

ESSAY

INTERNATIONAL HUMAN RIGHTS LAW AND BLACK LIVES MATTER: WHY WE SHOULD VIEW LIBERATION THROUGH THE LENS OF THE RIGHT TO LIFE

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Black Lives Matter. Black Lives Matter is a claim that the humanity of Black people, people of sub-Saharan African descent, should be valued and respected. The phrase, “Black Lives Matter,” was coined by Patrisse Cullors in 2013 after the murder of 17-year-old Trayvon Martin by a white vigilante.¹ Together with friends and allies, Opal Tometi and Alicia Garza, Cullors later co-founded the Black Lives Matter Global Network which now has officially recognized branches in the US, the UK, and Canada.²

In fact, the refrain “Black Lives Matter” was heard globally during protests in 2020, which primarily erupted due to the video-taped murder of a man named George Floyd. In the video, which went viral online, many saw Floyd screaming out “I can’t breathe” whilst a police officer knelt on his neck for over nine minutes.³ Protests broke out all over the world, from the US to the UK, which is unsurprising as Black Lives Matter is an inherently global

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1. Patrisse Cullors, *6 Years Later and Black Activists Are Still Fighting*, BLACK LIVES MATTER, <https://blacklivesmatter.com/six-years-strong/> (last visited Dec. 31, 2020).

2. BLACK LIVES MATTER, *Herstory*, <https://blacklivesmatter.com/herstory/> (last visited Dec. 31, 2020).

3. Eric Levenson, *Former officer knelt on George Floyd for 9 minutes and 29 seconds – not the infamous 8:46*, CNN (Mar. 30, 2021), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [<https://perma.cc/SY3N-M2VR>].

struggle.⁴ As Black Lives Matter co-founder Opal Tometi has recognized, the Black Lives Matter movement is a fight against anti-Black racism “as it occurs not only in the US, but around the world.”⁵

In this way, Black Lives Matter reflects the internationalism that has marked many Black human rights movements of the past. For example, when Dr Martin Luther King Jr. witnessed the 1957 Ghanaian independence celebrations, he connected international struggles for de-colonization with African-American civil rights struggles back home:

That night when I saw that old flag coming down and the new flag coming up, I saw something else . . . it was an event with eternal meaning, for it symbolizes something. That thing symbolized to me that an old order is passing away and a new order is coming into being. An old order of colonialism, of segregation, of discrimination is passing away now, and a new order of justice and freedom and goodwill is being born.⁶

Today, Tometi reminds us that Black Lives Matter is not only about linking the international with the national, but is also about ensuring that Black people globally have access to their “full civil, social, political, legal, economic and cultural rights as enshrined in the United Nations Universal Declaration of Human Rights.”⁷ However, despite the global orientation of Black Lives Matter,

4. See *Australia protests: thousands take part in Black Lives Matter and pro-refugee events amid Covid-19 warnings*, *GUARDIAN* (June 13, 2020), <https://www.theguardian.com/world/2020/jun/13/australia-protests-thousands-take-part-in-black-lives-matter-and-pro-refugee-events-amid-health-warnings> [<https://perma.cc/EPL2-HB59>]; Oluwaseun Matiluko, *What Does Black British Activism Look Like in 2020?*, *GAL-DEM* (June 6, 2020), <https://gal-dem.com/what-does-black-british-activism-look-like-in-2020/> [<https://perma.cc/E4EG-GKT3>] (last visited Feb. 15, 2021).

5. Natalie Morris, *Black Lives Matter co-founder: ‘We can’t wait for you - our allies must get on board quickly’*, *METRO* (Dec. 31, 2020), <https://metro.co.uk/2020/12/31/black-lives-matter-anti-racism-allies-must-get-on-board-quickly-13823295/> [<https://perma.cc/H5TH-NQ4W>] (last visited Dec. 31, 2020) (quoting Opal Tometi, co-founder of Black Lives Matter).

6. Cary Fraser, *Reframing Freedom and Citizenship in the Black Atlantic: MLK Jr., Ghana’s Independence, and the Shifting Terrain of History in the Atlantic World*, in *AFRICA, EMPIRE AND GLOBALIZATION* 509, 515-16 (Toyin Falola & Emily Brownell eds., 2011).

7. Opal Tometi & Gerald Lenoir, *Black Lives Matter Is Not a Civil Rights Movement*, *TIME* (Dec. 10, 2015), <https://time.com/4144655/international-human-rights-day-black-lives-matter/> [<https://perma.cc/9USN-B37Y>].

and Tometi's use of the language of international human rights law, there is a dearth of legal scholarship that has assessed how international human rights law could help ensure that Black lives do matter.

But if Black Lives Matter is calling us to ensure that the lives of Black people are respected, then it would be helpful to understand how Black people could guarantee their right to life under international human rights law. Therefore, this Essay argues that an understanding of the right to life, under international human rights law, could provide a constructive means of securing respect for Black life.

Of the various formulations of the right to life found in international human rights law, the Article 6 Right to Life found in the International Covenant on Civil and Political Rights ("ICCPR") seems to lend the most support to the Black Lives Matter movement.⁸ This is because it is one of the broadest rights to life found within international human rights law.

Article 6 of the ICCPR begins by affirming that 'every human being has the inherent right to life'.⁹ While Article 6 then goes on to discuss this with respect to the deaths of individuals at the hands of the state,¹⁰ the Human Rights Committee have explained that the right to life is "a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."¹¹

Thus, as Australian human rights scholar Sarah Joseph notes, Article 6 paragraph 1 could indicate "two different obligations."¹² It could target both "direct threats to life" and the removal of "obstacles to the enjoyment of a right to life with dignity."¹³ Indeed, elaborating further in its general comment, the Human

8. International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

9. ICCPR, *supra* note 8, art. 6, ¶ 1.

10. ICCPR, *supra* note 8, art. 6, ¶¶ 2-6.

11. Human Rights Comm., *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶ 3, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

12. Sarah Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, 19 HUM. RTS. L. REV. 347, 358 (2019).

13. *Id.*

Rights Committee indicated that a life with dignity may include protecting people from: violence, land-seizure, environmental degradation, life-threatening disease, hunger, malnutrition, poverty, and homelessness.¹⁴ Although Joseph argues that a “preferable interpretation” of Article 6 paragraph 1 might be that it “addresses those circumstances that plausibly threaten one’s life and simultaneously undermine dignity,” she also concedes that a right to life with dignity is a concept that could undergo “future development.”¹⁵ At any rate, recent Human Rights Committee jurisprudence confirms that a right to enjoy a life with dignity can be interpreted separately from a right to be protected from direct threats to life.¹⁶ Thus, this Author submits that, due to the flexible nature of conceptions of dignity, Article 6 paragraph 1 appears to have broad potential to protect Black life. After all, as many academics have noted, the concept of dignity is an amorphous and contested one, one which is “culturally dependent and eminently malleable.”¹⁷ Due to this malleability, it can be interpreted in a way that promotes, to quote scholar Christopher Bracey, the “self-worth and social value of socially disfavored groups.”¹⁸

In this way, the Article 6 paragraph 1 right to life could be a helpful right for those within the Black Lives Matter movement. Indeed, it seems more helpful than other conceptualizations of the right to life under international human rights law, such as that found in the European Convention on Human Rights (ECHR), for example.

Specifically, Article 2 paragraph 1 of the ECHR tells us that “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which

14. Human Rights Comm., *supra* note 11, ¶ 26.

15. Joseph, *supra* note 12, at 358-59.

16. *See* Joseph, *supra* note 12; *see, e.g.*, Human Rights Comm., *Teitiota v New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019).

17. *See, e.g.*, Conor O’Mahony, *There is No Such Thing as a Right to Dignity*, 10 INT’L J. CONST. L. 551, 557 (2012); *see* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 679 (2008); David Feldman, *Human Dignity as a Legal Value: Part I*, PUB. L. 682, 698 (Sweet & Maxwell Ltd. and Contributors, 1999).

18. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 720 (2005).

this penalty is provided by law.”¹⁹ Thus, the right to life within the ECHR is almost exclusively focused on preventing death.²⁰ This is important with respect to Black Lives Matter because it condemns unlawful state violence, one of the main issues that Black Lives Matter protesters have been organizing around.²¹ However, Black Lives Matter is not just concerned with deaths in custody or police brutality. In order to meet wider concerns about state racism, a more inclusive right to life is necessary.

Moreover, recent case law from the European Court of Human Rights indicates a reticence to read racism as something which has an impact on a person’s substantive Article 2 right to life. For example, in the case of *Nachova v. Bulgaria*, the applicants alleged that the right to life of two Roma men was breached after their racially motivated killing at the hands of the police.²² Despite the court acknowledging that there was ample evidence of widespread anti-Roma sentiment within Bulgaria, anti-Roma discrimination within the Bulgarian police force, as well as a credible allegation that the police officer who had shot the men had cried out “you damn Gypsies,” immediately after the shooting, the court found “insufficient basis for concluding that the . . . State” was liable “for a racist killing.”²³

Explaining their reasoning for not finding a substantive violation of anti-discrimination rights in conjunction with Article 2, the court found that in order to make a conclusive determination as to whether racism was a factor, the burden of proof would have to be shifted onto the State which would then need to prove that the police officer in question had not acted with racist intent.²⁴ The court concluded that it was not able to determine that a racist killing had taken place because the evidence was not sufficient to shift the burden onto Bulgaria, and

19. Y.B. Eur. Conv. On H.R., art. 2 ¶ 1.

20. EUR. CT. OF HUM. RTS., *Guide on Article 2 of the European Convention on Human Rights: Right to Life* 6, 8-30 (2020), https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf [<https://perma.cc/8FN7-NJRP>].

21. BLACK LIVES MATTER, *About*, <https://blacklivesmatter.com/about/>; BLACK LIVES MATTER, *2020 Impact Report*, <https://blacklivesmatter.com/wp-content/uploads/2021/02/blm-2020-impact-report.pdf>.

22. *Nachova and Others v. Bulgaria*, 2005-VII Eur. Ct. H.R. 1, ¶ 163 (2005).

23. *Id.* at 22-23.

24. *See id.* at 33.

that disproving racist intent would be too evidentiarily difficult for Bulgaria if the burden were to be shifted.²⁵

This finding is problematic for several reasons. First, the court indicated in its reasoning that having a relationship with someone of a particular racial or ethnic background would mean that one could not be racist to people of that same background. In paragraph 152 of the judgment, the court states “[I]t is not possible to speculate on whether or not [the deceased’s] Roma origin had any bearing on the officers’ perception of them . . . Furthermore, there is evidence that some of the officers knew one or both of the victims personally.”²⁶ This reasoning is very similar to what sociologists describe as the harmful “some of my best friends are Black” phenomenon that occurs in Western states, where non-Black people argue that, because they have relationships with Black people, they could not possibly be racist toward other Black people.²⁷ But, as Mary Jackman and Marie Crane explain, while “intergroup friendship increases . . . bonds of affection . . . it does not undercut the discrimination that defines the unequal relationship between the two groups”, the majority and minority group.²⁸

Second, the court suggests that in order to prove that racism has happened, one needs to prove that the enactor of the racism acted with racist intent. The court argued this despite acknowledging that in many countries “proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent.”²⁹ Indeed, the idea that one needs to prove racist intent in order to prove racism has been widely discredited by many in the fight against anti-Black racism, including famed civil rights activists Kwame Ture and Charles Hamilton.³⁰ Lamenting the state of racism in the United States, Ture and

25. *See id.*

26. *Id.* at 32.

27. *See* Mary R. Jackman & Marie Crane, “Some of my best friends are black . . .”: *Interracial Friendship and Whites’ Racial Attitudes*, 50 *PUB. OP. Q.* 459, 462 (1986).

28. *Id.* at 482.

29. *Nachova and Others v. Bulgaria*, 2005-VII Eur. Ct. H.R. at 33. One of the first countries to recognize that racism can be embodied in disparate impact, and not just disparate treatment was the United States in the Supreme Court case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

30. KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA I* (1992).

Hamilton noted that whilst many white people felt they could “absolve themselves from individual blame” because they personally would never do something to intentionally harm a Black person, they still continued to “support political officials and institutions that would and do perpetuate institutionally racist polices.”³¹

Therefore, because the ECHR right to life almost exclusively focuses on state killings and ignores the other ways in which the state could harm people, and because ECHR jurisprudence is lacking when it comes to assessing the substantive impact of racism on the right to life, the ECHR conception of the right to life seems wanting. Similar critiques can be made of other rights to life found within international human rights law, including the right to life under the American Convention on Human Rights.³²

Thus, the Article 6 paragraph 1 conception of the right to life and its focus on a right to life with dignity may be the best formulation of a right to life. This is because it seems that this formulation of the right to life can work to ensure that Black lives really do matter within international law. Of course, its efficacy can be critiqued in that many States have not yet ratified the first Optional Protocol to the ICCPR,³³ meaning that individuals within these states cannot yet bring right to life claims to the Human Rights Committee.³⁴ However, the wide right to life, found in Article 6 paragraph 1 of the ICCPR, could provide a revolutionary insight into how Black life could be protected, inspiring innovative legal arguments both nationally and internationally. By further developing our understanding of Article 6 paragraph 1 of the ICCPR, a different route may be opened to those seeking to protect Black life—one for Black

31. *Id.* at 2.

32. *Cf.* Laura Goolsby, *Why International Law Should Matter to Black Lives Matter: A Draft Petition to the Inter-American Commission on Human Rights on Behalf of the Family of Eric Garner*, 21 U. PA. J.L. & SOC. CHANGE 29, 43-46 (2018).

33. *See* Office United Nations High Comm’r for Hum. Rts. (OHCHR), *Status of Ratification Interactive Dashboard: International Covenant on Civil and Political Rights*, Fact Sheet No. 30, Rev. 1, <https://indicators.ohchr.org/> [<https://perma.cc/2FPQ-Y7HQ>] (last visited Mar. 25, 2021).

34. *See id.*

people to make “legal consciousness their own in order to attack injustice.”³⁵

35. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Keynote Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988)*, in 11 *WOMEN'S RTS. L. REP.*, Spring 1989, at 7, 8.