

Dear Colloquium Participants:

Thank you in advance for reading this portion of my forthcoming book, *The World is on Our Side: America and the Race for Human Rights under Law* (under contract; Cambridge University Press). *The World is on Our Side* explores how U.S. civil rights politics shaped the development of the International Convention on the Elimination of All Forms of Racial Discrimination, the U.N.'s most comprehensive treaty on race.

“Racial Discrimination as a Public Problem” is chapter two of the book as well as sections of the book’s introduction and epilogue. I have adapted this unpublished piece from the manuscript so that you can read it as a self-contained article. I look forward to your feedback.

Best,  
HTL

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***Racial Discrimination as a Public Problem***

INTRODUCTION

In late 1963, the United States Department of State prepared for renewed international criticism of the Jim Crow South. During the early 1960s, as newly independent nations joined the United Nations and as the U.S. civil rights movement escalated, many U.N. delegates questioned the U.S.'s ability to lead a racially diverse world. Few U.N. organs caused State Department officials more consternation than the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission). The Sub-Commission was a fourteen member body comprised of racial experts from across the world. Given the Sub-Commission's racial mission, the Sub-Commission often transformed into a forum where foreign officials shamed the body's U.S. members for proclaiming the U.S.'s commitment to democracy abroad while denying African-Americans democracy at home.<sup>1</sup>

But federal officials had devised a plan to help rebrand the image of U.S. democracy. The State Department selected lawyer Morris Abram, known for "the leadership that he is taking in the field of civil rights in the South," as the next U.S. member on the Sub-Commission. Abram was no ordinary civil rights lawyer.<sup>2</sup> In the early 1960s, Abram was an attorney for movement's most recognizable figure, Dr. Martin Luther King, Jr.<sup>3</sup> Abram, like King, was an Atlanta resident, and the civil rights lawyer served as a trustee at King's alma mater, Morehouse College, and had personal ties to movement giants, like Roy Wilkins, Benjamin Mays, and Whitney Young.<sup>4</sup> According to the *New York Times*, the University of Chicago-trained lawyer had built a national reputation

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<sup>1</sup> John Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968).

<sup>2</sup> Letter from Harlan Cleveland to Phillip Halpern (Mar. 31, 1962) (on file with National Archives, College Park, Md., Central Foreign Policy Files, Record Group 59, Box 550, Folder 341.0707/5-1860) [hereinafter Central Foreign Policy Files].

<sup>3</sup> *Real Drama Followed the Kennedy Call in the King Case*, NORFOLK JOURNAL AND GUIDE, Dec. 31, 1960 at 8.

<sup>4</sup> *W. Young to Talk on Race*, N.Y. AMSTERDAM, Sept. 21, 1963, at 22.

“as an attorney in crucial cases dealing with major civil rights and civil liberties issues.”<sup>5</sup> Abram was founding member of the Lawyers’ Committee for Civil Rights and had waged a protracted battle for black voting rights in the South, which culminated with a landmark U.S. Supreme Court decision recognizing the “one person, one vote” principle.<sup>6</sup> Abram chaired the board of the American Jewish Committee and later served the organization’s national president.<sup>7</sup> State Department officials were very pleased with their choice for the Sub-Commission. In Abram, they had found a “trouble shooter” both “familiar with civil rights developments here” and “willing to undertake the United Nations assignment.”<sup>8</sup>

State Department officials then named Clyde Ferguson, an African-American attorney widely considered “one of the best civil rights legal brains in the country,” as Morris Abram’s alternate to the Sub-Commission.<sup>9</sup> Ferguson’s credentials were virtually unrivaled. He was an honors graduate of Harvard Law School, taught on the Harvard general and Rutgers Law faculties, and served as a board member of the NAACP Legal Defense Fund.<sup>10</sup> In 1962, Ferguson was appointed General Counsel of the U.S. Commission on Civil Rights. Black America reveled in Ferguson’s singular feat. Writers across the country heralded him for being “the first member of his race to serve as chief legal officer for a federal agency.”<sup>11</sup> And in the fall of 1963, Ferguson was named Dean of the Howard University School of Law—the civil rights citadel that had produced Thurgood Marshall.<sup>12</sup> In his capacity on the Sub-Commission, Ferguson would

<sup>5</sup> *Jewish Unit Picks National Leader*, N.Y. TIMES, Feb. 16, 1964, at 73.

<sup>6</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963)(declaring that “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”). See also *South v. Peters*, 339 U.S. 276 (1950); *Hartsfield v. Sloan*, 357 U.S. 916 (1958).

<sup>7</sup> *Morris Abram is Named Chairman of Jewish Body*, ATL. DAILY WORLD, May 8, 1962, at 3; *Jewish Unit Picks National Leader*, N.Y. TIMES, Feb. 16, 1964, at 73.

<sup>8</sup> Memorandum from Nathaniel McKitterick to Harlan Cleveland (July 23, 1963) (on file with John F. Kennedy Presidential Library and Museum, Box 114, Folder U.N. Human Rights).

<sup>9</sup> *Ferguson New Howard Law Dean*, N.Y. AMSTERDAM NEWS, Aug. 10, 1963, at 4.

<sup>10</sup> *C.C. Ferguson on Harvard Staff*, BALT. AFRO-AMERICAN, May 19, 1951, at 7.

<sup>11</sup> *The Week’s Newsmakers*, BALT. AFRO-AMERICAN, May 26, 1962 at 11; See also *Rutgers Law Professor Is New General Counsel of U.S. Rights Agency*, CLE. CALL AND POST, May 26, 1962 at 1C; *Top Rights Counsel*, PITT. COURIER, May 26, 1962, at 3; *A “First” Sworn In As Chief Civil Rights Counsel*, NORFOLK JOURNAL AND GUIDE, May 26, 1962, at 11; *Photo Standalone*, CHI. DEFENDER, May 26, 1962, at 9; *Quits Rutgers to Head U.S. Civil Rights Post*, N.Y. AMSTERDAM NEWS, May 26, 1962, at 8; *Dean Earned Name in Civil Rights Field*, WASH. POST, Aug. 3, 1963 at C1.

<sup>12</sup> *Clarence Ferguson Appointed Howard University Law Dean*, BALT. AFRO-AMERICAN, Aug. 10, 1963, at 1, 3.

negotiate with U.N. working parties, assist with drafting international legislation, and surrogate as the U.S. member in Abram's absence.<sup>13</sup> The State Department had selected one of the premier representatives of the race.<sup>14</sup>

The State Department's personnel decisions were groundbreaking. Both Abram and Ferguson were immensely talented, but they offered much more than their considerable intellectual abilities to the U.S. delegation to the Sub-Commission. State Department officials recognized that civil and human rights were not simply moral issues; they were also foreign policy issues.<sup>15</sup> The State Department had tapped two high-profile, civil rights lawyers to champion U.S. constitutional values. Ferguson was the first African-American to serve on the Sub-Commission, and Abram only the second Jew. Both men were natives of the South, the region of the country so fiercely criticized at the U.N., and their personal and professional backgrounds lent immediate credibility to the U.S. position.<sup>16</sup> The U.S. delegation literally embodied the nation's commitment to racial progress. Together, these men told a remarkable story of how America's ongoing social transformation could serve as a model for the world.

The State Department made one final move in preparation for the Sub-Commission's upcoming session. During its 18<sup>th</sup> session, the U.N. General Assembly gave "absolute priority to the preparation of a draft international convention on the elimination of all forms of racial discrimination."<sup>17</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or Convention) would become the world's most comprehensive treaty on race, and the General Assembly tasked the Sub-Commission with preparing the U.N.'s first draft.<sup>18</sup> State Department officials seized the moment. They charged Morris Abram and Clyde Ferguson to develop a U.S. draft of the Convention that might be used as the basis for the Sub-

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<sup>13</sup> Letter from Morris Abram to Berl Bernhard (Jan. 2, 1963) (on file with the Stuart A. Rose Manuscript, Archives, and Rare Book Library (MARBL), Emory University, Morris Abram Papers, Box 94, Folder Sub-Commission on Prevention of Discrimination, Etc., 1963) [hereinafter Abram Papers].

<sup>14</sup> See KENNETH MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2013).

<sup>15</sup> See Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> G.A. Res. A/RES/1906 (XVIII) (Nov. 20, 1963).

<sup>18</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 6, 1969).

Commission's debates. The State Department's drafting instructions to Abram and Ferguson were clear. "On the development of text," the State Department's guidance paper read, "the approach should be along the lines of the 'equal protection' concept in our 14th Amendment."<sup>19</sup> If international human rights law mirrored U.S. constitutional law, State Department officials reasoned, then U.S. officials could persuasively argue that the U.S. was at the vanguard of racial progress. The State Department lobbied the Sub-Commission's chairman, and the U.S. was subsequently named as the primary drafter of the Convention. When Abram and Ferguson were presented with the unique opportunity to mold the world's most comprehensive treaty on race, they exported U.S. constitutional law and values, like equal protection, into the U.N. Race Convention.<sup>20</sup>

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Despite the rich exchanges between the Sub-Commission, State Department, and the civil rights community, the relationship between the U.S. civil rights movement and the Convention's legislative history remains under-explored. In fact, one prominent human rights scholar, David Forsythe, has gone as far to claim that "the United States, despite its dominant power, has not been a major shaper of community standards or international regimes on human rights."<sup>21</sup> *Racial Discrimination as a Public Problem* contributes to a growing historiography and corrects this common misperception.<sup>22</sup> Two of America's foremost civil rights lawyers took center stage during the Convention debates.

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<sup>19</sup> Guidance Paper, Draft Convention on the Elimination of All Forms of Racial Discrimination (Jan. 7, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 3).

<sup>20</sup> U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 412th mtg. at 3-6, U.N. Doc. E/CN.4/Sub.2/SR.412 (Jan. 15, 1964) [hereinafter Subcomm. 412 mtg.].

<sup>21</sup> David Forsythe, *Human Rights in U.S. Foreign Policy: Retrospect and Prospect*, 105 POL. SCI. QUARTERLY 435 (1990). It's critical to note that the terms "civil rights" and "human rights" were hotly contested in the early and mid-1960s. During the Convention debates, Clyde Ferguson conceded, "I know that internationally what constitutes human rights is still quite difficult of definition, quite difficult of articulation. Domestically what constitutes the civil rights which we use almost daily in our dialogue is equally difficult of statement or articulation or even in some cases, of analysis." See Clarence Clyde Ferguson, *The Nature and Dimensions of Human Rights in the United States*, 11 HOWARD L.J. 452, 456-457 (1965). These definitional problems were present even at the founding of the U.N. See *infra* note 101. For the sake of readability, this article uses the term "civil rights" to refer to the protections then offered under the U.S. Constitution and the term "human rights" to refer to the protections offered under the Universal Declaration of Human Rights.

<sup>22</sup> CAROL ANDERSON, *BOURGEOIS RADICALS: THE STRUGGLE FOR COLONIAL LIBERATION, 1941-1960* (2016); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2003).

The State Department acknowledged there was still race work to do in the U.S. but maintained that the federal government had become an important ally in the fight against racism. These officials hoped to persuade newly independent countries and the Sub-Commission to embrace U.S. constitutional values by showcasing the widespread transformations in U.S. law, policy, and society. Much of the Cold War civil rights scholarship has demonstrated how U.S. interest in winning the hearts and minds of the Third World spurred these domestic civil rights reforms.<sup>23</sup> The history of the Race Convention demonstrates that international affairs not only helped to shape the U.S. civil rights movement but the U.S. civil rights movement also helped to shape international human rights law.

Before Malcolm X boldly challenged those in the movement to “expand the civil rights struggle to the level of human rights” and “take the case of the black man in this country before the nations in the U.N.,” Morris Abram and Clyde Ferguson were at the U.N. drafting the Convention.<sup>24</sup> This watershed moment in Malcolm’s political consciousness has typically functioned as a metaphor for the shift in the political agendas of the movement.<sup>25</sup> Decentering Malcolm from the story of black internationalism in the 1960s uncovers the rich varieties of U.S. human rights advocacy during this period. Cold War liberals, including Morris Abram and Clyde Ferguson, were similarly interested in developments at the U.N. Abram and Ferguson, like Malcolm X, attempted to use international law to transform domestic law and politics. Yet, unlike Malcolm, the State Department’s appointees to the Sub-Commission sought to protect the U.S.’s international reputation and foreign policy interests in the process. This untold story of racial diplomacy—the collaboration between the State Department, Abram, and Ferguson—illustrates how racial liberals became key components of U.S. statecraft during the Cold War, exposes great tensions

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<sup>23</sup> See Brenda Gayle Plummer, *The Changing Face of Diplomatic History: A Literature Review*, 38 THE HIST. TEACHER 385 (2005); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955 (2003); THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA (2003); JAMES MERIWEATHER, PROUDLY WE CAN BE AFRICANS: BLACK AMERICANS AND AFRICA, 1935-1961 (2002); Dudziak, *supra* note 15; PENNY VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937-1957 (1998); BRENDA GAYLE PLUMMER, RISING WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935-1960 (1996).

<sup>24</sup> The Ballot or the Bullet (Apr. 3, 1964), in MALCOLM X SPEAKS 23 (George Breitman ed., 1990).

<sup>25</sup> See e.g. SAMUEL MOYN, THE LAST UTOPIA 104-105 (2010).

within the global freedom struggle, and reveals the diversity of strategies race men used to end Jim Crow.

Such an exploration also sheds new light on the international impact of mid-century movement lawyering. Some foreign leaders were deeply impressed by the hard-earned victories of U.S. civil rights lawyers, and these officials drew extensively from movement lawyers' experiences and insights to remake world constitutions. The Kenyan government, for example, commissioned Thurgood Marshall, to help draft the country's independence constitution.<sup>26</sup> Abram and Ferguson were part of this elite network of civil rights lawyers conducting international diplomacy in the early and mid-1960s. Abram and Ferguson's diplomacy at the U.N., however, has had an even more far-reaching effect on world race relations than Marshall's work for the Kenyan government.<sup>27</sup> There are now 178 parties to the Convention, scores of countries have domesticated the Convention, intergovernmental organizations have developed new human rights mechanisms to assist with the implementation of the Convention, and individuals throughout the world use the Convention to seek legal redress in national and international courts.<sup>28</sup> Abram and Ferguson's approach to the Convention debates was so powerful that it still guides the U.S. State Department's approach to the Convention today.

However, historians have generally looked favorably upon civil rights lawyers and activists' efforts to step past national borders and forge transnational connections. *Racial Discrimination as a Public Problem* offers a more nuanced

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<sup>26</sup> For a rich account of Marshall's diplomacy in Kenya, see MARY DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (2008).

<sup>27</sup> See e.g. *A Tribute to the Memory of Clarence Clyde Ferguson, Jr.*, 19 HARV. C.R.-C.L.L.REV. ii (1984). Despite the proliferation of civil rights scholarship, the movement's larger-than-life personalities—men like Thurgood Marshall—dominate the literature on civil rights lawyering. See WIL HAYGOOD, *SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA* (2016); CHARLES ZELDEN, *THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION* (2013); GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012); LARRY GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* (2012); THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 471 (Mark Tushnet ed., 2001); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998); MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* (1997); MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994).

<sup>28</sup> See PATRICK THORNBERRY, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (2017).

view of these attempts to extend the movement's geopolitical reach. While Abram and Ferguson left an indelible imprint on the Convention, their advocacy also demonstrates the limitations of transplanting U.S. conceptions of equal protection into foreign and international law.

Toward this end, this article reconsiders the role of the U.S. South in the evolution of global governance. Most international legal histories do not treat the U.S. South or Southerners as important to the epistemological production of international human rights law.<sup>29</sup> The U.S. South is conventionally depicted as an insular region—anything but a space critical to the production of international law. This article instead offers fresh understandings of how the U.S. South and Southerners played pivotal roles in the Convention's legislative history.

Finally, and perhaps most ambitiously, *Racial Discrimination as a Public Problem* is a biography of U.S. racial diplomacy—and specifically, how race leaders, both black and white, state and non-state actors, negotiated and managed race relations across racial, regional, and national lines during the Cold War. The article seeks to capture how these leaders communicated the possibilities of racial progress over time and how they gave their ideas life. The article uses the legislative history of the Convention to engage enduring narratives on U.S. racial progress and write a new, more global history of the civil and human rights movements. And so inasmuch as the article is a history of transplanting domestic law into international law, it is also a much broader story of how U.S. civil rights leaders and their allies sought to remake race relations in America and the world.

Part I of the article offers background on the Convention's origins and explains why the equal protection clause became central to the Convention debates. Part II details the U.S.'s Convention strategy. The equal protection clause was a potent weapon for the State Department, but the delegation's reliance on equal protection came with costs. Part III highlights those costs. This section begins with an internalist account of the legal and political problems Abram and Ferguson faced for attempting to make the Convention in the image of the equal protection clause. This section then uses unexamined diplomatic records to reveal how the U.S. members were able to overcome their challenges and insert civil rights into the human rights convention. Part IV examines the results of the partnership between the State Department and civil rights

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<sup>29</sup> See STEVEN JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES* (2016). See also NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (1980).

leadership. The article concludes by critically reflecting on the efficacy of a U.S.-centered, international race treaty.

#### I. A BRIEF HISTORY OF THE CONVENTION AND THE U.S.'S INTEREST IN THE CONVENTION DEBATES

The push to create a comprehensive treaty on discrimination began with an outbreak of anti-Semitism in Europe and the rise of decolonization. The U.N. initially planned to author a treaty that addressed “all manifestations and practices of racial, religious and national hatred,”<sup>30</sup> but members of the burgeoning Afro-Asian bloc moved to separate the treaty into two: one treaty on racial discrimination and a second treaty on religious intolerance. Given the familiar ideological fissures at the U.N., the Afro-Asian bloc argued that incorporating a ban on religious intolerance in the treaty would delay the treaty’s adoption. The Soviet Union, most notably, aimed to avoid all U.N. examinations of its long and continuing anti-Semitic practices. The country’s U.N. delegates routinely refused to even acknowledge Soviet anti-Semitism. Many Third World representatives agreed that due to the Soviet Union’s egregious record on religious tolerance a broad treaty on discrimination would likely be sidelined. The U.N.’s efforts to end racial discrimination would then become collateral damage. The U.N. General Assembly eventually ceded to the Afro-Asian bloc’s request and placed race and religion into separate human rights instruments.<sup>31</sup>

The U.N. General Assembly then tasked the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities with drafting the primary language for human rights instruments on race and religious discrimination, respectively. The Sub-Commission began its process by authoring declarations on each topic. These declarations, as the term indicates, did not establish legal obligations on state signatories. They were instead non-binding expressions declaring the ideal standards for all countries to follow. Once the Sub-Commission completed each aspirational document and the General Assembly ratified a particular declaration, the Sub-Commission could begin drafting the corresponding convention by relying on the ratified declaration as a

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<sup>30</sup> Ofra Friesel, *Race Versus Religion in the Making of the International Convention on the Elimination of All Forms of Racial Discrimination*, 32 *LAW & HIST. REV.* 351, 361 (2014). A wave of anti-Semitism began in late 1959 and stretched throughout Europe. *See e.g. DRP Member Desecrates Jewish Synagogue*, *DIE PRESSE* (Vienna, Austria), Dec. 29, 1959, at 3; *Synagogue Desecration Spreading Wide*, *DIE PRESSE* (Vienna, Austria), Dec. 30, 1959, at 3; *New Anti-Semitic Riots*, *DIE PRESSE* (Vienna, Austria), Dec. 31, 1959, at 3.

<sup>31</sup> Friesel, *supra* note 30, at 374-76.

guide. Each convention, as a treaty and pursuant to international law, would then create binding legal obligations on its state parties.<sup>32</sup>

The U.N. General Assembly looked to the Sub-Commission to produce the primary draft of the proposed human rights instruments, because under U.N. protocol, the Sub-Commission was an apolitical body. U.N. rules stated that the Sub-Commission's members were racial "experts" operating in their individual capacities, not as representatives of their home states. Moreover, the U.N. expressly prohibited the Sub-Commission from discussing specific developments in any country. The Sub-Commission was designed to advance the idea that human rights were to be "above politics," "neutral," and "universal" in application.<sup>33</sup> Nonetheless, the Sub-Commission's recognition of personal autonomy was often a legal fiction as the Sub-Commission was composed of racial "experts" appointed by their respective national governments. Racial "experts" typically operated as state agents. The U.N.'s fraught conception of racial "expertise" privileged state assessments of pressing issues of discrimination and masked how the Sub-Commission's structure gave states a viable way to pursue their national interests under the guise of human rights promotion. To be sure, at times during the Sub-Commission's deliberations, the body evinced real concern for the world's minority populations during its deliberations. Yet, at other times during its deliberations, racial politics were simply power politics. Nations used this forum to discredit their ideological enemies, gain allies, rehabilitate their foreign reputations, and spread their visions for race relations abroad. And in many instances, these diverse motivations for human rights work dovetailed in the Convention debates.<sup>34</sup>

The U.S. had been badly embarrassed before the human rights community during the debates on the U.N. Declaration on the Elimination of All Forms of Racial Discrimination (Declaration), the precursor to the Convention. Article 2 of the Declaration proclaimed, "No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the grounds of race, colour or ethnic origin."<sup>35</sup> This provision ran afoul of the fourteenth amendment to the U.S. Constitution. Despite U.S. rhetoric, its

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<sup>32</sup> *Id.* at 376. After the Sub-Commission completed each draft, the draft then went to the Commission on Human Rights, the Third Committee, and ultimately the General Assembly for additional debate. See Lerner, *supra* note 29, at 4-6.

<sup>33</sup> Humphrey, *supra* note 1, at 869-70.

<sup>34</sup> MORRIS ABRAM, *THE DAY IS SHORT* 151-154 (1982).

<sup>35</sup> G.A. Res. 1904 (XVIII), art. 2, U.N. Doc. A/RES/18/1904 (Nov. 20, 1963).

constitution could not reach all forms of racial discrimination under the Declaration. The Declaration passed unanimously, but the U.S. abstained from the vote given “the constitutional difficulties” the article presented.<sup>36</sup>

State Department officials recognized that the Convention debates offered new opportunities for the U.S. to counter the Eastern bloc’s advances on the Sub-Commission. The Convention, unlike the Declaration, would be legally binding upon state parties. Now with an opening to redefine racial discrimination, the State Department embarked upon a strategy to translate its vision of equal protection into a binding treaty.<sup>37</sup>

## II. A U.S. PLAN FOR THE WORLD

The U.S. strategy for the Convention debates offered a lesson in managing a racial revolution. The State Department developed a “civil rights as human rights” approach to the negotiations. It first required that the U.S. declare that it was committed to serving as the world’s leader in the struggle for equal protection under law. “It can be pointed out that our Constitution is consistent with the Universal Declaration [of Human Rights], which has been generally accepted as an international norm,” the State Department’s instructions for the Convention negotiations read. State Department officials contended that it was not American values that had been the source of the nation’s race problems. It was lapses in the commitment to those values that had caused race problems. But with a civil rights bill then before Congress, a President sympathetic to the movement, and the Warren Court deeply dedicated to protecting the rights of racial minorities, there now appeared to be a robust federal commitment to honoring the U.S. Constitution, a model human rights document. The State Department hoped that its strategy would counter foreign criticism of U.S. race relations, enlarge the

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<sup>36</sup> Clarence Clyde Ferguson, Jr., General Counsel to Mrs. Rachel Nason (Sept. 18, 1963) (on file with National Archives, College Park, Md., Record Group 84, Office of Economic and Social Affairs, Dev. Econ. Am. Reds to Discrim., Box 86, Folder Discrimination: Race—1960-63).

<sup>37</sup> Morris Abram highlighted this substantial distinction between the Declaration and the Convention early in the Convention debates. While the Declaration inspired portions of the U.S. draft, Abram reminded his colleagues, “the Declaration [was] not offered as legislation and of course this was widely known to the Assembly when it was adopted. Now we are drafting a Convention. It is not sufficient to merely lift clauses from the Declaration and to rewrite the proclamations as commands.” Statement of Morris B. Abram before Sub-Commission on Prevention of Discrimination and Protection of Minorities (Jan. 13, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); U.N. ESCOR, Sub-Commission On Prevention Of Discrimination and Protection Of Minorities, U.N. Doc. E/CN.4/Sub.2/L.408 (Jan. 14, 1964).

U.S.'s sphere of influence at the U.N., and reposition the nation in discussions of global racial progress—all without offending the U.S. Constitution.<sup>38</sup>

### A. *South of Freedom*

However, 1963, in many ways, appeared to be the wrong year for the State Department to act so brazenly. Birmingham's high-pressured fire hoses, snarling police dogs, and dead children haunted America's conscience.<sup>39</sup> More than 200,000 citizens marched on Washington to remind the world that now 100 years after the Emancipation Proclamation "the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity."<sup>40</sup> African diplomats repeatedly complained to the State Department and their home governments after they were Jim Crowed out of housing in the District of Columbia. These diplomats faced additional humiliation on the drive from the nation's capital to U.N. headquarters. They were frequently harassed and denied access to public accommodations on Maryland's infamous Route 40.<sup>41</sup> America's race problems appeared not to be temporary lapses in democratic governance. Racial domination seemed to be a defining feature of U.S. democracy. Why should a government that had failed to stamp out racism within its own borders be charged with directing the world's march against bigotry? Outright denial, scapegoating, or dismissing the significance of the American dilemma would undermine U.S. credibility during the Convention debates, State Department officials reasoned. An America perceived as lukewarm or even hostile to civil rights progress would struggle to endear the human rights community to its interests and values. If civil rights were truly synonymous with human rights, federal officials maintained, the U.S. had to powerfully convey the great prospects for racial progress under U.S. constitutionalism.

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<sup>38</sup> Guidance Paper, *supra* note 19, at 4-5.

<sup>39</sup> PETER LEVY, *CIVIL WAR ON RACE STREET: THE CIVIL RIGHTS MOVEMENT IN CAMBRIDGE, MARYLAND* (2003); CLAYBORNE CARSON, *THE STUDENT VOICE, 1960-1965: PERIODICAL OF THE STUDENT NONVIOLENT COORDINATING COMMITTEE* (1990).

<sup>40</sup> I Have a Dream (Aug. 27, 1963), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 78 (Clayborne Carson and Kris Shepard eds., 2001).

<sup>41</sup> CHARLES COBB, *ON THE ROAD TO FREEDOM: A GUIDED TOUR OF THE CIVIL RIGHTS TRAIL* 40 (2008) C. Fraser Smith, *HERE LIES JIM CROW: CIVIL RIGHTS IN MARYLAND* 222 (2008); Michael Krenn, *The Unwelcome Mat: African Diplomats in Washington, D.C., during the Kennedy Years*, in Plummer, *supra* note 23, at 163; Renee Romano, *No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961-1964*, 87 J. AM. HIST. 546 (2000); MICHAEL KRENN, *RACE AND U.S. FOREIGN POLICY DURING THE COLD WAR* 265-66 (1998).

The State Department's strategy demanded new levels of transparency, seriousness, and visible leadership on the race question. Nothing demonstrated this portion of their plan more than Ambassador Adlai Stevenson's address to the U.N. General Assembly's Social, Cultural, and Humanitarian Committee in late 1963. The U.S. delegate assigned to the committee was scheduled to address the group of representatives from all 107 U.N. delegations, but Stevenson, the senior USUN representative, usurped the scheduled delegate's slot. Ambassador Stevenson announced that he was making the speech himself given the Convention's significance.<sup>42</sup> "Mr. Chairman," the seasoned diplomat began, "I trust that the appearance of the head of the United States Delegation here today will be rightly taken as evidence of the importance which my country places the work of this committee in the field of racial justice. The United States government—indeed a broad cross-section of our whole society—is at this moment preoccupied with the painful but compelling task of rooting out racial discrimination from our own national life." Stevenson conceded to the U.N. audience that "the names of many of our cities have been made known—and at times been made notorious—throughout the world: Jackson, Little Rock, Albany, Cambridge, and Birmingham, for example." Stevenson went further. "The recent murder of four innocent Negro children in a church has shocked and sickened us all."<sup>43</sup> Only weeks earlier, a time-delayed, dynamite blast rocked Birmingham's Sixteenth Street Baptist Church killing Addie Mae Collins, Denise McNair, Carole Robertson, and Cynthia Wesley. In a region where many citizens prized religiosity, the Klan's callous attack on a civil rights sanctuary after the morning's Sunday School lesson epitomized America's deep hypocrisies.<sup>44</sup> "Such a crime impairs human freedom not only here," Stevenson lamented, "but throughout the world."<sup>45</sup>

Many reporters and U.N. delegations were astonished by the ambassador's frank and painfully honest commentary. The *New York Times* described Stevenson's remarks as "an uncommonly candid recital of the racial struggle in the United States. Rarely in the United Nations do member states talk about their internal problems, and even more rarely do they do so with such open self-criticism."<sup>46</sup> But Stevenson's candor was strategic. Newswires crisscrossed the globe, circulating sensational portraits of racial strife in the U.S. America's difficulty in protecting the human rights of its black citizens, Stevenson readily

<sup>42</sup> *Adlai Backs U.N.'s Race Statement*, WASH. POST, Oct. 2, 1963 at A23.

<sup>43</sup> Statement of Ambassador Adlai E. Stevenson, United States Representative to the United Nations (Oct. 1, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 1).

<sup>44</sup> CAROLYN MCKINSTRY, *WHILE THE WORLD WATCHED: A BIRMINGHAM BOMBING SURVIVOR COMES OF AGE DURING THE CIVIL RIGHTS MOVEMENT* (2011).

<sup>45</sup> Stevenson, *supra* note 45, at 5.

<sup>46</sup> Kathleen Teltsch, *Stevenson Gives Pledge on Rights*, N.Y. TIMES, Oct. 2, 1963 at 24.

admitted, “is evident to all.” The ambassador then reconceptualized the nation’s racial struggles. Rather than assume a purely defensive posture, Stevenson asserted that the “troubles we have today are the result of progress made yesterday. This is real significance of Little Rock, Birmingham, Albany, Cambridge, and Jackson.” His reframing of the American dilemma attempted to capture the emotionalism of the moment, demands for increased U.S. transparency, and his firm belief in the redemptive power of U.S. values. “It is an unhappy fact that ignorance is stubborn and prejudice dies hard. But we are moving—swiftly now and surely—in the direction of equal rights for all in the last corner of the land.”<sup>47</sup>

The State Department’s approach to race required U.S. diplomats to explain away the nation’s race problems through American exceptionalism. According to this progressive narrative, the U.S. had been trailblazers in the world’s struggle for liberty for nearly two hundred years. The civil rights movement was the last phase in America’s march toward human rights for all. “In my own country, we are even now living through our third revolution in the name of freedom. Each has been accompanied by anguish,” the U.S. Ambassador to the U.N. acknowledged. “These three revolutions of freedom in my own land illustrate the phases involved in the evolution of the conception of human rights—phases often erratic and uncertain in detail but steady in the basic purpose of assuring wider liberties to all.” The first revolution was a battle “for freedom from colonial dependence,” Stevenson explained, and “our second revolution for freedom” was the Civil War. Unlike the first two revolutions, “[o]ur third and current revolution for freedom has been essentially peaceful; and nearly all Americans, Negro as well as white, are determined to keep it that way,” the ambassador claimed. “Thus do we keep revising and broadening our conception of human rights in my country. Let us look at the record of my nation’s fight to live up a bit better to its heritage.” He concluded, “We therefore would not risk leaving the impression that we place anything but the highest priority on the fight against discrimination everywhere.”<sup>48</sup> Stevenson’s evolutionary logic was standard fare for U.S. Cold Warriors interested in race reform and fit neatly within the Convention debates.

The State Department’s strategy also borrowed from the trope of Southern exceptionalism. This myth regionalized U.S. racism, making America’s race problem, at its core, a Southern problem. The U.S. ambassador’s list of “notorious[ly]” racist cities—“Little Rock, Birmingham, Albany, Cambridge, and

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<sup>47</sup> Stevenson, *supra* note 45, at 5.

<sup>48</sup> *Id.*

Jackson”—were all below the Mason-Dixon Line.<sup>49</sup> This presentation of U.S. race relations conveniently sidestepped the national realities of white supremacy and ignored the fierce and growing movement activism in cities like Detroit, Chicago, and Los Angeles.<sup>50</sup> The trope of Southern exceptionalism also purported to explain federalism’s relationship to racial justice.<sup>51</sup> Racial subordination occurred in the U.S., because many Southern state governments invoked states’ rights to impede racial progress. It was federal officials, pursuant to this binary line of reasoning, who brought racial modernity to their backward brethren. During Adlai Stevenson’s speech to the Social, Cultural, and Humanitarian Committee, the ambassador invoked this familiar binary. “And if anyone is disposed to doubt the resolve of my government to enforce the Supreme Court decision on equal rights in education, I would remind him that a short time ago, thousands of Federal troops supported the right of a single individual to sit in the classrooms of the University of Mississippi.”<sup>52</sup> In Stevenson’s flat assessment of the standoff in Oxford, there was no room for federal ineptitude, complicity, or cowardice in the campus desegregation story.<sup>53</sup> The federal government was James Meredith’s, and by extension, the race’s savior. Stevenson emphasized, “[T]he machinery of the national government has been mobilized to support an irrevocable commitment—to destroy racial discrimination in this society forever.” Southern governments were largely the problem. The federal government had the region’s solutions. “The mature reaction of world opinion to recent events in the American South shows that people around the world recognize the difference between a country which is having racial trouble because it is unwilling to make progress and a country which is having racial trouble because it *is* making progress,” the ambassador asserted. “My government” is committed to the “speedy elimination of racial discrimination in all its forms’ [and] we are doing a great deal about it.”<sup>54</sup>

### *B. Morris Abram and Clyde Ferguson: The Changing Faces of U.S. Racial Diplomacy*

Ambassador Stevenson enlisted Morris Abram and Clyde Ferguson—men who represented the promise of a new South—as key allies in the State

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<sup>49</sup> *Id.*

<sup>50</sup> THOMAS SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2009); FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940-1980 (Komozi Woodard and Jeanne Theoharis, eds. 2003).

<sup>51</sup> For more on Southern exceptionalism, see *THE MYTH OF SOUTHERN EXCEPTIONALISM* (Matthew Lassiter and Joseph Crespino, eds. 2010).

<sup>52</sup> Stevenson, *supra* note 45, at 4-5.

<sup>53</sup> See JAMES MEREDITH, *THREE YEARS IN MISSISSIPPI* (1966).

<sup>54</sup> Stevenson, *supra* note 45, at 4-5.

Department's treaty negotiations. The race leaders possessed cosmopolitan worldviews, but they ultimately believed that the U.S. federal government could and should be the world's engine for racial progress. Abram and Ferguson regularly demonstrated the ability to close the gaps between the American ideals and the practices, and they had built their reputations on excelling in these crisis situations. The State Department widely distributed Abram and Ferguson's federal staff directories to other delegations as part of U.N. protocol, but their compelling personal narratives, which the experts were not shy about sharing, offered the U.S. a much greater public relations tool.<sup>55</sup>

Morris Abram was born in Fitzgerald, Georgia to a Jewish immigrant from Romania. Abram "trace[d] his interest in human rights back to his boyhood in the tiny town," a Baptist hamlet in Georgia's black belt that was feared for its local klavern. As a young man, he left rural America for Oxford, England on a Rhodes Scholarship. During the Second World War, he joined the Army Air Forces, quickly rising to the rank of major and earning the Legion of Merit for his "exceptionally meritorious conduct" in war. At the close of hostilities, Abram moved to Germany and joined U.S. Supreme Court Justice Robert Jackson's legal staff in Nuremberg. There, the decorated, World War II veteran prosecuted Nazis—including Adolf Hitler's designated successor, Hermann Goering—at the International Military Tribunal. When Abram returned to his home state, he again braved battles with racists and anti-Semites. He collaborated with lawyers from the Anti-Defamation League to draft legislation aimed at breaking the Klan's stranglehold on the South. The statute, which criminalized public mask wearing, was enacted in five states and fifty southern cities, including Atlanta.<sup>56</sup> Abram later occupied the liberal edge of the New Frontier as a key human rights voice in the Kennedy White House. In 1961, for example, President Kennedy dispatched Abram to represent the U.S. at Tanganyika's independence celebration and appointed him to be the first general counsel of the Peace Corps.<sup>57</sup> State Department officials recognized that Abram's identity and insights would allow him to speak authoritatively on the most pressing, legal issues facing the Sub-Commission: the creation of a treaty on racial discrimination and a declaration on religious intolerance. Given the "crisis character of human rights issues" on the

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<sup>55</sup> See Biography of Morris Berthold Abram (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 8); Biographical Summary of Clarence Clyde Ferguson, Jr. (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 8).

<sup>56</sup> Lawyer, Educator, Civil Rights Activist, Jewish Community Leader, Educator, Diplomat, Morris Abram (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 12).

<sup>57</sup> Audrey Clinton, *Peace Corps Aide Says Aim is Human Relations*, NEWSDAY, June 8, 1961, at 55; *Abram Back from U. S. Peace Corps in Tanganyika*, ATL. DAILY WORLD, Dec. 15, 1961, at 1; *Abram an Old Battler for Human Rights*, N.Y. WORLD-TELEGRAM, Mar. 29, 1966, at 5.

U.N.'s agenda, the State Department identified an impressive slate of progressive candidates "equipped to give leadership" and "handle emergencies" during the Sub-Commission's session. One stood out. "As you know, our first choice," the State Department memo's disclosed, "is Morris Abram."<sup>58</sup>

Clyde Ferguson was born in Wilmington, North Carolina to a prominent Methodist preacher, who, as part of the Great Migration, took his family north to escape Jim Crow. Ferguson graduated Phi Beta Kappa from Ohio State, and he, too, earned a Rhodes nomination. And like Abram, Ferguson joined the war effort in the 1940s and shined in battle. The native North Carolinian won a Bronze Star for his heroism in the European and Southwest Pacific theatres. In the 1950s, the Harvard Law honors graduate gained a wealth of experience in international human rights law and politics. He studied at the Academia Inter-Americano de Derecho in Havana and represented the U.S. at the Western Hemisphere United Nations Economic, Social, Cultural Organization's (UNESCO) conference.<sup>59</sup> In the fall of 1963, Adlai Stevenson selected the civil rights lawyer to serve as the mission's special adviser to the U.N. General Assembly. State Department officials were clear about why they named Ferguson to the post. "The racial disturbances in this country . . . will undoubtedly provide ammunition for the Soviet bloc and the extremists among the Afro-Asians to use against us in debate and may affect adversely our influence with the more moderate African delegations," one State Department memorandum read. "We must emphasize our own determination to end racial discrimination in this country and if the Soviet Union tries to capitalize on the situation here and have no hesitation in reversing the attack in this area where the Soviet bloc is vulnerable."<sup>60</sup> As Stevenson's speech to the U.N. conceded, the iconic images from the Birmingham movement invited unparalleled criticisms. Only weeks after Martin Luther King's "Letter from the Birmingham Jail," King published a hard-hitting editorial, where he described Birmingham as "the last stop before Johannesburg, South Africa."<sup>61</sup> The analogies between "petty apartheid" and "grand apartheid" were gaining traction, Adlai Stevenson's staffers stressed. "We need a special adviser on human rights on our Delegation to the 18<sup>th</sup> General Assembly to keep the Delegation straight on race developments in the U.S. and on apartheid in South Africa—both can come up in any committee at any time, or in plenary."

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<sup>58</sup> Memorandum from Nathaniel McKitterick to Harlan Cleveland, *supra* note 8, at 1.

<sup>59</sup> Biographical Summary of Clarence Clyde Ferguson, Jr., *supra* note 55, at 1.

<sup>60</sup> Memorandum from Nathaniel McKitterick to Harlan Cleveland (July 16, 1963) (on file with John F. Kennedy Library, Harlan Cleveland Papers, Box 114, Folder U.N. Human Rights).

<sup>61</sup> Martin Luther King, Jr., *Birmingham, U.S.A.: How It All Began*, N.Y. AMSTERDAM, June 8, 1963 at 10.

Ferguson was selected. The dean's racial background and experience as an adviser to Stevenson proved to be significant in his appointment as Abram's alternate during the Convention debates. "Our preference is Clyde Ferguson," State Department officials revealed in their discussion of potential alternates. After rattling off Ferguson's personal accomplishments, they turned to two other, primary considerations. "He is a Negro," the selections memorandum underscored, "and someone already familiar with the U.N."<sup>62</sup>

Abram and Ferguson were strong institutional fits for the State Department's plan, because they personified the marriage between the Cold War and the era's "responsible" race leadership.<sup>63</sup> The U.S. racial experts, like State Department officials, contended that the U.S. could lead the world's pursuit of freedom given the trajectory of American history and the moral superiority of U.S. constitutional values. They believed that American race relations were not where they needed to be, but the men were quick to assert that the nation was a far cry from the shadows of its gloomy past. The U.S.'s racial tensions were simply growing pains in the evolution of democratic governance. "We are in the midst of a revolution. I sometimes call it the third American revolution," Ferguson wrote, echoing Adlai Stevenson. "In short, I think a revolution may be used affirmatively ...and this revolution presents the grand opportunity to seize the flux of change for the purpose of finally resolving our problem."<sup>64</sup> Abram and Ferguson had devoted their adulthoods to creating a world that embraced the very best U.S. ideals—or what they perceived as such. In fact, they had risked their lives for these ideals at home and abroad.

Abram and Ferguson were also well-suited to execute the State Department's plan, because they did not blush at the idea that international human rights lawmaking, traditionally viewed as an apolitical process, could be a powerful tool in fighting the Cold War. Indeed men, like Abram, reveled in it. "If the United States is to fulfill its expected role as a leader of international moral conscience—and it should," he proclaimed, "it will have to act forcefully on issues of international human rights."<sup>65</sup> There were real reputational costs for the U.S. if the nation did not lead the Convention's drafting and eventually ratify the treaty. Americans' distaste for U.N. affairs, which exploded during the Eisenhower years, was now self-defeating and outmoded. "Over the past decade,

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<sup>62</sup> Memorandum from Nathaniel McKittrick to Harlan Cleveland, *supra* note 60, at 1.

<sup>63</sup> See Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

<sup>64</sup> Ferguson, *supra* note 21, at 460-62.

<sup>65</sup> United States Policy (n.d) (on file with MARBL, Abram Papers, Box 94, Folder 8).

more than 50 new nations have joined the United Nations,” Ferguson declared during the treaty debates. “These nations are, with few exceptions, non-white.” The explosion of Third World countries at the U.N. had radically shifted the direction of U.N. affairs and remade the Cold War. “[T]hese non-white nations have taken the lead in making both colonialism and its vestiges in the forms of racial discrimination critical issues in world politics,” Ferguson added. His experience during the Declaration debates had been instructive. “The major focus in the last (18th) session of the United Nations was on racial discrimination as such, and as an attribute of colonialism. In both plenary sessions and the meetings of committees of the assembly, the non-white nations, now in a majority, have mounted through various devices sustained attacks on racial discrimination and systems of segregation—particularly apartheid.”<sup>66</sup> The Convention was the era’s most anticipated human rights instrument. Abram and Ferguson knew that if the U.S. truly desired to limit the Soviet sphere of influence at the U.N., the U.S. delegation needed to take more aggressive stances on human rights issues.

Abram and Ferguson believed that the newly independent countries at the U.N. could find a clear path to modernity by adopting the constitutional values in the U.S. draft of the Convention. The U.S. Constitution, they argued, provided the human rights protections necessary to ensure an inclusive multiracial and multiethnic democracy. Ensuring diverse populations equality before law was indeed challenging, but the U.S. experts preached democracy’s unqualified application to all people.<sup>67</sup> “One fact to which I was fond of alluding was undeniable,” Abram maintained. “After American occupation, former totalitarian states such as Germany, Italy, and Japan became functioning democracies. Soviet occupation never birthed a democratic regime, and in the case of Czechoslovakia, strangled one that was full-grown.”<sup>68</sup> Moreover, the U.S. strategy allowed the movement lawyers a way to plant their ideas for law and policy into constitutions abroad. “Indeed, it is quite likely that this item relating to racial discrimination,”

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<sup>66</sup> Clarence Clyde Ferguson, Jr., *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 1 LAW TRAN. Q. 61 (1964).

<sup>67</sup> For example, Morris Abram played a pivotal role in cultivating Atlanta’s image as “the city too busy to hate.” Abram was so convinced that his vision of democratic governance could produce racial progress across the world that he flew the Sub-Commission to Atlanta in 1964 to study race relations in the city. Abram hoped that Sub-Commission’s visit to the Southern capital would “educate foreigners on the United States and what we regarded as a model city” and would limit Soviet influence during the Convention’s debates. See H. Timothy Lovelace, Jr., *Making the World in Atlanta’s Image: The Student Non-Violent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention*, 32 LAW & HIST. REV. 385 (2014).

<sup>68</sup> Abram, *supra* note 34, at 151-152.

Ferguson declared in the midst of the Convention debates, “will demonstrate more so than ever, the truism that foreign policy is simply the logical extension of domestic policy.”<sup>69</sup> Countries experiencing social upheavals, wrestling with constitutional chaos, or just tasting independence frequently borrowed from international instruments like the Universal Declaration of Human Rights to establish the rule of law. Abram and Ferguson recognized that if the U.S. did not adequately participate in the Convention debates, when these politically fragile societies domesticated the treaty, as many countries would later do, their laws might resemble the Soviet Constitution. The U.S. would be rendered as an outlier in global race relations.

The State Department had obvious foreign policy incentives to send an interracial and interfaith delegation to the Sub-Commission for the Convention debates, but these motivations were particularly important given the Sub-Commission’s protocol. With Abram and Ferguson as U.S. experts, the U.S. did not need to violate Sub-Commission’s rules by publicly discussing the nation’s commitment to social progress. Abram and Ferguson provided the Kennedy administration with two highly visible and tangible indicators of that progress. The composition of the delegation would speak for itself. The human rights community knew of the State Department’s thin record of appointing Jewish attorneys to the Commission on Human Rights and its subsidiary organ and the utter absence of such a record for blacks. The appointments of Abram and Ferguson caused no sea change in U.S. race relations, yet the symbolism of their selections mattered. The State Department appeared to be making a sincere and conscious effort to live up to its calls for equality.

Equally important, Abram and Ferguson were themselves engaging in the kind of desegregationist project at the U.N. that they had engaged in domestically. They lived their politics on U.S. soil and aspired to be at the forefront of an international movement to safeguard minority rights. Abram’s advocacy on behalf of Soviet Jews exemplified how the U.S. experts’ service on the Sub-Commission transformed into an opportunity to promulgate their own visions for global equality. “[W]hile the Russian representative [on the Sub-Commission] expostulated on the vitality of civil rights in the Soviet Union,” Abram remembered, the Soviets “embarked on anti-Semitic programs, directly and by proxy, on a scale instituted by no great power since World War II.” Abram ripped the Soviet Constitution for being a sham, and he was able to use his new platform to pass international legislation targeting religious and ethnic

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<sup>69</sup> Clarence Clyde Ferguson, *The United Nations Human Rights Covenants: Problems of Ratification and Implementation*, 62 AM. SOC’Y INT’L L. PROC. 83, 90 (1968).

persecution. “At the United Nations, my voice, however frustrated by circumstances, was being heard,” Abram declared.<sup>70</sup> Partnering with the State Department afforded the U.S. experts the ability to harness the power of the state in ways that gave the U.S. lawyers and their causes greater global prominence.

Finally, the U.S. racial experts were not only seeking to export U.S. civil rights law for the good of humankind in foreign lands; they also aimed to import a greater appreciation for global politics to aid the movement in the U.S. This was especially important for Clyde Ferguson. Ferguson hypothesized that racial progress would not occur in the U.S. without judges and policymakers recognizing the impact of domestic race relations on U.S. foreign policy. When these key stakeholders acknowledged Jim Crow’s reputational costs, they would be more likely to support domestic civil rights reforms. Scholars of U.S. constitutional law—even in the 1950s—often used the Supreme Court’s ruling in *Brown v. Board of Education* to explain how the Cold War could benefit the U.S. civil rights movement. In Ferguson’s first book, *Desegregation and the Law*, the pioneering race scholar asserted, “It is inconceivable that the international discord between East and West had no effect upon the nine men who were to determine a national discord between North and South.”<sup>71</sup> The Harvard Law graduate was student of legal realism. Ferguson pulled directly from case filings to reveal the “foreign-domestic tapestry . . . apparent in the very arguments made to the Supreme Court in *Brown v. Board of Education*.” In the book, which won strong reviews from Morris Ernst, Jackie Robinson, and Thurgood Marshall,<sup>72</sup> Ferguson pointed to the fact that “[f]oreign policy entered the briefs submitted by counsel to the Court.” He continued, “The lawyers for the NAACP wrote: ‘Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.’” Ferguson also noted that the Justice Department, backed by the State Department, filed a brief on behalf of the NAACP in *Brown*, urging the

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<sup>70</sup> Abram, *supra* note 34, at 151-154.

<sup>71</sup> ALBERT BLAUSTEIN AND CLARENCE CLYDE FERGUSON, *DESEGREGATION AND THE LAW* 12 (1957).

<sup>72</sup> *Desegregation and the Law* was favorably reviewed in major U.S. newspapers. See *Tribune Reviewers’ Choices*, CHI. TRIBUNE, Dec. 1, 1957, at 1; *Significant and Timely*, N.Y. HERALD TRIBUNE, Oct. 27, 1957 at E2; *Reflections of American Ideas and Ideals*, N.Y. TIMES, Nov. 17, 1957 at BR124; George Schuyler, *This Week’s Books*, PITT. COURIER, Nov. 23, 1957, at B2. Reviewers of *Desegregation and the Law* often situated the book and the racial desegregation within a Cold War framework. Philip Kurland, for example, a former Supreme Court clerk to Justice Felix Frankfurter and a constitutional law scholar at the University of Chicago, began his review of *Desegregation and the Law* in international and, perhaps, hyperbolic terms. “Not even Sputnik or the ICBM presents so vital a problem to the people of the United States as does the issue of enforcement of the Supreme Court’s desegregation decree.” Philip Kurland, *The Desegregation Decree and the Courts*, CHI. TRIBUNE, Nov. 24, 1957, at C9.

Warren Court to view *Brown* within the “context of the present world struggle between freedom and tyranny ...[for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries.”<sup>73</sup> The Justice Department’s brief pressed that “[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.” The Justice Department’s brief quoted Secretary of State Dean Acheson. “The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy.”<sup>74</sup>

What was so remarkable about this particular moment was the movement lawyers’ strategy. Abram and Ferguson were actively using the treaty-making process to advance civil rights law *and* bolster the U.S.’s international image. The U.S. experts posited that if world leadership rested, in part, on race leadership during the Convention debates, then federal officials had new incentives to support domestic civil rights reform. Put slightly differently, Abram and Ferguson joined the State Department’s Convention diplomacy, because active U.S. involvement might encourage the U.S. to become more committed to practicing at home what it preached abroad. In 1964, an upbeat Clyde Ferguson proclaimed, “The proposed United Nations Convention against Racial Discrimination is likely to have not only a profound impact in the United Nations, but also a rather substantial impact on the United States policy in both the domestic and foreign fields.” The U.S. government and the civil rights movement could reap great fruit from a joint, human rights venture. While the federal

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<sup>73</sup> Blaustein and Ferguson, *supra* note 71, at 12.

<sup>74</sup> See Brief for the United States as Amicus Curiae at 6-8, 1952 WL 82045 (1952). Many everyday Americans also appreciated the global significance of the Court’s decision. In *Desegregation and the Law*, Ferguson sampled from the era’s popular periodicals for evidence: ...*Time*, in typical *Time* style, observed: “The international effect may be scarcely less important. In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that ‘all men are created.’” *Time*’s companion publication, *Life*, supported this position with the assertion that the Supreme Court “at one stroke immeasurably raised the respect of other nations for the U.S.” ...More dramatic was the summary in the tenth anniversary issue of the Negro magazine, *Ebony*: “Negro America fashioned a chain of political, social and economic victories that were discussed in Europe, applauded in Asia and imitated in Africa ...the [legal] advances strengthened the cause of freedom everywhere. Blaustein and Ferguson, *supra* note 71, at 12-13.

officials and movement leaders might separately pursue racial reform at the U.N. out of their own self-interests, the State Department and the civil rights lawyers recognized that their cooperation could yield a more plentiful bounty for their respective constituencies.<sup>75</sup>

Trust radiated from this unprecedented collaboration. The State Department was dispatching two of America's leading civil rights lawyers, technically in their individual capacities, to one of the most sensitive U.N. organs to compose the world's preeminent treaty on race. They would serve as both goodwill ambassadors and racial critics—with no ostensible legal consequences for going rogue. There had been serious skeptics of the State Department's audacious move, and arguably for good reason. Blacks working outside the auspices of the State Department had flooded the Sub-Commission and the Commission on Human Rights with human rights complaints since its inception. Their pleas, however, met with devastating results. Shortly after the creation of the U.N., W.E.B. Du Bois, the towering intellectual, NAACP founder, and Pan-Africanist, petitioned the U.N., charging the U.S. with violating African-Americans' human rights.<sup>76</sup> Eleanor Roosevelt, then Commission on Human Rights Chair and an NAACP board member, fumed that Du Bois's attempts to tarnish America's image had given credence to the Communists' claims about the inadequacies of U.S. constitutional law and policy. U.N. officials claimed they lacked jurisdiction to recognize Du Bois's appeal, and the civil rights group dismissed Du Bois from the NAACP, the very organization he helped to found four decades earlier.<sup>77</sup> William Patterson, attorney and national secretary of the Civil Rights Congress, charged the U.S. with genocide in a 1951 U.N. petition. He was soon stripped of his passport and publicly scorned for allegedly aiding the Soviet cause. Paul Robeson signed the petition, and he, too, found himself on the political margins. The prominent civil rights leader, award-winning entertainer, and darling of black America was summoned before the House Un-American Committee, lost his passport, and was blasted by the press and the liberal establishment for his reported ties to the Reds.<sup>78</sup>

Abram and Ferguson's brand of racial diplomacy was a sharp rebuke of their predecessors' approach to international human rights law. There was no need to shame the U.S. at the U.N. or look to "foreign" legal standards to improve the lived experiences of African-Americans. These were hapless and hopeless

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<sup>75</sup> Ferguson, *supra* note 66, at 64.

<sup>76</sup> DAVID LEWIS, W.E.B. DU BOIS, 1919-1963: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY 554 (2001).

<sup>77</sup> Anderson, *supra* note 23, at 130-54.

<sup>78</sup> GERALD HORNE, COMMUNIST FRONT? THE CIVIL RIGHTS CONGRESS, 1946-1956 (1988).

lines of attack, the racial experts scoffed. Ferguson recognized how an older generation of civil rights lawyers and activists, both radicals and liberals, had sparked a firestorm when they used international human rights law to illustrate the shortcomings of U.S. constitutionalism. Their human rights strategies suggested that subversive forces controlled the civil rights movement and “gave rise to ...the Bricker episode.”<sup>79</sup> These confrontational tactics also threatened to alienate would-be allies in the State Department—the same constituency that proved essential to the victory in *Brown* and that was proving valuable in the push towards the Civil Rights Act of 1964. Collaborating with the State Department had the potential to advance the U.S. civil rights movement without causing the racial backlash prior efforts had produced. In fact, this strategy would give the movement new legitimacy. After all, what blacks really wanted was in the nation’s best interests, Abram and Ferguson maintained. They were simply asking for the blessings of democracy, the same rights and privileges bestowed to other citizens.

State Department officials had a final reason to feel confident that Abram and Ferguson posed no real risk to U.S. foreign policy interests: they were political appointees. Abram, for example, had strong ties to John F. Kennedy from the earliest days of his Presidential run. During the 1960 race, the Democratic stalwart stumped for Kennedy in Georgia and masterfully converted registered black Atlantans into Kennedy voters.<sup>80</sup> The thoroughly vetted delegates cringed at the thought of embarrassing their President or their nation while at the U.N. They worked closely with the Kennedy and later Johnson administrations during the treaty negotiations and embraced their status as de facto agents of the State Department.<sup>81</sup> There were no questions about the experts’ fidelity to their country. They had the guidance papers and security clearances to prove it.

This experiment in diplomacy was rooted in an abiding faith in America’s future. The State Department and the U.S. experts possessed a gritty determination to make democracy work. Such a model for global race reform

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<sup>79</sup> Human Rights Lecture (n.d.), (on file with Harvard Law School Library, Clarence Clyde Ferguson Papers, Box 6, Folder 1).

<sup>80</sup> Abram, *supra* note 34, at 132.

<sup>81</sup> Morris Abram and Clyde Ferguson occupied even greater roles in formulating the U.S. civil and human rights policy. In 1965, for example, Johnson appointed Abram the U.S. delegate to the U.N. Commission on Human Rights and Ferguson the full-time U.S. member of the Sub-Commission, and both men also played instrumental roles in planning and executing the 1966 White House Conference on Civil Rights. See Biography of Morris Berthold Abram, *supra* note 55, at 1-3; Biographic Sketch of Clarence Clyde Ferguson (on file with the Harvard Law, Clarence Clyde Ferguson Papers, Box 12, Folder 8).

fostered great cooperation where there had been deep suspicion and reflected serious study of social movement lawyering. The partnership was, for some, a testament of hope.

### *C. ICERD: Made in America*

Morris Abram and Clyde Ferguson met with the Interdepartmental Committee on Foreign Policy Relating to Human Rights for several weeks in late 1963 to compose language for the U.S. draft of the Convention. The interagency group featured representatives from the State Department's Bureau of International Organization Affairs, Office of the Assistant Legal Adviser for U.N. Affairs, the U.S. Mission to the U.N., the Justice Department's Office of Legal Counsel, and the U.S. Civil Rights Commission. At times, Abram and Ferguson "met with considerable opposition from certain quarters in the State Department and Justice Department on the very issue of a U.N. Convention dealing with race," but the Interdepartmental Committee was able to develop eight substantive articles in time for the Sub-Commission's January 1964 session.<sup>82</sup> Abram and Ferguson recognized that "the [U.N. General Assembly] expected that the Declaration against Racial Discrimination would be the used as the basis" for the Convention. The U.S. experts, in consultation with the Interdepartmental Committee, adapted the Declaration's language to accord with "'equal protection' concept in [the] 14<sup>th</sup> amendment."<sup>83</sup>

Article I of the U.S. draft Convention defined racial discrimination. It read, "For the purpose of this convention, racial discrimination includes any distinction, exclusion or preference made on the basis of race, colour, national or ethnic origin." The remainder of the U.S. draft outlined the specific racial obligations, pursuant to the equal protection clause, that each state would undertake as a party to the Convention. These provisions were fresh and progressive, reflecting the emerging constitutional values shaping the contours of U.S. civil rights law and policy in the mid-1960s.<sup>84</sup>

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<sup>82</sup> C. Clyde Ferguson, Jr., Book Review, 70 AM. J. INT'L L. 610 (1976). *See also* Letter from Morris Abram to Clyde Ferguson (Dec. 30, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9); Letter from Rachel Nason to Morris Abram (Jan. 10, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9). Abram and Ferguson later added a ninth article addressing hate speech and hate organizations. (Jan. 13, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).

<sup>83</sup> Guidance Paper, *supra* note 19, at 4.

<sup>84</sup> Suggested Draft for U.N. Convention on the Elimination of All Forms of Racial Discrimination (Jan. 7, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 3) [hereinafter Suggested Draft].

Article II of the U.S. draft reiterated Article I's prohibition against racial preferences but made one notable exception: affirmative action.<sup>85</sup> Ferguson, in particular, had been an early proponent of affirmative action. In 1957, Ferguson delivered a keynote address during the National Bar Association's annual conference urging the federal government to expand the concept of non-discrimination by providing blacks racial preferences in hiring.<sup>86</sup> In the early 1960s, as General Counsel of the U.S. Civil Rights Commission, Ferguson and Commission members defended Executive Orders 10925 and 11114, Kennedy Administration initiatives aimed at diversifying federal employment and contracting.<sup>87</sup> And as Dean of Howard Law School, Ferguson penned several articles praising the shift in "emphasis in civil rights ...from prohibitory negative measures such as prohibitions against acting out racially discriminatory attitudes, to positive measures requiring affirmative actions designed to assure full opportunity in the society we now know."<sup>88</sup> Article II authorized states to "take special concrete measures in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups" that had endured past discrimination.

Article III of the draft was similarly bold. It mandated that states "end without delay governmental and other public policies of racial segregation and especially policies of apartheid."<sup>89</sup> U.N. delegations, regardless of political alliances, often held apartheid out as the world's monument to racial inequality, and Abram and Ferguson's article reflected the human rights consensus around South African race relations.<sup>90</sup>

Article IV emanated directly from the U.S. sit-in movement and the spirited congressional debates that eventually led to the enactment of the Civil Rights Act of 1964. The provision required states to "take effective measures,

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<sup>85</sup> *Id.* at 2-3.

<sup>86</sup> Ferguson, *supra* note 21, at 459-60.

<sup>87</sup> See e.g. United States Commission on Civil Rights, CIVIL RIGHTS '63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 89 (1963).

<sup>88</sup> Clarence Clyde Ferguson, Jr., *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 FED. B.J. 102 (1964); see also Clarence Clyde Ferguson, Jr., *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to Withhold Appropriated Funds*, 14 BUFF. L. REV. 1 (1964).

<sup>89</sup> Suggested Draft, *supra* note 84, at 3.

<sup>90</sup> Shortly after its founding, the U.N began passing a wide array of resolutions regarding apartheid in South Africa. See G.A. Res. 44 (I) (Dec. 8, 1946); G.A. Res. 395 (V) (Dec. 2, 1950); G.A. Res. 615 (VII) (Dec. 5, 1952); G.A. Res. 1179 (XII) (Nov. 26, 1957); G.A. Res. 1302 (XIII) (Dec. 10, 1958); G.A. Res. 1460 (XIV) (Dec. 10, 1959); G.A. Res. 1597 (XV) (Apr. 13, 1961); G.A. Res. 1662 (XVI) (Nov. 28 1961); G.A. Res. 1761 (XVII) (Nov. 6, 1962).

including the adoption of legislation ...to assure equal access to any place or facility intended for use by the general public.” Article V reiterated that states must prevent governmental discrimination “in the enjoyment of political and citizenship rights.”

Articles VI and VII guaranteed all persons “equal justice under the law.” Under these provisions, states were ordered to provide “effective remed[ies]” against racial discrimination and “competent” tribunals to recognize those rights. Article VIII required states to take “immediate steps through educational and other means ...to promote understanding, tolerance, and friendship among all nations and all peoples.” This article reflected the longstanding position at the U.N. and in the U.S. that education was essential to healing the world’s racial divisions.<sup>91</sup>

The U.S. draft won international acclaim. The *Atlanta Daily World*, the largest African-American newspaper in the South, called the U.S. proposal a “sweeping eight-point international treaty,” highlighted Abram’s hometown roots, and congratulated the “brilliant attorney” for spearheading the U.N.’s push to end racial discrimination. The *New York Times* emphasized that the U.S. draft “offered a number of wide-ranging ideas for barring discrimination on the basis of race, color or ethnic origin through legislation, regulations and special machinery.” The *Times* characterized the U.S. draft as an innovative effort that could “test sentiment at home and abroad on a treaty attempting to ban racial bias.”<sup>92</sup> In cities, like Lagos, Santiago, and Addis Ababa, and Sub-Saharan Africa,<sup>93</sup> global media outlets covered the leading role that the Sub-Commission’s U.S. members played in the Convention debates—all to the delight of State Department officials. When Mohammed Mudawi, the Sub-Commission’s racial expert from the Sudan, learned that the U.S. draft would serve as the primary text for the Convention debates, he declared that Convention should mandate that state parties to the treaty adopt a constitutional amendment prohibiting racial discrimination. “If a general provision akin to the fourteenth amendment of the United States Constitution were included in the constitution of

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<sup>91</sup> Suggested Draft, *supra* note 84, at 3-5.

<sup>92</sup> Kathleen Teltsch, *Pact to Ban Bias Proposed in U.N.*, N.Y. TIMES, Jan. 14, 1964, at 7.

<sup>93</sup> *Discrimination*, WEST AFRICAN PILOT (Lagos, Nigeria), Jan. 15, 1964, at 1; *United Nations Commission Observes Racial Situation in U.S.*, EL MERCURIO (Santiago, Chile), Jan. 27, 1964, at 33; *U.N. Members Visit Atlanta, Georgia*, ETHIOPIAN HERALD (Addis Ababa, Ethiopia), Jan. 27, 1964, at 4.

a country,” Mudawi blurted, “it would be difficult to amend or delete it.”<sup>94</sup> One of Mr. Mudawi’s colleagues soon reminded him of the organ’s protocol.<sup>95</sup>

The U.S. drafters wanted to be on the right side of human rights history. “I venture to say that the Sub-Commission has never had so interesting and important an agenda as submitted by the Secretary General for this, the 16<sup>th</sup> session,” Morris Abram told U.N. watchers. Abram called the task of drafting the body’s most comprehensive treaty on race “literally epochal.” He was right. The Sub-Commission had never been charged with such an awesome responsibility. For some in the international community, the Sub-Commission simply studied obvious racial phenomena, composed ineffectual reports for other U.N. organs, and functioned as a political battleground where rivals traded thinly veiled attacks. The Sub-Commission’s 16<sup>th</sup> session promised to produce an altogether different result. Drafting the Race Convention was the U.N.’s “absolute priority” for the entire year. With Georgia’s native son at the helm of the U.N.’s unprecedented effort, the U.S. lawyer brimmed with expectation, pledging to produce a document “not only for the people of the United States” but for the “monumental benefit to every man, woman, and child on this planet.” The Southern statesman was convinced that he would forever change the world.<sup>96</sup>

Clyde Ferguson, too, was caught up in the racial zeitgeist of the 1960s. “Today, in 1964, two grand tides in the affairs of mankind sweep the world,” Ferguson wrote in an academic article published during the Convention debates. “One is the drive against colonialism,” he asserted, “and the second is the drive against racial discrimination.”<sup>97</sup> Ferguson was part of a black internationalist tradition that placed African-American activism in global terms.<sup>98</sup> “The Afro-

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<sup>94</sup> U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 407th mtg. at 11, U.N. Doc. E/CN.4/Sub.2/SR.407 (Jan. 14, 1964) [hereinafter Subcomm. 407 mtg.].

<sup>95</sup> U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 408th mtg. at 5, U.N. Doc. E/CN.4/Sub.2/SR.408 (Jan. 14, 1964) [hereinafter Subcomm. 408 mtg.].

<sup>96</sup> Statement by Morris B. Abram at Sixteenth Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Jan. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).

<sup>97</sup> Ferguson, *supra* note 65, at 75.

<sup>98</sup> HENRY RICHARDSON, III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008); Kevin Gaines, *AMERICAN AFRICANS IN GHANA: BLACK EXPATRIATES IN THE CIVIL RIGHTS ERA* (2006); Hope Lewis, *Reflections of “Black Crit Theory”: Human Rights*, 45 VILL. L. REV. 1075 (2000); Gay McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J.

Asian drive for independence from colonialism and the Afro-American drive against racial discrimination are not unrelated,” he maintained. In fact, the “international forces arrayed against ‘white colonialism’ and political systems based upon racial discriminations have merged in the promotion of the United Nations Convention on the Elimination of All Forms of Racial Discrimination.”<sup>99</sup> The new dean considered himself to be an intellectual and political heir of a young W.E.B. Du Bois, reading the blowing winds of racial change in a way the eminent scholar had done two generations earlier—that the problem of the twentieth-century was that of the color-line.<sup>100</sup> “Indeed, so strong and intense have been these movements for freedom and equality that we might easily conclude that the unleashing of these social forces are far more characteristic of this century than is the release of the energy of the atom,” Ferguson continued. “What we are now witnessing is the release of the energy of ideals.”<sup>101</sup>

### III. RACIAL DISCRIMINATION AS A PUBLIC PROBLEM

#### A. *Placing the State Action Doctrine in a Global Context*

Abram and Ferguson’s push to make the Race Convention in the image of U.S. civil rights law and policy would soon face real obstacles. Although the U.S. experts had produced the Sub-Commission’s first draft of the Convention, the Eastern bloc quickly countered. The Sub-Commission’s Soviet and Polish experts, Boris Ivanov and Wojciech Ketrzynski, circulated their own version of the Convention to the organ’s other experts. The jointly authored text lacked the craftsmanship of the U.S. draft and in many places deviated in structure from the Declaration on Racial Discrimination, but the rich ideas contained in the text were morally defensible and politically viable. Article I of the Soviet-Polish draft defined racial discrimination as “any differentiation, ban on access, exclusion, preference or limitation,” on minorities’ abilities to enjoy “freedoms in political,

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571 (1997); Henry Richardson, III, *African Americans and International Law: For Professor Goler Teal Butcher, with Appreciation*, 37 HOW. L.J. 217 (1994).

<sup>99</sup> Ferguson, *supra* note 65, at 75.

<sup>100</sup> W.E.B. DU BOIS, *SOULS OF BLACK FOLK* (1903). Ferguson additionally claimed that [s]eparate but equal ... was the attempt, an attempt principally attributable to a Negro, Booker T. Washington, to work out some social theory for the purposes of dealing with a new social organization based on something other than human slavery.” Washington’s effort was “not only totally unsuccessful but also positively damaging to the very drive for human rights or civil rights within the country.” Howard Law School, according to Dean Ferguson, “created the alternative to the articulations of Booker T. Washington—working within the constitutional system, as we know it, a scheme was devised for real equality...” Ferguson, *supra* note 21, at 456.

<sup>101</sup> Ferguson, *supra* note 65, at 75.

economic, social, cultural or any other field of public life.”<sup>102</sup> This provision reproduced the constellation of rights recognized in the 1936 USSR Constitution and its offspring, the 1952 Constitution of Poland. Pursuant to Article 123 of the Stalin Constitution<sup>103</sup> and Article 69 of the Polish Constitution,<sup>104</sup> citizens had the right to “enjoy equal rights in all spheres of public, political, economic, social and cultural life.” Wojciech Ketrzynski, who doubled as an official in the Polish Foreign Service, submitted the text on behalf of Sub-Commission’s Eastern bloc.<sup>105</sup>

Article II of the Soviet-Polish draft enumerated the obligations of each state party to the Convention. The proposed treaty’s list of substantive rights was extensive. The Soviet-Polish draft, like its American counterpart, mandated that states ensure “equality for all before the law,” eliminate racial discrimination “in granting political rights” and “enjoyment of civil rights,” afford “effective protection and remedies...without distinction to race, colour, national or ethnic origin,” and guarantee equal “access to all kinds of transport, recreation and public facilities, including restaurants, hotels, cinemas, parks, cafes, etc.” The Soviet-Polish draft also included a provision that mirrored the U.S. members’ call for affirmative action. Under the proviso, which drew inspiration from Soviet experience with managing a multiethnic state and educating Third World college students, state parties to the Convention were “to provide training of skilled manpower and expert personnel from among the groups of population formerly deprived of the right to education.”<sup>106</sup> The similarities between the competing drafts were irrefutable, but they also ended here.

The Soviet-Polish draft dwarfed the U.S.’s proposal. Article II of the Eastern bloc’s draft additionally called on states to end racial discrimination in a wide range of economic, social, and cultural rights—including the right to form and join trade unions, the right to employment and equal pay, the right to

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<sup>102</sup> Messrs. Ivanov and Ketrzynski: Draft Convention on the Elimination of All Forms of Racial Discrimination, at 2, U.N. Doc. E/CN.4/Sub.2/L.314.

<sup>103</sup> Konstitutsiia SSSR (1936) [Konst. SSSR] art. 123 [USSR Constitution].

<sup>104</sup> Konstytucja Rzeczypospolitej Polskiej (1952) [Constitution], art. 69 (Pol.).

<sup>105</sup> Letter from Morris Abram to George Goodwin (Dec. 23, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9); U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 410th mtg. at 7, U.N. Doc. E/CN.4/Sub.2/SR.410 (Jan. 15, 1964).

<sup>106</sup> Messrs. Ivanov and Ketrzynski, *supra* note 102, at 2-4. See also TERRY MARTIN, *THE AFFIRMATIVE ACTION EMPIRE: NATIONS AND NATIONALISM IN THE SOVIET UNION, 1923-1939* (2001); *COLD WAR CROSSINGS: INTERNATIONAL TRAVEL AND EXCHANGE ACROSS THE SOVIET BLOC, 1940s-1960s*, (Michael David-Fox, et. al. eds., 2014).

education, the right to housing, and the right to public health, medical care, and social security. If the Eastern bloc's catalogue of prohibitions was not exhaustive, Article II of their draft declared that state parties to the Convention must prohibit all "acts or manifestations of racial discrimination of any kind."<sup>107</sup> There was no question about the Eastern bloc's commitment to racial justice, at least on paper. Their proposed Convention made America look weak before the human rights community.

At stake was the very conception of human rights. For more than a decade and a half, the Eastern and Western blocs had fought bitter drafting wars at the U.N. over this issue. The wrangling was predictable. The U.S. and its Western allies argued that civil and political rights were the only human rights. The Allied Powers feared that placing economic, social, and cultural rights on the same plane as civil and political rights might undermine individual freedoms. The Soviet Union's totalitarian state was sufficient evidence. Moreover, these market-driven states were wary implementing many economic, social, and cultural rights, because they seemed so impractical and imprudent. These rights were non-justiciable, difficult to measure and implement, and sowed the constitutional seeds for a sprawling welfare state. The Soviet Union and its closely aligned countries ripped the Western bloc for what they viewed as a *laissez faire* approach to social justice. All rights flowed from the state, Eastern delegates shot back, and thus economic, social, and cultural rights were at least as important as civil and political rights; in fact, civil and political rights were illusory when citizens did not have economic, social, and cultural protections.<sup>108</sup> What made this moment in the Race Convention debates so fascinating was that the Sub-Commission's Eastern bloc was arguing for the indivisibility of human rights in the race context. Non-discrimination in civil rights was not enough, and neither was non-discrimination in economic, social, and cultural rights. The U.N. General Assembly had tasked the Sub-Commission with drafting a treaty that eliminated all forms of racial discrimination. This was an uncompromising fight; there could be no equivocation or division of rights.

The Soviet-Polish proposal to ban all "acts or manifestations of racial discrimination of any kind" was explosive. Early in the Convention debates, the

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<sup>107</sup> Messrs. Ivanov and Ketrzynski, *supra* note 102, at 2-4.

<sup>108</sup> PHILIP ALSTON, *ECONOMIC AND SOCIAL RIGHTS IN HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 137, 147- 51 (1994). The schism became so pronounced that in 1950, the U.N. General Assembly divided the International Bill of Rights and began the process of drafting an International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The fighting between the blocs, nonetheless, persisted so long that the covenants were not adopted until in 1966, a year after the Convention's ratification.

Sub-Commission's experts had agreed to table the discussions of one manifestation of racial discrimination—hate speech, the most controversial issue during the Declaration and Convention debates.<sup>109</sup> Even with that difficulty temporarily sidelined, Article II of the Soviet-Polish proposal went well beyond the U.S. lawyers' proposed treaty. Abram and Ferguson had developed their text "along the lines of the 'equal protection' concept in [the] 14th Amendment."<sup>110</sup> Pursuant to the state action doctrine, the equal protection clause only applied to government entities. Abram and Ferguson confessed that there remained unambiguous areas of law where state actors still denied U.S. citizens equal protection of the law. "The sensitive right," Ferguson divulged in a State Department memorandum, "is that of marriage." Abram concurred. Ferguson then returned to a prediction he had made in *Desegregation and the Law*. "While the Supreme Court has not yet passed on the validity of miscegenation statutes," Ferguson's memorandum concluded, "it is clear that such state laws are unconstitutional."<sup>111</sup>

More significantly, the U.S. draft's equal protection framework left private discrimination virtually unscathed.<sup>112</sup> Private discrimination was rampant in essential areas of U.S. life, such as health care, housing, and employment, a fact that the U.S. racial experts were keenly aware of. In fact, Abram and Ferguson had become racial statesmen due to each man's willingness to confront well-entrenched forms of public and private discrimination.<sup>113</sup> Furthermore, the U.S. experts acknowledged that given the resounding demands for justice heard throughout the world, "one can conclude that the intended coverage of the Convention is inclusive of all areas of human affairs in which racial

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<sup>109</sup> Subcomm. 412 mtg., *supra* note 20, at 6.

<sup>110</sup> Guidance Paper, *supra* note 19, at 4.

<sup>111</sup> Comments by Dean Clyde Ferguson, Jr. (Morris Abram concurring) on Sub-Commission Draft Convention on the Elimination of All Forms of Racial Discrimination (Jan. 30, 1963) (on file with MARBL, Abram Papers, Folder 94, Box 9). The U.S. Supreme Court would not strike down state bans on interracial marriage for another three years. *See Loving v. Virginia*, 388 U.S. 1 (1967). *See also* Blaustein and Ferguson, *supra* note 71, at 22-23.

<sup>112</sup> Ferguson reiterated this point in an often overlooked reflection on the Convention's legislative history. He wrote, "[T]he convention is comprehensive as it applies to discrimination in public life," as the construction of the term "public life" reflects "the intent of the drafters of the convention to comprehend something like our conception of state action and to reserve some area of privacy..." *See* Clyde Ferguson, *International Convention on the Elimination of All Forms of Racial Discrimination*, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 41-43 (Richard Lillich ed., 1981).

<sup>113</sup> *See e.g.* Abram, *supra* note 34, at 153-54; UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS '63 (1963); United States Commission on Civil Rights, CIVIL RIGHTS U.S.A.: HOUSING IN WASHINGTON, D.C. (1962).

discrimination might be manifested” rather than simply state-sponsored discrimination.<sup>114</sup> Abram and Ferguson, however, were at the U.N. to promote U.S. foreign policy interests, not to expose the limitations of U.S. constitutional law or gift the Eastern bloc with new sources of credible fodder. While the U.S. draft was perhaps imperfect, the draft provided the world with a legal floor for human rights protections. If adopted, the treaty would guarantee other countries’ citizens no less than what the U.S. guaranteed its own citizens. Nevertheless, basing the Convention on the equal protection clause seemed woefully inadequate and even inappropriate considering the express mission of the race treaty. The state action requirement of the equal protection clause had often frustrated racial progress in the U.S., as it recast private discrimination as constitutionally permissible, politically acceptable, and morally defensible behavior. The U.S. draft threatened to export American problems.

“From a legal point of view,” Boris Ivanov announced to the Sub-Commission, the draft “proposed by Mr. Abram was unacceptable as a working text. It represented a backward step in relation to the Declaration [on the Elimination of All Forms of Racial Discrimination] adopted by the General Assembly.”<sup>115</sup> The Soviet’s pointed commentary highlighted the tensions between America’s rhetoric and the limited protections offered by the U.S. draft. Under the Declaration, he reminded the Sub-Commission members, “No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.”<sup>116</sup> The U.S. draft, according to the Soviet, “would leave the door open to discrimination and racism by giving the state the role of a mere observer.” The equal protection framework restricted the reach of the U.S. draft, and Ivanov knew it.

“The draft of which he was a co-sponsor, on the other hand, laid down that the state must ‘admit within its territory no acts or manifestations of racial discrimination of any kind.’” The former professor of political science lectured the Sub-Commission, his steely voice growing thick in judgment. “It was not enough for the state to refrain from all acts of discrimination; others must also be prevented from committing such acts,” Ivanov persisted. There were too many “passive” states that some Sub-Commission members were attempting to placate. The Declaration had won unanimous support at the General Assembly, the Soviet argued, precisely because it required states to take a bold stand against racism.

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<sup>114</sup> Ferguson, *supra* note 66, at 70.

<sup>115</sup> Subcomm 412 mtg., *supra* note 20, at 8.

<sup>116</sup> G.A. Res. 1904 (XVIII), *supra* note 35, art. 2.

“In that regard ... [Ivanov] pointed out that the draft submitted by Mr. Ketrzynski and himself did not constitute a departure from the Declaration on the Elimination of All Forms of Racial Discrimination, in which it was expressly said that racism must be ended; it was rather the logical sequel to that Declaration.” Ivanov’s conclusion was simple: replace “Mr. Abram’s draft of article II” with “article II as submitted by Mr. Ketrzynski and himself.”<sup>117</sup>

The Soviet’s impassioned remarks were the types of affronts that Abram had come to expect. Ivanov’s tone was not *per se* out of line, and his penetrating analysis of the primary text before the Sub-Commission was a completely valid exercise of his duties as a racial expert. What exasperated Abram was Ivanov’s empty self-righteousness, or what Abram perceived as such. “I was being constantly taunted by the Russians about the glaring inequities in my own country, particularly before the passage of the Civil Rights Act of 1964, which ended segregation in places of public accommodation in some of the southern states,” Abram remembered. “I felt very frustrated, because I knew that in any fair debate, our society, for all of its flaws, could stand inspection, but Soviet society could not.”<sup>118</sup> The Soviets’ human rights record was, without question, abysmal, and Abram spent much of time on the Sub-Commission proving the Soviets’ “pious denials” of institutionalized discrimination in the USSR wrong—without actually publicly identifying the USSR.<sup>119</sup> In 1964, Abram and Ivanov began a year-long battle over the Soviet’s commitment to ending all forms of discrimination after the Ukrainian Academy of Science published *Judaism Without Embellishment*. The book’s “lurid paperback cover resembled a reprint of Streicher’s *Der Sturmer*,” a Nazi newspaper of the early and mid-twentieth century whose violently anti-Semitic images reached subscribers across the globe. For Abram and other human rights watchers, the state-sponsored press’s willingness to print and deny that “the crudest imaginable caricatures of Jews polluted [the book’s] pages” epitomized the Soviet Union’s hollow calls for equality.<sup>120</sup> Moreover, days before the Sub-Commission’s session, a Ghanaian

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<sup>117</sup> Subcomm 412 mtg., *supra* note 20, at 8.

<sup>118</sup> Abram, *supra* note 34, at 152-53.

<sup>119</sup> See e.g. Moeshe Decter, *The Status of Jews in the Soviet Union*, 41 FOREIGN AFF. 420-430 (1963).

<sup>120</sup> One 1935 issue, for instance, featured replies from readers in Argentina, Australia, Brazil, Great Britain, Greece, Paraguay, and the United States. JULIUS STREICHER, NAZI EDITOR OF THE NOTORIOUS ANTI-SEMITIC NEWSPAPER DER STURMER. The controversy over *Judaism Without Embellishment* became such an international embarrassment for the Soviets that the Communist Party Ideological Commission took the rare step of condemning the book as a “serious mistake.” Soviet Premier Nikita Khrushchev eventually removed the anti-Semitic text from bookstands.

medical student studying in Moscow, Edmund Assare-Addo, was murdered for planning to marry a young Russian woman over the objections of her family. The USSR's small, African student population had long endured racial discrimination on trams, streets, and in places of public accommodation, but after the Soviet government denied that Assare-Addo's murder was racially motivated, African students stormed the Red Square. More than five hundred mourning African immigrants marched in protest of Soviet disregard for African life.<sup>121</sup> Marchers hoisted large placards in Russian and English that read, "Stop killing Africans! Away with your gangsterism," "Is this Birmingham or Moscow?" and "Death and Friendship"—a bitter twist on the communist slogan, "Peace and Friendship." The African students defied Soviet law to rally for "one of the largest demonstrations in Red Square since the Bolshevik Revolution of 1917."<sup>122</sup> Yet, given the Sub-Commission's rules, these events never bubbled to the surface of the Convention debates. The Soviets offered straight-faced denials about its human rights abuses and Ivanov feigned sincerity about ensuring total equality, Abram remembered, while "the United States in the 1960s took great abuse from quarters in which freedom and liberty were unknown."<sup>123</sup>

The session was reaching a feverish pitch. Arcot Krishnaswami, the Sub-Commission's racial expert from India, attempted to calm the situation by constructing, what he called, a "compromise" text. The former member of Parliament and lawyer from Madras had spent much of his life watching human rights battles between global superpowers. His father was one of the architects of the U.N. Charter.<sup>124</sup> Krishnaswami "proposed that article II, paragraph 1 of the draft submitted by Mr. Ivanov and Mr. Ketrzynski be inserted after article II, paragraph 2, of Mr. Abram's draft thus reconciling the two points of view." But Krishnaswami's suggestion was far from a compromise. The amended text would still require states to prohibit racial discrimination in public and private life.<sup>125</sup>

But before the Sub-Commission could warm to Krishnaswami's idea of a brokered deal, Peter Calvocoressi, the Sub-Commission's racial expert from the U.K., objected to the Indian proposal. Calvocoressi simply "did not think the two viewpoints were reconcilable. Under article II, paragraph 1, of the draft of Mr.

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WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE 67 (2001).

<sup>121</sup> Cyril Dunn, *Africa Explodes in Moscow*, WASH. POST, Dec. 29, 1963, at E4.

<sup>122</sup> David Miller, *African Outburst Hit Moscow*, BOS. GLOBE, Dec. 19, 1963 at 14; *Late News*, S. CHINA MORNING POST (Hong Kong, China), Dec. 21, 1963 at 28.

<sup>123</sup> Abram, *supra* note 34, at 150-51.

<sup>124</sup> Letter from Morris Abram to George Goodwin, *supra* note 105, at 2.

<sup>125</sup> Subcomm. 412 mtg., *supra* note 20, at 8.

Ivanov and Mr. Ketrzynski, all acts and manifestations of racial discrimination must be prohibited by the State ... a provision which since the meaning of the term was not defined—would danger freedom of thought, opinion, and expression.” Calvocoressi claimed that this “was the basic difference between the two schools of thought.”<sup>126</sup>

The British barrister’s retreat to a defense of free speech was predictable. At first blush, Calvocoressi’s comments seemed to be a principled move to safeguard rights recognized under Articles 19 and 20 of the Universal Declaration of Human Rights.<sup>127</sup> However, Calvocoressi’s free speech defenses were mere pretext. The members of the Sub-Commission had already agreed to table the debates over regulation of hate speech and organizations.<sup>128</sup> It was eminently possible, for example, to ban all forms of racial discrimination with a hate speech exception. The real issue for Calvocoressi was that Article II of the Soviet-Polish draft posed serious legislative problems for the United Kingdom’s delegation. There was no hiding that racism was endemic to British rule. In parts of the South Atlantic, Indian, and Pacific, the crumbling empire still clutched tightly to some its remaining colonial territories and abdicated legal responsibility for settlers crushing popular uprisings in indirectly ruled lands. In the North Atlantic, post-war immigrants to Britain found employment, education, and housing discrimination in abundance. London’s rapidly growing black communities were victims not only of racial riots but also police brutality, frame-ups, and constant surveillance. Shop and pub owners posted crudely made signs in their storefront windows. Their message was clear: “No Irish, No blacks, No dogs.”<sup>129</sup> And in 1963, as Dr. King crusaded in the streets of Birmingham, Alabama, a multiracial coalition of African, Asian, and Caribbean immigrants, who had followed King’s meteoric rise to global prominence, launched their own protests in Birmingham, England. The Birmingham Bus Boycott, styled after the Montgomery Bus Boycott, attracted worldwide sympathies to the dismay of Great Britain’s Foreign Office.<sup>130</sup>

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<sup>126</sup> *Id.* at 8-9.

<sup>127</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 19, 20 (Dec. 10, 1948).

<sup>128</sup> Subcomm. 412 mtg., *supra* note 20, at 6.

<sup>129</sup> See CAROLE BOYCE DAVIES, *LEFT OF KARL MARX* (2008); PEARSON NURSE, *MY JOURNEY THROUGH RACISM* (2011).

<sup>130</sup> MADGE DRESSER, *BLACK AND WHITE ON THE BUSES: THE 1963 COLOUR BAR DISPUTE IN BRISTOL* (1986). For early news coverage of the U.K. boycott, see *Bus Boycott By West Indians*, LONDON TIMES, May 3, 1963, at 11; Perhaps, equally interesting, the Bristol Bus Boycott officially ended on August 28, 1963, the same day as the March on Washington. *Bus Crew Colour Bar Ends*, LONDON TIMES, Aug. 29, 1963, at 6.

In a private memo on the Convention, the British Foreign Office confessed that the empire would be unable to immediately cease all manifestations of racial discrimination. It seemed impractical, foolhardy, and, in many ways, complete disregard to the British way of life. “Can a government insist that a music club admit members of a race which happens to like an entirely different kind of music? ...Can a government, other than a ruthless dictatorship, command an institution to enroll members or employ staff whose background and interests are unsuited to the aims of the institution?,” the Foreign Office memorandum asked rhetorically. “As for individuals, you can make laws to prevent them from injuring individuals of other races; you cannot eliminate their prejudices. You can endeavor to eliminate prejudices in the community as a whole, over a long term and with immense pains, by education.” The Foreign Office’s memorandum admitted, “Flagrant racial discrimination by employers, landlords, and so on can be prevented,” but resigned that “experience has shown that evasions cannot. ...[O]nly by patient education can he be led to make his choices on valid grounds, not on prejudice.” The British government’s approach to racial justice was equal parts defeatism, unwillingness, and bald racism. On the other hand, the empire’s bureaucrats applauded themselves for their recent management of Third World liberation. Britain’s record of “steady guidance of colonial peoples to independence is such a shining one,” the confidential note read.<sup>131</sup> Publicly, Peter Calvocoressi was much cooler. His tall, emotionless face betrayed no confidence. Furthermore, he could be sure that revealing Britain’s insecurities and embellishments would not endear the body of racial experts to his government’s positions.

The Sub-Commission’s expert from the Philippines, Judge José Inglés, interjected. The Judge was a brilliant and charming man beloved at the U.N. for his unrelenting stances against bias. He had attended Columbia University, and

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<sup>131</sup> Memorandum from Ms. Tyler to Mr. Pill (Jan. 23, 1964), Population and Discrimination: Sub-Commission on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331. Even U.K. officials outside of the Foreign Office frequently complained of how many legal and political difficulties the draft Convention posed for their government. *See e.g.* Memorandum of F. Harrison (Mar. 25, 1964), National Archives, Kew, United Kingdom, United Nations Declaration and Convention Concerning the Elimination of All Forms of Discrimination, LAB 13/1936 [hereinafter LAB 13/1936]; Memorandum of E.A. Ferguson (Apr. 7, 1964), National Archives, Kew, United Kingdom, LAB 13/1936; Memorandum of F. Harrison (May 6, 1964), National Archives, Kew, United Kingdom, LAB 13/1936; Memorandum of K.G. Sherriff (Jul. 2, 1964), National Archives, Kew, United Kingdom, LAB 13/1936; Memorandum of D. Bawden (Jul. 7, 1964), National Archives, Kew, United Kingdom, LAB 13/1936; Memorandum of E.A. Ferguson (Jul. 21, 1964), National Archives, Kew, United Kingdom, LAB 13/1936; Brief, ECOSOC Session.

there, he became familiar with the city's vibrant protest culture.<sup>132</sup> In his personal effects, he stored newspaper clippings of movement activism that defied State Department accounts of U.S. racism.<sup>133</sup> Inglés entered the debate, arguing "that article II of the draft submitted by Mr. Ivanov and Mr. Ketrzynski was preferable to article II, paragraphs 1 and 2, of Mr. Abram's draft." Ivanov's position, the Judge reasoned, "would place the state under the obligation of refraining from all acts of discrimination itself and forbidding such acts by others." The Sub-Commission already had its drafting guide. "[A]rticle 2, paragraph 2, of the Declaration," he reminded the group, targeted the actions of "States, institutions, groups, and individuals."<sup>134</sup>

The Sub-Commission's Chairman, Hernán Santa Cruz, agreed with the Judge's observations. The Chairman counseled the Sub-Commission's members "not lose sight in its debates of the fundamental ideas set out in ...the Declaration adopted by the General Assembly." As experts, their "task was to prepare a truly effective instrument, capable of achieving the purposes set out in the Declaration." Toward that end, Santa Cruz weighed in on the debates now growing long in the day. "Article II of Mr. Abram's draft seemed sufficiently explicit with regard to the need to prevent state parties to the Convention from practicing discrimination in any form," he editorialized. The U.S. draft "was, however, inadequate with respect to another obligation of the State, that of preventing private individuals and groups from practicing discrimination." Santa Cruz realized Abram's dilemma as the U.S. member. Although Abram was not formally a U.S. government representative, the legal questions before the Sub-Commission were "extremely complicated and could [leave] certain state parties to the Convention with many constitutional problems and problems of domestic legislation." Nonetheless, these problems should not be Abram's concerns or the concerns of any member of the Sub-Commission. The Chairman declared, "The Sub-Commission, which was a group of independent experts, should not be held back by such considerations. Its one concern being to adopt a formula obliging states to undertake to prohibit all acts of discrimination in their territory."<sup>135</sup>

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<sup>132</sup> Letter from Morris Abram to George Goodwin, *supra* note 105, at 1; EUROPA PUBLICATIONS LIMITED, THE FAR EAST AND AUSTRALASIA, 1981-82 1252 (1981).

<sup>133</sup> For more on Inglés's willingness to take public notice of facts outside of official government accounts, *see e.g.* José Inglés, Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, U.N. Doc. E/CN.4/Sub.2/220/Rev. 1 (1963).

<sup>134</sup> Subcomm. 412 mtg., *supra* note 20, at 9.

<sup>135</sup> *Id.* at 10.

Abram's allies rose to his defense despite Santa Cruz's admonishment. Ivanov and Ketrzynski were wresting control from Abram. While the 1964 session began with the Sub-Commission relying on the U.S. draft as the Convention's primary text, the Eastern bloc members gained traction by refusing to tolerate any form of racism. Voitto Saario, the Sub-Commission's Finnish expert, objected to the mounting criticisms of the U.S. draft. "Article II of [the U.S. proposal]," he claimed, mirrored "article 2 of the Declaration on the Elimination of All Forms of Discrimination," because both provisions "dealt with ...the obligation of States not to practice discrimination themselves."<sup>136</sup> Francesco Capotorti, the Sub-Commission's Special Rapporteur and Italian expert, "recalled for the benefit of Mr. Inglés" a convention was not a declaration under international law. A convention was legally binding and required a more precise formulation of obligations than a declaration. Capotorti's patience was growing thin due to the extended and, at times, unfocused series of arguments in the plenary session. "[T]he time had come for the Sub-Commission to define its stance on the question of the obligations to be imposed on States dealing with discrimination, and more particularly the question of the measures to be taken by the State against individuals who practiced discrimination." Capotorti, a well-regarded professor of international law from Naples, mapped two routes for the Sub-Commission's future discussions. "The Sub-Commission could on the one hand, desire to draw up an instrument which could be accepted by the greatest number of states, and hence the necessity to adopt as flexible a formulation as possible," the international law scholar opined. "[O]n the other hand, [there was] the need to achieve real progress, a step forward, and thus to arrive at a more rigid and precise formulation." Capotorti "was inclined to take an uncompromising stand forbidding States to commit any act tainted with discrimination. Where individuals were concerned, he would favor a more flexible approach." He suggested that the Sub-Commission "request states to prohibit any act of discrimination, while discarding the idea of 'manifestation,' which went too far."<sup>137</sup>

Boris Ivanov held the line. "[A]rticle II of Mr. Abram's text was not strong enough to deal effectively with racial discrimination," he insisted. "To be content with not encouraging discrimination was not enough; one must go further. That was what article II, paragraph 1 [of the Soviet-Polish draft] was about," his resolve ever apparent. "The State would be released from the role of mere observer assigned to it by [his draft], and it would be compelled to promise that it would adopt the necessary measures to deal with racial discrimination."<sup>138</sup>

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<sup>136</sup> *Id.* at 10-11.

<sup>137</sup> *Id.* at 11-12.

<sup>138</sup> *Id.* at 12-13.

Morris Abram finally spoke. He had been relatively quiet during the Sub-Commission's debates, attempting not to appear defensive or apologetic for the U.S. draft. He lived under a federal government that was taking great strides to end racial discrimination. Furthermore, many of the criticisms of his article II draft "were unwarranted if the document as a whole was taken into account." Abram was adamant that states should not intervene in the private lives of individuals. He was firmly convinced that "only the moral persuasion of the government, the influence of the norms set forth in the Declaration and the education of public opinion should be relied on in the attempt to abolish discrimination in that field."<sup>139</sup>

The Sub-Commission's debate had reached a stalemate. Francisco Cuevas Cancino, the expert from Mexico, was aggravated by the direction of the drafting session. The Sub-Commission had taken "Mr. Abram's text as a basis for its work," Cuevas Cancino sighed, but now the group had now based on other members' drafts. The day was already late, and the Sub-Commission had found a way to become preoccupied with a mere fraction of its agenda.<sup>140</sup>

This delay in progress had been one of the State Department's main concerns going into the 1964 session. The protracted debates over the Race Convention were reducing the time allotted to drafting the Declaration on Religious Intolerance. The Bureau of International Organizations surmised that this was part of the Eastern Bloc's plan for the Sub-Commission's 1964 session. "On the question of priorities, the drafting of the convention on racial discrimination should not be allowed to delay or crowd out completion of the declaration on religious intolerance," the Bureau's guidance paper to Abram and Ferguson had instructed. "Unless the draft Declaration against Religious Intolerance is discussed in the General Assembly in advance of, or at the same time as the second (convention) stage of its action on race discrimination, there is danger that problems of religious discrimination may be pushed aside as of less significance." The "drafts on both subjects should, if possible, be available for General Assembly consideration next fall, and the Sub-Commission should take steps to assure completion of at least the declaration on religion." The Bureau recommended that "[o]ne possibility of speeding up work may be through work parties of the whole on each subject." The Sub-Commission's working parties met outside of the Sub-Commission's formal sessions. Members could avoid the Sub-Commission's puritanical rules and hash out their real differences. These conversations were deeply ideological, often indecorous, and perhaps, most

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<sup>139</sup> *Id.* at 13.

<sup>140</sup> *Id.* at 13-14.

important, off the public record. Moreover, many of the Sub-Commission's racial experts took themselves and their U.N.-designated titles quite seriously. Constituting a working party, the Bureau noted, was an efficient strategy to make headway in the Sub-Commission's ambitious agenda, because working parties "avoid[ed] at least a part of the usual oratorical ... argumentation characteristic of plenary meetings." In a letter to Abram and Ferguson, the Bureau emphasized, "Advance consultation for this purpose should be undertaken with friendly delegations and experts on the Sub-Commission, and where possible through private conversations among the experts, to create understanding and counter possible opposition."<sup>141</sup>

The Chairman soon ended the impasse. The Sub-Commission had discussed Articles I, II, and IX together rather than discussing each on its merits. The remaining articles would be discussed in order. Abram had privately lobbied Santa Cruz, and the Chairman agreed to send Article I to a small working group of Sub-Commission members for redrafting. Nonetheless, the damage was done. Ivanov and Ketrzynski had commandeered the debates. Abram and Ferguson seemed stuck. The Soviet and Polish experts had executed their drafting coup by presenting the Eastern bloc's proposal after the Sub-Commission's session was well underway. It gave the U.S. members no time to study the Soviet-Polish draft or prepare well-considered rebuttals. The Eastern bloc kept Soviet anti-Semitism out of the spotlight while now taking the moral and legal high ground in the race debate.<sup>142</sup>

### *B. Beyond the Travaux Préparatoires*

The Sub-Commission's working group featured Abram, Ivanov, Ketrzynski, Calvocoressi, and Capotorti, the architects of the Article 1 and 2 drafts. As the working group prepared to meet off the record, Abram and Ferguson responded to the Eastern bloc's draft with a plan that allowed the U.S. to take an equally bold stance but not offend U.S. constitutional law. The U.S. experts developed a theory that a reasonable reading of Article I of the Soviet-Polish draft would allow a state party to the Convention to define racial discrimination as only race-based infringements on *public* life. As Ferguson later explained, this language—introduced by Boris Ivanov—prohibits "discrimination in 'political, economic, social, cultural or *any other field of public life*...'" Ferguson underscored, "The grammatical ambiguity of the emphasized clause is

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<sup>141</sup> Guidance Paper, *supra* note 20, at 3; Letter from Rachel Nason to Morris Abram (Dec. 20, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9).

<sup>142</sup> Morris Abram Re: Present Situation (Jan. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9). Subcomm. 412 mtg., *supra* note 20, at 14.

of critical import. It is not clear whether only fields of ‘public life’ are involved (eiusdem generis) or whether both public and private fields are covered respecting economic, social and cultural affairs, but beyond these enumerated fields *only* rights respecting public affairs are covered.” He reiterated, “The ambiguity is of critical import to the United States.”<sup>143</sup>

If the phrase “other field of public life” could be construed as only prohibiting public discrimination, then the draft Convention arguably conformed to the obligations already imposed by the U.S. Constitution. “[I]t was now apparent that the ‘state action’ concept is evolving into a concept for determining ‘public’ in American constitutional law,” Ferguson maintained. Thus, while odious, private discrimination did not violate the U.S. Constitution or the Convention. Furthermore, the provision in the Soviet-Polish draft that mandated non-discrimination in economic, social, and cultural rights would not cause the U.S. legal problems under the U.S. Constitution or the Convention. The U.S. Constitution did not guarantee economic, social, or cultural rights. State-sponsored discrimination could not exist in those areas.<sup>144</sup>

The public-private divide presented Peter Calvocoressi with a similar conceptual problem. The British Foreign Office characterized Article I as “troublesome.” In a confidential memorandum, a solicitor in the Foreign Office wrote, “The line between what is public and what is private might be extremely difficult to draw. For example, what is a Golf Club or a Political Party?” He contended, “Golf clubs etc. may exercise discretion on racial grounds. They are members’ clubs created by contract between the members; they are not public places in my view.” Racial discrimination in public accommodations posed the same troubles for the British as it did for the Americans. The British had not yet adopted the Race Relations Act of 1965,<sup>145</sup> and the civil rights bill then before the U.S. Congress was stalled. The proposed U.S. legislation still needed more than four dozen signatures.<sup>146</sup> The British turned to English and Commonwealth law to stake its position on the proposed Convention article. “Every person does have an equal right to access to any public place,” the Foreign Office acknowledged, “although in some cases the person responsible for that place may, at his

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<sup>143</sup> Present Situation, *supra* note 142, at 1; Comments by Dean Clyde Ferguson, Jr., *supra* note 111, at 2-3; Ferguson, *supra* note 66, at 69.

<sup>144</sup> Comments by Dean Clyde Ferguson, Jr., *supra* note 111, at 2-3; Ferguson, *supra* note 66, at 69.

<sup>145</sup> See ERIC BLEICH, RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960S (2003).

<sup>146</sup> NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA 92 (2005).

discretion, exclude him.”<sup>147</sup> Yet, this position was becoming unpopular around the world and could easily be construed as hostile to the spirit and social movements behind the race treaty.

The British and U.S. members on the Sub-Commission held their own meeting before the working group’s session to discuss their respective approaches to Article I. Calvocoressi was Abram’s closest ally on the Sub-Commission. The two had known each other since the Nuremberg trials, and they often exchanged warm letters discussing developments in the U.N. organ.<sup>148</sup> During the private meeting between Calvocoressi, Abram, and Ferguson, the U.S. members shared their reading of the draft Convention. The British diplomat was impressed by the Americans’ argument and so were officials back in London. “The expression ‘public life’ is extremely useful as part of this definition,” the Foreign Office declared. “We should maintain it.” The Foreign Office also recommended that the U.K. delegation to the U.N. take the American approach in the Convention’s future negotiations. “I think we should bear this in mind,” the Foreign Office advised, “and in any statements during negotiations try to insinuate the idea that public life is to be interpreted fairly narrowly.”<sup>149</sup>

Beneath the bluster, the U.S. and British members were quietly hatching their plan. Certainly, Calvocoressi’s demonstrated commitment to racial equality was far less than either Abram or Ferguson’s. Yet, their national interests converged. When Abram and Calvocoressi joined the working group on Article I, they carved out a compromise. The group agreed that there would be no ban on all “manifestations” of racial discrimination under Article I of the draft Convention, but Abram and Calvocoressi caved to Ivanov and Ketrzynski’s definition of racial discrimination. With the blocs now satisfied, the Chairman put Article I to vote. The newly drafted language declared, “In this Convention, the term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin in human rights and freedoms in political, economic, social, cultural or any other field of public life set forth inter alia in the Universal Declaration of Human Rights.” The working group’s amendment unanimously passed, and the Sub-Commission broke for the weekend.<sup>150</sup>

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<sup>147</sup> Draft Convention on Elimination of All Forms of Racial Discrimination (1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178331).

<sup>148</sup> Letter from Morris Abram to George Goodwin, *supra* note 105, at 1.

<sup>149</sup> ECOSOC (Jun. 30, 1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178331).

<sup>150</sup> See U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 414th mtg. at 6, U.N. Doc. E/CN.4/Sub.2/SR.414 (Jan. 15, 1964).

*C. Racial Experts Take the Public Offensive*

Early on Monday morning, eight Sub-Commission members spoke in succession to address the implications of the winding Article I debates. Mohammed Mudawi and Arcot Krishnaswami “reminded the Sub-Commission that the Commission on Human Rights had [also] requested it to prepare ... a preliminary draft of a declaration on the elimination of all forms of religious intolerance.” The State Department was right. The race debates were crowding out the religion debates. Mudawi and Krishnaswami “suggested that the Sub-Commission take up [the Declaration on Religious Intolerance]” at the same time that it continued its consideration of [the Convention on Race].” If the two were not jointly considered, the Sub-Commission “might not have the time to do justice to [the Declaration], which had a high priority.” Clyde Ferguson, sitting in the meeting as Morris Abram’s alternate, concurred with Mudawi and Krishnaswami. “Perhaps the work on [the Convention] could be continued in working groups while the plenary meetings for the next week would be devoted to the Declaration,” Ferguson said, repeating the instructions contained in the State Department’s guidance paper and letter. José Inglés shared his colleagues’ sentiments. “In his view, [the Declaration] had a priority equal to that of [the Convention].” Inglés “suggested that the Sub-Commission might extend its deliberations several days if necessary to complete its work on both items.” Peter Calvocoressi, Jean-Marcel Bouquin, Francesco Capotorti, and Mohammed Awad, the Sub-Commission’s expert from the United Arab Republic, joined the chorus. Capotorti urged members to collaborate privately over the next two days to complete their drafts of the Declaration. Awad endorsed Inglés’s recommendation “that the session should be extended if necessary.” The momentum on the Sub-Commission was shifting back to the Americans.<sup>151</sup>

Ivanov’s indignation was palpable. The Soviet countered, pushing the Sub-Commission to “conclude its work on [the Convention] before taking up [the Declaration].” The General Assembly had stated, in no uncertain terms, that the preparation of the Convention was its “absolute priority.” Ending racial discrimination “was the most important task before the Sub-Commission.”<sup>152</sup>

The Soviet’s efforts were in vain. The Chairman dismissed Ivanov’s plea, noting that “there appeared to be a general agreement that the Sub-Commission

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<sup>151</sup> See U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 415th mtg. at 3-6, U.N. Doc. E/CN.4/Sub.2/SR.415 (Jan. 15, 1964).

<sup>152</sup> *Id.*

should begin the discussion of [the Declaration on Religious Intolerance].” Debate of the proposed Declaration would commence, as José Inglés had proposed, after a two-day period of working party collaborations. Ivanov’s filibuster was nearing its end.<sup>153</sup>

The Sub-Commission returned to its discussion of the draft Convention. The experts endeavored to have much shorter discussions of the articles, and as the body had already agreed, they would discuss the articles in the order originally proposed by the U.S. Article II of the Abram-Ferguson draft read, “No State shall make any discrimination whatsoever against persons, groups of persons, or institutions on the grounds of race, color, or ethnic origin, or where applicable, on the basis of ‘nationality’ or national origin.” It was a provision that outlined the obligations of each state, struck a blow against Soviet discrimination, and directly responded to Ivanov’s concern that states had to take an active role in ending racial discrimination. Boris Ivanov responded with his own version of Article II. He introduced an amendment to Article II of the Soviet-Polish draft, which declared, “Each Contracting State undertakes to prohibit racial discrimination and to carry out by all possible measures a policy of eliminating it in all its forms, since racial discrimination is an infringement of the rights and an offense to the dignity of the human person and a denial of the rules of international law and of the principles and objectives set forth in the United Nations documents mentioned in the preamble of the present Convention.”<sup>154</sup> Peter Calvocoressi and Francesco Capotorti offered their own draft Article II, which stated, “Each Contracting State undertakes to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms. Each Contracting State shall rigorously abstain from any act or practice of racial discrimination and undertakes that all its legislative, executive, administrative and judicial organs, and also local authorities and public institutions of all kinds within its territory, shall act in conformity with this obligation.” It continued, “No Contracting State shall encourage, advocate, or support racial discrimination by any individual, group, or private organization.”<sup>155</sup>

The Sub-Commission eventually chose the Calvocoressi-Capotorti draft to serve as the basis for the Article II debates. The language in the draft

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<sup>153</sup> *Id.*

<sup>154</sup> Earlier in the Convention debates, the Sub-Commission adopted a lengthy preamble, which acknowledged the importance of the U.N. Charter, Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and other pertinent resolutions on racial discrimination.

<sup>155</sup> *Id.*

incorporated ideas from the U.S., Soviet, and Polish members and tracked the state obligations under Article 2 of the Declaration.<sup>156</sup> The Sub-Commission's experts, however, found the text of Calvocoressi and Capotorti's draft unwieldy. A flurry of amendments followed.

In the midst of these revisions, there remained one key task for the Western bloc. The Western bloc needed to establish a reading of the Convention that might conform to their respective constitutional obligations—without reopening the highly contentious and long-winded Article I debates or revealing the bloc's Article I strategy. Clyde Ferguson struck on behalf of the coalition. As amendments were being offered on Article II, Ferguson told the Sub-Commission that Article II needed improvements to “avoid the difficulties raised.” “[I]t was desirable to replace” portions of Article II, so that it was clear that the “expressions ‘local authorities’ and ‘public institutions’” meant that “each state party, including all of its organs of whatever nature shall abstain from racial discrimination.” He recognized that “public and private bodies ... were sometimes so difficult to define,” but it was essential that states end any discrimination in areas “which belonged to the state or were run by it.” Ferguson additionally recommended that Calvocoressi and Capotorti “delete the words ‘within its territory’” their draft. Again, it was imperative that the draft emphasized “that the responsibility of the state extended to all areas in which exercised authority.” “If the Convention were to be effective,” Ferguson stated, “it must be drafted in clear and precise language.” Jean-Marcel Bouquin agreed, “suggest[ing] that, in the interests of clarity and coherence, sub-paragraph (a) should be amended to read as follows: ‘Each State Party undertakes to engage in no act or practice of racial discrimination, and to insure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.’” Calvocoressi “accepted Mr. Bouquin’s amendment and remarked that it should give satisfaction to Mr. Ferguson, as [Bouquin’s amendment] did not contain the words ‘within its territory.’” After several additional amendments that improved the readability of the draft, the British and Italian members revised their article. Article II’s final language declared:

1. State Parties to the present Convention condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms, and to this end:

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<sup>156</sup> *Id.* Article 2(2) of the Declaration states, “No State shall encourage, advocate or lend its support ... to any discrimination based on race, colour or ethnic origin by any group, institution or individual.”

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination, and to insure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. Each State Party undertakes not to encourage, advocate or support racial discrimination by any person, group or organization.<sup>157</sup>

Abram and Ferguson's strategy worked brilliantly. Article II appeared to offer a vision of a more active state, precisely what the Eastern bloc had demanded. On the other hand, the Western bloc had established a legislative record where they could credibly argue that "public" referred to "state action."

#### IV. CIVIL RIGHTS LIBERALISM AND THE POLITICS OF HOPE

On January 30, 1964, Clyde Ferguson submitted a memorandum to the State Department on behalf of both U.S. experts, analyzing each article in the proposed treaty. "In general, the draft Convention is a considerable improvement over the Race Declaration. This improvement is reflected not only in the improved draftsmanship of articles which caused grave concern to the United States," the memorandum emphasized, "but also in more precise articulation of duties and obligations." Abram and Ferguson were also pleased to report that "there is now a substantial legislative history regarding the meaning and scope of several of the more critical terms used in the prohibitory sections."<sup>158</sup>

The memorandum explained that Article I of the draft Convention defined the term "racial discrimination."<sup>159</sup> Article I prohibited racial discrimination in "political, economic, social, cultural or any other field of public life," Ferguson wrote, but there were "obvious constitutional questions which would be raised by such language in a treaty to which the United States were a party." There was also the "policy problem of whether it is desirable to deal with racial discrimination in non-public areas of concern." The difficulties caused by the word "public" recurred in Article II of the draft Convention. "The major and substantial problem raised by this article is that each state undertakes to eliminate racial discrimination by 'public authorities and public institutions.'" The

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<sup>157</sup> See U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 416th mtg. at 3-5, U.N. Doc. E/CN.4/Sub.2/SR.416 (Jan. 20, 1964); U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess., 417th mtg. at 4, U.N. Doc. E/CN.4/Sub.2/SR.417 (Jan. 21, 1964).

<sup>158</sup> Comments by Dean Clyde Ferguson, Jr., *supra* note 111, at 1;

<sup>159</sup> *Id.*

memorandum continued, “The citizens of the United States sitting in the Sub-Commission raised the question of the meaning of ‘public’ as used in the article. The record reflects that ‘public,’ as used in this case, meant the state and all its organs, and state-supported or connected institutions.” Ferguson repeated the point, defending the U.S. members at the expense of the memorandum’s prose. “That meaning, as is clear from the legislative history, is clearly consistent with United States constitutional law.”<sup>160</sup>

The civil rights lawyers turned to the sit-in cases, a series of Warren Court decisions that redefined the state action doctrine, to justify their positions on Articles I and II of the draft Convention.<sup>161</sup> The sit-ins transformed U.S. constitutional politics. Activists fought over the future of U.S. constitutional law by making constitutional claims with their bodies in racially segregated spaces. As these protesters filled the air with songs that became the soundtrack to the civil rights movement, they were simultaneously raising profound legal questions—over the meaning of the equal protection clause, the potential reaches of the commerce power, and the scope of private property rights.<sup>162</sup>

Ferguson began his reading of “public life” by examining the Court’s first sit-in case, *Burton v. Wilmington Parking Authority*. In *Wilmington Parking Authority*, William “Dutch” Burton, a black city councilman in Wilmington, Delaware, staged a sit-in at Eagle Coffee Shoppe, a racially segregated restaurant. The restaurant was located in a parking garage owned and operated by the Wilmington Parking Authority, a Delaware state agency, and the restaurant’s operator was the Parking authority’s lessee. Burton’s sit-in was far from spontaneous. Burton and many of his constituents had longed to challenge a state statute permitting racial discrimination in public accommodations. Before staging the sit-in, Burton met with Louis Redding, a black graduate of Harvard Law who had risen to international heights as the chief lawyer in *Belton v. Gebhart* and *Bulah v. Gebhart*, the Delaware suits consolidated into *Brown v. Board of Education*. Redding urged Burton to challenge the state statute by attacking the “private” restaurant located in a publicly owned parking garage.<sup>163</sup> In *Wilmington Parking Authority*, the Warren Court held that “when a state leases public property in the manner ...shown ...here, the proscriptions of the Fourteenth

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<sup>160</sup> Ferguson, *supra* note 66, at 69-70.

<sup>161</sup> *Id.* at 70-71.

<sup>162</sup> See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

<sup>163</sup> See ANNETTE WOOLARD-PROVINE, *INTEGRATING DELAWARE: THE REDDINGS OF WILMINGTON* 130-31 (2003).

Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.” The Convention’s “definition of racial discrimination [was] consistent with the United States’ legal developments,” Ferguson asserted, because he had “clearly limited the scope of the word ‘public’ to state action and state-supported institutions along the lines of the Supreme Court decision in the *Wilmington Parking Authority* case.”<sup>164</sup>

Ferguson then analyzed sit-in cases in Richmond, Virginia, Savannah, Georgia, and Memphis, Tennessee to buttress the experts’ argument that Article II, “as it now stands, is within the constitutional authority of the United States.” “[T]he Supreme Court in three 1963 decisions again reaffirmed that no municipally owned and operated facilities may be segregated and no unreasonable delay will be allowed in effectuating their desegregation,” Ferguson explained.<sup>165</sup> Each of the 1963 decisions extended the equal protection clause. In the Richmond case, Ford Johnson, an honors student at the city’s historically black college, staged a sit-in in a segregated courtroom. Johnson, a leader in the movement sweeping campuses across the country, had already challenged segregation outside of courtrooms. He felt compelled to confront segregation inside of courtrooms too.<sup>166</sup> The Warren Court overturned the student’s conviction in short order, holding that “‘it is no longer open to question that a state may not constitutionally require segregation of public facilities.’” Accordingly, Article II of the Sub-Commission’s draft, if ratified, Ferguson observed, would not impose any new obligations on the U.S. government.<sup>167</sup>

*Wright v. Georgia* similarly supported Ferguson and Abram’s argument. In Savannah, six young black men were arrested for playing in Daffin Park, a gorgeous, 50-acre city park surrounded by homes with colonnaded front porches and racially restrictive covenants. The “Savannah Six,” as they were known in civil rights circles, were arrested and convicted of breaching the peace when they refused police instructions to leave the park. The Court eventually overturned their convictions. Article II’s prohibition on state-sponsored discrimination accorded with *Wright*, Ferguson argued, because “in *Wright* ...the Court held a

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<sup>164</sup> Comments by Dean Clyde Ferguson, Jr., *supra* note 111, at 2-3 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

<sup>165</sup> *Id.* at 3.

<sup>166</sup> See, e.g., *Court Voids Race Bar on Leasehold*, WASH. POST, Apr. 18, 1961 at A1; *Court Cites Use of Government Space*, CHI. DEFENDER, Apr. 28, 1961 at 15; Anthony Lewis, *Court on ‘Private Bias,’* N.Y. TIMES, Apr. 23, 1961 at 18.

<sup>167</sup> Comments by Dean Clyde Ferguson, Jr., *supra* note 11, at 3 (citing *Johnson v. Virginia*, 373 U.S. 61 (1963)).

municipality cannot arrest and prosecute Negroes for peaceably seeking the use of city-owned and operated recreational facilities.”<sup>168</sup>

And in Memphis, black college students teamed with local leaders, like Maxine Smith, Benjamin Hooks, and Billy Kyles—individuals who would later play starring roles in the Poor People’s Campaign—to launch their own set of sit-in strikes. The city agreed to desegregate municipal facilities yet proceeded slowly and gradually, citing the Court’s opinion in *Brown II*. However, in *Watson v. Memphis*, the Court declared that Memphis must promptly desegregate all municipal facilities. “The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise,” the Court held.<sup>169</sup> Ferguson’s use of the Memphis movement in U.S. diplomacy vindicated the cries for “freedom now” in the Blues City. In the process, the U.S. expert’s reading of the sit-in cases offered the Warren Court newfound significance in the Cold War and gave the U.S. government good reason to ratify the race treaty.

Ferguson’s memorandum to the State Department offered a final legal argument. It would allow the U.S. to assert even greater leadership in the Convention debates. Although Article II of the draft Convention only targeted public discrimination, Congress had the authority to enact legislation that would “exceed the duty which would be undertaken under Article II.” Ferguson asserted, “Under the commerce clause of the Constitution, public and private discrimination could be reached as long as the subject of the instrumentality of discrimination affected interstate commerce.”<sup>170</sup> This was the same legal argument proponents of Title II of the Civil Rights Act had endorsed. Secretary of State Dean Rusk, for example, had testified before the Senate Commerce Committee on behalf of Title II. Rusk declared that U.S. prestige abroad suffered due to the “treatment of nonwhite diplomats and visitors to the United States” in the nation’s public accommodations.<sup>171</sup> Abram and Ferguson reasoned that if civil rights law provided U.S. citizens with more legal protection than the Convention offered others around the world, then the U.S. could point to its constitutional revolution and remind foreign critics of how exceptional America really was.

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<sup>168</sup> *Id.* at 3 (citing *Wright v. Georgia*, 373 U.S. 284 (1963)).

<sup>169</sup> *Id.*; Ferguson, *supra* note 66, at 71 (citing *Watson v. City of Memphis*, 373 U.S. 526 (1963)).

<sup>170</sup> U.S. Const. art. 1, 8, cl. 3.

<sup>171</sup> *Civil Rights: Public Accommodations, Hearings on S. 1732 Before the S. Committee on Commerce*, 88th Cong. 1 (1963) (statement of Hon. Dean Rusk, Secretary of State).

The State Department congratulated Abram and Ferguson for effectively advancing U.S. interests during the Convention debates. They had faced an uphill battle given the nation's racial turmoil in 1963, but "Morris Abram with Clyde Ferguson of Howard University as his alternate achieved remarkable success on all issues," a Bureau of International Organizations memorandum beamed.<sup>172</sup> Morris Abram traveled back to Washington following the Sub-Commission's historic session to meet with Assistant Secretary of State Harlan Cleveland about the "critical issues" in the draft Convention. The first two issues on their agenda were the "definitions [of] racial discrimination—Article I" and the meaning of "public—Article I and Article II (a)."<sup>173</sup> By all accounts, the meeting went exceedingly well. In fact, Abram and Ferguson's strategy in the Sub-Commission became the blueprint for U.S. delegates who continued the Convention negotiations in the Commission on Human Rights, Third Committee, and General Assembly. In the guidance papers issued to U.S. representatives at each level of the treaty negotiations, State Department officials repeated that "the United States is prepared to support the Convention as drafted by the Sub-Commission, in light of the legislative history established there particularly on the meaning of discrimination—as related to public life." The proposed Convention "will enable participating states to combat racial discrimination in its many and varied forms in all fields of public life. This definition applies throughout the Convention to each of the various articles. It distinguishes clearly between activities in public life and those of a purely private nature." The State Department's guidance papers thickened with mockery. "This [provision] was proposed in the Sub-Commission by the Soviet member." The memoranda directed U.S. representatives who would continue to negotiate the treaty that they "should avoid focusing attention on this important phrase, but if any substantial move develops to eliminate it, the Delegation should strongly resist such revision." The guidance papers continued, "Should this limitation be removed, the paragraph would not be acceptable since it would require governmental action in areas of private conduct beyond the reach of federal authority."<sup>174</sup>

Although U.S. constitutional law and the racial experts' guidance papers might not have gone as far some in the movement might have wanted in January 1964, the experts felt at ease with their positions, because the definition of public

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<sup>172</sup> Memorandum from Joseph Sisco to William Stibravy (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 9).

<sup>173</sup> Letter from Dean Rusk to Morris Abram (Mar. 25, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).

<sup>174</sup> Position Paper, Commission on Human Rights (Mar. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); U.S. Positions on Articles (May 12, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); Agenda for Cleveland-Abram Consultation (Feb. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).

discrimination was rapidly changing in their favor. The Supreme Court, in particular, was finding new ways to reach and end forms of racial segregation in areas once considered private. Racial progress was often toilsome and always messy, yet the gap between what the U.S. practiced and what it preached was steadily closing. Abram and Ferguson had not only witnessed these developments; they had been integral parts of that change. Never in their lifetimes—and perhaps in the nation’s history—had so many Americans, black and white, been so serious about forcing their country to live up to its promises. The future was filled with hope from the experts’ perspectives and hope well-justified.

The U.S. experts, like many racial liberals during the mid-twentieth century, read racial progress teleologically. Abram, the distinguished Supreme Court advocate, was certain that the Warren Court would make racial discrimination “a political dinosaur.”<sup>175</sup> Ferguson, more sober in expression but just as optimistic in outlook, believed that it was “probable that the Supreme Court will go even further in extending the application of the present meaning of state action.” Scholars, practitioners, and everyday people were forcing the U.S. to reconsider the public-private divide. This constitutional question was at the core of America’s racial crisis. In 1964, the Warren Court’s civil rights jurisprudence appeared to project well for many movement participants. Ferguson theorized several directions the Court might take to expand the state action concept. The Court, for example, could extend *Shelley v. Kraemer* to establish the principle that “[a]ny slight participation by any state instrumentality in a discriminatory scheme—no matter how limited that ‘participation’—is unconstitutional state action.” Here, “[r]acial classifications might be outlawed in the operation of a private school on the theory that its educational standards are prescribed by the state; racial classifications might be struck down in the employment policies of a private corporation on the theory that the existence of a corporation depended upon a state charter.” The Court could extend the 14<sup>th</sup> amendment in the same way that it had done with the 15<sup>th</sup> Amendment in *Smith v. Allwright*—that any “statutory scheme so pervasive as to substantially limit the area of operation of a private enterprise results in such enterprise becoming subject to the obligations of the state.” The Court might tackle some forms of private racial discrimination by regulating ostensibly private entities “clothed with a public interest.” Ferguson noted that in *Guillory v. Administrators of Tulane University*, Judge J. Skelly Wright, reviled as “Judas Wright” by New Orleans blue bloods and blue collars alike, had relied on this logic to desegregate the

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<sup>175</sup> Abram, *supra* note 34, at 104.

Uptown campus two years earlier.<sup>176</sup> And if Congress actually passed the pending civil rights bill, the Court could easily uphold the legislation using the interstate commerce clause.<sup>177</sup> The Justices' progressive rulings had "forecast the trend of future decisions," Ferguson boasted, a view that captured the era's liberal ethos.<sup>178</sup>

The State Department's civil rights as human rights strategy offered racial liberals a way to dignify a movement typically cast as "irresponsible." Black protesters, like the "Savannah Six," had been denounced by segregationists for shattering the image of the 230-year-old seaport city lined with quaint cobblestone streets and lush squares of moss-laden oaks. Now a century after General Sherman's March to the Sea, the State Department had used the second siege of Savannah to help chart a path for others around the world to follow.<sup>179</sup> Placing the Savannah protests within a larger narrative on American progress rendered the demonstrations as more constructive, more familiar, and more American. Similarly, the State Department's strategy lent greater legitimacy to the tireless efforts of civil rights lawyers. The U.S. experts and their colleagues—individuals like Constance Baker Motley, Derrick Bell, and Louis Redding—had risked life and reputation for representing allegedly "extremist" clients and causes.<sup>180</sup> Yet, when the principals in a legal relationship became more "respectable" so did the agents. The vibrancy of the civil rights movement was not a sign that American values were flawed. It instead symbolized citizens' commitment to perfecting the American idea.

The U.S. members felt genuine pride for their personal accomplishments and for the nation's ongoing march to freedom. "I was keenly aware that I was representing the only great power that stands for human rights," Morris Abram remembered of his time on the Sub-Commission.<sup>181</sup> Clyde Ferguson considered his contribution to the Convention as one of his signal achievements. In the spring of 1965, Ferguson organized a Howard Law symposium on the Convention, and the dean told the day's audience that Americans' conception of

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<sup>176</sup> See Clarence Clyde Ferguson, Jr., *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 FED. B.J. 102, 106-109 (1964).

<sup>177</sup> *Id.* at 115.

<sup>178</sup> *Id.* at 106.

<sup>179</sup> For a full account of the siege, see, e.g., Homer Bigart, *Savannah is Tranquil*, N.Y. TIMES, July 19, 1964, at 1.

<sup>180</sup> See, e.g., CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 184-85 (1999) (describing Motley and Bell's legal advocacy for the NAACP); see also Woolard-Provine, *supra* note 163, at 130-31.

<sup>181</sup> Abram, *supra* note 34, at 150-151.

rights was broader than at “any period within the last 100 years.” This moment, for Ferguson, was indeed the second Reconstruction and the Third American Revolution. “[W]e are in the midst of a very definite historical development in the United States which demonstrates that our traditional conception of civil rights has been perceptively broadened. This broadening over the last 5 years has moved at a very, very rapid pace.” Dean Ferguson, proud of Howard’s central role in creating “the very revolution that we have now,” concluded, “I would say that at the present time, what we generally understand to come within the compass of human rights as used in the international dialogue is roughly the same as civil rights as we use the term here in the United States.”<sup>182</sup>

But a racial paradox remained. Two pioneering civil rights attorneys advanced a reading of the Convention that circumscribed the treaty’s definition of racial discrimination. Abram and Ferguson had been willing to wager on U.S. racial progress over time and envisioned that the nation that would eventually eviscerate both public and private discrimination. They expected that the world would then follow America’s lead. Yet, as history demonstrated then and continues to demonstrate today, racial progress—domestically or internationally—is never inevitable. Unfortunately, the U.S.’s racial diplomacy recreated the state action problem so many people of color had hoped to overthrow.

#### CONCLUSION

In 2014, in the wake of the U.S. mortgage crisis, a broad coalition of U.S. non-governmental organizations submitted shadow reports to the U.N. Committee on the Elimination on Racial Discrimination, the Convention’s monitoring body. The human rights advocates charged that the U.S. federal government had violated the Convention by failing to adequately protect African-Americans and Latinos from the housing meltdown. Despite the Fair Housing Act, many mortgage bankers trapped African-Americans and Latinos under subprime loans even when their credit and incomes warranted standard prime loans. The shadow briefs maintained that U.S. deregulation of the mortgage industry, continued residential segregation, and ineffective enforcement of existing fair housing laws significantly contributed to minority homeowners’ distress. The disparate racial impact of the mortgage crisis was staggering. One study in the Northeast showed that the foreclosure rate per housing unit was five times higher in poor minority

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<sup>182</sup> Ferguson, *supra* note 21, at 456-457.

neighborhoods than in poor predominantly white neighborhoods.<sup>183</sup> Home equity is the largest source of wealth for U.S. families, and the shadow reports declared that the devastating losses in wealth by race would exacerbate the persistent and massive U.S. wealth inequalities. The shadow briefs also emphasized the collateral consequences of the mortgage crisis on communities of color: depressed property values, higher insurance rates for homeowners, increased eviction of renters, more homelessness, greater housing segregation, and reduced local tax revenues for schools and public works.<sup>184</sup>

The U.S. State Department acknowledged that the mortgage crisis had indeed victimized black and Latino communities but claimed that the U.S. government had no treaty obligation to end or remedy all private housing discrimination. In the U.S.'s periodic report to the Committee, the State Department argued that the Convention's "reference in Article I to the fields of 'public life' reflects a distinction between spheres of public conduct that are customarily subject to government regulation, and spheres of private conduct that may not be."<sup>185</sup> While the U.S. government condemned "the unjustified disproportionate effect of the foreclosure crisis on communities of color," it maintained that all forms of private housing discrimination, including many of the factors leading to the crisis, were not actionable. The State Department added that the U.S. government relied on this narrow reading of the treaty when it ratified the Convention and entered a formal reservation to this end.<sup>186</sup> Moreover,

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<sup>183</sup> See National Law Center on Homelessness and Poverty, *Racial Discrimination in Housing and Homelessness in the United States 2* (July 3, 2014),

[http://www.ushrnetwork.org/sites/ushrnetwork.org/files/nlchp\\_2014.](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/nlchp_2014.7.3_cerd_housing_report_final.pdf)

[7.3\\_cerd\\_housing\\_report\\_final.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/nlchp_2014.7.3_cerd_housing_report_final.pdf).

<sup>184</sup> *Id.* See also National Law Center on Homelessness and Poverty, *Racial Discrimination in Housing and Homelessness in the United States* (July 3, 2014),

[http://www.ushrnetwork.org/sites/ushrnetwork.org/files/nlchp\\_2014.](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/nlchp_2014.7.3_cerd_housing_report_final.pdf)

[7.3\\_cerd\\_housing\\_report\\_final.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/housing_segregation_shadow_report_prrac-nfha_final.pdf); Poverty and Race Research Action Council and Fair Housing Alliance, *Discrimination and Segregation in Housing*, (July 2014),

[http://www.ushrnetwork.org/sites/ushrnetwork.](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/housing_segregation_shadow_report_prrac-nfha_final.pdf)

[org/files/housing\\_segregation\\_shadow\\_report\\_prrac-nfha\\_final.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/housing_segregation_shadow_report_prrac-nfha_final.pdf); National Association for the Advancement of Colored People, *Shadow Report to the Committee on Racial Discrimination* (July 2014), [http://tbinternet.ohchr.org/Treaties/](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17809_E.pdf)

[CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17809\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17809_E.pdf). Here, I use the term "Latino" rather than "Latinx" to accurately reflect the terms used by the U.S. officials and the drafters of the shadow reports.

<sup>185</sup> Government of the United States of America, *Periodic Report to the United Nation Committee on the Elimination of Racial Discrimination 9* (June 12, 2013),

[http://www.ushrnetwork.org/sites/ushrnetwork.org/files/](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic_icerd_report_of_the_usg_2013.pdf)

[periodic\\_icerd\\_report\\_of\\_the\\_usg\\_2013.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic_icerd_report_of_the_usg_2013.pdf).

<sup>186</sup> *Id.* at 9, 14.

the State Department claimed that the U.S. government's existing efforts had *exceeded* its duty under the Convention. It highlighted the Justice Department's settlement with Countrywide Financial Corporation and discussed the existing government programs and laws covering housing discrimination.<sup>187</sup> Nonetheless, the State Department insisted that given the Convention's reference to "public life" and the U.S. reservation, the U.S. had no treaty obligation to "prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under U.S. law."<sup>188</sup>

A half century after the Convention debates, U.S. officials were again relying on Abram and Ferguson's diplomacy to avoid racial accountability at the U.N. The U.S. members' ability to create an ambiguous definition of racial discrimination provided the State Department with language to defend private bias. Surely, the authors of the Convention shadow reports never imagined that an attorney for Martin Luther King, Jr. and the former Dean of Howard Law would have given the State Department the legal arguments and legislative record to oppose modern calls for racial justice. And surely, Abram and Ferguson would have never imagined that their diplomacy would be used to defeat calls for racial justice a full fifty years later.

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<sup>187</sup> *Id.* at 25-27.

<sup>188</sup> *Id.* at 9.