doi:10.1017/amp.2023.89

DECOLONIZING HUMAN RIGHTS PRACTICE TO PROMOTE RACIAL JUSTICE: IS IT POSSIBLE?

This panel was convened at 12:00 p.m. on Thursday, March 30, 2023, by Angela Mudukuti, International Criminal Lawyer, who introduced the panelists: Anna Spain Bradley, Law professor and author of the book *Global Racism*, Vice Chancellor for Equity, Diversity and Inclusion at UCLA; Joshua Castellino, Executive Co-Director, Minority Rights International and Professor of International and Comparative Law, University of Derby, United Kingdom; Felipe Gonzalez Morales, UN Special Rapporteur on the human rights of migrants; and Claudia Flores, Law professor, Director, Lowenstein International Human Rights Clinic at Yale Law School and co-host of the podcast "Entitled."

Introduction

Scholarship in the fields of Third World Approaches to International Law and Critical Race Theory has shown how human rights doctrines can perpetuate racial hierarchies and geopolitical power imbalances in the international system. Conflicts and responses to conflict in Palestine, Myanmar, Ethiopia, Ukraine, the Black Lives Matter protests in the United States, COVID-19 vaccine inequity, and a global refugee crisis all showed instances of racist assumptions. This panel examined the structural barriers affecting human rights work that, in turn, impact the ability of international legal doctrine to promote racial justice and equality.

The panel followed an interactive question and answer format and provided an opportunity for audience participation. The following is a summary of contributions made by Angela Mudukuti, Anna Spain Bradley, Joshua Castellino, and Felipe Morales Gonzalez in their own words.

Introductory Remarks by Angela Mudukuti*

Thank you all for joining us. Thank you to the organizers for bringing us all together. It is a pleasure to be with you all today. Speaking from their lived personal and professional experience, our panelists will look at the challenges and take you from the structural inadequacies in existing legal frameworks to discriminatory treatment of minorities and migrants to prejudicial practices and structures in academia. Recalling Angela Davis's wise words, "walls turned sideways are bridges," our panelists will also leave us with constructive solutions. In the meantime, allow me to set the scene and tell you all a story.

From an early age you are outraged by racism and discrimination, let us say you come from the Global South and are a person of color. You decide to fight for these rights and work in the human rights arena. You want to work for the United Nations (UN) or the International Criminal Court. Sadly, you cannot get an internship because they are mostly unpaid and you cannot afford to live in Geneva, The Hague, or New York without a stipend. But that is where you need to be to get your career going. It is no surprise that 49.2 percent of UN interns come from Western countries. They

* International criminal lawyer.

either have generational wealth, or access to funds that can make an unpaid internship a welcome opportunity.

Somehow you get something and then end up bouncing from one short-term contract to the next. It is hard to get a visa and at times you cannot apply for certain jobs or consultancies because they do not sponsor visas, leaving all the opportunities for those from the EU, United States, or other Global North countries—the "desirable" nationalities.

Then you soon realize that as a matter of official policy, the number of staff positions at the UN and the ICC are proportional to a state's financial contribution, which automatically favors those from the Global North who are predominately white (not exclusively, but predominately). As we speak, there are 473 professional staff at the ICC and 256 of them are from the Global North. That is more than half of staff from one of the five regions recognized by the system.

Seeking to be solution oriented, you think to yourself, what about positions in field offices in the Global South? Well, they are mostly filled with privileged Global Northers who are seconded or funded by their governments and earn more than the local staff members. That is the situation at international organizations—but what about civil society, in particular, the international non-governmental organizations (INGOs)? To your dismay it is the same visa struggle there. Not to mention the fraught dynamics between INGOs and their local partners.

INGOs tend to look down on grass roots NGOs and come in with a top-down approach that is laced with condescension and the belief that local actors do not know how to help themselves. The neocolonial structural bias and typical white savior mentality that permeates the work is evident.

To add to that, whether you work for the international organizations or the INGOs, you yourself face systemic racial discrimination. Your supervisors try to set you up to fail and your subordinates attempt to undermine you. Sometimes it is blatant, sometimes it is subtle. Sometimes you report it, sometimes you do not because nothing will be done. You know it will likely be swept under the rug. In fact, the perpetrator will likely be promoted, and you will be deemed a human resources liability. At best, the perpetrator will be sent for "sensitivity training," which, quite frankly, is not good enough.

Many people of color in this field will identify with this story. In fact I have heard these and other accounts from several of my friends and colleagues and it is with their permission that I share their stories—our stories—the stories of people of color in the human rights world.

The most concerning part of this story and the colonial and racially prejudicial environment we work in, is that it is those who we expect to know better who perpetuate discrimination.

It is those who from memory can recite laws that protect the right to equality and the right to be free from discrimination. It is those very same people who when they are told they are being racist will become defensive, and tell you that they "have Black friends" and have "worked with other people of color before."

As people who claim to care about human rights, we all need to be aware of the colonial infrastructure that has yet to be dismantled. It allows discrimination and racial injustice to continue not only in the way we approach the work, but also in the way we treat our colleagues, which is why this panel is so important.

I am grateful to ASIL for creating a space for this discussion and I hope it is the first of many discussions. This cannot be something we shy away from or use euphemisms for.

In talking about decolonizing human rights, one must also pay tribute to the interconnectedness of struggle and recognize the challenges faced by persons with disabilities, trans people, Indigenous people, and other persecuted groups. All of this needs to be addressed. As Kimberly Crenshaw says: "If you don't have a lens that's been trained to look at how various forms of discrimination come together, you're unlikely to develop a set of policies that will be as inclusive as they need to be."

This panel is an opportunity to, in the words of Bell Hooks, "critically intervene in a way that challenges or changes," and our panelists are here to do exactly that.

Remarks by Anna Spain Bradley*

Good morning, good evening, and welcome to everyone in the room and online. Thank you for joining us. I wish to acknowledge our ASIL Annual Meeting co-chairs, especially Jenny Domino, for their vision and leadership that made this panel possible.

The question posed that I respond to here is this: what structural limitations bar the promotion of racial justice through human rights?

To promote racial justice, we must prevent and address racism in all its forms. For human rights law, we face a foundational challenge to this quest. We cannot fight a harm we choose not to see. We cannot fight a harm we do not name. We cannot fight a harm we have yet to define. In 2016, I began analyzing the intersection of human rights law and human rights frameworks and the challenge of racism. At that time, I was able to identify in *Human Rights Racism*[1] that the international legal framework of treaty law had yet to define racism. Instead, international law demonstrates an historical preference for framing legal protections around the concept of racial discrimination.

What is the difference? To understand how international law has arrived at defining racial discrimination, we must return to the 1950s and 1960s when the world tried to define this persistent and insidious harm.

In 1965, nations drafted and adopted the International Convention on the Elimination of Racial Discrimination (ICERD).[2] The treaty sought nothing less than the "elimination of all forms of racial discrimination." Yet the final treaty language, for all its groundbreaking ideas, failed to name or to define forms of racial discrimination beyond Apartheid and racial segregation. The Convention condemns "any doctrine of superiority based on racial differentiation," but not "any doctrine of racial differentiation or superiority" as appears in the earlier United Nations Declaration on the Elimination of All Forms of Racial Discrimination.[3] Some states pointed the finger elsewhere rather than at themselves, denying or deemphasizing that racial discrimination against ethnic or racial minorities and Indigenous peoples was a problem in their own nation.

Revisiting the ICERD's *travaux préparatoires* reveals the important dialogues, negotiations, and disagreements that countries had in developing specific language that would bind nations.

This history shows us exactly where we got stuck and, I argue, exactly where we remain stuck today. The world does not agree on what racial discrimination is, let alone what racism is. Despite UNESCO's seminal 1950 report, *The Race Question*,[4] putting nations on notice that race is a "manmade construct with no basis in biology or science," the world still lacks agreement on the fundamental concept of race.

* UCLA Professor of Law. Remarks provided in my personal capacity and do not represent the views of UCLA or any other institution with which I am affiliated.

[1] Anna Spain Bradley, *Human Rights Racism*, 32 Harv. Hum. Rts. J. 1 (2019), *at* https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2020/06/Human-Rights-Racism-1.pdf.

[2] International Convention on the Elimination of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195, *at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

[3] GA Res. 1904 (XVIII), UN Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963), *at* https://www.oas.org/dil/1963%20United%20Nations%20Declaration%20on%20the%20Elimination%20of%20All%20Forms%20of%20Racial%20Discrimination,%20proclaimed%20by%20the%20General%20Assembly%20of%20the%20United%20Nations%20on%20November%2020,%201963,%20resolution%201904%20(XVIII).pdf.

[4] UNESCO, The Race Question (1950), *at* https://unesdoc.unesco.org/ark:/48223/pf0000128291.

Racism is a lived reality for billions of people around the world today that causes cultural, economic, health, and dignity harms. It remains a troubling threat to international peace and security. On March 21, 2023, United Nations Secretary-General António Guterres called the question yet again and asked all peoples of the world to work harder to fight racism.

To take up this fight we need to name, describe, and confirm the harms we seek to stop. We also need to appreciate that leaders and institutions that are charged with holding people accountable for behaviors and misconduct cannot do so without a clearly defined understanding of what racism is and the full extent of its harms. My research on human rights law and racism investigates these arenas, and my work in leadership and advocacy helps inform this study.

In closing, let us look to the future. The newest generations of our world are facing complex challenges. Racism is one of them, and it is knotted up with other forms of oppression as well. Addressing these demanding calls to action and finding authentic solutions takes hope. It takes the kind of hope best described by the late, great United Nations diplomat and Nobel Peace Prize laureate Ralph Johnson Bunche who described himself as an "incurable optimist." Human rights was originally envisioned to provide humanity with optimism—about ourselves and about the promise of a global community. We must remain true to that vision.

Remarks by Joshua Castellino*

The annals of history reveal the shameful extent to which international law has served as handmaiden to abuse of powers. Principles concerning *terra nullius* and the inherent dignity and worth of every individual, developed within their own domestic legal systems, were simply deemed inapplicable to others by states embarking on wealth and resource competitions. The gore of these adventures barely makes their own history books, while the destruction of circular economies their actions sparked is a continuing tort experienced today as environmental destruction. While European states were not the first, and not necessarily the most brutal colonizers in global history, their impact on international law differs in two respects. First, it was accompanied by self-congratulatory claims of being "creators" of public international law, which only truly recognized their own legal personality; second, their ability to break emerging norms warranted muted responses from their own fraternity. Contemporary genuflection toward the valence of rules—despite their unjust framing—over equity, puts seeking recompense for past actions beyond legal reach, baking injustices into systems and reinforcing a patriarchy based on racial and ethno-religious superiority.

The erection of a human rights regime after World War II was a valiant attempt to draw a line in the sand. It signified a coordinated effort, eventually successful, in enabling the *justice* project within international law to emerge over the quest to maintain *order and security*. Seventy-five years after their passage, the impact of the Universal Declaration of Human Rights and the Genocide Convention must be acknowledged. They introduced fissures in the near-absolute sovereignty of the state, subjected to global scrutiny to the extent to which codified rights of individuals were impinged upon.

Wanton attacks upon the human rights regime, emanating recently from scholars of international law mostly based in the West, delivered a sharp brake on the extent to which the regimes could serve the justice project. In accusing a sub-discipline of failures to achieve more—often warranted, they provided a convenient theme to populist political narratives keen to undermine societal structures for their gain. Instrumentalizing this criticism and feeding it in palatable morsels to

* Executive Co-Director, Minority Rights Group International and Professor of International & Comparative Law, University of Derby, United Kingdom.

disenfranchised populations who felt underserved by its promise weakened its capital in the public square at a time when most needed: a time of scarcity and growing human insecurity, where the powerful could manipulate events for their own purposes.

The theme of this panel contains the accusation of the complicity of global human rights regimes in perpetuating racial hierarchies and failures in tackling geopolitical imbalances. Yet, the problem, suggested here, lies deeper within the foundations of public international law, first, in assumptions made about power; second, in the processes envisaged by which racial hierarchies and the patriarchy could be dismantled—even assuming these twin goals are well-honed quests, not mere rhetoric expected of twenty-first century discourses.

At least three structural barriers are hardwired into public international law practice that are directly responsible for maintenance of racial hierarchies and the entrenched patriarchy. First, the assumption that UN decolonization tackled racial hierarchies. Second, asserting the primacy of "order" in achieving that transition as laudable in maintaining international peace and security at a time of transition, never mind serving a just transition. Third, the imposition of the state as the only legitimized form of governance, endowed with full legal personality and an equal place at the table of international society.

World War II occurred when non-self-governing territories, i.e., the former colonies, were agitating for independence. They seized upon Creole action in the Americas, who asserted self-determination to free "their" territories from Spanish and Portuguese rule in the early 1900s, to struggle for "home rule." Many empires were crashing, faced with emerging (patriarchal) nationalisms: the massive Ottoman Empire was crumbling; the Austro-Hungarian empire had faded; and the British, French, Portuguese, Belgian, Dutch, Italian, and German "overseas possessions" were under fire. An obscure rule, *uti possidetis juris*, derived from Roman law—a diktat of Praetors ruling over disputed possessions of goods—was rejuvenated to determine the fate of entire tracts of territories. It sanctified colonial boundaries drawn upon maps where no white foot had ever trod, whose function had been to determine one white power's jurisdiction from another. The decolonization that followed was effectively akin to privatization of a colony where power was handed from departing colonial ruler to dominant almost exclusively male ethno-religious majority communities within the created unit. The new rulers bore loose allegiance to the departing ruler. This last point was deemed important for the "development" of the new entity now recognized as a state, where wealth was still generated and expatriated by corporations from previous rulers, to their home territorial domain. The illogic of boundaries randomly dividing communities across national frontiers was presented as a threat to the emerging state, mitigated by arms sales to both sides, profiting the seller, dwindling the limited public purse of the buyer, while generating regional tensions justifying more arms. Order was deemed more important than addressing injustices of the new structures.

The transition assumed only one form of governance could emerge: the state—the governance system existing in Europe. Thus Emirates, Sultanates, Khanates, tribal structures, autonomous semi-colluding entities, loose confederations, and other governance systems were erased as this entity was presented as the sole legitimate actor in international law. The reward for recognition as a state yielded exclusive jurisdiction over a deemed territory, irrespective of effective control, competing or more compelling narratives of submerged historical structures.

The newly recognized states were welcomed into international society where they enhanced the "diversity quotient" of the Club while remaining subservient, often beholden in socioeconomic terms to the extractive model developed by the Club's founders for their purposes. The transition reified entrenched patriarchies. The new entities embarked on "nation-building," applying social theories exported from the West. Some paid lip service to differentiated identities but all generated masculine nationalist narratives that were indoctrinated as definitive histories of "their" territories.

Within new units and older ones that spawned them, contested narratives are still manufactured that reinforce racial hierarchies and patriarchies as a virulent nationalism in times of scarcity. People deemed "foreign" or "illegal" are portrayed as threats to "home" values to generate artificial majorities united in fear. Meanwhile the extractive economic model, now with wider participation of nearly all states, spirals the world toward planetary boundaries. The enormous profits extracted from nature in one location no longer nest exclusively in former colonial territories, but in tailored tax havens where no international law penetrates, solidifying edifices maintaining racial hierarchies and entrenched patriarchies.

Despite the odds, this entrenched structure can be unraveled through collective action, assuming widespread consensus of its need. Several key solutions present themselves. First, determination to claw back wealth generated from the extractive model, not necessarily for redistribution, but to mitigate the climate crisis. Faced with a challenge of seeking gain-based recovery rather than loss-based compensation in private law, the crime of unjust enrichment was framed to recompense unjust transfer of value in financial transactions.[5] Technology enables tracing of wealth acquisition to resting places. Unlocking this wealth would provide missing trillions of dollars needed for climate mitigation and adaptation. Mothballing extractive industries and halting profit extraction from nature without compensation or damage mediation would be a concurrent step. Second, treating the world as seventeen subregions—sixteen occupied,[6] rather than the 195 competing sovereign states—that collectively tackle the climate crisis and unravel racial and gendered hierarchies at subregional level would better address the size, scale, and intertwined nature of these challenges. Third, governments, especially in light of mass media control and populism, have proved unwilling to drive system change. They generate rhetoric signaling system modification rather than the wholesale system change that Indigenous communities, scientists, and youth call for. This is due to the deep implication of governments in power status quos. Longitudinal readings of histories provide compelling evidence that governments are unwilling to address climate change, unravel racial hierarchies, and dismantle the patriarchy. Governments only change when communities, civil societies, businesses, and other actors make this their fundamental goal. Absent this, entrenched systematized privileges will continue, with occasional concessions toward a modicum of diversity to the Club.

Human rights can serve the justice project. Expecting it to deliver the scale of system change needed, then accusing it of perpetrating racial hierarchies and being unable to tackle geopolitical imbalances, is not only an overstatement of its perceived powers. It actively absolves those involved in system preservation.

Remarks by Felipe Gonzalez Morales*

Thanks for the invitation to participate at this panel at the Annual Meeting of the American Society of International Law. As the United Nations Special Rapporteur on the human rights of migrants, participating at this event with this host is very pertinent for me, as the very same

[5] Joshua Castellino, *Entrenched Structural Discrimination and the Environment: Recovery-Based International Law Response to Colonial Crime* (TOAEP Policy Brief Series No. 140, 2022), *at* https://www.toaep.org/pbs-pdf/140-castellino.

[6] The seventeen subregions are The Pacific, East Asia, Southeast Asia, South Asia, Central Asia, West Asia, Central and Eastern Europe, Western Europe, North Africa, West Africa, Central Africa, East Africa and the Horn, Southern Africa, South America, Central America, North America, and the largely uninhabited Polar Regions. This is based on a longer historical reading of community interaction than the last bout of European colonization and forms the practice of *Minority Rights Group*.

* United Nations Special Rapporteur on the Human Rights of Migrants.

issue and scope of international legal standards is a key component of the debates about migration at international fora such as the United Nations. Most countries of destination have not ratified the International Convention on the Protection of All Migrant Workers and Members of Their Families —the main international instrument on the human rights of migrants—so it is a permanent challenge to determine the scope of such rights, for which a range of international instruments has to be used. So, I would say that this is the most elemental structural barrier that affects my field of work.

Another general barrier is that, regarding the human rights of migrants, states tend to have a more restrictive approach concerning the rights of most other vulnerable groups. This can be observed when you look at the fact that even states with a reasonable record of implementation of decisions by international human rights bodies quite often have a poor record of compliance in the field of migration, not attending the decisions of such bodies nor following the recommendations contained in their reports.

The whole approach in the field of migration policies is pervaded by inequalities. This is reflected in domestic legislation and in practice. Discrimination against migrants is rampant in many states and it becomes especially acute regarding irregular migrants. Racism plays a key role in this picture, taking discrimination to the extreme.

The approach by many countries of the destination of migrants puts the human rights of migrants in a secondary place. Security, which can be a legitimate limitation for some (not all) human rights for both nationals and migrants, becomes the foremost component of policies when regarding the latter, at the stake of their rights. This represents *per se* an unequal treatment for migrants, often based on racist prejudices.

Racism is also a source of discrimination by states regarding migrants from different backgrounds. In visits as Special Rapporteur to monitor human rights conditions of migrants, I have observed countries where regular pathways exist to migrate from states with predominantly Caucasian populations, while those from other backgrounds confront harsh responses from the country of destination, including pushbacks, automatic migratory detention upon an irregular entry to the territory, and other severe violations of their rights. This is what I found, for instance, in my visit to Hungary, where depending on the migrants background, the response would be completely different.

Another worrisome aspect is the current global approach to the right to seek asylum. Over the last few years, there has been an increasing trend to limit and even impede the exercise of such right. This can be observed in externalization policies, according to which an asylum-seeker is denied a permit to entry to the country where he or she wants to seek asylum but has to lodge his or her claim from the territory of another country. Not only does this usually affect the safety of the asylum-seeker, but also severely impairs the chances of obtaining asylum, as this implies serious limitations to have asylum proceedings according to due process of law standards and access to justice. In this respect, inequalities are also present, as quite often countries of destination apply different sets of rules depending on the country of origin of the asylum-seekers and their background.

Among the main issues reflecting unequal policies in the field of migration are the practice of "pushbacks," the extensive use of migratory detention and the limited access to public services for migrants.

The practice of "pushbacks" has become a global phenomenon, widely used in different regions of the world. Through this practice, states summarily expel migrants or asylum-seekers who try to enter irregularly into their territories, in violation of the physical integrity, their right to seek asylum, and the right to access to justice, among other human rights. It also violates the *non-refoulement* principle and the prohibition of collective expulsions. Racism is usually an important component in this regard.

Concerning migratory detention, that is, detention solely based on the migratory status of the person, who has not committed any crime, according to international law it should be a measure of last resort, so it could be only exceptionally applied and exclusively to adults. Many countries continue to resort to migratory detention on a regular basis, becoming an extensive practice. A number of states also apply migratory detention to children, in rampant violation of international standards.

Access to public services also reflects the inequalities in the treatment of migrants, especially those with irregular status. Many irregular migrants do not resort to public services or only do so in emergency situations, due to fear of being harassed, detained, and deported. This has severe negative consequences in their access to health, education, social services, the judicial system, and so forth. Again, these features are often pervaded by racism and inequalities.

International debates on migration reflect the features mentioned above. The whole predominant approach of a radically different, inequal treatment to migrants, is strongly set at international debates. Sometimes this is openly stated at international fora, for instance, when states disqualify migrants for being from "other culture" or "other religion." More often, this is done in a less strident but similarly harmful manner, building in fact an international framework with many racist and unequal features, or abstaining from doing serious efforts to address racism and inequalities and from giving them the prominent place they deserve at the international agenda on migration. Concern about the serious violations of the human rights of migrants in many regions of the globe is not a central issue at the debates in international fora and no significant, coordinated efforts to act in a decisive manner to change this grave and pervasive situation currently exist.

Conclusion

Angela Mudukuti

Thank you to our panelists for a rich discussion. I must conclude this panel by answering the question posed by this panel in the affirmative—it is possible to decolonize human rights practice and that it starts with each and every one of us. In our own ways, in our respective fields, we can take action. As eloquently stated by Alice Walker, "activism is the rent I pay for living on this planet," so let us go out and pay our rent.