable of contracting with each other).

20. *See* Huq *supra* note 10, at 184–85, wherein Huq confronts the centrality of race and racism to contracts and business law, noting that

reinforcing the idea of objectivity in contracts leaves the impression that the doctrine is free from bias, and that there is a uniform set of lived experiences shared by all parties to a contract. More so in contract law, which entails the legal ordering of the market economy, it is important to examine the relationship of race, law, and capitalism.

*See also* Angela Harris & James J. Varellas III, *Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1, 6 (2020) ("[B]oth 'public' and 'private' law have come to depend on the idealization of efficient and free markets that respond nimbly to rational preferences and maximize social wealth for all.").

or other grave forms of exploitation.<sup>21</sup> In so doing, critical contract theory offers up the contract, and the law of contracts, as something that is—contrary to prevalent understanding<sup>22</sup>—political and indicative of societies’ hegemonized notions of legal personhood.

Critical contract theory seeks to disabuse those studying the law of contracts of the notion that private ordering and commercial law are efficient, pure spaces that are, or should be, immune from critique, regulation, and transformation. It resists mainstream (and for those possessing social and political privilege, convenient) assumptions that take as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.<sup>23</sup> The history of free markets and the transactions occurring therein demonstrate that one person’s freedom of contract has meant exploitation, extraction, and expropriation for many others,<sup>24</sup> just as liberal democratic governance in White Global Northern nations has necessarily been made possible through chattel slavery, settler colonialism, and subjugation of Black and Indigenous people. Critical contract theory focuses upon the interplay between commercial and social contracting—highlighting the reality that contracts are human, social, political, and legal constructions and that our collective investments in the regulation of agreements for goods and services supports the social contracts of the communities concerned therewith. In sum, legally enforceable agreements do, and must always, work together with tacit social contracts for either system of contracting to exist and be sustained.

I apply critical contract theory throughout this Article, analyzing the rise of contract and international law as complementary parts of a liberal geopolitical regime aimed at creating equality for White peoples among themselves, at the explicit expense of those first categorized as barbaric (to justify colonial conquest) and then raced as nonwhite (to sustain colonial order). International law is the

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21. See Penningroth, *supra* note 11, at 1289–90. Penningroth discusses, at length, the centrality of race to contract law, but also how the races of Black plaintiffs in contracts cases have either been highlighted for theoretical purposes or effaced for the purposes of doctrinal mainstreaming. See *id.* at 1238–59.

22. See Harris & Varellas III, *supra* note 20, at 6 (“[T]he legal scholarship of the last half-century has withdrawn from ‘questions of economic distribution and structural coercion’. In legal fields designated as politics-regarding (such as constitutional or administrative law), great deference is paid to existing economic and political distributions, which are treated as neutral baselines from which courts should not stray without a compelling rationale.”) (citation omitted); Cass Sunstein has, in his influential 1987 article, criticized the *Lochner* court’s assumption that law can be neutral. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (“For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement . . . . Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.”).

23. Sunstein, *supra* note 22, at 874.

24. See TERI A. MCMURTRY-CHUBB, RACE UNEQUALS 1–9 (2021) (describing the constraints that slave overseers’ employment contracts with plantation owners placed on the overseers’ socioeconomic mobility).

product of explicit international social contracting. But international law, while wholly dependent upon social and political will, is given force through legally enforceable agreements—or, traditional contracts. Multi- and bilateral agreements are at the center of the process and substance of international law, which are themselves based upon conventions, treaties, and accords. International law is sustained via such agreements, both in the context of public international law and the laws governing international commerce.<sup>25</sup> In *Foster v. Neilson*, Chief Justice Marshall of the United States Supreme Court wrote that “a treaty is, in its nature, a contract between nations.”<sup>26</sup>

Treaties, or legally binding agreements between and among states, are a cornerstone of international law. As international law depends upon the willing participation and accession of sovereign states dealing with each other as equals, the agreements between and among states much more closely resemble commercial contracts than do the agreements between states and their citizens. Per the Vienna Convention on the Law of Treaties, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>27</sup> Laurence Helfer has described states’ obligations to their treaties in the following way:

No state can be forced to accept a treaty without its consent, nor can it be compelled to join an intergovernmental organization against its will. Once a state has assented to a treaty and has successfully shepherded it through its national approval process, however, it must observe its treaty commitments in good faith. International law takes a dim view of challenges to this meta norm of treaty adherence.<sup>28</sup>

Treaties function very similarly to commercial contracts (and in some cases, they are commercial contracts), with international law taking compliance with treaties seriously—so much so that violations of treaties are known as treaty breach.<sup>29</sup> Like contracts for the sale of goods, international law favors renegotiation and enforcement of treaties rather than unilateral abandonment thereof.<sup>30</sup>

When shifts in the political landscape or domestic preferences undermine a treaty’s objectives or render its terms unduly burdensome or obsolete, international law directs states to eschew unilateral action in favor of negotiation with their treaty

25. Vienna Convention on the Law of Treaties, art. 2, ¶ 1(a), May 23, 1969, 1155 U.N.T.S. 331 (“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

26. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313–14 (1829).

27. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

28. Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1580–81 (2005).

29. *See id.* at 1581 (“Claims of invalidity, changed circumstances, and other exculpatory doctrines are narrowly construed, with the result that most unilateral deviations are viewed as breaches of a treaty.”).

30. *See id.*

partners. The plausible outcomes of such collaborative efforts range from a temporary suspension of the treaty, to a modification of its terms, to wholesale abrogation of the agreement with or without the adoption of a fresh set of treaty commitments.<sup>31</sup>

Of course, international law is comprised of public and private law as well as commercial law; the UN Convention on Contracts for the International Sale of Goods (CISG)<sup>32</sup> is exemplary of the interrelating systems of “public” and “commercial” agreements working together to form international law and governance. The CISG, which is the multi-lateral treaty that establishes a uniform legal framework for international commerce, also serves as a reminder that the dichotomization of public and commercial law that leads scholars to erect barriers between “real” and “social” contracts is but a fiction—a fiction that is often weaponized to preserve oppressive hierarchies within the law and legal education that merit dismantling. Considering the making and enforcing of public international law through the lens of contracting—commercial or otherwise—allows investigating eyes and minds to recognize that international law is a human construction, subject to constant negotiation, and in the perpetual service of geopolitical ordering.

#### *B. Whiteness as Contract and the Establishment of the United Nations*

Mills’s theory of the racial contract is of a social contract fueled and perpetuated by settler colonialism and racial capitalism.<sup>33</sup> The contract is an agreement by and for people, who have raced themselves as white, to form and maintain a body politic from which those raced as Black are necessarily excluded, and from which those raced neither as Black nor White are selectively excluded or included. Exploitation and extraction of human capital and material resources are the goal of the organization and perpetuation of the racial contract, and modern racial formations provide justification for the economic coercion and expropriation carried forth by the white body politic.

Because the racial contract is, as Mills describes, an exploitation contract,<sup>34</sup> contracting by Black people frustrates the racial contract’s purpose.<sup>35</sup> Consequently, Black independence from the white body politic is forbidden, as is Black participation therein;<sup>36</sup> similarly, Black contracting and proprietorship are also systematically threatened, if not forbidden, whenever and wherever they may threaten white domination of economic, political, and social resources.<sup>37</sup> Whiteness

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31. *See id.*

32. This Convention is also known as the Vienna Convention. *See* United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, U.N. Doc. 1489 U.N.T.S. 3.

33. *See* CHARLES W. MILLS, *THE RACIAL CONTRACT* 9, 12–14 (1997).

34. *Id.* at 9.

35. *See* Jackson Sow, *supra* note 6, at 1830.

36. *Id.* at 1820–23.

37. *Id.* at 1830.

therefore becomes inalienable from contracting authority; conversely, while Black people regularly engage in commercial activity, they have no reliable expectation that their contractual agreements—sociopolitical or commercial—will be respected or performed. Blackness thus becomes subjected to a purgatory-like existence, suspended between presence and absence, life and death, and citizen and internally displaced person. Within the racial state, Black people are invaluable, but never equal, as their presence as inferior creates space for the superior. Within the Racial Superstate, postcolonial nations, inherently racialized as they are, are similarly critical to the legitimacy of international law but are never allowed to exercise complete autonomy or authority within the realm, as permanently junior states.

Whiteness contracting supports the Racial Superstate.<sup>38</sup> Much like national and local racial contracts, the international racial contract is supported by the interplay between public and private ordering—with public law often formally rejecting racism and racial discrimination while private law ensures its continued perpetuation. Applying critical contract theory to the discussion of the role that white supremacy played in the founding of the UN reveals that the founding member states employed Whiteness—and more specifically, white global domination—as consideration for their agreements to be bound to each other in their global governance project. As such, the UN, and international law, are not merely racialized but *racializing* forces.<sup>39</sup> Because Black contracting—commercial and otherwise—is inherently threatening to white bodies politic, international law is manipulated and undermined as necessary to avoid respecting the legal personhood of Afro-descendant people and the equal sovereignty of their nation-states. Whether through the negotiations and interpretations of multilateral conventions, or through bilateral agreements, Black people remain systematically marked for dispossession of material assets, physical freedoms, full political franchise, and comprehensive legal recourse throughout public international law.<sup>40</sup>

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38. See *id.* at 1827 (“The creation of race and whiteness was not only a means of developing the American project then, but also of creating the present global institutional order and global governing frameworks and norms.”); MILLS, *supra* note 33, at 33–39.

39. Randle DeFalco and Frédéric Mégret have made a similar argument specifically about the International Criminal Court, contending that “it may be less interesting and plausible to see the ICC as racist than to see it as racialising, that is, as part of the ongoing social construction of race.” Randle C. DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 LONDON REV. INT’L L. 55, 56 (2019).

40. See Jackson Sow, *supra* note 6, at 1810 (“This Article uses contract theory to explain why Black people’s possession of property—including their rights to home ownership and life-sustaining utilities, their rights to personal physical integrity, their rights to cast votes, and their rights to existence in a public space—is regularly met with brutal resistance. In articulating a theory of personhood in which Black people are stripped of contractual capacity and the rights to political, commercial, or personal proprietorship, I explain how grave, anti-Black human rights abuses are tolerated and sanctioned within the United States.”).

### 1. *The United Nations as a Colonial and Racial Formation*

This Article positions the United Nations as the central governing body of the Racial Superstate. Tendayi Achiume and Gay McDougall, writing together, have described the UN system as a system that was birthed under the leadership of colonial and former enslaving powers that even at the time of its inception remained invested in global racial hierarchy.<sup>41</sup> The Racial Superstate finds its roots in settler colonialism, a global project that exists both formally and informally to this day. For proof of the same, one need look no further than the halls of the UN Headquarters in New York City, where the Trusteeship Council Chamber remains.<sup>42</sup> The UN describes the Trusteeship Council as “one of the main organs of the United Nations” and the purpose of the Trusteeship Council was to manage “trust territories”—or colonies of the powers defeated in the Second World War—and their transitions to formal independence, until the Council’s operations were suspended in the mid-1990s (following Palau’s independence).<sup>43</sup> The Trusteeship Council, though formed to oversee processes of decolonization, served as a macro-colonial administrator, reflecting a desire of colonial powers such as the United Kingdom and France to strike a compromise between domestic political parties’ conflicting views on colonialism.<sup>44</sup> The Trusteeship Council still exists, as it has not been abolished, and is currently comprised of and led by the select group of world powers—the United States, United Kingdom, France, Russia, and China—known as the P-5 states.<sup>45</sup>

Within the Racial Superstate, Whiteness is still the most precious capital, bargained for not only by residents of any one nation but by nations themselves, and jealously guarded by those in its possession. The possession of Whiteness in the Racial Superstate allows for race-based economic exploitation not only by a state against its Black citizenry, but by Western powers vis-à-vis its colonial subject states. Within the Racial Superstate, legal personhood is tiered according to race: the French do not need visas for entry to Senegal, but Senegalese citizens must acquire a visa to enter France; though Senegalese citizens can acquire French citizenship, the French Whiteness contract permanently excludes people of Senegalese ancestry from French identity.<sup>46</sup>

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41. E. Tendayi Achiume & Gay McDougall, *Anti-Racism at the United Nations*, 117 AM. J. INT’L L. 82 (2023).

42. See *Trusteeship Council Chamber*, UNITED NATIONS GIFTS, <https://www.un.org/ungifts/trusteeship-council-chamber> [<https://perma.cc/QE3S-JE5N>] (last visited Feb. 26, 2024).

43. *Trusteeship Council*, UNITED NATIONS, <https://www.un.org/en/about-us/trusteeship-council> [<https://perma.cc/43YL-AY6K>] (last visited Feb. 26, 2024).

44. See Ernst B. Haas, *The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System*, 7 INT’L ORG. 1 (1953).

45. See U.N. Charter art. 23, ¶ 1.

46. See ERIK R. VICKSTROM, *PATHWAYS AND CONSEQUENCES OF LEGAL IRREGULARITY* 40–49 (2019). Additionally, I contend that “whiteness is the product of contracting—both commercial and social—that creates, and continues to negotiate, an invisible common law that preserves control over property, capital, power, and contracting authority for those raced as white.” Jackson Sow, *supra*

The Racial Superstate is exemplified, not only by neocolonial geopolitical systems that subjugate people of African and Indigenous heritage and descent to the wills and whims of global power, but also by the structures and procedures in place at the UN. The UN has not eliminated the Trusteeship Council and has instead placed it under the supervision of major imperial powers.<sup>47</sup> Despite the UN's formal commitments to eradicate racial discrimination, its programmatic commitments to remember and condemn the Trans-Atlantic slave trade and colonialism, and its ongoing International Decade for People of African Descent, anti-Blackness remains deeply engrained within the organization. Indeed, anti-Blackness is quite literally built into the UN's structures, procedures, and the substance of its conventions. This structural, institutional, and systemic racism within the UN and throughout its global jurisdiction is not the result of poor, myopic institutional design but of intentional engineering. This engineering perpetuates, as intended, tiered global citizenship based upon race and national origin.<sup>48</sup>

As currently structured, the P-5 occupy permanent spots on the Trusteeship Council and possess veto power. Ten other nations can serve on the Trusteeship Council for temporary two-year terms. France holds a permanent seat on the United Nations Security Council; Senegal is eligible for a two-year rotating term every couple of decades, and its temporary membership on the Security Council does not come with veto power; conversely, France's permanent membership does.<sup>49</sup> As of 2022, more than fifty UN member states had never been Members on the Security Council. Based on the so-called liberal values of the world powers holding permanent seats, the structure, and accompanying system of reserving permanent decision-making power for mostly Euro-American nations, could not be more anti-democratic, illiberal, and unjust.

The Security Council's exclusion of all African and majority Black nations from its permanent seats is patently anti-Black. The Security Council's white supremacy is somewhat obvious, but at the least, China holds one of the five

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note 6, at 1810–11. I have also argued that “race is a sociopolitical construction meant to consolidate economic wealth and power amongst those people raced as white and that this construction is bargained-for.” *Id.* at 1814–15. Further, I contend that the Whiteness contract is operationalized via a “system of separate yet interrelated and coordinated commercial (and legally enforceable) contracts and social contracting, which is often tacit though given force through the law.” See Marissa Jackson Sow, *Whiteness as Contract as a Framework for Understanding America's Police Problem: Part One: Police as Guardians of the American Racial Contract*, CONTRACTSPROF BLOG (Apr. 27, 2021), [https://lawprofessors.typepad.com/contractsprof\\_blog/2021/04/guest-blogger-marissa-jackson-sow-on-whiteness-as-contract-and-the-police-part-i.html](https://lawprofessors.typepad.com/contractsprof_blog/2021/04/guest-blogger-marissa-jackson-sow-on-whiteness-as-contract-and-the-police-part-i.html) [<https://perma.cc/F7E8-T56P>].

47. See United Nations, *supra* note 43 (“At its seventy-second session in 2019, the Trusteeship Council elected Anne Gueguen of France as its President and Jonathan Guy Allen of the United Kingdom as its Vice-President.”).

48. See Achiume, *supra* note 2, at 379–80; see also Spain Bradley, *supra* note 1, at 41–42 (describing the racial bias endemic to the United Nations—and especially at the Security Council—and within the International Criminal Court).

49. See U.N. Charter art. 23, ¶ 1.

permanent seats, and combined with Russia's permanent presence on the Security Council, one counterargument is that the structure of the Security Council is not about race and coloniality, but nuclear weapons (begging the question of why the nations responsible for the world's most catastrophic tools of insecurity could be given permanent authority over keeping the world safe). That Black and Brown-led nations are permanently excluded from permanent representation on the Security Council is nothing less than a demonstration of the widely-held belief within the UN that African, Caribbean, and most Asian nations are incapable of leadership and undesirable as world leaders—a belief that is based in a legacy of colonialism that is itself bolstered by racism and which drives delegation of decision-making authority in international relations and international law.<sup>50</sup>

The structure is internally inconsistent as well—even from a liberal perspective. If the overarching goal of the Security Council is to maintain global security and stability,<sup>51</sup> as understood through a liberal lens, it makes very little sense to grant permanent veto power to autocratic bad actors such as Russia and China, and to allow such power to remain effectively unchecked because of the lack of democratic structure and process in place. If the justification for reserving permanent slots on the Security Council is that only certain liberal Western countries can be trusted with world governance, there would arguably still be no place for Russia or China in such an equation.

To carry the inquiry still further, this time from the critical perspective from which this Article is written, is there any nation with a permanent UN Security Council Seat that should have the power and authority that comes with such a seat? It is all too easy to criticize Russia and China; meanwhile, the United States also boasts a dismal domestic human rights record, particularly with respect to its Black, Asian, Latinx, and Indigenous populations. The human rights records of France and the United Kingdom do not fare better, and all three nations are reviled by many others for what is viewed as violent interventionism in poorer countries that stifles those nations' economic, political, and social progress.<sup>52</sup>

Several options exist for reforms and transformations that could ameliorate the current illegitimacy of the UN Security Council. One option would be to disband the Security Council entirely. Another option would be to remove all permanent seats and veto powers and make all memberships temporary and rotating. Another option still would be to ensure that all memberships are temporary and geographically equitable. A more conservative option would be to

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50. See Siba N. Grovogui, *Come to Africa: A Hermeneutics of Race in International Theory*, 26 ALTS.: GLOB. LOC. POL. 425, 425–27 (2001).

51. *United Nations Security Council*, UNITED NATIONS, <https://www.un.org/securitycouncil/> [<https://perma.cc/38Q7-XGSE>] (last visited Feb. 26, 2024) (describing the Security Council as having “primary responsibility for the maintenance of international peace and security”).

52. See Achiume, *supra* note 2, at 396 (“It should not be forgotten that the liberal project is an imperial project.”).

simply expand the permanent memberships to include representatives from all continents and historically excluded demographics. What is clear is that the current structure of the Security Council explicitly and actively excludes Black decision-making power concerning international security, and prioritizes the will and whims of colonial and imperial powers—not because of any nobility or superior ability to govern the world, but instead because of financial largesse acquired through colonial rule, enslavement and massacre of African and Indigenous peoples throughout the Global South, and the acquisition of dangerous nuclear capacity.

## 2. *On Personhood and the Roots of Anti-Blackness in International Law*

In earlier work on the Whiteness contract, I referred to the theories of Afropessimism<sup>53</sup> and necropolitics<sup>54</sup> set forth by contemporary philosophers Frank Wilderson and Achille Mbembe, respectively. I did so to offer color to readers regarding the process and impact of structuring Black people out of the American politic. I make mention of these theories again here, as the frameworks they advance are also applicable in the contexts of international law and geopolitics.

Wilderson's work on Afropessimism moves readers beyond prevalent notions of racial discrimination as the result of interpersonal bias, reflecting instead, as did the work of Franz Fanon and others before him, how within the global institutional order people of African descent are completely constructed out of human rights benefits (and even human rights discourse) because they have already been constructed out of humanity.<sup>55</sup> Where I argue that Black people are constructed outside of personhood politically, legally, and socioeconomically, Afropessimism goes further, into terrifying territory. Afropessimism posits humanity, too, as a construct, contending it is a construct that excludes Blackness as a definitional matter.<sup>56</sup> Afropessimism contends that humanity and beyond humanity (i.e., personhood) are constructed and organized in opposition to Blackness and that humanity, therefore, needs Blackness to exist.<sup>57</sup> This may account for the fact that Black people are simultaneously hyper-visible and invisibilized within white supremacist societies and spaces.<sup>58</sup> Critiques of Afropessimism note that the theory

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53. See Jackson Sow, *supra* note 6, at 1849, 1851.

54. See *id.* at 1831–32.

55. See Gathii, *supra* note 2, at 1641 (“For TWAIL, international law is the product of a combination of the colonial project and anthropologically reified definitions of the primitive. It is this racialized primitiveness of the non-European that justified conquest and subjugation. These deeply racialized discourses presumed the West was superior and civilized but were also predicated on assumptions of White supremacy, in which White was pure, neutral, and rational while the others were impure, abnormal, and degenerate.”); MILLS, *supra* note 33, at 20 (describing “international law, pacts, treaties and legal decisions” as part of a “series of acts” by which “Europeans . . . emerge as the ‘lords of human kind’ . . . with the increasing power to determine the standing of the non-Europeans who are their subjects”).

56. See FRANK B. WILDERSON III, AFROPESSIMISM 384 (2020).

57. See *id.*

58. See *id.*

itself tends to veer towards the anti-Blackness it bemoans, with Wilderson concluding—wrongly, I believe—that Black life is essentially impossible to reproduce or flourish.<sup>59</sup> However, if the theory fails, it is because it continues to measure Black life against white supremacist standards that are themselves worthless. When viewed as a framework for explaining how anti-Blackness works in a strategic, political manner, however, Afropessimism is very helpful in explaining the creation and sustaining power of the Racial Superstate.

Wilderson is certainly not the first critical theorist to dislocate people of African descent from prevalent understandings of humanity. Many years earlier, Sylvia Wynter notably did the work of “unsettling the coloniality of being,” drawing upon the work of Franz Fanon<sup>60</sup> and others to do so. Here, again, a collaborative engagement of both CRT and TWAIL theories is profoundly helpful: where Wilderson speaks of an exclusion of the Black being from humanity, Mbembe considers a real-time degradation of humans (that disproportionately impacts all people of Global Southern heritage) via liberal governance that has the impact of dispossessing them of the benefits that liberalism is supposed to guarantee.<sup>61</sup> Wynter, on the other hand, considers that “man”-hood is entirely overrepresented due to settler colonialism, and that this overrepresentation “enables the interests, reality, and well-being of the empirical human world to continue to be imperatively subordinated to those of the now globally hegemonic ethnoclass world of ‘Man.’”<sup>62</sup> Mbembe’s theory of necropolitics pushes us to understand that Black social death is not so much a matter of ontology as it is the result of strategic political engineering supported by law.<sup>63</sup> Necropolitics is a form of governance that subjects a portion of a state’s citizenry to threat, or to the threat of death, to maximize and optimize life and its benefits—power, wealth, liberty—for another portion of the citizenry. It is an ingredient that is dispensable to the liberal project, and considered in contractual terms, the death and oppression of some acts are the consideration that allows for a social democratic contract to benefit others. Mills recalls, for example, John Adams’s declaration that “Negroes, Indians, and [Kaffirs] cannot bear democracy.”<sup>64</sup>

According to Antony Anghie, International law, since its early modern beginnings in the writings of scholars such as Vitoria, Grotius and Vattel, has been

59. See Jesse McCarthy, *On Afropessimism*, L.A. REV. BOOKS (July 20, 2020), <https://lareviewofbooks.org/article/on-afropessimism/> [<https://perma.cc/8LKA-LERD>], for another, very comprehensive, critique of Wilderson’s theory.

60. Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 NEW CENTENNIAL REV. 257, 261 (2003).

61. WILDERSON III, *supra* note 56; ACHILLE MBEMBE, *NECROPOLITICS* (2011).

62. See Wynter, *supra* note 60, at 262 (2003). Wynter also quotes Howard Winant’s references to a modernity marked by a “rise of the West” and the “subjugation of the rest of us.” See HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* 21 (Warren Crichlow & Cameron McCarthy eds., 1994).

63. MBEMBE, *supra* note 61.

64. MILLS, *supra* note 33, at 57 (quoting RICHARD T. DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING* 75 (1980)).

principally, almost unquestionably, a product of Western thought and experience—particularly in situations where European countries were beginning to engage with non-European peoples in the New World, the Near and Far East, and elsewhere.<sup>65</sup> It is therefore unsurprising that the international law regime is premised upon the idea that Euro-American nations, or the Western Europeans and Others Group (WEOG), must retain control of global geopolitics via the law. Europeans and their progeny are entitled not only to their own sovereignty but also to limit the sovereignty of their (former) colonial subjects—and specifically on the basis of an ideology of white supremacy and nonwhite incompetence that has been reinforced, over time, by the continual brute force of physical violence and economic extraction. This project was first organized via colonization, and then reorganized via the establishment of the UN and the contemporary norms of public international law—which privilege national sovereignty for nations with existing colonial power while subjecting historically colonized nations to laws and norms established by their (formally) former colonial rulers.<sup>66</sup> This Article joins the voices of the international law scholars who have explained that international law, as a regime, systemically upholds the extraction of nonwhite labor; the containment and removal of nonwhite bodies; the villainization of nonwhite people, cultures, and conditions;<sup>67</sup> and the interruption and minimization of nonwhite state sovereignty.<sup>68</sup>

### 3. *The Extraction-to-Neo-Imperial Superpower Industrial Pipeline*

James Thuo Gathii has remarked that “unlike TWAAIL, CRT has largely not been concerned with the economic underpinnings of the racial state.”<sup>69</sup> In major exception to this observation stands the work of Teri McMurtry-Chubb, who has

65. Antony Anghie, *Slavery and International Law: The Jurisprudence of Henry Richardson*, 31 TEMP. INT’L & COMPAR. L.J. 11, 14–15 (2017).

66. According to Gathii, *supra* note 2, at 1618, From a TWAAIL perspective, Europe established a “geopolitical order in which it had already defined or was defining itself as modern and the centre [sic] of history.” . . . [F]or TWAAIL scholars, international law is a social, political, and economic order constituted to protect the interests of formerly colonial powers and the business interests of their elites.

(quoting CHARLES NGWENA, WHAT IS AFRICANNESS? CONTESTING NATIVISM IN RACE, CULTURE AND SEXUALITIES 59 (2018)).

67. See Gathii, *supra* note 2, at 1621 (“The majority White population in the United States blames Black people and people of color for the continuing reality of racial inequality. Similarly, international law, and its projects such as neoliberalism, blames non-European nations for their inequality. CRT and TWAAIL uncover this.”).

68. *Id.* at 1648 (“Just as slavery dehumanized Black people as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.”); see also Achiume, *supra* note 2, at 379 (“[T]he maintenance of Black racial subordination in the United States (and other countries) is properly understood as involving a transnational dimension, one that institutionally implicates the United Nations and international law as well”).

69. Gathii, *supra* note 2, at 1647.

written in-depth about how American market capitalism and the nation's liberal social order were literally constructed around the enslavement and ownership of enslaved African people and their labor (or "stored property").<sup>70</sup> Per McMurtry-Chubb's research, beyond the tiering of personhood based on race existed a tiering of personhood within Whiteness and masculinity that reserved the full benefits of white identity and manhood to men who were able to contract ownership of at least twenty enslaved people. These men's poorer White employees enjoyed limited access to the benefits of Whiteness and masculinity because of their insecure grasp on capital and contracting power. Without a class of people completely dispossessed of contracting authority, property rights, or even the right of personal physical integrity via conquest and enslavement, poor and rich white men in the pre-industrial United States would not have had a currency with which to negotiate the terms of the American body politic and their roles therein—nor would they have been able to develop the economy that would ultimately position the United States as a global economic, and thus, political, superpower with the ability to define the contours of international law.<sup>71</sup> By bringing together McMurtry-Chubb's work with TWAIL scholarship, the relationship between Western states' amassment of capital at the expense of colonized and enslaved populations and their amassment of geopolitical power and global legal authority becomes clear.

McMurtry-Chubb's explanation of how slavery built up the United States' economic prosperity and power also clarifies how the United States was able to amass its geopolitical power and authority.<sup>72</sup> Its ill-gotten wealth translated into

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70. See MCMURTRY-CHUBB, *supra* note 24. But see Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1780 (1993) (recognized by Gathii as a "significant exception," Gathii, *supra* note 2, at 1631 n.99, and cited throughout his Article), and Jackson Sow, *supra* note 6, at 1811. Readers should also consider PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 136–45 (1991), in which Williams recounts the fatal 1984 shooting of Eleanor Bumpurs by New York City Police, who were attempting to remove Bumpurs from her home because she was \$96.85 short on her rent. Outside of the legal academy, celebrated scholars Ruth Wilson Gilmore, Robin D.G. Kelley, Cedric Robinson, and Keanaga-Yamahtta Taylor, among others, are well-known for their studies of racial capitalism and/or Black Marxism. See, e.g., RUTH WILSON GILMORE, *CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION* (forthcoming Dec. 2024) (on file with author); ROBIN D. G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2003); KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019); CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983).

71. See Gathii, *supra* note 2, at 1623 (discussing "how the formal equality of States obscures colonial and postcolonial plunder of resources and the ways that international law perpetuates the subordination of formerly colonial countries"). Gathii includes the United States as one such colonial nation, using its colonial domination of Puerto Rico as an example of its continued race-based domination and extraction of the island. See *id.* at 1642–44.

72. See *id.* at 1620 ("CRT traces the historical accumulation of racial advantages and shows how they shape and structure life chances of privileged Whites today. TWAIL traces how imperialism preserved the economic hegemony of European and American powers as well as how contemporary understandings of economic development reproduce the tropes of alien, colonial, and racist rule in the era of neoliberalism.").

political and military might that enabled its allied victory over the Axis Powers in World War II and positioned it as leader of the free world at the time of the UN's founding. Many historians, including Carol Anderson, have written about the paradoxical nature of the United States' fight for liberal democracy and human rights internationally, given its commitment to Jim Crow and tiered citizenship benefits based on race domestically in the mid-twentieth century.<sup>73</sup> But racial contracting requires such paradoxes; it is only through structured racial oppression within the United States and throughout the colonial empires of fellow Western powers that the Racial Superstate in place at the UN today could have ever come into existence. As within the Racial State, racial discrimination and white supremacy are not flaws, but features, of the Racial Superstate.<sup>74</sup>

Race is not natural, but political, social, and economic. Race is also fundamentally a legal classification. The admission of Russia and China into the Security Council in 1945 did not represent the ideal geopolitical arrangement for the allied Western states; it instead reflects political necessity that still serves the ends of the Racial Superstate's contractors. But race still ultimately translates into contracting power and political proprietorship: because Russia is not a liberal democracy, Russia is culturally, socially, and geopolitically constructed as less white (and thus less good) and more villainous than its Western European counterparts<sup>75</sup>, while Chinese might is popularly denigrated by the West as nefarious and ill-gotten, playing into a longstanding anti-Asian trope portraying Asian people as "cunning and corrupt" and untrustworthy, "given to despotism."<sup>76</sup> Thus, within the upper echelons of power at the UN, the balance of political franchise remains firmly in the hands of white-ruled, Western liberal democracies—both because White equals

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73. CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–55, at 3–4 (2003).

74. See Achiume, *supra* note 2, at 380 ("I highlight, as others have, that racial injustice must be assessed and grappled with as a potentially defining or systemic feature of the liberal imperial project, rather than a pathology or aberration that simply requires harder work or more commitment to reform. For purveyors of international human rights law and its accompanying institutional mechanisms—no matter how well-intentioned they may understand themselves to be—the point is that racism is not outside of their systems but is instead an institutionalized feature of these systems.").

75. See Achiume, *supra* note 2, at 379–80. Achiume notes that within the international law regime, "[t]he language and commitments of international human rights are quintessentially liberal, and within this frame liberalism is good (illiberalism and non-liberalism are bad), and liberal democracy is implicitly and explicitly the means through which this good is realized," despite the work that liberal states do to maintain their national racial contracts and the order of the Racial Superstate. *Id.*

76. STUART CREIGHTON MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785–1882, at 20–26 (1969). Asian Americans have been stereotyped as perpetual foreigners in the United States, as people who have inferior cultural practices, and as a monolithic people who pose a threat to American stability and security. See Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 6 (2000). This has had legal consequences: in the United States, for example, the California Supreme Court held that the testimony of Chinese people was inadmissible against White defendants. See *People v. Hall*, 4 Cal. 399 (1854).

right within the Racial Superstate, and because White also equals might.<sup>77</sup>

## II. RIGHTS WITHOUT REMEDIES: PEOPLE OF COLOR AND EXISTENTIAL PURGATORY WITHIN PUBLIC INTERNATIONAL LAW

The 43<sup>rd</sup> Session of the UN's Human Rights Council, held in Geneva in June 2020, provides a compelling example of how public international law—through the UN's human rights mechanisms—supports the Racial Superstate by constructing Afro-descendant people outside of the possibilities of justice and, therefore, removing them from the global body politic and the bargaining power attached to full membership therein.<sup>78</sup> The Session offers a microcosmic glance at the current state of the global political order and its use of force, or the threat thereof, to exclude Black and nonwhite people and nonwhite-led member states from exercising political power and availing themselves of their human rights before the United Nations. This Part of the Article offers up a discussion of how, in the face of promises of legal remedies for human rights violations, contracting activity within the UN system maintains national and international systems that sustain violent racist oppression.

### *A. Case Study: The 43rd Session of the Human Rights Council and the Black American Dilemma*

In June 2020, all fifty-four African nations led a “bold . . . unprecedented”<sup>79</sup> condemnation of anti-Black racism in the United States at the UN Human Rights Council. With the support of over 600 human rights organizations and the families of George Floyd, Philando Castile, Breonna Taylor, and Michael Brown,<sup>80</sup> the bloc of nations known as the Africa Group demanded that Council convene an urgent debate on George Floyd's death and the larger issue of police brutality in the United States.<sup>81</sup> The Africa Group submitted a resolution to the Human Rights Council

77. For example, James Thuo Gathii writes, “[t]he good governance agenda [of Africa] presents its technical and economic jargon as an ideologically neutral and universal antidote to the ‘turmoil,’ ‘chaos,’ corruption, authoritarianism and ‘disorder’ of the post-colonial African experience.” James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 15 *THIRD WORLD LEGAL STUD.* 65, 67 (1999). This same approach is used by liberal Western states to non-Western and illiberal states such as China and Russia. *See id.* at 67–68.

78. *See* Statement from the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, The Working Group of Experts on People of African Descent & joined by The Special Rapporteur on the Rights of Freedom of Assembly and Association, and the Coordination Committee of the UN Human Rights Special Procedures, *Urgent Debate of the Human Rights Council on “the Current Racially Inspired Human Rights Violations, Systemic Racism, Police Brutality and the Violence Against Peaceful Protest”* (June 17, 2020) [hereinafter H.R.C. Statement], <https://www.ohchr.org/en/statements/2020/06/urgent-debate-human-rights-council-current-racially-inspired-human-rights> [https://perma.cc/E2FN-HB JL].

79. Achiume, *supra* note 2, at 382.

80. *See* H.R.C. Statement, *supra* note 78.

81. *See* Achiume, *supra* note 2, at 381–82. But see also Dunbar-Ortiz's accounts of protest by the entire African delegation at the United Nations General Assembly in 1982, which walked out of a

calling for a commission of inquiry into systemic racism and police brutality in the United States that would report back to the Human Rights Council with its findings in a year's time.

The Africa Group's demand for a commission to investigate and issue a report on American anti-Blackness and police brutality was the most aggressive legal stance the Global South could ever have hoped to take against the West using the UN's mechanisms. Though no one involved in the process was ever under the impression that a report would solve the problem of the systematic terrorization and slaughter of Black Americans and abuse of journalists and protesters by American law enforcement officers, the public exposure of the narrative of American benevolence and supremacy as a myth<sup>82</sup> was the Africa Group's most immediate objective. As with all name-and-shame campaigns, the larger goal was to leverage public outrage to pressure the American government into the desired reforms.

The Human Rights Council agreed to hold the convening, and the debate was held during a special session during the height of the COVID-19 pandemic. Donning masks and respecting social distancing guidelines, diplomats, UN officials, activists, and victims spoke passionately—even casting aside normal diplomatic euphemisms to call systemic racism in the United States of America by its name. E. Tendayi Achiume, legal scholar and Special Rapporteur on Contemporary Forms of Racism, was particularly forceful in her statements: speaking in a video message, she condemned what she viewed as an erosion of commitment to anti-racism by the UN, and she urged the Council to vote in favor of a commission of inquiry empowered to investigate systemic racism in law enforcement not just in the United States, but globally.<sup>83</sup> Importantly, Achiume also flatly rejected the arguments of Western states who claimed that a commission of inquiry should be reserved for human rights violations more serious than deadly police brutality, pointing to the global uprisings as evidence of how serious the world's citizenry considered such violations to be.<sup>84</sup>

Though the United States withdrew from the Council in 2018,<sup>85</sup> alleging bias

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meeting in which Spain and the Holy See proposed that the year 1992 “be celebrated in the United Nations as an ‘encounter’ between Europe and the peoples of the Americas, with Europeans bearing the gifts of civilization and Christianity to the Indigenous peoples.” The United States and Canada supported the Spanish proposal. ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES* 197 (2014).

82. See MILLS, *supra* note 33, at 83. Mills describes physical violence as one of two traditional methods of coercion by the racial state. The second method is “ideological conditioning.” *Id.* Calling for a meeting of the Human Rights Council was an open show of rejection of that conditioning.

83. See *id.*

84. See *id.*

85. The United States announced its withdrawal from the Council in June 2018, citing “chronic bias against Israel.” See Colin Dwyer, *U.S. Announces Its Withdrawal From U.N. Human Rights Council*, NPR (June 19, 2018, 5:09 PM ET), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> [<https://perma.cc/W5P3-5VKY>]. The United States regained its Council seat in 2021. See Rick Gladstone, *U.S. Regains Seat at U.N.*

by the Council against Israel,<sup>86</sup> a senior U.S. diplomat defended the United States during the proceedings. Per the representative:

[American] transparency, commitment to a free press, and insistence on the right to justice allow the world to see our problems and openly engage on our efforts at finding solutions . . . And when violations of people’s rights are committed, we hold people accountable through independent courts, and through an independent media.<sup>87</sup>

The diplomat then attempted to deflect attention from the United States by claiming that other nations’ human rights records deserved the Council’s attention and ire: “It is countries that hide the truth, violently silence their critics, don’t have democratic accountability, and refuse even to recognize fundamental freedoms that merit censure.”<sup>88</sup> Ironically, the Africa Group had requested the Human Rights Council session because of its belief that the United States was guilty of these exact offenses, as video had emerged of police arresting on-duty journalists at protests<sup>89</sup> and brutalizing nonviolent protesters<sup>90</sup> and numerous police officers had been able to kill Black Americans with impunity prior to Derek Chauvin’s murder of George Floyd, as well as days afterward.<sup>91</sup>

Thus, the United States and the European-allied WEOG bloc<sup>92</sup>, including Brazil and the United Kingdom, appealed to a familiar hagiography of liberal democratic and Euro-American moral superiority. They sought to minimize the severity and degree of the human rights violations by law enforcement in the United States through deflection—racism, they claimed, is a problem of which all are guilty—in support of a case against focused attention on the violations of one state,

*Human Rights Council, 3 Years After Quitting*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/10/14/world/un-us-human-rights-council.html> [<https://perma.cc/7M9B-5LPJ>].

86. See Dwyer, *supra* note 85.

87. Stephanie Nebehay, *African Nations Seek U.N. Inquiry into U.S. Racism, ‘Police Brutality’ – Text*, REUTERS (June 16, 2020, 7:51 AM PDT), <https://www.reuters.com/article/us-minneapolis-police-protests-un-exclus/exclusive-african-nations-seek-u-n-inquiry-into-u-s-racism-police-brutality-text-idUSKBN23N0UM> [<https://perma.cc/X3YZ-Q3R2>].

88. *Id.*

89. See *id.*; see also H.R.C. Statement, *supra* note 78 (recounting E. Tendayi Achiume’s statement recalling the police killings of Philando Castile, Breonna Taylor, and other Black Americans in the United States).

90. See H.R.C. Statement, *supra* note 78.

91. See *id.* (recalling the June 12, 2020, police killing of Black American Rayshard Brooks in Atlanta, Georgia); see also Malachy Browne, Christina Kelso & Barbara Marcolini, *How Rayshard Brooks Was Fatally Shot by the Atlanta Police*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2020/06/14/us/videos-rayshard-brooks-shooting-atlanta-police.html> [<https://perma.cc/Z7LN-KK74>] (detailing the fatal police shooting of Mr. Brooks).

92. The bloc is comprised of twenty-eight states, plus the United States as an observer state. Unlike other blocs, which are geographical, the WEOG bloc is geopolitical and largely comprised of predominantly White and White-led states. See Achiume, *supra* note 2, at 388 n.38.

the gravity of such violations (which the United States also sought to downplay)<sup>93</sup> notwithstanding. They appealed to national sovereignty—ironically so, at the UN<sup>94</sup>—and the rule of law, claiming that any race-based human rights violations that took place in the United States would be remedied through the American justice system,<sup>95</sup> even though the uprisings were themselves an indictment of the failures of the American justice system to adequately to protect Black people, protesters, and journalists from state violence. These appeals were nothing less than bargaining, renegotiating the terms of the global racial contract in the face of evidence of its potential voidability. In so bargaining, the United States gaslit the Council, the Africa Group, and even George Floyd’s brother, who also spoke passionately during the debate in support of the commission of inquiry.<sup>96</sup> Ultimately, the Council voted against a commission of inquiry, opting instead for a report from the High Commissioner on Human Rights for presentation to the Human Rights Council, followed by interactive dialogue. And so, the UN’s racial contract remained intact, reinforced once again.<sup>97</sup> According to Achiume:

At the conclusion of the Urgent Debate, the Human Rights Council adopted a consensus resolution that was a shadow of the Africa Group’s strong proposal. Rather than authorizing an independent commission of inquiry for the United States, the Human Rights Council directed the High Commissioner of Human Rights to prepare a thematic report on systemic anti-Black racism in law enforcement. The progression from an unpublished draft of the resolution to the introduced Draft Resolution, to the finalized Human Rights Council Resolution illustrates the gradual erosion of accountability for the United States . . . .<sup>98</sup>

Though several Global South and Black-led nations spoke out strongly against anti-Black violence throughout the proceedings, with several diplomats declaring on the Human Rights Council floor that “Black Lives Matter,” White-led and Western states rallied to the defense of the United States.<sup>99</sup> The WEOG bloc also

93. *See id.* at 391 (“Implicit in the discourse and framing by the WEOG during the Debate was also a designation of the brutal anti-Black racism that fueled the racial justice uprisings as insufficiently serious human rights violations to warrant international accountability mechanisms.”).

94. *But see* ANNA SPAIN BRADLEY, HUMAN CHOICE IN INTERNATIONAL LAW (2021) (explaining her argument that appealing to national sovereignty is not ironic at all, as the Security Council’s original establishment centered nations’ sovereignty concerns).

95. *See* Achiume, *supra* note 2, at 393.

96. *See* Nebehay, *supra* note 87 (reporting that over 600 activist groups called for the Council to investigate U.S. human rights abuses); *see also* H.R.C. Statement, *supra* note 78 (noting that the families of Philando Castile, Breonna Taylor, Michael Brown, and George Floyd had turned to the Human Rights Council “for help”).

97. *See* Achiume, *supra* note 2, at 388.

98. *Id.* at 389.

99. *See* Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, EJIL: TALK! (June 26, 2020), <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-a>

threatened Global Southern states with loss of foreign aid from the United States if those countries spoke up about the American police brutality and systemic racism issues. Per Achiume:

Although the United States had withdrawn from the Human Rights Council two years earlier, some diplomats reported informally that the United States had threatened their capitals with cuts to international aid if they insisted on the commission of inquiry. In the period of formal and informal negotiations among Human Rights Council member states, I had conversations with diplomats, civil society actors, and even UN functionaries who noted the use of political and economic threats by the United States and some of its WEOG allies designed to eliminate the possibility of an international inquiry focused on the United States.<sup>100</sup>

Thus, the opportunity to use the UN’s racial justice architecture to substantively combat racism “w[as] thwarted by WEOG—including through economic and political threats against weaker states.”<sup>101</sup> The United States’ use of diplomatic back channels to coerce compliance from poor Black and Brown nations<sup>102</sup> so that it could preserve a narrative of innocence—even if the face of evidence to the contrary—is as troubling as it is typical;<sup>103</sup> such is the solidarity it enjoys with other White-led settler colonial states. In a statement, the ACLU accused WEOG countries of “maintaining and perpetuating entrenched systems of white supremacy.”<sup>104</sup> The role of contracting in the Urgent Debate cannot be

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t-the-human-rights-council/ [https://perma.cc/2R2B-9JKN] (“[T]he US seemed to be the elephant in the Assembly Hall for much of the debate, with the vast majority of states managing to avoid any direct mention of the US at all. When the US was cited by WEOG states, it was often with approval, to indicate ‘confidence’ in the US as an ‘open liberal democracy governed by the rule of law’ to ‘address issues appropriately’ (Australia), and only exceptionally to express ‘[concern] about the disproportionate use of force by the security services against the African-American community’ (Switzerland).”).

100. Achiume, *supra* note 2, at 389.

101. Achiume & McDougall, *supra* note 41, at 84. However, Achiume and McDougall remain optimistic that the Urgent Debate’s elevation of “the role and voice of civil society and directly impacted groups has given enormous new momentum to the global anti-racism movement. The institutionalization of their participation may also result in further normative change and political action in the future.” *Id.* at 85.

102. Achiume, citing Sejal Parmar, describes the actions of the United States and other WEOG states to weaken the Africa Group’s demands and influence negotiations so that the resulting resolution would not be U.S.-focused as “geopolitical bullying,” “extreme pressure,” and “behind-the-scenes influence.” *Id.* at 388–89 (citing Parmar, *supra* note 99).

103. *See id.* at 387 (describing the “failure” of the Urgent Debate as the result of “systemic racism, liberal business as usual”).

104. Joint Statement from International Service for Human Rights (ISHR), American Civil Liberties Union, East and Horn of Africa Human Rights Defenders Project, Asian Forum for Human Rights and Development (FORUM-ASIA), International Lesbian and Gay Association (ILGA-World), Centro de Estudios Legales y Sociales, Center for Reproductive Rights, CIVICUS: World Alliance for

overstated: the ability of the United States and allies to leverage agreements to provide aid to poorer countries outside of the international law structure proved that private bilateral agreements between states (and especially when one state has outsized power and influence) can act as a barrier to international law enforcement. WEOG states used the power of contracts to ensure that the United Nations' racial contract—a social contract that guarantees its position as a world superpower—remained undisturbed.

The politics and ensuing outcome of the June 2020 Human Rights Council Debate demonstrate how people of African descent are constructed out of the global body politic—despite formal participation therein—at the UN, and more broadly within the sphere of international law. The governance structure at UN, which is perpetuated by financial commitments and raw, racialized geopolitical power built up through colonial extraction, sustains a racist balance of power that disempowers African and Caribbean nations, as well as the discontented Black citizenry of Global Northern nations.

The UN's rules and procedures support this geopolitical arrangement, which are such that the interests and voices of Black people in Global Northern nations are swallowed up by the states' interests in state sovereignty, the appearances of exceptionalism, immunity from censure and penalty, and, certainly, the saving of face. Despite the exceptional solidarity exhibited by the African nations, procedure allowed WEOG states to block their initiative. As discussed, *infra*, these barriers to racial justice are not unfortunate happenstance, but rather, the result of structure as well as concerted, “formidable opposition”<sup>105</sup> by Western powers to the real momentum of anti-racist and decolonial justice that exists within and outside of the UN's walls.

### B. *Unveiling the United Nations' Racial Contract*

By coordinating with each other to ensure that the United States was functionally exempted from human rights law investigation and enforcement, the WEOG states reinforced that, as within Global Northern nations' domestic laws, Whiteness is protected by the law but not bound by it, while Blackness and Indigeneity are bound by laws and not protected by them.<sup>106</sup> Also reinforced thereby

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Citizen Participation & Cairo Institute for Human Rights Studies, delivered at the conclusion of 43rd session of the U.N. H.R.C. (June 23, 2020), (available at <https://www.aclu.org/documents/joint-ngo-statement-following-adoption-hrc-resolution-systemic-racism-and-police> [<https://perma.cc/XPN6-CMLA>]).

105. Achiume & McDougall, *supra* note 41, at 86.

106. See Adam Serwer, *The Coronavirus Was an Emergency Until Trump Found Out Who Was Dying*, NEW YORKER (May 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [<https://perma.cc/M5DL-QMY7>] (“The underlying assumptions of white innocence and black guilt are all part of what the philosopher Charles Mills calls the ‘racial contract.’ ... [T]he rules as written do not apply to nonwhite people in the same way. The Declaration of Independence states that all men are created equal; the racial contract limits this to white men with property. The law says murder is illegal; the racial contract says it’s fine for white people to chase and

was a tradition within contemporary international law of according greater levels of sovereignty to WEOG states than to poor, Brown and Black post-colonial states, on the basis of the illiberal and presumed corrupt governance of the latter—Whiteness as legality, and nonwhiteness as illegality.

Such is the essence of the racial contract, which writer Adam Serwer has described as “a codicil rendered in invisible ink, one stating that the rules as written do not apply to nonwhite people in the same way.”<sup>107</sup> To guarantee exemptions from the rules to which everyone has formally negotiated and agreed, WEOG nations—like White people—must necessarily be able to count upon innocence, or at least, acquittal.<sup>108</sup> By contrast, the contract is dependent upon Black, Global Southern, and postcolonial guilt,<sup>109</sup> so that WEOG diplomats will have someone to whom they can deflect when confronted with their nation’s crimes. “The underlying assumptions of white innocence and black guilt,”<sup>110</sup> which undergird the racial contract, are used to undergird and defend disproportionate attributions of sovereignty and authority to WEOG nations—nations populated by a predominantly White citizenry—at the continued expense of their former colonies.

According to Mills, “*nonwhite subpersonhood is enshrined simultaneously with white personhood.*”<sup>111</sup> The White construction of nonwhite subpersonhood allows White states—whose violence is unparalleled and generally unpunished—to erase, deny, or minimize their violations of human rights against nonwhite subpersons, while making much of human rights violations committed against nonwhite subpersons by other nonwhite subpersons.<sup>112</sup>

Such explains the United States’ straight-faced declaration that a commission

murder black people if they have decided that those black people scare them.”).

107. *Id.*

108. In a 2022 essay, I describe the “presumption, and even a guarantee, of innocence” and “a guilty Blackness”—as necessary elements of the Whiteness bargain. Marissa Jackson Sow, *Whiteness as Guilt*, 69 UCLA L. REV. DISC. (L. MEETS WORLD) 20, 24–25 (2022).

109. *See id.*

110. Serwer, *supra* note 106.

111. MILLS, *supra* note 33, at 56.

112. *See id.* at 103–04 (quoting AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM (1950) in reference to the “implicit double standard in European ‘outrage’ at Nazism, in which Hitler ‘applied to Europe colonialist procedures which until then had been reserved exclusively for the Arabs of Algeria, the coolies of India, and the blacks of Africa’”). This type of discourse, which shifts responsibility for imperialism’s atrocities onto the Global Southern victims thereof, has recently made its way into a popular context, most recently following the death of the United Kingdom’s Queen Elizabeth II in September of 2022. The Queen’s passing inspired renewed conversation regarding the British royal family’s culpability in the theft of post-colonial nations’ resources and in atrocities against their people. In a televised interview by CNN anchor Don Lemon of “royal commentator” Hillary Fordwich, Lemon told Fordwich that the Royal Family should pay reparations for their role in colonialism. Fordwich retorted those West African nations who “round[ed] up their own people” should pay reparations to British sailors who died at sea “trying to stop the slavery.” Simone Carter, *Don Lemon’s Talk About Royal Reparations Blasted by Conservatives*, NEWSWEEK (Sept. 20, 2022, 1:37 PM), <https://www.newsweek.com/don-lemons-talk-about-royal-reparations-blasted-conservatives-twitter-1744624> [https://perma.cc/7TFQ-ZAY5].

of inquiry into the systematic murders, beatings, and other abuses of human beings of Black Americans would be an overblown response to a “problem” much less important than real human rights violations, such as the repression of free speech in nations led by nonwhite leaders.<sup>113</sup> It explains the insistence of the United States upon dominating decision-making and adjudication at the UN, while simultaneously refusing to be bound by international law, as well as its willingness to work outside of the legal channels it claims to champion to achieve its desired geopolitical ends. This Racial Superstate operates exactly as individual racial states do, in macrocosm—depending on racism and white supremacy for their sustenance, while consistently denying its existence. Within the sphere of international law, racial contracting premises the sovereignty, authority, innocence, and collective humanity of White states upon the dependence, impotence, and incompetence, guilt, and collective sub-humanity of postcolonial states.

What Dunbar-Ortiz describes as an individual “race to innocence”<sup>114</sup> is also applicable to whole nations obsessed with their brands as enlightened, liberal, benevolent, and moral. While the prospect of a commission on inquiry would have paled in comparison to the threats of military force to which Western states regularly subject Global Southern nations via the Security Council, any show of resistance by the Global South—and especially African nations—is particularly violative of the terms of the racial contract. Thus, it is particularly frustrating and destabilizing for the WEOG, which has, at times, lost control over a self-created narrative of benevolence and divine right of rule upon which it depends, as social movements continue to expose their brutality and their guilt.

Early TWAIL scholars emphasized the importance of state sovereignty to postcolonial nations in their engagement of international law;<sup>115</sup> however, it is now apparent that WEOG state sovereignty is systematically weaponized against postcolonial states, as WEOG states demand postcolonial nations’ submission to international law and its institutions while exempting themselves therefrom.<sup>116</sup>

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113. See Nebehay, *supra* note 87.

114. DUNBAR-ORTIZ, *supra* note 81, at 229.

115. Scholars such as Antony Anghie, described as mentor to the first TWAIL cohort in the 1990s, see James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011), emphasized the centrality of state sovereignty to postcolonial nations’ adoption of international law. See ANGHIE, *supra* note 3.

116. The United States does not submit to the jurisdiction of the ICC but has called for government officials of other nations to be prosecuted by the Court. See Michael Martin & John Bellinger III, *The U.S. does not recognize the jurisdiction of the International Criminal Court*, NPR (April 16, 2022, 4:54 PM ET), <https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court> [<https://perma.cc/V9W4-QNDB>] (reporting on President Joseph Biden’s calls for Vladimir Putin to be prosecuted by the ICC). Notably, the United States supported the Court’s prosecution of Sudanese President Omar Al Bashir. See *id.*; see also DeFalco & Mégret, *supra* note 39, at 76 (recalling how the United States successfully campaigned the requirement of a legal nexus between crimes against humanity and waging of aggressive war as the International Military Tribunal at Nuremberg was being negotiated, so as to exempt U.S. officials from accusations of crimes against humanity relating to their support for Jim Crow laws in the United States—yet another

Global Northern state sovereignty is directly inverse to Global Southern state sovereignty. The relationship between states' sovereignty and international law is an extrapolation of relationship of individuals' rights in liberal states and national laws: with respect to individuals and nation-states alike, laws and norms do not apply equally to White and nonwhite. Predominantly White Global Northern states—racial states—use their sovereignty to exert dominance over nonwhite postcolonial states, weaponizing that sovereignty to avoid being bound by international law, especially where their breaches of international law impact subpersons or states they consider to be subsovereign.<sup>117</sup> Beyond the human rights context, this deleterious dynamic is present and potent in other spheres of public international law. A prominent example is found in the Rome Statute and international criminal law: the United States does not submit to the jurisdiction of the International Criminal Court, while regularly insisting upon the prosecutions of other, postcolonial states. The Court's over-representation of Black defendants<sup>118</sup> enforces and reinforces a geopolitical hegemony that is blatantly racialized, and racializing.<sup>119</sup>

With several exceptions, international law requires that petitioners exhaust their remedies at the national level before filing a petition with regional or international commissions and courts.<sup>120</sup> Despite the numerous exceptions available to this rule, this requirement poses significant barriers to access to justice for those human rights petitioners and victims who must seek remedies from nations deemed to provide due process to complainants, even when such due process is illusory.<sup>121</sup>

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reminder of the role that contracting (negotiations, in this case) has long played in protecting Whiteness within international law).

117. See Achiume, *supra* note 2, at 392 (noting that while WEOG states objected, at the 2020 Urgent Debate, to singling out the United States for criticism and investigation, WEOG states regularly single out postcolonial states for criticism and condemnation).

118. As of April 2019, all defendants facing accusations before the ICC were Black and/or Arab Africans. DeFalco and Mégret have described the overrepresentation of these demographics as defendants before the Court as “almost cartoonish.” DeFalco & Mégret, *supra* note 39, at 59. As of 2022, all fifty-one defendants at the ICC were still exclusively Black and Arab Africans. See *Defendants, INTERNATIONAL CRIMINAL COURT*, <https://www.icc-cpi.int/defendants> [<https://web.archive.org/web/20240222220443/https://www.icc-cpi.int/defendants>] (last visited Mar. 1, 2024).

119. See DeFalco & Mégret, *supra* note 39, at 56, in which the authors discuss the accusations of “a specifically *racist* dimension in the exercise of prosecutorial discretion at the ICC, one that persistently ends up shifting the international judicial gaze towards Black bodies.” Per the authors, “it may be less interesting and plausible to see the ICC as racist than to see it as *racialising*, that is, as part of the ongoing social construction of race.” *Id.*

120. The exhaustion of local remedies is an important principle of customary international law. See CHITTHARANJAN FELIX AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 22 (2d ed. 2004) (“The requirement that local remedies should be resorted to seems to have been recognized in the early history of Europe, before the modern national state had been born . . .”).

121. Achiume and Parmar refer to this phenomenon in their reflections upon the 2020 H.R.C. Urgent Debate, noting that the Urgent Debate marked the first time that a Global Northern state (except for Israel) had been called to account for human rights violations by the United Nations in that way, and detailing the efforts of the United States and WEOG states to obstruct the process. See Parmar, *supra* note 99. Achiume has noted that “special sessions have overwhelmingly investigated states in the Middle East and Africa . . . , no member of the U.N. Security Council has been the focus of a special

This requirement under international law has the effect of helping nations maintain and protect their domestic racial contracts while also preserving racial hegemony within international organizations via the application of international legal standards. Because WEOG states are accorded disproportionate levels of sovereignty and immunity from the UN's accountability mechanisms<sup>122</sup> along with outsized decision-making authority and influence within the UN system, victims of racist human rights violations in these states have a more difficult time proving that they have not received remedies at the national level and are therefore constructed out of remedies at the international level.

### C. *The Paradox of Black American Engagement of the United Nations*

The story of African-Americana has always been one of resistance and organized advocacy—including legal advocacy, as excavated and recounted by Hank Richardson in his groundbreaking legal history of African-American claims to “outside law” from the seventeenth century onward.<sup>123</sup> Richardson’s work reveals that Black people in the United States have, for centuries, been acutely aware of their human rights, as well as the fact that they were systematically and overtly deprived thereof, as people who had resisted capture and enslavement and later fought against their status as people who were “jim-crowed.”<sup>124</sup> David Walker’s 1829 Appeal to the Colored Citizens of the World<sup>125</sup> excoriates White Americans for enslaving Africans in the United States while simultaneously claiming to be adherents of the Christian faith and that all men were created equal and endowed with inalienable rights. A century later, Marcus Garvey would develop a sophisticated and radical human rights manifesto in the 1920 Declaration of Rights of the Negro Peoples of the World at the first annual United Negro Improvement Association

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session during its time on the Security Council, and certainly no permanent member of the Security Council had, until 2020, been the subject of a special session.” Achiume, *supra* note 2, at 382–83. The request for the Special Session by the Africa Group was, thus remarkable, because “the coalition was requesting that a familiar tool be used in an atypical manner and against a geopolitical heavyweight (the United States) that regularly shields itself from international intervention.” *Id.* at 382–83.

122. *See id.* at 391; *see also* Gathii, *supra* note 2, at 1613 (“[J]ust as slavery dehumanized Blacks as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.”); ANGHIE, *supra* note 3, at 103 (“Sovereignty was therefore aligned with European ideas of social order, political organization, progress and development. . . . In contrast, lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory.”).

123. HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 49–76 (2008).

124. Marcus Garvey, *Declaration of the Rights of the Negro Peoples of the World*, 13 BLACK CAMERA 335, 336 (2021).

125. *See* DAVID WALKER, *WALKER’S APPEAL, IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA, WRITTEN IN BOSTON, STATE OF MASSACHUSETTS, SEPTEMBER 28, 1829* (Boston, 3d & last ed. 1830), <https://pds.lib.harvard.edu/pds/temp/async/490230637-1-96.pdf> [<https://perma.cc/KC4L-GJAY>].

convention, held in Harlem, New York, and attended by some 12,000 participants.<sup>126</sup>

Notably, both documents and their authors based their visions for human rights in resistance against the brutal denigration of Black life in the United States; more notably still, both authors created a vision for human rights that was global, envisioning worldwide application and enforcement. Black political and intellectual contributions to human rights are longstanding. The 1920 Declaration of Rights of Negro Peoples of the World has been described as “one of the most remarkable human rights declarations produced by civil society in the 20<sup>th</sup> century.”<sup>127</sup> Despite this fact, Garvey’s Declaration and Walker’s Appeal have largely been excluded from human rights discourse and history.

Given the racially hegemonizing functions of the UN, the engagement of the UN by people of African descent warrants careful, nuanced analysis. The family of George Floyd is not the first group of African-Americans to seek legal remedy from the UN.<sup>128</sup> Rather, the UN has long been a forum for promise, potential, and frustration for people of African descent. The tradition of looking to international law for remedies not available for people of African descent in the United States has long been a complicated exercise because Black people’s lack of legal personhood—while often better concealed under value-laden platitudes and programming—is also present in international law.<sup>129</sup> Still, as the UN was being formed, Black American activists strategically agitated American policymakers for progress relating to the indignities and horrors of Jim Crow; their argument, unsurprisingly, was that the United States could not lead the world at the international level when its own house was in disarray.

Richardson recounts W.E.B. DuBois’s 1945 testimony before the United States Senate’s Foreign Relations Committee, advocating for the U.S. ratification of the UN Charter and representing “the likely majority of politically informed African-Americans.”<sup>130</sup>

African-Americans had been for more than three centuries so

126. See Steven L. B. Jensen, “*We are Jimcrowed:*” *Marcus Garvey and the 1920 Declaration of Rights of the Negro Peoples of the World*, OPEN GLOBAL RIGHTS (Feb. 3, 2021), <https://www.openglobalrights.org/marcus-garvey-and-the-declaration-of-rights-of-the-negro-peoples-of-the-world/> [https://perma.cc/3MHS-M3U7].

127. *Id.*

128. See Achiume, *supra* note 2, at 384 (noting that the coalition of advocates pressing for a commission of inquiry into human rights violations perpetuated by the United States contextualized their demands within the history of African-American human rights advocacy before the United Nations).

As early as 1947, the NAACP’s *An Appeal to the World*, drafted by DuBois, was one of the first submissions by a nongovernmental organization requesting human rights investigation of a U.N. member state. This and other early petitions laid the groundwork for the 1951 *We Charge Genocide* petition, which was submitted to the United Nations General Assembly by the Civil Rights Congress (CRC).

*Id.* at 384.

129. See *id.* at 378–79.

130. RICHARDSON III, *supra* note 123, at xxxi.

deeply involved in and afflicted by the political, economic, legal, cultural and international processes that built America from an eastern seaboard string of struggling British colonies to, in 1945, the major victor nation and military industrial powerhouse at the close of World War II. And during the same three centuries, Black folks, long before, during, and after the Civil War and Reconstruction, had been so profoundly involved in their own high risk and parallel domestic and international struggles against slavery and systemic racism. . . Their hope and demand was that the emerging new world order, of which the UN Charter would essentially be the constitution, would serve their fundamental collective goal to be free from racism, in ways that American law, white majority policies and sentiments, and the American economy clearly had not provided.<sup>131</sup>

DuBois worked with Ralph Bunche to transmit language he wanted to see in the Charter to the United States Delegation to the San Francisco Conference, where the Charter was being drafted. He wanted language that denounced imperialism and colonialism, demanded emancipation of colonies, and that declared human rights and indispensable part of democratic governance.<sup>132</sup> However, not only did the United States Secretary of State announce that the United States would not support a human rights declaration in the Charter, but the United States saw to it that human rights provisions no produce no binding legal obligation upon member states.<sup>133</sup> As for DuBois, the United States responded to his efforts by continuing to subject him to national security investigations, as it had throughout his career.<sup>134</sup>

Malcolm X, later known as El Hajj Malik el-Shabbaz, stands out as a mid-twentieth-century proponent of a transformative international human rights-based approach to racial justice in the United States,<sup>135</sup> notably from his famous 1960 “The Ballot or the Bullet” speech.<sup>136</sup> X preferred a human rights-focused articulation of rights over the American-prescribed focus on civil liberties, viewing civil rights law as a vehicle of white supremacy. Like many other Black Americans, he had an implicit, and profound, understanding of the American racial contract. Said X:

I am one who doesn't believe in deluding myself. I'm not going to sit at your table and watch you eat, with nothing on my plate,

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131. *Id.* at xxxii.

132. *See id.* at xxxv.

133. *See id.* at xxxix–xl.

134. *See id.* at xxxvii.

135. *See* Achiume, *supra* note 2, at 384 (quoting Jamil Dakwar’s citation of X as one of the “great Black leaders . . . who believed in internationalizing the struggle for human rights and racial justice in the United States”).

136. *See* Malcolm X, *The Ballot or the Bullet* (April 3, 1964), [http://www.edchange.org/multicultural/speeches/malcolm\\_x\\_ballot.html](http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html) [<https://perma.cc/226A-KETT>].

and call myself a diner. Sitting at the table doesn't make you a diner unless you eat some of what's on that plate. Being here in America doesn't make you an American. Being born here in America doesn't make you an American. Why, if birth made you American, you wouldn't need any legislation; you wouldn't need any amendments to the Constitution; you wouldn't be faced with civil rights filibustering in Washington, D.C., right now.<sup>137</sup>

X understood that one could be present in the United States without being part of the nation's body politic, while being subjected to the state's power and authority. He also understood that natural humanity did not guarantee legal personhood; rather, Black Americans' lack of legal personhood left them burdened by obligations, yet bereft of civil rights and other benefits of American citizenship. In her examination of Muhammad Ali's refusal to serve in the U.S. armed forces during the Vietnam War, Joyce Hughes notes that "Blacks were drafted in higher numbers than whites and were more likely to be sent to combat units on the front lines and thus they were more likely to be killed."<sup>138</sup> According to Hughes, from 1965 until 1967, Black soldiers made up 20% of casualties according to some estimates, and up to 29% of casualties according to other estimates<sup>139</sup>—in any case, "almost twice the percentage of Blacks in the U.S. population."<sup>140</sup> X, speaking in 1968, had come to view the quest to seek remedies under American law for race-based human rights violations as a futility; he knew that the crimes committed against Black Americans on account of their race had the accord of the local, state, and even the U.S. federal government, despite anti-discrimination laws and statutes that proclaimed otherwise. According to X, "When you take your case to Washington, D.C., you're taking it to the criminal who's responsible; it's like running from the wolf to the fox."<sup>141</sup>

According to Justin Hansford and Meena Jagganath:

Malcolm X . . . reminds us all of the importance of moving beyond efforts to reclaim our rights as citizens of the United States through legal means, limited by laws and institutions that once enslaved, then legally segregated, and now subject to militarized policing and mass incarceration this country's Black population. We must instead reclaim our rights as human beings.<sup>142</sup>

X's understanding that America's racial contractors would never seek to

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137. *Id.*

138. Joyce A. Hughes, *Muhammad Ali: The Passport Issue*, 42 N.C. CENT. L. REV. 167, 172 (2020).

139. *Id.* at 172–73.

140. *Id.* at 173.

141. X, *supra* note 136.

142. Justin Hansford & Meena Jagganath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 154 (2015).

dismantle the nation's racial contract undergirded his turn toward international law—a pivot that paralleled his pivot toward internationalism in his personal life.<sup>143</sup> He denotes a precursor to the current movement of human rights engagement: X intentionally disinvested from the American project, having decided that the African-American quest for equality or full American citizenship—including a never-ending cycle of legal reforms to a profoundly racist legal system—was an exercise in futility.

X acknowledged that seeking justice via the American legal system is a reasonable course of action to which Black Americans have a definitive right; unfortunately, that pursuit of justice will never bear fruit. Said X, “[W]hen you demonstrate against segregation, the law is on your side. The Supreme Court is on your side. Now, who is it that opposes you in carrying out the law? The police department itself.”<sup>144</sup> For X, the UN human rights system provided the only meaningful path to justice for Black Americans.<sup>145</sup>

Sadly, X's metaphor still holds at the UN; at the semicircular table arrangement in the UN's Security Council Chamber, not everyone present is a diner. And not only is the racial contract present in international law, but it is a driving force of international law; moreover, the racial contract present in the international sphere is the father, and not the child, of the racial contract present in individual nation-states.<sup>146</sup> As evidenced by the June 2020 proceedings in Geneva and the long history of advocacy vis-à-vis the UN preceding it, the racial contracts in force in the United States and at the international level have sought to frustrate justice for Black Americans for as long as Black Americans have looked to international law for justice.<sup>147</sup>

Eleanor Roosevelt led the drafting of the International Bill of Rights, including

143. X's embrace of internationalism during this period was broad. His embrace of international law coincided with his departure from the Nation of Islam for the Sunni branch of the Islamic faith, which accounts for nearly 90% of the world's Muslims. X's embrace of Sunni Islam led him to change his name to El Hajj Malik El-Shabazz, took him around the world, and transformed him into both a racial justice and human rights activist before his assassination in 1965. See MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 339–42 (Philip Novak ed., Grove Press 1964) (detailing his experience as a Hajj pilgrim in Mecca and reflecting on how his pilgrimage changed his outlook on how to achieve racial justice).

144. X, *supra* note 136.

145. *See id.*

146. European imperialism led to the conquest and settling of the present-day United States of America. *See, e.g.,* DUNBAR-ORTIZ, *supra* note 81; Gathii, *supra* note 2, at 1618 (“For TWAIL scholars, the enduring distinctions made between Europeans and non-Europeans or White and nonwhite people is what created the racial distinctions from which the development of international law drew. After all, it was this racial logic that associated Whiteness or being European with the attributes of civilization and modernity such as Christianity, settled agriculture, and ownership of land.” (citing CHARLES NGWENA, WHAT IS AFRICANNESS? CONTESTING NATIVISM IN RACE, CULTURE AND SEXUALITIES 59 (2018))).

147. For in-depth discussion of how Western powers successfully prevented the United Nations Commission on Human Rights from acting relating to racist discrimination, see for example, PAUL GORDON LAUREN, POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION 239–40 (1988); ANDERSON, *supra* note 73.

the Universal Declaration of Human Rights.<sup>148</sup> As such, she oversaw the drafting and execution of the international social contract with respect to human rights law and norms.<sup>149</sup> There can be no doubt that the American and Western European WWII victory—with its accompanying moral victories—is what propelled the United States to become a geopolitical superpower and chief evangelist of the highly racialized idea that only certain nations are equipped for global leadership and unquestioned authority, and that even among this group of nations, the United States would be preeminent.<sup>150</sup>

Despite her work to secure human rights for the world's people, Roosevelt took great pains to suppress the human rights activism of Black Americans in her own home country.<sup>151</sup> She referred to the Civil Rights Congress's (CRC) 1951 *We Charge Genocide* petition, which sought accountability for the lynchings of Black Americans, as “ridiculous”<sup>152</sup> despite her acuity relating to human rights violations elsewhere around the world because “the U.S. government—worried about bad PR during the Cold War—mounted a campaign to blunt any domestic and international impact [the petition] might have.”<sup>153</sup> The UN never acknowledged receipt of the CRC's petition, and the petition “was scuttled, largely due to the efforts of U.S. emissaries and none other than Eleanor Roosevelt, head of the UN Human Rights Commission who, three years earlier, had scored a major coup with the passage of

148. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* xv (2001) (“Early in 1947 . . . a remarkable group of men and women gathered, at the behest of the newly formed United Nations, under the chairmanship of Eleanor Roosevelt, to draft the first ‘international bill of rights.’”).

149. See *id.*

150. Consider, for example, Gathii's reflections on the Western good governance agenda as it relates to the African continent:

[G]ood governance agenda presents its technical and economic jargon as an ideologically neutral and universal antidote to the ‘turmoil,’ ‘chaos,’ corruption, authoritarianism and ‘disorder’ of the post-colonial African experience. The invocation of such imagery has become key to legitimizing this neo-liberalism as the best, or perhaps the only alternative to sub-Saharan Africa's predicament.

Gathii, *supra* note 77, at 67–68. For her part, Achiume describes the 2020 Urgent Debate as the first and only to date concerning a human rights crisis in a country widely considered a liberal democratic paragon, for which the global human rights receivership processes, implicitly associated with U.N. intervention, could not possibly be intended or appropriate, at least from the perspective of other liberal democratic countries and observers.

Achiume, *supra* note 2, at 378.

151. See ANDERSON, *supra* note 73; Charles H. Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations*, 16 J. AM. ETHNIC HIST. 35 (1997).

152. See Alex Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously*, POLITICO (Dec. 26, 2021) (quoting Roosevelt), <https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045> [<https://perma.cc/43XN-AUEX>].

153. *Id.*

the Universal Declaration of Human Rights on 10 December 1948.”<sup>154</sup> The United States would, for its part, use various means to antagonize and punish the members of the CRC for their attempts to name and shame the United States on the world stage—including snatching the passports of William Patterson and Paul Robeson<sup>155</sup> and pressuring the NAACP to repudiate the petition as a “conspiracy.”<sup>156</sup>

Just as the drafters of the United States Constitution negotiated away the right of Black Americans to be free from enslavement so that southern states would ratify the document,<sup>157</sup> the United States thus made the choice to bargain away Black Americans’ opportunity to advocate for greater human rights realization using a combination of force and ideological conditioning in its negotiations for global geopolitical dominance. By refusing to act on behalf of the Black activists and the voices they represented—in response to an earlier 1946 petition by the National Negro Congress, “The UN responded that their hands were tied. During the drafting of its Charter, the U.S. delegation had forced through a ‘domestic jurisdiction’ clause to prevent ‘intervention’ in affairs deemed (capaciously) to be internal matters”<sup>158</sup>—the UN made its position as an endorser of American geopolitical power clear.

The creator of the contemporary concept of genocide and human rights lawyer Raphael Lemkin also downplayed the long history of violence committed against Black Americans. “Genocide means annihilation and destruction,” he stated, “not merely discrimination.”<sup>159</sup> Of the practice of lynching Black Americans, Lemkin claimed that such atrocities were “actions against individuals—not intended to destroy a race,”<sup>160</sup> in an effort to ensure that the 1951 Refugee Convention would be ratified.<sup>161</sup> In so doing, the United States and UN demonstrated that law—both domestic and international—serves politics and that international law specifically works in service of the racial contracts in force within national and international governments.

#### *D. Liberalism in International Law: A Weapon and Shield Against Racial Contractual Breaches*

Prominent critical race theorist Linda Greene has written about the weaponization of formalism by conservative and far-right political forces to

154. SCOTT W. MURRAY, UNDERSTANDING ATROCITIES: REMEMBERING, REPRESENTING AND TEACHING GENOCIDE 134–35 (2017).

155. See David Helps, “*We Charge Genocide*”: Revisiting Black Radicals’ Appeals to the World Community, 3 RADICAL AM. 9 (2018).

156. Hinton, *supra* note 152; see Helps, *supra* note 155, at 11 (describing the NAACP’s work with the U.S. Department of State to discredit the petition).

157. See Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1137–43 (2012).

158. Helps, *supra* note 155, at 4–5.

159. Hinton, *supra* note 152.

160. *Id.*

161. *See id.*

undermine attempts to reform the U.S. justice system and provide remedies for racial discrimination.<sup>162</sup> As discussed *supra*, the American government has, since the UN's founding, weaponized and manipulated the very concept of the rule of law to secure geopolitical power on the global stage. By so doing, the United States and other Global Northern powers give themselves exclusive authority to (1) determine the parameters of legality and justice,<sup>163</sup> (2) immunize themselves from exposure to human rights-focused critiques from the Global South, and (3) ultimately, perpetuate a global racial contract that has been both tacitly and expressly organized at the UN and through the interpretation and enforcement of international law.

Global Northern powers (including the United States) expressly manipulate public international law to preserve an international social contract that excludes people of African descent from the possibility of remedies for even the gravest race-based human rights violations.<sup>164</sup> Within the realm of international law, neocolonial and formerly slaveholding powers appeal to the values of state sovereignty as a shield on one hand while also weaponizing rigid adherence to international legal norms that serve their dominance specifically to prevent breaches to the racist geopolitical contract for which they have negotiated<sup>165</sup>—even though, and, indeed, *because*—such breaches are essential to the installation of a more racially just world order.<sup>166</sup> Referring to the Urgent Debate, Achiume puts it thusly:

[T]he international human rights frame not only is neglectful of racial justice, but also can suppress the most promising avenues for achieving this racial justice, as this frame has notably done since its inception. The actors responsible for driving this suppression are, and have often been, nations and regions forming the liberal democratic wing of the international order—the conventional purveyors of the international human rights system as a universal good.<sup>167</sup>

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162. See Linda S. Greene, *Race in the Twenty-First Century: Equality through Law?*, 64 TUL. L. REV. 1515, 1517–18 (1990) (discussing the civil rights decisions of the U.S. Supreme Court's 1989 term, which she characterizes as marked by “the tendency to interpret statutes rigidly, narrowly, and hypertechnically, thereby stripping them of transformative content . . . to maintain the status quo” and use of “language that preserves the appearance of proper concern for achieving equality” while being “indifferent to reality and indifferent to the impact of the decisions on the historical victims of racial discrimination”).

163. See, e.g., Helps, *supra* note 155, at 4–5 (discussing the UN's refusal to take up a 1946 petition to the UN Human Rights Commission titled *A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States* because the United States had negotiated a domestic jurisdiction clause into the UN Charter to prevent international “intervention” into “internal matters”).

164. See Achiume, *supra* note 2, at 380.

165. See *id.* at 380, 387–93 (describing the employment of liberalism to shield the United States for accountability for racism while simultaneously appealing to the strength of American rule of law and United Nations values).

166. *Id.* at 380.

167. *Id.*

In a writing disparaging the *We Charge Genocide* campaign, Eleanor Roosevelt opened by noting that the killing of NAACP state coordinator Harry Moore saddened her because “[t]hat is the kind of violent incident that will be spread all over every country in the world and the harm it will do us among the people of the world is untold.”<sup>168</sup> Her remarks were reflective of the long history of the United States and other Western states’ investment in immunity from accountability for their anti-Black and anti-Indigenous violence on the global stage and within the international law apparatus. The creation of the international law regime is a clear example of how law serves politics—in the case of international law, geopolitics—and desired sociopolitical order. The process of social and racial contracting in liberal regimes requires that a body politic negotiate the terms, conditions, benefits, and costs of the desired order—including who is to participate in the body politic and who is not.

### III. OUTSIDE OF THE LAW: EXCLUDING PEOPLES OF COLOR FROM LEGAL REMEDIES

The history of the development of the post-World War II public international law regime demonstrates that Whiteness does not only serve as a marker for who benefits from the law; rather, Whiteness itself *is* the law.<sup>169</sup> As discussed, *infra*,<sup>170</sup> the efforts of Black American activists to have the violent oppression of Black peoples in the United States classified as genocide have been largely unsuccessful as their claims for human rights remedies have been deemed insufficiently grave to be classified as genocide<sup>171</sup> or, otherwise, as matters to be remedied by the United States itself.<sup>172</sup> However, despite claims of American government officials to the contrary, the history of deadly state violence against Black people in the United States is undeniable; that this violence continues to occur, and in systematic fashion, is undeniable as well. The central question is how one should qualify the steady stream of instances of deadly violence against Black American civilians by common citizens and law enforcement officers alike if not as genocide or ethnic cleansing. There exists, thus, a harmful gap between the real experiences of Black Americans living and dying under the tyranny of state violence and the legal definitions and

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168. As discussed, *supra* Section II.C., Eleanor Roosevelt felt compelled to denigrate the *We Charge Genocide* campaign because she viewed the harm it would do to the United States’ global reputation as unwarranted. See Eleanor Roosevelt, *My Day, December 28, 1951*, THE ELEANOR ROOSEVELT PAPERS, DIGITAL EDITION (May 3, 2022), [https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?\\_y=1951&\\_f=md002103](https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1951&_f=md002103) [https://perma.cc/3RTJ-GS4Q] (“Our Negro citizens will know this and will feel that everything that appears in it must be true. It will do great harm at home because the answers to untruths and half-truths are always less dramatic than the assertions.”).

169. See Jackson Sow, *supra* note 6, at 1825–26 (discussing the construction of Whiteness as synonymous with legality and divine right).

170. See *supra* Part I for in-depth discussion of the United States’ resistance to the 1951 *We Charge Genocide* petition.

171. See *supra* note 95 and accompanying text.

172. See *id.*

mechanisms within international law that they can use for successful petitions.

A similarly unfortunate dynamic exists within the international refugee law regime, which has been constructed around the specific needs of European protection seekers and the interests of European and European-majority states. Despite prohibitions on racial discrimination in grants of refugee status, the global refugee and asylum regime regularly excludes Black, Brown, and Indigenous communities from the protections of the law. Thus, they find themselves out of the law's reach when in need of protection but squarely in view of the law when the world seeks to surveil, punish, or extract from them.

This Part of the Article considers the roles of global social contracting and traditional contracting in excluding Afrodescendant people, Indigenous peoples, and Global Southerners from the substance of international law and its remedies for violations of human rights and humanitarian law. This social contract keeps Western powers immune from charges of genocide and crimes against humanity against racially subordinated communities; within the refugee law regime, it privileges White and White-adjacent protection seekers as more deserving of refuge than nonwhite protection seekers who are assumed to be migrants exploiting refugee law for economic opportunity and viewed as undesirable.<sup>173</sup> The social contract also supports the commercial contracting of undesirable protection seekers between nations. I engage a longstanding debate among genocide scholars, contemplating and challenging existing definitions of genocide and crimes against humanity and considering the inherently political, racial, and racializing nature of such definitions. Such definitional exclusion from legal recognition and legal remedies is intentional and necessary to preserve the international racial contract and the Racial Superstate.

*A. No Humans Involved?<sup>174</sup> The Racial Contract and the Genocide Convention*

*As a concept, genocide does not apply to Black people.* None of the 2020 UN Office of the High Commissioner for Human Rights Fellows of African Descent could believe their ears.<sup>175</sup> The official's words were galling, but it was certainly not the first time I had heard such a declaration pertaining to atrocities against African

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173. See generally Marissa Jackson Sow, *Ukrainian Refugees, Race, and International Law's Choice Between Order and Justice*, 116 AM. J. INT'L L. 698 (2022) (describing treatment of Ukrainian refugees and protection seekers from predominantly Black and Brown countries).

174. "No Humans Involved" refers to a designation by the Los Angeles Police Department in the 1990s of deaths of young Black men and other undesirable populations, such as people struggling with substance abuse and sex workers. See Luis Rodriguez, *The Endless Dream Game of Death*, 52 GRAND STREET 70 (1995); Sylvia Wynter, "No Humans Involved": *An Open Letter to My Colleagues*, 1 FORUM N.H.I.: KNOWLEDGE FOR 21ST CENTURY 1 (1994).

175. I served as a Fellow in the United Nations Office of the High Commissioner for Human Rights' 2020 Fellowship for People of African Descent in November and December of 2020 with a cohort of Black activists from around the world. I have intentionally omitted the staff lawyer's name and title from the discussion above.

Americans. Some scholars maintain that no such massacre apart from the Jewish Holocaust constitutes a genocide, while others claim that the massacre of approximately 800,000 Hutus in Rwanda is the second and last genocide to have occurred in modern history.<sup>176</sup> The declaration spoke not only as to what types of past atrocities could be considered genocide but who could ever be protected by laws meant to prevent it in the future.

Similar rhetoric has resurfaced concerning the Israeli bombardments of Gaza and other Palestinian territory following the Hamas attacks on Israel on October 7, 2023. The debate has been framed differently: while not disqualifying the possibility of protecting Palestinians under the law of genocide *per se*, both the claims and mere idea that Palestinians could be subjected to genocide or ethnic cleansing by the state of Israel were rejected by Israel and its Western allies as anti-Semitic “blood libel.”<sup>177</sup> The idea that accusing the Israeli government of genocide and ethnic cleansing is a slur against Jewish people reinforces the idea that genocide is a crime that is primarily defined by the Holocaust and a crime over which Jewish communities have prioritized definitional authority. Labeling human rights provisions and mechanisms as definitionally anti-Semitic is not new either: WEOG states have previously used claims of anti-Semitism to decry and contest human rights and racial justice mechanisms such as the Durban Declaration and Plan of Action (DDPA) because of the DDPA’s affirmation of Palestinian human rights.<sup>178</sup>

Like the United States, Israel’s membership in the WEOG bloc and its official identity as a democratic state are used to grant it moral authority and a presumption of magnanimity and benevolence despite striking evidence of war crimes and intent to forcibly displace, starve, and kill as many residents in Gaza as possible. This

176. The concept of genocide is a matter of heated, longstanding debate. “Partly because of the powerful emotional, moral, and political interests at stake in all these discourses, ‘genocide is an essentially contested concept par excellence.’” MARTIN SHAW, *WHAT IS GENOCIDE?* 4 (2d ed., 2015) (quoting CHRISTOPHER POWELL, *BARBARIC CIVILIZATION: A CRITICAL SOCIOLOGY OF GENOCIDE* 67 (2011)).

177. See United Nations, *Gaza: South Africa Levels Accusations of ‘Genocidal Conduct’ Against Israel at World Court*, UN NEWS (Jan. 11, 2024), <https://news.un.org/en/story/2024/01/1145402> [<https://perma.cc/7CQY-4B5S>] (reporting on the UN High Commissioner on Human Rights’ rejection of accusations by Israeli officials that the UN’s concerns that Israeli was breaching international law in Gaza constituted “blood libel” against Israel and Jewish communities); Mike Corder, *South Africa Says Israel’s Campaign in Gaza Amounts to Genocide. What Can the UN Do About It?*, ASSOCIATED PRESS (Jan. 11, 2024), <https://apnews.com/article/un-court-south-africa-israel-gaza-genocide-71be2ce7f09bfee05a7cae26689ee262> [<https://perma.cc/WR82-VBQ4>] (reporting that an Israeli official claimed that South Africa’s application to the International Court of Justice was “absurd blood libel.” *See id.*)

178. Achiume & McDougall, *supra* note 41, at 84. The United States and United Kingdom have also used claims of anti-Semitism in the DDPA as reasons for their “no” votes on the UN’s racial justice resolutions of 2021 and 2022, described, *infra*, in Conclusion. In April 2023, a coalition of Israeli and civil society organizations urged the United Nations to avoid adopting a definition of anti-Semitism that they claimed would be used to make the Israeli state immune to legitimate critiques. *See* Chris McGreal, *UN Urged to Reject Anti-Semitism Definition over ‘Misuse’ to Shield Israel*, THE GUARDIAN (April 24, 2023), <https://www.theguardian.com/news/2023/apr/24/un-ihra-antisemitism-definition-israel-criticism> [<https://perma.cc/NB3Q-FK69>].

presumption serves as a defense mechanism against claims that the protections of international law are necessary for Palestinians, as it does against African American claims against the United States. And an agreement between WEOG states to stand together to defend Israel against even the most damning accusations keeps the presumption and the inability of G-77 states to pass international resolutions to condemn and end the bombardment intact.

An anticolonial approach to international law does not support such narrow and politically malleable views of genocide. Current debates concerning whether Black American and Palestinian people can be victims of genocide, and whether the United States, Israel, or other White-led liberal democracies can be perpetrators thereof, offer up evidence of how definitions of international crimes serve the Racial Superstate.<sup>179</sup> Because of national and geopolitical interests in ensuring that remedies do not attach to certain populations' rights,<sup>180</sup> the legal definitions of atrocities such as genocide generally fail to capture and satisfy the public's demand for definition of and accountability for state-sanctioned and state-enforced atrocities. The definition of genocide is thus subjected to great deal of gatekeeping that is intentionally unhelpful to communities in great need of legal protection.

The etymological definition of genocide is as clear in text as it is unclear in its interpretation and usefulness. The term itself is currently defined by the UN as follows:

- . . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- a. Killing members of the group
  - b. Causing serious bodily or mental harm to members of the group
  - c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
  - d. Imposing measures intended to prevent births within the group
  - e. Forcibly transferring children of the group to another group<sup>181</sup>

The most prevalent popular understanding of genocide is the mass and intentional killing of a large group of people—particularly those of a specific race or ethnic group.<sup>182</sup> Genocide is commonly understood as actions taken to kill a large mass of people all at once or over a relatively short period of time. Scholars,

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179. SHAW, *supra* note 176, at 43 (“The United Nations was formed by the victors of the Second World War, who made themselves permanent, veto-wielding members of its Security Council. The Genocide Convention was one of its early projects, and the great powers and their allies had overwhelming influence in its drafting . . . Generally, the powers were most comfortable with a Convention which primarily criminalized the kind of racially motivated crimes for which the defeated Axis powers had been responsible.”).

180. *Id.* (noting that the Allied powers purposely excluded forced removal of populations from the Genocide Convention's scope because of their complicity in the forced removal of racialized and colonized peoples).

181. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

182. SHAW, *supra* note 176, at viii.

however, have never agreed upon how narrow or broad the definition of genocide should be and, therefore, which acts constitute genocide.<sup>183</sup> Genocide scholar Martin Shaw has noted that the act of defining genocide is no straightforward matter as the concept of genocide is as political as it is legal. Western powers negotiated the terms of the Genocide Convention specifically with their geopolitical interests—and dominance—in mind.<sup>184</sup> The powers specifically excluded aspects of genocide, such as forced removal, from the Genocide Convention, so that they would not be held accountable for those practices, which they supported against nonwhite peoples and nations.<sup>185</sup> For its part, the United States has been adamant in its insistence that it be shielded from claims of genocide and other atrocities from Black Americans in particular, opting out of the jurisdiction of the International Criminal Court to avoid any potential criminal liability and weakening the entire Court through its failure to participate.<sup>186</sup> Though the United States participated in negotiations leading to the Court's creation, the United States knows that its participation in the Court could interfere with its bargain for maximum power and immunity from accountability for itself and its allies.<sup>187</sup>

Significantly, the UN definition of genocide does *not* limit genocide to the killing of a group of people.<sup>188</sup> Rather, killing members of a targeted group people is but one way to commit genocide. Notably, the UN does not establish a threshold for how many people must be killed or harmed for genocide to occur.<sup>189</sup> That the killing or harm must impact a significant number of people is, rather, implied by the intent to destroy, in whole or in part, a group of people. Thus, the application of how genocide is defined under international law has been overcome by the politics of the Racial Superstate and those Racial States who use the concept of genocide as a weapon against geopolitical foes and as a shield against themselves and their allies.<sup>190</sup>

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183. *Id.* at 4–5.

184. *See id.* at 43.

185. *See id.*

186. *See supra* Part II for a discussion of the United States' efforts to avoid accountability for the systemic oppression of its Black population.

187. Though the United States participated in negotiations to establish the ICC, it is not a State Party to the Court. As of 2022, 123 nations are States Parties to the Court. *See The States Parties to the Rome Statute*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties> [<https://perma.cc/P9LY-C7SM>] (last visited Feb. 26, 2024).

188. The United Nations Convention on Genocide defines genocide as follows: any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

189. *See id.*

190. *See SHAW, supra* note 176, at 43.

As written, the Genocide Convention's definition of genocide also recognizes conspiracy to commit genocide, attempt to commit genocide, direct and public incitement to commit genocide, and complicity in genocide as punishable crimes.<sup>191</sup> This is significant as even inchoate genocides cause severe harm by subjecting populations to terror, threat, and physical harm, and because the broad language leaves much room for expansive and protective interpretation of the law.

An anticolonial approach to genocide could also include cultural genocide—the attempts to eliminate evidence and memory of a population and their histories, traditions, customs, and institutions.<sup>192</sup> Cultural genocide, originally recognized by Raphael Lemkin,<sup>193</sup> is often a feature of ethnic cleansing schemes. It even implicates state policies and programs associated with liberal governance, such as urban gentrification schemes. Alex Hinton advocates for the use of a “structural genocide” standard that would account for the well-documented atrocities committed against Black people in the United States throughout history.<sup>194</sup> He makes the compelling point that this more inclusive standard comports with Lemkin's early definition of genocide—a definition Lemkin advanced before his vision of the law was clouded by the politics of hiding the American race problem and highlighting Soviet illiberalism.<sup>195</sup>

A sticking point in the debate over what constitutes genocide is whether genocide is too difficult to prove because of the specific intent requirement.<sup>196</sup> Those in favor of a very narrow construction of the law of genocide support proof of a special intent to kill or cause harm and require that a very large number of people be massacred. The UN supports the demonstration of an extra special intent and concedes that such a requirement makes genocide difficult to prove. However, this construction—which allows WEOG states to avoid culpability for genocide against nonwhite communities—is not at all supported by the text of the Genocide Convention<sup>197</sup> and, as Hinton reminds his readers, is also not consistent with Raphael Lemkin's original concept of genocide.<sup>198</sup>

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191. See Genocide Convention, *supra* note 188188, at art. 3.

192. See Hinton *supra* note 152 (discussing cultural genocide as “crush[ing] the ‘spirit’” of a protected group, a form of genocide which was excluded from the Convention by the Allied powers).

193. See *id.*

194. But see Kevin Jon Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, OPINIO JURIS (Dec. 30, 2021), <https://opiniojuris.org/2021/12/30/is-structural-genocide-legally-genocide-a-response-to-hinton/> [<https://perma.cc/LP4Z-T9YX>] (disagreeing with Hinton that structural genocide is legally genocide).

195. See *id.* (“Lemkin's original understanding of genocide, however, is not reflected in the much narrower Genocide Convention.”); see also Hinton, *supra* note 152 (“Such group destruction was carried out not just by killing but by political, social, cultural, economic, biological, religious, moral, and physical means that crushed the ‘spirit’ of the victim group. This is exactly the sort of interwoven tapestry of group diminishment ‘We Charge Genocide’ sought to establish as constituting the genocide of Black Americans.”).

196. See Heller, *supra* note 194194

197. See Genocide Convention, *supra* note 188.

198. See Hinton, *supra* note 152.

The legal gap between the crimes of genocide and ethnic cleansing is also largely meaningless and equally subjected to highly racialized geopolitical machinations. Ethnic cleansing is not defined as a separate crime under international law, and the UN has not established an official definition, though a UN Commission of Experts defined ethnic cleansing in the following two ways: “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” and “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>199</sup>

While the concepts of genocide and ethnic cleansing are not completely identical, they can be interchangeable as neither ethnic cleansing nor genocide requires mass killing. A justice-oriented system of international law would ensure that, even if genocide is to be adjudicated according to the specific intent standard, the atrocities perpetuated against Black Americans be recognized as crimes against humanity or ethnic cleansing—or that some other equally serious designation be created to depict the Black American experience with terror, repression, and state-sponsored murders and lynchings. Instead, international laws have been bargained for specifically to aid the United States in avoiding any accountability for these crimes.<sup>200</sup> The refusal to ever apply the definition of genocide to Black Americans and the efforts to avoid “singling out” the United States for its human rights violations against Black people are indicative of the intentional exclusion of Black people from legal protections within the international law regime. It is also an extremely palpable example of the exclusion of people of African descent from legal personhood and political humanity.<sup>201</sup>

Unlike genocide, crimes against humanity<sup>202</sup> have not yet been codified in a separate treaty under international law; the concept of crimes against humanity has instead evolved under customary international law and, like genocide, the prohibition of crimes against humanity is a peremptory norm from which no state

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199. *Ethnic Cleansing*, UNITED NATIONS OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml> [<https://perma.cc/E NV3-ESHH>] (last visited Feb. 27, 2024).

200. *See* Achiume, *supra* note 2, at 392–93.

201. *Id.* at 393.

202. Per the Rome Statute, crimes against humanity include: Murder; Extermination; Enslavement; Deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. *See* Rome Statute of the International Criminal Court, art. 7, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute of the Int'l Crim. C.].

may derogate.<sup>203</sup> Like genocide, crimes against humanity may occur during war or peace time,<sup>204</sup> and Shaw makes the claim that the distinction between war and peace is overwrought<sup>205</sup> as the commission of genocide and crimes against humanity against people may be understood as a form of warfare.

Crimes against humanity require a physical element—the violative act is a contextual element as the crime must be widespread, systematic, and carried out against a civilian population. They also require a mental element—there must be knowledge of the violative act.<sup>206</sup> Crimes against humanity can be distinct from ethnic cleansing and genocide. First, crimes against humanity do not necessarily target a specific, racialized group of people. Second, while the crimes must be carried out in furtherance of state or organizational policy, the policy need not be formal and, importantly, can be inferred from a totality of circumstances.<sup>207</sup> Thus, crimes against humanity are defined more broadly than genocide has been, and genocide and ethnic cleansing will meet its definition. This is important because even if a contemporary campaign targeting Black, Brown, and Indigenous peoples fails, somehow, to meet the UN definition of genocide, the pogrom may still meet the standard for a crime against humanity and, thus, be recognized as an atrocity, a human rights violation, and a criminal act.

Once one understands that crimes against humanity committed against racialized communities are intended to leave their victims politically dead, economically dead, and physically speaking, nearly-dead or near-dead,<sup>208</sup> the value of distinctions between genocide and crimes against humanity rests only in administrative categorical distinctions that allow for the recognition of atrocities and not the maintenance of hierarchies between such atrocities. Such administrative distinctions should not allow countries to play politics about which atrocities matter and which do not; nor should countries be able to immunize themselves from prosecution because responsibility for one atrocity rests within a body in which countries such as the United States conveniently do not participate.

Phenomena must be defined by those who have experienced them. Put more sharply, the atrocities committed against Black, Brown, and Indigenous peoples around the world by Western powers must be described and defined by their survivors and not by their perpetrators. An overly narrow interpretation of the Genocide Convention by European scholars, lawmakers, and commentators is a form of legal and structural violence: privileging White political interests and

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203. *See Crimes Against Humanity*, UNITED NATIONS OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> [<https://perma.cc/J4NA-3A6J>] (last visited Feb. 27, 2024).

204. *See* Rome Statute of the Int'l Crim. C., *supra* note 202, at art. 7, ¶ 1.

205. *See* SHAW, *supra* note 176, at 44.

206. *See* Rome Statute of the Int'l Crim. C., *supra* note 202.

207. *See id.*

208. *See* Jackson Sow, *supra* note 6, at 1834–35 (describing the suspension of Black people between “human and nonhuman animal, or somewhere between life and death”).

narratives over the realities of Black, Brown, and Indigenous experiences with Western brutality; erasing Black, Brown, and Indigenous histories; and thus, reifying the racial contract at the domestic and global level. That international law prohibits and condemns genocide as the penultimate crime while so defining genocide to avoid responsibility for their own complicity therein is both paradoxical and paradigmatic, as the terms of the racial contract specify that the ways in which White people are to deal with each other do not apply to the ways in which White people deal with people of color.<sup>209</sup> Put more bluntly by Chief Justice Roger Taney, within the Racial Superstate, the Negro and their counterparts in racial subordination—a being of inferior order—still have no rights the White man is bound to respect.<sup>210</sup>

*B. The Elusive—and Racially Exclusive—Right of Refuge*

While debates concerning the definitions of genocide illuminate how international law is negotiated to support certain states in avoiding accountability for racist atrocities, the application of the law of refugees demonstrates how the law is used to avail some people of their human rights while categorically denying human rights and humanitarian relief to others.<sup>211</sup> The right to asylum is enshrined in international law—specifically the 1951 Convention Relating to the Status of Refugees (Refugee Convention).<sup>212</sup> Accordingly, persons meeting the qualifications enumerated by the Refugee Convention should, as a matter of international law, be recognized as refugees and treated accordingly by nations that are party to the Refugee Convention or its 1967 Protocol, without respect to race, national origin, or religion.<sup>213</sup> Instead, however, recognizing the right to asylum is highly political and highly racialized.<sup>214</sup>

Because anti-Blackness is global and because of the devastating and long-standing impacts of colonialism in predominantly Black and Brown nations and communities, Black and Brown people are disproportionately impacted by humanitarian crises while also being classified as less desirable refuge-seekers than

209. See Adam Serwer, *The Coronavirus was an Emergency Until Trump Found out Who was Dying*, ATLANTIC (May 9, 2020, 12:25 PM ET), <https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/> [<https://web.archive.org/web/20240219055203/https://www.theatlantic.com/ideas/archive/2020/05/americas-racial-contract-showing/611389/>]

210. See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

211. See Jackson Sow, *Closing the Gap: Towards a Rights-Based Approach to Refugee Law*, 4 NW. INTERDISC. L. REV. 147, 149 (2011).

212. See Convention Relating to the Status of Refugees, art. 3, ¶ 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

213. Article 3 of the Refugee Convention prohibits discrimination against refugees on account of “race, religion, or country of origin.” See *id.*

214. E. Tendayi Achiume, *Race, Refugees, and International Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 43, 56 (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021) (“The regime excluded Third World, nonwhite refugees. The confluence of First World nation-state interest meant that the Refugee Convention definition of a refugee, which restricted status to those fleeing events in Europe, by design and effect racialized the very first international legal definition of a refugee.”).

White people.<sup>215</sup> The operating mechanisms of racial contracting—ideological conditioning and force—are systematically employed to keep nonwhite, especially Black and Brown, asylum seekers out of racial states.<sup>216</sup>

The Refugee Convention only recognizes as persecution the systemic denials of civil and political rights<sup>217</sup> and does not acknowledge the ways in which racialized structural economic and environmental oppression of communities—which, in many cases, stem from the legacies of Euro-American imperialism and colonialism—also trigger refugee crises. The results are two-fold: First, people who are seeking protection because of economic or environmental catastrophes do not qualify for refuge under the Convention even if a direct connection exists between the push factors and structural racial, ethnic, sexual, or faith-based oppression.<sup>218</sup> Second, states who are seeking to deny asylum specific classes or people must label those classes of people as migrants or as “economic migrants” to avoid any legal obligation to provide them refuge.<sup>219</sup> The denying states have the option of deciding that these classes of people are migrants, and not refugees, on their own or they may rely upon the language of the Refugee Convention for support.

One cruel irony of this distinction is that, of course, European-American settlers were also economic migrants.<sup>220</sup> Europeans colonized much of the Global South for the purpose of extracting resources therefrom and still do so today, migrating to and from their own countries to the homes of others in search of wealth extraction. Thus, the Refugee Convention contributes to the gaslighting of those people who believe in, or who seek to benefit from, international law; the Refugee Convention provides formal protections of which many of the world’s people may never avail themselves for no other reason beyond their own nonwhiteness.<sup>221</sup>

215. *See id.* at 57; *see also* Christopher Kyriakides, Dina Taha, Carlo Handy Charles & Rodolfo D. Torres, *Introduction: The Racialized Refugee Regime*, 35 REFUGEE 3, 4–5 (2019) (“A set of political and media-validated scripts play out—particularly in the cultural construction of a war-induced ‘refugee crisis’—that informs Western assumptions of what a refugee is and that excludes the ‘non-deserving.’ In the West, migrants and refugees from the Global South and East are (in)validated within a ‘victim-pariah’ representational status couplet, where entrants must prove they do not constitute a threat to the receiving state.” (citations omitted)).

216. Tendayi Achiume characterizes the existing order as an “extant international legal fiction and logic of formally independent, autonomous nation-states (each with a right to exclude nonnationals as a matter of existential priority)” that sustains “the project of African regional containment undertaken by the African Union and the European Union. Today, this regional containment is undergirded by a sovereignty discourse that justifies African exclusion from Europe as an incident of collective self-determination of European nations, which may rightfully be wielded against political strangers.” E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520–21 (2019).

217. *See* Refugee Convention, *supra* note 212; MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGEE FROM DEPRIVATION 2–20 (2007) (critiquing the “artificial” dichotomy between refugees and economic migrants).

218. *See* Jackson Sow, *supra* note 211, at 156.

219. *See* Jackson Sow, *supra* note 173, at 704.

220. *See* Achiume, *supra* note 216, at 1535.

221. *See id.* at 1530–31 (“First World citizens have far greater capacity for lawful international mobility relative to their Third World counterparts . . . . One’s nationality determines the range of one’s

The United Kingdom (UK) is party to the 1951 Convention Relating to the Status of Refugees and the Refugee Convention's 1967 Protocol. Formally speaking, the UK's asylum system is based upon the Refugee Convention and Protocol as well as the European Convention on Human Rights.<sup>222</sup> Despite this, a desire to cater to a racist, xenophobic far-right has incentivized the UK government to establish and enhance its "hostile environment" policy for asylum-seekers and refugees.<sup>223</sup> As part of the Nationality and Borders Act (the Act), which "provides a new legislative framework for issues relating to nationality, asylum, and immigration, which makes asylum claims less likely to succeed and limits the rights available to many of those whose claims are successful,"<sup>224</sup> is a highly controversial provision that creates a two-tier system of classifying refugees.

Clause 11 of the Act allows the UK to treat the second tier of refugees less favorably than the first tier, which is comprised of refugees that the UK deems to have arrived in the UK directly from territory in which their life or freedom was threatened and presented themselves to UK authorities immediately. The Act allows the UK to transfer its asylum claims to Rwanda as part of its UK-Rwanda Migration and Economic Development Partnership.<sup>225</sup> "The policy [does] not involve sending asylum seekers to Rwanda while their UK claims are processed but will instead make their claims 'inadmissible' in the United Kingdom and transfer all responsibility to Rwanda."<sup>226</sup>

The agreement is a clear example of the role of contracting—in this case, bilateral government contracting—in national and international racial ordering. The five-year agreement, detailed in a Memorandum of Understanding (MOU), signed by high-level representatives of the two countries would, by all common legal standards (just as an example), meet the requirements of an enforceable agreement:<sup>227</sup> mutual

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freedom of movement in a way that completely belies claims that assert or imply that all persons are equally without the right of freedom of international movement in our global order . . . . Freedom of movement is, in effect, politically determined and racially differentiated.")

222. See Melanie Gower, *Article 31 of the Refugee Convention* 4–6, HOUSE COMMONS LIBR. (July 15, 2021), <https://researchbriefings.files.parliament.uk/documents/CBP-9281/CBP-9281.pdf> [<https://perma.cc/TQ87-NCLE>].

223. See Piyal Sen, Grace Crowley, Paul Arnell, Cornelius Katona, Mishka Pillay, Lauren Z. Waterman & Andrew Forrester, *The UK's Exportation of Asylum Obligations to Rwanda: A Challenge to Mental Health, Ethics and the Law*, 62(3) MED. SCI. L. 165, 165 (2022).

224. *Id.* (citation omitted)

225. *Id.*; see also *Migration and Economic Development Partnership with Rwanda*, UNHCR UK, <https://www.unhcr.org/uk/what-we-do/uk-asylum-and-policy/migration-and-economic-development-partnership-rwanda#:~:text=UNHCR%20believes%20the%20UK's%20announced,established%20international%20refugee%20protection%20system> [<https://perma.cc/4AKD-SH8M>] (last visited Feb. 27, 2024) (describing the UN Refugee Agency's opposition to the partnership).

226. Sen et al., *supra* note 223.

227. See *Policy Paper: Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, U.K. HOME OFF. (Apr. 6, 2023), <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ir>

assent, legal capacity to contract, and a bargained-for exchange.

The asylum arrangement allows the UK to send some people to Rwanda who would otherwise claim asylum in the UK.<sup>228</sup> Rwanda will consider them for permission to stay or return to their country of origin. They will not be eligible to return to the UK. In return, the UK is providing £120 million funding to Rwanda.<sup>229</sup> The UK has also committed to resettling an unspecified number of vulnerable refugees currently in Rwanda.<sup>230</sup> Notably, the European Court of Human Rights halted the first deportation flight from the UK to Rwanda in June 2022 in an eleventh-hour interim measure.<sup>231</sup> However, the Court's decision notwithstanding, the UK has vowed to continue with their plans to deport asylum seekers to Rwanda.<sup>232</sup>

The plan meets the xenophobic desires of the UK's political far right and its desire to engineer a contemporary ethno-state with a firmly reinforced, highly racialized social contract. The UK has been explicit that the goal of its agreement with Rwanda is to discourage people from seeking asylum in the UK. While nowhere in the text of the MOU is there any language suggesting that the UK is hoping to stop nonwhite people from seeking refuge on its territory, that the plan satisfies the overtly racist objectives of many who support the plan is indisputable.

The scheme is controversial for numerous reasons, and among the critiques of the agreement is that it makes asylum seekers more susceptible to smugglers and traffickers. However, a sober reality of the agreement is that because it is undergirded by hundreds of millions of pounds sterling, the agreement itself converts asylum seekers into capital, if not chattel. It opens the door to the privatization of asylum claims processing, and it indirectly commodifies asylum seekers. That the overwhelming majority, if not all, of these asylum seekers redirected from the UK to Rwanda will be nonwhite necessarily means that no matter the intent of the program, the impact thereof is to deny nonwhite people the right to have their claims processed in the country in which they sought refuge and, accordingly, the very right to seek refuge itself. As of September 2022, a similar

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eland-and-the-government-of-the-republic-of-r [https://perma.cc/4XP9-ECHK].

228. See Stephen Castle & Megan Specia, *U.K. Court Upholds Policy to Deport Asylum Seekers to Rwanda*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/world/europe/uk-rwanda-asylum-seekers-high-court.html#:~:text=Under%20a%20deal%20with%20Rwanda,able%20to%20return%20to%20Britain> [https://perma.cc/JCJ4-NYXV].

229. *Id.*

230. See Melanie Gower & Patrick Butchard, *UK-Rwanda Migration and Economic Development Partnership 4*, HOUSE COMMONS LIBR. (June 28, 2022), <https://researchbriefings.files.parliament.uk/documents/CBP-9568/CBP-9568.pdf> [https://perma.cc/Z4QJ-UVXG].

231. See Press Release, Registrar of Ct., *The European Court Grants Urgent Interim Measure in Case Concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda*, EUR. CT. H.R. (June 14, 2022), <https://hudoc.echr.coe.int/eng-press?i=003-7359967-10054452> [https://perma.cc/7WED-HXJK].

232. See Diane Taylor, *Home Office Planning New Deportation Flight to Rwanda*, GUARDIAN (Aug. 25, 2022), <https://www.theguardian.com/uk-news/2022/aug/25/home-office-planning-new-deportation-flight-rwanda> [https://perma.cc/LD2B-AKM5].

agreement between Denmark and Rwanda was also advancing<sup>233</sup>—an agreement that had led Amnesty International’s Europe Director to complain, in 2021, that “[t]he idea that rich countries can pay their way out of their international obligations . . . is deeply worrying.”<sup>234</sup>

The outsourcing agreement thus provides an excellent case study of the relationship between international law and racial contracting, and it also demonstrates how racial contracting itself operates outside of the United States and within the realm of the Racial Superstate. First, consider the global social contract, which says that a nation like the United Kingdom has a legitimate—if not compelling—interest in controlling human migration because of its wealth, stability, and geopolitical influence. What is tacitly understood is that the UK has the right to take draconian measures to control migration—even if that migration is done by asylum seekers—because it is a predominantly White, and thus civilized, nation with an order that is entitled to respect.

Not so much a country like Rwanda: Rwanda, as an African nation, maintains its geopolitical positioning as a state that is prone perpetually vulnerable to the will, the desires, and the might of a colonial settler power. It is to receive and submit to foreign intervention. Never mind Rwanda’s small geographic size; as the UK prime minister boasted to his constituents, there would be no cap on how many asylum seekers the UK could send Rwanda’s way.<sup>235</sup> Rwanda and Rwanda’s neighboring states, in distinct contrast to the UK, have a far less compelling interest in controlling migration, in national security, and in a social order that should be left unperturbed—particularly if a powerful nation like the UK is willing to pay for the destabilizing inconvenience.

Unfortunately, much of the rhetoric used to critique the agreement also relies upon racialized tropes regarding Rwanda and African states more generally. One prominent argument against the outsourcing of asylum seekers and their claims processing to Rwanda is that Rwanda has a poor human rights record. While this may be so, the idea behind the sentiment is that the asylum seekers would be safer in the UK and Denmark because these European nations have a better human rights

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233. See Christian Wienberg, *Denmark Moves Closer to Sending Asylum Seekers to Rwanda*, BLOOMBERG (Sept. 9, 2022), <https://www.bloomberg.com/news/articles/2022-09-09/denmark-moves-closer-to-sending-asylum-seekers-to-rwanda?leadSource=verify%20wall> [https://perma.cc/7LU2-AKY2]. Notably, *Bloomberg* is covering this arrangement via its “Markets” beat.

234. See Johannes Birkebaek, *UN Committee Criticizes Denmark on Third Country Plans for Asylum Seekers*, REUTERS (Nov. 28, 2023), <https://www.reuters.com/world/europe/un-committee-criticizes-denmark-third-country-plans-asylum-seekers-2023-11-28/> [https://perma.cc/WE22-MKSS]; *Denmark: Plans to Send Asylum-Seekers to Rwanda “Unconscionable and Potentially Unlawful,”* AMNESTY INT’L (May 5, 2021), <https://www.amnesty.org/en/latest/news/2021/05/denmark-plans-to-send-asylum-seekers-to-rwanda-unconscionable-and-potentially-unlawful/> [https://perma.cc/9PXX-HTKT].

235. See Joe Mayes & Alex Morales, *Boris Johnson Reveals Plan to Send Asylum Seekers to Rwanda*, BLOOMBERG (Apr. 14, 2022), <https://www.bloomberg.com/news/articles/2022-04-14/boris-johnson-reveals-plan-to-send-asylum-seekers-to-rwanda> [https://perma.cc/2CWF-7LM2] (describing the agreement with Rwanda as “uncapped” and focused on “male economic migrants in the main”).

record—notwithstanding the fact that the outsourcing agreement is one of many data points demonstrating lack of regard for the human rights of nonwhite people is a feature of European governments as well.

#### IV. TOWARD RECKONING AND RENEGOTIATION

The UN International Decade for People of African descent has highlighted how pervasive anti-Black racism is throughout the world; ironically, it has also revealed just how entrenched anti-Blackness is within international law and how little will exist within the UN to transform itself or the legal instruments it oversees in the service of anti-racist justice. Though people of African descent around the world are demanding urgent anti-racist transformations, both in their home countries and at the UN,<sup>236</sup> the UN has continued to take steps that can be most generously described as incremental and gradual. Moreover, despite the best intentions and the extraordinary efforts of UN representatives, such as the Working Group of Experts on People of African Descent, the power of the global racial contract has been effective at stifling actions that would successfully breach the contract—whether within the Global Superstate or within individual nations.

Having recognized the existence and mechanisms of a Racial Superstate that is belied by the formal provisions of international law and operationalized through an unspoken, but visible, racial contract, this Article now turns to recommendations for dismantling that contract. To provide effective and adequate remedies for victims of humanitarian crises, human rights violations, and mass atrocities and to permit for greater self-determination by formerly colonized peoples, international law's racial contract must be rescinded, and the Racial Superstate dissolved. This Part of the Article offers a brief discussion of the costs of racism to international law's legitimacy and effectiveness; considers how to deconstruct international law's racial contract so that a new anti-racist social contract can be renegotiated and executed; and finally, echoes the calls of human rights scholars recommending that international law formally recognize racism as a human rights violation, that scholars reckon with racism in international law scholarship, and that international organizations also tackle the racism built into their institutions. The recommendations below are non-exhaustive and merely aspire to offer a contribution to the existing racial justice-oriented literature within the field.

##### *A. Deconstructing the Racial Superstate and Renegotiating the International Social Contract*

The concept of deconstruction is popular in social justice spaces, and the term

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236. See Achiume & McDougall, *supra* note 41, at 86 (“As evinced by our own experiences working within this system, collaboration among UN member states to sideline any real reckoning for historical and contemporary racism and racial discrimination rooted in slavery and colonialism remains a feature of the UN system. But so does sustained anti-racism mobilizations that seek to push within and past the system and its institutional and political constraints.”).

“deconstruction” is often used somewhat interchangeably with “decolonization.”<sup>237</sup> The basic idea behind deconstruction in the social justice context is that having been educated to normalize and accept systems of oppression as the human status quo, one must be re-educated—gradually, progressively, and persistently shedding the worldview and paradigms of the oppressors in favor of perspectives and attitudes that are open to and then, intent upon, working for a just and equitable world. As colonization and chattel slavery are systems of economic oppression and exploitation given sustaining power through the force of law (which reflects the assent of the body politic), decolonization, emancipation, and abolition are processes that require physical deconstruction, or “unsettling,”<sup>238</sup> in addition to legal, political, social, and economic deconstruction. Thus, decolonization and deconstruction become interchangeable concepts that can refer to dismantlement across many spheres—including the ideological and psychological.<sup>239</sup>

Reframed in contractual terms, international law’s Whiteness contract must be terminated or adjudged void. Contract law considers certain contracts, including contracts for illegal activity and contracts with those persons lacking contractual capacity, to be void. In such cases, though a deal may have been struck, the law refuses to recognize them and forbids the performance thereof. Other contracts, poisoned by market misconduct—unfair dealings—are voidable and may be terminated if the victim of the misconduct raises the misconduct as a defense against enforceability. Where states parties have bargained for equal shares in international law via negotiation of conventions and treaties, becoming signatories thereto and ratifying those legal instruments, those states who have thereafter been excluded from the benefits of their bargain may raise the defenses of fraud,<sup>240</sup> or even duress and undue influence.<sup>241</sup> They may otherwise claim material breach of UN conventions: that they have reasonably and detrimentally relied on the promises of equality and demand that equality be performed;<sup>242</sup> that, given the clearly disparate interests of the G-77 and WEOG states, a lack of mutual assent has existed such that no social contract has ever truly existed;<sup>243</sup> or, that the terms of the contract are

237. See Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION: INDIGENITY EDUC. & SOC’Y 1, 1 (2012) (“The easy adoption of decolonizing discourse by educational advocacy and scholarship, evidenced by the increasing number of calls to ‘decolonize our schools,’ or use ‘decolonizing methods,’ or, ‘decolonize student thinking’, turns decolonization into a metaphor.”).

238. *Id.* at 3.

239. *Id.* at 19.

240. Fraudulent misrepresentation can prevent the formation of a contract or make the contract formed voidable. See RESTATEMENT (SECOND) OF CONTRACTS §§ 162–64 (AM. L. INST. 2013).

241. Duress and undue influence can make contracts voidable. While physical duress between states does not exactly mirror physical duress between contracting individuals, the threat of military intervention or nuclear activity serves as a parallel to physical threat between states. See *id.* §§ 174–77.

242. Promissory estoppel prevents parties from inducing good faith actors into detrimental reliance upon promises made and then claiming that no contract had been formed. See *id.* § 90.

243. Mutual assent is an element of contract formation—without it, no contract has been formed. See *id.* § 17.

simply unconscionable, given the disparate inequalities of bargaining power at play.<sup>244</sup> The United States, for example, has protested what it views as unfair treatment of itself and its allies by withdrawing its participation from bodies such as the Human Rights Council and, most recently, it—along with several other WEOG states—has suspended its funding of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Other states must be able to collectively demand transformation of the United Nations on this basis and in similar fashion.

If the goal is justice, then deconstruction and reconstruction of the UN and the international law regime are compulsory. This process of transformation would, in the international law context, necessarily be carried forth in the form of renegotiations of conventions, institutional structures, complaint procedures, and more—reminding us that social contracting is indeed closely linked to traditional contracting processes. Within international law, as within the laws of states, anti-oppression transformations require a reorientation from maintenance of power and sociopolitical order to the production and protection of justice.<sup>245</sup> To that end, I make and echo the following recommendations: Restructure the UN Security Council; Recognize Racism as a Violation of International Law; and Confront Racism and Race Denial in International Law Scholarship.

### *1. Restructure the United Nations Security Council*

One practicable, reform-based solution is to heed the calls of those who have long complained about the colonial structure of the Security Council and to decolonize the Security Council. Completely democratizing the Security Council—giving all members of the Security Council equal veto powers, eliminating permanent seats on the Security Council, and instead converting all memberships on the Security Council to rotating memberships—could solve for the Security Council’s existing inequitable form and function. The permanent members of the Security Council would undoubtedly launch serious resistance to this proposed transformation, likely involving attempts at financial coercion of G-77 states by Western Powers or even threats to abandon the UN system entirely. However, if G-77 countries find that they have more to gain through increased decision-making authority than through the existing structure, transformation of the Security Council

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244. *See id.* § 208.

245. Refugee law scholar James Hathaway has discussed the gap between the prevailing idea that the goals of refugee law are to provide humanitarian assistance and human rights protections when they are instead oriented toward supporting states’ interests in regulating migration. *See* James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 130 (1990) (“Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism and in basic principles of human rights. In practice, however, international refugee law seems to be of marginal value in meeting the needs of the forcibly displaced and, in fact, increasingly affords a basis for rationalizing the decisions of states to refuse protection.”).

might one day be possible. In an era of global populism, uprisings, and defections—the UK from the European Union, and plans of several West African states to leave ECOWAS—the states holding permanent Security Council seats will need to be careful not to isolate G-77 countries and jeopardize the standing of the UN. The social contract in place is only sustainable insofar as there are states for the superpowers to dominate. Mass resistance by G-77 countries would force the existing powers on the Security Council to negotiate, lest the UN lose authority, legitimacy, and usefulness; after all, “smart power”<sup>246</sup> recognizes that the ability to leverage international law in the service of foreign policy outcomes is better than isolation.

The UN is not necessarily without promise or redemption. So said Achiume and McDougall, “Although we highlight. . . challenging terrain, anti-racism efforts at the United Nations cannot and should not be reduced to the conduct of states and the UN Secretariat. Since its inception, the United Nations has been a vibrant and urgent site of advocacy by civil society and social movements who have leveraged this global platform to fight racial justice battles that could not be won through purely local, national, or regional strategies.”<sup>247</sup> The UN’s human rights mechanisms provide an opportunity for advocates to make complaints concerning racist discrimination and related human rights abuses. For example, in response to human rights abuses perpetuated against Black Lives Matter protesters by Philadelphia Police Department officers, law professors Rachel Lopez and Lauren Katz Smith (along with law students participating in Drexel University’s Community Lawyering Clinic and the ACLU of Pennsylvania) submitted a complaint to three UN Special Rapporteurs in December 2020.<sup>248</sup> In response to that complaint, in February 2021, twenty-three UN special procedures endorsed measures demanded by Black Lives Matter to reform laws and policies relating to American law enforcement’s response to racial justice activism and protests.<sup>249</sup> The availability of these mechanisms supports the continued engagement of the UN by racial justice activists.

However, this Article has not attempted to make the case that meaningful human rights mechanisms do not exist within the UN. Rather, it seeks to illuminate how entrenched white supremacy undermines these mechanisms and their promise, and it uses contracting and social contracting to do so. This White supremacist

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246. See Hendrik Hertzberg, *Smart Power*, NEW YORKER (Jan. 18, 2009), <https://www.newyorker.com/magazine/2009/01/26/smart-power> [<https://perma.cc/9ALJ-BRMC>].

247. Achiume & McDougall, *supra* note 41, at 83.

248. See *SCLC Calls For United Nations to Hold City of Philadelphia Accountable For Police Violence*, DREXEL UNIV. THOMAS R. KLINE SCH. L. (Dec. 1, 2020), <https://drexel.edu/law/about/news/articles/overview/2020/December/community-lawyering-clinic-policing-un-submission/> [<https://perma.cc/Y2GV-D8RZ>].

249. See Press Release, United Nations Office of the High Commissioner for Human Rights, USA: UN Experts Urge Far-Reaching Reforms on Policing and Racism (Feb. 26, 2021), <https://www.ohchr.org/en/press-releases/2021/02/usa-un-experts-urge-far-reaching-reforms-policing-and-racism?LangID=E&NewsID=26805> [<https://perma.cc/93PT-TKX5>] (listing the names of the twenty-three Special Procedures who endorsed measures demanded by Black Lives Matter activists in response to the advocacy of Drexel University’s Stern Community Law Clinic as well as the measures demanded).

hegemony operates in intentional and coordinated fashion vis-à-vis the UN's Security Council and the Human Rights Council to systematically frustrate the United Nations' racial justice engagement.

2. *Recognize Racism, and Particularly Anti-Black Racism, as a Violation of International Law*

In recent years, scholars of international law have become steadily more vocal about the need for international law to reckon with racism and its impacts. Mohsen al Attar has called for systemic racism to be centered in the study of international law, while Anna Spain Bradley has called for the application of critical race theory to international human rights law.<sup>250</sup> Spain Bradley has notably also called for the recognition of racism as a human rights violation that is separate and distinct from racial discrimination.<sup>251</sup> Similarly, Tendayi Achiume, together with Devon Carbado, recently argued that the epistemic borders between Critical Race Theory and Third World Approaches to International Law are “unwarranted,”<sup>252</sup> noting several parallels between the “analytical and normative work” done by each field and citing the work of James Thuo Gathii on lessons that each field might teach the other.<sup>253</sup>

This Article joins those scholars in calling for a formal reckoning with systemic racism within international law, and it specifically endorses and echoes Spain Bradley's call for the recognition of racism as a violation of international law. Beyond a general recognition of racism as a human rights violation, international law must recognize the history of anti-Black racism within international law and international law's specific constructions of Blackness outside of international law's protections as well as the ways it continues to deny Black-majority nations full membership within the global body politic. Even if a definition of genocide cannot be reconciled with the experiences of systemic dispossession, brutality, and murder of Black people in the United States, a formal recognition of systemic racism as a violation of human rights must account for the lived experiences of those people of African descent enduring anti-Black racism in the United States. Moreover, such a human rights violation must be defined as a violation of civil and political rights and as a violation of international criminal law, for the violation to be regarded seriously.

Following the special Human Rights Council Session in June 2020, UN Human Rights High Commissioner Michelle Bachelet issued a report—released in June 2021—detailing an Agenda to eradicate systemic racism against people of African descent. According to the report, “[t]he objectives of this transformative agenda in the annex are to reverse cultures of denial, dismantle systemic racism and

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250. See Mohsen al-Attar, *I Can't Breathe: Confronting the Racism of International Law*, MOHSEN AL ATTAR (Oct. 6, 2020), <https://mohsenalattar.org/i-cant-breathe-confronting-the-racism-of-international-law/> [<https://perma.cc/3D2J-CN25>]; see also Spain Bradley, *supra* note 1, at 48–55.

251. See Spain Bradley, *supra* note 1, at 48–50.

252. See Achiume & Carbado, *supra* note 2, at 1462.

253. See *id.* (citing Gathii, *supra* note 2).

accelerate the pace of action; end impunity for human rights violations by law enforcement officials and close trust deficits in this area; ensure that the voices of people of African descent and those who stand up against racism are heard and that their concerns are acted upon; and acknowledge and confront legacies, including through accountability and redress.”<sup>254</sup>

The primary victory in the report is the acknowledgment that systemic racism is a global scourge, and that it is a scourge that should be addressed via human rights mechanisms. Additionally, the report also honored victims of police violence by naming them and thus recognizing their humanity.<sup>255</sup> The report clarified the linkages between systemic racism and legacies of enslavement and colonialism<sup>256</sup> and noted the pervasiveness of racist police brutality in the West.<sup>257</sup> As such, the report reflects the potential beginnings of reckoning with the racial contracts of member states by the UN.

While the report is significant, however, missing therefrom is any plan for the UN itself and its organs to attack systemic racism internal to its organization and to the laws it promulgates. The Agenda, instead, called upon States to “translate [it] into action plans and concrete measures,”<sup>258</sup> leaving unanswered the obvious question of what to do about states committed to their national racial contracts.

The Human Rights High Commissioner’s report placed no obligations upon states—nor could it; it instead called upon states to take their own actions. Also missing from the report was a clear and plain definition of racism as a human rights violation. The report directly addresses “violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and people of African descent.”<sup>259</sup> It later refers to systemic racism as a form of racial discrimination, noting that “[i]nternational human rights law and political commitments provide a clear framework for attaining substantive [...] racial justice and equality,”<sup>260</sup> beyond a purely formal conception of equality. They place obligations on States to eliminate all forms of racial discrimination, including

254. This report was issued in lieu of a Commission of Inquiry. See Human Rights Council Res. 43/1, U.N. Doc. A/HRC/RES/43/1 (June 19, 2020), <https://undocs.org/A/HRC/RES/43/1> [<https://perma.cc/7DHB-3D7K>] (directing High Commissioner **Error! Bookmark not defined.** to prepare the report). For the report itself, see *Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers*, U.N. Doc. A/HRC/47/53, at 1 (June 1, 2021), <https://www.ohchr.org/en/documents/reports/ahrc4753-promotion-and-protection-human-rights-and-fundamental-freedoms-africans> [<https://perma.cc/QR8P-JK4W>].

255. See U.N. Report, *supra* note 254, ¶ 30.

256. See *id.* ¶¶ 11, 61.

257. See *id.* ¶¶ 8, 105–11.

258. *Id.* ¶ 314.

259. See *id.* ¶ 4. However, the phrasing, which separates “systemic racism” and “violations of international human rights law” by a comma in the report, seems to indicate that the two are separate concepts.

<sup>260</sup> *Id.* ¶ 77

systemic racism.<sup>261</sup> Per the report, systemic racism is the:

[O]peration of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, de jure or de facto discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin. Systemic racism often manifests itself in pervasive racial stereotypes, prejudice and bias and is frequently rooted in histories and legacies of enslavement, the transatlantic trade in enslaved Africans and colonialism.<sup>262</sup>

The failure to declare systemic racism a *per se* violation of international human rights law and not a mere form of racial discrimination reflects yet another missed opportunity by the UN to rescind its own racial contract and pressure states to do the same.

### *B. Confront Racism and Race Denial in International Law Scholarship*

Unsettling the coloniality of being<sup>263</sup> must also lead to an unsettling of the coloniality of knowledge. International law scholarship must also reckon with racism—both the racism that stifles international law’s potential to offer justice to the world and actively perpetuates white supremacy globally and the racism perpetuated in scholarship about international law.

One of the terms of the racial contract is that the racism for which the contractors have negotiated is to be overt and public wherever public law so allows and tacit and private wherever public law forbids it. This is, for the contract, a survival mechanism, and it is this dynamic that pushes liberalism’s apartheid requirement to the darkness where it cannot be seen and, therefore, confronted.<sup>264</sup> While international law makes claims to advance freedom, security, and justice, in practice, it continues to reify oppressive hierarchies based in unjustifiable beliefs in Euro-American superiority and Afro- and Asian inferiority. Scholars commit violence upon their readers and colleagues by refusing to acknowledge the centrality of race to international law.

Several contemporary decolonial scholars of international have been pressing for transformative change. The work of scholars such as Tendayi Achiume, Antony Anghie, Mohsen al Attar, Bhupinder Chimni, James Thuo Gathii, Gay McDougall,

261. *Id.* ¶ 77.

262. *Id.* ¶ 15.

263. *See generally* Wynter, *supra* note 60, 257–337 (2003).

264. *See* Achiume, *supra* note 2, at 396 (“[I]n its historical and contemporary manifestations [the liberal project] has always sustained political and economic interconnection among groups and individuals on unequal terms, including on the basis of race. Indeed, even the history of the international human rights framework for combatting racial discrimination is fraught with liberal opposition to the very framework.”).

Makau wa Mutua, Catherine Powell, Jaya Ramji-Nogales, Hank Richardson, Matiangai Sirleaf, Chantal Thomas, Ntina Tzouvala, and Adrien Wing<sup>265</sup> among others represents formidable resistance to international law's commitments to an unearned redemption narrative regarding the role that race and racism play in undergirding the international law regime and the literature relating thereto. A quarter-century ago, Chimni decried the "myth of difference" within the international refugee law regime, which promulgated the idea that "refugee flows in the Third World were . . . radically different from refugee flows in Europe since the end of the First World War." Through this myth, "an image of a 'normal' refugee was constructed—white, male and anti-communist—which clashed sharply with individuals fleeing the Third World." Chimni contended that scholars have failed to recognize the role that imperialism and colonialism have played in generating refugee crises in the Global South and that refugee studies had done little to combat the "self-serving" beliefs that upheld the myth.

Matiangai Sirleaf has recently written about racism denial and the impact thereof of her work on international law and public health:

I remember vividly being admonished at workshops that the response to the Ebola epidemic was not influenced by race. Some commentators strongly encouraged me to remove references to race in my piece *'Ebola Does Not Fall From The Sky'*. The reluctance to acknowledge race was particularly striking when even the satirical publication, *The Onion*, could see the racialized responses to Ebola, running a mock headline in October 2014, which read, *'Experts: Ebola Vaccine At Least 50 White People Away'*.<sup>266</sup>

Bearing witness to the material impact of the harm of the racialization of diseases and then being gaslit when attempting to write and share your research on this very phenomenon epitomizes the conundrum of #TheorizingWhileBlack . . . the gaslighting of being whitesplained does significant harm to Black people's well-being by forcing you to question your own reality and perceptions. The tragedy for Black scholarship can result in the suppression and silencing of our perspectives and interventions.<sup>267</sup>

Mohsen al Attar, for his part, has plainly claimed that Eurocentrism and racism "suffuse" the international law regime,<sup>268</sup> and his work confronts the ways in which racism has also suffused international law scholarship. He has called attention to the

265. I have cited work by these scholars, among others, throughout this Article and thank them for laying a foundation for my own scholarly inquiries.

266. Matiangai Sirleaf, *Do You Have to Say That You Are Black*, THIRD WORLD APPROACHES TO INT'L L. REV.: REFLECTIONS (June 15, 2022), <https://twailr.com/do-you-have-to-say-that-you-are-black/#:~:text=Matiangai%20Sirleaf%20reflects%20on%20the,in%20international%20law%20and%20beyond> [https://perma.cc/MK66-SC6K].

267. *Id.*

268. al Attar, *supra* note 251.

Eurocentrism of international law scholarship, even noting that the most popular texts on international law taught in Asia are written and edited by White Europeans.<sup>269</sup> In these texts, acknowledgements of racism are very rare.<sup>270</sup> Many scholars take comfort in the (unfounded) belief that “international law was cleansed of its racist foundations through decolonization.”<sup>271</sup> al Attar sharply criticizes the erasure of Black and Brown people’s agency, histories, and continued struggles against white supremacy and racial inequality within the global institutional order in positivist international law scholarship. Says al Attar, “Denial of the racism that undergirds the entire edifice, yet again, perpetuates racialised injustices and strengthens the grip of the status quo.”<sup>272</sup>

al Attar recommends the adoption of anti-racist pedagogy within international law scholarship.<sup>273</sup> This Article joins his call for an approach to teaching and writing about international law that adopts and incorporates critical race theory and Third World Approaches to International Law. To quote Mills:

Intellectuals write about what interests them, what they find important, and—especially if the writer is prolific—silence constitutes good prima facie evidence that the subject was not of particular interest. By their failure to denounce the great crimes inseparable from the European conquest, or by the half-heartedness of their condemnation, or by their actual endorsement of it in some cases, most of the leading European ethical theorists reveal their complicity in the Racial Contract.<sup>274</sup>

Oliver Wendell Holmes famously reflected that “the life of the law has . . . been experience.”<sup>275</sup> For the racial contract to be revoked, it must first be recognized, and before it is recognized, it must be perceived. Because much work goes into concealing the contract’s existence, an equal or greater amount of work from scholars will be necessary to reveal and condemn the presence of the contract and white supremacy within international law and organizations.<sup>276</sup> Ultimately, a conversation about the need to diversify the practice of international law as well as the “bench” of scholarly international law talent will also become unavoidable—Black and Brown scholars are those best suited to teach and think about racism because they recognize and experience racism and because they are familiar with the measures necessary to repair harm and create the conditions for equality and liberation.

The UN and other global institutions have a role to play in providing

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269. *See id.*

270. *See id.*

271. *See id.*

272. *Id.*

273. *Id.*

274. *See* MILLS, *supra* note 33, at 94.

275. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

276. *See id.*

opportunities for racism's survivors to engage international law professionally, but responsibility most certainly also falls much closer to the ground with law schools and legal education. International law's racism is so deeply entrenched that traditional international law pedagogy regularly fails to acknowledge racism or even offer comprehensive accounts of world history that include slavery or colonialism.<sup>277</sup> That so many international law and human rights internships and fellowships are uncompensated or poorly compensated also constructively excludes underprivileged and historically marginalized candidates from participation; moreover, uncompensated and undercompensated labor is a practice that should be firmly rejected by international law experts and scholars in general.

If, for Wynter, the colonial, Eurocentric, heteronormative, Judeo-Christian creation that is “man” is overrepresented at the expense of all who are constructed outside of manhood,<sup>278</sup> it follows that man's knowledge, methods of knowledge production, and decisions about who is authorized to produce knowledge have also been overrepresented within the international law sphere. “Anti-racist pedagogy teaches us to choose better.”<sup>279</sup> But we must first choose to want to become better.

#### CONCLUSION

On October 7, 2022, the Human Rights Council held a vote on a resolution to take concrete action to combat racism, racial discrimination, xenophobia, and “related forms of intolerance.”<sup>280</sup> The resolution, entitled “From Rhetoric to Reality,” marked a concerted effort to move beyond assertions of investment in racial justice toward investments in racial justice by calling for financial and human capital to support the mandate of the Working Group of Experts on People of

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277. See Anna Spain Bradley, *International Law's Racism Problem*, OPINIO JURIS (Apr. 9, 2019), <http://opiniojuris.org/2019/09/04/international-laws-racism-problem/> [<https://perma.cc/BA3X-A4EC>] (“[I]n 2019 most leading casebooks in international law don't even include the word racism in their index. Many students of international law are introduced to the importance of the ‘Grotian Tradition’ but not that of the abolition of slavery or the Haitian Revolution.”); Mohsen al Attar, *Tackling White Ignorance in International Law—“How Much Time Do You Have? It's Not Enough,”* OPINIO JURIS (Sept. 30, 2022), <http://opiniojuris.org/2022/09/30/tackling-white-ignorance-in-international-law-how-much-time-do-you-have-its-not-enough/> [<https://perma.cc/D9CM-RM7Q>] (“Just as philosophers exclude white supremacy from their syllabi . . . so do scholars of international law vanish it from the discipline. In a standard international law course, racism only merits cursory mention in reference to the International Convention for the Elimination of Racial Discrimination and as evidence of the normative supremacy of human rights . . .”).

278. See Wynter, *supra* note 60, at 262.

279. al Attar, *supra* note 251.

280. Press Release, Office of the High Commissioner on Human Rights, Human Rights Council Adopts 14 Resolutions, Extends Mandates on Ethiopia, Burundi, Venezuela, Democratic Republic of the Congo, Central African Republic, and Somalia, Concludes Regular Fifty-first Session (Oct. 7, 2022), <https://www.ohchr.org/en/press-releases/2022/10/human-rights-council-adopts-14-resolutions-extends-mandates-ethiopia-burundi> [<https://perma.cc/CC2G-BH2P>].

African Descent.<sup>281</sup> The resolution was adopted with thirty-two “yea” votes, nine votes against, and six abstentions.<sup>282</sup> The states parties voted against were: Czech Republic, France, Germany, Montenegro, Netherlands, Poland, Ukraine, the United Kingdom, and the United States of America—all members of the WEOG or Eastern European bloc.<sup>283</sup> Among the UK’s objections to the resolution was the claim that states are required to pay reparations for slavery and colonialism. The UK noted, rather ironically, that enslavement and colonialism were not violations of international law at the time they occurred and objected on that basis—with no reflection on why enslavement and colonialism were not considered violations of international law at the time and which states would have made such decisions.<sup>284</sup>

Since the October 7, 2023, Hamas attack on Israel and the subsequent Israeli bombardments of Gaza and the West Bank, things have both changed and remained the same at the UN.<sup>285</sup> A December 2023 UN General Assembly resolution calling for an immediate humanitarian ceasefire passed with a large majority of states voting in favor of the adopted resolution. Of the ten states voting against and the twenty-three states abstaining were members of the WEOG bloc and the Eastern European bloc: United States, Israel, Austria, the Czech Republic, Guatemala, Liberia, Micronesia, Nauru, Papua New Guinea and Paraguay voted against the resolution; the UK, Germany, Hungary, Italy, Argentina, Malawi, the Netherlands, Ukraine, South Sudan, and Uruguay abstained.<sup>286</sup> Notably, several WEOG states broke ranks with the United States, the UK, and Israel and voted for the resolution, including France, Denmark, Sweden, Finland, Norway, Australia, and Canada.<sup>287</sup>

Only several weeks earlier, the General Assembly had adopted a similar resolution calling for a ceasefire with a smaller majority of 121 states as over forty states—including several WEOG states—abstained from voting. Austria, Croatia, the Czech Republic, Israel, and the United States were among fourteen states who voted against the resolution.<sup>288</sup> Prior to the October resolution adoption, four

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281. *See id.*

282. *See id.*

283. *See id.*

284. The United Kingdom also cited its objection to the resolution’s references to the Durban conference, which it considered anti-Semitic. *See* Rita French, U.K. Hum. Rts. Ambassador, UN Human Rights Council 51: UK Explanation of Vote on Racism Resolution (Oct. 7, 2022), <https://www.gov.uk/government/speeches/un-human-rights-council-51-uk-explanation-of-vote-on-racism-resolution> [<https://perma.cc/EH9G-JGK7>].

285. *See UN General Assembly Votes by Large Majority for Immediate Humanitarian Ceasefire During Emergency Session*, U.N. NEWS (Dec. 12, 2023), <https://news.un.org/en/story/2023/12/1144717> [<https://perma.cc/LK8Y-GNRB>].

286. *See id.*

287. *See id.*

288. *See General Assembly Adopts Resolution Calling for Immediate, Sustained Humanitarian Truce Leading to Cessation of Hostilities between Israel, Hamas*, UNITED NATIONS (Oct. 27, 2023), <https://press.un.org/en/2023/ga12548.doc.html> [<https://perma.cc/3ULG-2CYL>]; Jacob Magid, *UN Resolution Urging Immediate Gaza Ceasefire Passes with Overwhelming Majority*, TIMES OF ISRAEL

attempts at adopting resolutions on pauses in the bombardments or ceasefires had failed in the UN Security Council:<sup>289</sup> a mid-December 2023 vote was met with thirteen Security Council members in favor of a ceasefire, while the United Kingdom abstained and the United States offered the sole veto, blocking the resolution.<sup>290</sup>

Days after the overwhelmingly successful General Assembly vote, a subsequent vote in the Security Council that did not call for a ceasefire but instead demanded immediate and unhindered humanitarian assistance to be delivered to Palestinians was held on December 22, 2023.<sup>291</sup> The United States and Russia abstained—with Russia complaining that the resolution did not offer strong enough support for Palestinians and the United States objecting to a failure of the resolution to condemn Hamas.<sup>292</sup> That the United States did not veto the resolution is a remarkable shift, which followed weeks of negotiations between States Parties. Still, the necessity of these negotiations—and the power of the United States and Russia to disrupt humanitarian aid supported by most of the world with a sole vote against—shows that disproportionate power remains with and on behalf of Whiteness.

Still, there are other signs of continued, resolute resistance against the UN's Whiteness contract and increased demands that international law be put to work on behalf of all the worlds' peoples. A week after the Security Council vote, South Africa instituted proceedings against Israel before the International Court of Justice, accusing Israel of committing and having committed genocide in violation of the Genocide Convention against Palestinians in the Gaza Strip.<sup>293</sup> South Africa requested that the Court issue provisional measures of protection for the Palestinian people.<sup>294</sup> On January 26, 2024, the Court—with an American judge serving as the Court's president—found that “at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the [Genocide] Convention,” ordering Israel to

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(Oct. 28, 2023, 1:48 AM), <https://www.timesofisrael.com/un-resolution-urging-immediate-gaza-ceasefire-passes-with-overwhelming-majority/> [<https://perma.cc/N84B-GGDE>].

289. See Edith M. Lederer, *U.N. Security Council Adopts Resolution Calling for Urgent Humanitarian Pauses in Gaza*, TIME (Nov. 15, 2023, 4:03 PM), <https://time.com/6335677/u-n-security-council-vote-resolution-humanitarian-pauses-gaza/> [<https://perma.cc/Z2XT-XBDL>].

290. See Edith M. Lederer, *US Vetoes UN Resolution Backed by Many Nations Demanding Immediate Humanitarian Cease-fire in Gaza*, AP NEWS (Dec. 9, 2023, 5:49 AM), <https://apnews.com/article/israel-palestinians-un-resolution-ceasefire-humanitarian-6d3bfd31d6c25168e828274d96b85cf8> [<https://perma.cc/6GDJ-URY3>].

291. See *Security Council Adopts Key Resolution on Gaza Crisis; Russia, US Abstain*, U.N. NEWS (Dec. 22, 2023), <https://news.un.org/en/story/2023/12/1145022> [<https://perma.cc/7XFA-5HWL>].

292. See *id.*

293. Press Release, I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), I.C.J. Press Release No. 2024/6 (Jan. 26, 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-pre-01-00-en.pdf> [<https://perma.cc/5GES-T5MR>].

294. See *id.*

prevent acts of Genocide in Gaza.<sup>295</sup> The order of provisional measures was a stunning blow to Israel and its fellow WEOG allies who had characterized South Africa's application to the Court as meritless and baseless.<sup>296</sup>

Breaching or interfering with the Racial Superstate's Whiteness contract has its consequences. On the same day of the ruling, Israel claimed that several employees of United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)—the UN agency tasked with meeting the needs of Palestinian refugees—had taken part in Hamas's October 7th attacks.<sup>297</sup> Though UNRWA terminated its contracts with the accused employees without any evidence of their culpability<sup>298</sup>, key WEOG group donors also decided to breach their own commitments to UNRWA by pausing their funding.<sup>299</sup> Among those donors were the United States, Canada, Germany, Switzerland, Australia, the UK, Italy, the Netherlands, and Finland.<sup>300</sup> American donations to UNRWA in 2023 alone accounted for nearly a third of UNRWA's contributions in the past year, making the suspension in funding devastating to the agency and the Palestinian people served thereby.<sup>301</sup> The WEOG states are clearly unhappy with the shifts in bargaining power reflected in the UN's support of Palestinians and the ICJ's order: the timing of the funding suspension has led commentators to muse that notwithstanding any potential veracity of the accusations against the now-fired UNRWA employees, the decisions to suspend, or breach, funding commitments

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295. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J. 192, ¶ 30 (Jan. 26), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf> [<https://perma.cc/K3PN-ZBGR>].

296. Israel called South Africa's claims "baseless." Emily Rauhala & Kareem Fahim, *South Africa Presses Genocide Case Against Israel at International Court*, WASHINGTON POST (Jan. 11, 2024), <https://www.washingtonpost.com/world/2024/01/11/south-africa-icj-hearing-israel-genocide/> [<https://perma.cc/3ZTT-6FJR>]. U.S. Secretary of State Anthony Blinken described South Africa's claims "meritless" and described the case as a "distraction." Chile Eboe-Osuji, *South Africa's ICJ Case Was Too Narrow*, FOREIGN POL'Y (Feb. 2, 2024, 1:24 PM), <https://foreignpolicy.com/2024/02/02/south-africa-israel-icj-gaza-genocide-hamas/> [<https://perma.cc/6345-MSZ2>].

297. See Emine Sinmaz, *UNRWA Staff Accused by Israel Sacked Without Evidence, Chief Admits*, GUARDIAN (Feb. 9, 2024), <https://www.theguardian.com/world/2024/feb/09/head-of-un-wra-says-he-followed-reverse-due-process-in-sacking-accused-gaza-staff> [<https://perma.cc/GLH7-AX6K>].

298. See *id.*

299. See *id.* (noting that 16 countries suspended funding to the agency, depriving it of approximately \$440,000,000).

300. See Bethan McKernan, *UK, US and Other Countries to Pause Funding for Key UN Aid Agency for Palestinian Refugees*, GUARDIAN (Jan. 28, 2024, 1:01 AM), <https://www.theguardian.com/politics/2024/jan/27/uk-to-pause-funding-for-key-un-aid-agency-for-palestinian-refugees> [<https://perma.cc/CXG6-54NA>].

301. See Jillian Kestler-D'Amours, *'Reckless': Proposed ban on US Funding for UNRWA Raises Alarm*, AL JAZEERA (Feb. 7, 2024), <https://www.aljazeera.com/news/2024/2/7/reckless-proposed-ban-on-us-funding-for-unrwa-raises-alarm> [<https://perma.cc/LB3U-CBFM>] (noting that the U.S. contributed \$422 million to UNRWA in 2023, accounting for 30 percent of UNRWA's total contributions for the year).

were acts of political retaliation.<sup>302</sup>

Within the international law regime, as within the legal regimes of individual states, contracting is fundamental to race and race is central to contracting. Colonial racial formations serve, in the present era, as markers of who deserves and who does not deserve human rights and humanitarian protections, and of which states are entitled to bargaining and decision-making power within institutions like the UN. This Article has sought to highlight that the social contracting that undergirds the Racial Superstate is also supported by enforceable agreements between and among states. Take, for example, the news reports of a confidential report generated by diplomats from EU countries arguing “for a more ‘transactional’ approach to foreign aid that would tie funding for African countries to their willingness to work ‘based on common values and a joint vision’” relating to the war in Ukraine.<sup>303</sup> Specifically, European countries have become concerned about losing African nations’ support for Ukraine and the war or, as reported, “the battle for hearts and minds in Africa;” the EU is opting to place financial pressures on African countries—essentially buying, or extorting, African support.<sup>304</sup> An African nation that wished to maintain ideological independence regarding the war effort would therefore have to do so at the cost of increased economic, social, and therefore political instability at home—factors that would weaken it domestically and regionally, while also rendering it more vulnerable to various Western interventions.<sup>305</sup>

Contracting for foreign aid allows powerful, White, Western states to exert control over Africa and its people and place constraints on African sovereignty and self-determination. Likewise, decisions to suspend UNRWA funding have created additional discursive space for Israel’s arguments that UNRWA should be abolished.<sup>306</sup> With colonial extraction contributing to the Global South’s reliance upon Western aid in the first instance, the neo-coloniality of the envisioned aid plan becomes apparent.

The human costs of white supremacy and Eurocentrism in the international

302. See Moustafa Bayoumi, *Millions of Palestinians Rely on UNRWA. Why is the US Suspending Funding Based on Israeli Accusations?*, GUARDIAN (Jan. 31, 2024, 6:01 AM), <https://www.theguardian.com/commentisfree/2024/jan/31/unrwa-aid-us-suspension-collective-punishment-palestinians-israel> [<https://perma.cc/EK88-RWAJ>].

303. Vince Chadwick, *Exclusive: Internal Report Shows EU Fears Losing Africa Over Ukraine*, DEVEX, (July 22, 2022), <https://www.devex.com/news/exclusive-internal-report-shows-eu-fears-losing-africa-over-ukraine-103694> [<https://perma.cc/7EEG-MWJH>].

304. *Id.*

305. Of this relationship, Achiume has remarked as follows: “Given the political ties that bind Africans to Europeans in a relationship that subordinates the former for the benefit of the latter, African regional containment is an unjust practice that violates African entitlements to European nation-state admission and inclusion.” Achiume, *supra* note 216, at 1521.

306. See, e.g., *Opinion: Gaza Conflict: What is UNRWA and Why is Israel Calling for its Abolition?*, UCL NEWS (Feb. 2, 2024), <https://www.ucl.ac.uk/news/2024/feb/opinion-gaza-conflict-what-unrwa-and-why-israel-calling-its-abolition> [<https://perma.cc/E2TX-C65R>] (recalling that Benjamin Netanyahu and members of the Knesset have called for UNRWA to be dissolved).

law regime are extremely high for the victims of racism and survivors of neo-colonialism. Nonwhite people and people of the Global South—or, as Sylvia Wynter calls them, “the postcolonial variant of Fanon’s category of *les damnés*”<sup>307</sup>—find themselves trapped within a matrix in which international law is held up as a path of legal possibility, commerce, development, and recourse while they are also systematically denied its benefits.<sup>308</sup>

Racial states are both derivative and catalytic of the Racial Superstate. As “*les damnés*,”<sup>309</sup> the problems that racialized people face in demanding and obtaining remedies for violations of their rights and in competing for and exercising ownership of the world’s resources on the global scale parallel in many ways the problems that Black and Indigenous people face in engaging these activities in the United States. Despite formal laws guaranteeing strict equality between people regardless of race, ethnicity, and national origin, Indigenous people and people of African descent, and the nation-states they populate, enjoy tiered political personhood at best. International law has a racism problem because racism is, in many ways, its fuel. Racism is, thus, not merely a problem for international law but for the racialized people hoping to find justice thereunder.

Calling upon the UN and its most powerful member states to recognize and respect the personhood—and the humanity—of Black, Brown, and Indigenous peoples is at the core of the issues explored in this Article. The softly-spoken understanding that the concept of genocide cannot apply to Black Americans and should not be applied to Palestinians must, at a minimum, be loudly and formally disavowed; not only does this wrongful understanding fail to account for the manifestations of racism, it performs the terms of the global racial contract which specify that certain racialized communities are to be excluded from legal and political personhood.<sup>310</sup> So does the racial tiering of refugees and the racial contracting that pervades nations’ systems of refugee admissions and asylum claims processing.

Whether physical, political, legal, or psychological, the process of deconstructing oppression—of decolonization—is fundamentally about renegotiation. Slavery in the United States provides some clear examples; the period of Reconstruction (which was also intended to be a period of deconstruction) saw American federal law change dramatically, conferring upon people who had once been constructed into legal status as personal property of slaveholders the rights to themselves contract to hold, convey, sell, and lease property. The social contract,

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307. Wynter, *supra* note 60, at 261.

308. In a domestic, U.S.-focused context, Monica Bell has called this phenomenon “legal estrangement.” See Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (describing a system by which “current regimes can operate to effectively banish whole communities from the body politic”).

309. Wynter, *supra* note 60, at 261.

310. See *id.* at 261–62; MILLS, *supra* note 33, at 98–105 (describing the “astonishing historical record of European atrocity against nonwhites” upon which the European project rested and which was accepted because of the idea that nonwhite people were sub-persons).

given force of law, that held that White Americans could purchase and sell people of African descent was thus renegotiated to abolish slavery, and this process of abolition would force the rescission of the previously enforceable contracts that slaveholders had executed for enslaved labor. In the social contract realm, renegotiation of an anti-racist social contract that will govern the global institutional order and transform international law will involve the imposition of those formally excluded from the body politic thereupon, making demands either for independence or inclusion and concessions from those who have been hoarding power heretofore. But, as Whiteness as Contract seeks to make clear, the renegotiation of the body politic and its social contract to include new classes of members also requires the renegotiation of the commercial agreements that sustained the body politic as it was initially formed, as well as the political charters, compacts, and treaties that had once assumed for the terms of the original social contract.<sup>311</sup>

Acknowledging racism as a human rights violation, by contrast, is a way of reconstructing legal personhood into racialized and colonized peoples, and it also potentially opens a path by which those who have experienced racism may seek to avail themselves of remedies corresponding to their rights. Should international law adopt a comprehensive understanding of the nature of racism and its consequences, renegotiation of international criminal law, the law of refugees, and international human rights will be compulsory. So, too, will the dismantling of racism in the structure of the UN as well as within its workforce. And of course, those of us who study and teach international law have a responsibility to deconstruct our assumptions about international law and the global institutional order as it currently exists. International law's racial contract is an accord worth breaching. Whether it is breached or not will determine whether international law is worth respecting and worth keeping around.

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311. See generally Jackson Sow, *supra* note 6.