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An Imperial History of Race-Religion in International Law

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More than half a century after the United Nations General Assembly's adoption of the International Convention on the Prohibition of All Forms of Racial Discrimination (ICERD), efforts are underway to formulate a protocol to the landmark convention.¹ Much of the momentum for that endeavor comes from sustained local and global advocacy against racism.² An integral part of contemporary anti-racism efforts is a push for legal recognition of the intersectional dimensions of racial domination and subjugation to address the unique precarity of persons inhabiting marginalized axes of identities and experiences.³ United Nations (UN) debates over repowering the ICERD have therefore featured proposals to intersectionalize the international legal response to racism and racial discrimination. The proposals have sought to address a number of

¹ United Nations Human Rights Council, Rep. of the Ad Hoc Committee on the Elaboration of Complementary Standards on Its Tenth Session, A/HRC/42/58, para 8 (2019) (UNHRC Ad Hoc Committee Tenth Session). For a repository of documents relating to the ongoing UN process, see <https://www.ohchr.org/en/hrc-subsiaries/adhoc-committee-on-complementary-standards-to-icerd>.

² See Thiago Amparo & Andressa Vieira e Silva, *George Floyd at the UN: Whiteness, International Law, and Police Violence*, 7 UC IRVINE JOURNAL OF INTERNATIONAL, TRANSNATIONAL, AND COMPARATIVE LAW 1, 91 (2022); Rosana Garcíandia & Philippa Webb, *The UN's Work on Racial Discrimination: Achievements and Challenges*, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE, 216-45 (2022).

³ For the foundational works on intersectionality, see Kimberlé W. Crenshaw, *Mapping the Margins: Identity Politics, Intersectionality, and Violence Against Women*, 6 STAN. L. REV. 43, 1241-299 (1991); Kimberlé W. Crenshaw, *On Intersectionality: Essential Writings* (The New Press 2017) (2014); Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2018).

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intersectional experiences, but the axis of race and religion has been particularly contentious.⁴ Emanating from the global south and sponsored by state parties to the Organization of Islamic Conference (OIC), the African bloc, and several Asian states, that proposal has called for ICERD's recognition of religious discrimination as it intersects with racial discrimination in the experiences of persons who are simultaneously racial and religious minorities.⁵ A dimension of that proposal, however, goes beyond calling attention to the "race-religion"⁶ intersectional axis; it seeks international legal recognition of contemporary discrimination against religious minorities as a form of racism. Proponents cite the common practice of attributing homogenizing racial markers to internally diverse religious minority groups as a notable manifestation of this "racing" of "religion,"⁷ and argue that such homogenization paves the way for "race-religion" discrimination.⁸

⁴ United Nations Human Rights Council, Rep. of the Ad Hoc Committee on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination on the intersessional legal expert consultation considering the elements of a draft additional protocol to the Convention prepared by the Ad Hoc Committee on Its Tenth Session at para 35 (2022) ("Tenth Expert Session Report").

⁵ UNHRC Ad Hoc Committee Tenth Session. The proposal also finds support from Russia.

⁶ I borrow the term "race-religion" from Geraldine Heng, *EMPIRE OF MAGIC: MEDIEVAL ROMANCE AND THE POLITICS OF CULTURAL FANTASY* (Columbia University Press 2003). In Heng's seminal account of the Middle Ages, she argues that salient sociolegal demarcations in that historical period were at the same time racial as they were religious, leading Heng to coin the term "race-religion." See also Geraldine Heng, *The Invention of Race in the European Middle Ages I: Race Studies, Modernity, and the Middle Ages*, 8 *LITERATURE COMPASS*, 315-31 (2011).

⁷ Moustafa Bayoumi, *Racing Religion*, 6 *CR: THE NEW CENTENNIAL REVIEW* 2, 267-93 (2006).

⁸ Tenth Expert Session Report at para 59; United Nations Human Rights Council, Rep. of the Ad Hoc Committee on the Elaboration of Complementary Standards on Its Twelfth Session (Advance Edited Version), A/HRC/51/57 (2022) ("Report of the Ad Hoc Committee, Twelfth Session").

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Claims about the racialization of religious minorities have hardly been confined to UN debates. An emerging body of scholarship now argues that minority religions are deprived of international and national legal protections due to the exclusionary Euro-Christian foundations of the legal regime of religious liberty.⁹ Religious minorities are not construed as religious persons, scholars argue, but instead law racializes these persons by homogenizing and ultimately demarcating these persons as a disfavored 'other' to 'civilized' society.¹⁰ This process connotes racialization, but persistent international legal understanding of racism in phenotypical terms

⁹ Bayoumi, *supra* note 7, at 267-93; Nasar Meer, *Racialization and Religion: Race, Culture and Difference in the Study of Antisemitism and Islamophobia*, in *RACIALIZATION AND RELIGION* 1-14 (Routledge 2014); Saher Selod & David G. Embrick, *Racialization and Muslims: Situating the Muslim Experience in Race Scholarship*, 7 *SOCIOLOGY COMPASS* 8, 644-55 (2013); Junaid Rana, *The Language of Terror: Panic, Peril, Racism*, in *STATE OF WHITE SUPREMACY: RACISM, GOVERNANCE, AND THE UNITED STATES* (Moon-Kie Jung, João H. Costa Vargas, And Eduardo Bonilla-Silva eds., Stanford University Press 2011); Craig Considine, *The Racialization of Islam in the United States: Islamophobia, Hate Crimes, and "Flying While Brown,"* 8 *RELIGIONS* 9, 165 (2017); Farid Hafez, *Unwanted Identities: The 'Religion Line' and Global Islamophobia*, 63 *DEVELOPMENT* 1, 9-19 (2020); Peter Kivisto, *RELIGION AND IMMIGRATION: MIGRANT FAITHS IN NORTH AMERICA AND WESTERN EUROPE* (John Wiley & Sons 2014); Nasar Meer & Tariq Modood, *For "Jewish" Read "Muslim"? Islamophobia as a Form of Racialisation of Ethno-Religious Groups in Britain Today*, 1 *ISLAMOPHOBIA STUDIES JOURNAL* 1, 34-5 (2012); Tariq Modood, *MULTICULTURAL POLITICS: RACISM, ETHNICITY, AND MUSLIMS IN BRITAIN* (University of Minnesota Press 2005). See, however, Anna Sophie Lauwers, *Is Islamophobia (Always) Racism?* 7 *CRITICAL PHILOSOPHY OF RACE* 2, 306-32 (2019). See further Damir Skenderovic & Christina Späti, *From Orientalism to Islamophobia: Reflections, Confirmations, and Reservations*, 4 *REORIENT* 2, 130-43 (2019) (for a nuanced treatment, including of the comparison between Islamophobia and anti-semitism).

¹⁰ Sahar F. Aziz, *THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM* (University of California Press 2021).

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effectively preclude religious minorities from legal remedies. The consequence has been that religious minorities slip through a “protection gap,” deprived of recourse both in the legal protections against racial discrimination and those safeguarding religious liberty.¹¹

The case of Islamophobia has, in many ways, become central to advocacy and scholarship exploring this interplay of religious and racial discrimination.¹² The broader social and political conditions for anti-Muslim discrimination reveal a homogenization and attribution of racial markers to Muslims despite Muslims being culturally, nationally, and ethnically diverse. A

¹¹ Tenth Expert Session Report at para 56.

¹² The use of the term “Islamophobia” is not uncontested. A 1997 Runnymede Trust report, which is credited for the first use of the term, itself acknowledges that the term is “not ideal.” See Runnymede Trust, *Islamophobia: A Challenge for Us All* (Runnymede Trust, 1997). Some contend that the term’s centering of “Islam” conflates anti-Muslim bias with (legitimate) critique of Islam as a faith and ideology. Despite these and other criticisms, the term continues to be widely used to express anti-Muslim discrimination. See Anver Emon, *Introduction, in SYSTEMIC ISLAMOPHOBIA: A RESEARCH AGENDA* (University of Toronto Press 2023), 2-3 (surveying critiques of the term “Islamophobia”, and noting that even erstwhile critics of the term such as the Conservative Party of Canada, who has argued that the term silences legitimate criticism of Islam, have come to utilize it following horrific hate crime, leading to a “general domestication” of the term); Todd H. Green, *THE FEAR OF ISLAM: AN INTRODUCTION TO ISLAMOPHOBIA IN THE WEST* (Fortress Press 2019) at 14 (narrating the Conservative Party of Canada’s contention that the term “Islamophobia” silences legitimate criticism of Islam); Namira Islam, *Soft Islamophobia*, 9 *RELIGIONS* 9, 280-96 (2018); Rabiat Akande, *Centering the Black Muslimah in SYSTEMIC ISLAMOPHOBIA: A RESEARCH AGENDA* (University of Toronto Press 2023). For works situating Islamophobia at the intersection of racial and religious discrimination, see Aziz, *supra* note 10; Bayoumi, *supra* note 7, at 267-93. Sahar Ahmed, *The Right to Religious Freedom Under International Human Rights Law and Islamic Jurisprudence: A Re-interpretation* (2022) (Ph.D. dissertation, Trinity College, Dublin); Alia Al-Saji, *The Racialization of Muslim Veils: A Philosophical Analysis*, 36 *PHILOSOPHY & SOCIAL CRITICISM* 8, 875-902 (2010).

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foremost illustration is the case of the Muslim veil.¹³ As they manifest in contemporary Europe and parts of North America, legal restrictions on the veil reveal a construction of the Muslim as a simultaneously racial and religious “other.”¹⁴ The discourses legitimating those restrictions homogenize Muslims as an essentialized racial category, marking the Muslim ‘other’ as foreign—and fundamentally different. It is not only that Muslim women are demographically more likely to be phenotypically Black or brown; rather, what is at issue here is the racialized construction of *Muslimness* by these legal restrictions. The discursive construction of the veil as *innately* Muslim (and rejection of competing understandings),¹⁵ and its framing of the covered Muslim woman’s bid to live out that commitment to the veil as the antithesis of the universal(izing) civilizational

¹³ Although I note the practical distinctions in the headscarf and the veil, I use the two terms interchangeably for much (though not all) of this article for the purpose of this legal analysis of Muslim women’s covering.

¹⁴ Akande, *supra* note 12, at 25 (noting that “what Muslim women wear or uncover continues to be hotly contested and the subject of a social, political, and legal discourse that often elides the agency of Muslim women.”). See further Faiza Hirji, *Claiming Our Space: Muslim Women, Activism, and Social Media*, 6 ISLAMOPHOBIA STUDIES JOURNAL 1, 78-92 (2021).

¹⁵ Within Sunni Islam, while jurists of the Shafi and Hanbali schools have generally argued that the veil (here meaning the covering of the entirety of the Muslim woman’s body) is prescribed by Islamic law, those of the Maliki and Hanafi schools have generally dissented on this point, arguing instead for a legal requirement of a mode of covering that leaves the face and hands uncovered (meaning the headscarf). Although this has meant that there has been juristic unanimity on the headscarf as a bare minimum (even as Shafites and Hanbalites have found that insufficient and required a completely veiled body), there have emerged dissenting voices, even on the headscarf requirement. For a nuanced legal, historical, and sociological analysis, see Sahar Amer, *WHAT IS VEILING?* (UNC Press Books 2014). For a Shi’i account, see Fatimah Aqleem & Nasir Atifa, *Hijab’s Hijab: A Call for Inclusion, Peace, and Resistance Shia Muslims Women’s Standpoint*, 7 INTERNATIONAL JOURNAL OF PEACE AND CONFLICT STUDIES 4 (2022).

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ideals of liberty, security, and equality reveal the intricate entanglement of racial and religious othering. The point here is not that the veil is *not* a religious symbol; rather, I argue that by understanding the veil as a ‘peculiar’ religious symbol, the state affirms its status as a foreign artefact that marks the alienness of the wearer. In this way, law and policy solutions to the ‘problem’ of the veil mark Muslims as an undifferentiated outsider within the western social order.¹⁶

Both the international law of religious liberty and that concerning racial discrimination have been unresponsive to this interplay of racial and religious othering in restrictions on the veil. An overwhelming record of unsuccessful appeals to courts by veiled Muslim women (particularly in the context of the European Court of Human Rights)¹⁷ reveal the afterlife of what critical histories insist was originally fashioned as a Euro-Christian religious liberty regime.¹⁸ Notably,

¹⁶ For an analysis of the state’s assumption of the prerogative to define what constitutes religion especially in the case of the headscarf, see Talal Asad, *French Secularism and the ‘Islamic Veil Affair,’* 8 THE HEDGEHOG REVIEW, 93-106 (2006). For an analysis of the strategic “lawfare” of framing claims as religious or not religious in the comparative contexts of Indigenous communities in Canada (the Ktunaxa) and Norway (the Sami), see Helge Årsheim, *Including and Excluding Indigenous Religion Through Law*, 65 NUMEN 5-6, 531-61 (2018).

¹⁷ T. Jeremy Gunn, *The “Principle of Secularism” and the European Court of Human Rights: A Shell Game*, IN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF, 465-573 (2019). Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT’L L. 663 (2010); Ahmed, *supra* note 12.

¹⁸ For these critical histories, see Samuel Moyn, *CHRISTIAN HUMAN RIGHTS* (University of Pennsylvania Press 2015); Linde Lindkvist, *SHRINES AND SOULS: THE REINVENTION OF RELIGIOUS LIBERTY AND THE GENESIS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Lund University 2014); Rabiat Akande, *Neutralizing Secularism: Religious Antiliberalism and the Twentieth-Century Global Ecumenical Project*, 37 JOURNAL OF LAW AND RELIGION 286-318 (2022); Ahmed, *supra* note 12.

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the court has reasoned that the crucifix is a cultural symbol rather than a religious symbol, consequently upholding the presence of the crucifix in the public sphere.¹⁹ At the same time, however, the court's jurisprudence on the Muslim veil has reflected a racializing interpretive stance in which the court understands the veil at once as inherently Muslim and as intrinsically antithetical to the values of civilized society, and thus justifiably subject to restrictions. As a result, the court's conception of 'religion,' and of what religious traditions are worthy of protection is inextricably linked with a civilizational hierarchy that is undeniably racial and religious. Yet, the racializing jurisprudence of religious liberty coexists with a lack of meaningful recourse to racial equality protections due to the enduring phenotypical understandings of race in constructions of the ICERD.²⁰

If the case of anti-Muslim racism features prominently in the current ICERD debates, the "racing of religion" is hardly limited to the experience of Muslims. Racialized religious minorities abound, with the experiences of Jews and Indigenous peoples finding expression in ongoing policy debates and scholarly literature.²¹ For advocates and scholars of Islamophobia and other forms of

¹⁹ *Lautsi v. Italy*, Eur. Ct. H.R. (2011).

²⁰ See Part III below for further analysis of this protection gap under the ICERD, and in the broader international legal framework.

²¹ For the rich multidisciplinary literature illuminating this interplay of race and religion in the construction of non-Euro-Christian faiths and analyzing its consequences, see Meer, *supra* note 9, at 1-14 (arguing that biology was considered, along with religious culture, to be "co-constitutive of a racial category" even prior to its articulation in Atlantic slavery and Enlightenment-themed colonial encounters); Nabil Matar, *Britons and Muslims in the Early Modern Period: From Prejudice to a (Theory of) Toleration*, 43 PATTERNS OF PREJUDICE 213, 217 (2009) (dating the race-religion interplay prior to the *Reconquista*); Walter D. Mignolo, *Islamophobia and Hispanophobia: How They Came Together in the Euro-American Imagination*, 4 ARCHES QUARTERLY 24, 29 (2010) (noting that

the term “race” in Sebastian de Covarrubias’s infamous sixteenth-century dictionary was synonymous with the terms ‘blood’ and ‘religion.’); Slobodan Drakulic, *Anti-Turkish Obsession and the Exodus of Balkan Muslims*, 43 PATTERNS OF PREJUDICE 233, 234 (2009) (highlighting this interplay in Papal discourse and proclamations in the Crusades); Etienne Balibar, *Is There a ‘Neo-racism’?* in RACE AND RACIALIZATION: ESSENTIAL READINGS 86 (Tania Das Gupta, Carl E. James, Chris Andersen, Grace-Edward Galabuzi, Roger C. A. Maaka eds., 2007) (deploying the term “cultural racism” to analyze that intimate interplay of the processes of racialization and religious discrimination and concluding that “cultural racism” concerns itself with “signs of a deep psychology, as signs of a spiritual inheritance rather than a biological heredity”); Modood, *supra* note 9 (analyzing anti-Muslim racism by noting the key feature of racism as the supposition “that certain qualities are inherent to a group,” and noting that it is “secondary whether these qualities are perceived to be hereditary or cultural, racial or ethnic.”); Meer & Modood, *supra* note 9, at 34-5 (suggesting that to understand the racialization of religion is, therefore, to apprehend historical and contemporary “signifying processes that construct differentiated social collectivities as races”). For a collection of work illustrating the settler colonial state’s designation of indigenous communities’ ways of life as “alien” and analyzing the religious, racial(izing) and national dimensions of that project, see John Borrows, CANADA’S INDIGENOUS CONSTITUTION, 249 (University of Toronto Press 2010); Ronald Niezen, ed., SPIRIT WARS: NATIVE NORTH AMERICAN RELIGIONS IN THE AGE OF NATION BUILDING (Berkeley: University of California Press 2000); Margaret D. Jacobs, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940 (U of Nebraska Press 2009); Bryan Newland (Assistant Secretary – Indian Affairs); Ben Berger, “*Is State Neutrality Bad for Indigenous Religious Freedom?*” in Jeffrey Hewitt, Beverly Jacobs, and Richard Moon, eds., INDIGENOUS SPIRITUALITY AND RELIGIOUS FREEDOM (University of Toronto Press, Forthcoming); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONNECTICUT L REV at 397; Rani-Henrik Andersson, THE LAKOTA GHOST DANCE OF 1890 (Lincoln: University of Nebraska Press 2008). For a collection of essays exploring this interconnection between racialization and religious otherization in the context as it impacts Muslims and Jews, see the volume Meer, *supra* note 9, and Robert Miles, RACISM (Routledge 1989). For an emerging body of

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racialized religious discrimination, the making of the ICERD protocol presents an opportunity to close the protection gap in the international legal framework that continues to preclude effective remedy.

There exists substantial opposition to the ICERD proposal. As expressed by the European Union delegation to the ICERD talks, the disapproval of the race-religion proposal stems in part from a concern that recognizing the intersection of racial and religious discrimination would unduly privilege religion to the detriment of other intersectional experiences.²² Further, concerns about the vulnerability of internal minorities within religious groups have been expressed by human rights experts.²³ Skeptics also argue that the best response to the experience of discrimination by racialized religious groups would be to strengthen the international legal frameworks addressing racial discrimination and religious discrimination separately, rather than

interdisciplinary legal scholarship unmasking the interplay between racial and religious othering in law and policy, see Ratna Kapur, *Race-making, Religion and Rights in the Post-colony: Unmasking the Pathogen in Assembling a Hindu Nation*, 18 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 4, 499-516 (2022); Eve Darian-Smith, RELIGION, RACE, RIGHTS: LANDMARKS IN THE HISTORY OF MODERN ANGLO-AMERICAN LAW (Hart Publishing 2010); Aziz, *supra* note 10; Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 NYU ANN. SURV. AM. L. 29 (2013); Rana, *supra* note 9, at 211; Considine, *supra* note 9, at 165; Hafez, *supra* note 9, at 9-19; Kivisto, *supra* note 9; Nuray Karaman & Michelle Christian, “*My Hijab Is Like My Skin Color*”: Muslim Women Students, Racialization, and Intersectionality, 6 SOCIOLOGY OF RACE AND ETHNICITY 4, 517-32 (2020).

²² Rep. of the Ad Hoc Committee on Its Twelfth Session (2022).

²³ United Nations Human Rights Council, Report to the Ad Hoc Committee on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination on the intersessional legal expert consultation considering the elements of a draft additional protocol to the Convention prepared by the Ad Hoc Committee at its tenth session, para 35 (2020).

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conflating the two forms of discrimination. Therefore, contrary to the ICERD reform proponents' close interlinkage of racial and religious discrimination, critics of the proposal seek to disentangle these as disparate experiences deserving distinct legal responses.

This article intervenes in the ongoing ICERD debate by looking to the past. I argue, first, that racial and religious othering were mutually co-constitutive in the colonial encounter, an encounter that critical genealogies have established as foundational to the making of modern international law.²⁴ Moreover, I contend that the legacy of that past survives in the continuing interplay of the racial and religious othering of the non-Euro-Christian other. I further show that the current proposal that seeks international legal recognition of the interplay between racial and religious othering is far from new. Iterations of that race-religion proposal surfaced at two defining moments in international legal history—of late, during the mid-twentieth-century negotiations that culminated in the ICERD, and previously, during the early twentieth-century negotiation of the League of Nations' Covenant. It is striking that these past attempts have received little attention in the scholarly literature and in the ongoing ICERD debates. By illuminating the centrality of race-religion othering to the colonial encounter and analyzing how historical efforts to formulate an appropriate international legal response to that interplay foundered, this article presents an imperial history of race-religion in international law. The narrative that follows reveals that the story of the racialization of religious minorities and the story of the protection gap that deprives these groups of international legal protection are far from separate narratives. Rather, these accounts are

²⁴ See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Makau Mutua, *What is TWAIL?* 94 AM. SOC'Y INT'L L. PROC. 31 (2000); Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INTERNATIONAL COMMUNITY LAW REVIEW 4 371-78 (2008).

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interconnected, bound in a story of othering that is foundational to the colonial origins of the international legal order. Recognizing the ways in which today's international legal framework (and the mounting challenge to its legitimacy) inhabits the history narrated in this article is indispensable to imagining effective international legal protections for racialized religious minorities.

The article proceeds as follows. Based on a close examination of imperial legal discourses in the nineteenth and early twentieth century, Part I illuminates the mutual co-constitution of race and religion in the colonial encounter. Part II spotlights two earlier attempts to link international legal protections for race and religion, revealing the "how" and the "why" behind those failed efforts. Arguing that the imperial history of race-religion othering lives on, Part III illuminates the enduring protection gap that continues to preclude effective recourse for racialized religious minorities in international law. I suggest that the protection gap is sustained even by well-intended juristic efforts that frame the problem of race-religion discrimination as one of double discrimination, based on the distinct categories of race and religion, rather than as a mutually constitutive form of discrimination. Only an appreciation of the intimate interplay of the racial and religious othering of the non-Euro-Christian other is faithful to the historical chronicle, and only such an understanding can serve as a basis for constructive reform efforts.

I: COLONIAL FOUNDATIONS

Acknowledging the racial cum religious hierarchy on which the modern law of nations was founded, foremost international legal jurist Lassa Francis Lawrence Oppenheim declared in 1905

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that international law is “essentially a product of a Christian civilization.”²⁵ The Christian civilizational identity that Oppenheim referenced was not only religious, it was also undoubtedly racial. Revealing the racial dimensions of this Christian civilizational identity, John Westlake, Whewell Professor of International Law at Cambridge, had famously noted in 1894 that “the inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites should be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out.”²⁶ By setting a civilizational distinction between the “Christian white race” and the “savage” and “fanatical” other, European empire and the international law it engendered promoted an “indivisible race-religion discourse.”²⁷

That Christian civilizational identity, of course, elided tensions within the European project, including Catholic-Protestant struggles. Yet, global imperial ambitions and, ultimately, expansion necessitated a shift in emphasis from interconfessional difference to a Christian European versus others distinction—at least on the global stage—consequently cementing the racialization of religious difference in international thought. Indeed, anthropologist Peter Van der

²⁵ Lassa Oppenheim, *International Law: A Treatise*, Vol. 1, 4, 346 (1905). Indeed, Oppenheim argues that “[a]s the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them,” *id.* at 10.

²⁶ John Westlake, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW*, 136-45 (University Press 1894). See the testimony of Antony Anghie before the Ad Hoc Committee on the Elaboration of Complementary Standards on Its twelfth session. United Nations Human Rights Council, Rep. of the Ad Hoc Committee on Its Twelfth Session, 19-21 (2022).

²⁷ Heng, *supra* note 6, at 234.

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Veer roots the nineteenth-century emergence of interconfessional toleration in Europe to this quest to produce a Christian civilizational identity that was so integral to Europe's imperial expansion. Rather than a manifestation of an ideological commitment to religious toleration, Van der Veer argues that the enfranchisement of Christian minorities in Europe such as Catholics in England sought to shift political loyalty from religious identity to a European Christian identity.²⁸ With that shift, the opposition between Britain as a Protestant nation and France as a Catholic nation became less relevant than "the opposition between a Christian, civilized nation and colonized peoples without civilized religions."²⁹ The religious dimensions of racial differentiation and subordination and the associated racialization of religious differentiation and subordination would come to animate global European imperialism.

European colonial ambition was vast and global; that colonial project notably unfolded with particular horrors in the Americas as European settlers encountered Indigenous populations.³⁰ The settler colonial state regarded Indigenous faiths as "alien to Western law, politics, and religion."³¹ That legal construction of alienness and the ensuing denigration of Indigenous forms

²⁸ Peter Van der Veer, *IMPERIAL ENCOUNTERS: RELIGION AND MODERNITY IN INDIA AND BRITAIN*, 22 (Princeton University Press 2020).

²⁹ *Id.*

³⁰ For an account of how early Euro-Christian imaginations of the figure of the "Jew," and "Muslim" came to be mirrored in the settler colonial discourse on aboriginal peoples, see Jonathan Boyarin, *THE UNCONVERTED SELF: JEWS, INDIANS, AND THE IDENTITY OF CHRISTIAN EUROPE* (2009).

³¹ Borrows, *supra* note 21; Wayne Warry, *ENDING DENIAL: UNDERSTANDING ABORIGINAL ISSUES* (University of Toronto Press 2008). See further S. James Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford University Press 2004); John Borrows & Leonard Ian Rotman, *ABORIGINAL LEGAL ISSUES: CASES, MATERIALS & COMMENTARY* (Butterworths 1998); John Rhodes, *An American Tradition: The*

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of spirituality was as much racial as it was religious.³² Regarded as “heathen” practices, Indigenous spiritual practices were not considered religions worthy of toleration. Rather, the settler colonial

Religious Persecution of Native Americans 52:1 MONT L REV 13, 46 (1991); Michael Lee Ross, FIRST NATIONS SACRED SITES IN CANADA’S COURTS (University of British Columbia Press 2005), 6, 22-23, 153-70.

³² References to the experiences of Indigenous communities have featured in the ICERD race-religion debate, with transnational Indigenous civil society organizations observing the proceedings expressing an interest in the question. Present at the twelfth session of the subcommittee considering the ICERD proposal were: Indian Council of South America and the Indigenous Peoples and Nations Coalition, Confederacion regional Indigena Puno Conreinu and the International Human Rights Association of American Minorities. The International Human Rights Association of American Minorities submitted to the committee that in the future, Indigenous experts also be invited to participate in the Ad Hoc Committee’s work on elaborating an additional protocol, given that the development of international law for Indigenous peoples was lacking). However, the experience of indigenous peoples has been largely elided in the ICERD discussions. This may be due in part to the sui generis nature with which First Nations concerns are treated under international law. One distinctive feature that might mark the race-religion analysis of indigenous people is the centrality of ancestral land to Indigenous religions and forms of spirituality. For an in-depth analysis, see Borrows, *supra* note 21; Natasha Bakht & Lynda Collins, “*The Earth is Our Mother*”: *Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada*, 62 MCGILL LAW JOURNAL 3 (2017). The UN Human Rights Committee has noted that the UN Human Rights Committee has specifically observed that Art. 27 minority rights protection may include “a particular way of life associated with the use of land resources, especially in the case of [I]ndigenous peoples.” See UN Human Rights Committee, 50th Sess, CCPR/C/21/Rev.1/Add.5 (1994) at para 6.2, [General Comment No. 23] at para. 7. The UN Special Rapporteur on the Rights of Indigenous Peoples notes that the “desecration and lack of access to sacred places inflicts permanent harm on [I]ndigenous peoples for whom these places are essential parts of identity.” Report of the Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, on the Situation of Indigenous Peoples in the United States of America, UNHRCOR, 21st Sess, Annex, Agenda Item 3, A/HRC/21/47/Add.1 (2012) at para 44.

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state understood those so-called heathen practices as bound in the inherent nature of the uncivilized “Indian,” as much biological as it was cultural. The task then was to design a civilizational project to “kill the Indian,” especially in “the child.”³³ That project at once homogenized the “Indian,”

Similarly, the UN Committee on the Elimination of Racial Discrimination (CERD) called on the United States “to pay particular attention to the right to health and cultural rights of [Indigenous] people[s], which may be infringed upon by activities threatening their environment ... or disregarding the spiritual and cultural significance they give to their ancestral lands.” Report of the Committee on the Elimination of Racial Discrimination, UNGAOR, 61st Sess, Supp No 18, A/61/18 (2006) at para 8. As the InterAmerican Court of Human Rights declared in *Awas Tigni v. Nicaragua*, “[f]or [I]ndigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79, at para 149, Annual Report of the Inter-American Court of Human Rights: 2001, OEA/Ser.L/V/III.54 Doc.4 (2002) 675. See also *The Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172, at para 200, Annual Report of the Inter-American Commission on Human Rights: 2007, OEA/Ser.L/V/II.130 Doc.22 rev.1 (2007) 25. The African Court of Human and People’s Rights has also acknowledged the integral nature of land to Indigenous spirituality, upholding this as a dimension of the religious liberty protection under the African Charter on Human and People’s Rights (the Banjul Charter), 1981. See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (25 November 2009), Gambia 276/2003. See further the International Law Association’s recognition of this centrality of land to Indigenous faiths and this Indigenous religious liberty in Committee on the Rights of Indigenous Peoples, “Final Report” (2012) International Law Association, Sofia Conference Report at 27, online: <www.ila-hq.org/en/committees/index.cfm/cid/1024>.

³³ Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada,” vol. 1 (Winnipeg: TRC, 2015) 3-4, 371 (citing Statement by Honourable Stéphane Dion, MP (House of Commons, 11 June 2008)) and at 46 (noting that residential “schools can be best understood in the context of this relationship between the growth of global,

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eliding a rich history of diverse practices, even as it sought to convert these populations to Christianity exclusively on European terms.³⁴ The criminalization of Indigenous religious practices, the destruction of Indigenous sacred sites, and the horrendous history of residential schools were foremost in the arsenal of that colonial civilizational project whose history continues to be told and retold.³⁵

European-based empires and the Christian churches); Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?* 62 MCGILL LJ 1 243 (2016).

³⁴ See Borrows, *supra* note 21 ; Berger, *supra* note 21 (arguing that the settler colonial project to subjugate indigenous peoples cannot be disentangled from the EuroChristian project that was simultaneously about Christianising as it was about denationalizing and detribalizing indigenous persons and communities). Carpenter, *supra* note 21, at 397 (describing the entanglement of religion, citizenship, and nationhood in the settler colonial state's construction of indigenous communities). See further Niezen, *supra* note 21; Sarah Dees, *Native American Religions*, in OXFORD RESEARCH ENCYCLOPEDIA OF RELIGION IN AMERICA (2018).

³⁵ See J. R. Miller, SHINGWAUK'S VISION: A HISTORY OF NATIVE RESIDENTIAL SCHOOLS (University of Toronto Press 1996); Jacobs, *supra* note 21; Bryan Newland (Assistant Secretary – Indian Affairs); “Federal Indian Boarding School Initiative Investigative Report, United States Department of the Interior (2022) at <https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf>; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* at 63 (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1999). For laws criminalizing ceremonial dancing, see *An Act further to amend “The Indian Act, 1880,”* SC 1884, c 27, s 3 (prohibiting the Potlach); *An Act further to amend the Indian Act*, SC 1895, c 35, s 6 (prohibiting the Sundance). See also E. Brian Titley, *A NARROW VISION: DUNCAN CAMPBELL SCOTT AND THE ADMINISTRATION OF INDIAN AFFAIRS IN CANADA* (Vancouver: University of British Columbia Press 1986) at 163; Bakht & Collins, *supra* note 32, at 790–91. These laws remained on the books in Canada until revision in 1951. See *The Indian Act*, SC 1951, c 29, s 123(2), repealing *Indian Act*, RSC 1927, c 98, ss 2186 (s 140 of the 1927 *Indian Act* addressing the Potlach and Sundance prohibitions).

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In many ways, however, the lesser-known story of the colonial race-religion project in nineteenth- and twentieth-century Africa offers an unparalleled insight into the international legal politics of the racialization of religious difference, especially as it concerns the contemporary ICERD debates. Africa was, of course, “Christian Europe’s” quintessential “other.” The continent was not only regarded as uncivilized but also as having been cut off from civilization, hence Hegel’s well-known conclusion that the continent was wrapped in the “dark mantle of night.”³⁶ Africa, the historian Thomas Prasch explains, was regarded as “the blankest continent on the imperial map.”³⁷ That presumption of Africa’s “blank” state hinged on a civilizational othering that was simultaneously racial and religious. The mutual constitution of racial and religious othering was evident in the imperial discourse that permeated the series of conferences convened in Berlin, Germany from 1884-1885 to negotiate the parceling out of Africa among European powers.³⁸ The Berlin processes were founded on a premise of the superiority of the “idea of western Christian civilization.”³⁹ Delegates to the talks were “firmly convinced of the close

³⁶ G. W. F. Hegel, *LECTURES ON THE PHILOSOPHY OF WORLD HISTORY* 174 (H. B. Nisbet trans., Cambridge University Press 1975).

³⁷ Thomas Prasch, *Which God for Africa: The Islamic-Christian Missionary Debate in Late-Victorian England*, 33 *VICTORIAN STUDIES* 1, 51-73 (1989).

³⁸ For an examination of various parts of the Berlin processes (as Berlin was more of an extended series of talks and negotiations than one single conference), see *BISMARCK, EUROPE, AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884-1885 AND THE ONSET OF PARTITION* (Stig Förster et al., eds., Oxford University Press 1988).

³⁹ Horst Gründer, *Christian Missionary Activities in Africa in the Age of Imperialism and the Berlin Conference of 1884-1885*, in *BISMARCK, EUROPE, AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884-1885 AND THE ONSET OF PARTITION* 85-103 (Stig Förster et al. eds., Oxford University Press 1988).

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connection between Western culture and Christianity,” and for them, “the absolute cultural superiority of the Christian West was not a matter of debate.”⁴⁰ As reflected in the Berlin talks, the colonial project was messy and contested, and interests were frequently discordant rather than in alignment. Yet, at the heart of the African colonial venture was a race-religion project that sought to Christianize Africa on European terms.⁴¹

Berlin delegates understood Europe’s first task to be the advent of ‘civilization’ to ‘uncivilized’ peoples.⁴² Many delegates understood the vehicle of that civilization to be the Christian missionary project. The racial and religious othering which infused the Berlin discourse found theological and scientific justifications—which then served to legitimate the colonial enterprise. Notably, many delegates embraced the theological understanding that “blacks had inherited Noah’s curse (Genesis 9:25) from their alleged ancestor, Ham” leading to a “divine chastisement for Africa.”⁴³ Christian missionaries involved in the Berlin processes also understood the missionizing project as hearkening to Luke’s admonition ‘to light those living in darkness’ (Luke 1:79).⁴⁴ There were, therefore, racial dimensions to the religious othering and religious dimensions to the racial othering on which the civilizational distinction was based. Consequently,

⁴⁰ The exception to this view was the opinion of the Ottoman empire, which was present at the conference but represented a minority view.

⁴¹ See Akande, *supra* note 18, at 286-318 – as noted in detail below, the missionary project was discordant with the colonial enterprise in certain parts of imperial Africa (especially its Muslim parts), but even those administrators averse to Christian missionizing espoused a notion of civilizational othering that pit Christian Europe against an uncivilized racial and religious other.

⁴² Gründer, *supra* note 39.

⁴³ *Id.*

⁴⁴ *Id.*

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the civilizational distinction that animated the colonial project hinged on an indivisible race-religion discourse.

That Christian civilizational project—and the discourse it produced—served to unite participants at the Berlin talks even as rivalry between European states and different Christian confessions simmered in the background. The work of French Bishop Charles Maryoa Allemand Lavigerie (1825-1892), Archbishop of Algiers and founder of the missionary society, White Fathers, is illustrative.⁴⁵ Although Lavigerie was intent on having French Catholics outperform Protestants in acquiring dominion over Central and East Africa, he, like several other leading missionaries, gave primacy to the common European cause of founding a “Christian kingdom” in the heart of Africa.⁴⁶ This priority of the European Christian project led to Lavigerie’s cooperation with English Protestant missionaries, including those seeking to expand their missionary field in those parts of Africa that Lavigerie’s White Fathers had set its sights on.⁴⁷ In fact, it was that inclination that undergirded the Belgian King Leopold’s *Association Internationale Africaine*, which was created to coordinate, and possibly harmonize, European imperial interests on the continent.⁴⁸

The Christian civilizational project found expression in law. A prominent example is the legal instrument that resulted from the Berlin negotiations—the Berlin General Act. Article 6 of

⁴⁵ For a general account of Lavigerie, see generally Louis Philippe Adélard Baunard, *Le Cardinal Lavigerie* (1896); Jean Perraudin, *Le Cardinal Lavigerie et Léopold II* (1958).

⁴⁶ Gründer, *supra* note 39 at 90, citing Cardinal Lavigerie, *Instructions aux missionnaires, Namur*, 112-14 (1950) and Baunard, *supra* note 45, at 69-70.

⁴⁷ *Id.*

⁴⁸ *Id.*

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the Act sought to advance the Christian civilizational project in a way that reveals the race-religion foundations of the colonial enterprise. In Article 6, the European signatories to the Berlin Act “expressed their commitment to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being ...”⁴⁹ The signatories further committed to protecting all “religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.”⁵⁰ The Christianising mission espoused by Article 6, therefore, evoked European civilizational superiority, an idea that translated into a race-religion hierarchy. Reminiscent of Vitoria’s earlier discourse on Indigenous peoples, the entanglement of race and religion is inherent in empire’s construction of the African ‘native.’ By legal definition, the ‘native’ was Black, African, and non-Christian—always necessarily an ‘other’ to the European.⁵¹

⁴⁹ General Act of the Berlin Conference on West Africa (1885).

⁵⁰ *Id.* It does appear that the commitment to extend this protection without distinction on the basis of “creed or nation” was made in response to the advocacy of Ottoman representatives. Nevertheless, the tenor of the discussions and the wording of Art. 6 (for example, the reference to “bringing home to them the blessings of civilization”) indicates that the provision sought to protect Christianity rather than all faiths.

⁵¹ Rabiat Akande, *ENTANGLED DOMAINS: EMPIRE, LAW, AND RELIGION IN NORTHERN NIGERIA* (Cambridge University Press 2023). I acknowledge the pejorative connotations of the term “native;” however, because the term is a specific colonial legal category whose analysis is indispensable to understanding the mutual co-constitution of racial and religious othering, I have utilized it in parts of that narrative. To indicate the vexed nature of the term, I mark the term in single quotes except in cases where it occurs within direct quotations of sources (which is set out by double quotes) or in the title of scholarly works.

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This legal definition produced tensions in the colonial project between those who sought to create sociolegal conditions that would live up to this definition of ‘natives’ by preventing Christian proselytization and those who sought to convert ‘natives’ to Christians—even as they kept alive the premise that the African could not attain the stature of European Christianity.⁵² I return to that point later below. For now, it is important to note that for all of Europe’s homogenizing gaze, the ‘native’ did not operate as an undifferentiated category in practice. There were degrees of othering, culminating in intra-‘native’ distinctions.⁵³ Notably, Islam was regarded as “the quintessential other,”⁵⁴ leading Muslim African societies to be of primacy to the missionizing—and more broadly, to the imperial project.⁵⁵ Rather than severing the link between race and religion in the construction of the ‘native’ (and the integrity of both identities to the colonial encounter), these nuances only underscore the shifting dialectic between race and religion in the construction of Africans. The intra-‘native’ differentiations therefore illuminate degrees of precarity while simultaneously underscoring the centrality of race-religion othering to Europe’s colonial subjugation of Africa.

⁵² *Id.* Akande, *supra* note 18, at 286-318.

⁵³ The question of geographical origin was also salient, leading to a distinction between “natives” who were simultaneously African, and Indigenous to the territory (where they encountered the law), and “native-aliens,” who though African were not Indigenous to the territory. Akande, *supra* note 51, at 44.

⁵⁴ Akande, *supra* note 18, at 286-318. For an account asserting the commonalities between imperial rule by different European powers in Africa, see Mahmood Mamdani, *Historicizing Power and Responses to Power: Indirect Rule and its Reform*, 66 *SOCIAL RESEARCH* 3, 859-86 (1999); Mahmood Mamdani, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (Princeton University Press 2018).

⁵⁵ Akande, *supra* note 18, at 286-318.

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This interplay of religion and race in the ‘native’ identity made it impossible for ‘natives’ to enjoy religious liberty protections even though the Berlin Act nominally extended those protections to them through its guarantee of “freedom of conscience and religious toleration.”⁵⁶ In fact, by declaring that the goal of the provision was to “bring home” to Africans the “benefit of civilization,” the Act expressed the view prevalent in Berlin—that facilitating conditions for an African evolution toward a Christian civilization was the ultimate mission. For Lavigerie and several agents of imperialism involved in the Berlin processes, therefore, the spread of the Gospel was “the prime factor in the moral regeneration of the peoples of Africa.”⁵⁷ That moral regeneration project was infused by both racial and religious ideals and embarked on the making of colonial subjects on those terms.

One important manifestation of that race-religion project was France’s crusade against the Muslim veil in mid-twentieth century French Colonial Algeria.⁵⁸ An uncritical reading of the French project might understand it to be devoid of the religious project that Lavigerie and his collaborators sought to promote, and regard that project as a secular endeavor informed by a post-French-Revolution aversion to the Church. In that reading, the French unveiling project was racial, and the antithesis of a religious endeavor. In fact, however, the French agenda was at once racial and religious. Indeed, the image of the veiled Muslim woman was a racialized one, functioning as

⁵⁶ The provision guaranteed freedom of conscience and religious toleration “to the natives” (the colonized Indigenous population) “no less than to subjects or foreigners.” General Act of the Berlin Conference on West Africa, Art. 6 (1885).

⁵⁷ Gründer, *supra* note 39, at 92, citing M. Storme *Rapports du pere Planque, de Mgr Lavigerie et de Mgr. Comboni sur l’Association Internationale Africaine*, (1957) at 56-62.

⁵⁸ See Frantz Fanon, *Algeria Unveiled*, in *DECOLONIZATION* 60-73 (2004).

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“the negative mirror in which western constructions of identity and gender can be positively reflected.”⁵⁹ The French colonial gaze projected gender oppression onto Islam and naturalized that oppression onto the bodies of Muslim women, effectively racializing the veil and Muslims. Religious othering was bound up with that racializing project. Crucially, even as the French colonizer bandied justifications of *laïcité*, France’s unique and historically contingent brand of secularism, that project was hardly neutral of religion. In fact, the so-called secular public space that required unveiling contradicted only some religions and not others, with the consequence that it functioned to preclude only the racial other’s religious expression.⁶⁰ By doing so, the race-religion discourse not only survived, but also thrived in the French project.

As I have alluded to earlier, the idea that Christianity could regenerate the paradigmatic racial and religious other—the African—was not uncontested within the ranks of the European colonizers. Another view opposed the Christianization project not because it did not consider European Christian civilization as the ideal, but rather because it regarded Africans as lacking the capacity to attain the civilizational peak of Christianity. In fact, it regarded efforts to promote such civilizational ascent not only as doomed to fail, but also as carrying the risk of provoking anarchy.⁶¹

⁵⁹ Al-Saji, *supra* note 12, at 875-902.

⁶⁰ *Id.* On the politics of “secularism,” see Saba Mahmood, *Religious Difference in a Secular Age*, in RELIGIOUS DIFFERENCE IN A SECULAR AGE (Princeton University Press 2015). The disparate treatment of the Muslim veil and the Catholic nun’s habit in French Algeria is an example of this unprincipled construction of the so-called secular public sphere.

⁶¹ Edmund D. Morel, NIGERIA: ITS PEOPLE AND PROBLEMS 135 (Smith, Elder & Co., 1911); Edmund D. Morel, AFFAIRS OF WEST AFRICA 230 (Routledge 2013). For an account of the evolutionary view of civilizational development that became popular in the British imperial administration, see the work of Sir Henry

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Perhaps no event provoked that skepticism in the Christianization project, which predated empire's arrival in Africa, more than the 1857 sepoy revolt in British India. Understood in important sections of the colonial administration as an Indigenous revolt against empire's Christianizing and anglicizing project, the mutiny was followed by a shift in colonial governance attitudes and design. With that shift, the prior widespread support for an anglicizing project gave way to an instrumentalist deference to Indigenous faiths and institutions to maintain empire's tenuous hold. In Africa, that British anxiety would manifest in certain administrative circles as an inclination to grant ceremonial deference to Islam and shield the Muslim faithful from Christian missionary influence. Even as the memory of the Indian rebellion lingered, administrators justified their commitment to 'preserving' Islam on the basis that it was suited to Africans' primitive nature. As Frederick Lugard, the first Colonial Governor of Northern Nigeria and prominent promoter of this idea, noted, "Islam is incapable of the highest development but its limitations suit the limitations of the people."⁶² The Lugardian inclination set off a contestation within the imperial project. Yet, it is crucial to keep in mind that both positions—the Lugardian aversion to conversions to Christianity and the Lavigerie championing of an imperial proselytization project—rested on the same premise. This premise was that the African was at the same time a racial and religious other, and that the most extreme of that racial and religious debasement represented by the African could be found in the African Muslim. If, for Lugardians, that premise led to a

Maine: Henry Sumner Maine, *ANCIENT LAW* (Routledge 2017). For an account of Maine, see George Feaver, *FROM STATUS TO CONTRACT: A BIOGRAPHY OF SIR HENRY MAINE 1822-1888* 109-10, 255-57 (Longmans 1969); Priyasha Saksena, *Jousting Over Jurisdiction: Sovereignty and International Law in Late Nineteenth-Century South Asia*, 38 *LAW AND HISTORY REVIEW* 409-57 (2020).

⁶² See Frederick Lugard, *THE DUAL MANDATE IN BRITISH TROPICAL AFRICA* 78 (1922).

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conclusion that Africans were better left as Muslims, for missionaries, the African condition necessitated bringing the 'native' race into the light. Yet, even for the latter, the African could not completely transcend the darkness.⁶³ In all these projects, therefore, the paradigmatic racial cum religious other could never attain Europe's civilizational standing.

Pan-Africanist thought recognized this race-religion matrix and its centrality to the discourse that legitimated imperialism. A notable early exposition of this critique of the race-religion hierarchy can be found in Edward Wilmot Blyden's *Christianity, Islam, and the Negro Race*, a collection of writings first published in 1887, but which he began to author in the 1870s, before the Berlin talks.⁶⁴ After all, while the Berlin processes institutionalized the race-religion hierarchy to facilitate the parceling out of African territory, the race-religion discourse preceded the Scramble for Africa that Berlin sought to mediate. Writing in nineteenth-century Liberia, decades after African-American slaves first began to be repatriated to that territory, West Indies-born Blyden put the racial and religious hierarchy at the center of the processes of domination that subjugated "negro" peoples.⁶⁵ Although Blyden was a Presbyterian minister, he was unsparing in

⁶³ For the French context, see Al-Saji, *supra* note 12, at 875-902.

⁶⁴ Edward Wilmot Blyden, *CHRISTIANITY, ISLAM AND THE NEGRO RACE* (Black Classic Press 1993). The volume included half a dozen essays that Blyden had published in a *British Quarterly*, *Fraser's Magazine*, in 1870s.

⁶⁵ *Id.* See also Barbara Celarent, *Christianity, Islam and the Negro Race*, 120 *AMERICAN JOURNAL OF SOCIOLOGY* 4 1285-293 (2015). For an exposition of Blyden's reading of Christianity (and Islam) through a race lens, see Edward E. Curtis IV, *Edward Wilmot Blyden (1832–1912) and the Paradox of Islam, Islam in Black America: Identity, Liberation, and Difference*, in *AFRICAN-AMERICAN ISLAMIC THOUGHT* (State University of New York Press 2002); Richard Brent Turner, *ISLAM IN THE AFRICAN-AMERICAN EXPERIENCE* 50-51 (Indiana University Press 2003). See, however, Jacob S. Dorman, *Lifted Out of the Commonplace Grandeur of*

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his criticism of the European missionary enterprise in Africa due to what he regarded as its eurocentrism.⁶⁶ In Blyden's view, that eurocentrism meant that even as missionaries proselytized "negros," they never wholly expected that audience of their proselytism to attain European standing. As a 1921 Pan-African Congress held in Paris noted, that imperial project recognized "negros as *naturally and inevitably and eternally inferior.*"⁶⁷ The notions of hierarchy that undergirded the European imperial enterprise therefore already wrote religious difference into racial difference. Ultimately, Blyden would depart from the Presbytery ministry, renaming himself a "Minister of Truth"⁶⁸ and setting forth a vision of emancipation that entailed dismantling the

Modern Times: Reappraising Edward Wilmot Blyden's Views of Islam and Afrocentrism in Light of His Scholarly Black Christian Orientalism, 12 SOULS 4, 398-418 (2010).

⁶⁶ Mano Delea, *Edward W. Blyden's Intellectual Tradition: The Place of 'Race' and Religion*, 48 SOCIAL DYNAMICS 3, 389-406 (2022); Albert Kasanda, *Exploring Pan-Africanism's Theories: From Race-based Solidarity to Political Unity and Beyond*, 28 JOURNAL OF AFRICAN CULTURAL STUDIES 2, 179-95 (2016); Celarent, *supra* note 65, at 1285-293.

⁶⁷ Emphasis supplied. The Paris Conference resolved:

To the World: The absolute equality of races, physical, political, and social, is the founding stone of world and human advancement. No one denies great differences of gift, capacity, and attainment among individuals of all races, but the voice of Science, Religion, and practical Politics is one in denying the God-appointed existence of super-races, or of races, naturally and inevitably and eternally inferior.

See George Padmore, *HISTORY OF THE PAN-AFRICAN CONGRESS* (Hammersmith Bookshop 1963).

⁶⁸ See Moses N. Moore, *Edward Blyden and the Presbyterian Mission in Liberia*, 48 UNION SEMINARY QUARTERLY REVIEW 1/2 77-79 (1994). See further Delea, *supra* note 66, at 400. For an account of Blyden's intellectual evolution on the Christian missionary project as it related to the race question, see V. Y. Mudimbe, *THE INVENTION OF AFRICA: GNOSIS, PHILOSOPHY, AND THE ORDER OF KNOWLEDGE* (Lulu Press, Inc. 2020).

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close links between race and religion that doomed the European missionary enterprise in Africa.⁶⁹ He would eventually call for an alliance between Islam and an African form of Christianity shorn of the European mission as the vehicle for this emancipation.⁷⁰ Ethiopianism, the idea of an Africanist Christianity advanced in its early form by Blyden, would later become a feature of Pan-Africanist thought and, ultimately, be integral to decolonization efforts in the mid-twentieth century.

As I will show below, later Pan-Africanist critique of imperialism would not lose sight of its early appreciation of the links between racial and religious othering in the hierarchies that legitimated imperialism. Indeed, that awareness of the mutual co-constitution of racial and religious discrimination in the colonial encounter would culminate in a demand for an interlinked international legal protection for racial and religious discrimination as African states began the

⁶⁹ Delea, *supra* note 66, at 389-406; Kasanda, *supra* note 66, at 179-95; Celarent, *supra* note 65.

⁷⁰ See *Blyden to Mary Kingsley in May 7, 1900*, in *SELECTED LETTERS OF EDWARD WILMOT BLYDEN* 463-464 (Hollis R. Lynch ed., 1978); Edward W. Blyden, *The Mohammedans of Nigeria*, in *CHRISTIANITY, ISLAM, AND THE NEGRO RACE* 309 (1885). By the end of Blyden's life, he would come to argue that Islam was itself a form of Christianity, and the best form of Christianity suited to Africans. See Edward W. Blyden, *West Africa, August 22, 1903, 199-200*, in *BLYDEN OF LIBERIA: AN ACCOUNT OF THE LIFE AND LABORS OF EDWARD WILMOT BLYDEN, L.L.D. AS RECORDED IN LETTERS AND IN PRINT* (Edith Holden ed., 1966). For a critique of this understanding and a proposition that Blyden's embrace of Islam as a tool of emancipation was with regards to Islam's "anthropology" rather than its theology, see Dorman, *supra* note 65 citing *BLYDEN, SIERRA LEONE AND LIBERIA* (1884) at 232. Hierarchies, however, persisted even in Blyden's thought; notably, he regarded Indigenous African faiths, "paganism," as being uncivilized, and the proper object of civilizational efforts. See Edward Wilmot Blyden, *Mohammedanism in Western Africa*, in *Christianity, Islam and the Negro Race*, 188 (1993); Dorman, *supra* note 65, at 410.

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process of formal decolonization in the mid-twentieth century. Before venturing into that discussion, I turn first to an important debate over the race-religion question that unfolded on the global stage in the early decades of the twentieth century. That debate illuminates a consciousness of imperialism's race-religion hierarchies well beyond the shores of Africa and spotlights an early attempt to challenge that domination by interlinking racial and religious protections in international law.

II. THE INTERNATIONAL LEGAL POLITICS OF RACING RELIGION

A. Racing Religion at the League

A race-religion hierarchy—and subordination—that emerged from race-religion othering was integral to the European imperialist venture, and to the international legal ideas that justified and sustained colonialism. As that history unfolded globally, the first discernible modern attempt to link international legal protections for race and religion surfaced during the 1919 negotiations of the Covenant of the League of Nations. To understand the stakes—and ultimate fate—of that proposal, it is crucial to note that it was preceded by a religious equality proposal. Destined for inclusion in Article 18 of the Covenant, the declaration of religious equality and positive protections for the principle of religious freedom and liberty of conscience had the firm support of the two leading voices in the deliberations—the United States and Britain. Indeed, U.S. President Woodrow Wilson, who was the chair of the commission deliberating on the covenant, was particularly vocal in his support for a religious liberty provision.⁷¹ On its part, Britain proposed a

⁷¹ This was despite some hesitation from members of the U.S. delegation, particularly Colonel House and D. H. Miller.

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recognition of religious liberty as a preambular declaration. Tabled by its representatives, Robert Cecil and Jan Smuts, the British proposal provided: “They [the High Contracting Parties] unite in solemn recognition of the principle of freedom of conscience and religion.”⁷²

The British and American proposals for international legal protection for religious liberty ostensibly sought to establish a more inclusive regime of religious liberty than the above-referenced Article 6 of the Berlin Act. However, the events that follow reveal that both provisions were far from the globally inclusive regime that they seemed; rather, like the Berlin Act, that notion of religious liberty was grounded in an idea of Western Christian civilization and it envisioned religious liberty protections as a prerogative of that tradition.

The untroubled voyage of the religious liberty proposal toward inclusion in the League Covenant was thwarted by a Japanese proposal to link that provision with racial protections. The representative of Japan and sponsor of the proposal, Baron Makino, justified his proposition by arguing that “racial and religious animosities have constituted a fruitful source of trouble and warfare among different peoples.”⁷³ Makino praised the U.S.-sponsored provision for its recognition of the religious dimensions of international tensions, and violence, but queried its

⁷² This proposal was at the end of the eighth meeting of the Commission. Lord Cecil was the chair of the proceedings and made it clear that in addition to Britain’s individual support for the provision, Wilson’s championship for the religious liberty provision weighed heavily in favor of its inclusion. Cecil noted: “As President Wilson especially demands the inclusion of this article in the text ... I think it cannot very well be omitted.” See D. H. Miller, *The Drafting of the Covenant* (Vol. 1, 1928).

⁷³ *Minutes, 10th Meeting in* D. H. Miller, *The Drafting of the Covenant* (Vol. 2, 1928), 323-24.

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omission of the interlinked question of race.⁷⁴ To remedy what he understood as a defect in the religious liberty provision, Makino proposed a supplemental provision that read:

The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord, as soon as possible, to all alien nationals of states members of the League equal and just treatment in every respect, making no distinction, either in law or in fact, on account of their race or nationality.⁷⁵

Makino's proposal did not mirror contemporary sophisticated postulations of the racialization of religion; however, it was firmly rooted in a recognition of the intimacy of racial and religious discrimination in the world the League inhabited.⁷⁶ Under those circumstances, to

⁷⁴ *Id.* Makino asserted:

[Art. 21] as it stands attempts to eliminate religious causes of strife from international relationships, and as the race question is also a standing difficulty which may become acute and dangerous at any moment in the future, it is desirable that a provision should be made in this Covenant for the treatment of this subject.

⁷⁵ Arthur S. Link (ed.), *The Papers of Woodrow Wilson* (Vol. LIV, 1986), at 500.

⁷⁶ Sahar Aziz notes that works on the racialization of religion have tended to overlook the experience of Asians, including the Japanese. See Aziz, *supra* note 10, at 61. So too have accounts of the racialization of Asians tended to overlook these religious dimensions (see, for instance, Marilyn Lake & Henry Reynolds, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE QUESTION OF RACIAL EQUALITY* 274 (Melbourne University Publishing 2008)). In fact, religious othering had an intimate relationship with this racial othering of the Asian. Chinese, for instance, were stereotyped as a "pagan race." Edward S. Shapiro, *A TIME FOR HEALING: AMERICAN JEWRY SINCE WORLD WAR II*, Vol. 5, xv (JHU Press 1995). They were stereotyped as "superstitious," and their customs, physical features, and foreignness permanent impediments to their ability to assimilate into White Protestant America." Aziz, *supra* note 10, at 61 (citing Karen Brodtkin, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 40-41, (Rutgers University

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entrench protections for religion in international law without guaranteeing protections for racial equality and justice was to institutionalize a flawed legal regime. Makino consequently proposed that the League Covenant treat the challenge of racial and religious discrimination “hand in hand” rather than as distinct challenges requiring separate protectional mechanisms and remedies.⁷⁷

The Japanese proposal was roundly defeated.⁷⁸ The loudest resistance to the race proposal came from the sponsors of the religious liberty provision—the United Kingdom and the United States. The U.S. opposition appears to have arisen from an immediate concern that the Japanese proposal was a threat to domestic laws that limited immigration from East Asia.⁷⁹ In the case of the UK, widespread anti-Asian prejudice was not only limited to the seat of empire, but also manifested in its overseas imperial holdings, particularly in Australia and New Zealand.⁸⁰ In fact,

Press 1998)). Indeed, the Chinese practice of Buddhism and Confucianism were among the reasons that the Chinese were deemed ineligible for American citizenship. See Henry L. Feingold, *THE JEWISH PEOPLE IN AMERICA*, Vol. 2, 145 (Johns Hopkins University Press 1992). The Japanese were equally subject to the race-religion stereotype that racialized their Shinto and Buddhist faith; indeed, Japanese Buddhists were the first to be rounded up after the attack on Pearl Harbour (see Aziz, *supra* note 10, at 62, citing Shapiro, *A TIME FOR HEALING*, 52.).

⁷⁷ D. H. Miller, *The Drafting of the Covenant*, Vol. 1, 183 (1928). See also Malcolm D. Evans, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 100 (Cambridge University Press 2008).

⁷⁸ Not even the Chinese delegation who declared “full sympathy with the spirit” of Makino’s proposal supported it. Rather, they reserved their position.

⁷⁹ The relevant US legislation was The Immigration Act of 1924 (The Johnson–Reed Act). The purpose of the immigration act was to limit the number of immigrants into the United States and to ban immigrants from Asia. See further Francis Paul Walters, *A HISTORY OF THE LEAGUE OF NATIONS*, Vol. 1, 63 (1952).

⁸⁰ *Id.* As part of an unofficial “White Australia” policy, Australia’s 1901 Immigration Restriction Act was passed to restrict immigration (especially from Asian countries), and to encourage immigration from Europe. For the Act, see

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resistance to the Japanese proposal was fiercest among British administrators in Australia. The Australian Prime Minister, William Morris Hughes, was the most vocal in opposing the Japanese proposal. Hughes worried that Australia was especially vulnerable to the threat bound to result from the Japanese wielding of a race-religion provision to challenge anti-Asian exclusionary policies. In Hughes's understanding, this threat was the incursion of Asians into Australia and the demise of the "White Australia" policy that he and many administrators cherished and that was codified in a discriminatory immigration legislation.⁸¹

Australian anxiety was heightened by its geographical location, but it was not alone in its alarm. In the face of the Japanese pairing of the religious equality proposal with that of racial equality, Woodrow Wilson, hastily retreated from his sponsorship of the religious equality provision. U.S. hostility to the Japanese proposal did not appear to have been motivated a concern that it would be challenged by its internal minorities. After all, the Japanese proposal and the emerging League design was unambiguous in its investing of states rather than individuals with legal protections (and obligations). The consequence of that design was to make it impossible for intrastate minorities to utilize any resulting international legal provisions against their own state or against a foreign state without the mediation of a state. U.S. concern with a potential challenge

The Immigration Restriction Act 1901, National Archives of Australia, <[https://www.naa.gov.au/explore-collection/immigration-and-citizenship/immigration-restriction-act-](https://www.naa.gov.au/explore-collection/immigration-and-citizenship/immigration-restriction-act-1901#:~:text=The%20Immigration%20Restriction%20Act%20was,help%20keep%20Australia%20'British)

[1901#:~:text=The%20Immigration%20Restriction%20Act%20was,help%20keep%20Australia%20'British](https://www.naa.gov.au/explore-collection/immigration-and-citizenship/immigration-restriction-act-1901#:~:text=The%20Immigration%20Restriction%20Act%20was,help%20keep%20Australia%20'British)> (last

visited May. 12, 2023). Similar to Australia, New Zealand had a "White New Zealand" policy where it aimed to keep non-whites (especially Asians) out of the country. See New Zealand's The Immigration Restriction

Amendment 1920 in Immigration Restriction Amendment Act 1920, NZLII,

http://www.nzlii.org/nz/legis/hist_act/iraa192011gv1920n23429/ (last visited Mar. 13, 2023).

⁸¹ See Evans, *supra* note 77, at 99.

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by internal minorities through the tool of international law would emerge only in later years with the onset of the human rights regime. In the context of the League negotiations, the U.S. opposition was due to concerns that legislations espousing anti-Asian prejudice, including those restricting immigration, would be challenged by Asian states.

The Japanese linking of racial and religious equality provisions laid bare the intimacy of racial and religious othering undergirding global subjugation by those same imperialist states that opposed the international legal recognition of the interplay of racial and religious discrimination. Even in the absence of much of the colonized world at the talks, and even though Japan was also culpable of imperial subjugation, Baron Makino's argument evoked the race-religion distinctions and violence that animated imperialism. It is therefore not surprising that leading imperialist states found the Japanese proposal provocative. Indeed, the British Representative, Lord Robert Cecil, described the proposal as "highly controversial."⁸² The Japanese proposal was effectively neutralized in the face of intense opposition.

The events that would unfold in the years between the First and Second World War, the so-called interwar years, would only underscore the legal politics of securing international legal recognition of the interplay of racial and religious discrimination. Even as the victors of the First World War thwarted the Japanese efforts to interlink race-religion protections in the League Covenant, it was impossible to ignore the ravages that race-religion othering and discrimination had unleashed in Europe. A long—and by then, systemic—European antisemitism unleashed violence on Jewish peoples across the continent. That situation was an undeniable manifestation

⁸² D. H. Miller, *The Drafting of the Covenant*, Vol. 2, 325 (1928).

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of the mutual constitution of racial and religious othering⁸³ to which Baron Makino drew attention; yet the response of the victors was not to entrench that recognition in the League Covenant. Rather, the approach adopted was to institute protections within the ‘minority treaties,’ which were bilateral agreements between the victors and certain states. With some divergence in their framing, those treaties generally guaranteed the rights of “racial, religious and linguistic minorities,”⁸⁴ and imposed on the states subject to the treaties the international obligation to protect these minorities. That process began with the Polish Treaty, which sought to protect Jewish minorities in Poland, and came to extend to newly formed states or others that had acquired new territory.⁸⁵ The United States was a key player in the making of the minority treaties, including through its leading role in the Polish Treaty in respect of which the United States proposed that the treaty protect “racial and religious minorities” from discrimination on the basis of “race or religion.”⁸⁶ Despite the

⁸³ For accounts of the racialization of Jews that is integral to antisemitism, see Balibar, *supra* note 21; Meer, *supra* note 9, at 389; G. M. Frederickson, *RACISM: A SHORT HISTORY* (Princeton University Press 2002). For an account of the (first half of the) twentieth century international legal and political discourse on the Jewish “race,” see James Loeffler, *ROOTED COSMOPOLITANS: JEWS AND HUMAN RIGHTS IN THE TWENTIETH CENTURY* (Yale University Press 2018).

⁸⁴ See, for instance, Art. 13 of the Polish Treaty.

⁸⁵ For a consideration of the Polish issue in the League deliberations, see K. Lundgreen-Nielson, *THE POLISH PROBLEM AT THE PARIS PEACE CONFERENCE* (Odense University Press 1979).

⁸⁶ Evans notes that “it was US President Wilson that requested that a committee of experts be appointed to consider the question of international obligations that had to be accepted by Poland or any states created by the treaties of peace including the obligations to protect racial and religious minorities.” P. Mantoux, *Les Deliberations du Conseil des Quatres, 24 Mars – 28 Juin 1919* (Paris: Editions du Centre National de la Recherche Scientifique 1955) 441 in Evans, *supra* note 77, at 113.

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interchangeable use of the disjunctive “or” and the conjunctive “and” in the U.S. proposals and the minority treaties, the context of the interwar period was that racial and religious interpretation were understood as interlinked.⁸⁷

This acknowledgement of the nexus between racial and religious discrimination was, however, not general. In many ways, the minority treaties’ recognition of the interplay between racial and religious discrimination was reflective of an interlude rather than indicative of an established international legal approach. Notably, that recognition did not make it into the Treaty of Versailles itself, therefore absolving the First World War victors from undertaking legal protections in relation to such minorities in their territory. Neither were those victors who had obtained new territory been asked to contract separate minority treaties to guarantee the rights of minorities within their borders. Therefore, although Austria, Hungary, Bulgaria, and Turkey were made to sign treaties, Belgium, France, and Denmark were not asked to do so.⁸⁸ If an argument against Makino’s race-religion proposal during the League Covenant negotiations was that of undue interference in the affairs of states, that proposal was hardly open to the state subjects of the

⁸⁷ Wilson’s proposal for the German treaty made reference to the issue of both race and religion, Evans, *id* at 113.

It provided:

1. The State of... covenants and agrees that it will accord to all racial or national minorities within its jurisdiction exactly the same treatment and security, alike in law and in fact, that is accorded the racial or national majority of its people.
2. The State . . . covenants and agrees that it will not prohibit or interfere with the free exercise of any creed, religion or belief whose practices are not inconsistent with public order or public morals, and that no person within its jurisdiction shall be molested in life, liberty or the pursuit of happiness by reason of his adherence to any such creed, religion or belief.

See D. H. Miller, *The Drafting of the Covenant*. Vol. 2, 282 (1928).

⁸⁸ Evans, *supra* note 77, at 143.

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various minority treaties. This selective imposition of the treaties on losers rather than victors undermined the legitimacy of the system, and with it any redemptive possibility of serving as a precedent for a robust international legal recognition of the interplay between racial and religious discrimination.

B. Making the ICERD in the Postwar Years

Even as a mutually imbricated religious and racial othering continued to justify European decimation and dispossession of overseas peoples, the tenuous minority treaty regime forged in Europe in the interwar years did not shield the continent from the consequence of race-religion prejudice. The events of the Second World War and the horrifying atrocities of the Holocaust stripped all pretense of an international legal regime protecting racialized religious groups even as it underscored the close ties between racial and religious othering.

Three processes would shape the direction of the debate over an interlinked international legal protection for race and religion as they unfolded in the aftermath of the Second World War on the site of the United Nations, which succeeded the failed League of Nations. The first was the memory of the Holocaust and the credible fears that antisemitism, including in its Nazi form, had survived the horrors of the Holocaust. The second was the unfolding of the global process of decolonization, which saw much of the world emerge from the clutches of their European imperial overlords and join the United Nations as formally independent states and vocal critics of the imperial discourses that justified colonialism. The third was the broader political context of the Cold War between the East and West, signified by the USSR and the United States. Together, these three processes came to catalyze the alliances and inspire the arguments that featured in the UN debate in the post-Second World War years.

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References to racial and religious protections were common in the international legal instruments that emerged in the aftermath of World War II. The 1945 UN Charter, in its Article 1, declared one of the purposes of the UN to be “promoting, and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁸⁹ The Universal Declaration of Human Rights (UDHR), which followed three years later, evinced a similar notion.⁹⁰ As provisions that set out race and religion among a longer laundry list of individual equality protections integral to the emerging human rights regime, those references hardly bore witness to the close ties of racial and religious discrimination. As such, these documents did not therefore embody protections for race-religion discrimination. Yet, the international legal regime of religious liberty that emerged in the immediate aftermath of World War II underscored the intimate connections between racial and religious disparities in the international imperial order already revealed in the Berlin and League processes. Indeed, the earliest of these provisions that would come to be regarded as the encapsulation of the international human right to religious liberty, Article 18 of the UDHR, was a product of the advocacy by

⁸⁹ UN Charter Art. 1. See also: Art. 13(2) (“The General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”); Art. 55 (“... the United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”); and Art. 76 (setting out the objectives of the prior existing trusteeship system on similar terms as the purpose of the United Nations cited in Art. 55 above).

⁹⁰ See also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) Arts. 2, 16, and 18.

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international Protestant ecumenists who sought to protect Christian missions' access to overseas territories.⁹¹

Contesting received narratives of Article 18, critical histories question that provision's claim to universality by revealing its Christian preferentialist notion of religious liberty.⁹² With a strong impetus on the right to proselytize and change religion, Article 18 sought to sustain the race-religion othering that instantiated Europe's global imperial expansion.⁹³ To the European Christian ecumenical promoters of Article 18, that provision was intended to dismantle barriers to

⁹¹ Linde Lindkvist, *The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights*, 4 HUMANITY: AN INTERNATIONAL JOURNAL OF HUMAN RIGHTS, HUMANITARIANISM, AND DEVELOPMENT 429, 440 (2013); Akande, *supra* note 18, at 286-318.

⁹² For accounts of the Universal Declaration's inclusivity, see Mary Ann Glendon, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Random House Trade Paperbacks 2002); Hans Ingvar Roth, *Peng Chun Chang, Intercultural Ethics and the Universal Declaration of Human Rights*, IN *ETHICS AND COMMUNICATION: GLOBAL PERSPECTIVES* 98 and 99 (Göran Collste, ed., 2016); Hans Ingvar Roth, *P. C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (University of Pennsylvania Press 2018). For critical histories, see Samuel Moyn, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (Harvard University Press 2012); Moyn, *supra* note 18; Lindkvist, *supra* note 91, at 429, 440; and Akande, *supra* note 18, at 286-318 .

⁹³ Lindkvist, *supra* note 91, at 429-47. As foremost ecumenist Charles Malik admitted:

though I cared for every word in the Declaration, I felt that, if we should lose on this Article on freedom of conscience and religion ... my interest in the remainder of the Declaration would considerably flag... . [W]ithout the full and unimpaired right to think and believe freely, the value of these other rights pales into relative insignificance.

In Charles Malik, *The Universal Declaration of Human Rights*, in *FREE AND EQUAL: HUMAN RIGHTS IN ECUMENICAL PERSPECTIVE* 10–11 (Frederick O. Nolde ed., 1968).

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the mission field and to counter what they viewed as the intractable opposition of faiths like Islam that embodied legal proscriptions of and obstacles to conversion.⁹⁴ Missionary frustration in Muslim Africa was in many ways central to the advocacy—although Muslim Africans were by no means the only religious other that inspired ecumenical design of Article 18.⁹⁵ With that provision, ecumenists sought to advance the project of spreading the gospel, a project that was, as shown above, simultaneously racial as it was religious.⁹⁶ As such, the international legal regime birthed by the UDHR (and by implication, the United Nations) saw the flourishing of race-religion othering even as it continued to elide those interconnections, denying it of international legal recognition and protection.⁹⁷

⁹⁴ See M. Searle Bates, *RELIGIOUS LIBERTY: AN INQUIRY* (Da Capo Press 1945). At the forefront of the project were leaders such as American Otto Frederick Nolde, Lutheran missionary and inaugural director of the Commission of the Churches on International Affairs, the organization established by the World Council of Churches for the primary purpose of ensuring the making of an international legal provision on religious liberty.

⁹⁵ Akande, *supra* note 18, at 286-318. Lindkvist, *supra* note 91, at 429-47.

⁹⁶ Art. 18 would come to form the backbone of the international legal regime of religious liberty with its provisions reflected in major international human rights instruments, such as the International Covenant on Civil and Political Rights: Art. 18; European Convention on Human Rights: Art. 9; American Convention in Human Rights: Art. 12. For an account of how Art. 18 became domesticated in Northern Nigeria and its influence on the legal provisions of states emerging from colonial rule, see Akande, *supra* note 51. See, however, the different wording of Art. 8 of the African Charter on Human and People's Rights (the Banjul Charter): "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." The Banjul charter stands out in not mirroring the understanding of religious liberty evinced in Art. 18.

⁹⁷ Art. 18 was made in a world much of which was still under the colonization of Europe, meaning that the processes that culminated in its making was devoid of much democratic participation and engagement. Indeed, opposition to

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This was the backdrop against which a series of antisemitic incidents occurred in the winter of 1959-1960, shaking Europe and raising global fears of a resurgence of Nazi ideology.⁹⁸ In an immediate response, the UN General Assembly adopted a Declaration against religious and racial discrimination on December 12, 1960. In addition to the UNGA declaration, the UN Subcommission on the Prevention of Discrimination and Protection of Minorities issued a resolution that was noteworthy in its recognition of the interplay between racial and religious othering. The Subcommission declared a “deep concern” with the “manifestations of antisemitism and other forms of racial and national hatred and religious and racial prejudices which have occurred in various countries reminiscent of the crimes and outrages committed by the Nazis prior to and during the Second World War.”⁹⁹ The Subcommission’s choice of the term “prejudice” not only emphasized the interplay of racial and religious othering, but also rooted that interplay in an “internal pathology” rather than a mere social deviance.¹⁰⁰ By so doing, the Subcommission

Art. 18 came from some of the few non-Western states present at its deliberation, especially Muslim states like Saudi Arabia and Egypt who described the provision as a colonial one. See Lindkvist, *supra* note 18. And once more states began to emerge from colonial rule, Art. 18 faced more overt criticism at the United Nations for its exclusionary view of religion, and for the covert privilege it gave to European Christianity. As the Nigerian representative put it in the context of the debates over Art. 18 of the International Covenant on Civil and Political Rights, which is modelled on the UDHR: “Every individual should have the right to worship as he saw fit, even if he chose to worship a rock or a river.” See Evans, *supra* note 77, at 203.

⁹⁸ Michael Banton, *THE INTERNATIONAL POLITICS OF RACE* 43 (Polity Press 2002).

⁹⁹ *Id.* at 43-44.

¹⁰⁰ *Id.* As Banton notes: on the significance of using prejudice in this context, stating that it implied that racial and religious discrimination was a product of an internal pathology; that this approach had not been taking in framing rights in the ICCPR, including Art. 26, which treats discrimination as a mere social defiance as opposed to a manifestation of an internal pathology.

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appeared to acknowledge the extent of the problem of racial and religious prejudice in social, and indirectly, in international interactions. The UNGA and UN Subcommission resolutions were important interventions, but they hardly created enforceable international legal obligations or protections. The opportunity created by the resolutions would, however, be seized by a core group of recent entrants to the United Nations—newly decolonized African states. Armed with the memory of the racial cum religious othering foundations of the colonial encounter, that group would embark on concerted effort to craft an international legal provision that addressed the question of racial and religious subordination.

The 1950s and 1960s witnessed intensified successful advocacy for decolonization. That effort produced tangible results that increased the discursive clout, even if not the political power, of the rapidly decolonizing Global South. In Africa, for instance, although only ten African states attained Independence in the 1950s, that number had increased to forty-eight by the 1960s.¹⁰¹ For that bloc of critics of European imperialism who found themselves with seats at the United Nations, the critique of colonialism and advocacy for decolonization was very much linked to the denunciation of the civilizational othering that justified the European colonization of Africa. That civilizational distinction, it was recognized, was at once racial as it was cultural, subordinating the worldview, including religious and cultural practices, of the colonized population. This understanding is evident in the discourse of the Pan-African Congresses that began to be convened in 1900 and leading to the fifth celebrated 1945 Manchester Pan-African Congress that would be

¹⁰¹ John Hatch, *AFRICA: THE REBIRTH OF SELF-RULE* (Oxford University Press 1967).

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followed by the wave of decolonization across Africa.¹⁰² The 1921 Congress held in Paris, for instance, sought “the recognition of civilized men as civilized despite their race or colour” while also calling for “[f]reedom in their own religion and social customs and with the right to be different and nonconformist.”¹⁰³

Not all the Pan-African Congresses explicitly distilled the civilizational difference justification that legitimated imperialism into race-religion terms. Yet, there is no doubt that these gatherings espoused a comprehensive understanding of racial discrimination. Those international gatherings were reflections of powerful Pan-Africanist critiques emerging from the continent, denouncing colonialism as a form of domination powered by an indivisible race-religion othering.¹⁰⁴ Notable in particular was the rise of Indigenous African (“Ethiopianist”) Churches

¹⁰² Hakim Adi & Marika Sherwood, *THE 1945 MANCHESTER PAN-AFRICAN CONGRESS REVISITED* (New Beacon Books 1995); Marika Sherwood, *MANCHESTER AND THE 1945 PAN-AFRICAN CONGRESS* (Savannah Press 1995). See further Marika Sherwood, *Pan-African Conferences, 1900-1953: What Did ‘Pan-Africanism’ Mean?* 4 *THE JOURNAL OF PAN AFRICAN STUDIES* 10 106-26 (2012).

¹⁰³ Padmore, *supra* note 67.

¹⁰⁴ Pan Africanism was far from a uniform ideology and had multiple strands; yet, central to that intellectual current and political project was a critique of imperialism and the global denigration of Black peoples through a process of othering that was at once based on a cultural and religious differentiation as it was based on phenotypical distinction. To that extent, the concept of Ethiopianism was integral to Pan Africanism. See Barbara Bush, *IMPERIALISM, RACE AND RESISTANCE: AFRICA AND BRITAIN, 1919-1945* (2002). See further Sherwood (2012), *supra* note 102, at 106-126. For an early exposition of the idea of an African Church in resistance to the race-religion hierarchy at the heart of the imperial enterprise, see Blyden, *supra* note 64. For a seminal analysis of Pan-Africanist’s critique of the racial hierarchy inherent in Christian missionizing, and the attempt to deploy ideas about African Christianity and Islam to resist the race-religion underpinnings of the imperial missionizing enterprise, see Mudimbe, *supra* note 68.

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who rejected what they understood as the European missionary colonial complex.¹⁰⁵ Just like early Pan-Africanist, Edward Blyden, had since argued, these Ethiopianists insisted that the European Christian mission was integral to European imperialism and predicated on the simultaneous racial and religious subjugation of the African. Premised on this critique, Ethiopianism sought to foster a radical political consciousness that would dismantle that race-religion hierarchy even as it embraced Christianity.¹⁰⁶ Ethiopianists successfully argued that Christianity could be authentically African with the consequence that it sought to disentangle the race-religion project that lay at the heart of the imperialist missionary enterprise. These Pan-Africanist critiques would go on to inspire advocacy to end racial discrimination through a variety of proposals, including through a bid that came out of the Manchester gathering to criminalize racial discrimination in all its forms.¹⁰⁷

It was from the Pan-Africanist segment of the United Nations, largely comprised of states that attained Independence following Manchester, that a proposal emerged for the United Nations to codify an international prohibition on racial discrimination. Officially presented at the 17th session of the General Assembly 1962, that proposal encapsulated the African group's critique of

¹⁰⁵ For an analysis of the emergence of Indigenous African churches, borne of a critique of racial othering of European Christian missionizing and seeking to indigenize the Church to Africa, see Ogbu Uke Kalu, *AFRICAN CHRISTIANITY* (Africa World Press 2007). See further John L. Comaroff & Jean Comaroff, *OF REVELATION AND REVOLUTION: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER*, Vol. 2 (1997). Marthinus L. Daneel, *QUEST FOR BELONGING* 46-47 (Mambo Press 1987). See, however, J. Du Plessis, *A HISTORY OF CHRISTIAN MISSIONS IN SOUTH AFRICA* (Longmans Green 1911).

¹⁰⁶ Graham A. Duncan, *Ethiopianism in Pan-African Perspective, 1880-1920*, 41 *STUDIA HISTORIAE ECCLESIASTICAE* 2 198-218 (2015).

¹⁰⁷ See Adi & Sherwood, *supra* note 102; Sherwood (1995), *supra* note 102.

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the racist foundations of the colonial enterprise and their vision of the deployment of international law to neutralize the racial hierarchy that was intrinsic to the foundations of colonialism, and therefore, of the international legal order. As noted earlier, that understanding of the racial othering on which the European imperial order was founded was not unidimensional. Instead, it rightly apprehended the broader civilizational distinction that justified the colonization project as going far beyond somatic dimensions of racial othering, but also inspired in fact by pseudo-theological notions. Religion was foundational to that broader understanding. Notably, when the proposal for the making of an international convention ending racial discrimination was tabled at the 17th session of the UNGA, that proposal included protections against religious discrimination as part of the broader protection against racial discrimination. By interlinking both protections, the proposal took the view that racial and religious othering were mutually constitutive—rather than merely intersectional.

The race-religion proposal had support from elsewhere in the decolonizing world, specifically from Asia and the Middle East.¹⁰⁸ It was also the position of the recently created state of Israel. After all, leading Jewish activists who were foremost in the making of Israel were keenly aware of the interplay of racial and religious discrimination in antisemitism.¹⁰⁹ Addressing the UN Commission on Human Rights, Israeli representative Moshe Bartur stressed the interplay between religious and racial oppression. Bartur argued that “there was no clear line among racial, ethnic, and religious discrimination, and that all were diverse aspects of the same ugly mixture of hatred

¹⁰⁸ Ofra Friesel, *Race Versus Religion in the Making of the International Convention Against Racial Discrimination*, 1965, 32 LAW AND HISTORY REVIEW 2 374-75 (2014).

¹⁰⁹ For an account of the efforts of key Jewish figures to address antisemitism through international human rights, see Loeffler, *supra* note 83.

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and barbarism from which humanity, in spite of its astonishing technological and scientific progress.”¹¹⁰ Regardless of the strong support the proposal enjoyed among the part of the world that had long been the subject of the race-religion demarcations (and subordination) at issue, the proposal foundered under the weight of the geostrategic Cold War rivalry within Euro-America.

The UN debates were unfolding at a time when the Cold War was heating up between the two post-Second World War imperial powers—the United States and USSR. The UN gathering to deliberate over the race-religion proposal became an important site for that broader geopolitical rivalry. Jousting at the United Nations, the rivals sought to uncouple the racial and religious protections under debate; instead, they advocated the primacy of one over the other in ways that advanced each state’s geostrategic goals. As it had done during the League negotiations (and in the making of the minorities treaties), the United States positioned itself as the champion of religious liberty, throwing its weight behind the proposal to entrench religion into the convention. Even as it took great care to cement its image as the defender of religious freedom, the race dimensions of the proposal posed a conundrum for the United States.¹¹¹ After all, the negotiations were unfolding before the United Nations at a time when the world’s attention was affixed not only to systemic oppression of African Americans but also to the violent backlash against the

¹¹⁰ Moshe Bartur, *Statement in ECOSOC, July 5, 1963* (ISA/MFA, box 13, file 2632) in Friesel, *supra* note 108, at 380. See further the submission by Eliezer Yapou, the Israeli delegate to the Third Committee, which criticized the separation between religion and race, this time during deliberations on the draft of the convention for the elimination of racial discrimination, UN General Assembly, Declaration of the representative of Israel, September 30, 1963, Third Committee, 18th Session, 1252nd meeting (1963).

¹¹¹ Anna Su, *EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER* (Harvard University Press 2016).

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modest gains of the civil rights movement. Beyond the embarrassment of having to defend the widely publicized situation at home, the U.S. resistance to the racial discrimination provision was also informed by its strategic alliance with Apartheid South Africa. Nevertheless, the United States recognized the need to balance that alliance with South Africa, which included the siting of the Azores military base and other military facilities, with the strategic benefits of cultivating favorable relations with the rest of the continent.¹¹² Even if the United States had the power to effectively neutralize any backlash that may have arisen from alienating African states, the broader momentum for decolonization and the successful centralization of the denunciation of racial discrimination to the critique of colonialism meant that an opposition to racial equality would have been impolitic in those years. Given this situation at home and the international context, all the United States could hope to do was to downplay the racial equality dimensions of the proposal rather than to adopt a vocal oppositional stance.

At the same time, however, the religious discrimination dimension of the proposal offered an opportunity for the United States to further its own international reputation as a defender of religious liberty. Indeed, U.S. statesmen and leading clergy who held prominent positions in the international ecumenical (and missionary) movement made religious freedom central to the postwar international order.¹¹³ That rhetoric survived even as the legal politics of the frustrated Japanese race provision, the overt biases of the minority treaty regime, and the unmistakable

¹¹² *Memorandum, Arthur M. Schlesinger, Jr., special assistant to the president, to Robert F. Kennedy, attorney general, July 1, 1963 (Vol. XXI, 1963), no. 315 in Nina Davis Howland & Glenn W. LaFantasie, eds., Foreign Relations of the United States (Washington: US Government Printing Office, 1995).*

¹¹³ Akande, *supra* note 18, at 286-318; Lindkvist, *supra* note 91, at 429-47. On the US religious freedom project, Su, *supra* note 111 .

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Christian flavor of the UDHR's Article 18 called into question the religious freedom project's claim to neutrality. U.S. support for the religious liberty project in the moment after the Second World War was undoubtedly rooted in a longer story advancing a Euro-American Christian notion of faith. Yet, the United States constantly cast the USSR as a foe of religious freedom, juxtaposing it with its own ostensibly superior credentials on religious protections.¹¹⁴ Even as the United States criticized the USSR's 'godless communism' and its repression of religion and religious persons, it especially condemned the USSR for its treatment of Jewish minorities. Crucially, the United States sought to emphasize the USSR's antisemitism problem as that of religious liberty and sought to downplay the racial dimensions of anti-Jewish prejudice. By so doing, the United States might have hoped to divert attention from its own failings at home.

The USSR responded by rejecting the religious liberty dimensions of the proposal and emphasizing instead the racial equality provisions. Turning the tables, the USSR constantly brought up the question of anti-Black racism and the situation of African Americans in the United States, arguing that the pressing question requiring international action was that of racial discrimination as depicted in its most extreme form in the United States. Like the United States, the USSR therefore sought to delink the question of racial and religious discrimination, choosing either one to the exclusion of the other, and wielding each against the other.

UN discussions on the floor of the General Assembly and before the relevant UN Subcommission are replete with bickering not only between the United States and USSR but also more generally between the East and the West over the race-religion question. A 1962 exchange

¹¹⁴ T. Jeremy Gunn, *SPIRITUAL WEAPONS: THE COLD WAR AND THE FORGING OF AN AMERICAN NATIONAL RELIGION* (Praeger 2008).

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reveals the broader East-West dimensions of the debate.¹¹⁵ During the UN General Assembly's November 1, 1962 meeting, the Australian representative to the United Nations, H. D. White, blatantly charged the USSR with antisemitism. The Soviet representative, T. N. Nikolayeva, however, responded by describing the Australian charge as "filthy calumnies."¹¹⁶ Seeking to shift scrutiny to the United States, the Soviet representative charged the United States with "rank racism," citing the ongoing White opposition to the integration of Mississippi schools at the time.¹¹⁷ U.S. representative Marietta Tree responded that the Mississippi situation reflected a gradual "step up the long, rugged road toward gaining recognition of the dignity of the individual everywhere."¹¹⁸

On the other hand, Western imperial powers doubled down on their criticism of Soviet antisemitism. The Australian representative alleged systematic Soviet elimination of Jews by sentencing an "unduly high proportion" of Jews to death for economic offenses.¹¹⁹ Australia also cited Soviet restrictions on Jewish religious practices, such as the state ban on unleavened bread for the 1962 Passover observance, among other instances of curtailment of religious liberty. The British representative reiterated this criticism, expressing Britain's "profound regret that intolerance of religious practice exists in the Soviet Union and other Eastern European countries."¹²⁰ The Soviet bloc responded to these comments by criticizing Western colonialism.

¹¹⁵ Arnold H. Lubasch, *Australian in UN Accuses Soviet of Anti-Semitic Practices*, New York Times, November 2, 1962.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

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Nikolayeva argued that the scrutiny of the Soviet Union aimed to draw attention away from “the racial discrimination imposed by colonialism.”¹²¹ The Soviet Union then emphatically denied allegations of antisemitism and insisted that Jewish peoples thrived in the Soviet Union, as evidenced by the high Jewish composition of professional, artistic, and political positions.¹²² These accusations and counter-accusations came to be so common that both the United States and USSR representatives came to predict them and prepare responses in advance.¹²³ The East-West antagonism, which significantly intensified between the United States and the USSR,¹²⁴ greatly strained the UN efforts, ultimately withering the strength of the proposal for an international legal instrument recognizing the interplay between racial and religious discrimination.

The African group championing the proposal expressed its frustration with the U.S./USSR bid to decouple the question of religious othering from that of racial othering.¹²⁵ However, even

¹²¹ *Id.*

¹²² *Id.*

¹²³ In the case of the UN delegation, for example, they were urged to respond with descriptions of efforts being made by the government to address the question of racial discrimination. UN Commission on Human Rights, Position Papers for United States Delegation to the UN 1953–1965, February 22, 1963, 19th Session, *in* Friesel, *supra* note 108, at 367.

¹²⁴ *Id.* For a reflection on the US domestic constitutional dimensions of the U.S.-USSR accusations and counter-accusations over racial and religious discrimination, see Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7-150 (1994).

¹²⁵ For a report of the African Group criticism of the attempt to isolate the religion question from that of race, see Rachel C. Nason, US Department of State, to Morris B. Abram, *Position Paper for the Economic and Social Council's 37th Session*, June 8, 1964 (Abram Papers, Emory University, box 94, folder 9) reporting that the African delegates “were quick to oppose USSR efforts to postpone or minimize work on religious intolerance in favor of the

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as it criticized the opposition to the interlinking of legal protections against religious othering with those against racial othering, the African Group was careful to avoid appearances of taking sides in the debate between the United States and the USSR.¹²⁶ That attitude was an expression of the overall “non-aligned” posture that had been assumed by much of the newly decolonized world to the Cold War between the East and the West.¹²⁷ As these newly independent states emerged from the clutches of imperial dominion, they understood that substantive decolonization had not been attained even if formal colonialism was a thing of the past. Former European imperial powers continued to exert superior authority in global affairs, including at the United Nations, and several of these former colonizers continued to exercise political, social, and economic force over the decolonizing world. The Non-Aligned Movement was an attempt by these decolonizing states to assert their independence in the power tussle between European powers, and to seek to forge

race convention, and repeatedly took the lead in forcing discussion of the religious declaration in the sub-commission.” *In Friesel, supra* note 108, at 377.

¹²⁶ This posture would also inform the OAU posture to the proposal by African-American activists, the most prominent among which was Malcolm X, for the OAU “to recommend an immediate investigation into our problem by the United Nations Commission on Human Rights.” The OAU indicated its support through a resolution declaring that it “was deeply disturbed, however, by continuing manifestations of racial bigotry and racial oppression against Negro citizens of the United States of America ...the existence of discriminatory practices is a matter of deep concern to the member states of the OAU.” That resolution, however, stopped short of Malcolm X’s request. William W. Sales, Jr., *FROM CIVIL RIGHTS TO BLACK LIBERATION: MALCOLM X AND THE ORGANIZATION OF AFRO-AMERICAN UNITY* 68 (South End Press 1994).

¹²⁷ For a general discussion of Bandung, see Jürgen Dinkel, *THE NON-ALIGNED MOVEMENT: GENESIS, ORGANIZATION AND POLITICS (1927-1992)* (Brill 2018); *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* (Luis Eslava et al., eds., Cambridge University Press 2017).

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connections with states in the formerly colonized and decolonizing world. That non-aligned posture called for an aloofness from—and non-descent into—the U.S.-USSR debate even as the African Group criticized the hegemons' politicization of the race-religion question.

Beyond the challenges posed by the U.S.-USSR sparring, the proposal had started to run into obstacles even in those quarters where it had previously enjoyed support. Significantly, escalations in the Middle East over the occupation of Palestine had begun to erode the proposal's favor among its Middle East backers. The climate of suspicion in the Middle East was at once fueled by and incensed broader geopolitical contestation far beyond the UN race-religion debates. In the context of the UN debates, however, Israel's support for an interlinked provision might have provoked concerns among other Middle East representatives that criticism of Israel would be conflated with the forms of race-religious othering that the proposed convention sought to address. In the midst of these tensions, non-Israeli Middle East backers of the race-religion provision abandoned their erstwhile favor for the Israel-supported proposal.

In the face of opposition, the proposal for an interlinked provision ultimately foundered. The demise of that proposal was formally announced by a December 1962 UNGA resolution that sought to address the question of race and religion in separate international legal instruments.¹²⁸ By that resolution, the UNGA resolved to prepare a draft declaration and draft convention for the elimination of racial discrimination alongside separate drafts dealing with religious intolerance. The following year, the UNGA went even further, resolving “to give absolute priority to the preparation of a draft international convention on the elimination of all forms of racial discrimination.”¹²⁹ The reference to “all forms of racial discrimination” might appear to signal

¹²⁸ United Nations General Assembly, Res. 1780 and 1781 (Dec. 7, 1962).

¹²⁹ United Nations General Assembly, Res. 1906 (Nov. 20, 1963).

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attention to intersectional forms of racism; however, it in fact announced the UNGA's final retreat from a recognition of the interplay of racial and religious othering. Indeed, the UNGA would go ahead with the mandate on the racial dimension, concluding the processes of negotiating the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by the following year in 1963. Emerging from those processes, the ICERD became one of the earliest international human rights instruments. The ICERD made two references to religion: in its preambular reference to the UN mandate to ensure equality for all regardless of enumerated bases of difference (including religion), and in its Article 5 reference to the protection of individual rights in the enjoyment, *inter alia*, of the freedom of religion. Neither provision revived the interlinked race-religion protection initially proposed; rather, both provisions centered the neutered racial discrimination proposal that survived the debates. Even as the convention, ICERD, insisted that its mandate was to prohibit racial discrimination in all its "forms," its excision of and religious discrimination provision denied the imperial history of race-religious othering, and ultimately meant that the convention's promise rang shallow.

III: CONTEMPORARY STRUGGLES

A. The ICERD Debates

Never quite dead, the earlier struggles have made a comeback in ongoing UN debates over the formulation of a protocol to the 1963 ICERD. That debate among UN member states is unfolding before the Ad Hoc Committee on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination. At the urging of the UN General Assembly, the UN Human Rights Council established the committee

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to elaborate, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination, filling the existing gaps in the Convention and also providing new normative standards aimed at combating all forms of contemporary racism, including incitement to racial and religious hatred.¹³⁰

The work of the committee touches on four thematic areas, namely: dissemination of hate speech; racial cybercrime (social media networks and companies); all contemporary forms of discrimination based on religion or belief; and preventive measures to combat racist and xenophobic discrimination.¹³¹ The issue of the interface between racial and religious discrimination, which is integral to the committee's consideration of the extension of ICERD protections to religion, has, however, been the most intractable—as it was during the original making of the ICERD in the earlier years of the UN's existence.¹³²

¹³⁰ United Nations Human Rights Council, Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the effective implementation of the Durban Declaration and Programme of Action (Dec. 8, 2006). Indeed, the Ad Hoc Subcommittee's work now turns on the question of criminalizing racism following the UNGA and Human Rights Council's 2017 request to commence "...negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature."

¹³¹ Rep. of the United Nations Human Rights Council, A/HRC/42/58.

¹³² See, however, the landmark Durban Declaration's embrace of an intersectional lens as discussed in E. Tendayi Achiume, "Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the 2030 Agenda for Sustainable Development, the Sustainable Development Goals and the fight against racial discrimination," A/HRC/50/60.

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Some of the old UN alignments remain in the ongoing debate. The leading proponents of an interlinked proposal remain those states living with the memory of colonialism and the forms of differentiation through which the proposal legitimated itself.¹³³ In particular, the African Group continues to champion a proposal to extend ICERD protections to religion, thereby interlinking provisions for religious and racial equality in a way that recognizes the racial dimensions of religious othering. Although the African Group continues to be strengthened by general support from the Global South, it is now sharing the front seat on the proposal with the Organization of Islamic Conference, which features predominantly Muslim states from the Middle East and from Africa and Asia.¹³⁴ For these proponents of an interlinked provision, the living memory of colonialism is integral to the demand for an international legal response to the interplay of racial and religious othering.¹³⁵ This group understands colonialism to be far from past and sees the colonial legacy living on in contemporary forms of racial and religious othering. Although antisemitic attacks had provided the immediate impetus for the mid-twentieth century race-religion

¹³³ See generally Report of the Ad Hoc Committee, Twelfth Session; and Report of the Tenth Session.

¹³⁴ See generally Report of the Ad Hoc Committee, Twelfth Session. To be sure, there has been a notable discontinuity, particularly as reflected in Russia's novel support for the race-religion proposal (although no official votes have been taken at the current stage of negotiations). See Report of the Tenth Session, p. 18. Vocal opposition to the proposal has emerged from the European Union (even as the United States has taken a back seat in engaging in the debate as it unfolds in its earlier stages). See Report of the Ad Hoc Committee, Twelfth Session at 7-8.

¹³⁵ See, for instance, the China-sponsored HRC Resolution 48/7 on Colonialism. Rabiat Akande, *International Law and the Racialization of Religious Minorities: Presentation to the United Nations Ad Hoc Committee on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination*, Invited Expert, A/HRC/51/57 (2022).

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UN debates, today, the question of Islamophobia has taken the center stage in the debates over an international legal response to what is understood as the racialization of religious minorities.¹³⁶

Advocates argue that anti-Muslim prejudice is simultaneously rooted in religious and racial discrimination.¹³⁷ They therefore seek to render specious the boundary between religious and racial discrimination by evoking the memory of the entanglement of racial and religious othering in the civilizational distinction justifying colonial and postcolonial (including post-9/11) forms of domination.

The discipline of the Muslim body in national and international legal security, and the law's regulation of the Muslim headscarf and veil are foremost illustrations of the imbrication of religious and racial discrimination in the construction of Islamophobia. I consider the example of the latter—the Muslim headscarf and veil—by looking to the jurisprudence of no less a court than the European Court of Human Rights (ECtHR). This analysis of the court's jurisprudence on the question of the Muslim headscarf reveals how the Christian European foundations of international law continue to give life to a jurisprudence that excludes non-European religious others.¹³⁸ The ECtHR's reading of religious liberty creates a hierarchy of faiths that privileges European forms of Christianity, advances a majoritarian idea of religious liberty, and marginalizes minorities, most markedly the visibly Muslim woman. Beyond the ecumenical roots of the relevant European

¹³⁶ For an argument of the Organization of Islamic Cooperation with regard to Islamophobia, see Report of the Ad Hoc Committee, Twelfth Session, at 3-4.

¹³⁷ See Su'ad Abdul Khabeer, n.d. Islamophobia is Racism: Resource for Teaching & Learning about Anti-Muslim Racism in the United States, Islamophobia Is Racism. Accessed 29 March 2022.

<<https://islamophobiaistracism.wordpress.com>>; Aziz, *supra* note 10 ; Bayoumi, *supra* note 7, at 267-93.

¹³⁸ As I note earlier in this article, although the headscarf and the veil are different forms of covering, I use them interchangeably in this analysis to analyze the interplay between racial and religious othering.

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Convention's provision,¹³⁹ two legal devices have featured prominently in the ECtHR's exclusionary understanding of religious liberty. The first is the margin of appreciation (which defers to individual Christian European states' inclinations of what is an acceptable construction of religious liberty). The second legal device is the belief versus manifestation distinction which privileges European Christian notions of the superiority of conscience over faiths such as Islam in which the belief and practice are entangled rather than separate.¹⁴⁰ The outcome has been a body of jurisprudence that protects the expression of Christianity and Christian symbols as the preservation of European culture while restricting the Muslim veil/Muslim practice on the ground that they fall within derogable manifestations of religion subject to majoritarian public order

¹³⁹ Rooted in the making of General Assembly, Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), Art. 18.

¹⁴⁰ See General Assembly Res. 217A, Universal Declaration of Human Rights, Art. 18; General Assembly Res. 2200A (XXI), International Covenant on Civil and Political Rights, Art. 18; Council of Europe, European Convention on Human Rights, Art. 9. Critiques of the belief-manifestation distinction in the international law of religious liberty abounds; several scholars have asserted that the distinction is a product of the European experience and privileges the Protestant (and to an extent Christian) distinction between conscience and practice. See Winnifred Fallers Sullivan et al., eds., *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (Princeton University Press 2018); Peter Petkoff, *Forum internum and forum externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights*, 7 *RELIGION & HUMAN RIGHTS* 3 (2012): 183-214; Ahmed, *supra* note 12, at 64. An alternative reading would however hold that, these distinctions notwithstanding, the international legal framework of religious liberty protects all religions without distinction. Notably, the Human Rights Committee General Comment to Art. 18 of the International Covenant on Civil and Political Rights (ICCPR 1966) states that "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief." This article and an expanding body of literature on the international right to religious liberty contends otherwise.

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restrictions.¹⁴¹ Although the judicial decisions and the legal arguments before the ECtHR are conducted in the language of religion—and religious liberty—race and religion are indivisibly

¹⁴¹ The belief/manifestation distinction analyzed to illuminate the interplay of race and religion in Islamophobia is also apparent in the jurisprudential treatment of aboriginal faiths. Consider an example from Canadian jurisprudence, which is apposite given international law's centrality to its jurisprudence on religious liberty (See *Ktunaxa Nation v. British Columbia* (Forests, Lands and Natural Resource Operations), 2017 SCC 54 (the Supreme Court holding that there is a long-established interpretive presumption that Section 2 (a) of the Canadian Charter is to be interpreted in conformity with Canada's international human rights obligations). In *Ktunaxa Nation v. British Columbia*, the Ktunaxa nation contended that a proposed government construction of a ski resort in Qat'muk, a sacred site to the Ktunaxa, would infringe its right to "freedom of conscience and religion" under Section 2(a) of the Canadian Charter. In support of its claim, the Ktunaxa argued that the permanent construction proposed in Qat'muk would drive out the Grizzly Bear spirit, a "principal spirit within Ktunaxa religious beliefs and cosmology," with the consequence of "irrevocably impair[ing]" the Ktunaxa's "religious beliefs and practices" (paras 5 and 6). The Supreme Court declined to uphold Ktunaxa's claim, holding that the Charter right to religious liberty did not entitle the "object of the belief" to protection. The court extensively engaged with international law to reach its conclusion, highlighting in particular Art. 18 of the Universal Declaration of Human Rights, and Art. 18(1) of the International Covenant on Civil and Political Rights. That "belief" versus "object of belief" distinction, however, failed to acknowledge that protections for the state's guarantee of the Ktunaxa right to belief were meaningless in the face of irrevocable harm to the object of the community's belief. At its heart, the Ktunaxa case centered on a claim of "equal religious citizenship" for Indigenous Canadians and sought to overcome the race-religion civilizational distinction that effectively frustrated Indigenous claims to religious protections. (Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship," in Richard Moon, ed., *LAW AND RELIGIOUS PLURALISM IN CANADA* 87 (University of British Columbia Press 2008).) The illegibility of the Ktunaxa claim to the court is one evidence of the living legacy of colonial race-religion othering. For a discussion of the stakes of the Ktunaxa case prior to the Supreme Court decision, see Bakht, and Collins, *supra* note 32 at, 797. See further Årsheim, *supra* note 16, at 536 (an analysis of the Ktunaxa decision noting that international law does not protect the object of belief);

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intertwined in that legal discourse. Indeed, one cannot recognize the court's preferential treatment for the Christian faith and its subordination of 'foreign' faiths such as Islam merely through the lens of religion.¹⁴²

A comparison of two decisions of the ECtHR is illustrative. The first is the court's decision in *Dahlab v. Switzerland*¹⁴³ in which the court upheld a restriction on a Muslim Swiss primary school teacher's wearing of the veil on the ground, inter alia, that it violated the state's commitment to denominational neutrality. The court's rationale in *Dahlab* is, however, hard to square with its approach in *Lautsi v. Italy* when the court was faced with a challenge to the presence of a crucifix in an Italian classroom. Upholding the presence of the crucifix, the court held it to be a symbol of European culture that was at once Christian as it was secular.¹⁴⁴ By doing so, the court is, of course,

Berger, *supra* note 21. For an analysis troubling the category of "religion" in understanding Indigenous claims, see Dees, *supra* note 34.

¹⁴² For an analysis of what is elided by a construction of Jewishness solely through the either lens of race or religion, see Joseph H. H. Weiler, *Discrimination and Identity in London: The Jewish Free School Case*, Jewish Review of Books 1-6 (2010) at <<https://jewishreviewofbooks.com/articles/97/discrimination-and-identity-in-london-the-jewish-free-school-case/#>>. Weiler analyses *R(E) v The Governing Body of JFS* [2009] UKSC 15, a UK Supreme Court decision that nullified a Jewish Free School of London's admissions decision excluding a potential applicant on the basis that the applicant's lineage (and relatedly conversion procedure) did not align with the procedure recognized as orthodox by the school's rabbinic authorities. According to Weiler, the decision—that the school's decision amounted to ethnic or racial discrimination (rather than religious discrimination)—hinged on a misguided construction of Jewishness in purely ethno-racial terms. Moreover, Weiler argues that the decision's racial construction of the Jew enabled a Protestant reading of Jewish law that amounted to "sheer incomprehension" and "intolerance." Weiler, p. 3.

¹⁴³ *Dahlab v. Switzerland*, Eur. Ct. H.R. (2001).

¹⁴⁴ Judge Bonello in *Lautsi v. Italy*, Eur. Ct. H.R. (2011).

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exercising the sovereign power to define religion as a prelude to affixing a line that separates the religious—and, in particular, tolerable forms of religious manifestation—from a constructed secular whose specious content is itself determined by the state. Leading critiques of secularism already draw attention to the politics of states' exercise of this sovereign prerogative and the selective commitment to religious liberty that results therefrom.¹⁴⁵ I add here that an appreciation of the interplay between racial and religious othering illuminates what first appears to be an unprincipled construction of the sacred and the secular. The court's conception of what religion is and is not, and what forms of religion are worthy of protection and what forms are not, is intimately linked with a process of racial construction integral to a civilizational distinction that is at the same time racial as it is religious and even cultural.

Bound in a civilizational distinction, the simultaneous racial and religious othering finds life in the gender discourse that the court and proponents of restrictions deploy.¹⁴⁶ Consider, for

¹⁴⁵ Peter G. Danchin & Saba Mahmood, *Immunity or Regulation?: Antinomies of Religious Freedom*, 113 SOUTH ATLANTIC QUARTERLY (2014); Asad, *supra* note 16, at 93-106.

¹⁴⁶ For arguments about the intersection of race and gender with religion in these constructions of religious liberty that inevitably culminate in restrictions on what is empirically a predominantly non-White Muslim women population, see Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20(1) JOURNAL OF LAW AND SOCIETY 6 (1993); Eva Brems, *Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-Law of the European Court of Human Rights*, in CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD (Marie-Claire Foblets & Jean Francois Gaudreault-Desbiens., eds., 2009); Maleiha Malik, *The "Other" Citizens: Religion in a Multicultural Europe*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (Camil Ungureanu & Lorenzo Zucca eds., 2012); Lourdes Peroni, *Religion and Culture in the*

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instance, the court's declaration in *Dahlab* that the headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality."¹⁴⁷ Such rhetoric finds life far beyond the ECtHR and today's Europe, eliciting the colonial legacy in French Algeria.¹⁴⁸ As scholars such as Alia Saji argue, that discourse of gender equality functions as a way of racializing Muslims by projecting gender oppression to Islam and naturalizing that (gender oppression) to it. By doing so, the anti-veiling discourse defines Christian Europe as the opposite of the veil.¹⁴⁹ Just one example, *Dahlab* is part of a long line of decisions revealing the interplay of the processes of racialization and religious othering in the ECtHR treatment of a disfavored religious minority.¹⁵⁰ The racializing process of mirroring at play

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¹⁴⁷ *Dahlab v. Switzerland*, Eur. Ct. H.R. (2001).

¹⁴⁸ For a comparison of the Christian preferentialist religious liberty jurisprudence of the European Court of Human Rights and the U.S. Supreme Court, see Akande, *supra* note 18, at 286-318.

¹⁴⁹ See Frantz Fanon, *BLACK SKIN, WHITE MASKS* (Paladin 1970).

¹⁵⁰ For remarkably similar language to *Dahlab*, see *Leyla Şahin v. Turkey*, Eur. Ct. H.R. (2005). Analyzing the religious freedom jurisprudence of the European Court of Human Rights, T. Jeremy Gunn argues that a long line of decisions reveals a Muslim exception to what the court embraces as a general rule of religious liberty. See Gunn, *supra* note 17, at 465-573. See *Kurtuluş v. Turkey*, Eur. Ct. H.R. (2006), holding that the prohibition on a university professor's wearing of the headscarf was an expression of Turkey's secularism; *Ebrahimian v. France*, Eur. Ct. H.R. (2015) (holding that a prohibition of nurses "ostentatious" headscarf was merely application of the state's principle of secularism and the neutrality it imposed on the state and public officials); *Dogru v. France*, Eur. Ct. H.R. (2009) and *Kervanci v. France*, Eur. Ct. H.R. (2009) (upholding the expulsion of two Muslims girls for failing to remove their headscarf during their physical education class and finding no violation of Art. 9). See further *Köse and 93 others v. Turkey*, Eur. Ct. H.R. (2006); *Aktas v. France*, Eur. Ct. H.R. (2009); *Bayrak v. France*, Eur.

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in the language of these decisions and in the body of jurisprudence that it produces is one that homogenizes Muslims in general, and Muslim women in particular, in spite of the somatic, cultural, and ethnic heterogeneity of members of that faith. In the end, therefore, it is not only the circumstances that bring Muslim claimants to court that racializes their religious identity. In fact, even the court's decision itself is suffused with language that perpetuates the racial cum religious othering of the Muslim woman.

Commenting on this phenomenon in the post-9/11 moment, scholars point out that Islam does not fully receive protections as a religion.¹⁵¹ That analysis shows not only the bias of the international legal framework on religious liberty, it also reveals that the underlying legal, social, and political conditions that construct the Muslim 'other' and the response of legal institutions (including the courts when called upon to adjudicate that othering) are embedded in a process of homogenizing Muslims and rendering them as an outsider to civilization, human rights, and progress. By marking the Muslim as essentially foreign and different, the homogenizing discourse renders Muslims as an internally undifferentiated category and consequently elides intragroup forms of discrimination and vulnerability among Muslims—even as it claims to be attentive to

Ct. H.R. (2009); *Gamaleddyn v. France*, Eur. Ct. H.R. (2009); *Ghazal v. France*, Eur. Ct. H.R. (2009); *Jasvir Singh v. France*, *Bikramjit Singh v. France*, Eur. Ct. H.R. (2009); *Ranjit Singh v. France*, Eur. Ct. H.R. (2009) which were all decided along the same lines. Compare, however, to *Hasan and Eylem Zengin v. Turkey*, Eur. Ct. H.R. (2007), where the court held that not allowing Alevis an exemption from compulsory lessons in public schools that promoted Sunni Islam was a violation of Art. 9. This Muslim exception, I argue, is grounded in an interplay of religious and racial othering.

¹⁵¹ Gunn, *supra* note 17; Ahmed, *supra* note 12; Aziz, *supra* note 10; Bayoumi, *supra* note 7.

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those experiences.¹⁵² Such a discourse is overtly legitimated by projects such as gender equality (and national security); at its core, however, it is undoubtedly animated by a racializing discourse in which the Muslim is at the same time the racial and religious other.

B. An Ineffectual International Legal Framework

The current international legal framework continues to be unresponsive to the interplay of race-religion othering. To be sure, a tentative recognition of the interplay of religious and racial discrimination has begun to emerge in sections of the United Nations in recent years. The UN Office of the High Commissioner for Human Rights (OHCHR)'s report on "Combating Intolerance, Negative Stereotyping, Stigmatizing, Discrimination, Incitement to Violence and Violence against Persons, based on Religion or Belief"¹⁵³ gestures toward a recognition of the racialization of religious minorities. The race-religion intersection is also now being interrogated in OHCHR expert

¹⁵² The homogenization of Muslims is regardless of the fact that there are intragroup forms of discrimination even among Muslims, which therefore create intersectional forms of discrimination within the group. See Akande, *supra* note 12. See further Aziz, *supra* note 10. According to Aziz, five categories of Muslim individuals are often subject to being racially and religiously profiled in the United States: the religious one who practices the core tenets; the religious dissent suffers from Islamophobia more because they are not only visibly Muslim, they also oppose certain political stands; the secular dissent is often a liberal Muslim but has opposing political views; the secular Muslim is liberal and accepting of foreign policies; and finally, the "former racial Muslim who no longer practices Islam and is very vocal in criticizing the religion." Law's homogenization of these ostensible sub-groups is one manifestation of the close interplay of race and religion.

¹⁵³ United Nations Human Rights Office of the High Commissioner, "Combating Intolerance, Negative Stereotyping, Stigmatizing, discrimination, Incitement to Violence and Violence against Persons, based on Religion or Belief (A/67/178)." (United Nations, 2012), online:

<https://www.ohchr.org/Documents/Issues/Religion/AdditionalInfoSGReport67_178.pdf>.

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reports, with the work of the Special Rapporteur on *Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, with *Freedom of Religion and Belief* being foremost in that regard.¹⁵⁴ As a result of the sustained efforts of scholars and activists, the race-religion intersection is also now referenced by the widely endorsed United Nations Declaration on

¹⁵⁴ See Doudou Diene, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia And Related Intolerance, “Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination: Defamation of Religions and Global Efforts to Combat Racism: anti-Semitism, Christianophobia and Islamophobia,” [E/CN.4/2005/18/Add.4](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/102/18/PDF/G0510218.pdf?OpenElement) at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/102/18/PDF/G0510218.pdf?OpenElement>>; Doudou Diene, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia And Related Intolerance, “Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination: Situation of Muslims and Arab peoples in various parts of the world. E/CN.4/2006/17 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/107/32/PDF/G0610732.pdf?OpenElement>>; Human Rights Council, “Countering Islamophobia/Anti-Muslim Hatred to Eliminate Discrimination and Intolerance based on Religion or Belief”- Report of Ahmed Shaheed, the Special Rapporteur on Freedom of Religion or Belief, A/HRC/46/30, (Human Right Council, 2021), online: <<https://www.ohchr.org/en/documents/thematic-reports/ahrc4630-countering-islamophobiaanti-muslim-hatred-eliminate>>. The report document widespread anti-Muslim attitudes in India, Myanmar, United States, and across Europe. See further United Nations, Special Rapporteur’s Digest of Freedom of Religion or Belief: Excerpts of the Reports from 1986 to 2022 by the UN Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, 2023, online at <<https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>>.

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the Rights of Indigenous Peoples (UNDRIP).¹⁵⁵ By its preambular declaration that “*all doctrines, policies, and practices based on or advocating superiority of peoples or individuals on the basis of national origin or **racial, religious, ethnic or cultural differences are racist** ...*,”¹⁵⁶ UNDRIP demonstrates some awareness of the race-religion interplay in the othering of Indigenous persons. Yet, that consciousness is tamed by caution and has so far not yielded robust state action. Moreover, questions about the force and ultimate impact of UNDRIP remain given its status as a nonbinding declaration and the lack of consensus over whether it has crystallized to the status of customary international law.¹⁵⁷ Below, I turn to analyzing the jurisprudence of two key UN

¹⁵⁵ United Nations General Assembly, Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), a/res/47/1 (2007). For comprehensive discussions of UNDRIP, see Anaya, *supra* note 31; Hohmann, Jessie, and Marc Weller, eds., *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY* (Oxford University Press 2018); J. Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 *INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS* 207 (2007); Walter R. Echo-Hawk, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (Fulcrum Publishing 2016); Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1, 141-63 (2011); S. Allen and A. Xanthaki (eds.), *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (Bloomsbury Publishing 2011); S. Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, *HUMAN RIGHTS LAW REVIEW* 1 (2007).

¹⁵⁶ Emphasis supplied.

¹⁵⁷ These questions are particularly apposite given the initial negative votes against UNDRIP by the United States, Canada, Australia, and New Zealand—states “specially affected” by the issues addressed in the declaration. See Sylvanus Gbendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous*

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adjudicatory bodies, the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination, to illuminate the failings of the current international regime.

I. The UN Human Rights Committee's Jurisprudence

The reticence to confront race-religion othering is noticeable in the UN Human Rights Committee's jurisprudence, despite the committee's groundbreaking recognition of intersectionality in recent years. The committee's 2016 decisions in *Sonier Yaker v. France*¹⁵⁸ and *Hebbadj v. France*¹⁵⁹ are particularly noteworthy. Both proceedings were initiated by two veiled Muslim women to challenge their conviction under a French law, "Act No. 2010-1192," banning the wearing of face-covering apparel.¹⁶⁰ Both Yaker and Hebbadj argued before the UN Human Rights Committee that the French decisions convicting them for wearing the veil violated their rights to freedom of religion, and nondiscrimination as contained in the ICCPR Articles 18 and 26 respectively. The Human Rights Committee found that the ban on the niqab violated their rights to overtly manifest their religious beliefs. The question of intersectionality had an important place in the committee's decision, with the committee holding that the French "provision and its application to the author constitutes a form of intersectional discrimination based on gender and

Peoples (2007) in Contemporary International Human Rights Law, 6 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 2 (2017).

¹⁵⁸ *Sonier Yaker v. France*, Communication 2747/2016, Hum. Rts. Comm., CCPR/C/123/D/2747/2016), 2018.07.17).

¹⁵⁹ *Hebbadj v. France* Communication No. 2807/2016 Hum. Rts. Comm., CCPR/C/123/D/2807/2016).

¹⁶⁰ Miriana Hebbadj's application for the redress of her rights submitted to the European Court of Human Rights (ECtHR) in 2013 was rejected in September 2014 on the ground that it was inadmissible.

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religion.”¹⁶¹ The committee was, however, muted on the question of race, even as the legal restrictions in question cannot be properly understood without an appreciation of the broader discursive context in which the racial and religious othering of the Muslim is mutually co-constitutive.¹⁶²

An acknowledgement of the race-religion interplay, however, figured prominently in the Committee’s decision to entertain the communication in *Mohamed Rabbae et al. v. Netherlands*.¹⁶³ The authors, Muslim immigrants from Morocco, challenged a Dutch court’s decision to acquit Geert Wilders, a member of the Dutch parliament and founder of the Party for Freedom who had uttered derogatory statements against Muslims and immigrants. Netherlands had charged Wilders with “insulting a group for reasons of race or religion” and “incitement to hatred and discrimination on grounds of race or religion.” The authors who had joined proceedings initiated by the public prosecutor¹⁶⁴ argued that Wilders’ statements “were not directed at Islam as a religion but against Muslims as human beings or against non-Western migrants,” and amounted to “incitement to hatred, discrimination, and violence.”¹⁶⁵ Among other statements, Wilders had declared:

¹⁶¹ *Yaker*, para 8.17; *Hebbadj*, para 7.17.

¹⁶² See section titled “Racing Islam” above.

¹⁶³ *Mohamed Rabbae et al. v. Netherlands*, Communication No. 2124/2011, Hum. Rts. Comm., CCPR/C/117/D/2124/2011, 9.5 (Nov. 18, 2016). Note that this analysis of the jurisprudence on hate speech and freedom of expression is limited here to its interface with the race-religion analysis; a comprehensive consideration of the issue of the international regulation of hate speech is beyond the scope of this article.

¹⁶⁴ The public prosecutor had initially declined to prosecute but had been compelled to initiate the proceedings by an appellate court order. The charges had been brought pursuant to the Dutch Criminal Code: sections 137(c) and 137(d).

¹⁶⁵ *Id.*

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The demographic composition of the population is the biggest problem in the Netherlands. I am talking about what comes to the Netherlands and what multiplies here. If you look at the figures and its development. Muslims will move from the big cities to the countryside. We have to stop the tsunami of Islamization. That stabs us in the heart, in our identity, in our culture. If we do not defend ourselves, then all other items from my programme will prove to be worthless.¹⁶⁶

The authors argued that they had been personally affected by Wilders' hate speech and adduced evidence to show how that speech had led them to "suffer ... in their daily lives."¹⁶⁷ Testifying before the court, Mohamed Rabbac extensively invoked research data on "racism and the position of Moroccans in Dutch society."¹⁶⁸ Departing from its previous approach in petitions concerning hate speech filed by European Muslims, the committee found the petition admissible. Although the committee's determination on the merits ultimately found no breach of the ICCPR, the decision to admit the petition is significant because it hinged on the committee's acknowledgement of the intersection of racial and religious discrimination. The court's construction of the group was informed by its recognition of the intersection of race and religion both in Wilder's hate speech and in the experience of the claimants. As the committee noted:

The authors are Muslims and Moroccan nationals, and allege that Mr. Wilders' statements specifically target Muslims, Moroccans, non-Western immigrants, and Islam. The authors are therefore members of the category of persons who were the specific focus of Mr. Wilders' statements . . . Mr. Wilders' statements had specific consequences for them,

¹⁶⁶ *Id.* at para. 2.7.

¹⁶⁷ *Id.* at para. 2.11.

¹⁶⁸ *Id.* at para. 2.8.

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including in creating discriminatory social attitudes against the group and against them as members of the group.¹⁶⁹

Although the *Rabbae* decision indicates the committee's attunement to the interplay of racial and religious discrimination, it suffers from an important limitation. Notably, the committee's understanding of race-religion appears to utilize a double discrimination lens that understands the race-religion interplay merely as dual and fails to acknowledge their mutual co-constitution. While such an approach is of use to claimants where somatic racialization features as a dimension of the case, it is blind to race-religion othering where somatic racialization is not explicitly at play.

In fact, a double-discrimination interpretation of the *Rabbae* decision might explain the different outcome in the earlier cases of *A.W.P. v. Denmark*¹⁷⁰ and *Andersen v. Denmark*¹⁷¹ in which the committee found the separate petitions brought by two Dutch-born Muslims as members of the group targeted by hate speech to be inadmissible.¹⁷² In *Andersen v. Denmark*, a head-scarved Danish-born Muslim woman sought to challenge Denmark's decision to not prosecute certain members of the Danish People's Party (DPP) for remarks that she argued "form[ed] part of an overall ongoing campaign stirring up hatred against Danish Muslims."¹⁷³ Andersen had sought the prosecution of the relevant DPP members under a provision of Denmark's Criminal Code

¹⁶⁹ *Id.* at para. 9.6.

¹⁷⁰ *A.W.P. v. Denmark*, Communication No. 1879/2009, Hum. Rts. Comm., CCPR/C/109/D/1879/2009.

¹⁷¹ *Fatima Andersen v. Denmark*, Communication No. 1868/2009, Hum. Rts. Comm., CCPR/C/99/D/1868/2009 (Sept. 14, 2010).

¹⁷² For an analysis comparing *Andersen*, *A.W.P.*, and *Rabbae* on the issue of standing, see Whitney Barth, *Taking Great Care: Defining Victims of Hate Speech Targeting Religious Minorities*, CHI. J. INT'L L. 19 68 (2018).

¹⁷³ *Andersen v. Denmark* at para 3.2.

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penalizing “racially discriminating statements.”¹⁷⁴ Among others, the author pointed to a statement by a leading member of the Danish People’s Party on national television likening the hijab to a Nazi swastika.¹⁷⁵ Similarly, in *A.W.P. v. Denmark*, the author, a Danish-born Muslim man, alleged that Denmark’s failure to prosecute anti-Muslim hate speech amounted to a violation of his rights under ICCPR Articles 2 (nondiscrimination), 20 (prohibition of incitement to hatred), and 27 (right of minorities to practice their religion). Beyond the Nazi analogies alleged in *Andersen*, such statements included those by a DPP member and Parliamentarian that “Muslims societies are per definition losers. Muslims cannot think critically...and this produces losers...”¹⁷⁶ and another by a DPP member that “the idea that a fundamentalist with headscarf should become a member of the Danish Parliament is sick. She [the Muslim candidate for parliament] needs mental treatment...”¹⁷⁷ A.W.P. argued that the comments were a few examples of broader attempts by the DPP to stir up violent hatred against Muslims in Denmark, alleging that those statements “create[d] a hostile environment” and amounted to “concrete discrimination against him.”¹⁷⁸ Similarly, Andersen argued that those statements “not only hurt her but put her at risk of attacks by some Danes who believe that Muslims are responsible for crimes they have in fact not committed” while also adversely impacting her employment opportunities.¹⁷⁹ In spite of the similarities between these allegations and those at issue in *Rabbea*, the committee found the allegations insufficient to

¹⁷⁴ *Id.* at para 4.4. The relevant provision is Section 266(b) of the Criminal Code of Denmark. The section makes reference to a variety of grounds including race and religion.

¹⁷⁵ *Id.* at para 2.1.

¹⁷⁶ *A.W.P. v. Denmark*.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at para. 2.2.

¹⁷⁹ *Andersen v. Denmark* at para. 3.4.

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establish that the statements in question had “specific consequences or that “the specific consequences of the statement were imminent and would personally affect the author.¹⁸⁰ Accordingly, the committee held that the communications in *AWP and Andersen* amounted to *actio popularis* and were inadmissible.¹⁸¹

An exposition of the committee’s jurisprudence on *locus standi* and freedom of expression is beyond the scope of this article. I reference these cases to illustrate the limitations of a double-discrimination paradigm in addressing the experiences of racialized religious minorities. One important way to understand the difference between the committee’s approach in *A.W.P.* and *Andersen* and the one it took in *Rabbae* lies in the explicit invocation of race *and* religious identities in the latter case.¹⁸² In *Rabbae*, the committee’s construction of the speech as directed against Muslims and Moroccans enabled the court to understand the othering in that case as arising

¹⁸⁰ *A.W.P. v. Denmark* at para. 6.4.

¹⁸¹ The petitioners in both *Andersen* and *A.W.P.* had applied to rely on the broad construction of *locus standi* articulated by the committee in *Toonen v. Australia*, which involved a challenge of Tasmania’s criminalization of homosexuality by the gay petitioner. Although criminal proceedings had not been instituted against the petitioner and the laws in question had not been enforced for a decade, the committee held that the petition did not amount to an *actio popularis* and heard the claim. Explaining its decision, the committee noted Toonen had “made reasonable efforts to demonstrate the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally and that they could raise issues under articles 17 and 26 of the Covenant.” *Toonen v. Australia*, Communication No. 488/1992, Hum. Rts. Comm., CCPR C/50/D/488/1992 (Dec. 25, 1991) at 5.1.

¹⁸² To be sure, the Human Rights Committee does not require that petitioners allege multiple forms of discrimination under the ICCPR to bring claims; yet, it would appear that allegation of multiple forms of discrimination has come to be decisive in the committee’s determination of the “victim,” and hence, standing question. See Barth, *supra* note 172.

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from double discrimination: one based on religion, and the other based on a somatic/ethnic/national origin distinction. That intersectionality-as-double-discrimination lens proves helpful in admitting authors such as *Rabbea*; however, such a lens will continue to exclude those like *A.W.P.* and *Andersen* even as the discursive portrayal of the Muslims in the speech at issue in those cases was undoubtedly racialized in the ways historicized by this article.

II. The Committee on the Elimination of Racial Discrimination

The ineffectual double discrimination understanding of racialized religions is also apparent in the jurisprudence of Committee on the Elimination of Racial Discrimination (CERD), which is charged with implementing ICERD.¹⁸³ In general, CERD has recognized the interplay of racial and religious discrimination. In its General Recommendation 32, for instance, CERD declared that ICERD protections extend to persons belonging to racialized religious communities such as Muslims subjected to Islamophobia.¹⁸⁴ This acknowledgement has, however, not translated in an attunement to the mutual co-constitution of racial and religious othering.

¹⁸³ For a former CERD member's account of the jurisprudence of CERD on race and religion, see José A. Lindgren Alves, *Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination*, USFL Rev. 42, 941 (2007).

¹⁸⁴ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, (CERD/C/GC/32, 75th Session, 2009) online at <<https://digitallibrary.un.org/record/667786?ln=en>>. See further the committee's report issued in response to the rise of Islamophobia in the aftermath of the 9/11 terrorist attacks. UN Committee on the Elimination of Racial Discrimination (CERD), "Report on the Elimination of Racial Discrimination," (A/57/18, 60-61st Session: 2002), online: <<https://digitallibrary.un.org/record/477353?ln=en>> The

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Particularly noteworthy is CERD's response to Communication 36 of 2006 in which the petitioner argued that Islamophobia had been expressed as a form of racism post-9/11 in the West. In support of the claim, the petitioner cited the CERD's Concluding Observation of 2002 on Denmark where the Committee noted the "increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001."¹⁸⁵ In that Communication, the CERD had recommended that "the State party monitor this situation carefully, take decisive action to protect the rights of victims and deal with perpetrators, and report on this matter in its next periodic report."¹⁸⁶ Despite this earlier CERD declaration that appears to support Communication 36, the CERD found the Communication inadmissible.

In its decision, the CERD acknowledged its recognition of "the importance of the interface between race and religion and considers that it would be competent to consider a claim of 'double' discrimination based on religion and another ground specifically provided for in article 1 of the Convention, including national or ethnic origin."¹⁸⁷ However, the CERD rationalized its dismissal of the application on the ground that "the current petition ... exclusively relates to discrimination on religious grounds."¹⁸⁸ The Committee further pointed out that "the Convention does not cover discrimination based on religion alone and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its 'race, colour, descent, or national or

Durban Declaration equally entailed a recognition of intersectionality of racial discrimination and religious discrimination.

¹⁸⁵ U.N. Committee on the Elimination of All Forms of Racial Discrimination, 71st session, CERD/C/71/D/36/2006 (2007).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

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ethnic origin.”¹⁸⁹ By utilizing the lens of double discrimination, however, the CERD adopted an approach that locates the racialization of religious minorities solely in the intersecting axis of a racial and religious discrimination that are presumed to be separate forms of othering. That outlook holds on to an ineffectual somatic understanding of racial discrimination and obscures the mutual constitution of racial and religious othering as it pertains to disfavored minorities. In spite of its preliminary acknowledgment of the interplay of religious and racial discrimination, the CERD’s jurisprudence therefore reveals a skepticism of interlinking international legal protections for racial and religious discrimination in a way that recognizes the mutual co-constitution of race and religion.¹⁹⁰ That understanding of race-religion intersectionality as double discrimination along the axis of disparate (although intersectional) sets of identities is limited in its diagnosis of race-religion discrimination.

The double discrimination lens has found its way into the ICERD debates. Certain opponents of the ICERD proposal contend that to recognize discrimination against religious minorities as a form of racism would be to conflate two distinct forms of identity, one of which is immutable (race), and the other mutable and changeable (religion).¹⁹¹ Even some who sympathize with and champion the extension of ICERD protections for racial discrimination to certain religious discrimination speak of that relationship in narrow intersectional terms, one in which the axis of religious discrimination encounters that of (somatic) racial discrimination.¹⁹² Yet, such a

¹⁸⁹ *Id.*

¹⁹⁰ Rep. of the Human Rights Council on its 10th session, A/HRC/10/29 (2009).

¹⁹¹ *Id.* at para 58. Some experts noted that while religion in general can be critiqued, race cannot be, and others noted that conflating race and religion can be practically complicated.

¹⁹² Tenth Expert Session Report, Para. 56; Report of the Ad Hoc Committee, Twelfth Session, at 31.

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minimalist understanding of the interplay of identities undermines advances in critical race theory. That body of literature has since revealed the ways in which seemingly disparate identities such as “race” and “class” might in fact be mutually co-constitutive in their interaction in a given range of power relations.¹⁹³ The history narrated by this article illuminates that mutual co-constitution of racial and religious othering in the experience of the non-Euro-Christian other.

Another concern that has surfaced in the ongoing proceedings is that linking protections for race and religion would undeservingly privilege religion.¹⁹⁴ A related concern arises about intragroup vulnerability—that linking protections for race and religion would shield religion from critique and could mask the marginalization of persons inhabiting precarious intersections within religious groups.¹⁹⁵ The concern with intragroup minorities is important; after all, religion, like all ideologies, has historically been and continues to be susceptible to being deployed as a tool of oppression. Patriarchy and anti-Blackness, among other forms of oppression, are not alien to those inhabiting marginalized intersections, even within the ranks of racialized religious minorities.¹⁹⁶

¹⁹³ See the seminal work by Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 8, 1707-791 (1993).

¹⁹⁴ EU Representative, Report of the Ad Hoc Committee, Twelfth Session, at 29-30. Brian Leiter, *Why Tolerate Religion?* in *WHY TOLERATE RELIGION?* (Princeton University Press 2014).

¹⁹⁵ Tenth Expert Session Report, at para 35. At the expert session convened by the Ad Hoc Committee deliberating over the ICERD reform, some experts noted that: “there could be good faith critiques of religion, where the same is not true of “race.” Para. 58, Tenth Expert Session Report. However, some other experts expressed the view that both race and religion are core to identity. *Id.* at para. 58. There was also a discussion over the merits of defining “race” and “religion” in an amended ICERD. For a general examination of the consequences of a Muslim group-rights advocacy framework on intragroup minorities, especially women, see Elham Manea, *WOMEN AND SHARI'A LAW: THE IMPACT OF LEGAL PLURALISM IN THE UK* (Bloomsbury Publishing 2016).

¹⁹⁶ See Akande, *supra* note 12.

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Yet, this concern does not defeat the race-religion narrative. Indeed, an acknowledgement of the mutual imbrication of racial and religious othering underscores rather than elides intragroup vulnerability within the racial cum religious other.

The lessons of critical race theory, in its unmasking the unique vulnerability of internal minorities within subjugated racialized groups, is apposite.¹⁹⁷ Indeed, the experience of race-religion “othering” is heightened in the experience of persons rendered especially vulnerable by gender, Blackness, or class, among other identities.¹⁹⁸ It is not an accident that much about the racialization of Muslims has been illuminated in this article through examining the case of a minority within a minority—the veiled Muslim woman. The uneven distribution of oppression within the ranks of groups targeted by racial cum religious othering does not undo the enduring historical structuration of the race-religion distinction. Instead, since the race-religion subordination of the non-Euro-Christian other is rendered acutely legible in the experiences of intragroup minorities, the analytical lens of race-religion is sharpened by an attunement to intragroup vulnerability. In the same vein, efforts to interrogate intragroup forms of vulnerability within the race-religious other, can advanced by the race-religion-construct, rather than impeded by it.

The intra-group vulnerability-based opposition to the international legal recognition of race-religion discrimination accentuates a tension between two commitments—one, to interrogating the structural hierarchies that condition Europe’s racial-religious other to a subordinate position,

¹⁹⁷ See, for instance, Sahar Aziz, *Coercing Assimilationism: The Case of Muslim Women of Color*, 24

TRANSNATIONAL AND LAW AND CONTEMPORARY PROBLEMS, 388-399 (2015) (arguing that that “intergroup discrimination” can be “based on intragroup difference.” *Id.* at 391).

¹⁹⁸ *Id.*

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and the second, to unmasking internal forms of vulnerability within the race religious other. This framing creates a false choice. In fact, both projects need not be at odds. The structural hierarchies that construct the race-religious other are implicated in (though not solely responsible for) internal modes of marginalization. At the same time, the experience of internal minorities within the race-religious other acutely illuminates race-religion othering. In sum, therefore, confronting race-religion othering need not undermine unmasking—and remedying— inragroup vulnerability.

CONCLUSION

This article historicizes the current bid to link international legal protections for racial and religious discrimination. I situate that proposal in the longer history of the colonial origins of international law and argue that the European imperial expansionist project that formed the basis of the current international legal order was based on a race-religion demarcation. Far from separate, racial and religious othering were intimately bound and mutually co-constitutive. Moreover, that othering functioned to separate Christian Euro-America from its “others.” That racial-religious hierarchy and subordination inspired two significant historical efforts to secure international legal protection for the unique form of marginalization that emerged from the mutual imbrication of racial and religious othering. Tabled at epochal moments in the making of the international legal order—the foundational moments of negotiating the League Covenant, and the years following the Second World War—those efforts are meaningful even if they foundered. The neutralization of those earlier efforts by imperial powers reveals that the much-criticized protection gap that leaves racialized religious groups without legal recourse (and that in significant ways compounds the marginalization of those groups) is a product of the same hierarchies that subordinates the racial-religious other. The current ICERD debates provide a unique opportunity to confront the continuing

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afterlife of the imperial history of race-religion othering, and to creatively imagine an emancipatory international legal response.

In investigating the historical foundations of the co-constitution of religious and racial othering, this article has affixed its gaze on Europe nineteenth and twentieth century colonial encounter with the world. The centering of this imperial project—and the unmasking of its lasting global legacy—is not intended to elide earlier modes of imperial hierarchies and subordination. Neither does the account occlude contemporary manifestations of ethno-racial and religious discrimination in the global south, including within the formerly colonized states spearheading the ICERD reform. Whether those national forms of othering are disparate or intertwined; and whether they are a break from, or a continuity of the forms of othering set in motion by nineteenth century European imperialism is worthy of future research.¹⁹⁹ This article's task has been to offer an approach to understanding the international legal problem of race-religious discrimination, the ineffectual international framework that problem inhabits, and the enduring struggle against race-religion othering, by centering the history of Europe's colonial encounter with its "others." In looking to the colonial past, this approach illuminates much that is otherwise confounding about the inequities of the contemporary international legal regime and offers intellectual aid to contemporary efforts to transcend that past by bold reform.

¹⁹⁹ For an account tracing the legacy of colonialism on contemporary struggles over religious (though not racial) difference in the context of postcolonial Nigeria, see Akande, *supra* note 51.