RESPONSE OF LATINA AND LATINO CRITICAL LEGAL THEORY, INC., (LATCRIT)

TO QUESTIONNAIRE ON COMPLEMENTARY STANDARDS ON RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

Latina and Latino Critical Legal Theory, Inc., (LatCrit) is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations. LatCrit is a network of people of color and their allies who are academics, lawyers, organizers and others involved in multidimensional antisubordination work addressing the intersection and mutual constitution of race, sex, gender, sexuality, language, religion, color, ability, and other categories of identity that justify and are produced by exploitative and interdependent systems of subordination. We assert that subordination based on these identities, and on race and racism in particular, are both historical and structural. This understanding of race and racism prompts normative and institutional positions that are in some respects different from those found in the present International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In answering this questionnaire, we will introduce and apply our structural and historical analysis of race and racism by reference to elements of the ICERD and other texts that we find problematic or underdeveloped. We have proposed draft language responsive to our analyses and arguments.

I. Manifestations of Race Discrimination

The very concepts of race, races, and racism as we know them are fairly recent historical phenomena. In the wake of European colonization and conquest in South Asia, the North Atlantic, Africa, and the whole Western Hemisphere, various fields of knowledge and culture coalesced to diagnose, deduce, report upon, govern, civilize, save, dispossess, abduct, enslave, rape, and exterminate various races deemed lesser, savage, heathen, evil, stupid, primitive, or otherwise different from and deficient as compared with the peoples of European civilization. Scientific, religious, literary and other accounts of the several human races then justified the legal and political subordination of these new races, which was already well under way. In this way, when we speak of international antidiscrimination laws on race, races, and racisms, we are speaking of a very particular historical, cultural, and geopolitical legacy: the legacy of modern European colonization.

Thus it is most appropriate and important that the ICERD explicitly links its conception of race discrimination with European colonialism.[1] This link illustrates the actual historical specificity of these texts' apparently universal address. International laws on race discrimination are intertwined with a specific denomination of racism – European colonialism. Though international antidiscrimination laws on race cannot be

[1] The Preamble to the ICERD emphasizes that "the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and… the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end."

reduced only to matters of decolonization prompted by European occupation, such laws must *at a minimum* effectuate exactly such decolonization. Such laws too should take this context of decolonization as a jurisprudential paradigm for the development of other antidiscrimination regimes regarding race.

Because international race discrimination law is a law of decolonization, it is not a moral banishment of race *as such* from matters of law and policy. Quite the contrary. This much is evident from the texts' declarations that "affirmative action" is not discriminatory.[2] This clear commitment in these texts should be emphasized: states must distinguish decolonization from deracialization.[3]

Consequently, international antidiscrimination laws on race ought not – and already do not – prohibit race-based policy as being necessarily a manifestation of race discrimination. A reciprocal requirement, though, is not sufficiently addressed by existing law. International antidiscrimination laws on race ought not prohibit race-based policy as the primary or predominant manifestation of race discrimination.

Race is a social construction, meaning it is neither essential nor natural, but is rather a category of human thought and action. Race has not been *addressed by*, but rather *produced through* legal, commercial, religious, and other institutions.[4] As such, foundational structures of law and governance – even and often especially those that appear race-neutral – must be reconstructed in order to meaningfully counter racism. Structural manifestations of racism must therefore be apprehended by international antidiscrimination law.

Because of the aforementioned structural dimensions of race and racism, manifestations of race discrimination cannot be limited to individual claims of race-based animosity, stereotyping, or differentiation. Rather, antidiscrimination jurisprudence must be -- because race and racism are –structural engagements in human relations and resource distribution. As European colonialism surely did, international antidiscrimination law must impose upon radically diverse social scenes and actors so as to explicitly re-engineer power relations among individuals and groups in local, national, regional, and global politics. International antidiscrimination law must explicitly draw within its bounds all practices that are means or profits of racial subordination, be they public, private, differentiating, dominating, intentional, effective, subconscious,

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[2] E.g. Art. 1.2 of the ICERD.

[3] The great and cruel irony of contemporary U.S. Constitutional laws on racial inequality is the prohibition by the Supreme Court of "affirmative action" programs meant to redress the material historical consequences of centuries of diverse forms of racial subordination. Thus, governments' voluntary or mandatory distribution of work to racial minorities has been declared racially discriminatory. This of course is absurd. The international texts on racial discrimination, like other national constitutions, clearly state that such acts of decolonizing reconstruction are not acts of race discrimination.

[4] Moreover, race is a narrative and psychosocial structure that produces human experience, even and often as a subconscious schema or script for cognition and behavior. *See* Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 (4) JOURNAL OF SOCIAL ISSUES 835-848; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717 (2000); Ian Haney-Lopez, "*A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 Stanford L. Rev. 985 (2007).

institutional, idiosyncratic, collective, or individual in their characters.

II. & III. Remedies for and States' Affirmative Obligations Regarding Race Discrimination

As a consequence of all the foregoing, international antidiscrimination laws on race must not only prohibit and redress intentional, explicit, or other obviously racial policies of States Parties on behalf of individual petitioners. International antidiscrimination laws on race must also urge states to:

(1) acknowledge and develop a programmatic commitment to countering the continuing legacies of European colonization;

(2) redress and reconstruct every disparate impact upon historically and presently subordinated racialized groups;

(3) research and provide material reparations to historically subordinated racialized groups, including but not limited to those groups dispossessed, abducted, enslaved, raped, exterminated, or otherwise injured by European colonization;

(4) instigate institutional scrutiny and reconstruction aimed at:
- **(a) counteracting particular relevant histories of racism; and**
- **(b) seeking counsel of historically and presently subordinated and/or struggling racialized groups.**

Also, and in particular, this historical and structural definition of race and racism speaks against the unmitigated deference to states' disparate treatment of non-citizens established in the ICERD and other international rights instruments and institutions. It seems that concern over the ways in which nationality and/or alienage coincide with race and racism partly animate this Questionnaire and the Durban Programme, given their emphases on xenophobia, migration, occupation, and profiling. Such emphases are well founded and should lead ultimately to a modification of international antidiscrimination laws' deference to states as regards the difference alienage makes. Race was originally and has been always a question of citizenship. Racial categories in law, science, religion, and philosophy functioned chiefly to place certain persons, peoples, lands, and cultures beyond legal recognition and political obligation. Race was always a justification of injustice precisely because it entailed a refusal or reservation of citizenship. As such, a properly decolonizing international antidiscrimination law on race would require reconstruction of law and government as regards non-citizens. The mandate for just treatment of aliens is already manifest in humanitarian law and human rights law. The exception for and deference to states' differentiation of non-citizens is thus problematic for the ICERD and any international rights instrument. No doubt questions of migration, war, trade, and other matters may refer to and depend upon questions of citizenship. Such dependence is endemic to a society of nation-states. However, because of race's historical and structural inseparability from nationality and citizenship, the categorical

exclusion of states' distinctions of non-citizens from the reach of international antidiscrimination laws on race impinges profoundly and foundationally upon the capacity of such laws to comprehend race and racism.[5]

To challenge race discrimination as unjust necessarily entails a reciprocal challenge to justice defined by citizenship. Fundamental rights must be fully granted non-citizens in every encounter with state governments if international race discrimination law is to actually encounter and counteract the historical and structural force of racism.

In addition to the foregoing list of obligations, under a historical and structural antidiscrimination regime:

(5) Public and private institutions, groups, and individuals must recognize and enfranchise the fundamental rights of all, including individuals, groups, and institutions of allegedly foreign citizenship or origin.

In particular:

(6) In practices of detention (whether matters of law enforcement, migration, or war) all persons must be granted:

a) the rights and privileges afforded States parties' own citizens in criminal contexts;

b) the minimum standards of humanitarian law under States' parties own laws and customs as well as international law and custom; and,

c) the fundamental rights deemed fundamental under States' parties' own laws and customs as well as international law and custom.

Another contemporary global phenomenon speaks against the deference shown in international antidiscrimination and other human rights laws toward States regarding the

[5] In the United States this matter has been repeatedly and brutally made apparent. Some manifestations of the mutual constitution of systems of racial and national subordination in the United States include:

1) the Alien Act of 1789 in which citizenship under the new United States was immediately and for more than a century restricted to persons racialized as White;

2) the case of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), in which the Supreme Court declared citizenship a natural, moral, and political impossibility for Africans and African Americans;

3) the internment of Japanese and Japanese-American residents and citizens during World War II;

4) the present U.S. government's extraordinary and brutal systems of profiling, policing, and detention in its "War on Terror." Such systems are officially reserved for aliens, and are often if not always discrimination based on national origin, color, race, and religion along with national citizenship. *See* "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", 66 Fed. Reg. 57,833. For commentary, *see* Neil Katyal and Lawrence Tribe, *Waging War, Deciding Guilt: Judging the Military Tribunals*, 111 YALE L.J. 1259, 1298-1304 (2002).

relevance of citizenship. All international laws crafted in the interest of individual dignity and freedom – especially but not exclusively antidiscrimination laws on race – must confront the conscious, ongoing and deliberate failure of migrant-receiving countries to regulate justly low wage labor migration.

These migrations, this labor, and these failures to regulate justly are the cause and consequence of histories and systems of subordination based on race, national origin, color, and language. Such issues have always been and are still necessarily matters of race, racism, and xenophobia, and must be reached by international antidiscrimination law.

Unfortunately, the ICERD's aptly broad definition of "racial discrimination" (recognizing not only race and colour, but also national or ethnic origin (Art. 1.1)) is undermined profoundly by the explicit allowance that States may distinguish, exclude, restrict and allow preferences between citizens and non-citizens (Art. 1.2). This problem sadly cannot be remedied by the subsequent caveat that such distinctions may not discriminate against any particular nationality. Intentional or effective racial discrimination may nonetheless be perpetrated by a State's migration policies. For example, in the United States, workers of irregular status are not entitled to the remedy of back-pay when an employer unlawfully terminates them for engaging in the legally protected activity of union organizing.[6] Consequently, the incentive for employers to exploit workers in an irregular status increases, while workers' rights to redress for exploitation decrease.[7] Latina, Latino, and other racialized and nationalized minorities working in low wage employment, such as agriculture and construction, are thus systematically pipelined into workplaces with high rates of injury, death, discrimination, and exploitation. In this way, the deference found to States' parties regarding citizenship and migration in international human rights laws is counterproductive – especially but not exclusively in laws regarding race, racism, and xenophobia.

Nonetheless, current international human rights laws declare allocations of visas (and other matters of migration policy) an incident of national sovereignty immune from scrutiny under international rights regimes. Recent and important innovations, such as the Inter-American Court's OC-18[8], still focus only on in-country treatment of residents according to this standard, which is problematically deferential to States. The ICERD and other texts' deference to States in matters of citizenship and migration, if not reconsidered and qualified, will surely and can only displace, transform, and legitimate racial discrimination under other guises.

Recent laws move against this counterproductive deference, including the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (the "Migrant Workers Convention"), drafted specifically to address *contemporary* structures of racial and national disparity and subordination.[9] Economic, social and cultural rights regimes empower the United Nations to scrutinize economic

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[6] *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002).

[7] The *Hoffman Plastics* decision has resulted in a reduction of all labor and employment rights of migrant workers, who are usually also members of a historically and structurally subordinated racialized and/or nationalized group.

[8] OC-18 is the Inter-American Court's advisory opinion on the rights of undocumented workers.

[9] The Preamble of the Migrant Workers Convention articulates this concern quite precisely. International Convention on the Protection of the Rights of All Migrant Workers and Their Families, adopted on Adopted by General Assembly resolution 45/158 of 18 December 1990, entered into force on 1 July 2003.

and social programming relating to poverty and basic health indicators. In a similarly structural and affirmatively obligatory fashion, international human rights regimes – especially but not exclusively international antidiscrimination laws on race – must recognize visa allocation (and other matters of migration policy) as a critical issue of human rights in the historically unique, structurally contrived arrangements of contemporary multinational migration, production, and exchange.

Subsequent international human rights instruments, institutions, proceedings, and commentaries should and might heed the principles of the Migrant Workers Convention. They should and might too heed the principle articulated by the Inter-American Court on Human Rights on the Rights of Undocumented Migrants,[10] in which it held international principles of human rights prohibit discrimination on the basis of immigration status.[11] In its opinion, the Court clearly articulates the obligations of States to ensure that once a worker enters into an employment relationship, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment,"[12] outlining fundamental labor rights which must be respected, including the right of access to justice.[13]

As such, we propose that:

(7) Receiving governments must recognize, decriminalize, legitimize, legalize, and regulate the massive flows of low wage labor migration that take place throughout – and are indispensable to – the global economy.

(8) Future international law should affirm the holding in the Inter-American Court's OC-18 by stating that:

(a) once in-country and working, undocumented workers must receive the same rights and remedies as other workers; and

(b) special measures must be taken at all stages of migration to ensure that undocumented workers enjoy those rights.

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[10]. The Legal Status and Rights of Undocumented Migrants, September 17, 2003, available at http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc.

[11] Id.

[12]Id. at para. 134.

13. In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

These final recommendations are crucial to international antidiscrimination laws on race. Low wage labor migration issues are often inherently and/or effectively matters of national origin, color, and language. They are therefore also matters of race, racism, and xenophobia.