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ARTICLE

RACIAL DISCRIMINATION IN NATIONALITY LAWS: A DOCTRINAL BLIND SPOT OF INTERNATIONAL LAW?

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Statelessness has historically been overlooked by the international community, but it is now a significant focus of the work of academics, advocates, and international institutions. The United Nations High Commissioner for Refugees' campaign to end statelessness by 2024 is now past its half-way point. Yet, while it is understood that statelessness is often the result of systemic racial discrimination, the relationship between statelessness, nationality laws, and international norms of racial non-discrimination has received very little scholarly attention.

This Article addresses the lacuna in existing legal scholarship, and indeed in jurisprudential analysis, of racial discrimination in nationality matters, by undertaking the first in-depth examination of the history, interpretation, and application of Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and its consistency with the jus cogens *prohibition on racial discrimination. While focused explicitly on a particular treaty provision, this analysis raises*

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larger and vital questions about race, nationality, and statelessness—matters that are historically pertinent and have profound ongoing relevance.

The Article provides a principled, doctrinal interpretive framework within which to "read down" the problematic Article 1(3) so that the ICERD may be invoked to combat racially discriminatory nationality laws. The clarification and articulation of legal norms around Article 1(3), and a justification for its narrow interpretation, add to the existing legal tools for combatting discriminatory citizenship deprivation and denial and narrowing the boundaries of state discretion.

I. INTRODUCTION

Historically and rhetorically, it is understood that statelessness is often the result of systemic racial discrimination,[1] and that when such discrimination entails the denial or deprivation of nationality, it can operate as the first step in larger programs of persecution.[2] Yet, the relationship between statelessness, nationality laws, and international norms of racial non-discrimination has received little scholarly attention,[3] notwithstanding that it is estimated that seventy-five percent of the 10–15 million stateless persons globally belong to a minority group.[4] Given that the prohibition on racial discrimination is broadly considered a *jus cogens* norm of

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[1] The classic example is the denationalization of German Jews by the Nazi regime. *See infra* note 2. *See also* KRISTY A. BELTON, STATELESSNESS IN THE CARIBBEAN: THE PARADOX OF BELONGING IN A POSTNATIONAL WORLD 27–28 (2017); Amal de Chickera & Joanna Whiteman, *Addressing Statelessness Through the Rights to Equality and Non-Discrimination*, *in* SOLVING STATELESSNESS 99 (Laura van Waas & Melanie J. Khanna eds., 2017).

[2] PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 341 (2016) ("Morsink contextualizes the drafting of the right in the UDHR [Universal Declaration of Human Rights] as part of the reaction to Nazi policy that stripped Jews of their citizenship, citing Conot for the claim that deprivation of citizenship was more important in sealing their fate than the Nuremberg Laws." (citing ROBERT E. CONOT, JUSTICE IN NUREMBERG (1983))); *Id.* at 341 n.245 ("[T]o be without a nationality or not to be a citizen of any country at all is to stand naked in the world of international affairs. It is to be alone as a person, without protection against the aggression of states . . . . As . . . Nazi practices show, the right to a nationality is not the luxury some people think it is.").

[3] Indeed, this is true of nationality, citizenship, and race discrimination more broadly. For example, the American Journal of International Law has published a total of three articles on nationality and citizenship. *See* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694 (2011); Sean D. Murphy, *U.S. Interpretation of Continuous Nationality Rule*, 96 AM. J. INT'L L. 706 (2002); Marian Nash, *Loss of Nationality: Expatriating Statute and Administrative Standard of Evidence*, 87 AM. J. INT'L L. 598 (1993). It has published one article on ICERD. *See* Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985).

[4] U.N. HIGH COMM'R FOR REFUGEES, THIS IS OUR HOME: STATELESS MINORITIES AND THEIR SEARCH FOR CITIZENSHIP 1 (Nov. 2017). The report notes that:

> This percentage is based on statistics for stateless populations included in UNHCR's 2016 Global Trends Report that are known to belong to an ethnic, religious or linguistic minority. It does not account for minority groups that compose a proportion of a known stateless population in a country, but do not form the majority of that population. The percentage also does not include the many stateless minority groups for which UNHCR does not have adequate statistical data.

international law, meaning it is "a norm from which no derogation is permitted,"[5] how is it that national legal systems continue to permit race-based discrimination—in form or effect—in matters of nationality? And more poignantly, why is the international community apparently reticent to unequivocally critique racialized nationality laws, particularly when their application has produced large numbers of stateless persons? For instance, while the severe persecution and forcible deportation of Rohingya people from Myanmar in 2014 and 2017 has recently been widely condemned by the international community,[6] very little attention was directed at first instance to the racially discriminatory denationalization of Rohingya people that is a root cause of the predicament.[7] This "racial aphasia," that is, a "collective inability to speak about race" [8] in the context of nationality (at least until it reaches a point of crisis), may reflect a perennial tension between nationality as it pertains to individual rights (for example, the right to a nationality and the right not to be deprived of it arbitrarily) and nationality as it is reserved to the domain of states.[9] Despite the "astounding shift in international law from protecting the sovereignty of racism at the beginning of the twentieth century to openly combatting it by the beginning of the new millennium,"[10] the sovereign fortress of nationality laws still seems somewhat impervious to direct attack, even where such laws contravene anti-racial discrimination norms.

This tension is reflected in the very text of the International Convention on the Elimination of All Forms of

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[5] Spiro, *supra* note 3, at 716 n.144.

[6] *See, e.g.*, S.C. Pres. Statement 2017/22 (Nov. 6, 2017); Human Rights Council Res. 37/32, U.N. Doc. A/HRC/RES/37/32 (Mar. 23, 2018); Hum. Rts Council, Rep. of the Working Group on the Universal Periodic Review of Its Twenty-Third Session, U.N. Doc. A/HRC/31/13 (Dec. 23, 2015); G.A. Res. 70/233, Situation of Human Rights in Myanmar (Mar. 4, 2016).

[7] Early international reports concerning the denationalization of Rohingya people made few references to racial discrimination. *See, e.g.*, Hum. Rts. Council, Rep. of Working Group on the Universal Periodic Review of Its Tenth Session U.N. Doc. A/HRC/17/9 (Mar. 24, 2011). *See also* G.A. Res. 66/230, Situation of Human Rights in Myanmar (Dec. 24, 2011); G.A. Res. 65/241, Situation of Human Rights in Myanmar (Dec. 24, 2010).

[8] Debra Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT'L AFF. 133, 134–35 (2013). We are grateful to E. Tendayi Achiume for alerting us to this reference.

[9] For a discussion on the tension between human rights and state sovereignty, see SUZANNE EGAN, THE HUMAN RIGHTS TREATY SYSTEM: LAW AND PROCEDURE (2011).

[10] Thompson, *supra* note 8, at 133.

Racial Discrimination (ICERD).[11] Although ICERD generally provides strong protections against racial discrimination,[12] including in relation to "the right to nationality" in Article 5,[13] Articles 1(2) and 1(3) introduce limitation provisions. Article 1(2) provides that the Convention does not apply to distinctions between nationals and non-nationals, while Article 1(3) provides that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."[14] On its face, Article 1(3) might suggest that state laws and practices that target more than one nationality would not be in breach of the Convention, whether "nationality" means national or ethnic origin, or enjoyment of citizenship of a particular state. According to this interpretation, a country that has racialized citizenship laws could claim that its laws and practices affect multiple "nationalities" and therefore do not violate the Convention. Relatedly, where a state has denationalized certain ethnic groups, it might claim that the denationalized individuals are not citizens and invoke Article 1(2). Like Article 1(2), Article 1(3) on its face severely limits the "universalist ambition"[15] of the Convention.

The international community's historic reluctance to properly limit Article 1(3)'s scope in a robust and principled manner may mean that Article 1(3), or its animating assumptions, continues to exert an influence on the evolution of nationality laws and practices. So long as the notion persists that matters of nationality exist within the *domaine réservé* of states, largely untrammeled by norms of non-discrimination, states will

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[11] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter ICERD].

[12] *Id.* art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

[13] *Id.* art. 5 ("In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . Other civil rights, in particular . . . The right to nationality . . . .")

[14] *Id.* art. 1(3).

[15] THORNBERRY, *supra* note 2, at 140.

be able to rely on sovereignty-based claims in devising and operating their nationality laws.

To be sure, in recent years—often informed by General Recommendations issued by the Committee on the Elimination of Racial Discrimination (Committee)—numerous scholars have advanced narrowly construed interpretations of Article 1(3). However, these have often been put forward without robust justification. To a certain degree, the discourse around Article 1(3) appears to be self-referential, with scholars referring both to each other and to the same Committee General Recommendation Thirty (examined further below) as if caught in an echo chamber. The dearth of sustained scholarly attention around Article 1(3) makes it difficult to convincingly mount the argument that states are constrained with respect to discriminatory nationality laws.

At the same time, scholars point to racial non-discrimination as a *jus cogens* of international law in building the case that states are constrained in matters of nationality, but often without critical reflection. As John Tobin writes, "[a]ll too often . . . [the] process of defining the content of a human right is accompanied by scant, if any, explanation of the methodology used to generate the interpretation offered." [16] The same, according to Tobin, may be said of some of the work of treaty bodies. [17] New grounds are needed upon which to advance a narrow reading of Article 1(3), as well as a more developed understanding of the intersection between the prohibition of racial discrimination and the interpretive principles around *jus cogens* in the context of nationality.

This Article addresses the lacuna in existing legal scholarship, and indeed in jurisprudential analysis, of racial discrimination in nationality matters, by undertaking the first in-depth examination of the history, interpretation, and application of Article 1(3) of ICERD and its consistency with the *jus cogens* prohibition on racial discrimination. In doing so, this Article offers a nuanced reading of Article 1(3), and suggests that the peremptory norm of racial non-discrimination provides a robust justification for a narrowly circumscribed construal of Article 1(3). While focused explicitly on a particular treaty provision, this analysis raises larger and vital questions about race, nationality, and statelessness—matters that are historically pertinent and have profound ongoing relevance. This

[16] John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 1 (2010).

[17] *See id.* at 2.

Article puts forward the thesis that to the extent that matters of nationality are still considered a balancing act between individual rights and the prerogative of states, the interpretive *jus cogens* principle, as it relates to norms of racial non-discrimination, tips the balance in favor of equality and non-discrimination.

This Article is organized as follows. Part II considers the significance of racial discrimination in the context of nationality regulation, noting historical and contemporary manifestations of racialized citizenship. In Part III, the Article briefly canvasses the intersection between nationality matters within the reserved jurisdiction of states and the evolution of human rights law, examining the ways in which international law has narrowed states' prerogative in this domain. Part IV turns to a detailed examination of Article 1(3), considering first its drafting history, and then the Committee's treatment of the Article, and in particular General Recommendation Thirty. This section examines all individual and inter-state communications that have touched on nationality and provides an overview of relevant concluding observations over a period of thirty years. This Part concludes that the Committee has, to date, failed to articulate a clear and persuasive position that satisfactorily reconciles Articles 1(3) and 5(d)(iii). In Part V, the Article develops the argument that the *jus cogens* norm of prohibited racial discrimination can operate as an interpretative principle in the context of racialized nationality laws and practices. Part V examines the content of the norm and demonstrates that deprivation of nationality can be considered a form of systemic racial discrimination. Finally, Part VI considers the effects or consequences of racial non-discrimination as a *jus cogens* norm, and develops an interpretation of Article 1(3) in light of the *jus cogens* status of racial non-discrimination as a strong interpretive principle.

II. RACIAL DISCRIMINATION AND NATIONALITY LAWS

Human rights inhere in a person by virtue of his or her humanity; indeed, international human rights instruments do not generally condition enjoyment of rights on citizenship. Yet, in practice it remains the case that citizenship often operates as a prerequisite for access to basic human rights,[18] famously

[18] *See, e.g.*, David Owen, *Citizenship and Human Rights*, *in* THE OXFORD HANDBOOK ON CITIZENSHIP 247, 250 (Ayelet Sachar et al. eds., 2017).

described by German political theorist Hannah Arendt as "the right to have rights."[19] As numerous scholars have noted, while statelessness[20] itself is a serious human rights violation, the condition of statelessness can also leave people vulnerable to other profound human rights violations.[21]

Notwithstanding this and despite a renewed focus on statelessness as a pressing and pervasive global human rights issue,[22] the international community continues to struggle to articulate statelessness as a problem significantly animated by racial and ethnic discrimination.[23] In its 2017 #IBELONG Campaign report, which focused on discrimination against minority groups, the United Nations High Commissioner for Refugees (UNHCR) pointed out that discrimination lies at the heart of most cases of statelessness; it is both a cause and consequence of statelessness.[24] As another scholar writes, "most stateless populations lack legal nationality because they are part of a marginalised group that faces systematic discrimination and oppression from the start."[25] Yet, racial discrimination has not

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[19] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1968).

[20] *See* Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Statelessness Convention] (defining the term "stateless person" as a person "who is not considered as a national by any State under the operation of its law").

[21] *See* INST. FOR STATELESSNESS & INCLUSION, THE WORLD'S STATELESS 29 (2014) (arguing that statelessness is a gateway to further human rights abuses). *See also* LINDSEY N. KINGSTON, FULLY HUMAN: PERSONHOOD, CITIZENSHIP, AND RIGHTS (2019) [hereinafter KINGSTON, FULLY HUMAN] (arguing that statelessness is an example of how basic human rights are threatened whenever a person's relationship to the state is weakened or destroyed).

[22] *See generally* Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28 INT'L J. REFUGEE L. 564 (2016) (analyzing the developments in international campaigns to address statelessness).

[23] Other relevant causes of statelessness include gender discrimination, state succession, gaps in nationality laws, conflicting nationality laws, migration, and administrative barriers to birth registration. *See* Michelle Foster et al., *Part One: The Protection of Stateless Persons in Australian Law—The Rationale for a Statelessness Determination Procedure*, 40 MELBOURNE L. REV. 401, 408–09 (2017).

[24] de Chickera & Whiteman, *supra* note 1, at 103.

[25] *See* Lindsey N. Kingston, *Worthy of Rights: Statelessness as a Cause and Symptom of Marginalisation*, *in* UNDERSTANDING STATELESSNESS 17 (Tendayi Bloom et al. eds., 2017) [hereinafter Kingston, *Worthy of Rights*]. *See also* Lindsey N. Kingston & Saheli Datta, *Strengthening the Norms of Global Responsibility: Structural Violence in Relation to Internal Displacement and Statelessness*, 4 GLOB. RESP. TO PROTECT 475 (2012) (emphasizing the political vulnerability of stateless people).

been a significant focus of the UNHCR #IBELONG campaign, which aims to end statelessness by 2024, nor of the work of the wide array of international actors engaged in the campaign. Gender discrimination and childhood statelessness have been (appropriately) explicitly identified as core, "urgent" issues in resolving statelessness,[26] with dedicated campaigns and much attention from relevant international actors, including treaty bodies. Racial discrimination, however, has not been identified in the same manner despite its undeniably pivotal role in the creation of statelessness in the modern era.[27] Comprehensive work has been undertaken in relation to gender discrimination in nationality laws, which has produced widely accessible information about the number and identity of countries that retain such discrimination.[28] By contrast, no such analysis has

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[26] *See* U.N. High Comm'r for Refugees et al., Urgent Action Needed to Reform Gender Discriminatory Nationality Laws Causing Childhood Statelessness (Aug. 22, 2019), https://www.unhcr.org/en-au/news/press/2019/8/5d5e63d9456/urgent-action-needed-reform-gender-discriminatory-nationality-laws-causing.html [https://perma.cc/C4UT-S9RY].

[27] Rohingya people represent one of the largest known stateless populations, underlining the relevance of discrimination based on ethnicity and race to statelessness today. There is no question that race discrimination underpins their predicament. Indeed, the International Court of Justice (ICJ) issued interim measures in January 2020 in relation to Gambia's case against Myanmar which claims that Myanmar has violated the Genocide Convention. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 178 (Jan. 23). Article I of the Genocide Convention, provides that all States parties undertake "to prevent and to punish" the crime of genocide. *Id.* ¶ 49. Article II provides that genocide means a list of relevant acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." *Id.* The ICJ held:

> Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that, with regard to the situation described above, Myanmar must, in accordance with its obligations under the Convention, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to the 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; and (d) imposing measures intended to prevent births within the group.

Id. ¶ 79. *See also*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[28] *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, BACKGROUND NOTE ON GENDER EQUALITY, NATIONALITY LAWS AND STATELESSNESS 2019 (Mar. 8, 2019), https://www.refworld.org/docid/5c8120847.html (demonstrating that

been undertaken regarding the prevalence of direct or indirect racial discrimination in nationality laws, nor is there an equivalent list of countries that maintain explicitly or indirectly racially discriminatory nationality laws. This may well explain why, of the 252 pledges made by states at the UNHCR High-Level Segment on Statelessness in October 2019, only Uganda's pledge related to racial discrimination.[29] This lack of focus on racial discrimination is perhaps unsurprising when considering that, as E. Tendayi Achiume convincingly argues, "racial equality is marginal to the global human rights agenda."[30] As she notes, despite wide ratification of ICERD, having now reached 182 states parties,[31] "racial equality has seemingly drifted to the margins" of the human rights agenda,[32] including in our view the campaign to eradicate statelessness.

If racial discrimination is both a cause and consequence of statelessness,[33] nationality laws and practices of certain countries can both enshrine and enable such discrimination. This insidious cycle[34] of "racialized citizenship"[35] can be seen in many instances of mass denial or deprivation of citizenship, even as the

significant steps have been taken to address gender discriminatory nationality laws in the international community) [https://perma.cc/2TBV-BWT8].

[29] U.N. High Comm'r for Refugees, Results of the High-Level Segment on Statelessness, (Oct. 2019), https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness [https://perma.cc/8QXS-FWVE].

[30] E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 SUR INT'L J. ON HUM. RTS. 141, 142 (2018) [hereinafter Achiume, *Racial Equality*].

[31] U.N. Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en [https://perma.cc/G5AJ-7DF9] (last visited Nov. 22, 2020).

[32] Achiume, *Racial Equality*, *supra* note 30, at 144.

[33] *See, e.g.*, U.N. OFF. HIGH COMM'R, FORUM ON MINORITY ISSUES ELEVENTH SESSION, STATELESSNESS: A MINORITY ISSUE, CONCEPT NOTE 3 (Nov. 29–30, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session11/ConceptNote.pdf [https://perma.cc/6R3Y-3AA9]

[34] Kingston, *Worthy of Rights*, *supra* note 25. *See also* de Chickera & Whiteman, *supra* note 1, at 105 ("[I]n addition to continuing to face discrimination on the basis of pre-existing characteristics, a person's status as stateless often becomes a basis for further discrimination."). *See* KINGSTON, FULLY HUMAN, *supra* note 21, at 57–78; Brad Blitz & Maureen Lynch, *Statelessness and the Deprivation of Nationality*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 1 (Brad K. Blitz & Maureen Lynch eds., 2011).

[35] David Scott FitzGerald, *The History of Racialized Citizenship*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 129, 130 (Ayelet Sachar et al. eds., 2017).

precise mechanisms of the discrimination may vary from case to case. Racialized citizenship often intersects with gender and religious discrimination.[36] It can manifest both directly and indirectly, and across distinct "moments" of the citizenship cycle, from acquisition, to naturalization, to deprivation of citizenship.[37] Across all of these moments or sites of racialized citizenship, writes David Scott FitzGerald, "racialization may consist of negative discrimination against a particular group and/or a positive preference that favors a particular group."[38] The first moment presents differently depending on whether a state adopts *jus soli* (right of soil, or birthright citizenship) as its guiding principle, or *jus sanguinis* (the principle of citizenship by descent).[39] At the second stage, naturalization or conferral of citizenship can be restricted, or denied, for certain groups.

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[36] *See generally* Special Rapporteur on Contemp. Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Report, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018) [hereinafter Special Rapporteur Report on Contemporary Forms of Racism]. *See also* E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT'L L. 333, 353–55 (2018) [hereinafter Achiume, *Governing Xenophobia*]. Achiume notes that "the absence of religion from Article 1's otherwise broad definition of racial discrimination" undermines "ICERD's capacity comprehensively to address the contemporary problem of xenophobia." *Id.* However, she also notes that the Committee has found that Article 1 may apply to cases involving religious discrimination in some cases. *Id. See, e.g.*, Comm. on Elimination Racial Discrimination, General Recommendation Thirty-Two, on the Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, ¶ 7, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter General Recommendation Thirty-Two]; Radha Govil & Alice Edwards, *Women, Nationality and Statelessness*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 169 (Alice Edwards & Laura van Waas eds., 2014); Comm. on Elimination Racial Discrimination, Rep. on the Fifty-Sixth Session (Mar. 6–24, 2000) Fifty-Seventh Session (Jul. 31–Aug. 25, 2000), U.N. Doc. A/55/18, at 152 (Aug. 25 2000); Comm. on Elimination Discrimination Against Women, General Recommendation No. Thirty-Two on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014).

[37] *See* FitzGerald, *supra* note 35.

[38] *Id.*

[39] *Id.* at 131. For an interesting discussion of *jus sanguinis* as being "historically tainted because it is rooted in practices and conceptions that rely on ethno-nationalist ideas about political membership," see Costica Dumbrava, *Bloodlines and Belonging: Time to Abandon* Ius Sanguinis*?*, *in* DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 73, 73 (Rainer Bauböck ed., 2018). *But see* Rainer Bauböck, Ius Filiationis*: A Defence of Citizenship by Descent*, *in* DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP, *supra*, at 83 (noting that the following contributions to this collection challenge Dumbrava's view on this question).

Denationalization or deprivation of citizenship marks the third potential site for racialized citizenship.[40]

While some historical cases of racialized citizenship laws are well known, examined, and long since rejected,[41] many contemporary manifestations are under-examined. UNHCR opines that at least twenty states have nationality laws that permit denial or deprivation of nationality on discriminatory grounds including race,[42] yet no comprehensive analysis of direct and indirect racial discrimination in nationality laws has been undertaken, and hence the true scope of the problem is unknown.

The most observable cases of racialized citizenship (often leading to statelessness) are those resulting from manifestly discriminatory nationality laws. Rohingya people, considered among the world's most persecuted ethnic minority groups,[43] have been rendered stateless en masse by Myanmar.[44] The plight of Rohingya people is in large measure reflected in and perpetuated by the passing of Myanmar's discriminatory 1982 Citizenship Law[45] and longstanding discriminatory

[40] FitzGerald, *supra* note 35, at 131–32.

[41] *See generally* IAN HANEY LÓPEZ, *Racial Restrictions in the Law of Citizenship*, *in* WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27 (1996) (regarding the United States); JAMES JUPP, FROM WHITE AUSTRALIA TO WOOMERA: THE STORY OF AUSTRALIAN IMMIGRATION (2002) (regarding Australian racialized citizenship laws).

[42] U.N. HIGH COMM'R FOR REFUGEES, GLOBAL ACTION PLAN TO END STATELESSNESS: 2014–2024, 16 (2017), https://www.unhcr.org/54621bf49.html [https://perma.cc/AE2S-SZ32]. *See also* de Chickera & Whiteman, *supra* note 1, at 101–03.

[43] Shatti Hoque, *Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya*, 32 EMORY INT'L L. REV. 551 (2018) (citing *The Rohingyas: The Most Persecuted People on Earth?*, ECONOMIST (June 13, 2015), https://www.economist.com/asia/2015/06/13/the-most-persecuted-people-on-earth) [https://perma.cc/T2VK-L8SF]. *See also* Katie Young, *Who Are the Rohingya and What Is Happening in Myanmar?*, AMNESTY INT'L (Sept. 26, 2017), https://www.amnesty.org.au/who-are-the-rohingya-refugees [https://perma.cc/3SZA-N97R].

[44] *See generally* AMNESTY INT'L, MYANMAR: AMNESTY INTERNATIONAL ANNUAL REPORT 2016 (2017), https://www.amnesty.org/download/Documents/ASA1657612017ENGLISH.pdf [https://perma.cc/3BFU-PETX] (describing several instances of discrimination and persecution).

[45] Nyi Nyi Kyaw, *Unpacking the Presumed Statelessness of Rohingyas*, 15 J. IMMIGR. & REFUGEE STUD. 269, 272 (2017) ("The main academic and policy argument in the past decades is that the Rohingya are not recognized as citizens of Myanmar because of the discriminatory 1982 law.") (citations omitted).

implementation practices.[46] The Citizenship Law and its implementation are "at the heart of a discriminatory system" which left not only Rohingya people but also other non-Rohingya Muslim minorities without citizenship.[47]

Another blatantly discriminatory instance of mass denationalization involves Dominicans of Haitian descent in the Dominican Republic. In 2010, a new Dominican constitution inscribed the already precarious citizenship status of Haitian Dominicans by providing that the children of persons "in transit or residing illegally in the Dominican territory"[48] were not considered citizens of the Dominican Republic.[49] Prior to 2010, the 1929 Constitution of the Dominican Republic operated under the principle of *jus soli*, thus recognizing as Dominican most persons born within the territory of the country.[50] In Pierre v. No. Judgment 473/2012, the Dominican Constitutional Court ruled that children of "irregular migrants" were not considered

[46] *Id.* at 282 ("[T]he 1982 law—however discriminatory its textual provisions are according to international human rights standards—should not be regarded as the *sole* cause of the Rohingya problem.").

[47] IRISH CTR. FOR HUM. RTS., CRIMES AGAINST HUMANITY IN WESTERN BURMA: THE SITUATION OF THE ROHINGYA, 10 (2010); U.N. HIGH COMM'R FOR REFUGEES, STATELESSNESS AND THE ROHINGYA CRISIS 2 (Nov. 2017), https://www.refworld.org/docid/5a05b4664.html [https://perma.cc/C976-M7WT]. The authors note that approximately one million, largely Rohingya people, within the Rakhine State are stateless "due to the restrictive provisions and application of the Myanmar citizenship law which primarily confers citizenship on the basis of race." *See also* Hum. Rts. Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 458–748 U.N. Doc. A/HRC/39/CRP.2 (2018) (finding that based on its overall assessment of the situation in Myanmar since 2011, and particularly in Rakhine State, the extreme levels of violence perpetrated against Rohingya people in 2016 and 2017 resulted from the "systemic oppression and persecution of the Rohingya," including the denial of their legal status, identity, and citizenship, and followed the instigation of hatred against Rohingya people on *ethnic, racial, or religious grounds*).

[48] CONSTITUCIÓN DE LA POLÍTICA DE LA REPÚBLICA DOMINICANA [CONSTITUTION] Jan. 26, 2010, art. 18(3) (Dom. Rep.).

[49] Ernesto Sagas & Ediberto Roman, *Who Belongs: Citizenship and Statelessness in the Dominican Republic*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 35, 35 (2017).

[50] Nicia C. Mejia, *Dominican Apartheid: Inside the Flawed Migration System of the Dominican Republic*, 18 HARV. LATINO L. REV. 201, 202–03 (2015) (noting an exception to the principle of *jus soli* for those born to foreign diplomats or foreigners who were "in transit"). *See also* Richard T. Middleton, *The Operation of the Principle of* Jus Soli *and its Effect on Immigrant Inclusion into a National Identity: A Constitutional Analysis of the United States and the Dominican Republic*, 13 RUTGERS RACE & L. REV. 69, 70 (2011).

Dominican, thereby excluding them from citizenship.[51] In effect, the decision meant that the Constitution (and its interpretation) shifted from operating under a *jus soli* principle—redefining Dominican citizenship to exclude and render stateless thousands of Haitian Dominicans.[52] As has been noted, "[t]he current legal conceptions of Dominican citizenship reflect widespread cultural practices and historical trends, in which Haitians have historically been portrayed as racialized 'others.'"[53]

More recently, the 2019 update of the National Register of Citizens in Assam, India, has been described as "possibly the largest exercise in creating conditions of statelessness" [54] in history.[55] The most recent draft list excluded 1.9 million people, disproportionately impacting Bengali-speaking Muslims (with other religious and ethnic minorities caught in the intersectional xenophobic expulsion). [56] The subsequent enactment of the Citizenship Amendment Act by the Indian Parliament has been widely condemned as embodying direct discrimination against

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[51] Pierre v. No. Judgment 473/2012, TC/0168/13 1, 98 (Dom. Rep. Trib. Const. 2013). *See also* U.N. High Comm'r for Refugees, Submission by the U.N. High Comm'r for Refugees for the Office of the High Comm'r for Hum. Rts.' Compilation Rep., Universal Periodic Rev.: Haiti, at 2 (Mar. 2016) (estimating that 133,000 Dominicans of Haitian descent were rendered stateless by the decision of the constitutional court).

[52] *See* Jonathan M. Katz, *What Happened When a Nation Erased Birthright Citizenship*, ATLANTIC (Nov. 12, 2018), https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/ [https://perma.cc/6CHR-TBDK]; Alan Yuhas, *Dominicans of Haitian Descent Turned into 'Ghost Citizens', says Amnesty*, GUARDIAN (Nov. 19, 2015), https://www.theguardian.com/world/2015/nov/19/dominican-republic-violated-human-rights-haitians-citizens [https://perma.cc/S9AG-Z5E9].

[53] Sagas & Roman, *supra* note 49, at 37. *See, e.g.*, Mejia, *supra* note 50; BELTON, *supra* note 1.

[54] Priya Pillai, *Of Statelessness, Detention Camps and Deportations: India and the "National Register of Citizens" in Assam*, OPINIO JURIS (Jul. 12, 2019), https://opiniojuris.org/2019/07/12/of-statelessness-detention-camps-and-deportations-india-and-the-national-register-of-citizens-in-assam [https://perma.cc/7GSW-9SSV].

[55] *See also* Rohini Mohan, *Inside India's Sham Trials That Could Strip Millions of Citizenship*, VICE NEWS (Jul. 29, 2019), https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship [https://perma.cc/4DE7-4H8S].

[56] *See generally* Anushka Sharma, *Contextualizing Statelessness in the Indian Legal Framework: Illegal Immigration in Assam*, 8 CHRIST U. L.J. 25 (2019) (arguing that current legal frameworks are not equipped to address statelessness); Amit Ranjan, *National Register of Citizen Update: History and its Impact*, ASIAN ETHNICITY, June 28, 2019, at 1.

Muslims, further underlining the discrimination at the heart of the contemporary citizenship crisis in India.[57]

Additionally, many African Commonwealth countries which, having broadly inherited *jus soli* systems of citizenship, almost universally replaced birthright citizenship with laws based on citizenship by descent following independence, often "implicitly or explicitly intended to exclude potential citizens of non-African descent,"[58] and often on a racially or ethnically discriminatory basis.[59] The legacy of colonization and decolonization can bring about entrenched cases of racialized statelessness, as can other forms of state succession.[60] As addressed further below, it is important to note that such cases can be characterized by direct or indirect forms of racial discrimination,[61] and can occur in the absence of discriminatory intent.[62]

III. NATIONALITY MATTERS: BETWEEN STATE SOVEREIGNTY AND HUMAN RIGHTS

Under traditional notions of state sovereignty, decisions relating to the conferral, withdrawal, and regulation of nationality are, in principle, not a matter for international law.[63]

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[57] *See* Farrah Ahmed, *Arbitrariness, Subordination and Unequal Citizenship*, 4 INDIAN L. REV. 121 (2020). *See also* Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, 4 INDIAN L. REV. 138 (2020); Monika Verma, *Citizenship (Amendment) Act, 2019: The Pernicious Outcomes of the Altering Equation of Citizenship in India*, CONFLICT, JUST., DECOLONIZATION: CRITICAL STUD. INTER-ASIAN SOC'Y (June 24, 2020), https://www.researchgate.net/publication/342436363_Citizenship_Amendment_Act_2019_The_Pernicious_Outcomes_of_the_Altering_Equation_of_Citizenship_in_India [https://perma.cc/ZA43-JQ5A]; Atul Alexander, *Evaluating the Citizenship Amendment Act, 2019 in India: Perspectives from International Refugee Law,* INT'L L. UNDER CONSTR. (Feb. 27, 2020), https://grojil.org/2020/02/27/evaluating-the-citizenship-amendment-act-2019-in-india-perspectives-from-international-refugee-law/ [https://perma.cc/C3RF-7JKN].

[58] BRONWEN MANBY, CITIZENSHIP IN AFRICA 76 (2018).

[59] *See e.g.*, THE PUBLIC ORDER ACT [CONSTITUTION] Dec. 31, 1965, (Sierra Leone); CONSTITUTION OF THE REPUBLIC OF UGANDA [CONSTITUTION] Oct. 8, 1995, (Uganda). *See generally* MANBY, *supra* note 58, at 193–99.

[60] de Chickera & Whiteman, *supra* note 1, at 101.

[61] ICERD, *supra* note 11, art 1(1) (requiring states to eliminate discrimination in purpose or effect, as well as discrimination that occurs in the absence of discriminatory intent). *See, e.g.*, THORNBERRY, *supra* note 2, at 114.

[62] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 18.

[63] Manley O. Hudson (Special Rapporteur of the International Law Commission) *Rep. on Nationality, Including Statelessness*, at 7, U.N. Doc. A/CN.4/50 (1952) ("In principle, questions of nationality fall within the domestic

Rather, nationality is a matter "for each state to decide"[64] within the "reserved domain"[65] of states. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention) did not create an individual right to nationality; states alone grant and withdraw nationality. [66] Article 1 provides that it is "for each State to determine under its own law who are its nationals."[67] According to Article 2, "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."[68] However, Article 1 also provides that "[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."[69]

Accordingly, even within the traditional framework, the exclusive right of states in nationality matters has long been understood as dependent on (and tempered by) the development of international relations. In 1923, in the Nationality Decrees in

jurisdiction of each State."). *See also* Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (February 7) [hereinafter Tunis and Morocco Nationality Decrees] ("The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 384 (6th ed. 2018).

[64] Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984). *Accord* Spiro, *supra* note 3, at 714 (commenting that even through most of the late twentieth century, "the conventional wisdom among legal scholars held nationality practice to be largely unconstrained by international law." (citing GEORG SCHWARTZBERGER, A MANUAL OF INTERNATIONAL LAW 141 (5th ed. 1967) ("[I]n principle, international law leaves each territorial sovereign to decide which of his inhabitants he wishes to grant nationality."))); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65 (2nd ed. 1979) ("The right of a State to determine who are, and who are not, its nationals is an essential element of its sovereignty."); Otto Kimminich, *The Conventions for the Prevention of Double Citizenship and Their Meaning for Germany and Europe in an Era of Migration*, 38 GERMAN Y.B. INT'L L. 224, 224 (1995) (affirming the Hague Convention's provision that "[i]t is for each State to determine under its own law who are its nationals") (citation omitted).

[65] Tunis and Morocco Nationality Decrees, *supra* note 63, at 24.

[66] League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 13, 1930, 179 L.N.T.S. 89 [hereinafter 1930 Hague Convention].

[67] *Id.* art. 1.

[68] *Id.* art. 2.

[69] *Id.* art. 1.

Tunis and Morocco Opinion, the Permanent Court of International Justice made the following statement:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain. . . . [I]t may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.[70]

Today, it is well accepted by scholars that international human rights law has evolved to place significant constraints on states' prerogatives in nationality matters, such that traditional notions of sovereignty have been eroded, albeit not eradicated.[71] It is often stated that, in many instances and under certain circumstances, a refusal to grant nationality or a withdrawal of nationality violates norms of international law. Scholars tend to point to a cluster of intersecting areas of international human rights law to establish the claim that the traditional position has been modified in important ways. Interestingly—and perhaps tellingly—a number of scholars have pointed to ICERD [72] (together with other non-discrimination treaties, or treaties containing non-discrimination clauses) to argue that the

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[70] Tunis and Morocco Nationality Decrees, *supra* note 63, at 24. *See also* Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, ¶¶ 20–21 (April 6). *See* Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685 (2015).

[71] For detailed discussions of the phases and contours of international human rights law that constrain state sovereignty in nationality practice, see Spiro, *supra* note 3.

[72] *See, e.g.*, Alice Edwards, *The Meaning of Nationality in International Law in an Era of Human Rights*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 26 (Alice Edwards & Laura van Waas eds., 2014) [hereinafter Edwards, *The Meaning of Nationality*].

evolution of human rights has encroached on states' prerogatives in nationality matters.[73]

In the context of nationality matters, scholars tend to focus on three interfacing areas of international law where constraints are imposed on state discretion in the context of nationality matters. First, reliance is placed on the prohibition of arbitrary deprivation of nationality as a constraint on state discretion. Arbitrary deprivation of nationality generally refers to withdrawal or denial[74] of nationality where such deprivation does not serve a legitimate purpose, where it does not follow the principle of proportionality, where it is discriminatory, and/or where it is otherwise incompatible with international law.[75] International and regional human rights instruments reinforce this prohibition of arbitrary deprivation of nationality.[76]

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[73] Consider also the relationship of Article 1(3) to similar exclusion/limitation clauses contained in other human rights instruments. *See* G.A. Res. 40/144 (XL), Declaration of Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, art. 2(1) (Dec. 13, 1985):

> Nothing in this Declaration should be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.

See also 1954 Statelessness Convention, *supra* note 20, art. 31; Convention on the Reduction of Statelessness art. 1(2)(c), art. 4(2)(c), art. 8(3), Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter 1961 Statelessness Convention].

[74] MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 51–52 (2019). *See also* LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 101 (2008).

[75] Edwards, *The Meaning of Nationality*, *supra* note 72, at 26. *See also* Jorunn Brandvoll, *Deprivation of Nationality*, *in* NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 194 (Alice Edwards & Laura van Waas eds., 2014).

[76] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10 1948) [hereinafter UDHR] ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."); Convention on the Rights of Persons with Disabilities art. 18(1)(a), Dec. 3, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD] (stating that it is upon states parties to ensure "persons with disabilities . . . [h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."); Organization of American States, American Convention on Human Rights art. 20, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123. ("1. Every person has the right to a nationality; 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the

Second, there is an emerging view that the duty to prevent statelessness is developing as a norm of customary international law and that this duty represents a constraint on state discretion in nationality matters.[77] Reliance is placed on treaty provisions that share an underlying concern to prevent statelessness. Article 13 of the 1930 Hague Convention provides that if a child does not acquire the new nationality of his or her parents in the context of their naturalization, they are to retain their original nationality.[78] Article 9(1) of the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) provides that "[states] shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[79]

The Convention on the Rights of the Child (CRC) includes under Articles 7 and 8 the right to a nationality and the right to an identity—and specifies that these rights are to be implemented "in particular where the child would otherwise be stateless." [80] Importantly, these provisions in human rights instruments are complemented by the two major conventions on

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right to any other nationality; 3. No one shall be arbitrarily deprived of his nationality or of the right to change it."). *See also* League of Arab States, Arab Charter on Human Rights, Art. 29, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) ("Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality."); The Commonwealth of Independent States, Convention on Human Rights and Fundamental Freedoms art. 24, May 26, 1995, 3 I.H.R.R. 1 (stating both that "[e]veryone shall have the right to citizenship," and that "[n]o one shall be arbitrarily deprived of his citizenship or of the right to change it.").

[77] Edwards, *The Meaning of Nationality*, *supra* note 72, at 28. *See also* Sanoj Rajan, *Ending International Surrogacy-Induced Statelessness: An International Human Rights Law Perspective*, 58 INDIAN J. INT'L L. 128 (2018) (noting that this is especially the case with respect to children).

[78] 1930 Hague Convention, *supra* note 66, art. 13 ("Naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted. In such case the law of that State may specify the conditions governing the acquisition of its nationality by the minor children as a result of the naturalisation of the parents. In cases where minor children do not acquire the nationality of their parents as the result of the naturalisation of the latter, they shall retain their existing nationality.").

[79] United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. *See also* United Nations Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65.

[80] United Nations Convention on the Rights of the Child arts. 7-8, Nov. 20, 1989, 1577 U.N.T.S. 3.

statelessness: the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention)[81] and the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention).[82]

Finally, and related to the prohibition of arbitrary deprivation of nationality, scholars point to the general principle of non-discrimination in nationality laws as a constraint on state discretion. Non-discrimination is underpinned by and fundamental to all major human rights instruments. Article 9 of the 1961 Statelessness Convention prohibits the deprivation of nationality on racial, ethnic, religious, or political grounds. Article 9(2) of CEDAW provides, "States Parties shall grant women equal rights with men to acquire, change or retain their nationality." Article 18(1)(a) of the Convention on the Rights of Persons with Disabilities provides that states parties shall ensure that persons with disabilities "[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."[83] Importantly for the purposes of this paper, scholars point to Article 5(d)(iii) of ICERD, which provides that depriving any person of their nationality on the basis of race, color, or national or ethnic origin is a breach of a state's obligations under the Convention.[84] Often in tandem with this reference, scholars tend to stress the importance of the prohibition on racial discrimination as a *jus cogens* norm of international law.

It is important to recall that these three areas interface and intersect. For example, deprivation of nationality on the basis of race, color, sex, language, etc. has been considered arbitrary and therefore prohibited under international law.[85] Several academics have also argued that deprivation that results in statelessness is inherently arbitrary.[86] Together, the three

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[81] 1954 Statelessness Convention, *supra* note 20.

[82] 1961 Statelessness Convention, *supra* note 73.

[83] CRPD, *supra* note 76, art. 18(1)(a).

[84] Note that "descent"—listed as a prohibited ground of discrimination in Article 1(1)—is missing from Article 5, yet this is unlikely to have any impact given that Article 5 refers to racial discrimination, defined in Article 1 as including discrimination based on descent.

[85] *See e.g.*, Hum. Rts. Council, Draft Resolution of Its Twentieth Session, U.N. Doc. A/HRC/20/L.9, at 2 (June 28, 2012).

[86] *See e.g.*, RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 245 (2d ed. 1994) (arguing that arbitrary is defined as "a discriminatory measure, directed against a particular section of the population or as resulting in statelessness"); Johannes M. M. Chan, *The Right to a*

intersecting principles, and the contemporary academic discourse around them, go a long way in advancing a "new international law of citizenship."[87] However, there remains a chink in the armor of the new regime related to nationality practice, which, if left unaddressed, threatens to undermine its robustness. Article 1(3) of ICERD, at least on its face, reflects and possibly perpetuates a lingering remnant of state discretion. While ICERD itself is time and again put forward as an example of a constraint on state discretion, most scholars tend to ignore or brush over a tension that exists in the very text of the Convention and that perhaps perpetuates the very problem they seek to resolve.

Coming into force on January 4, 1969, ICERD is broadly considered the core of the international human rights framework for addressing and combating racial discrimination.[88] Article 1(1) defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[89]

As explained above, Article 1(2) of the Convention stipulates a limitation on the terms of Article 1(1). It provides that the Convention does not apply to distinctions, exclusions, restrictions, or preferences made between citizens and non-citizens. It has been argued that "while this provision allows States to make some distinctions between citizens and non-citizens," it must be narrowly construed and interpreted in accordance with standards relating to the prohibition of racial discrimination and equality before the law as enshrined in Article 5 of the Convention.[90] A full discussion of Article 1(2) is

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Nationality as a Human Right: The Current Trend Towards Recognition, 12 HUM. RTS. L.J. 1, 3 (1991).

[87] Spiro, *supra* note 3.

[88] Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, *in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 135 (Sandra Fredman ed., 2001).

[89] ICERD, *supra* note 11, art.1(1).

[90] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, at ¶19 (also noting that "[d]istinctions between citizens and non-citizens cannot be applied in a racially discriminatory manner or as a pretext for racial

beyond the scope of this paper,[91] but 1(2) does help to contextualize Article 1(3) and its place in the drafting history of the Convention. The distinction between citizens and non-citizens also underscores the importance of the right to nationality (as enshrined in Article 5(d)(iii), which applies without distinction to "everyone") and, as shown below, simultaneously highlights the protection gap represented by Article 1(3).

Secondary material on Article 1(3) has mostly either taken as an (unproblematic) given that Article 1(3) limits the applicability of Article 1(1) or produced only thin justifications for interpreting Article 1(3) narrowly, often focusing on the second clause of the Article ("provided that such provisions do not discriminate against any particular nationality") and glossing over the first ("[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization").[92] Further, few treatments to date have explored the apparent contradiction between Article 5(d)(iii) and Article 1(3). Natan Lerner writes that Articles 1(2) and 1(3) combine to mean that the Convention should not be taken as interfering "in the internal legislation of any State as far as differences in the rights of citizens and non-citizens are concerned, [nor as] pretend[ing] to affect substantive or procedural norms on citizenship and naturalization."[93] Theodor Meron simply states that under Article 1(3) "nationality, citizenship or naturalization provisions of a particular state may not discriminate against any particular nationality."[94] In a reflection on racial discrimination as a major driver of denationalization and restrictive access to citizenship, James A. Goldston asserts that while Article 1(3) of ICERD "grants states discretion in applying race-based distinctions when it comes to citizenship rules," the language of the Article also places limits on this discretion.[95] A recent report of the

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discrimination."). *Accord* DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 48 (2011).

[91] For further analysis, see Achiume, *Governing Xenophobia*, *supra* note 36, at 356–58.

[92] ICERD, *supra* note 11, art.1(3).

[93] NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 35 (1980) [hereinafter LERNER, U.N. CONVENTION].

[94] Meron, *supra* note 3, at 311.

[95] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 333 (2006).

Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance from 2018 highlights this tension in noting that "the regulation of nationality is generally considered to be within the domestic jurisdiction of States," yet "international law provides that the right of States to decide who their nationals are is not absolute."[96]

To be sure, some scholars have acknowledged Article 1(3) as problematic. Peter Spiro observes that while international law has significantly and broadly constrained discriminatory classifications, Article 1(3) "brackets the use of race as a criterion for citizenship."[97] He concludes that "[i]n its original conception . . . the Convention was not intended to constrain criteria for admission from outside the existing community," citing the Convention as an example of international law's historical silence about a citizenship regime that had the clear effect of excluding outsiders on the basis of race.[98] Joanne Mariner makes a similar observation. Writing in 2003, she comments:

> the convention shifts gears with regard to rules regulating citizenship. Despite its broad and

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[96] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 23 (citing U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, Hum. Rts. Council, ¶¶ 20, 57, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009)) ("The [International Law] Commission also affirmed that the right of States to decide who their nationals are is not absolute and that, in particular, States must comply with their human rights obligations concerning the granting of nationality."). *Accord* Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984) (contending that that "the manners in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights"); Václav Mikulka (Special Rapporteur), *Third Rep. on Nationality in Relation to the Succession of States*, at 20–21, U.N. Doc. A/CN.4/480 (Feb. 27, 1997) (indicating that a State must exercise "its discretionary power within the scope of its territorial or personal competence . . . in a manner consistent with its international obligations in the field of human rights."). *See also id.* at 20 (indicating that "State sovereignty in the determination of its nationals does not mean the absence of all rational constraints. The legislative competence of the State with respect to nationality is not absolute.") (citing HENRI BATIFFOL & PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ 69–70 (7th ed. 1981)).

[97] Spiro, *supra* note 3, at 716.

[98] *Id.* Note, however, Spiro's treatment of racial discrimination as *jus cogens*: "The prohibition on race discrimination has since arguably evolved into a *jus cogens* norm—that is, a norm from which no derogation is permitted." *Id.* at 716 n.144 (citing Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03*,* Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003)).

> unqualified language about the necessity of eliminating racial and ethnic discrimination in all of its manifestations, the treaty contains an explicit exception for countries' citizenship and naturalization policies. . . . Practices that would, in short, merit the sternest reproach in nearly every other area of government policy are considered permissible in the area of citizenship.[99]

Mariner made this observation just a year before the Committee formulated its General Recommendation Thirty, which advanced a significantly narrowed interpretation of the Article 1(3) limitation clauses. This Article returns to the Committee's Recommendation below, but for now it is important to stress that generous scholarly and Committee interpretations notwithstanding, it is difficult, and possibly counterproductive, to ignore the fact that on its face, the language of Article 1(3) undermines the reach and application of the Convention. As Egon Schwelb rightly points out, with Article 1(3) left unconstrained, under its terms a provision "depriving of their citizenship the citizens of a State Party who belong to a specific racial or ethnic group would be a legal provision 'concerning nationality' and 'concerning citizenship' and would" therefore be compatible with Article 1(3).[100] Needed is a principled approach for "reading down" Article 1(3), one that heeds closely to the

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[99] Joanne Mariner, *Racism, Citizenship and National Identity*, 46 DEVELOPMENT 64, 64–65 (2003). Mariner notes in a separate essay that "while adamantly prohibiting racial and ethnic discrimination in other areas, international human rights law falters notably with regard to rules regulating citizenship." Joanne Mariner, *Racism Citizenship and National Identity: A Conceptual Challenge for the UN Racial Conference*, FINDLAW (Sept. 3, 2001), https://supreme.findlaw.com/legal-commentary/racism-citizenship-and-national-identity.html [https://perma.cc/YM8W-SQ6J]. Mariner points to ICERD's inclusion of "an explicit exception for countries' citizenship and naturalization policies," noting that this provision specifies "that the convention's protections against discrimination do not generally extend to legal rules on citizenship and naturalization, although they do bar discrimination against particular nationalities." Mariner, *supra*, at 64–65.

[100] Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1009 (1966) [hereinafter Schwelb, *Elimination of All Forms of Racial Discrimination*] (although contending that Article 5(d)(iii) "limits the very wide field of application of Article 1(3), such . . . a provision of this kind would ultimately be incompatible with the Convention.").

principles of treaty interpretation as set out in the Vienna Convention on the Law of Treaties (VCLT).[101]

IV. ARTICLE 1(3): HISTORY AND CURRENT APPROACHES

In this Part, the Article addresses the gaps outlined above by undertaking a thorough review of the drafting history of Article 1(3) and an analysis of its interpretation and implementation by the Committee.

Article 31(1) of VCLT sets out the principal scheme of treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[102] It is worth noting as a general matter that human rights treaties should arguably be interpreted in a manner "favorable to the effective protection of individual rights."[103]

VCLT permits recourse to preparatory materials (*travaux préparatoires)* as supplementary tools when other canons of treaty interpretation deliver ambiguous (or absurd) results. Although the intentionalist approach to treaty interpretation remains highly contested, it is generally agreed that preparatory materials can shed light on the literal and contextual meanings of a provision and that the intention of parties, as distilled from the preparatory materials, serves as "a relevant and underlying consideration"—even if they remain in the background.[104] Given the ambiguity and confusion surrounding Article 1(3), this Part begins by considering its drafting history.

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[101] Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[102] *Id.* art. 31.

[103] Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 912 (2009) (citing MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 3 (1995) ("[T]he terms (of a human rights treaty) are to be interpreted in a manner favourable to the individual and that, in particular, limitations and restrictions on rights are to be read narrowly.")). *See also* Tobin, *supra* note 16, at 50 (noting that international human rights treaties should be interpreted dynamically and in a manner that reflects "factors which are considered essential to ensure a constructive approach to interpretation."); Pushpanathan v. Canada, [1998] S.C.R. 982, ¶ 57 (Can.) ("This overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.").

[104] Tobin, *supra* note 16, at 23.

A. The Drafting History of Article 1(3) of ICERD

As well as disclosing a perennial tension between racial non-discrimination and state discretion in the regulation of nationality (and perhaps, too, a lingering bastion of that discretion), a close reading of the drafting history of Article 1(3) reveals that while the Article 1(3) reflects a concern with state sovereignty, it equally reflects an immediate concern with colonialism (or anti-colonialism). As Patrick Thornberry notes, "[f]or many delegates, colonialism was the great racial evil."[105] Undergirded by similar logic, the twin concerns of anti-colonialism and state sovereignty (what might be described as the unconstrained power to define the boundaries of membership)[106] meant that many states—both developing and developed—could conjoin and concur around the broad language of Article 1(3). As demonstrated above, Article 1(1) defines racial discrimination as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[107]

As Kevin Boyle and Anneliese Baldaccini write:

> While the words "colour," "descent," and "ethnic origin" did not represent major difficulties, a serious problem arose with regard to the term "national origin" due to it being widely used as relating to nationality or citizenship. To avoid any misinterpretation, paragraphs 2 and 3 were added to Article 1 excluding distinctions between

[105] THORNBERRY, *supra* note 2, at 1. *See also* Rüdiger Wolfrum, *The Committee on the Elimination of Racial Discrimination*, 3 MAX PLANCK Y.B. U.N. L. 489 (1999) (noting that the drafting of the preamble to the Convention reflected a sensitivity to the challenge and practice of colonialism and other issues); David Keane & Annapurna Waughray, *Introduction*, *in* FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 4–5 (David Kaene & Annapurna Waughray eds., 2014).

[106] *See* Spiro, *supra* note 3, at 744.

[107] ICERD, *supra* note 11, art. 1(1).

> citizens and non-citizens from the ambit of the definition.[108]

Initially, the Sub-Commission's draft convention proposed the "interpretive" Article 8 to serve as a counterbalance to the broad protection offered by Article 1(1) and the contested invocation of "national origin."[109] Draft Article 8 reads as follows:

> Nothing in the present Convention may be interpreted as implicitly recognizing or denying political or other rights to non-nationals nor to groups of persons of a common race, colour, ethnic or national origin which exist or may exist as distinct groups within a State Party.[110]

There was general agreement that the article was intended by the Sub-Commission to provide a qualification to Article 1. It was "aimed at precluding certain interpretations of the provisions of the Convention."[111] There was considerable discussion, however, about the scope and intention of some of the wording used in the Sub-Commission's text. A joint amendment to Article 8 proposed by representatives of France, India, and the Philippines read as follows:

> Nothing in this present Convention may be interpreted as affecting in any way the distinction between national and non-nationals of a State, as recognized by international law, in the enjoyment of political or other rights, or as amending provisions governing the exercise of political or other rights by naturalized persons . . . .[112]

After lengthy discussions that revolved largely around the inclusion of the words "national origin" in Article 1(1), Article

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[108] Boyle & Baldaccini, *supra* note 88, at 152 n.79.

[109] U.N. ESCOR, 37th Sess., Supp. 8, at ¶¶ 248, 253, U.N. Doc. E/CN.4/874 (Feb. 17–Mar. 18, 1964).

[110] *Id.* ¶ 242.

[111] *Id.* ¶ 248.

[112] *Id.* ¶ 247. *See also* Comm'n on Hum. Rts. Sub-commission on Prevention of Discrimination & Protection of Minorities, Rep. of the Sixteenth Sess., 41, U.N. Doc. E/CN.4/873 (Feb. 11, 1964). The phrase "as recognized by international law" was later deleted. Earlier drafts focused largely on non-citizens. The first version, submitted by Calvoressi and Capotorti, included the provision that nothing in the Convention "shall be interpreted as implying a grant of equal political rights to nationals of a contracting State or a grant of political rights to a distinct racial ethnic or national group as such." THORNBERRY, *supra* note 2, at 142.

8 was deleted at the 808th meeting.[113] Following deletion of Article 8 from the draft Convention, the representative of France moved at the 809th meeting of the Commission to reconsider Article 1, paragraph 1, with a view to deciding whether the word "national" should be retained.[114] After further discussion and a series of textual proposals, the Commission agreed at its 810th meeting to place the word "national" within square brackets, and to add the following words, also in square brackets, at the end of the paragraph: "In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State."[115] At the conclusion of the Twentieth Session of the Commission on Human Rights, Draft Article 1 read as follows:

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[116]

The language of Article 1 of the draft Convention arose again at the Twentieth Session of the General Assembly. Article 1(3) was initially conceived as a replacement of Article 8 in light of the decision to retain the reference to national origin in Article 1(1). Although a number of states called for the deletion of all brackets, it was felt that some explanation to eliminate the ambiguity of the word "national" was necessary, specifically following the deletion of Article 8.[117] For example, the representative of France observed that "it was not surprising that the term 'national origin' had given rise to difficulties, since it could be interpreted in two entirely different ways," one sociological and the other legal.[118] Like the original Article 8, the

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[113] LERNER, U.N. CONVENTION, *supra* note 93, at 27.

[114] *Id.*

[115] *Id.*

[116] U.N. ESCOR, 37th Sess., Supp. 8, *supra* note 109, at 111. ("In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.").

[117] U.N. GAOR, 20th Sess., 1304th mtg. at 83–86, U.N. Doc. A/C.3/SR.1304 (Oct. 14, 1965).

[118] Goolam E. Vahanwati, Presentation Before the U.N. Committee on the Elimination of Racial Discrimination (Feb. 26, 2007), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/Ind/INT_CERD_STA_Ind_70_11102_E.pdf [https://perma.cc/QWE5-JQRZ].

paired Articles 1(2) and 1(3) were therefore viewed as limiting interpretive clauses on the broad protections conferred by 1(1), and especially in response to the (contested) inclusion of the term "national origin" therein. The discussions around national origin were influenced strongly by concerns and anxieties related to colonialism and the desire of many states to preserve national governance. This concern is evident in comments by the representative of Uganda, who stated, "it was natural that a country which had just become independent should wish to give its own nationals the key posts in the economy hitherto largely held by nationals."[119] It is perhaps worth noting that a similar concern for independence in a post-colonial context can be discerned in the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads at Article 2(3): "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[120] Here too, Article 2(3) follows a broad non-discrimination clause in Article 2(2), which provides that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[121] Evo Dankwa has pointed out that during the drafting history of ICESCR a number of delegates from developing countries had urged that the approval of Article 2(2) "would be tantamount to perpetuating the dominant position of aliens in the economic field," particularly in light of colonial powers that had deprived the new states "of that opportunity to ensure that meaningful economic rights were exercised by most people in their countries."[122]

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[119] U.N. GAOR, 20th Sess., 1305th mtg. at 89, U.N. Doc. A/C.3/SR.1305 (Oct. 14, 1965).

[120] International Covenant on Economic, Social and Cultural Rights art. 2(3), Dec. 16, 1966, 933 U.N.T.S. 3.

[121] *Id.* art. 2(2).

[122] Evo Dankwa, *Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 230, 236 (1987) (citing U.N. GAOR, Draft International Convention on Human Rights, at 235, U.N. Doc. A/5365 (1962) ("The sole aim of the proposals in question was to rectify situations which frequently existed in the developing countries particularly those which recently won their independence. In such countries, the influence of non-nationals on the national economy—a heritage of the colonial era—was often such that nationals were not in a position fully to enjoy the

However, the concerns around the inclusion of the words "national origin" and its relevance to nationality laws in ICERD were also animated, at least in part, by a desire on the part of powerful, developed states to "assure states parties that due respect is given to state sovereignty in areas concerning naturalization."[123] For example, the representative of the United Kingdom stated that the term "national origin" tended to confuse the issue because "such a provision [regarding nationality] would do away with the special facilities given by States to those of their nationals who, having changed their nationality, subsequently wished to recover their original nationality . . . as compared with aliens desiring to acquire that nationality by naturalization."[124] Similarly, the representative of France explained that the inclusion of the words "national origin" might "impair the principle that temporary measures taken by Governments with regards to naturalised persons did not constitute discrimination."[125] The representative of Italy likewise explained that the mention of national origin would "raise difficulties in

economic rights set forth in the draft Covenant.")). *See also* Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, 17 INT'L J. REFUGEE L. 293 (2005) (asserting that the "purpose of Article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times," but that the provision should be narrowly construed).

[123] Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 HUM. RTS. Q. 74, 79, 82 (1987).

[124] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010, refers to this comment, and others like it, as an attempt at "maintaining disabilities of naturalised persons" and argues that this is the key animating consideration that gave rise to Article 1(3). The representative of the United Kingdom added that since the definition of racial discrimination in paragraph 1 was exceedingly broad, certain legitimate differentiations based on national origin might conceivably be prohibited under the convention if the words were retained. For example, in the United Kingdom, preference was given to married women who had lost their British nationality in assisting them to reacquire that nationality; such preference could not be deemed discrimination. U.N. ESCOR, Summary Record of the 786th Meeting, 20th Sess., at 4, U.N. Doc. E/CN.4/SR.786 (Apr. 21, 1964).

[125] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010. *See* Comm'n on Hum. Rts., Rep. of the Prevention and Protection of Minorities Subcomm. on Its Fourteenth Session, 42, U.N. Doc. E/CN.4/830 (Feb. 8. 1962). In making this claim, the representative of France pointed to the Report of the 14th session of the Sub-Commission on the Prevention of Discrimination and Protection of Minority Rights to the Commission on Human Rights, in which it was asserted that an insistence upon an over-generous policy of granting full political rights immediately to all naturalized persons might discourage nations from giving nationality to many applicants as the view that all naturalized persons should enjoy the same political rights as any other national was not shared by every State.

connection with enforcement of the right to nationality under article V" as it might present an obstacle to states, such as Italy, "which endeavoured to assist former Italian nationals to reacquire Italian nationality."[126]

In the final analysis, a joint amendment of Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland, and Senegal was proposed and adopted unanimously, almost without comment. The delegate of France said that the text submitted was entirely acceptable to his delegation and to that of the United States. The amendment clarified that the Convention would not apply to non-citizens or affect legislation on nationality, citizenship, or naturalization, provided that there was no discrimination against any particular nationality.[127] The only further mention of Articles 1(2) and 1(3) arose briefly during discussions on Article 5, where the delegate of India stated that "the word 'everyone' in the introductory part of that article might be regarded as including non-citizens as well as citizens," but that in view of Article 1 "the word 'everyone' no longer presented difficulties for his delegation."[128] While many scholars tend to follow Schwelb's view that paragraph 3 of Article 1, as inserted by the Third Committee into the Convention, "appears, to a certain extent at least, to be a saving clause for maintaining disabilities of naturalised persons,"[129] a close reading of the drafting history suggests a more complex view. The twin concerns of state sovereignty and anti-colonialism reinforced each other and were absorbed and reflected into the broad terms of Article 1(3).

Broadly, two key points are discernable from the complex drafting history of Article 1(3). First, the term and notion of "nationality" caused much confusion and anxiety among state representatives, who ultimately did not arrive at a settled definition. The word "nationality" therefore remains ambiguous for the purposes of treaty interpretation, and to a certain extent can and did refer to a person's legal *status* as well as to his or her legal citizenship (as evinced by the concern for protecting the

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[126] U.N. ESCOR, Summary Record of the 786th Meeting, *supra* note 124, at 5.

[127] U.N. HIGH COMM'R FOR HUM. RTS. THE RIGHTS OF NON-CITIZENS 9 (2006), https://www.ohchr.org/Documents/Publications/noncitizensen.pdf [https://perma.cc/A6YV-SMSY].

[128] U.N. GAOR, 20th Sess., 1309th mtg. at 105, U.N. Doc. A/C.3/SR/1309 (Oct. 19, 1965).

[129] Schwelb, *Elimination of All Forms of Racial Discrimination*, *supra* note 100, at 1010.

advantage granted to natural born citizens and the disadvantages of naturalization).[130] Second, and relatedly, while Article 1(3) was viewed as an exception to the broad protections contained in Article 1(1), it was seen by many of the drafters as a limited exception aimed at providing scope for states to favor or give preference to certain groups in response to the context of decolonization.

B. Committee on the Elimination of Racial Discrimination and Article 1(3): Toward a Justification

The Convention's expert monitoring body, the Committee, was established by operation of Article 8 of ICERD.[131] The Committee is comprised of independent experts nominated and elected by states parties to ICERD.[132] States parties to ICERD are obliged to report to the Committee one year after the Convention enters into force and every two years thereafter on the measures they have adopted to give effect to the Convention.[133] The Committee publishes concluding observations on the basis of the information gathered through this reporting. Additionally, the Committee is to report annually to the General Assembly on its activities, and is empowered to make General Recommendations and suggestions on the basis of the information they have gathered from states parties.[134] Furthermore, the Committee is empowered under Article 11 to receive and communicate inter-state complaints regarding the failure to give effect to the Convention by a state party.[135] This mechanism was utilized for the first time in 2018 when three separate complaints were received by the Committee.[136] This is particularly noteworthy since it is the first time that an inter-state complaint mechanism has been invoked under any United

[130] *Id.* at 1010 (noting that including the word "national" lacked the support of several states because, among other reasons, "certain legitimate differentiations based on national origin might conceivably be prohibited under the Convention if the words were retained.").

[131] ICERD, *supra* note 11, art. 8.

[132] *Id.* art. 8(1)–(4).

[133] *Id.* art. 9(1).

[134] *Id.* art. 9(2).

[135] *Id.* art. 11(1).

[136] *See* State of Qatar v. Kingdom of Saudi Arabia, ICERD-ISC-2018/1 (Comm. on Elimination Racial Discrimination 2018); State of Qatar v United Arab Emirates, ICERD-ISC-2018/2 (Comm. on Elimination Racial Discrimination 2018); State of Palestine v State of Israel, ICERD-ISC-2018/3 (Comm. on Elimination Racial Discrimination 2018).

Nations (UN) human rights treaty.[137] While none of these complaints challenge nationality laws, they and the parallel case before the International Court of Justice (ICJ)[138] raise issues about the correct interpretation of Article 1(2) of the ICERD and hence the relationship between discrimination on the grounds of nationality and racial discrimination.[139]

Article 14 (1) provides that a state party may make a declaration allowing for individual and group complaints to be made to the Committee regarding violations of rights under the Convention by the state in question.[140] Of the fifty-seven individual communications brought to the Committee, only three have invoked Article 5(d)(iii), namely, racial discrimination in respect of the right to nationality, and in none of these cases has the claim been made out.[141]

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[137] U.N. High Comm'r for Hum. Rts, Comm. on Elimination Racial Discrimination, *Inter-State Communications*, https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx [https://perma.cc/N9A2-8F3H] (last visited Sept. 6, 2020). For other such mechanisms, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 21, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 74, Dec. 18, 1990, 2220 U.N.T.S. 3; International Convention on the Protection of All Persons from Enforced Disappearance art. 32, Dec. 20, 2006, 2716 U.N.T.S. 3; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 10, Dec. 10, 2008, 2922 U.N.T.S. 29; Optional Protocol to the Convention of the Rights of the Child on a Communication Procedure art. 12, Dec. 19, 2011, 2983 U.N.T.S. Registration No. 27531; International Covenant on Civil and Political Rights arts. 41–43, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

[138] Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Application Instituting Proceedings, ¶¶ 55–56 (June 11, 2018), https://www.icj-cij.org/public/files/case-related/172/172-20180611-APP-01-00-EN.pdf [https://perma.cc/K6M6-3P3G] (conceding that while Article 1(2) affords nations the right to distinguish citizens from non-citizens, it does not allow nations to discriminate against non-nationals by treating one group differently from another).

[139] *See* Comm. on Elimination Racial Discrimination, Jurisdiction of the Inter-State Communication Submitted by Qatar Against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/5 (Aug. 30, 2019).

[140] ICERD, *supra* note 11, art. 14 (Of the 182 states parties to the Convention, fifty-nine have made a declaration under art. 14(1) to recognize the competency of the Committee to hear individual complaints. The Committee only possesses jurisdiction to hear the petitioner's complaint once it has ascertained that they have exhausted all domestic remedies. *Id.* art. 14(7)(a). After hearing the complaint, the Committee is required to communicate any suggestion and recommendation to both the State party and the petitioner. *Id.* art. 14(7)(b)).

[141] *See* Pjetri v. Switzerland, Communication 53/2013, Opinion, Comm. on Elimination Racial Discrimination, ¶ 4.2, U.N. Doc. CERD/C/91/D/53/2013

By contrast, nationality matters have been considered more extensively in the context of the Committee's examination of individual country reports, although in that context the issue is examined relatively infrequently.[142] The Committee was initially reluctant to criticize states' treatment of non-citizens and nationality laws, especially as those laws related to naturalization and the granting of preferential treatment to citizens of favored nations.[143] In more recent years, the Committee's General Recommendations, and especially General Recommendation Thirty, have somewhat narrowed the terms of the Convention so that Article 5 is now seen as limiting the scope of Articles 1(2) and 1(3). Even with this interpretation advanced in its General Recommendations, the Committee has been inconsistent in its willingness to comment directly on racially discriminatory nationality laws. Our survey of the Committee's concluding observations over a thirty-year period reveals that it is, to a certain degree, still reluctant to call attention clearly and unequivocally to discriminatory nationality laws, particularly as they relate to the denial of nationality.

In its General Recommendation Eleven, the Committee made a preliminary and interesting interpretive maneuver with respect to Article 1. Noting that Article 1(2) exempts from Article

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(Jan. 23, 2017) (Petitioner claimed that his application for naturalization was rejected based on his national origin and disability.); A.M.M. v. Switzerland, Communication 50/2012, Opinion, Comm. on Elimination Racial Discrimination, ¶ 3, U.N. Doc. CERD/C/84/D/50/2012 (Mar. 11, 2014) (Petitioner claimed that the State violated his right not to be arbitrarily discriminated against, on account of his race and national origin, in his quest to secure refugee status.); D.R. v. Australia, Communication 42/2008, Opinion, Comm. on Elimination Racial Discrimination, ¶ 7.3, U.N. Doc. CERD/C/75/D/42/2008 (Sep. 15, 2009) (Petitioner claimed that in withdrawing him from Social Security and depriving him of the right to the full benefits of citizenship, the State arbitrarily discriminated against him because of his race and nationality.). This is current up to November 19, 2020.

[142] The Committee has published concluding observations on 161 countries. The analysis for this article has derived from a review of all of the concluding observations available in English up until December 2019.

[143] Mahalic & Mahalic, *supra* note 123, at 79 ("States parties hold, and the Committee has agreed, that a state has the sovereign right to decide who can enter and remain in its territory provided that no element of racial discrimination is involved. Committee members have been hesitant to criticize a state's naturalization laws unless they reveal a flagrant racially discriminatory practice. With one exception, the Committee has discovered no racist provisions on the face of any state party's naturalization laws."); Comm. on Elimination Racial Discrimination, Rep. of Meeting, U.N. Doc. CERD/C/SR.488 (Aug. 11, 1980); Comm. on Elimination Racial Discrimination, Provisional Summary Record of Its Twenty-Eighth Session, 643rd mtg. U.N. Doc. CERD/C/SR.643 (July 22, 1983).

1(1) actions by states parties that differentiate between citizens and non-citizens, the Committee asserted that Article 1(3) provides a qualification to paragraph 2 "by declaring that, among non-citizens, States parties may not discriminate against any particular nationality."[144] Thornberry claims that "the general direction of the CERD approach has been to shrink progressively any lacuna in human rights protection represented by 1(2) and 1(3)." [145] The Committee's General Recommendation Thirty, adopted in 2004, certainly augments the same logic contained in General Recommendation Eleven and widens its guiding principle.[146] Echoing General Recommendation Eleven, Section I of General Recommendation Thirty provides that "Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality."[147] Section 4 of General Recommendation Thirty speaks directly to Article 1(3) under the subheading, "Access to citizenship."[148] Paragraph 13 requires states to ensure that "particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents." [149] Paragraph 14 "recognize[s] that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[150]

Our survey of concluding observations reveals that, since General Recommendation Thirty, the principles it sets out are frequently relied upon. However, the Committee tends to focus on gender-based discrimination,[151] the risk of statelessness or

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[144] Comm. on Elimination Racial Discrimination, General Recommendation Eleven, on Non-Citizens, ¶ 1, U.N. Doc. A/48/18 (1993).

[145] THORNBERRY, *supra* note 2, at 146.

[146] Comm. on Elimination Racial Discrimination, General Recommendation Thirty, on Discrimination Against Non-Citizens, ¶ 14, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005) [hereinafter General Recommendation Thirty] (noting that states parties who fail to grant citizenship on account of race or heritage violate their obligations under the Convention).

[147] *Id.* ¶ 1.

[148] *Id.* at 4.

[149] *Id.* ¶ 13.

[150] *Id.* ¶ 14.

[151] The Committee focused on these issues in relation to fifteen countries. *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Bahamas, U.N. Doc. CERD/C/64/CO/1 (Apr. 28, 2004); Comm. on Elimination of Racial Discrimination, Concluding Observations on Bahrain, U.N. Doc. CERD/C/BHR/CO/7, at 17 (Apr. 14, 2005); Comm. on Elimination

Racial Discrimination, 59th Sess., U.N. Doc. A/56/18, at 288 (2001) (regarding Egypt); Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/304/Add.98 (Apr. 19, 2000) (*but see* Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/7 (Oct. 19 2006) *and* Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/8-9 (Sept. 23, 2010)); Comm. on Elimination Racial Discrimination, Concluding Observations on Kyrgyzstan, U.N. Doc. CERD/C/KGZ/CO/8-10, at 15 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Lebanon, U.N. Doc. CERD/C/LBN/CO/18-22 (Oct. 5, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Madagascar, U.N. Doc. CERD/C/65/CO/4 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Mauritania, U.N. Doc. CERD/C/65/CO/5, at 18 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Mauritania, U.N. Doc. CERD/C/MRT/CO/8-14, at 19 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Morocco, U.N. Doc. CERD/C/MAR/CO/17-18, at 16 (Sept. 13, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Nigeria, U.N. Doc. CERD/C/NGA/CO/18, at 21 (Mar. 27, 2007); Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/1 (Oct. 19, 2006), Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/2-5, at 25 (June 6, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Qatar, U.N. Doc. CERD/C/QAT/CO/17-21 (Jan. 2, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Republic of Korea, U.N. Doc. CERD/C/KOR/CO/17-19 (Jan. 10, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Saudi Arabia, U.N. Doc. CERD/C/62/CO/8, at 14 (June 2, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Saudi Arabia, U.N. Doc. CERD/C/SAU/CO/4-9 (June 8, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Senegal, U.N. Doc. CERD/C/SEN/CO/16-18, at 19 (Oct. 24, 2012).

absence of measures to address the risk of statelessness,[152] and discrimination against non-citizens generally, [153] without

[152] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Azerbaijan, U.N. Doc. CERD/C/AZE/CO/7-9 (June 10, 2016); Comm. on Elimination Racial Discrimination, Concluding Observation on Cambodia, U.N. Doc. CERD/C/KHM/CO/14-17, at 5–7 (Dec. 12, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Cameroon, U.N. Doc. CERD/C/CMR/CO/19-21 (Sept. 26, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Czechia, U.N. Doc. CERD/C/CZE/CO/12-13 (Sept. 19, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, U.N. Doc. CERD/C/EST/CO/7, (Oct. 19, 2006); Comm. on Elimination Racial Discrimination, Concluding Observations on Georgia, U.N. Doc. CERD/C/GEO/CO/4-5 (Sept. 20, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Georgia, U.N. Doc. CERD/C/GEO/CO/6-8 (June 22, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Kazakhstan, U.N. Doc. CERD/C/KAZ/CO/6-7 (Mar. 14, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Kyrgyzstan, U.N. Doc. CERD/C/KGZ/CO/8-10 (May 30, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Oman, U.N. Doc. CERD/C/OMN/CO/2-5 (June 6, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on Qatar, U.N. Doc. CERD/C/QAT/CO/17-21, at 27 (Jan. 2, 2019); Comm. on Elimination Racial Discrimination, Concluding Observations on Slovenia, U.N. Doc. CERD/C/SVN/CO/6-7 (Sept. 20, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Sudan, U.N. Doc. CERD/C/SDN/CO/12-16, at 19 (June 12, 2015); Comm. on Elimination Racial Discrimination, Concluding Observations on Togo, U.N. Doc. CERD/C/TGO/CO/18-19 (Jan. 18, 2017).

[153] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Azerbaijan, U.N. Doc CERD/C/AZE/CO/4, at 10 (Apr. 14, 2005); Comm. on Elimination Racial Discrimination, Concluding Observations on Belarus, U.N. Doc. CERD/C/65/CO/2, at 11 (Dec. 10 2004); Comm. on Elimination Racial Discrimination, Concluding Observations on Belarus, U.N. Doc. CERD/C/BLR/CO/20-23 (Dec. 21, 2017); Comm. on Elimination Racial Discrimination, Concluding Observations on Belgium, U.N. Doc. CERD/C/BEL/CO/15 (Apr. 11, 2008); Comm. on Elimination Racial Discrimination, Concluding Observations on Belgium, U.N. Doc. CERD/C/BEL/CO/16-19 (Mar. 14, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on Botswana, U.N. Doc. CERD/C/BWA/CO/16, at 20 (Apr. 4, 2006); Comm. on Elimination Racial Discrimination, Concluding Observations on Burkina Faso, U.N. Doc. CERD/C/BFA/CO/12-19, at 10 (Sept. 23, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on Chile, U.N. Doc. CERD/C/CHL/CO/19-21 (Sept. 23, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on Congo (Democratic Republic of), U.N. Doc. CERD/C/COG/CO/9 (Mar. 23, 2009); Comm. on Elimination Racial Discrimination, Concluding Observations on Cuba, U.N. Doc. CERD/C/CUB/CO/14-18 (Apr. 8, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Japan, U.N. Doc. CERD/C/JPN/CO/10-11 (Sept. 26, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Kazakhstan, U.N. Doc.

bringing consistent attention to the existence of racially discriminatory nationality laws and practices. To be sure, the Committee has sometimes homed in directly on discriminatory nationality laws, although it is perhaps worth noting that when it does make reference directly to the Convention it tends to cite Article 5 without mention of Article 1(3).[154]

General Recommendation Thirty appears to draw a distinction between *denial* of nationality and *deprivation/withdrawal* of nationality. Specifically, deprivation of nationality on racially discriminatory grounds is described as a *breach*,[155] whereas in relation to denial, states are urged to "ensure" non-discrimination against "particular groups," and "pay due attention to" potential discrimination.[156]

CERD/C/65/CO/3 (Dec. 10, 2004); Comm. on Elimination Racial Discrimination, 62nd Sess., U.N. Doc. A/62/18, at 75 (2007) (regarding Kyrgyzstan); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016); Comm. on Elimination Racial Discrimination, Concluding Observations on (North) Macedonia, U.N. Doc. CERD/C/MKD/CO/8-10 (Sept. 21, 2015); Comm. on Elimination Racial Discrimination, Concluding Observations on Peru, U.N. Doc. CERD/C/PER/CO/22-23 (May 23, 2018); Comm. on Elimination Racial Discrimination, Concluding Observations on Poland, U.N. Doc. CERD/C/POL/CO/20-21(Mar. 19, 2014); Comm. on Elimination Racial Discrimination, Concluding Observations on United States of America, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

[154] *See, e.g.*, Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011); Comm. on Elimination Racial Discrimination, Concluding Observations on Maldives, U.N. Doc. CERD/C/MDV/CO/5-12 (Sept. 14, 2011). *But see* Comm. on Elimination Racial Discrimination, Concluding Observations on Côte d'Ivoire, U.N. Doc. CERD/C/62/CO/1 (June 3, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013); Comm. on Elimination Racial Discrimination, Concluding Observations on France, U.N. Doc. CERD/C/FRA/CO/17-19 (Sept. 23, 2010); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016).

[155] General Recommendation Thirty, *supra* note 146, ¶ 14.

[156] *Id.* ¶ 13 (This is also replicated in Comm. on Elimination Racial Discrimination, General Recommendation Thirty-Four, on Racial Discrimination against People of African Descent, ¶¶ 47–49, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011)). *See also* Michiel Hoornick, The Right to Nationality Under the International Convention of All Forms of Racial Discrimination: An Assessment of its Interpretation by the Committee on the Elimination of Racial Discrimination, 27 (Aug. 6, 2018) (L.L.M. Thesis, Tilburg University) (on file with University Library, Tilburg University).

Our analysis of concluding observations revealed that with respect to *denial* of citizenship,[157] the Committee tends to use similar language to that seen in General Recommendation Thirty, including "draws attention to," "is concerned," and "recommends." For example, with respect to reports that government officials in Nepal were seeking to discourage Dalits from applying for citizenship and that other groups had been denied citizenship by descent, the Committee recommended that Nepal ensure that "the laws, regulations and practices contain procedures for issuing citizenship certificates without distinction as to caste." [158] In 2011, the Committee noted that it was "particularly concerned" with the discriminatory provisions in the Maldivian Constitution that "all Maldivians should be Muslim, thus excluding non-Muslims from obtaining citizenship . . . and affecting mainly people of a different national or ethnic origin."[159] Here, the Committee referred only to Article 5.[160] The Committee's concluding observations on Cyprus in 2013 noted with concern that naturalization requests from persons of Southeast Asian origin had been denied, despite meeting requirements for naturalization.[161] The Committee in that case recommended that Cyprus "respect the right to nationality without discrimination." [162] In 2001, prior to its issuance of General Recommendation Thirty, the Committee in its observations on Latvia noted the fact that "only such persons who were citizens of Latvia before 1940 and their descendants have automatically been granted citizenship," while other persons—more than twenty-five percent of the resident population—had to apply for citizenship and were therefore in a disadvantaged position.[163] The Committee also noted the existence of persons

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[157] Our analysis revealed that denial of nationality on the basis of race/ethnic origin was considered in relation to seventeen countries between 1995 and December 2019 (being Bahrain, Cambodia, Croatia, Cyprus, Czech Republic, Estonia, Iraq, Germany, Kenya, Maldives, Nepal, Qatar, Republic of Korea, Switzerland, Syrian Arab Republic, Tajikistan, and Togo).

[158] Comm. on Elimination Racial Discrimination, Concluding Observations on Nepal, ¶ 34, U.N. Doc. CERD/C/NPL/CO/17-23 (May 29, 2018).

[159] Comm. on Elimination Racial Discrimination, Concluding Observations on Maldives, ¶ 10, U.N. Doc. CERD/C/MDV/CO/5-12 (Sept. 14, 2011).

[160] *Id.*

[161] Comm. on Elimination Racial Discrimination, Concluding Observations on Cyprus, ¶ 18, U.N. Doc. CERD/C/CYP/CO/17-22 (Sept. 23, 2013).

[162] *Id.*

[163] Comm. on Elimination Racial Discrimination, Concluding Observations on Latvia, ¶ 12, U.N. Doc. CERD/C/304/Add.79 (Apr. 12, 2001). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on

who did not qualify for citizenship under the then current Citizenship law and who therefore "may not be protected against racial discrimination in their exercise of rights under Articles 5(d)(i) and (ii) and 5(e) of the Convention."[164]

The Committee has in some instances made more focused recommendations in relation to discriminatory denial of nationality, pointing to particular reform measures that are "urged" or "requested." For example, in relation to Kenya, the Committee recommended in 2011 that Kenya make "necessary amendments to its legislation and administrative procedures in order to implement the new constitutional provisions on citizenship."[165] In relation to Jordan's gendered nationality laws, the Committee recommended in 2012 that the state party "review and amend the Jordanian Nationality Act (Law No. 7 of 1954) in order to ensure that a Jordanian mother married to a non-Jordanian man has the right to confer her nationality to her children equally and without discrimination."[166] And again in 2017, drawing more explicitly on General Recommendation Thirty, the Committee requested that the state party "amend the Jordanian Nationality Act . . . to eliminate provisions that discriminate against non-Arab spouses of Jordanian citizens."[167]

When the Committee utilizes stronger or more forceful language it tends to be in relation to *deprivation or withdrawal* of citizenship.[168] In 2007, for example, the Committee stressed with respect to Turkmenistan that "deprivation of citizenship on the basis of national or ethnic origin *is a breach of the obligation to ensure non-discriminatory enjoyment of the right to nationality*," and "urge[d] the State party to refrain from

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Syria, ¶ 10, U.N. Doc. CERD/C/304/Add.70 (July 7, 1999) ("The Committee is concerned about Syrian-born Kurds, who are considered either as foreigners or as maktoumeen (unregistered) by the Syrian authorities and who face administrative and practical difficulties in acquiring Syrian nationality, although they have no other nationality by birth.").

[164] *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Iraq, ¶ 17, U.N. Doc. CERD/C/IRQ/CO/15-21 (Sept. 22, 2014) (using slightly stronger language).

[165] Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, ¶ 21, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011).

[166] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 11, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012).

[167] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 23, U.N. Doc. CERD/C/JOR/CO/18-20 (Dec. 26, 2017).

[168] *See* Hoornick, *supra* note 156. Our analysis revealed that the Committee discussed deprivation of nationality in relation to ten countries within the period under examination (being Ethiopia, Iraq, Jordan, Kenya, Kyrgyzstan, Oman, Palestine, Qatar, Sudan, and Turkmenistan).

adopting any policy that directly or indirectly leads to such deprivation."[169] This language of breach of obligation is striking, as it is considerably stronger than the weaker language of "concern" more commonly invoked in relation to cases of denial of citizenship. In other cases of deprivation, while the language of breach or violation is not invoked, there is nonetheless a more forceful approach. For example, in 2012 the Committee noted Jordan's "withdrawal of citizenship from persons originating from the West Bank of the Occupied Palestinian Territory," and "urge[d] the State party to discontinue the practice of withdrawing nationality from persons originating from the Occupied Palestinian Territory."[170] It has further called for remedial action following unlawful deprivation in the form of reinstatement of nationality in the context of Jordan[171] and Iraq.[172]

The difficulty with this differential approach in relation to denial of nationality on the one hand and deprivation of nationality on the other is that its rationale is not explained in either General Recommendation Thirty or any of the Committee's concluding observations. Such a neat dichotomy is not evident in the text of the treaty; it is, after all, not clear why a denial of nationality on racial grounds is any less a violation of Article 5(d)(iii)'s right to nationality on non-discriminatory grounds than an active withdrawal of nationality.

In only a few concluding observations has Article 1(3) explicitly been mentioned,[173] although, notably, it does not

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[169] Comm. on Elimination Racial Discrimination, Concluding Observations on Turkmenistan, ¶16, U.N. Doc. CERD/C/TKM/CO/5* (Mar. 27, 2007) (emphasis added). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Ethiopia, ¶ 23, U.N. Doc. CERD/C/ETH/CO/15 (June 20, 2007) (noting with concern the situation of children of parents of Eritrean origin, who were deprived of their Ethiopian citizenship in the period 1998–2000); Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012); Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, U.N. Doc. CERD/C/JOR/CO/18-20 (Dec. 26, 2017); Comm. on Elimination Racial Discrimination, Concluding Observations on Kenya, U.N. Doc. CERD/C/KEN/CO/1-4 (Sept. 14, 2011).

[170] Comm. on Elimination Racial Discrimination, Concluding Observations on Jordan, ¶ 12, U.N. Doc. CERD/C/JOR/CO/13-17 (Apr. 4, 2012).

[171] *Id.*

[172] Comm. on Elimination Racial Discrimination, Concluding Observations on Iraq, ¶ 17, U.N. Doc. CERD/C/IRQ/CO/15-21 (Sept. 22, 2014).

[173] Our analysis identified that Article 1(3) was mentioned in relation to six countries (being Côte d'Ivoire, Dominican Republic, France, Iraq, Namibia,

generally appear to have been relied upon by states parties as a justification or defense of discriminatory nationality laws. Rather it has been the Committee that has occasionally identified a potential conflict with Article 1(3). Yet, there is no in-depth analysis in these reports of the scope of Article 1(3); rather Article 1(3) is most commonly cited without discussion. For instance, in relation to the discrimination against Dominicans of Haitian origin mentioned above, the Committee observed that the various practices "all lead to a situation of statelessness (art. 1(3) and art. 5 (d) (iii))."[174] However, in two instances, the Committee's relatively more detailed remarks reveal that its focus is indeed on instances where it appears that a state's discriminatory nationality law or implementation thereof singles out a *particular* nationality or ethnic group. For example, in relation to France, the Committee recommended in 2010 that the state "ensure that, in conformity with article 1, paragraph 3, of the Convention, any measures taken in this area should not lead to the stigmatization *of any particular nationality*."[175] In relation to Iraq, the Committee noted that it asked the state party "whether the special provision which referred specifically to Arab citizens of other countries met the requirements of article 1, paragraph 3, of the Convention."[176]

While the Committee's increasing willingness to examine and critique nationality laws that may have a discriminatory object or effect is laudable, it is difficult to discern the interpretive methodology applied by the Committee in arriving at its interpretation of Article 1(3).[177] Of course, as an exception

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and Sierra Leone)—a total of seven reports (twice regarding Sierra Leone). *See* sources cited *infra* notes 174–176.

[174] Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, ¶ 19, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Cote d'Ivoire, ¶ 11, U.N. Doc. CERD/C/62/CO/1 (June 3, 2003); Comm. on Elimination Racial Discrimination, Concluding Observations on Namibia, ¶ 28, U.N. Doc. CERD/C/NAM/CO/13-15 (June 10, 2016); Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Forty-Sixth Session, ¶ 280, U.N. Doc. A/46/18 (Feb. 27, 1992) (regarding Sierra Leone); Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Fiftieth Session, ¶ 588, U.N. Doc. A/50/18 (Sept. 22, 1995) (regarding Sierra Leone).

[175] Comm. on Elimination Racial Discrimination, Concluding Observations on France, ¶ 11, U.N. Doc. CERD/C/FRA/CO/17-19 (Sept. 23, 2010) (emphasis added).

[176] Comm. on Elimination Racial Discrimination, Rep. on the Work of Its Forty-Second Session, ¶ 303, U.N. Doc. A/42/18 (Aug. 7, 1987) (regarding Iraq).

[177] *But see* THORNBERRY, *supra* note 2, at 158.

to Article 1(1), Article 1(3) should be narrowly construed.[178] But in general, no clear justification has been put by the Committee for essentially having read Article 1(3) out of the Convention in its General Recommendation Thirty, at least in the context of deprivation of nationality. To the contrary, the instances cited above where Article 1(3) has been considered by the Committee suggest an ongoing role for the exception, confusing rather than illuminating the Committee's vision of the relationship between Article 1(3) and Article 5(d)(iii) as articulated in General Recommendation Thirty.

Our comprehensive analysis of the Committee's approach to racial discrimination in nationality laws points to two key ongoing problems. First, the Committee has continued to use relatively soft language in response [179] to states parties' invocation of state sovereignty to justify discriminatory nationality laws. [180] Indeed, in one of the few individual communications directly to challenge the implementation of nationality laws, the state party, Switzerland, relied explicitly on

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[178] Contrary to THORNBERRY, *supra* note 2, it might be argued that the rule of restrictive interpretation ought to apply here, that is, in favor of the freedom of state sovereignty, but as Article 1(3) relates to a State's negative obligation (to refrain from discriminating against a particular nationality), deference to state sovereignty is not necessarily warranted as a matter of interpretation. For discussion of restrictive interpretation, see, for example, H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48 (1949); OPPENHEIM'S INTERNATIONAL LAW 1279 (Robert Jennings & Arthur Watts eds., 2008); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 280–84 (2007). *See also* BROWNLIE, *supra* note 63, at 635; ARNOLD MCNAIR, THE LAW OF TREATIES 765–66 (1961) (noting that the rule "is believed to be now of declining importance"); Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 26 (Sept. 10).

[179] *See* Comm. on Elimination Racial Discrimination, Concluding Observations on Kuwait, ¶ 31, U.N. Doc. CERD/C/KWT/CO/21-24 (Sept. 19, 2017) ("While noting the State party's position regarding the sovereign nature of nationality issues, the Committee remains concerned that the Nationality Act does not allow Kuwaiti women who marry foreigners to pass on their nationality to their children and spouses on an equal footing with Kuwaiti men.").

[180] Comm. on Elimination Racial Discrimination, Concluding Observations on Kuwait: Addendum, ¶ 2, U.N. Doc. CERD/C/KWT/CO/21-24/Add.1. (Nov. 12, 2018) ("It should be emphasized at the outset that the granting of nationality is a sovereign right of the State, and that cases are assessed in the light of the State's fundamental interests."). *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Dominican Republic, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013). Estonia has put forward the reservation of "cultural heritage" as a justification for discriminatory nationality laws. Comm. on Elimination Racial Discrimination, Concluding Observations on Estonia, ¶ 15, U.N. Doc. CERD/C/EST/CO/7 (Oct. 19 2006).

Article 1(3) in its argument that the claim was inadmissible.[181] In finding the claim to be admissible (although dismissing it on the merits), the Committee did not take the opportunity to provide a robust explanation of the relationship between Article 1(3) and Article 5(d)(iii), but rather relied once again on General Recommendation Thirty.[182] A strong interpretive framework for explaining its application of General Recommendation Thirty might empower the Committee to respond more forcefully to such invocations. The absence of a principled framework for explaining the limited reach of state sovereignty in matters of nationality simultaneously empowers states to continue relying on such claims, and threatens to weaken state engagement with the process of review. Second, the Committee still does not routinely raise matters of nationality, even in obvious cases of discrimination.[183] Indeed in some instances, other UN treaty bodies have been more active on the topic of racial discrimination in nationality laws than the very treaty body vested with core responsibility in matters of racial discrimination. For example, the Committee did not comment on Liberia's nationality laws in its 2001 review,[184] whereas the Committee on the Rights of the Child commented on Liberia's discriminatory nationality laws in both its 2004 and 2012 Concluding Observations.[185] In 2012, for example, it noted with regret that:

> [D]espite its previous recommendation, the granting of citizenship to children born in the State party remains restricted on the basis of colour or racial origin according to the provisions

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[181] Pjetri v. Switzerland, Communication 53/2013, Opinion, Comm. on Elimination Racial Discrimination, ¶ 4.2, U.N. Doc. CERD/C/91/D/53/2013 (Jan. 23, 2017).

[182] *Id.* ¶ 6.2.

[183] Our analysis reveals that there was no discussion of nationality laws in the reviews of sixty-one countries (being Albania, Argentina, Austria, Bangladesh, Barbados, Belize, Bolivia, Bulgaria, Burundi, Cabo Verde, Canada, Chad, China, Colombia, Djibouti, Ecuador, Fiji, Gabon, Gambia, Ghana, Guatemala, Guinea, Guyana, Haiti, Holy See, Hungary, India, Iran, Ireland, Jamaica, Lao People's Democratic Republic, Lesotho, Liberia, Mali, Malta, Mauritius, Mexico, Mozambique, Nicaragua, Niger, Pakistan, Panama, Papua New Guinea, Paraguay, Philippines, Republic of Moldova, Romania, Saint Vincent and the Grenadines, Seychelles, Slovakia, Solomon Islands, South Africa, Spain, Tonga, Trinidad and Tobago, Turkey, Uganda, Uruguay, Venezuela, Yugoslavia (Former Republic of), and Zambia).

[184] Hoornick, *supra* note 156, at 27.

[185] *See* Comm. on Rts. Child, Concluding Observations on Liberia, ¶ 32, U.N. Doc. CRC/C/15/Add.236 (July 1, 2004); Comm. on Rts. Child, Concluding Observation on Liberia, ¶ 42, U.N. Doc. CRC/C/LBR/CO/2-4 (Dec. 13, 2012).

> contained in article 27 of the Constitution and the Alien and the Nationalization Law, which are contrary to article 2 of the [CRC] Convention.[186]

The following section argues that *jus cogens* and anti-fragmentation (and the interplay between the two) as interpretive principles are appropriate tools to address this interpretive gap and provide the framework needed to more squarely address the fundamental issue of racism in nationality laws.

V. JUS COGENS AS AN INTERPRETIVE PRINCIPLE IN THE CONTEXT OF RACIAL DISCRIMINATION AND NATIONALITY PRACTICE

While the *jus cogens* status of the prohibition on racial discrimination in the context of (or as it extends to matters of) nationality has received considerable support, it is often asserted without critical reflection. Writing in 1978, Paul Weis commented that the prohibition of discriminatory denationalization—particularly acts of collective denationalization—may be regarded as a general principle of international law, and "this certainly applies to discrimination on the basis of race which may be considered as contravening a peremptory norm of international law."[187] Similarly, Laura van Waas writes that the *jus cogens* prohibition "restricts the freedom of states to legislate on nationality matters by demanding that such regulations must not differentiate between individuals on the basis of [race] either in purpose or in effect."[188] According to van Waas, the prohibition covers laws that provide for both "access to, [and] withdrawal of, nationality" through "delineating the scope of" such laws,[189] and adds that the prohibition of racial discrimination "has joined the ranks of *jus cogens*."[190] Spiro likewise contends that "the prohibition on race discrimination has since arguably evolved into *a jus cogens* norm—that is, a norm from which no derogation is permitted,"[191] and James A. Goldston notes that "[t]he prohibition against racial

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[186] Comm. on Rts. Child, Concluding Observation on Liberia, ¶ 41 U.N. Doc. CRC/C/LBR/CO/2-4 (Dec. 13, 2012).

[187] WEIS, *supra* note 64, at 125.

[188] VAN WAAS, *supra* note 74, at 103.

[189] *Id.*

[190] *Id.* at 103, 158 n.39 (citing ICERD, *supra* note 11, art. 5). *See also* General Recommendation Thirty, *supra* note 146.

[191] Spiro, *supra* note 3, at 716 n.144.

discrimination, contained in all major international and regional human rights instruments, is by now a well-settled rule of customary international law that has become a *jus cogens*, or peremptory, norm."[192] While certainly an important contribution to the discourse around the prohibition of racial discrimination in the context of nationality, observations about the *jus cogens* status of racial non-discrimination, in the absence of principled analysis, are limited in their ability to advance the robustness of the legal framework.

A. Impact of Conflict with a *Jus Cogens* Norm

The "starting point for any study of *jus cogens*" is the VCLT.[193] Article 53 of the Convention states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[194]

Not only is the content of *jus cogens* a fiercely contested issue (which will be revisited in depth below), but the timing of the emergence of a *jus cogens* norm can also be contentious. In order to avoid complicated arguments as to whether a particular *jus cogens* norm had indeed emerged at the time a treaty was concluded, Article 64 of the VCLT provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." [195] Accordingly, once a *jus cogens* norm is identified, any existing treaty may be assessed for compliance

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[192] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 328 (2006).

[193] Int'l L. Comm'n, Rep. on the Work of Its Sixty-Sixth Session, Supplement No. 10, U.N. Doc. A/69/10, at 277 (Aug. 8, 2014) *quoted in* Dire Tladi (Special Rapporteur), *Second Report on* Jus Cogens, ¶ 33, U.N. Doc. A/CN.4/706 (Mar. 16, 2017). *See also* Int'l L. Comm'n, *Fragmentation of International Law, Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 375, U.N. Doc. A/CN.4/L.682, (Apr. 13, 2006) [hereinafter Int'l L. Comm'n, *Fragmentation of International Law*].

[194] VCLT, *supra* note 101, art. 53.

[195] *Id.* art. 64.

with the norm, regardless of when precisely the *jus cogens* norm emerged.

However, this raises a challenging issue, namely, the consequences and effects that flow from the presence of conflict with *jus cogens* norms. The characterization of the effects of *jus cogens* has been described as "the greater prize than identifying the norm itself."[196] As Dire Tladi, International Law Commission (Commission) Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), noted in a 2017 report, invalidity of a treaty is often considered "the primary, or even sole, consequence of the *jus cogens* status of a norm."[197] At first glance, Articles 53 and 64 of VCLT present a problem for the validity of ICERD in light of Article 1(3) and its potential inconsistency with the *jus cogens* prohibition against racial discrimination.[198]

However, there is an alternative to invaliding a treaty that conflicts with a *jus cogens* norm. In the 2017 report, Special Rapporteur Tladi explains that the requirement to resort to the "draconian" outcome of treaty invalidity[199] when a conflict with *jus cogens* norms seemingly arises should—and indeed generally *can*—be avoided by reading treaty provisions in light of *jus cogens* norms. Due to the "fundamental principle" that "treaties are binding on the parties and must be performed in good faith,"[200] known as *pacta sunt servanda*, the validity of a treaty, and not its invalidity, should be strived for when determining if

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[196] DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW 15 (2017), *quoted in* Dire Tladi (Special Rapporteur), *Third Report on Peremptory Norms of General International Law (*Jus Cogens*)*, ¶ 20, U.N. Doc. A/CN.4/714 (Feb. 12, 2018) [hereinafter Special Rapporteur, *Third Report on* Jus Cogens].

[197] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 30. *See also* Kyoj Kawasaki, *A Brief Note on the Legal Effects of* Jus Cogens *in International Law*, 34 HITOTSUBASHI J. L. & POL. 27 (2006); HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW (2014).

[198] *See* VCLT, *supra* note 101, art. 44(5) (stating that one key differentiation is that severability of the relevant provision is not possible for cases falling under Article 53). *See generally* Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 30–54.

[199] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

[200] *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 221, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

such a conflict arises.[201] Whether or not a treaty conflicts with a peremptory norm "can only be determined after [establishing] the meaning of the treaty," which, in turn, can only be established through the application of Articles 31 and 32 of VCLT.[202] The Commission envisages that *jus cogens* norms are treated as "strong interpretative principles"[203] to be invoked during the process of interpretation.

As well as calling attention to the requirement that treaties or treaty provisions "be interpreted in good faith," in keeping with the ordinary meaning of the text, and "in their context and in light of the object and purpose of the treaty," a 2006 report by the Commission's Study Group on fragmentation emphasizes Article 31(3)(c)—which is often "taken to express . . . the principle of systemic integration."[204] Article 31(3)(c) provides that the interpreter "shall take into account [a]ny relevant rules of international law applicable in the relations between the parties."[205] According to the Commission's Study Group, treaties must be interpreted against the background of their normative environment and in keeping with these norms.[206] As the Commission's Study Group explained, "[t]his points to the need to carry out interpretation so as to see the rules in view of some comprehensible and coherent objective," and, crucially, to do so in such a way so as to give priority to "concerns that are more important at the cost of less important objectives."[207] These background rules, according to the 2017 report by the Commission's Special Rapporteur Tladi, include *jus cogens* norms.[208] As Cezary Mik explains, "[t]his means that in cases of normative conflicts with peremptory norms that can be resolved through interpretation, one has to rely on such interpretative rules that will support a *jus cogens*-friendly interpretation of

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[201] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

[202] *Id.* ¶ 56.

[203] Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, Supplement No. 10, U.N. Doc. A/56/10, at 85 (2001) [hereinafter Int'l L. Comm'n, Fifty-Third Session].

[204] Int'l L. Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶¶ 412–424 (internal quotations omitted) (internal citations omitted).

[205] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59 (internal quotations omitted).

[206] Int'l L. Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶ 419.

[207] *Id.*

[208] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶¶ 55–59.

dispositive norms." [209] Likewise, Special Rapporteur Tladi summarizes this section of his 2017 report with the following words: "a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)."[210]

The question of whether a *jus cogens* norm is to be taken into account in the process of treaty interpretation turns on "the applicability of such a rule in a specific case."[211] This requires a two-fold inquiry. First, what is the content of the *jus cogens* norm (in this case, the norm of racial non-discrimination) and how do matters of nationality fit within this scope? Second, what does this mean for a principled interpretation of Article 1(3)?

B. Content of the *Jus Cogens* Norm of Racial Non-Discrimination

Turning first to the content or identification of the norm itself, while it is the case that the prohibition on racial discrimination is broadly recognized as a *jus cogens* norm of international law,[212] the precise content of racial discrimination is often left unaddressed, with pronouncements to the effect that

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[209] Cezary Mik, Jus Cogens *in Contemporary International Law*, 33 POL. Y.B. INT'L L. 27, 73 (2013).

[210] Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 67–68 (internal quotations omitted). *See also* Int'l L. Comm'n, Peremptory Norms of General International Law (*Jus Cogens*): Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, at 5, U.N. Doc. A/CN.4/L.936, (May 29, 2019) (Draft Conclusion 20 adopts a rule to interpret other rules of international law consistently with *jus cogens* norms as far as possible).

[211] Mik, *supra* note 209, at 74.

[212] *See* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 10 (2d ed. 2010); ALEXANDER ORAKHELASHVILI, IDENTIFICATION OF PEREMPTORY NORMS IN INTERNATIONAL LAW 54 (2006); Michael Byers, *Conceptualising the Relationship Between* Jus Cogens *and* Erga Omnes *Rules*, 66 NORDIC J. INT'L L. 211, 219 (1997); NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 24 (1991) [hereinafter, LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW]; Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239, 240 (2005); THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION 408 (1998). Int'l L. Comm'n, Fifty-Third Session, *supra* note 203, at 85 (listing the problem of "racial discrimination" as a peremptory norm "clearly accepted and recognized" by international and national tribunals); Int'l Law Comm'n, *Fragmentation of International Law*, *supra* note 193, ¶ 374; Dire Tladi (Special Rapporteur), *Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*)*, ¶¶ 56–61, 91–135, U.N. Doc. A/CN.4/727 (Jan. 31, 2019) [hereinafter Special Rapporteur, *Fourth Report on* Jus Cogens]; Comm. on Elimination Racial Discrimination, Rep. on the Sixtieth Session and Sixty-First Session, Supplement at 107, U.N. Doc. A/57/18 (Nov. 1, 2002).

racial discrimination is a *jus cogens* norm often unaccompanied by any analysis of what that exactly means.[213]

The *Restatement (Third) of the Foreign Relations Law of the United States* defines *jus cogens* norms to include, among others, the prohibitions against genocide; slavery or slave trade; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and "a consistent pattern of gross violations of internationally recognized human rights."[214] Scholars tend to cite this influential statement, together with a handful of ICJ and regional decisions, to establish the *jus cogens* status of racial discrimination (or systemic racial discrimination). While majority opinions of the ICJ have dealt only intermittently and sparingly with *jus cogens* norms directly, [215] the majority judgment of the court in the seminal Barcelona Traction[216] case has formed the foundation for many scholars' understanding of *jus cogens* norms.[217] Drawing a distinction between obligations owed by a state vis-a-vis another state and those owed to the international community as a whole and supporting a public order theory of *jus cogens*,[218] the court in Barcelona Traction noted that due to the "importance of the rights involved," obligations owed to the community as a whole are seen to be obligations *erga omnes*, meaning where "all States can be held to have a legal interest in their protection."[219] The court listed among these obligations the protection from and prohibition against racial discrimination. [220] In the ICJ's 1971 advisory

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[213] *See* sources cited *supra* note 212.

[214] Restatement (Third) of the Foreign Relations Law of the United States § 702 (Am. L. Inst. 1987). *See also id.* § 102; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331 (2009).

[215] Dire Tladi (Special Rapporteur), *First Report on* Jus Cogens, ¶¶ 44–47, U.N. Doc. A/CN.4/693 (Mar. 8, 2016) (noting that there have been eleven references to *jus cogens* norms in majority judgments by the ICJ, all of which "have assumed (or at least appear to assume) the existence of *jus cogens* as part of modern international law.").

[216] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5) [hereinafter Barcelona Traction].

[217] *See* THOMAS WEATHERALL, *JUS COGENS*: INTERNATIONAL LAW AND SOCIAL CONTRACT 240 (2015).

[218] Criddle & Fox-Decent, *supra* note 214, at 344.

[219] Barcelona Traction, *supra* note 216, ¶ 33. While obligations *erga omnes* and *jus cogens* are different concepts, Special Rapporteur, *Third Report on* Jus Cogens, *supra* note 196, ¶ 111, contends that the two are interconnected in that "peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States."

[220] Barcelona Traction, *supra* note 216, ¶ 34. *See also id.* at 289, 304 (separate opinion of Ammoun, J.) ("[T]he principle of equality and that of non-

opinion on Namibia, the court additionally noted that "[t]o establish . . . and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[221] In a separate opinion, Judge Ammoun reiterated the General Assembly position condemning "policies of apartheid and racial discrimination . . . as constituting a crime against humanity."[222]

A number of domestic and regional courts have upheld the *jus cogens* status of racial non-discrimination. Supporting a notion of *jus cogens* as natural law, the Inter-American Court of Human Rights in their advisory opinion on Judicial Conditions and the Rights of Undocumented Migrants stated:

> [T]his Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.[223]

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discrimination on racial grounds which follow therefrom, both of which principles, like the right of self-determination, are imperative rules of law.") (The court's reference to these norms was made in *obiter*.). *See* Vera Gowland-Debbas, *Judicial Insights into the Fundamental Values and Interests of the International Community*, *in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 327, 333 (A.S. Muller, D. Raič, & J.M. Thuránszky eds., 1997).

[221] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21).

[222] *Id.* at 79, 81 (separate opinion of Ammoun, J.) (citing G.A. Res. 2074 (XX), ¶ 4 (Dec. 17, 1965)). *See also* Educational, Scientific, and Cultural Organization Res. 3/1.1/2, Declaration on Race and Racial Prejudice (Nov. 20, 1978) (declaring that as a most serious violation of the complete self-fulfillment of human being, apartheid "is a crime against humanity." A distinction is made in Article 4(3) between apartheid and "other policies and practices or racial segregation and discrimination" which are not seen to amount to crimes against humanity but "crimes against the conscience and dignity of mankind.").

[223] Judicial Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). *See also* MYRES MCDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 3–6 (1980).

The court maintained that "no legal act" that conflicts with the principle of non-discrimination is acceptable,[224] and further characterized the *jus cogens* status of non-discrimination as deriving "directly from the oneness of the human family and . . . linked to the essential dignity of the individual."[225] Importantly, the court affirmed the status of the prohibition on discrimination as *jus cogens* in the Case of Expelled Dominicans and Haitians v. Dominican Republic.[226] Specifically in the context of the right to nationality, the court stated that the prohibition:

> [R]equires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights.[227]

Numerous preeminent scholars regard the prohibition on racial discrimination as possessing the status of a *jus cogens* norm. As noted above, in most instances the listing of racial discrimination has not been accompanied with any analysis of the content of this prohibition. In the third edition of the influential *Principles of Public International Law*, Ian Brownlie states that the principle of racial non-discrimination is one of the "least controversial" examples of a peremptory norm, together with the prohibition of the use of force, the law of genocide, crimes against humanity, and the rules prohibiting the slave trade and piracy.[228] Similarly, Schwelb notes that "if there is a subject

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[224] Judicial Condition and the Rights of Undocumented Migrants, *supra* note 223, ¶ 101.

[225] *Id.* ¶ 87.

[226] Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 264 (Aug. 28, 2014).

[227] *Id.* Domestic courts have reiterated the status of the prohibition on racial discrimination. *See, e.g.*, R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2004] UKHL 55, [46] ("State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race."). *See also* Comm. of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (including racial discrimination as one of the norms to "arguably . . . meet the stringent criteria for *jus cogens*.").

[228] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510–13 (3d ed. 1980) (noting also that ICERD itself could be added to the existing/suggested body of *jus cogens*). Other examples of *jus cogens* norms include rules prohibiting aggressive war, the law of genocide, trade in slaves,

matter in present-day international law which appears to be a successful candidate for regulation by peremptory norms, it is certainly the prohibition of racial discrimination."[229] Referring to both Schwelb and Brownlie, Warwick McKean reasoned in 1983 that if genocide and slavery, as "extreme forms" of the denial of the principle of equality are considered to possess a *jus cogens* character, then "it is not unreasonable to suppose that other examples of the denial of the principle [of equality] may be contrary to the doctrine" and that non-discrimination "is a strong candidate for inclusion under this heading."[230] Other scholars have framed the *jus cogens* norm as relating to *severe* or *systemic* forms of racial discrimination. Lauri Hannikainen writes that the *jus cogens* prohibition applies to "severe" forms of discrimination, adding that the prohibition may further extend to "substantial" acts of discrimination which affect the non-

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piracy, other crimes against humanity, and the principles of self-determination. *Id.* at 417.

[229] Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 956 (1976).

[230] WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 277–84 (1983). *See also* AUSTIN, *supra* note 212, at 10 ("There is no agreement on the criteria for identifying which principles of general international law have a peremptory character: everything depends on the particular nature of the subject matter. Perhaps the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter) and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity."); LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 212, at 24, 71 (noting that racial discrimination at least is already considered a *jus cogens*, namely a peremptory rule of international law from which no derogation is possible, a rule that can only be modified by a new rule of the same status. "However, as stated by the UN Secretary General in a report on the implementation of the program of action for the Second Decade to Combat Racism and Racial Discrimination, the Convention is endowed 'with strong moral force of virtually universality rooted in the overriding principle (*jus cogens*) that racial discrimination must be eliminated everywhere.'"); VAN DERVORT, *supra* note 212, at 408 (stating that the concept of *jus cogens* is still subject to some controversy but would generally include the prohibition of the use or threat of force and aggression and the prevention and repression of genocide, piracy, slave trade, racial discrimination, terrorism or the taking of hostages, and torture, even though the evolving nature of these principles does not allow a conclusive definition); JOHN TOBIN, THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 42 (2019) (citing LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 249 (1983)).

derogable rights listed in Article 4 of the ICCPR and Article 27 of the American Convention on Human Rights.[231]

In January 2019, the Commission published the most recent report by Special Rapporteur Tladi on peremptory norms of general international law. While the report includes the prohibition of apartheid and racial discrimination in its illustrative list of *jus cogens* norms,[232] the report stresses that the content of the norm is "a *composite* act" made up of "the prohibition of apartheid with racial discrimination as an integral part of that."[233] It is important to note, however, that almost all of the sources which the report draws upon to establish its definition identify racial discrimination as *a separate and distinct jus cogens* norm, with the prohibition on racial discrimination generally defined in terms of severe or systematic forms of racial discrimination.[234]

As part of his line of reasoning, the Rapporteur refers to the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)[235] and the definition of apartheid contained therein as a potential indicator of the scope of the content of this peremptory norm.[236] Crucially, Article 2 of the Apartheid Convention provides that the term "the crime of apartheid," includes, inter alia, at Article 2(c):

> [A]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial

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[231] LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 340–42 (1988).

[232] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 60.

[233] *Id.* ¶ 91.

[234] *See, e.g.*, JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 156–58 (1987); Alain Pellet, *Comments in Response to Christine Chinkin and in Defense of* Jus Cogens *as the Best Bastion Against the Excesses of Fragmentation*, 17 FINNISH Y.B. INT'L L. 83, 85 (2006); Barcelona Traction, *supra* note 216.

[235] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

[236] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 91.

> group or groups basic human rights and freedoms, including the right to work . . . the right to education, the right to leave and to return to their country, *the right to a nationality*, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.[237]

Under the Apartheid Convention, the key elements required to meet the definition of "the crime of apartheid" in Article 2(c) appear to be that: first, there is a denial of members of a racial group or groups of a basic human right or freedom (including, among others listed, the right to nationality); second, that the denial of rights is undertaken by legislative or other measures; third, that those measures are calculated to prevent the racial group from participation in the political, social, economic, and cultural life of the country, and deliberately create conditions preventing the full development of the group or groups; and fourth, that the acts are inhuman and committed for the purposes of maintaining the dominance of one racial group over another and systematically oppressing the dominated group. [238]

At its most exacting, then, the *jus cogens* norm of non-discrimination prohibits forms of racial discrimination that rise to the level of invidious discrimination, with apartheid positioned as a paradigmatic example. This formulation departs in some measure from the more frequent understanding of racial non-discrimination as a separate *jus cogens* norm, and represents a particularly high bar for establishing peremptoriness. [239] Particularly noteworthy is the requirement for intention to be present. Yet, even under this formulation, many manifestations of denial or deprivation of nationality meet the more exacting

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[237] Apartheid Convention, *supra* note 235, art. 2 (emphasis added).

[238] *See* FitzGerald, *supra* note 35, at 143 (discussing South Africa's racialized system of nationality, which "denationalize[d] the majority black population . . . by assigning their nationality to the fictive new states and stripping them of their South African nationality."). *See also* John Dugard, *South Africa's Independent Homelands: An Exercise in Denationalization,* 10 DENV. J. INT'L L. & POL'Y 11 (1980).

[239] *But see* Int'l L. Comm'n, Provisional Summary Record of the 3472nd Meeting, U.N. Doc. A/CN.4/SR.3427 (July 9, 2019) (noting that following on the debate in the plenary, the Special Rapporteur in his revised proposal included only "the prohibition of apartheid," omitting the words "racial discrimination." The Drafting Committee decided to retain the reference to composite act of the prohibition of racial discrimination and apartheid.).

requirement of systemic racial discrimination and even, arguably, apartheid.[240] To take a paradigmatic example, the Nazi policy of stripping citizenship of Jewish people is accurately characterized as a measure "calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country," and deliberately creating "conditions preventing the full development of such a group or groups."[241]

However, it is our contention that such a high bar is not in fact required. While some historical and contemporary examples of racialized citizenship laws will *satisfy* the definition of apartheid, it is not *necessary* to do so in order to violate the *jus cogens* norm. As explained above, Special Rapporteur Tladi's 2019 report cites a wide range of sources that overwhelmingly favor a broader definition of the *jus cogens* norm, with serious, severe, or systemic racial discrimination widely understood to constitute a violation.[242] There is no reason in principle why intention is required in order for racial discrimination to reach the level of serious, severe, or even systemic.[243] While there is little to no explicit consideration of the role of intent or purpose within academic discussion on this issue—perhaps not surprising given that deep analysis of the content of the norm is often scant—contemporary understandings of the definition of racial discrimination unequivocally support the notion that racial discrimination may be established in the absence of explicit intent or purpose.

As the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance clearly articulates, the prohibition on racial discrimination requires states to combat both intentional discrimination as well as discrimination *in effect*.[244] The language of ICERD Article 1(1) enshrines this principle, stipulating that any distinction, etc. based on a prohibited ground is to be considered racial discrimination when it has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

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[240] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212, ¶ 91.

[241] Apartheid Convention, *supra* note 235, art. 2.

[242] Special Rapporteur, *Fourth Report on* Jus Cogens, *supra* note 212.

[243] For an excellent discussion of intention in the context of ICERD, see E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT'L L. 323, 361–64 (2014).

[244] Special Rapporteur Report on Contemporary Forms of Racism, *supra* note 36, ¶ 18.

fundamental freedoms."[245] Similarly, the Grand Chamber of the European Court of Human Rights has held that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent."[246] In that decision, the Court ruled that Danish Laws on Family Reunification constituted indirect discrimination on the basis of ethnic origin, in violation of Article 14 of the European Convention on Human Rights. Indeed, the notion that direct discrimination may be made out in the absence of intent might even be said to constitute a general principle of law, given the widespread acceptance in domestic jurisdictions of this notion.[247]

In sum, while it is widely accepted that the prohibition on racial discrimination has attained the status of a *jus cogens* norm, little attention has been given to the *scope* of this prohibition. At its most exacting, the prohibition extends only to laws and practices that amount to apartheid. Yet, even on that narrow approach, racial discrimination in nationality laws is capable of violating the norm, as recognized in the very text of the Apartheid Convention.[248] However, such a narrow approach does not have widespread support; rather, both jurisprudence and the views of eminent scholars overwhelmingly support the view that the *jus cogens* norm extends to *severe* or *systemic* forms of racial discrimination, and that such discrimination may manifest in intention *or* effect.

Having considered the scope of the *jus cogens* norm of racial non-discrimination, and how matters of nationality fit within it, the question then becomes one of application. Specifically, how does the *jus cogens* status of systemic racial non-discrimination apply to Article 1(3)? What does this mean for methods of interpreting Article 1(3) and its application to discriminatory cases of nationality regulation?

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[245] ICERD, *supra* note 11, art 1(1).

[246] Biao v. Denmark, App. No. 38590/10, ¶ 91 (May 24, 2016), http://hudoc.echr.coe.int/eng?i=001-141941 [https://perma.cc/BR9T-9HZB] (citing S.A.S. v. France, App. No. 43835/11, (July 1, 2014), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-145466&filename=001-145466.pdf&TID=uexpxlonsk [https://perma.cc/6GUZ-2FXZ]).

[247] *See, e.g.*, TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW (2015).

[248] Apartheid Convention, *supra* note 235, art. 2.

VI. TOWARD A PRINCIPLED INTERPRETATION OF ARTICLE 1(3)

Racially discriminatory nationality laws and practices are often calculated to prevent a group or groups from participation in the political, social, economic, and cultural life of the country. Even when they do not discriminate explicitly and directly, nationality laws can discriminate against certain groups in effect and produce the same exclusionary result. Indeed, the application of racially discriminatory nationality laws to a significant segment of the population of a state is a quintessential example of systemic racial discrimination under the terms of international law. In order for Article 1(3) to conform to the principle of integration, it must be applied consistently with the peremptory prohibition against systemic racial discrimination. Article 1(3) must also, as is widely accepted, be read in light of the broad protection enshrined in Article 5 of ICERD of the right to nationality for everyone (and arguably together with other treaty expressions of the right to a nationality)[249] and the international prohibition against arbitrary deprivation of nationality.[250]

Application of the *jus cogens* norm against systemic racial discrimination to the more prominent and egregious instances of denationalization outlined in Part II is straightforward.[251] In each of those cases, there is a denial of the basic human right to a nationality to members of a racial group or groups, and a convincing argument could be made that the relevant measures leading to this outcome were calculated to prevent the racial group from participation in the political, social, economic, and cultural life of the country. Yet, even where denial or deprivation of nationality does not meet such a high bar, racialized nationality laws may nonetheless violate the *jus cogens* norm given that they will, in many cases, meet the definition of serious or systemic racial discrimination.

However, does this mean that states can no longer maintain any discrimination in the content or application of nationality laws? In this regard, an important question to

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[249] UDHR, *supra* note 76, art. 15.

[250] *Id. See also* CRPD, *supra* note 76, art. 18(1)(a). Article 18(1)(a) provides an explicit prohibition against arbitrary deprivation of nationality. The prohibition has also been acknowledged to constitute a rule of customary international law, and applies whether or not it results in statelessness. Brandvoll, *supra* note 75, at 194.

[251] *See* discussion *supra* Part II.

consider is the distinction between differential treatment and prohibited preferences.[252] In General Recommendation Thirty-Two the Committee noted that differential treatment:

> "[C]onstitute[s] discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim[.]" As a logical corollary of this principle, . . . [General Recommendation Fourteen] (1993) . . . observes that "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate."[253]

To assist in understanding how this applies in the context of Article 1(3), it is relevant to recall the drafting history and its focus on post-colonial autonomy and the ability to favor particular national groups. Applying this reasoning to a contemporary example, referring to Israel's Law of Return,[254] Dan Ernst characterizes the moral difference between what he refers to as "positive" and "negative" nationality-based discrimination.[255] The former "singles out individuals of a particular ethnic, religious, or racial group for automatic admission because of that group's special entitlement to admission."[256] The latter bars or excludes a group or groups of people because they belong to "an unwanted ethnic, religious, or racial group."[257] While, according to Ernst, international law clearly prohibits negative nationality-based discrimination, it has been argued that there may exist certain limited circumstances under which nationality-based priorities are

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[252] *See* THORNBERRY, *supra* note 2, at 112.

[253] General Recommendation Thirty-Two, *supra* note 36, ¶ 8 (footnote omitted).

[254] Law of Return, 5710–1950, LSI 4 114 (1949–1950) (Isr.); Bill and an Explanatory Note, 5710–1950, HH 48 189 (Isr.). *See also* Ayelet Shachar, *Citizenship and Membership in the Israeli Polity*, *in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 386–433 (T. Aleinikoff Alexander & Klusmeyer Douglas eds., 2000).

[255] Dan Ernst, *The Meaning and Liberal Justifications of Israel's Law of Return*, 42 ISR. L. REV. 564, 583–85 (2009). In its General Recommendation Thirty-Two, CERD described the term "positive discrimination" as a *contradictio in terminis* which should be avoided in the context of international human rights standards. *See* General Recommendation Thirty-Two, *supra* note 36, ¶ 12.

[256] Ernst, *supra* note 255, at 584.

[257] *Id.*

normatively justified.[258] Seyla Benhabib reasons that giving preference to a certain group *with good reasons* may not be morally forbidden.[259]

> States in which certain ethnic groups reside are likely to plead for special treatment of their ethnic kin; in fact, there are states, such as Israel, which make the right of return a legal privilege for those who can claim Jewish descent. Similarly, Germany has policies which grant special privileges of return to ethnic Germans from the Baltic states, Russia, and other countries of eastern and central Europe (the so-called *Aussiedler* and *Vertriebene*). As long as a state does not deny those of different ethnicity and religion equivalent rights to seek entry and admission into a country . . . these practices need not be discriminatory. It is only because such practices are combined with the goals of preserving ethnic majorities and ethnic purity that they run afoul of and are discriminatory from a human rights perspective.[260]

Ernst goes on to note that Benhabib's reasoning is in keeping with ICERD's use of the term "against" ("that such provisions do not discriminate *against* any particular nationality") in the text of Article 1(3).[261] It may be possible to assert that Benhabib's reasoning is also in keeping with the drafting history of Article 1(3) which, as shown above, was motivated at least in part by concerns of certain developing and newly independent states related to anti-colonialism or self-determination. Finally, Benhabib's emphasis on the requirement of "good reason"[262] is in keeping with the Committee's statement that "differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such

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[258] *See id. See also* CHAIM GANS, THE LIMITS OF NATIONALISM 124–47 (2003).

[259] *See* Ernst, *supra* note 255, at 589–601.

[260] SEYLA BENHABIB, THE RIGHTS OF OTHERS 138 n.2 (2004). *See also* Ernst, *supra* note 255, at 589–601.

[261] Ernst, *supra* note 255, at 583 (citations omitted). For a discussion on Israel's new Citizenship and Entry into Israel (Temporary Order) Law, 2003, and the 2006 decision of the High Court of Justice upholding the constitutionality of that law, see Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8 THEORETICAL INQUIRIES L. 603 (2007).

[262] BENHABIB, *supra* note 260, at 132.

differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[263]

Following the reasoning of the European Court of Human Rights, this may be referred to as *justified* distinctions.[264] In the Belgian Linguistic case, the Court articulates the following two-limbed test for determining the difference between justified and unjustified distinctions:

> [T]he Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.[265]

The Court goes on to contend, with reference to Article 14 of the European Convention of Human Rights, that the prohibition on discrimination is violated "when it is clearly established that

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[263] Comm. on Elimination Racial Discrimination, Concluding Observations on Denmark, ¶ 19, U.N. Doc. CERD/C/DEN/CO/17 (Oct. 19, 2006). *See* General Recommendation Thirty-Two, *supra* note 36, ¶ 8 ("On the core notion of discrimination, general recommendation No. 30 (2004) of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'"). *See also* U.N. GAOR, 48th Sess., Supplement No. 18 at 115, U.N. Doc. A/48/18 (Sept. 15, 1993) (observing that "differential treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are 'legitimate'").

[264] *See* DANIEL MOECKLI ET AL., INTERNATIONAL HUMAN RIGHTS LAW (2010).

[265] *In re* Laws on the Use of Languages in Education in Belgium v. Belgium, App. No. 1474/62, at 31 (Feb. 9, 1967), http://hudoc.echr.coe.int/eng?i=001-57524 [https://perma.cc/5GHE-3ZRY] [hereinafter Belgian Linguistic Case]. *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Australia, ¶ 24, U.N. Doc. CERD/C/AUS/CO/14 (Apr. 15, 2005) (recommending that Australia "review its policies, taking into consideration the fact that, under the Convention, differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.").

there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."[266] Similarly, in the Biao v. Denmark decision, the Grand Chamber stated that, while not all differential treatment amounts to discrimination:

> A difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[267]

Such matters must be examined closely and the wider context appreciated. As Benhabib notes, positive discrimination in nationality laws is problematic when combined with the goals of preserving ethnic majorities and ethnic purity.[268] In our view, a contemporary example is the current citizenship crisis in India, which arguably "broadly aim[s] to convert India into a 'Hindu Rashtra' or a homeland for Hindus."[269]

Applying this analysis to the context of racial discrimination in nationality laws, and against the background of the peremptory prohibition of systemic racial discrimination, the effect of Articles 1(1) and 1(3) of ICERD is that state regulation of nationality must not discriminate, whether directly or indirectly, on the basis of race, color, descent, or national or ethnic origin in the attribution, regulation or deprivation of citizenship, except in narrowly circumscribed situations where differential *access* to citizenship is applied pursuant to a legitimate aim, and is proportional to the achievement of this aim. This limited exception is logically applicable only in relation to acquisition of or access to citizenship and not deprivation.

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[266] Belgian Linguistic Case, *supra* note 265, at 31.

[267] Biao v. Denmark, App. No. 38590/10, ¶ 90 (May 24, 2016), http://hudoc.echr.coe.int/eng?i=001-141941 [https://perma.cc/BR9T-9HZB]. *See also* Comm. on Elimination Racial Discrimination, Concluding Observations on Denmark, *supra* note 263.

[268] BENHABIB, *supra* note 260, at 138 n.2

[269] ASIAN L. CTR., MELBOURNE L. SCH., CONSTITUTIONALISM AND CIVIL LIBERTIES: A BRIEFING NOTE ON RECENT DEVELOPMENTS IN INDIA (2020) (citing Edward Anderson & Christophe Jaffrelot, *Hindu Nationalism and the 'Saffronisation of the Public Sphere': An Interview with Christophe Jaffrelot*, 26 CONTEMP. S. ASIA 468, 468–82 (2018)), https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3441054/Statelessness-in-India-Briefing-Note.pdf [https://perma.cc/K5QD-B22Q]. *See also* Christophe Jaffrelot, *The Fate of Secularism in India*, *in* THE BJP IN POWER: INDIAN DEMOCRACY AND RELIGIOUS NATIONALISM 51 (Milan Vaishnav ed., 2019); BENHABIB, *supra* note 260.

While this suggests that there may be greater state discretion in relation to denial of nationality, there is no clear dichotomy between cases of denial and cases of deprivation as may be suggested in the approach of the Committee at times. The limited exception means that in most cases the same analysis applies to racially discriminatory nationality laws whether the measure in question relates to access to or deprivation of citizenship.

With regard to the burden of proof, the Court in Biao v. Denmark reiterated the well-established proposition that once differential treatment has been demonstrated, the burden of showing that it was justified is upon the state. While the Court in that case applied its longstanding notion that there might exist a margin of appreciation for a State to assess the need for differential treatment, nonetheless "very weighty reasons"[270] would be required in order to justify differential treatment on the basis of nationality. In our view it is clear that no such margin exists in the *systemic* denial or deprivation of nationality made—whether exclusively or in part—on the grounds of race, descent, or ethnic or national origin, given the *jus cogens* stature of this principle.

VII. CONCLUSION

Writing in 2006, just a year after General Recommendation Thirty was published, James A. Goldston noted that the General Recommendation "offers a useful legal platform for advocacy, litigation and monitoring efforts,"[271] yet it is clear that such promise has not been realized. This Article has proffered a principled justification for Article 1(3)'s narrow interpretation with the aim of sharpening the Committee's persuasiveness. More broadly, to the extent that matters of nationality are still considered a balancing act between individual rights and the prerogative of states in this domain, the interpretive *jus cogens* principle as it relates to norms of racial non-discrimination and the clarification of the content and contours of the peremptory norm helps to tip the balance in favor of individual rights and forecloses the possibility of excluding the

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[270] *Biao*, App. No. 38590/10, ¶ 93 (citing Gaygusuz v. Austria, App. No. 17371/90 (May 23, 1996), http://hudoc.echr.coe.int/eng?i=001-58060); Poirrez v. France, App. No. 40892/98 (Sept. 30, 2003), http://hudoc.echr.coe.int/eng?i=001-61317; Andrejeva v. Latvia, App. No. 55707/00 (Feb. 18, 2009), http://hudoc.echr.coe.int/eng?i=001-91388; Ponomaryovi v. Bulgaria, App. No. 5335/05 (Nov. 28, 2011), http://hudoc.echr.coe.int/eng?i=001-105295).

[271] James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 346 (2006).

right to nationality from the interpretive fold of racial discrimination as a *jus cogens* norm.

This Article has provided a principled, doctrinal interpretive framework within which to "read down" the problematic Article 1(3) so that the international community no longer brushes over the provision, but rather utilizes it to help combat racially discriminatory nationality laws. The clarification and articulation of legal norms around Article 1(3) and a justification for its narrow interpretation adds to the existing legal tools for combatting discriminatory citizenship deprivation and denial, and narrowing the boundaries of state discretion.