

**IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA**

CP-51-CR-0113571-1982
Nos. 1357-1359 (1981)

COMMONWEALTH OF PENNSYLVANIA,

v.

MUMIA ABU-JAMAL.

**BRIEF OF AMICUS CURIAE
UNITED NATIONS WORKING GROUP OF EXPERTS
ON PEOPLE OF AFRICAN DESCENT**

December 6, 2022

UNITED NATIONS WORKING
GROUP OF EXPERTS ON
PEOPLE OF AFRICAN DESCENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

1. The United Nations Working Group of Experts on People of African Descent examines and monitors emblematic cases, including the legal case of Mumia Abu-Jamal, pursuant to its mandate “to study the problems of racial discrimination faced by people of African descent living in the diaspora,” “to propose measures to ensure full and effective access to the justice system by people of African descent,” and “to address all the issues concerning the well-being of Africans and people of African descent contained in the Durban Declaration and Programme of Action,”¹ It has made statements and issued related communications to the United States government in this regard. It also conducted a fact-finding visit to the United States in 2016.
2. The Working Group is comprised of international law, race, and human rights experts, charged with fact-finding and reporting to the United Nations Human Rights Council on issues at the intersection of race and human rights. The mandate of the United Nations Working Group of Experts on People of African Descent was developed at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, and set forth in the Durban Declaration and Programme of Action. To this end, Working Group was established as a UN Special Procedure in 2002 by the Commission on Human Rights resolution 2002/68 and subsequently renewed by the Commission on Human Rights and the Human Rights Council.²
3. The Working Group is composed of five independent experts appointed on the basis of equitable geographic representation according to the United Nations’ five regional groups of Member States: African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and other States. The Working Group’s current members include: Catherine S. Namakula, *Chairperson* (South Africa), Barbara G. Reynolds (Guyana), Dominique Day (United States), Miriam Ekiudoko (Hungary), and Sushil Raj (India). Members are appointed for a term of six years.
4. The persistent and stark racialized effects of decision-making in the criminal justice system raises issues of vital importance for the Working Group’s mandate. To this end, the Working Group has noted in 2010 that Americans of African descent constitute a

¹ U.N. Human Rights Council resolution 9/14, A/HRC/RES/9/14.

² The Commission on Human Rights and the Human Rights Council renewed the mandate of the UN Working Group of Experts on People of African Descent in various resolutions, including CHR 2003/30, A/HRC/RES/9/14, A/HRC/RES/18/28, A/HRC/RES/27/25, A/HRC/RES/36/23 and A/HRC/RES/45/24.

disproportionately large percentage of the population under criminal supervision,³ and recommended in 2016 that the US take concrete action to dismantle systemic racism in the administration of justice, address racial disparities in the criminal justice system, and confront the legacies of the historical trade and trafficking in enslaved Africans that has powerfully influenced the lives of African Americans, specifically, and of the modern State, more generally.

5. The Working Group has also stated that: “[t]here is a profound need to acknowledge that the transatlantic trade in Africans, enslavement, colonization and colonialism were a crime against humanity and are among the major sources and manifestations of racism, racial discrimination, Afrophobia, xenophobia and related intolerance.”⁴ The legacies of history have evolved into an ongoing, structural disadvantage for people of African descent, including how their human rights are respected. The Working Group is charged with, *inter alia*, interrogating these legacies’ impact on how justice is meted out in United States courtrooms, including how misconduct by police, prosecutorial, and judicial personnel are confronted and addressed as new evidence appears and insight grows.

INTRODUCTION

6. The Working Group of Experts on People of African Descent submits this brief to the Court as *amicus curiae*, with the objective of contributing to the analysis of systemic racism vis-à-vis the criminal justice system. The rule of law requires not just due process and procedural guarantees of fairness, but also commitments to review and reinterrogate misjudgments that may only be apparent later. This includes a strong commitment to eradicating the operation of racial bias and the effects of racial discrimination and systemic racism from the administration of justice, even when discovered only decades later.
7. Globally, we increasingly understand that racism is a risk to our core values, and that it exists across national, regional, or cultural boundaries.⁵ “Legacy mindsets,” or the legacies

³ Human Rights Council, *Report of the Working Group of Experts on People of African Descent: Visit to the United States of America*, ¶¶ 47-48, 73, A/HRC/15/18 (Aug. 6, 2010), <https://undocs.org/en/A/HRC/15/18>.

⁴ Human Rights Council, *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America*, ¶ 91, A/HRC/33/61/Add.2 (Aug. 18, 2016), <https://digitallibrary.un.org/record/848570?ln=en#record-files-collapse-header>.

⁵ See e.g., *Draft Council conclusions on combating racism and antisemitism*, Council of the European Union, Doc. No. 15222/21 (FR) (22 Dec. 2021); *EU Racial Equality Directive* (setting forth prohibitions on direct and indirect discrimination at Article 2(2)(a) and (b) and requiring equal treatment including in the areas of training, education, and social protection, regardless of their racial and ethnic origin). See also, Müller, Carolin (2021) *Anti-Racism in*

of our history of racial atrocity, endure in our social structures today⁶ and in the “psychological residue” of the enduring moral injury of the involvement in racial atrocity.⁷ There is a growing body of literature discussing how to act on racism, rather than race, as the relevant risk factor in public decision-making.⁸ Many ways in which systemic racism is perpetuated are not cured by adjusting for socioeconomic status or other factors. Anti-Black racism, in particular, has been so foundational to the modern global economy that it continues to animate mindsets. The transnational legacies of colonialism and the trade and trafficking in enslaved Africans are evident today in airline companies’ flight routes, transnational corporations’ favourable relationships with countries formerly colonized by their governments, longstanding banking and credit relationships, and other transnational relationships that have persisted since that time. They also operate measurably in the administration of justice.

8. Thus, the Working Group seeks to assist this Court in its charge to take steps to protect all under its jurisdiction from the effects of racial discrimination by providing relevant analysis and resources. It also seeks to aid the court in its work to assist the United States of America in meeting its treaty obligations under the International Convention to End All Forms of Racial Discrimination (ICERD).⁹

Europe: An Intersectional Approach to the Discourse on Empowerment through the EU Anti-Racism Action Plan 2020–2025. Social Sciences 10: 137. *Anti-Black Racism in Post-Mao China.* The China Quarterly, 138, 413-437; Rollo, Toby (2018). *The Color of Childhood: The Role of the Child/Human Binary in the Production of Anti-Black Racism.* Journal of Black Studies, 49 (4):307-329.

⁶ Rasmussen, Brian, and Daniel Salhani. *A Contemporary Kleinian Contribution to Understanding.* 84 Social Service Review 491 (2010), 492 (“No social structure or domain of social action and interaction is free from racism or impervious to its insidious effects. Racism also finds a home in the psyches of individuals who are socialized into racist environments, which produce and reproduce the naturalness of the concept of race”).

⁷ See Bryan K. Nichols and Medria L. Connolly, *Transforming Ghosts Into Ancestors,* Other/Wise 12 (May 14, 2020) (“The institution of slavery and its aftermath has inflicted a profound moral injury on the foundational beliefs of our country.... [that is] largely unconscious and protected by various forms of denial”).

⁸ Chokshi DA, Foote MMK, Morse ME. *How to Act Upon Racism—not Race—as a Risk Factor.* 3 JAMA Health Forum e220548 (2022).

⁹ UN General Assembly Resolution 2106 (XX) (Dec. 21, 1965), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

SUMMARY OF ARGUMENT

9. The courts are both the front lines and the last stop in confronting the legacies of race and racism in the administration of justice. There is a failure of protection of fundamental human rights where the guarantees of due process and equal protection need not protect individuals from improper racialized intent and effects in the administration of justice. Due process protections, and equal protection guarantees, when enacted, recognized fundamental barriers to racial justice for people of African descent in the United States (and elsewhere) based on their race and given existing laws, policies, and practices prevalent in nearly every jurisdiction.
10. More recently, a comprehensive, international acknowledgement of various ways race and racism have been instrumentalized in the criminal justice system to perpetuate racial hierarchy have become evident from new research and new authorities. Among other things, these demonstrate how bias may be perpetuated even among those charged with neutrality or objectivity and how deeply racialized the effects of criminal justice decision-making have been, even where no ill intent is apparent. Entrenched racial disparities and other effects are a direct reflection of the transnational origin of the social construct of race, during enslavement, and are illegal under international human rights law. The relevant human rights framework offers clear and unambiguous tools in this regard. Yet, decades-old credible evidence bias remains unchallenged in many situations in the United States, including in sectors beyond the criminal justice system. Nevertheless, there is an affirmative obligation to examine and redress racial discrimination, even if it is quite aged.

ARGUMENT

11. The international community, including the United States of America, has engaged in a racial reckoning in recent decades. In many cases, this has involved recognition and reinterrogation of how systems and policies in the justice system may, contrary to their design, perpetuate systemic racism and sustain durable injustice. Data disaggregated by race has confirmed entrenched racial disparities persist in all walks of life. These are especially apparent and intractable in the criminal justice system. Even children are seen as less innocent, more culpable, more prone to violence, and less childlike when they are Black.¹⁰ For people of African descent in the United States and outside, racism has licensed injustice, including compromising fundamental guarantees and rights to liberty, due process, and more. The acknowledgment of this, and the research that supports it, suggests

¹⁰ See e.g., Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *Journal of Personality and Social Psychology* 526 (2014) (“Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers.”)

a grave responsibility for state actors to exercise diligent efforts to confront, dismantle, and repair the harm done by public institutions channelling decisions through a racial lens.

I. RACIAL STEREOTYPES, DISPARITIES, AND ‘LEGACY MINDSETS’ IN INDIVIDUAL CASES REFLECT THE TRANSNATIONAL ORIGIN STORY OF SYSTEMIC RACISM

12. As this Court is likely aware, the origin story of race and anti-Blackness is deeply embedded in social structures and systems globally. As a result, systemic racism is not the abstract operation of social machinery. It is evident in the concrete decision-making of people with discretion to subtly or openly reinforce racialised norms and racial hierarchy.¹¹ Systemic racism is a powerful and measurable phenomenon that can be verified even without overt racial slurs or overt racial harassment. Consciously or not, racialised decision-making discriminates against people of African descent frequently. It is grounded in a historical context where race is so powerful in the public imaginary that it structures decision-making across society. The ‘legacy mindsets’ of colonialism and the trade and trafficking in enslaved Africans continue to influence instinct, belief, and decision-making today.
13. The UN Working Group of Experts on People of African Descent discussed the link between negative racial stereotyping of people of African descent and current racially biased decision-making in a thematic report to the UN General Assembly in 2019.¹² The

¹¹ Systemic racism was recently discussed in detail by the U.N. High Commissioner for Human Rights. See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper, A/HRC/47/CRP.1*, at ¶¶ 14-49 (“systemic racism against Africans and people of African descent, including as it relates to structural and institutional racism, is understood to be the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, de jure or de facto discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin. Systemic racism often manifests itself in pervasive racial stereotypes, prejudice and bias and is frequently rooted in histories and legacies of enslavement, the transatlantic trade in enslaved Africans and colonialism.”).

¹² See, UN Working Group of Experts on People of African Descent, *The role of negative racial stereotypes and the stereotyping of people of African descent in perpetuating racially biased decision-making, racial disparities and racial injustice*, A/74/274 (2 August 2019) at ¶ 12 (“[Even] abolition of slavery did nothing to overcome the harmful ideas created to defend it These long-standing ideas and prejudices merged with colonial Europe’s desire to exploit the land and labour of indigenous peoples and Africans. At this critical juncture, racial distinctions

Working Group found the historical use and ongoing prevalence of racial stereotyping in everyday life, including in the media, the justice system and elsewhere, fed ongoing denigration of people of African descent, as well as an impulse to control Black bodies that was licensed by related imagery. The Working Group concluded that:

Ultimately, the perpetuation, tolerance and licensing of racial bias via negative stereotypes that are prevalent in everyday life violates the human rights of people of African descent. The ability to exercise and enjoy key human rights is dramatically curtailed by racial bias in decision-making that is grounded in false beliefs. Racial bias has such systemic impact on the enjoyment and exercise of human rights that in different countries people of African descent face similar challenges.... By dehumanizing people of African descent in the social mindset and the body politic, the impact and injustice of inequality and entrenched racial disparities are neutralized and even justified.¹³

14. Importantly, the social construct of race, and its progeny, racism, have been transnational, from their earliest inception as guidelines to exploit new, transnational profit opportunities in the triangular trade between Europe, Africa, and the Americas.¹⁴ ‘Black’ and ‘White’ did not exist as racialized terms until they became necessary to license the precursors of our modern global economy – the trade and trafficking in enslaved Africans and the staggering profits associated with an enslaved labour force that could be (and was) worked to death every 5-7 years in order to facilitate the production of commercial products like sugar, cotton, tobacco, and the triangular trade between Europe, Africa and the Americas.¹⁵
15. Historically, licensing racial atrocity required normalizing blatant inhumanity in the many communities transnationally that would witness these atrocities first-hand. Globally, social conditioning processes habituated communities to racial atrocity, frequently via education, legal practices and norms, media, and interpersonal conveyances of racialised norms.¹⁶

were reinforced with legal force, as well as philosophical and scientific legitimacy, which demonized colonial subjects. These spurious ideas flourished throughout the early period, spawning false theories that were used to justify the belief in racial hierarchy”).

¹³ See *id.* at ¶ 76.

¹⁴ See e.g., Essed, P., Farquharson, K., Pillay, K., & White, E. J. (Eds.). (2018). *Relating worlds of racism: dehumanisation, belonging, and the normativity of European whiteness*. Springer; MacMaster, N. (2001). *Racism in Europe: 1870-2000*.

¹⁵ See e.g., Nikole Hannah-Jones, *The 1619 Project* (2021).

¹⁶ Derald Wing Sue, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (2010), at 118-120.

Narratives of racial hierarchy, white supremacy, and necessity were used in science, education, religion, business, employment, housing medicine, the justice system, and most other areas of life to lessen the culpability for racial atrocity by lessening the humanity, and therefore the human rights, of people of African descent. This occurred even as the children, labour, intellectual property, resources, and choices of people of African descent were stolen or instrumentalized. As a result, and as the United Nations High Commissioner for Human Rights has recently reported, in a global analysis, “[s]ystemic racism against Africans and people of African descent affects the enjoyment of human rights in every part of life.”¹⁷

16. Yet, today, licensing racial atrocity may involve merely dismissing evidence of racism or racial bias as a significant driver of associated decision-making. The legacies of colonialism and the trade and trafficking in enslaved Africans are evident in legacy mindsets about race, which are measurable nearly everywhere they are studied.¹⁸ Pervasive racial disparities in education, employment, wealth, health, and the administration of justice persist that do not reflect ability, aptitude, or preferences of people of African descent. Nevertheless, systemic racism is not a result of depersonalized systems operating to create structural racial disadvantage. Systemic racism is an accumulation of individual decisions that jointly enforce, justify, and reinforce traditional racial hierarchies and oppressions as a well-established norm.¹⁹ Systemic racism results from the exercise of power, discretion, and subjectivity in ways that reinforce racial hierarchy and the social conditioning of white supremacy that are reaffirmed via education, media, and community

¹⁷ The United Nations Office for the High Commissioner of Human Rights has offered important guidance on this within the past year. See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶ 18.

¹⁸ See Office of the UN High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶¶ 14-49.

¹⁹ See e.g., Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *Journal of Personality and Social Psychology* 526 (2014) (“Black boys are seen as older and less innocent and that they prompt a less essential conception of childhood than do their White same-age peers.”)

life.²⁰ Systemic racism is born of the social conditioning in racial hierarchy that occurs over the course of a lifetime and is reinforced in professional and educational spaces.²¹

17. As a result, evidence of bias or racism should not be diminished, and instead understood as having impact that may be pervasive in ways our social conditioning (i.e., a pervasive culture of denial) could obscure. Even trace evidence should inform an understanding that even well-considered present-day actions may not interrupt existing systemic racism. Facially neutral policy cannot whitewash, or erase, racial discrimination. International human rights law, as well as national and regional instruments, prohibits absolutely both *de jure* and *de facto* discrimination.²² The prohibition of *de facto* discrimination helps to protect individuals from State policies that rely on neutral language that nevertheless operate to discriminate on the basis of race, ethnicity, or colour. “Systemic racism persists, in large part, due to misconceptions that the abolition of slavery, the end of the transatlantic trade in enslaved Africans and colonialism, and measures taken by States to date, have removed the racially discriminatory structures built by those practices, addressed contemporary structures of racial discrimination, inequality and subordination, and created equal societies.”²³ To this end, the Committee on the Elimination of Racial Discrimination has emphasized that any restriction on human rights will be illegitimate if it involves racial discrimination.
18. Unpacking and drawing lines between abuses and violations of rights and racism, or even discrimination and race-based foundations is a matter requiring frequent interrogation and re-interrogation of decisions, as a culture of denial has always been a key feature of

²⁰ See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61 ¶¶ 14-49 (“systemic racism against Africans and people of African descent, including as it relates to structural and institutional racism, is understood to be the operation of a complex, interrelated system of laws, policies, practices and attitudes in State institutions, the private sector and societal structures that, combined, result in direct or indirect, intentional or unintentional, *de jure* or *de facto* discrimination, distinction, exclusion, restriction or preference on the basis of race, colour, descent or national or ethnic origin. Systemic racism often manifests itself in pervasive racial stereotypes, prejudice and bias and is frequently rooted in histories and legacies of enslavement, the transatlantic trade in enslaved Africans and colonialism.”)

²¹ Eduardo Bonilla-Silva, *Racism Without Racists* (2003) (“Racial structures remain in place for the same reasons that other structures do. Since actors racialized as “white”-or as members of the dominant race-receive material benefits from the racial order, they struggle (or passively receive the manifold wages of whiteness) to maintain their privileges”).

²² CERD Committee general recommendation No. 32 paras. 6-7; ICERD art. 1(1) (explaining the impermissibility of purposeful discrimination and *de facto* discrimination); Human Rights Committee, general comment No. 18, paras. 7, 9 (same).

²³ See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61 at ¶¶ 16.

systemic racism.²⁴ However, one important indicator of systemic racism is certain similarities that appear transnationally. Racial disparities in education, employment, criminal justice, incarceration, health care, child protection, the administration of justice, and elsewhere are measurable quantitatively and observable qualitatively. Often without precisely identifying the drivers or the specific sources of racial discrimination, these disparities evidence racialized decision-making, confirmed by research, by police, lawyers, courts, teachers, doctors, and more.

II. THE RELEVANT HUMAN RIGHTS FRAMEWORK GIVES RISE TO PERSISTENT CONCERNS OF RACIALLY DISCRIMINATORY EFFECTS

19. Among other things, international human rights law requires jurists to assume responsibility for ongoing effects of racial discrimination, even decades later. The State, including state actors in the courts, have an affirmative obligation to remedy racial discrimination under international law, and to recognize that facially neutral decision-making may fail to interrupt ongoing and pervasive racially discriminatory effects. International human rights law relies on the premise that all persons, by virtue of their humanity, should exercise and enjoy their human rights without discrimination on any grounds, including on the basis of race.
20. Principles of racial equality and non-discrimination are codified in all core human rights treaties, including the Universal Declaration on Human Rights, and discrimination on the basis of race often constitutes a substantive human rights violation.²⁵ The United States is party to several of these treaties, including the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of Racial Discrimination (ICERD).²⁶

²⁴See OHCHR, *Conference Room Paper*, A/HRC/47/CRP.1, *supra* at note 61 at ¶ 41 (“some States - especially those with links to enslavement, the transatlantic trade in enslaved Africans and colonialism – continue to deny or have failed to acknowledge the existence and impact of systemic racism, especially institutional racism, against Africans and people of African descent; or its linkages with enslavement and colonialism. As a result, they have not sufficiently examined the disparate impact of their legislation, policies and practices on certain groups of the population, including Africans and people of African descent.”)

²⁵ See ICERD arts. 1 & 2; *see also* ICCPR arts. 2(1) & 26.

²⁶ Office of the United Nations High Commissioner for Human Rights, *Ratification Status for United States*, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx.

21. The International Convention on the Elimination of Racial Discrimination (ICERD), Art. 1(1), mandates that any distinction, exclusion, restriction or preference based on prohibited grounds must be considered as racial discrimination when it has “the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms [...]”.²⁷ The Convention on Torture, for example, stipulates that torture includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... for any reason *based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁸ A similar right to equality before the law and equal protection of the law is enshrined in article 26 of the ICCPR.²⁹
22. In addition, UN Member States (like the United States) are obliged to construe their anti-racism and anti-discrimination obligations expansively. In its General Recommendation No. 32, the Committee on the Elimination of Racial Discrimination reiterates that the prohibition of racial discrimination in the Convention cannot be interpreted restrictively.³⁰ Similarly, with respect to the ICCPR, which the US ratified in 1992, the Human Rights Committee has clarified that the rights to be free from racially discriminatory effects, as set forth operate Article 26 independently from other anti-discrimination provisions, including ICCPR, Art. 2.³¹ Instead of ensuring freedom from discrimination in the

²⁷ The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 1(1) defines racial discrimination in broad terms as:

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

See ICERD, art. 1(1).

²⁸ UN Convention Against Torture, Article 1.

²⁹ *See* ICCPR, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

³⁰ CERD General Recommendation No. 32, paras. 6-10.

³¹ Human Rights Committee general comment 18, para. 12.

enjoyment of ICCPR rights, article 26 affirmatively “prohibits discrimination in law *or in fact* in any field regulated and protected by public authorities.”³² (emphasis added).

23. Thus, racial equality involves not only ‘formal’ (*de jure*) equality and equal protection of the law, but also substantive (*de facto*) equality in the enjoyment and exercise of human rights. The prohibition of racial discrimination applies to the enjoyment of all civil, political, economic, social and cultural rights.³³ Noting that the list of rights protected under article 5 of the Convention is non-exhaustive, the Committee on the Elimination of Racial Discrimination emphasizes that UN Member States are required to eliminate racial discrimination and guarantee the right to equality before the law in the enjoyment of all human rights and fundamental freedoms.³⁴
24. In addition, the Committee on the Elimination of Racial Discrimination has set forth additional important guidance. Its jurisprudence notes that prohibited racial discrimination may exist even in the absence of discriminatory intent. *In re Laurent Gabre Gabaroum*, the Committee recalled that “presumed victims of racial discrimination are not required to show that there was discriminatory intent against them”. To the contrary, the Committee held that the persistence of State institutions “in requiring the petitioner to prove discriminatory intent runs counter to the Convention’s prohibition against any and all behaviour that has a discriminatory effect.”³⁵ Instead, the UN Member State has an obligation to investigate and remediate discriminatory effects. To comply with the ICERD, UN Member States must take action to combat intentional or purposeful racial discrimination, as well as to combat *de facto* or unintentional racial discrimination.
25. Human rights treaties and treaty bodies have affirmed this directly. ICERD, Art. 5(d)(iii) explicitly obliges States parties to guarantee the right of everyone to equality before the law. In its General Recommendation No. 32, the Committee on the Elimination of Racial Discrimination reiterates that States are required to eliminate purposive or intentional discrimination as well as discrimination in effect³⁶ and structural forms of discrimination.³⁷

³² Human Rights Committee general comment 18, para. 12.

³³ ICCPR art. 2; ICESCR art. 2(2); ICERD art. 5; *see also* Committee on the Elimination of Racial Discrimination (“CERD Committee”) general recommendation No. 20, para. 1.

³⁴ CERD Committee general recommendation No. 20, para. 1.

³⁵ *Laurent Gabre Gabaroum v. France*, Opinion adopted by the Committee under article 14 of the Convention concerning communication No. 52/2012, ¶ 7.2, U.N. Doc. CERD/C/89/D/52/2012 (June 8, 2016)

³⁶ CERD Committee general recommendation No. 32, ¶¶ 6–7.

³⁷ *See e.g.*, CERD Committee general recommendation No. 34, ¶¶ 5–7.

Under ICERD, the United States has an obligation to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists,”³⁸ as well as to discourage anything that tends to strengthen racial divisions.³⁹

26. Finally, important guidance exists specific to people of African descent (including African Americans). CERD General Recommendation 34, which applies to all UN Member States, asks the States to respect the rights of people of African descent, to take measures to ensure their rights given the historical exploitation and use of people of African descent and the legacies that persist.⁴⁰

III. U.N. MECHANISMS AND TREATY BODIES NOTE SYSTEMIC RACISM AND HISTORICAL LEGACIES PERSIST IN THE UNITED STATES

27. The importance of confronting the everyday legacies of the trade and trafficking in enslaved Africans in the justice system in the United States has been reaffirmed by UN treaty bodies and mechanisms as recently as this year. In its regular review of the United States in 2022, the CERD also made specific findings with respect to ongoing racial disparities and injustices faced by people of African descent in the criminal justice system in the United States.⁴¹ This included specific recommendations to address racial disparities in the justice system.⁴² As with other United Nations mechanisms and treaty bodies, the CERD Committee’s observations and decisions should be “ascribe[d] great weight” in order “to achieve the necessary clarity and the essential consistency of international law.”⁴³
28. In September 2022, the CERD, the committee that monitors UN Member States’ compliance with the International Convention to End All Forms of Racial Discrimination

³⁸ ICERD art. 2(1)(c).

³⁹ ICERD art. 2(e).

⁴⁰ CERD, *General Recommendation 34*, CERD/C/GC/34 (Oct. 3, 2011), ¶¶ 42-44.

⁴¹ CERD, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, CERD/C/USA/CO/10-12 (Sept. 21, 2022) (available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2556&Lang=en).

⁴² *Id.* at ¶ 28 (“Recalling its general recommendation No. 31 (2005), the Committee urges the State party to take concrete and effective measures to eliminate racial disparities at all stages of the criminal justice system and of the juvenile justice system”)

⁴³ See e.g., *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66 (Courts “should ascribe great weight to the interpretations adopted by [the Human Rights Committee], this independent body that was established specifically to supervise the application of that treaty” in order “to achieve the necessary clarity and the essential consistency of international law.”).

(ICERD) treaty, reviewed the United States and issued concluding observations of the session in Geneva.⁴⁴ The CERD noted that “the Committee is concerned that the lingering legacies of colonialism and slavery continue to fuel racism and racial discrimination in the State party, undermining the full enjoyment of all human rights and fundamental freedoms by all individuals and communities in the State party.”⁴⁵

29. In this regard, the CERD noted particular concern, relevance, and urgency of its concluding observations relating to the importance of eliminating racism, including systemic racism, in the criminal justice system.⁴⁶ Among other things, the CERD recommended that the United States must “Address[] the disparate impact of the collateral consequences of the criminal justice system on racial and ethnic minorities.”⁴⁷
30. Following its official visit to the United States in 2016, the Working Group also expressed concern at the inadequacy of the impact of civil rights reform and laws which, “even if fully implemented, [] are insufficient to overcome and transform the institutional and structural racial discrimination and racism against people of African descent.”⁴⁸ The Working Group noted that “African Americans are overrepresented in the penitentiary system,”⁴⁹ and also observed that State criminal laws and policies “have been applied with racial bias.”⁵⁰ The Working Group concluded: “[r]acial bias and disparities in the criminal justice system, mass incarceration and the tough-on-crime policies disproportionately impact African Americans. Mandatory minimum sentencing and the disproportionate punishment of African Americans including with the death penalty are of grave concern.”⁵¹
31. The Working Group has noted that, in the United States, “people of African descent experience discrimination at every stage of the criminal justice system and are more likely

⁴⁴ CERD, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, CERD/C/USA/CO/10-12 (Sept. 21, 2022) (available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2556&Lang=en).

⁴⁵ *Id.* at ¶ 55.

⁴⁶ *Id.* at ¶ 67.

⁴⁷ *Id.* at ¶ 28(f).

⁴⁸ Report of the Working Group of Experts on People of African Descent on its mission to the United States of America (Aug. 16, 2016), A/HRC/33/61/Add.2, at ¶ 11.

⁴⁹ *Id.*, at ¶ 29.

⁵⁰ *Id.*, at ¶ 76.

⁵¹ *Id.*, at ¶ 69.

to be stopped, searched, arrested, convicted, and harshly sentenced, including the use of the death penalty....”⁵² More recently, the Working Group observed:

Enduring and entrenched racial disparities in the criminal justice system – as well as ongoing tolerance of race-based outcomes in policing, entrenched racial disparities, and ongoing selective enforcement of the law – reflect harmful stereotypes grounded in the historical legacies of the global trafficking in enslaved Africans, colonization, and the ways in which modern social narratives evolved from rhetoric designed to justify these institutions and the exploitation of people of African descent.⁵³

The ongoing concerns at systemic racism, racial disparities, and the impact of racial bias by those, like the police, developing cases and gathering evidence, suggest real and present due process concerns, including about the guarantees of a fair trial, where evidence of racial bias and discrimination emerges, even decades later.

IV. RE-EXAMINATION OF RACIALLY DISCRIMINATORY EFFECTS AND BIASED DECISION-MAKING, EVEN FROM DECADES AGO, IS WARRANTED GIVEN TODAY’S BROADER UNDERSTANDING OF THESE EFFECTS

32. As set forth *infra*, under international human rights law, the State has an obligation to confront and address ongoing racially discriminatory effects. This obligation is not mitigated by the age of a case or the fact these racially discriminatory effects may have persisted for decades already. The case of Mumia Abu-Jamal may present such concerns. The use of habeas corpus, conviction review / integrity units, and specific statutes to review such claims has been important. However, these vehicles have often been overly narrowly constructed, given the considerable task at hand, i.e., the dismantling of systemic racism case-by-case in systems built upon it. This is particularly true in busy courts with heavy dockets.
33. Although courts are often hesitant to disturb prior decisions, several historical events and legacy issues suggest an examination of racially discriminatory effects and biased decision-making, using the insights we possess today, is a relevant inquiry for the Court in this case. There are also criteria that enhance the urgency of such reviews and suggests the courts have an independent responsibility to a *de novo* review or a specific review in light of the

⁵² UN Office of the High Commissioner for Human Rights, *Fight against world drug problem must address unjust impact on people of African descent*, say UN rights experts, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24332&LangID=E>.

⁵³ *Id.*

possibility that racial animus, racial bias, or systemic racism may have tainted the guarantee of a fair trial and due process. These may include the evidence of racial bias or racial animus in multiple organs of the justice system (e.g., police, prosecutors, courts) or in multiple stages of the case.

34. According to the information the Working Group has received, in December 2018, the newly elected District Attorney for Philadelphia, Mr. Krasner, reported discovering six boxes of evidence relating to Mr. Mumia Abu-Jamal that were never disclosed to the defence, raising *Batson* and *Brady* concerns under domestic law, as well as similar concerns under the relevant international human rights instruments, in a storeroom of the District Attorney's office. These boxes contained: (i) a letter sent by a key eyewitness Mr. Robert Chobert to the prosecutor, Mr. Joseph McGill, indicating a promise to pay Mr. Chobert in exchange for his testimony against Mr. Mumia Abu-Jamal; (ii) notes, memos and letters written by several officers of the District Attorney, that the witness Ms. Cynthia White was promised leniency with her open cases in exchange for perjuring against Mr. Mumia Abu-Jamal; and (iii) *voir dire* notes written by prosecutor, demonstrating the peremptory challenge was racially biased.
35. In addition to the *Batson* issues raised here, other historical issues give rise to serious concerns at impropriety and racial discriminatory effects given the actions of multiple organs of the justice system.⁵⁴ According to the information the Working Group received, a significant percentage of the police officers involved in gathering evidence and presenting the case were investigated and eventually convicted and jailed on charges including corruption and evidence tampering, information that was unavailable to the jury at the time it was assessing the credibility, tendency toward bias, and reliability of these officers. A court stenographer, Terry Maurer Carter, declared under oath that she heard the trial judge, Hon. Albert F. Sabo state to another judge, “I’m going to help them fry the n****r”, directly referring to Mr. Mumia Abu-Jamal. The trial judge’s own history of convictions and sentences in capital cases also evidenced deep racial disparities, including a high number of defendants sentenced to death (thirty-one (31) death sentences over a period of fourteen (14) years, twenty-nine (29) of whom were racial minorities. The trial court also is alleged to have managed the jury, which was overwhelmingly white after the prosecutor used eleven of fifteen peremptory challenges to strike Black jurors, in a biased manner. This included striking a Black juror seeking permissions that were readily granted to another white juror in the same trial. In addition, irregularities of witnesses, including recantations and payment for testimony favorable to the Commonwealth’s case, persist.

⁵⁴ See generally, Amnesty International, *USA: A Life In The Balance: The Case of Mumia Abu-Jamal* (2000).

CONCLUSION

36. Systemic racism and individual racial animus, bias, and acts of misconduct grounded in racialized disdain cannot stand without offending international law, international human rights commitments and treaty obligations, and fundamental fairness. There is abundant evidence that the racial disparities in US policies, including in decision-making in the justice system, have disproportionately impacted the rights of Americans of African descent and violate international human rights law, even where these decisions reflect historical circumstances that embedded or ignored legacies of bias and racial animus. The right to a fair trial is just that – a fundamental right. Courts have an obligation to right constitutional wrongs, even decades later.
37. A racialized disparate impact is neither unknowing nor innocuous, even where particularly intractable. Racial justice relies on courts to confront, rather than ignore or dismiss, persistent and ongoing racially discriminatory effects that are evidenced by statements, circumstances, and decision-making. To comply with its international human rights obligations under the ICERD and elsewhere, state actors in UN Member State should review outcomes that embed racially discriminatory effects, even decades later. This Court’s examination of new evidence to ensure racial bias, discrimination, animus, or other legacy mindsets did not driving decision-making in individual cases, even historically, is well-supported by international law.

Date: 6 December 2022

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