

**Examining “colour” as a ground of prohibited discrimination in international human rights law with specific reference to the “intra-racial” colourism against persons with albinism in the Democratic Republic of Congo (DRC)**

by

**Mwenewu Carmela Kabakisa**

Submitted in partial fulfilment of the requirements for the degree

**LLM**

In the Faculty of Law,

**University of Pretoria**

June 2022

**Supervisor:** Professor Annelize Nienaber

**UNIVERSITY OF PRETORIA**

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**Full names of student:** Mwenewu Carmela Kabakisa.....

**Student number:** u14206120.....

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.....  
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## **Acknowledgements and dedications**

First and foremost, I would like to express my sincerest gratitude to my supervisor, Professor Annelize Nienaber. Your academic excellence has kept me inspired throughout this journey. Thank you for your guidance and patience. Not once did you lose confidence in me, despite the numerous challenges I faced and for that I am eternally grateful. I would also like to thank Professor Dire Tladi , Dr Martha Bradley and Professor Michelo Hansungule for your amazing delivery of the coursework modules. The memories and teachings from your classes will forever be etched in my heart.

Secondly, I would like to dedicate this mini-dissertation to my sister who is my role model and best friend, Vanessa Bukasa. Thank you for encouraging and enabling me to take on this degree. You noticed the competencies needed to see this through before I even recognised them in myself. You are the light of my life and the thought of making you proud is what got me to the finish line! I love you deeply.

A big thank you also goes to the rest of my family and friends who supported me throughout this journey.

Lastly, I dedicate this mini-dissertation to the victims of colourism in the DRC and across the world who have had their human rights violated. You matter and your human rights deserve full protection, just like everyone else.

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## List of abbreviations

<b>AIDS</b>	Acquired Immunodeficiency Syndrome
<b>HIV</b>	Human Immunodeficiency Virus
<b>DRC</b>	Democratic Republic of Congo
<b>CCPR</b>	Human Rights Committee
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UNESCO</b>	United Nations Educational Scientific and Cultural Organisation
<b>UTSS</b>	Under the Same Sun
<b>VCLT</b>	Vienna Convention on the Law of Treaties

## Summary

Non-discrimination is a fundamental principle of international human rights law. As seen in several instruments, the principle is enumerated by grounds upon which differentiation is prohibited. An example of this is Article 1(1) of the International Convention on the Elimination of Racial Discrimination (ICERD), which lists “colour” as a ground of “racial discrimination”. From this article, it is not clear whether “colour” can be regarded as independent from “race”. This is problematic because black Congolese persons with albinism experience violence at the hands of their fellow black people, due to their skin colour, which is usually fair tanned as a result of the medical condition. This violence is a form of discrimination known as “intra-racial” colourism and demonstrates that “race” and “colour” are at times distinct from each other. Hence, Article 1(1) of ICERD allows such discrimination, which violates a plethora of rights including the right to life, to perpetuate with impunity. Therefore, this study firstly seeks to identify any indications that “colour” is independent from “race”. This will be done by applying the rules of interpretation as contained in the Vienna Convention on the Law of Treaties (VCLT) to Article 1(1) of ICERD. Thereafter, the study analyses practical examples of the subsuming of “colour” under the ground of “race” in the reporting cycles of the Democratic Republic of Congo (DRC) to the Human Rights Committee (CCPR). Lastly, it examines how the instruments referred to and other measures, may be used to combat “intra-racial” colourism, before setting out recommendations and the overall conclusion of the study.

## CHAPTER ONE

### INTRODUCTION

“[P]ersons with albinism require protection against unfair discrimination on the basis of their race, but also specifically based on their colour”.<sup>1</sup>

#### 1.1. Background

Non-discrimination is a fundamental principle of international human rights law.<sup>2</sup> As seen in several instruments, the principle is enumerated by grounds upon which differentiation is prohibited.<sup>3</sup> One such ground is “colour” as seen in the Universal Declaration of Human Rights (UDHR),<sup>4</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>5</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>6</sup>

Article 1(1) of ICERD defines “racial discrimination” as follows: “any distinction, exclusion, restriction or preference based on race, *colour*, descent, or national or ethnic origin which has the

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<sup>1</sup> M Mswela & M Nothling-Slabbert ‘Colour discrimination against persons with albinism in South Africa’ (2013) 6 *The South African Journal of Bioethics and Law* 26.

<sup>2</sup> Human Rights Committee (CCPR) ‘General Comment No. 18: Non-discrimination’ (1989) para 1. In essence, the principle not only embraces the notion that all individuals must have their human rights equally respected, but also unites all human rights by ensuring that they apply to all persons without unwarranted exceptions. However, the principle does not absolutely prohibit all forms of discrimination but requires legal justification by a state for any discrimination against individuals belonging to a certain protected group. See M Mwakagali ‘International human rights law and discrimination protections: a comparison of regional and national responses’ in L Carlson *Comparative discrimination law: historical and theoretical frameworks* (2017) 1-2.

<sup>3</sup> E Vierdag *The concept of discrimination in international law* (1973) 83. There are two ways in which the grounds of discrimination can be enumerated. One is to formulate an exhaustive list of grounds, which can only be amended legislatively. The second approach also specifies a list of grounds but indicates that this list is non-exhaustive. This is the approach which has been primarily adopted in international human rights instruments. See L Wei Wei ‘Equality and non-discrimination under international human rights law’ (2004) 3 *Norwegian Centre for Human Rights Research Notes* 12. The grounds of discrimination are physiological as well as social clusters on which controlling and damaging connotations of “superiority” and “inferiority” have been imposed. See Mswela (n 1 above) 25.

<sup>4</sup> United Nations General Assembly (UNGA) Universal Declaration of Human Rights (UDHR) 1948 Resolution 217 A (III) art 2.

<sup>5</sup> UNGA International Covenant on Civil and Political Rights (ICCPR) 1966 Resolution 2200 A (XXI) art 2 (1).

<sup>6</sup> UNGA International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 Resolution 2106 (XX) art 1 (1). As its name suggests, ICERD is explicitly devoted to the elimination of racial discrimination. It consists of a preamble and 25 articles divided into three parts. The first part sets out the definition and scope of “racial discrimination” prohibited by ICERD and state party obligations. The second part deals with the establishment of a monitoring body, namely the Committee on the Elimination of Racial Discrimination (CERD) and the third part handles other technical matters involved in its implementation. See D Shirane *ICERD and CERD: a guide for civil society actors* (2011) 1.



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”.<sup>7</sup> Hence, ICERD lists “colour” as a ground of “racial discrimination”.<sup>8</sup>

Although it is not defined, it has been recognised that the use of “colour” therein references “skin colour”, that is the “pigmentation of human skin which is complexly determined by genetics”.<sup>9</sup> Discrimination based on “skin colour”, which is also known as “colourism”, may be defined as the “prejudicial treatment of people based solely on the pigment of their skin tone”, that is associated with various social connotations.<sup>10</sup> This prejudicial treatment can range from covert hints of disfavour to acts of physical violence.<sup>11</sup> In addition, “colourism” can occur both “inter-racially”, meaning across racial groups, and “intra-racially”, that is between members of the same race.<sup>12</sup>

An example of “intra-racial” colourism is seen in the Democratic Republic of Congo (DRC) against persons with albinism.<sup>13</sup> Congolese people with this medical condition are sometimes

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<sup>7</sup> ICERD (n 6 above) art 1(1).

<sup>8</sup> CERD has stated that the words “based on” do not bear any meaning different from “on the grounds of”. See CERD ‘General recommendation No 14: on article 1, paragraph 1 of the Convention’ (1993) para 1.

<sup>9</sup> W Aceves ‘Two stories about skin colour and international human rights advocacy’ (2015) 17 *Washington University Global Studies Law Review* 563.

<sup>10</sup> A Walker *In search of our mothers’ gardens: womanist prose* (1983) 291. Another definition of “colourism” is: “the tendency to perceive or behave towards members of a racial category based on the lightness or darkness of their skin tone”. See K Maddox & S Gray ‘Cognitive representations of black Americans: re-exploring the role of skin tone’ (2002) 28 *Personality and Social Psychology Bulletin* 250. Colourism has also been referred to as “shadism”, “skin tone bias”, “pigmentocracy” and the “colour complex”, all of which refer to a system of privilege and prejudice founded on the extent of lightness or darkness of a person’s skin colour. A combination of diverse sociological and psychological factors give skin colour its present connotations. See Mswela (n 1 above) 25.

<sup>11</sup> M Hunter ‘The persistent problem of colourism: skin tone, status and inequality’ (2007) 1 *Sociology Compass* 241.

<sup>12</sup> T Jones ‘Shades of brown: the law of skin colour’ (2000) 49 *Duke Law Journal* 1498. An example of “inter-racial colourism” is seen with the case of police brutality by white Americans against African-American males that sparked the movement called #BlackLivesMatter. A recent study found that those who are dark-skinned are more likely to be killed than their light-skinned counterparts. See A Fisher & J Crutchfield ‘Colourism and police killings’ (2017) 41 *Western Journal of Black Studies* 12.

<sup>13</sup> Albinism can be defined as “a rare, non-contagious, genetically inherited condition characterised by a lack of pigmentation in the hair, skin and eyes.” See Under the Same Sun (UTSS) ‘The political and civil rights of people with albinism in the Democratic Republic of Congo’ (2017) 2. UTSS is an organisation that promotes the well-being of persons with albinism via education and advocacy. See UTSS ‘what we do’ <https://www.underthesamesun.com/> (accessed on 30 May 2022). When albinism affects the hair and skin, it leaves a stark white to whitish-yellow colour, which may be described as “fair-tanned”. See M Mswela ‘The evil albino stereotype: an impediment to the right to equality’ (2013) 32 *Medicine and Law* 83-84. Black persons with albinism may also experience “inter-racial”

referred to as “*ndundu*” (other).<sup>14</sup> There are superstitious beliefs about the skin tone which characterises albinism.<sup>15</sup> As a result, they are subjected to discrimination in the form of abductions, physical attacks, mutilations, rape, trafficking of body parts and murder, by their fellow black people.<sup>16</sup>

Against this background, this mini-dissertation will examine “colour” as a ground of prohibited discrimination in international human rights law.<sup>17</sup> Such will be done with specific reference to the “intra-racial” colourism against persons with albinism in the DRC, as a violation of the right to life.<sup>18</sup>

## 1.2. Research problem

“Intra-racial” colourism demonstrates that “colour” may sometimes be distinct from “race”.<sup>19</sup> However, the definition of “racial discrimination” as contained in Article 1(1) of ICERD makes it

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colourism when persons from outside of their race discriminate against them because of their skin colour. In addition, the DRC is not the only country where colourism against persons with albinism exists. Other countries such as Tanzania, Namibia and South Africa also experience it. See Mswela (n 1 above) 25.

<sup>14</sup> UTSS (n 13 above) 2.

<sup>15</sup> Persons with albinism are sometimes regarded as magical. At the same time, they have been ostracised and even murdered for the opposite reason, that they are presumed to be a curse and bring bad luck to society. In many folk tales told to children, persons with albinism are often portrayed as evil cannibals. Furthermore, children who misbehave are told that if they continue being naughty, they will be devoured by an albino. See Mswela (n 13 above) 87.

<sup>16</sup> UTSS (n 13 above) 2.

<sup>17</sup> This mini-dissertation draws on the thesis of Dr Maureen Mswela which makes recommendations to assist in promoting the legal position of this vulnerable group. Given that there is evidence of colourism against persons with albinism within racial groups, the study recommends that there be greater engagement and research on “intra-racial” colourism; a subject which has received scant attention in the legal field due to the more common focus on comparisons between blacks and whites as racial groups. See M Mswela ‘A selection of legal issues relating to persons living with albinism’ PhD thesis, University of South Africa 2016, 235.

<sup>18</sup> United Nations General Assembly ‘Report of the Intendent Expert on the enjoyment of human rights by persons with albinism: applicable international human rights standards and related obligations addressing the issues faced by persons with albinism’ (2017) A/72/131 8.

<sup>19</sup> M Banton ‘Colour as a ground of discrimination’ in N Ghana & A Xanthaki *Minorities, people and self-determination: essays in honour of Patrick Thornberry* (2005) 237. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has defined “race” as follows: “it designates a group or population characterised by some concentrations relative as to frequency and distribution of hereditary particles (genes) or physical characters which appear fluctuate and often disappear in the course of time by reason of geographical and/or cultural isolation”. See UNESCO ‘Statement on race’ (1950).

less clear whether international human rights law recognises this distinction.<sup>20</sup> This is because of two reasons.<sup>21</sup>

Firstly, when an act falls within the ambit of “racial discrimination”, it is not required to specify whether reference is being made to the entire set of five grounds or to just one of them.<sup>22</sup> This poses a problem for the grounds of “race” and “colour” which are closely linked, due to the latter being used as the main physical characteristic to determine the former.<sup>23</sup> However, as exemplified by black Congolese persons with albinism, “race” and “colour” do not always match.<sup>24</sup> Secondly, the term “race” also has a strong association to “racial discrimination” in that the latter is the adjective of the former.<sup>25</sup>

In light of this definition, “colour” seems to be subsumed under the ground of “race”, to the point where “colour” appears to have no use in its own right.<sup>26</sup> This is seen in a concluding observation adopted by the Human Rights Committee (CCPR), which addresses violence and discrimination against persons with albinism in the DRC, without mentioning the applicability of “colour” as a ground of prohibited discrimination.<sup>27</sup> By not applying “colour”, the CCPR has stripped victims of the protection offered by this ground.<sup>28</sup> Furthermore, this has allowed the “intra-racial”

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<sup>20</sup> Banton (n 19 above) 237.

<sup>21</sup> As above.

<sup>22</sup> As above.

<sup>23</sup> Skin colour has traditionally been and remains an instant means of identifying race. See Mswela (n 1 above) 25. The lighter or more white one’s skin colour is, the more likely they are to be categorised as white while those with darker or more brown skin tones are classified as black. Other characteristics such as ethnicity and ancestry also play a role in determining race. See Jones (n 12 above) 1494.

<sup>24</sup> Aceves (n 9 above) 564. In terms of racial divides, skin colour is the mark which sets apart people of different racial groups, however, albinism is a special case that merits separate recognition. Persons living with albinism require protection against unfair discrimination based on their race, but also specifically based on their colour (or lack thereof). Persons living with albinism remain white or African, but what makes them “different” is the genetic condition that causes a lack of pigmentation, which affects their appearance. See Mswela (n 1 above) 26-27.

<sup>25</sup> Banton (n 19 above) 237.

<sup>26</sup> Human Rights Committee (CCPR) ‘Concluding observations on the fourth periodic report of the Democratic Republic of the Congo’ (2017) CCPR/C/COD/4 3.

<sup>27</sup> As above. The Human Rights Committee is the body of independent experts which monitors the implementation of the ICCPR by its state parties. See Office of the United Nations High Commissioner for Human Rights (OHCHR) ‘Monitoring civil and political rights’ <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (accessed on 13 February 2022).

<sup>28</sup> As above. Although international human rights instruments cannot substitute domestic laws, they serve as an operational complement to domestic laws. See M Mswela ‘Violence against persons with albinism in South Africa’ (2017) 17 *African Human Rights Law Journal* 132.

colourism against Congolese persons with albinism, which violates their right to life, to perpetuate with impunity.<sup>29</sup>

### 1.3. Motivation for the study

The reasons for the undertaking of this study are plentiful.<sup>30</sup> Firstly, as mentioned above, there is a high number of incidents of violence against Congolese persons with albinism, due to myths about their “skin colour”.<sup>31</sup> Children with albinism are subjected to physical violence because they are believed to be ghosts.<sup>32</sup> In addition, women and girls with albinism are exposed to sexual violence based on the belief that having intercourse with them can cure HIV/AIDS.<sup>33</sup> Furthermore, others have been murdered with the intention of selling their corpses, which can have an estimated value of up to \$75 000, for use in rituals believed to produce financial wealth.<sup>34</sup> However, there has been little or no legal action following such reports.<sup>35</sup>

Secondly, this violence has been exacerbated in the wake of the COVID-19 pandemic.<sup>36</sup> Due to their “skin colour”, persons with albinism have been branded as scapegoats or originators of the virus which is considered a “white man’s disease”, thus making them the targets of increased attacks.<sup>37</sup> In addition, as a result of lockdown restrictions, Congolese people are plunged deeper

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<sup>29</sup> Article 6 (1) of the ICCPR provides that: “every human being has the right to life”. See ICCPR (n 5 above) art 6 (1). By ratifying this treaty, the DRC has a duty to respect, protect, promote and fulfil this human right. See United Nations Human Rights Treaty Bodies ‘Ratification status for the Democratic Republic of Congo’ [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=48&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=48&Lang=EN) (accessed on 30 May 2022). Such translates into both negative and positive duties. The negative dimension of the right to life entails the duty not to take someone’s life. At the very least, the positive duty imposed on the state by the right to life means that it is obliged to protect its citizens from “life threatening attacks”. See Mswela (n 28 above) 132.

<sup>30</sup> UTSS ‘Reported attacks of persons with albinism (extended) most recent attacks included’ (2022) 14; UTSS (n 13 above) 6; United Nations News (UN News) ‘Witchcraft killings of persons with albinism have risen during the COVID-19 pandemic, UN expert says’ <https://news.un.org/en/story/2021/07/1096692> (accessed on 25 October 2021); Business Insider ‘People with albinism are being blamed for the spread of coronavirus in Africa because of their whiteness’ <https://www.businessinsider.com/coronavirus-africans-with-albinism-are-blamed-because-of-whiteness-2020-6?IR=T> (accessed on 25 October 2021); Amnesty International ‘Strengthen the criminal justice system to end attacks against persons with albinism’ (2020) 1; OHCHR ‘Regional action plan on albinism in Africa 2017-2021’ 3.

<sup>31</sup> As of the 29<sup>th</sup> of April 2022, UTSS has recorded 73 reports of attacks against persons with albinism in the DRC. See UTSS (n 30 above) 14. There are likely more cases as many go unreported. UTSS gathers information via the testimony of witnesses and survivors, police reports, field observations and credible journalistic accounts. See UTSS (n 13 above) 6.

<sup>32</sup> UTSS (n 13 above) 1.

<sup>33</sup> As above.

<sup>34</sup> As above. The nature of the killing of persons with albinism is brutal. Knives and machetes are reportedly the objects used to cut limbs, breasts and other body parts off the helpless screaming victims. See Mswela (n 28 above) 117-118.

<sup>35</sup> UTSS (n 13 above) 4.

<sup>36</sup> UN News (n 30) as above.

<sup>37</sup> Business Insider (n 30) as above.

into poverty, and some have increasingly turned to witchcraft practices that involve the harvesting of body parts as described above.<sup>38</sup> Amnesty International has also raised concerns that persons with albinism are at a higher risk to attacks during lockdowns.<sup>39</sup> This is because they are in insecure homes which are surrounded by communities with potential perpetrators who seek to violate their human rights.<sup>40</sup>

The last reason relates to the Regional Action Plan on Albinism in Africa, which was developed by the African Union as an attempt to combat the aforementioned human rights violations.<sup>41</sup> The plan consists of specific measures to be implemented by states and is based on four key pillars, namely: prevention, accountability, non-discrimination and protection.<sup>42</sup> One measure under the protection pillar is the review of national legislative frameworks to include “colour” as a ground of prohibited discrimination.<sup>43</sup> At present the DRC has only made progress of 1% towards reaching this goal.<sup>44</sup>

Therefore, this mini-dissertation seeks to identify ways in which international human rights law can combat “intra-racial” colourism, as a nuanced form of this discrimination.<sup>45</sup> This is done in an attempt to improve the position of Congolese persons with albinism and other victims of “intra-racial” colourism alike.<sup>46</sup>

#### 1.4. Research questions

Considering the motivation for the study, the following questions are answered:

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<sup>38</sup> UN News (n 30) as above. The DRC is the third largest population of poor people globally. In 2018, the World Bank estimated that 73% of the population lived on less than \$1.90 a day. See World Bank Group ‘Democratic Republic of Congo Overview’ <https://www.worldbank.org/en/country/drc/overview#1> (accessed on 22 February 2022).

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<sup>39</sup> Amnesty International (n 30 above) 1.

<sup>40</sup> As above.

<sup>41</sup> OHCHR (n 30 above) 3-8.

<sup>42</sup> As above.

<sup>43</sup> As above.

<sup>44</sup> Africa Albinism Network ‘Implementation of the regional action plan on albinism’

<https://actiononalbinism.org/en/page/172jn94zmm4p0owbwf088v9529> (accessed on 3 November 2021). Albinism is a very unique example of how a specific medical condition has led to harmful erroneous perceptions and stereotypes. For this reason, it is necessary to ensure that persons living with albinism also enjoy the full protection and benefit of the law and are not treated as second class citizens. Mswela (n 28 above) 7.

<sup>45</sup> Mswela (n 17 above) 235.

<sup>46</sup> Mswela (n 17 above) 235.

- 1.4.1. Are there any indications in international human rights law that “colour” is a ground of prohibited discrimination, independent from “race”?
- 1.4.2. Are there any indications in international human rights law that “colour” has been subsumed under “race” as a ground of prohibited discrimination?
- 1.4.3. Concentrating on the discrimination that Congolese persons with albinism face as an instance of “intra-racial” colourism, how can certain aspects of treaties and other measures be of particular use in addressing this violation of the human right to life?

## 1.5. Literature review

### 1.5.1. Indications in international human rights law that “colour” is a ground of prohibited discrimination independent from “race”

Several authors have observed that the drafting history of the UDHR, where “colour” first appeared as a ground of prohibited discrimination, contains indications that it is independent from “race”.<sup>47</sup> Farrior and Morsink note that the initial proposal to include “colour” came from a member of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (the Sub-Commission), who stated that it was not clear from the Charter of the United Nations (UN) that “colour” was included in the ground of “race”.<sup>48</sup> There was a conflicting opinion that “race” was understood to encompass “colour”, hence including it in the UDHR should be avoided, as it would convey the message that the Charter does not prohibit this form of discrimination.<sup>49</sup> Another member further added that if there was the slightest doubt, it would be better to add the word

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<sup>47</sup> J Morsink *The Universal Declaration of Human Rights: origins, drafting and intent* (2000) 103; S Farrior ‘Colour in the non-discrimination provisions of the Universal Declaration of Human Rights and the two covenants’ (2015) 14 *Washington University Global Studies Law Review* 753-762; J Sealy- Harrington & J Hamilton ‘Colour as a discrete ground of discrimination’ (2018) 7 *Canadian Journal of Human Rights* 17.

<sup>48</sup> Farrior (n 47 above) 757; Morsink (n 47 above) 102. The Sub-Commission was comprised of 26 independent experts in the field of human rights. Its main functions were to undertake studies on human rights issues, to make recommendations concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities and to carry out any other functions which may be entrusted to it. See OHCHR ‘Sub-Commission on the Promotion and Protection of Human Rights’ <https://www.ohchr.org/EN/HRBodies/SC/Pages/SubCommission.aspx> (accessed on 13 February 2022). Article 1 (3) of the Charter lists the following as one of the purposes of the intergovernmental organisation: “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion” See United Nations Charter of the United Nations 1945 1 UNTS XV art 1(3).

<sup>49</sup> Farrior (n 47 above) 757; Morsink (n 47 above) 102.



“colour” than risk leaving out certain groups from the ambit of the UDHR.<sup>50</sup> According to Sealy-Harrington and Watson-Hamilton, the final decision to explicitly mention “colour” in the UDHR, despite the divergent views expressed during the drafting process, was done to deliberately show that it is independent from the ground of “race”.<sup>51</sup>

On the contrary, Possi and Possi are of the view that the inclusion of colour in the UDHR simply reflects navigation through the complications associated with the definition of “race” at the time.<sup>52</sup> Similarly, Vierdag points out that “colour” is a superfluous ground.<sup>53</sup> This is because discrimination based on “race” is in practice discrimination based on “skin colour”.<sup>54</sup> Hence, the author references the earlier decision of the Sub-Commission not to mention “colour” as a separate ground, but that a note reading as follows should be added: “it being understood that the term race includes the idea of “colour””.<sup>55</sup>

Although the non-discrimination clause in the UDHR laid the foundation for numerous subsequent international human rights treaties, it is not a legally binding document.<sup>56</sup> Considering its declaratory character, this mini-dissertation seeks to answer this research question by applying the rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT) to “colour” in Article 1(1) of ICERD.<sup>57</sup> Unlike the UDHR, ICERD creates obligations for state parties such as the DRC upon ratification.<sup>58</sup> Therefore, if “colour” is either independent from or subsumed under “race” for the purposes of ICERD, the DRC has the *erga omnes* obligation to implement this domestically.<sup>59</sup>

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<sup>50</sup> As above.

<sup>51</sup> Harrington (n 47 above) 17.

<sup>52</sup> A Possi & A Possi ‘The identity question versus appropriateness of legal anti-discrimination measures: endorsing the disability approach to albinism’ (2017) 5 *African Disability Rights Yearbook* 118 at 133.

<sup>53</sup> Vierdag (n 3 above) 98.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> A Trindade ‘Universal Declaration of Human Rights’ *United Nations Audiovisual Library of International Law* (2008) 2.

<sup>57</sup> United Nations Vienna Convention on the Law of Treaties (VCLT) (1969) art 31-33; M Foster & T Baker ‘Racial discrimination in nationality laws: a doctrinal blind spot of international law?’ (2021) 11 *Columbia Journal of Race and Law* 107.

<sup>58</sup> N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination: revised* (2014) 76.

<sup>59</sup> In its dictum on the *Barcelona Traction* case, the International Court of Justice (ICJ) gave rise to the concept of *erga omnes* obligations in international law. These refer to the following obligations that states have towards the entire international community: the outlawing of acts of aggression; the outlawing of genocide; protection from slavery and the protection from racial discrimination. By its very nature this affects the freedom of state consent and the

### 1.5.2. Indications in international human rights law that “colour” has been subsumed under “race”

Mswela, Aceves and Farior are of the opinion that the definition of “racial discrimination” as contained in Article 1(1) of ICERD has led to the subsuming of “colour” under the ground of “race”.<sup>60</sup> According to Mswela, listing “colour” alongside “race” suggests that the former is a component of the latter.<sup>61</sup> This is critiqued because “skin colour” alone does not explain racial categories, as other elements such as ethnicity and bloodlines are used to assign persons to specific racial groups.<sup>62</sup> Hence, racial classification is not exclusively based on “skin colour” as that is only one of several factors used to designate race.<sup>63</sup> In addition, Aceves points to the fact that there is no definition for “colour” in ICERD which has led to “race” being used as a proxy for “colour”.<sup>64</sup> Farior references correspondence with a member of the CCPR in this regard, who states that they have never thought about a separate violation on the ground of “colour”, if only because of the automatic assumption that “race” covers “colour”, as exemplified by the definition in ICERD.<sup>65</sup>

On the contrary, Thornberry and Keane are of the view that the umbrella term for “racial discrimination” is not the same as “race”, hence this definition does not subsume “colour” under the ground of “race”.<sup>66</sup> Thornberry states that “racial discrimination” is given a stipulative meaning by ICERD, which includes both “race” and “colour” amongst other grounds, all of which are of equal importance to the Convention.<sup>67</sup> Keane who supports this view, further critiqued ICERD for not condemning the notion of “race”.<sup>68</sup> The author has thus called for ignoring the term “race” in

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sovereignty of states. See A Memeti & B Nuhija ‘The concept of *erga omnes* obligations in international law’ (2013) 14 *New Balkan Politics* 32. The prohibition of “racial discrimination” is also a peremptory norm of customary international law (*jus cogens*) and therefore, it is binding on all states. See D Silverstone et al *Non-discrimination in international law: a handbook for practitioners* (2011) 153.

<sup>60</sup> Aceves (n 9 above) 563; Mswela (n 1 above) 25; Farior (n 47 above) 769.

<sup>61</sup> Mswela (n 1 above) 25.

<sup>62</sup> As above.

<sup>63</sup> As above.

<sup>64</sup> Aceves (n 9 above) 563.

<sup>65</sup> Farior (n 47 above) 769.

<sup>66</sup> P Thornberry ‘The convention on the elimination of racial discrimination, indigenous peoples and caste/descent-based discrimination’ in J Castellino & N Walsh *International law and indigenous peoples* (2005) 19; D Keane *Caste-based discrimination in international human rights law* (2007) 10.

<sup>67</sup> Thornberry (n 66 above) 19.

<sup>68</sup> Keane (n 66 above) 179.



favour of “skin colour” in the international human rights sphere.<sup>69</sup> This would both accept the reality of colourism and remove the undercurrent of biological differences associated with the term “race”.<sup>70</sup>

Considering that the above-mentioned views focus on a theoretical analysis of the definition of “racial discrimination”, this mini-dissertation will answer this research question through an analysis of the practical application of “colour”.<sup>71</sup> Such analysis will be done with specific reference to the concluding observations of the CCPR during the latest reporting cycle of the DRC.<sup>72</sup> These observations reference the violence against Congolese persons with albinism without mentioning the applicability of “colour” as a ground of prohibited discrimination.<sup>73</sup>

### **1.5.3. Use of certain aspects of treaties and other measures in addressing violations of the human right to life based on “intra-racial” colourism**

According to Mswela, the use of an international human rights framework offers a starting point for accountability as well as a prospect for recognising and implementing the rights of persons with albinism who suffer covert discrimination as a result of “intra-racial” colourism.<sup>74</sup> Farrior has also noted that because “colour” is listed as a ground of prohibited discrimination in numerous treaties, certain aspects of these treaties can be used to combat such “intra-racial” colourism.<sup>75</sup> This includes the principle of discriminatory intent not being required, which is well-established in international human rights law that discrimination need not be intentional to violate human rights.<sup>76</sup> In addition, the author refers to the prohibition of discrimination in any area regulated by the state.<sup>77</sup> According to this prohibition, if the state regulates an area, the regulations must provide equality before the law and equal protection of the law.<sup>78</sup>

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<sup>69</sup> As above.

<sup>70</sup> As above.

<sup>71</sup> CCPR (n 25 above) 3.

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> Mswela (n 28 above) 93.

<sup>75</sup> Farrior (n 47 above) 769-773.

<sup>76</sup> As above.

<sup>77</sup> As above.

<sup>78</sup> As above.

In addition to laws and regulations, the above-mentioned authors as well as Aceves and Burke have listed other measures which can combat the “intra-racial” colourism that persons with albinism face.<sup>79</sup> These measures include accurate education on albinism as a medical condition, the collection of disaggregated data which specifically focuses on colourism and the requirement that measures must be effective, failing which states are urged to intensify their efforts.<sup>80</sup>

To answer this research question, this mini-dissertation will draw on the works set out above by applying the principles and measures suggested, specifically to the “intra-racial” colourism faced by Congolese persons with albinism.<sup>81</sup>

## **1.6. Research methodology**

In order to address the gaps in the current literature as described above, a desktop research method will be employed. In terms of this methodology, the sources of international human rights law will be consulted.<sup>82</sup> This includes declarations, treaties and the general principles of law.<sup>83</sup> In addition, relevant case law, journal articles, textbooks and the concluding observations of treaty bodies will also be incorporated into various sections of this study.<sup>84</sup>

## **1.7. Assumptions**

In addition to the research methodology employed, the study will be premised on three assumptions. Firstly, I act on the assumption that the violence as a form of discrimination faced by black Congolese persons with albinism by their fellow black people, constitutes “intra-racial” colourism.<sup>85</sup> Secondly, I assume that by ratifying ICERD and the ICCPR, the DRC intends to comply with its corresponding obligations.<sup>86</sup> Lastly, I act on the assumption that any person concerned with a treaty is by necessity competent to interpret it.<sup>87</sup>

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<sup>79</sup> Aceves (n 6 above) 583; J Burke ‘Colourism as an intra-racial phenomenon: the case of Tanzania’ (2015) 5.

<sup>80</sup> Farrior (n 44 above) 774; Aceves (n 6 above) 583; Burke (n 79 above) 5.

<sup>81</sup> As above.

<sup>82</sup> United Nations Statute of the International Court of Justice (ICJ Statute) (1946).

<sup>83</sup> ICJ Statute (n 82 above) art 38.

<sup>84</sup> As above.

<sup>85</sup> Jones (n 12 above) 1498; UTSS (n 13 above) 1.

<sup>86</sup> United Nations Human Rights Treaty Bodies ‘Reporting status for the Democratic Republic of Congo’ [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN) (accessed 12 November 2021).

<sup>87</sup> O Dorr & K Schamlenbach *The Vienna Convention on the Law of Treaties: a commentary* (2012) 530.

## **1.8. Scope and limitations of the study**

This mini-dissertation will only address how “colour” as a ground of prohibited discrimination can be used to combat the “intra-racial” colourism against Congolese persons with albinism, which violates their right to life.<sup>88</sup> Hence, while cognisant of the fact that persons with albinism face multiple and intersectional forms of discrimination, the grounds of disability and gender will not be addressed.<sup>89</sup> Furthermore, this paper will focus exclusively on the right to life, noting that persons with albinism have had other human rights violated including but not limited to, their rights to health care, education and adequate housing.<sup>90</sup> Lastly, while references may be made to other countries throughout the mini-dissertation, recommendations will only be made for the application of “colour” as a ground of prohibited discrimination in the DRC.<sup>91</sup>

## **1.9. Chapter overview**

### **1.9.1. Chapter one**

This is an introductory chapter which contextualises the study, beginning with a statement of the background, research problem and motivation for its undertaking. Thereafter, the research questions, literature review and chosen research methodology are set out. It then explains the assumptions relied upon and the limitations of the study, closing in this chapter overview.

### **1.9.2. Chapter two**

The purpose of this chapter is to determine whether there are any indications in international human rights law that “colour” is independent from “race”. If that is the case, it may encompass the prohibition to “intra-racial” colourism as experienced by Congolese persons with albinism. To this end, the rules of interpretation as provided for in the VCLT will be applied to “colour” in Article 1(1) of ICERD.

### **1.9.3. Chapter three**

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<sup>88</sup> UNGA (n 15 above) 4-15.

<sup>89</sup> As above.

<sup>90</sup> As above.

<sup>91</sup> CCPR (n 26 above) 3.

This chapter seeks to determine whether there are any indications in international human rights law that “colour” has been subsumed under “race”. As the CCPR adopted a concluding observation on the violence against persons with albinism in the DRC, the key documents of the reporting cycles will be analysed in this regard.

#### **1.9.4. Chapter four**

The purpose of this chapter is to determine how certain aspects of treaties, which provide for “colour” as a ground of prohibited discrimination, can be used to address the violation of the right to life held by Congolese persons with albinism. To this end, the principles of “discriminatory intent not required” and “discrimination in any area regulated by the state”, will be analysed. Thereafter, measures required in addition to laws and regulations such as research and education, disaggregated data and the requirement that measures must be effective will be examined.

#### **1.9.5. Chapter five**

This chapter closes the study by firstly summarising chapters two through four of the study. Thereafter, recommendations are made before setting out the overall conclusion of the mini-dissertation.

In the next chapter we turn to an examination of “colour” as an independent ground of prohibited discrimination.

## CHAPTER TWO

### “COLOUR” AS AN INDEPENDENT GROUND OF PROHIBITED DISCRIMINATION

#### 2.1. Introduction

The purpose of this chapter is to determine whether there are any indications in international human rights law that “colour” is independent from “race” as grounds of prohibited discrimination.

<sup>1</sup> If that is the case, the ground of “colour” may encompass a prohibition on “intra-racial” colourism as experienced by Congolese persons with albinism.<sup>2</sup> To this end, the rules of interpretation as provided for in the Vienna Convention on the Law of Treaties (VCLT) will be applied to “colour” in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>3</sup> In conclusion, the implications of this interpretation for the “intra-racial” colourism against Congolese persons with albinism will be analysed.<sup>4</sup>

#### 2.2. Rules of Treaty Interpretation

Treaty interpretation is the process of establishing the true meaning of a treaty term.<sup>5</sup> Articles 31 to 33 of the VCLT provide rules which designate the principles and various elements to be considered during this process.<sup>6</sup>

Article 31(1) of the VCLT contains the *General Rule of Interpretation*.<sup>7</sup> According to this rule, the principle of good faith must be overarching in consideration of three elements, namely: the

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<sup>1</sup> M Foster & T Baker ‘Racial discrimination in nationality laws: a doctrinal blind spot of international law?’ (2021) 11 *Columbia Journal of Race and Law* 107.

<sup>2</sup> T Jones ‘Shades of brown: the law of skin colour’ (2000) 49 *Duke Law Journal* 1498; Under the Same Sun (UTSS) ‘The political and civil rights of people with albinism in the Democratic Republic of Congo’ (2017) 2

<sup>3</sup> United Nations Vienna Convention on the Law of Treaties (VCLT) (1969) art 31-33; United Nations General Assembly International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 Resolution 2106 (XX) art 1(1).

<sup>4</sup> Jones (n 2 above) 1498; UTSS (n 2 above) 1.

<sup>5</sup> This is an important practice because the effective application of a treaty is reliant on its accurate understanding. See O Dorr & K Schamlenbach *The Vienna Convention on the Law of Treaties: a commentary* (2012) 522.

<sup>6</sup> VCLT (n 3 above) art 31-33. The rules in art 31-33 reflect universal custom, hence, they can apply to all treaties. See Dorr & Schamlenbach (n 5 above) 525.

<sup>7</sup> This analysis excludes Article 31(2), (3) and (4) of the VCLT for several reasons. Firstly, Article 22 of ICERD provides that any disputes regarding its interpretation shall be referred to the International Court of Justice (ICJ). At

“ordinary meaning” of the term, the “context” of the treaty as well as its “object and purpose”.<sup>8</sup> This rule is based on the textual approach, meaning that the text is presumed to be an authentic expression of the will of the drafters.<sup>9</sup> Consequently, the starting point of the interpretation process according to this rule is the elucidation of the text.<sup>10</sup>

Article 32 of the VCLT provides for *Supplementary Means of Interpretation*.<sup>11</sup> If the interpretation resulting from Article 31 is ambiguous, obscure, leads to a result which is manifestly absurd or unreasonable, then recourse may be had to the preparatory work of a treaty which is referred to as the “*travaux préparatoires*”.<sup>12</sup> In addition, the circumstances surrounding the conclusion of the treaty may be considered.<sup>13</sup> The *Supplementary Means of Interpretation* reflect the intentional approach to treaty interpretation.<sup>14</sup> This is because the “*travaux préparatoire*” and circumstances at conclusion illuminate a common understanding of the negotiating parties as to the meaning of the treaty provisions.<sup>15</sup>

Lastly, Article 33 of the VCLT stipulates the rules applicable to the *Interpretation of Treaties Authenticated in Two or More Languages*.<sup>16</sup> Firstly, it provides that the text of a treaty is equally authoritative in each language, unless such treaty provides otherwise or the parties agree that, in the case of divergence a text, a particular language shall prevail.<sup>17</sup> Furthermore, the terms of the treaty are presumed to have the same meaning in each authenticated text.<sup>18</sup> Taking into account that ICERD was adopted in the six official languages of the United Nations (UN), namely: Arabic,

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present, there have been no such disputes on the ground of “colour”. Secondly, there is no subsequent practice in the application of ICERD which establishes the agreement of the parties regarding the interpretation of “colour”. Thirdly, there are no rules of international law that are applicable in the relations between the parties with specific regard to the ground of “colour”. Lastly, no special meaning of the term has been established by the parties to the treaty. See VCLT (n 3 above) art 31(2) – (4).

<sup>8</sup> VCLT (n 3 above) art 31(1).

<sup>9</sup> Dorr & Schamlenbach (n 5 above) 541.

<sup>10</sup> Although this is the starting point for interpretation, the *General Rule of Interpretation* does not describe a hierarchical order in which the elements listed therein should be applied to the text. See Dorr & Schamlenbach (n 5 above) 541.

<sup>11</sup> VCLT (n 3 above) art 32.

<sup>12</sup> As above.

<sup>13</sup> As above.

<sup>14</sup> Dorr & Schamlenbach (n 5 above) 575.

<sup>15</sup> As above.

<sup>16</sup> VCLT (n 3 above) art 33.

<sup>17</sup> As above.

<sup>18</sup> As above.

Chinese, English, French, Russian and Spanish, only the English version, which is considered as equally authoritative, will be analysed.<sup>19</sup> In addition, it will be presumed that the ground of “colour” has the same meaning in each authenticated text.<sup>20</sup>

What follows is the application of Article 31(1) of the VCLT to “colour” in order to determine whether it is independent from “race”.<sup>21</sup> If that is the case, it may encompass the prohibition of “intra-racial” colourism as experienced by Congolese persons with albinism.<sup>22</sup> Should this interpretation meet the requirements mentioned in Article 32 of the VCLT, then recourse will be made to the *Supplementary Means of Interpretation* as mentioned above.<sup>23</sup>

### **2.3. Application of the *General Rule of Interpretation* to “colour” as a ground of “racial discrimination”**

#### **2.3.1. Good faith**

The principle of good faith is embodied in the opening words of the *General Rule of Interpretation*, and thus sets an undertaking for the entire process.<sup>24</sup> This undertaking entails applying the test of reasonableness in order to qualify the dogmatism that can arise from a purely verbal or teleological analysis.<sup>25</sup> An example of this is seen with Article 23(1) of the UN Charter which provides for the composition of the Security Council.<sup>26</sup> In accordance with this principle, the “Republic of China” and the “Union of Soviet Socialist Republics”, must today be referred to as the “People’s Republic of China” and the “Russian Federation” respectively.<sup>27</sup> Any other approach which, although it might be in accordance with the ordinary meaning of those names, would be contrary to the

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<sup>19</sup> Chinese, French, English, Russian and Spanish were the first adopted official languages. See United Nations General Assembly ‘Resolutions adopted on the reports of the first committee’ (1946) Resolution 2 (I). Arabic was included on this list thereafter. See United Nations General Assembly ‘Resolutions adopted on the reports of the fifth committee’ (1980) Resolution 32/219 A.

<sup>20</sup> VCLT (n 3 above) art 33.

<sup>21</sup> VCLT (n 3 above) art 31(1).

<sup>22</sup> Jones (n 2 above) 1498; UTSS (n 2 above) 1.

<sup>23</sup> VCLT (n 3 above) art 32.

<sup>24</sup> Dorr & Schamlenbach (n 5 above) 548.

<sup>25</sup> As above.

<sup>26</sup> Dorr & Schamlenbach (n 5 above) 549; United Nations General Assembly Charter of the United Nations (1945) 1 UNTS XVI art 23 (1).

<sup>27</sup> Dorr & Schamlenbach (n 5 above) 549.

principle of good faith.<sup>28</sup> Hence, this principle will be observed through the entire process of interpretation, beginning by establishing the ordinary meaning of “colour” as contained in Article 1(1) of ICERD.<sup>29</sup>

### 2.3.2. Ordinary meaning

The process of determining the ordinary meaning of “colour” includes finding a meaning that is “regular, customary or normal”.<sup>30</sup> In order to establish such a meaning, international judicial bodies have previously turned to dictionaries, including more generalised ones.<sup>31</sup> By following this logic, the *Oxford English Dictionary* defines “colour” as the “appearance that things have that results from the way in which they reflect light”.<sup>32</sup> A similar definition is given in the *Collins English Dictionary*.<sup>33</sup> According to the *Merriam-Webster Dictionary*, “colour” is defined as “a quality such as red, blue and green that you see when you look at something”.<sup>34</sup> Hence, the aforementioned reasonably constitutes what a layman would determine as the “ordinary meaning” of the term “colour”.<sup>35</sup> However, the *General Rule of Interpretation* also allows for consideration of the kind of treaty in question to establish the “ordinary meaning”.<sup>36</sup>

When the kind of treaty is taken into account, the test is no longer to meet a layman’s understanding of the “ordinary meaning” of the term, but rather what a person who is reasonably informed on the subject matter of the treaty would classify as such.<sup>37</sup> Taking into account that the ICERD focuses on combating “racial discrimination”, several scholars have recognised that “colour”, as contained

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<sup>28</sup> As above.

<sup>29</sup> VCLT (n 3 above) art 31(1); ICERD (n 3 above) art 1(1).

<sup>30</sup> Dorr & Schamlenbach (n 5 above) 542.

<sup>31</sup> As above. See also Case concerning *Oil Platforms (Islamic Republic of Iran v The United States of America)* ICJ (6 November 2003) ICJ Reports 803 and *Kasikili/Sedudu Island Botswana v Namibia* ICJ (13 December 1999) ICJ Reports 1045.

<sup>32</sup> Oxford English Dictionary ‘Oxford learner’s dictionaries: colour’

[https://www.oxfordlearnersdictionaries.com/definition/english/color\\_1](https://www.oxfordlearnersdictionaries.com/definition/english/color_1) (accessed on 16 December 2021).

<sup>33</sup> Collins Dictionary ‘English dictionary definition of colour’

<https://www.collinsdictionary.com/dictionary/english/colour> (accessed on 16 December 2021).

<sup>34</sup> Merriam Webster Dictionary Definition of colour’ <https://www.merriam-webster.com/dictionary/colour> (accessed on 16 December 2021).

<sup>35</sup> VCLT (n 3 above) art 31(1).

<sup>36</sup> Dorr & Schamlenbach (n 5 above) 542.

<sup>37</sup> As above.



in Article 1(1) of the ICERD references the term “skin colour”.<sup>38</sup> According to some of these scholars, the reason for the inclusion of this term in this kind of treaty is because “skin colour” is the main physical characteristic that is used to assign people to different racial groups.<sup>39</sup> Therefore, it can be reasonably deduced that persons who are reasonably informed on the subject matter of the CERD regard the “ordinary meaning” of “colour” therein to reference “skin colour”.<sup>40</sup>

The last aspect to be considered when determining the “ordinary meaning” of a treaty term is that of tense.<sup>41</sup> There are two approaches which can be employed in this regard.<sup>42</sup> One is the Static approach, which supports the meaning of treaty provisions as at the time of its conclusion.<sup>43</sup> The second is the Dynamic approach which is also referred to as “evolutionary interpretation”, and seeks to establish the meaning of a treaty at the time of its interpretation.<sup>44</sup> This approach as applied by the International Court of Justice (ICJ) in the *Namibia* opinion and the *Aegean Sea Continental Shelf* case, is used for generic terms.<sup>45</sup> Such terms are those whose meaning is expected to change with time and thus presumably is intended to be given meaning in light of the circumstances at interpretation.<sup>46</sup> As noted in General Recommendation 32, the entire ICERD is a living instrument that must be interpreted taking into account the circumstances of contemporary society.<sup>47</sup> In addition, the Independent Expert on the enjoyment of human rights by persons with albinism (Independent Expert), has recently identified the violence against persons with albinism

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<sup>38</sup> W Aceves ‘Two stories about skin colour and international human rights advocacy’ (2015) 17 *Washington University Global Studies Law Review* 563; S Fariior ‘Colour in the non-discrimination provisions of the Universal Declaration of Human Rights and the two covenants’ (2015) 14 *Washington University Global Studies Law Review* 742 ; J Morsink *The Universal Declaration of Human Rights: origins, drafting and intent* (2000) 102; J Sealy-Harrington & J Hamilton ‘Colour as a discrete ground of discrimination’ (2018) 7 *Canadian Journal of Human Rights* 1 at 17; M Banton ‘Colour as a ground of discrimination’ in N Ghanae & A Xanthaki *Minorities, people and self-determination: essays in honour of Patrick Thornberry* (2005) 237; 5 J Burke ‘Colourism as an intra-racial phenomenon: the case of Tanzania’ (2015) 5.

<sup>39</sup> Aceves (n 38 above) 563; Burke (n 38 above) 5.

<sup>40</sup> Dorr & Schamlenbach (n 5 above) 533-542.

<sup>41</sup> As above.

<sup>42</sup> As above.

<sup>43</sup> As above.

<sup>44</sup> As above.

<sup>45</sup> As above. See also Case concerning *the rights of nationals the United States of America in Morocco (France v the United States of America)* ICJ (27 August 1952); Case concerning *Aegean Sea continental shelf case (Greece v Turkey)* ICJ (19 December 1978) ICJ Reports 3.

<sup>46</sup> Dorr & Schamlenbach (n 5 above) 533.

<sup>47</sup> Committee on the Elimination of Racial Discrimination (CERD) ‘General recommendation no. 32: on the scope and meaning of special measures in the International Convention on the Elimination of all Forms of Racial Discrimination’ (2009) CERD/C/GC/32. See also D Keane ‘Mapping the International Convention on the Elimination of. Racial Discrimination as a living instrument’ (2020) 20 *Human Rights Law Review* 236.

as discrimination based on “skin colour” as provided for in the ICERD.<sup>48</sup> Hence, a reasonable contemporary understanding of “colour” in Article 1(1) of ICERD is that it references “skin colour”.<sup>49</sup>

The above analysis suggests that the “ordinary meaning” of “colour” in Article 1(1) of the ICERD is “skin colour”, which is sometimes independent from “race”.<sup>50</sup> This means that it could possibly encompass the prohibition of “intra-racial” colourism as experienced by Congolese persons with albinism.<sup>51</sup> The process of interpretation, however, is not a purely grammatical exercise.<sup>52</sup> In fact, the *General Rule of Interpretation* prohibits establishing an “ordinary meaning” that is divorced from the place where the term is located in the text.<sup>53</sup> Instead, the terms of a treaty have to be interpreted in their “context”.<sup>54</sup>

### 2.3.3. Context

In the *Oil Platforms* case, the ICJ demonstrated that for purposes of the *General Rule of Interpretation*, “context” includes the title of the treaty.<sup>55</sup> The title of the ICERD is referenced from a preceding instrument, namely the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.<sup>56</sup> This declaration, which also lists both “race” and “colour” as prohibited grounds, was established to put an end to all racially discriminatory practices in other

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<sup>48</sup> United Nations General Assembly ‘Report of the Intendent Expert on the enjoyment of human rights by persons with albinism: applicable international human rights standards and related obligations addressing the issues faced by persons with albinism’ (2017) A/72/131 8. In 2015, the Human Rights Council, an organisation of the UN which oversees the promotion and protection of all human rights across the globe, adopted a resolution which provided for the mandate of the first Independent Expert on the enjoyment of human Rights by Persons with Albinism: Ikponwosa Ero. For an overview of this mandate see Human Rights Council ‘Resolution of the Human Rights Committee 28/6 Independent Expert on the enjoyment of human rights by persons with albinism’ (2015) A/HRC/RES/28/ 6.

<sup>49</sup> Dorr & Schamlenbach (n 5 above) 542.

<sup>50</sup> As above.

<sup>51</sup> Jones (n 2 above) 1498; UTSS (n 2above) 1.

<sup>52</sup> Dorr & Schamlenbach (n 5 above) 543.

<sup>53</sup> As above.

<sup>54</sup> As above. In its advisory opinion on the Constitution of the Maritime Safety Committee, the ICJ provided that the “ordinary meaning” of words can be confirmed from the context in which they are used. See Advisory Opinion on the *Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organisation* ICJ (8 June 1960) ICJ Reports 150.

<sup>55</sup> Dorr & Schamlenbach (n 5 above) 553. See also ICJ (n 31 above) 803.

<sup>56</sup> D Shirane *The International Convention on the Elimination of All Forms of Racial Discrimination and the Committee on the Elimination of Racial Discrimination: a guide for civil society actors* (2011) 1.

states.<sup>57</sup> The idea that “racial discrimination” perpetuates in the domestic realm was largely ignored, until the unanimous condemnation by states of Apartheid in South Africa.<sup>58</sup> This condemnation symbolised the belief that racially discriminatory practices, including discrimination on both grounds in one state can be a legitimate concern of others, thus curtailing the principle of national sovereignty.<sup>59</sup> Therefore, it can be reasonably concluded from the title of ICERD that discrimination based on “colour” and “race” are both forms of “racial discrimination”, which is a matter of international concern.<sup>60</sup>

Context can also be determined by analysing the preamble of the treaty in question.<sup>61</sup> The preamble of ICERD mentions the ground of “race” three times, two of which also include that of “colour”.<sup>62</sup> The first mention provides that ICERD gives effect to one of the purposes of the UN Charter, namely to “promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to “race”, amongst other grounds.<sup>63</sup> The second mention refers to the UDHR and proclaims that “everyone is entitled to the rights and freedoms set out therein”, without distinction particularly on the grounds of both “race” and “colour”.<sup>64</sup> The final mention reaffirms a stance of the State Parties to the Convention.<sup>65</sup> Such stance is that discrimination between human beings on the ground of “colour” constitutes an “obstacle to friendly and peaceful relations among nations” and other detrimental effects.<sup>66</sup> Therefore, the preamble of ICERD reasonably indicates that in light of the UDHR, it gives effect

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<sup>57</sup> Shirane (n 56 above) 1. Article 1(1) provides that discrimination “between human beings on the grounds of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter. See United Nations General Assembly Declaration on the Elimination of All Forms of Racial Discrimination (1963) A/RES/1904 Article 1(1).

<sup>58</sup> Shirane (n 56 above) 1.

<sup>59</sup> As above.

<sup>60</sup> Dorr & Schamlenbach (n 5 above) 543.

<sup>61</sup> As above. There are many examples in international jurisprudence which reference the preamble of a treaty to elucidate the meaning of a term therein. See Case concerning *Asylum (Colombia v Peru)* ICJ (20 November 195) ICJ Reports 1950; Case concerning *Sovereignty over Pulau (Indonesia v Malaysia)* ICJ (17 December 2002) ICJ Reports 625; ICJ (n 54 above) 150. See also N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination: revised* (2014) 76.

<sup>62</sup> ICERD (n 2 above) preamble par 1-7.

<sup>63</sup> As above.

<sup>64</sup> As above.

<sup>65</sup> As above.

<sup>66</sup> As above.

to the prohibition of discrimination on the grounds of both “race” and “colour” and that discrimination based on both grounds constitute an obstacle to world peace.<sup>67</sup>

Another factor to take into account when determining the context is the position of the term in question.<sup>68</sup> The fact that the definition of “racial discrimination” appears at the beginning of ICERD emphasises the importance of the non-discrimination principle.<sup>69</sup> In fact, the prohibition of “racial discrimination” has been recognised as having the exceptional character of *jus cogens*, which creates obligations *erga omnes*, from which no derogation is acceptable.<sup>70</sup> As previously mentioned, taking into account that “skin colour” is the main physical characteristic used to assign people to different racial groups, it may be regarded as closely related to “race”.<sup>71</sup> Hence, the positioning of “colour” as the second listed ground after “race”, in a convention which combats “racial discrimination”, reasonably indicates this close relationship between “race” and “colour”.<sup>72</sup>

The final element that is considered here is punctuation, the importance of which can be seen in the *Aegean Sea Continental Shelf* case, where the ICJ had to deal with the French phrase “*et, notamment,*” and explicitly pointed to the commas used.<sup>73</sup> Article 1(1) of ICERD lists three grounds of “racial discrimination” which are separated by commas, namely “race, colour, descent”.<sup>74</sup> By contrast, national and ethnic origin are conjoined by the term “or”, which is used to link alternatives.<sup>75</sup> The use of commas in the English language when listing items demonstrates a separation from one item to the next.<sup>76</sup> Therefore, it can be reasonably concluded that for purposes of ICERD, “race” and “colour” are two distinct grounds of “racial discrimination”.<sup>77</sup>

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<sup>67</sup> As above.

<sup>68</sup> Dorr & Schamlenbach (n 5 above) 543.

<sup>69</sup> Farrior (n 37 above) 752.

<sup>70</sup> “Egra omnes” is a Latin term which translates to “in relation to everyone”. See A Memeti & B Nuhija ‘The concept of *egra omnes* obligations in international law’ (2013) 14 *New Balkan Politics* 32; D Silverstone et al *Non-discrimination in international law: a handbook for practitioners* (2011) 153. See also G McDougall ‘The International Convention on the Elimination of All Forms of Racial Discrimination’ *United Nations Audiovisual Library* (2021) 1.

<sup>71</sup> Jones (n 2 above) 1494.

<sup>72</sup> Dorr & Schamlenbach (n 5 above) 543.

<sup>73</sup> As above. See also ICJ (n 45 above) 3.

<sup>74</sup> ICERD (n 3 above) Article 1(1).

<sup>75</sup> This alternative nature is evident in the exclusive use of “national origin” as opposed to the conjoined term in the preamble. However, save for the reference to the UN Charter, all mentions of “race” are followed by “colour” as set out above. See ICERD (n 2 above) preamble para 1-7.

<sup>76</sup> Dorr & Schamlenbach (n 5 above) 553.

<sup>77</sup> As above.

Taking the above into account, it can be reasonably deduced that “colour” in the context of ICERD is a ground of racial discrimination which is independent from “race”.<sup>78</sup> Thus it possibly includes the prohibition of “intra-racial” colourism, as experienced by Congolese persons with albinism.<sup>79</sup> The *General Rule of Interpretation* requires that the “object and purpose” of the convention in question also be taken into account.<sup>80</sup>

#### 2.3.4. Object and purpose

The application of the composite concept “object and purpose” in the process of interpretation was first seen in the French version of the ICJ opinion on *Reservations to the Genocide Convention*.<sup>81</sup> Here, the Court ruled on the admissibility of reservations to treaties according to the term “*l’objet et le but*”, which appeared in the English version as “object and purpose”.<sup>82</sup> Although many treaties have a variety of different and possibly conflicting purposes, the *General Rule of Interpretation* refers to a singular “object and purpose”.<sup>83</sup> This speaks to the overarching telos of the treaty as a whole.<sup>84</sup> The title together with the preamble of a treaty regularly contains such “object and purpose”.<sup>85</sup> The title of the Convention in question calls for the “elimination of *all* forms of racial discrimination”.<sup>86</sup> In addition, the preamble of ICERD provides that it was resolved for State Parties to adopt “all the necessary measures for speedily eliminating racial discrimination in all its forms and manifestations”.<sup>87</sup> Hence, it can be reasonably deduced that the overarching purpose of ICERD is to eliminate “racial discrimination” in *all* its forms.<sup>88</sup> The use of the term “all” here confirms that “colour” encompasses both “inter-racial” and “intra-racial” colourism.<sup>89</sup>

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<sup>78</sup> As above.

<sup>79</sup> As above. See also Jones (n 9 above) 1498; UTSS (n 10 above) 1.

<sup>80</sup> Dorr & Schamlenbach (n 5 above) 545.

<sup>81</sup> As above. See also Advisory Opinion on the *Reservations to the Convention on the Prevention and the Punishment of the Crime on Genocide* ICJ (28 May 1951) ICJ Reports 1951.

<sup>82</sup> Dorr & Schamlenbach (n 80 above) 545; ICJ (n 81 above) as above 1951.

<sup>83</sup> Dorr & Schamlenbach (n 80 above) 546.

<sup>84</sup> As above.

<sup>85</sup> As above.

<sup>86</sup> ICERD (n 2 above) title and preamble para 9.

<sup>87</sup> As above.

<sup>88</sup> Dorr & Schamlenbach (n 5 above) 546.

<sup>89</sup> ICERD (n 2 above) title and preamble para 9.

## 2.4 Result of the Application of the *General Rule of Interpretation* to “colour” as a ground of “racial discrimination”

In light of the above, it can be reasonably concluded that “colour” in Article 1(1) of ICERD is independent from “race” and thus includes the prohibition of “intra-racial” colourism.<sup>90</sup> This is because the “ordinary meaning” indicates that “colour” therein refers to “skin colour”.<sup>91</sup> Although it has a relationship with “race”, it is still sometimes separate to it as shown by the determined context.<sup>92</sup> In addition, the “object and purpose” indicate that both “race” and “colour” and by virtue “intra-racial” colourism are to be regarded as encompassed in the term “*all forms of racial discrimination*”.<sup>93</sup> The umbrella term for the Convention is “racial discrimination”, not “race”.<sup>94</sup> Thus, “racial discrimination” is given a stipulative meaning as per the five grounds set out therein.<sup>95</sup> Therefore, despite their close relationship, “race” is not the same as “racial discrimination” and thus, “colour” has not been subsumed under “race”.<sup>96</sup>

In fact, this interpretation has been confirmed through a recommendation made by the Independent Expert.<sup>97</sup> Such recommendation provided that the prohibition of “racial discrimination” on the ground of “colour” can be used to combat the discrimination faced by persons with albinism.<sup>98</sup> This is despite the fact that they are often of the same “race” as those who persecute them.<sup>99</sup>

The result of this application of Article 31(1) of the VCLT is not ambiguous, obscure, unreasonable or manifestly absurd.<sup>100</sup> Therefore, no recourse will be made to the *Supplementary Means of*

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<sup>90</sup> Dorr & Schamlenbach (n 5 above) 543-553

<sup>91</sup> As above.

<sup>92</sup> As above.

<sup>93</sup> As above.

<sup>94</sup> P Thornberry ‘The convention on the elimination of racial discrimination, indigenous peoples and caste/descent-based discrimination’ in J Castellino & N Walsh *International law and indigenous peoples* (2005) 19; D Keane *Caste-based discrimination in international human rights law* (2007) 19.

<sup>95</sup> As above.

<sup>96</sup> As above.

<sup>97</sup> United Nations General Assembly (n 48 above) 8.

<sup>98</sup> As above.

<sup>99</sup> As above.

<sup>100</sup> VCLT (n 3 above) Article 31(1)-33.

*Interpretation* as per Article 32 of the VCLT.<sup>101</sup> The application of Article 33 has been dealt with above.<sup>102</sup>

## **2.5. Conclusion**

The application of the rules of interpretation in the VCLT finds that “colour” in Article 1(1) of ICERD is independent from “race” and includes the prohibition of “intra-racial” colourism, as experienced by Congolese persons with albinism.<sup>103</sup> However, in practice, this definition has led to the subsuming of “colour” under the ground of “race”.<sup>104</sup> An example of this is seen in the most recent concluding observations of the Human Rights Committee (CCPR) in the fourth reporting cycle of the DRC.<sup>105</sup> The next chapter entails an analysis of the key documents in this regard.<sup>106</sup>

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<sup>101</sup> As above.

<sup>102</sup> As above.

<sup>103</sup> As above.

<sup>104</sup> Human Rights Committee (CCPR) ‘Concluding observations on the fourth periodic report of the Democratic Republic of the Congo’ (2017) CCPR/C/COD/4 3.

<sup>105</sup> As above.

<sup>106</sup> As above.





## CHAPTER THREE

### “COLOUR” SUBSUMED UNDER THE GROUND OF “RACE”

#### 3.1. Introduction

This chapter seeks to determine whether there are any indications in international human rights law that despite its independence in theory, “colour” has been subsumed under “race” in practice.<sup>1</sup> As the Human Rights Committee (CCPR) adopted a concluding observation on the violence against persons with albinism in the Democratic Republic of Congo (DRC), the key documents of the fourth periodic reporting cycle will be analysed.<sup>2</sup> In conclusion, the implications thereof for the “intra-racial” colourism against Congolese persons with albinism will be set out.<sup>3</sup>

#### 3.2. Overview of the first three reporting cycles of the DRC to the CCPR

##### 3.2.1. Common Core document

At the outset of the reporting process, states submit a common core document, as per the guidelines on harmonised reporting under international human rights treaties.<sup>4</sup> These guidelines require the document to include general information on the legal grounds of prohibited discrimination, the steps taken to ensure that discrimination on all prohibited grounds is prevented, as well as the measures taken to eliminate discrimination on all grounds.<sup>5</sup> In addition, as important changes in a state take place, the document is updated so that treaty monitoring bodies can remain apprised of these current developments.<sup>6</sup>

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<sup>1</sup> P Thornberry ‘The convention on the elimination of racial discrimination, indigenous peoples and caste/descent-based discrimination’ in J Castellino & N Walsh *International law and indigenous peoples* (2005) 19; D Keane *Caste-based discrimination in international human rights law* (2007) 19.

<sup>2</sup> Human Rights Committee (CCPR) ‘Concluding observations on the fourth periodic report of the Democratic Republic of the Congo’ (2017) CCPR/C/COD/4 3.

<sup>3</sup> T Jones ‘Shades of brown: the law of skin colour’ (2000) 49 *Duke Law Journal* 1498; Under the Same Sun (UTSS) ‘The political and civil rights of people with albinism in the Democratic Republic of Congo’ (2017) 2

<sup>4</sup> Office of the High Commissioner on Human Rights (OHCHR) Fact Sheet No.15 ‘Civil and political rights: the human rights committee’ 15.

<sup>5</sup> United Nations ‘Compilation of guidelines on the form and content of reports to be submitted by state parties to the international human rights treaties’ (2009) HRI/Gen/2/Rev.6 13.

<sup>6</sup> OHCHR (n 4 above) 15.

Following the introduction of the Congolese *Constitution of the Third Republic* in 2006 and other legislative changes, the most recent common core document states that the said Constitution provides for the equal status of all persons before the law.<sup>7</sup> No reference to any grounds of discrimination as per the harmonised guidelines is made.<sup>8</sup>

### 3.2.3. Initial and second report

After submitting the common core document, states prepare their initial report as per a set of guidelines provided by the CCPR.<sup>9</sup> In terms of these guidelines, states are required to set out the legislative measures relating to the protection against discrimination on the grounds of both “race” and “colour”, amongst others.<sup>10</sup> In addition, the significance of the omission of any ground of discrimination must be explained.<sup>11</sup> The DRC submitted Article 12 of the *Constitution of the Second Republic* in this regard.<sup>12</sup> Article 12 lists only “race” as a ground of prohibited discrimination.<sup>13</sup> No mention is made of the ground of “colour”, neither is an explanation as to its omission provided in the report.<sup>14</sup>

Based on their dialogue with the DRC, the CCPR adopted what are known as concluding observations.<sup>15</sup> These set out both the positive aspects of a State’s implementation of a treaty as well as the areas where further action is recommended.<sup>16</sup> The CCPR stated that Article 12 did not

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<sup>7</sup> United Nations ‘Common core documents forming part of the reports of State Parties: Democratic Republic of Congo’ (2013) HRI/CORE/COD/ 2013 16. Following years of civil war, on the 17<sup>th</sup> of December 2002, the DRC entered into a peace agreement endorsed by the international community in Pretoria, South Africa. This laid the foundation for the Constitution of National Unity known as the Transition Constitution. The Transition Constitution in turn laid down a few cardinal rules that have been carried over the 2006 Constitution known as the Constitution of the Third Republic. This was promulgated by President Joseph Kabila on the 18<sup>th</sup> of February 2006. See D Zongwe et.al ‘Update: overview of the legal system of the Democratic Republic of Congo (DRC) and research’ (2020) Globalex [https://www.nyulawglobal.org/globalex/Democratic\\_Republic\\_Congo1.html#\\_Constitutional\\_History](https://www.nyulawglobal.org/globalex/Democratic_Republic_Congo1.html#_Constitutional_History) (accessed on 16 December 2021). See also The Constitution of the Democratic Republic of Congo (DRC Constitution) 2005 Article 17.

<sup>8</sup> United Nations (n 5 above) 16.

<sup>9</sup> OHCHR (n 4 above) 16.

<sup>10</sup> CCPR ‘Guidelines for the treaty specific document to be submitted by state parties under article 40 of the International Covenant on Civil and Political Rights’ (2010) UN Doc CCPR/C/2009/1 6.

<sup>11</sup> As above.

<sup>12</sup> CCPR ‘Consideration of reports submitted by State Parties, under Article 40 of the Covenant, first periodic report, the Democratic Republic of Congo’ (1987) UN Doc CCPR/C/4/Add 10.

<sup>13</sup> As above.

<sup>14</sup> As above

<sup>15</sup> OHCHR (n 4 above) 16.

<sup>16</sup> As above.

seem to “accord fully with the non-discrimination provision in the International Covenant on Civil and Political Rights”.<sup>17</sup> It was also asked why discrimination based on political opinion was not prohibited; however, no observations were made on the omitted ground of “colour”.<sup>18</sup>

The DRC went on to submit its second report in 1989, however, at the time of writing this dissertation, there are no official documents available to the public, hence an analysis of the third report follows.<sup>19</sup>

### 3.2.3 Third report

In 2005, the DRC submitted its third periodic report to the CCPR.<sup>20</sup> In this report, Article 17 in the *Constitution of the Third Republic* was submitted as evidence of the implementation of the non-discrimination principle.<sup>21</sup> The Article lists the following as grounds of prohibited discrimination: “race”, “ethnic group”, “tribe” and belonging to a “cultural or linguistic minority”.<sup>22</sup> The ground of “colour”, therefore, is also excluded from this non-discrimination clause.<sup>23</sup>

Based on this report, the CCPR adopted a List of Issues, which addresses the most crucial matters regarding the enjoyment of Covenant rights.<sup>24</sup> The List of Issues in this cycle makes no mention to the grounds of prohibited discrimination in Article 17 and more specifically, to the exclusion of “colour”.<sup>25</sup> Furthermore, the concluding observations did not address this exclusion when setting out the principal subjects of concern.<sup>26</sup>

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<sup>17</sup> United Nations General Assembly ‘Report of the Human Rights Committee’ (1987) UN Doc A/42/40.

<sup>18</sup> As above.

<sup>19</sup> United Nations Human Rights Treaty Bodies ‘Reporting status for the Democratic Republic of Congo’ [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN) (accessed 12 November 2021).

<sup>20</sup> CCPR ‘Consideration of reports submitted by States Parties under Article 40 of the Covenant, third periodic report, Democratic Republic of Congo’ (2005) UN Doc CCPR/C/COD/2005 10.

<sup>21</sup> As above.

<sup>22</sup> As above.

<sup>23</sup> As above.

<sup>24</sup> OHCHR (n 4 above) 18.

<sup>25</sup> CCPR ‘Consideration of reports submitted by State Parties under Article 40 of the Covenant, list of issues to be taken up in connection with the third periodic report of the Democratic Republic of the Congo’ (2005) UN Doc CCPR/COD/Q/3.

<sup>26</sup> CCPR ‘Consideration of reports submitted by State Parties under Article 40 of the Covenant, concluding observations of the Human Rights Committee, Democratic Republic of Congo’ (26 April 2006) UN Doc CCPR/C/.

### 3.2.4. “Colour” in the first three reporting cycles

The periodic cycles set out above demonstrate a lack of attention to the ground of “colour” by the CCPR.<sup>27</sup> This may be due to the close relationship between the grounds of “race” and “colour”, as discussed in Chapter 2.<sup>28</sup> However, the “intra-racial” colourism against Congolese persons with albinism demonstrates that the two grounds are, in certain instances, to be treated as distinct from each other.<sup>29</sup> The CCPR has adopted concluding observations in this regard.<sup>30</sup> What follows is an analysis of the key documents in the fourth reporting cycle.<sup>31</sup>

## 3.3. Key documents in the fourth periodic cycle of the DRC to the CCPR

### 3.3.1. List of Issues

In its List of Issues of the fourth periodic cycle, the CCPR asked the DRC to provide “measures taken to protect the integrity of albino adults and children, as well as their families, and especially their mothers”.<sup>32</sup> In response to this, Under the Same Sun (UTSS), a civil society organisation committed to “ending the often-deadly discrimination against people with albinism”, submitted a report to the CCPR.<sup>33</sup>

### 3.3.2. Report by Under The Same Sun (UTSS)

The UTSS lists Article 17 in the *Constitution of the Third Republic* as one of the aforementioned requested measures.<sup>34</sup> As pointed out above, Article 17 does not provide for “colour” as a ground of prohibited discrimination.<sup>35</sup> Through a description of selected cases of violence, this report essentially demonstrates that Congolese persons with albinism do not enjoy the right to life as guaranteed in Article 6 of the ICCPR.<sup>36</sup>

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<sup>27</sup> As above.

<sup>28</sup> Jones (n 2 above) 1494

<sup>29</sup> As above. See also UTSS (n 2 above) 1

<sup>30</sup> CCPR (n 2 above) 3.

<sup>31</sup> As above.

<sup>32</sup> CCPR ‘List of issues in relation to the fourth periodic cycle of the Democratic Republic of Congo’ (2017) UN Doc CCPR/C/COD/Q/4.

<sup>33</sup> UTSS (n 2 above) 1-12. The CCPR regards the submission of reports by civil society actors as best practice. See OHCHR (n 4 above) 17.

<sup>34</sup> UTSS (n 10 above) 3

<sup>35</sup> DRC Constitution (n 7 above) Article 17.

<sup>36</sup> UTSS (n 10 above) 3-6.

In the same vein, the report notes that although the ICCPR was ratified by a monist DRC in 1976, the national implementation thereof is still a work in progress.<sup>37</sup> It refers to certain sections of the ICCPR in this regard and specifically Article 4(1) which provides for the conduct of State Parties during times of public emergency.<sup>38</sup> Taking into account the conflict in the DRC over the last two decades, the UTSS provides that Article 4(1) continues to have effect in protecting individuals from discrimination on the grounds of both “race” and “colour”.<sup>39</sup>

Based on this report, the CCPR adopted a concluding observation on the violence against Congolese persons with albinism.<sup>40</sup>

### 3.3.3. Concluding observations

In its concluding observations, the CCPR expressed concern about the lack of measures to address reported cases of discrimination and violence against persons with albinism.<sup>41</sup> The same was said about the absence of comprehensive anti-discrimination legislation, specifically with regards to the non-discrimination clause in Article 17.<sup>42</sup>

The CCPR thereafter made three recommendations for implementation by the DRC.<sup>43</sup> First the DRC should take effective measures to prevent discrimination including acts of violence, and ensure that victims receive full reparation.<sup>44</sup> The second recommendation requires the DRC to guarantee the protection and enjoyment, on an equal footing, of Covenant rights for all persons with albinism.<sup>45</sup> Lastly it was recommended to enact comprehensive legislation providing full and

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<sup>37</sup> As above.

<sup>38</sup>As above. Article 4 (1) provides that: “in times of public emergency which threaten the life of the nation and existence of which is fully proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law, and do not involve discrimination based on race, colour, sex, language, religion or social origin”. See United Nations General Assembly International Covenant on Civil and Political Rights (ICCPR) 1966 Resolution 2200 A (XXI) CCPR Article 4 (1).

<sup>39</sup> UTSS (n 10 above) 3.

<sup>40</sup> CCPR (n 2 above) 3.

<sup>41</sup> As above.

<sup>42</sup> As above.

<sup>43</sup> As above.

<sup>44</sup> As above.

<sup>45</sup> As above.

effective protection against discrimination, containing an exhaustive list of prohibited grounds of discrimination, including “sexual orientation” and “gender identity”.<sup>46</sup>

The CCPR made no reference to “colour” as a ground of prohibited discrimination in this regard.<sup>47</sup>

### 3.4. “Colour” in the fourth reporting cycle

Despite the fact that discrimination against persons with albinism is based on “colour”, the CCPR did not address this because “colour” is not viewed as independent from “race”.<sup>48</sup> This may be because the CCPR has overlooked that there is a difference between “race” and “racial discrimination”, hence it did not explicitly mention the applicability of “colour” as a form of “racial discrimination” here.<sup>49</sup> The CCPR requested that the DRC include specific and up-to-date information on the implementation of the recommendations made in the present concluding observations in the next periodic report.<sup>50</sup> By coupling this request, together with the fact that the DRC has never reported on the omission of the ground of “colour”, the CCPR may have created a blind spot for the DRC by failing to highlight this as a breach of the *erga omnes* obligation of non-discrimination.<sup>51</sup>

### 3.5. Conclusion

Although “colour” has been identified as an independent ground of prohibited discrimination in the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), the concluding observation of the CCPR is an example of how in practice, it has been subsumed under the ground of “race”.<sup>52</sup> This allows for the “intra-racial colourism” against Congolese persons with albinism to perpetuate with impunity, as it creates a blind spot for states who have failed to list this ground in domestic laws.<sup>53</sup> However, since “colour” is included in the non-

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<sup>46</sup>As above.

<sup>47</sup>As above.

<sup>48</sup> United Nations General Assembly ‘Report of the Intendent Expert on the enjoyment of human rights by persons with albinism: applicable international human rights standards and related obligations addressing the issues faced by persons with albinism’ (2017) A/72/131 8

<sup>49</sup> Thornberry (n 1 above) 19.

<sup>50</sup> CCPR (n 2 above) 9.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> As above.

discrimination clause of the ICCPR and other human rights instruments, certain aspects of these treaties, as well as other measures, may be of particular use in addressing human rights violations in this regard.<sup>54</sup> Chapter four entails the application of this to the human right to life of Congolese persons with albinism.<sup>55</sup>

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<sup>54</sup> Farrior (n 44 above) 770.

<sup>55</sup> Farrior (n 44 above) 770.

## CHAPTER FOUR

### THE USE OF CERTAIN ASPECTS OF TREATIES AND OTHER MEASURES TO ADDRESS THE VIOLATION OF THE RIGHT TO LIFE BASED ON “INTRA-RACIAL” COLOURISM

#### 4.1. Introduction

The purpose of this chapter is to determine how certain aspects of treaties, which provide for “colour” as a ground of prohibited discrimination, may be used to address the violation of the right to life held by Congolese persons with albinism.<sup>1</sup> To this end, the principles of “discriminatory intent not required” and “discrimination in any area regulated by the state”, will be analysed.<sup>2</sup> Thereafter, measures required in addition to laws and regulations such as education, disaggregated data and the requirement that measures must be effective, will be examined.<sup>3</sup> In conclusion, the impact of these measures on the protection of the human right to life held by Congolese persons with albinism from “intra-racial” colourism, will be evaluated.<sup>4</sup>

#### 4.2. Discriminatory intent not required

It is a well-established principle of international human rights law that discrimination does not need to be intentional in order to qualify as a violation of human rights.<sup>5</sup> This principle was recognised by the Human Rights Committee (CCPR) in the case of *Broeks v the Netherlands*.<sup>6</sup> The applicant claimed a violation of the International Covenant on Civil and Political Rights (ICCPR), as there was an unacceptable distinction in Dutch unemployment benefit law.<sup>7</sup> As a married

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<sup>1</sup> S Farrior ‘Colour in the non-discrimination provisions of the Universal Declaration of Human Rights and the two covenants’ (2015) 14 *Washington University Global Studies Law Review* 770.

<sup>2</sup> As above.

<sup>3</sup> As above. See also J Burke ‘Colourism as an intra-racial phenomenon: the case of Tanzania’ (2015); W Aceves ‘Two stories about skin colour and international human rights advocacy’ (2015) 17 *Washington University Global Studies Law Review* 563

<sup>4</sup> United Nations General Assembly International Covenant on Civil and Political Rights (ICCPR) 1966 Resolution 2200 A (XXI) art 6(1).

<sup>5</sup> Farrior (n 1 above) 771. See also D Silverstone et. al *Non-discrimination in international law: a handbook for practitioners* (2011) 106.

<sup>6</sup> Silverstone (n 5 above) 106. See also Communication 172/1984 *Broeks v The Netherlands* CCPR (9 April 1987) UN Doc CCPRC/29/D/172/1984.

<sup>7</sup> Silversone (n 5 above) 106.



woman, the law deprived the applicant of unemployment benefits, however, if she were a man, whether married or unmarried, the law in question would not have deprived her of such benefits.<sup>8</sup> The CCPR found a violation on the ground of sex discrimination.<sup>9</sup> This was notwithstanding that the State Party had not intended to discriminate against women and confirms that prohibited discrimination might occur unintentionally or without malice.<sup>10</sup> Laws and policies that have the effect of depriving people of their rights because of their “colour”, are human rights violations.<sup>11</sup> This is so, even if it was not the intent of legislators to bring about this result.<sup>12</sup> Hence, this approach recognises that a lack of intention does not diminish the existence or experience of discriminatory treatment.<sup>13</sup> It also disallows claims of unconscious bias to excuse the state from carrying out its obligations.<sup>14</sup>

As mentioned in Chapter three, the subsuming of “colour” under the ground of “race” by the CCPR may have created a blind spot for the DRC.<sup>15</sup> However, as per this principle, the DRC is still required to meet the obligation to enact a comprehensive anti-discriminatory provision which explicitly prohibits discrimination based on “colour”.<sup>16</sup> Failure to do so is a violation of the right to life, even if it is unconscious.<sup>17</sup> Hence, Congolese persons with albinism may bring individual complaints to the CCPR in order to address the “intra-racial” colourism which violates their right to life on the ground of “colour”.<sup>18</sup>

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<sup>8</sup> As above.

<sup>9</sup> As above.

<sup>10</sup> As above.

<sup>11</sup> Farrior (n 1 above) 770-771.

<sup>12</sup> As above.

<sup>13</sup> As above.

<sup>14</sup> As above.

<sup>15</sup> Human Rights Committee (CCPR) ‘Concluding observations on the fourth periodic report of the Democratic Republic of the Congo’ (2017) CCPR/C/COD/4 3.

<sup>16</sup> Silverstone (n 5 above) 106.

<sup>17</sup> As above.

<sup>18</sup> Article 1 of the Optional Protocol to the ICCPR reads as follows: “a State Party to the Covenant that becomes a party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. See United Nations General Assembly Optional Protocol to the International Covenant on Civil and Political Rights (1966) Resolution 2200 A (XXI). This was ratified by the DRC on the 1<sup>st</sup> of November 1976. See United Nations Treaty Bodies United Nations Human Rights Treaty Bodies ‘Reporting status for the Democratic Republic of Congo’

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COD&Lang=EN)  
(accessed 12 November 2021).

### 4.3. Discrimination in any area regulated by the state

Traditional international human rights jurisprudence has focused primarily on protecting private individuals from abuse by public authorities.<sup>19</sup> This is because such public authorities have the greatest effect on the level of equality in a country.<sup>20</sup> However, equality cannot be achieved if only public authorities are subject to rules on non-discrimination.<sup>21</sup> Efforts by states to further the equality of vulnerable groups may be limited if society in general discriminates against them.<sup>22</sup> Therefore, international human rights law requires states not only to comply with non-discrimination principles itself, but also to ensure that those principles are applicable to all those within a state.<sup>23</sup> This is embodied in what is known as “positive” and “negative” obligations of the state respectively.<sup>24</sup>

#### 4.3.1. “Negative obligation” on states not to discriminate

The “negative obligation on the state not to discriminate speaks to the introduction of legislation and the application thereof.<sup>25</sup> Article 26 of the ICCPR further requires states to provide effective protection against discrimination on any ground, including that of “colour”.<sup>26</sup> In its General Comment 18, the CCPR stated that Article 26 is “concerned with the obligation imposed on States Parties in regard to their legislation and the application thereof.”<sup>27</sup> Thus, when legislation is adopted by a State Party, it must comply with the requirement of Article 26 in that its content not be discriminatory”.<sup>28</sup> The DRC, therefore, has a “negative obligation” to introduce the ground of

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<sup>19</sup> Silverstone (n 5 above) 19.

<sup>20</sup> This is as a result of their power to make laws, tax its subjects and spend the national budget. See Silverstone (n 5 above) 20.

<sup>21</sup> Silverstone (n 5 above) 20.

<sup>22</sup> As above.

<sup>23</sup> As above.

<sup>24</sup> As above.

<sup>25</sup> As above.

<sup>26</sup> As above. Article 26 of the ICCPR provides that: “All persons are equal before the law and are entitled to equal protection of the law. In this respect, the law shall prohibit 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.” See ICCPR (n 4 above) art 26.

<sup>27</sup> CCPR ‘General Comment No.18: Non-discrimination’(1989) 1.

<sup>28</sup> Silverstone (n 5 above) 20.

“colour” in its non-discrimination provisions.<sup>29</sup> This may protect against violations of the right to life based on “intra-racial” colourism, as experienced by Congolese persons with albinism.<sup>30</sup>

The “negative obligation” also speaks to the application of such provisions.<sup>31</sup> In the DRC, the social stigma of albinism predisposes key stakeholders in the justice system.<sup>32</sup> Hence, some key actors in the justice system have prejudices and respond to stereotypes that prevent a safe and enabling environment for persons with albinism to access justice.<sup>33</sup> As stated by the UTSS, “the reporting, investigation, arrest, prosecution and conviction of the perpetrators of these crimes against Congolese with albinism remain rare”.<sup>34</sup>

Therefore, in addition to the introduction of comprehensive anti-discriminatory laws which prohibit discrimination based on “colour”, the DRC should also implement measures which ensure its effective application.<sup>35</sup> An example of this is the establishment of a task force on albinism, consisting of members of various relevant ministries including that of justice, which could help legislators on the effective application of the ground of “colour”.<sup>36</sup> Such a task force should be appropriately resourced with accurate information on the condition, inclusive of civil society groups and people with albinism.<sup>37</sup>

#### **4.3.2. “Positive obligation” on states not to discriminate**

The “positive obligation” on states not to discriminate consists of addressing discrimination in the private sphere.<sup>38</sup> Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that states must prohibit and prevent racial discrimination “by any person, group or organisation”.<sup>39</sup> In the case of *Lacko v Slovak Republic*,

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<sup>29</sup> ICCPR (n 4 above) art 26.

<sup>30</sup> ICCPR (n 4 above) art 6(1).

<sup>31</sup> ICCPR (n 4 above) art 26.

<sup>32</sup> United Nations General Assembly ‘Report of the Independent Expert on the enjoyment of human rights by persons with albinism: right to access to justice for persons with albinism’ (2019) A/HRC/40/62 4.

<sup>33</sup> United Nations General Assembly (n 32 above) 7.

<sup>34</sup> Under the Same Sun (UTSS) ‘The political and civil rights of people with albinism in the Democratic Republic of Congo’ (2017) 4.

<sup>35</sup> ICCPR (n 3 above) art 26.

<sup>36</sup> UTSS (n 34 above) 10.

<sup>37</sup> As above.

<sup>38</sup> Silverstone (n 5 above) 20.

<sup>39</sup> Article 2 (1)(d) of ICERD reads as follows: “each State Party shall prohibit and bring to an end, by all appropriate means including legislation as required by circumstances, racial discrimination by any persons, group or organisation”. See ICERD (n 4 above) art 2(1)(d).

the Committee on the Elimination of Racial Discrimination (CERD) found that the state was under a “positive obligation” to criminally investigate a private individual when he discriminated against another private individual on the basis of one of the grounds of “racial discrimination”.<sup>40</sup>

The CCPR has also affirmed the “positive obligation” of states to combat private sector discrimination in the admissibility of the decision of *Nahlik v Austria*.<sup>41</sup> In this case, it was stated that “under Articles 2 and 26 of the Covenant, the State Party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of the States Parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties”.<sup>42</sup>

Hence, when private claims of “intra-racial” colourism are brought by Congolese persons with albinism, the judiciary of the DRC has the “positive obligation” to criminally investigate these claims.<sup>43</sup> Furthermore, it must be ensured that persons with albinism are free from discrimination on the ground of colour occurring both within the public or private spheres.<sup>44</sup> This includes the violence they face at the hands of their fellow citizens.<sup>45</sup>

#### **4.4. Measures in addition to laws and regulations**

States must not only enact laws and regulations, but also take other measures to address the root causes of the prejudice or conditions that lead to discrimination.<sup>46</sup> The CCPR has remarked that the failure to fully eradicate the effects of past discrimination in society makes it more difficult to ensure the full enjoyment of the rights in the Covenant.<sup>47</sup> It is, therefore, not just laws but also other measures which bring about changes in discriminatory attitudes that the state has an obligation to introduce.<sup>48</sup>

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<sup>40</sup> Silverstone (n 5 above) 21. See also *Miroslav v Slovakia* CERD (9 August 2001) CERD/C/59/D/11/1998.

<sup>41</sup> Silverstone (n 5 above) 21. See also *Mumtaz v Austria* CCPR (29 April 2002) CCPR/C/74/D/965/2000.

<sup>42</sup> Silverstone (n 5 above) 21.

<sup>43</sup> ICCPR (n 4 above) art (1)(d).

<sup>44</sup> As above.

<sup>45</sup> As above.

<sup>46</sup> Farrior (n 1 above) 773.

<sup>47</sup> As above. See also United Nations General Assembly ‘Report of the Human Rights Committee’ (1996) UN Doc A/40/50 VOL I para 270.

<sup>48</sup> United Nations General Assembly (n 47 above) para 270.

#### 4.4.1. Research and education

There is little popular knowledge about the condition of albinism in the DRC.<sup>49</sup> In this vacuum, superstitions about their “skin colour” thrive which leads to the violation of the human right to life as referred to throughout this mini-dissertation.<sup>50</sup> Hence, accurate research and education on the condition, which can combat these dangerous myths should be made readily available and promoted to the public.<sup>51</sup> In addition, education must be provided to those who hold power over others in society, such as police, judges, prosecutors, administrators and enforcers of regulations, so that they do not exercise that power in a discriminatory manner.<sup>52</sup>

#### 4.4.1. Disaggregated data

Human rights treaty bodies have emphasised the importance of gathering data disaggregated by “race”, “colour” and the other enumerated grounds.<sup>53</sup> This is in part to address the denial syndrome, where states deny that discrimination on certain grounds is a problem in their country, or the minimisation syndrome, where states minimise the problem of discrimination in their countries.<sup>54</sup> Without disaggregated data, states do not necessarily know whether people are facing discrimination.<sup>55</sup> Hence, once the ground of “colour” has been adopted by the DRC, corresponding disaggregated data should be provided to assess its effectiveness in protecting the human right to life of Congolese persons with albinism.<sup>56</sup>

#### 4.4.2. Requirement that measures must be effective

In the event that the DRC has taken the steps mentioned above but problems of “intra-racial” colourism persist, the CCPR urges states to intensify its efforts or to make its efforts more

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<sup>49</sup> UTSS (n 34 above) 1. In the DRC there is still no reliable data on the prevalence, clinical features or clinical outcomes of persons with albinism. At the time of completing this mini-dissertation, only a single report documenting the treatment of advanced basal carcinoma (a type of cancer) in an albino patient has been published from the DRC. See G Inena et.al ‘Patterns of skin cancer and treatment outcomes for patients with albinism at Kisangani Clinic, DRC’ (2020) 59 *International Journal of Dermatology* 1125 at 1125.

<sup>50</sup> UTSS (n 10 above) 1.

<sup>51</sup> As above, 6.

<sup>52</sup> As above.

<sup>53</sup> Committee on the Elimination of Racial Discrimination ‘Guidelines for the CERD-specific document to be submitted by States Parties under Article 9, paragraph 1 of the Convention’ (2008) CERD/C/2007/1 para 6.

<sup>54</sup> Farrior (n 1 above) 775.

<sup>55</sup> As above.

<sup>56</sup> As above.

targeted.<sup>57</sup> Therefore, it is recommended that this requirement is adhered to until persons with albinism and other victims of “intra-racial” colourism alike are able to fully enjoy the right to life.<sup>58</sup>

#### **4.5. Conclusion**

The above principles and measures demonstrate that treaties which prohibit discrimination on the ground of “colour” can be used to combat the “intra-racial” colourism against Congolese persons with albinism, which violates their right to life.<sup>59</sup> The principle of discriminatory intent not being required and the ratification of the Optional Protocol to the ICCPR allow for victims to bring individual complaints to the CCPR.<sup>60</sup> The adherence to the principle of discrimination in any area regulated by the state will prevent the “intra-racial” colourism which occurs in the private sphere, to perpetuate with impunity in the public sphere.<sup>61</sup> Lastly, measures such as education, disaggregated data and the requirement of effectiveness will bring about and monitor changes in discriminatory attitudes.<sup>62</sup> We now turn to the concluding chapter of the mini- dissertation, which summarises the study and makes recommendations.

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<sup>57</sup> United Nations General Assembly (n 47 above) para 182.

<sup>58</sup> As above.

<sup>59</sup> Farrior (n 1 above) 775.

<sup>60</sup> Silverstone (n 5 above) 19.

<sup>61</sup> Silverstone (n 250 above) 20.

<sup>62</sup> Farrior (n 44 above) 775.

## CHAPTER FIVE

### RECOMMENDATIONS AND CONCLUSION

#### 5.1. Introduction

This chapter closes the study by summarising the findings of chapters two to four, and thereafter, making recommendations. Finally, the overall conclusion of the mini-dissertation is reached.

#### 5.2. Summary of chapters

Chapter two found that it can be reasonably concluded that “colour” in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), is independent from “race” and thus includes the prohibition on “intra-racial” colourism.<sup>1</sup> This is because the “ordinary meaning” indicates that “colour” as therein is “skin colour”.<sup>2</sup> Although it has a relationship with “race”, it is still sometimes separate to it as shown by the determined context.<sup>3</sup> In addition, the “object and purpose” indicate that both “race” and “colour”, and by virtue “intra-racial” colourism are to be regarded as encompassed in the term “*all* forms of racial discrimination”.<sup>4</sup> The umbrella term for the Convention is “racial discrimination”, not “race”.<sup>5</sup> Thus, “racial discrimination” is given a stipulative meaning as per the five grounds set out therein.<sup>6</sup> Therefore, despite their close relationship, “race” is not the same as “racial discrimination” and, thus, “colour” has not been subsumed under “race”.<sup>7</sup>

Despite its independence in theory, Chapter three demonstrated that the ground of “colour” is subsumed under “race” in practice.<sup>8</sup> The concluding observations of the Human Rights Committee (CCPR) have allowed for the “intra-racial” colourism against Congolese persons with albinism to continue with impunity, as it creates a blind spot for the DRC who has failed to list this ground in

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<sup>1</sup> O Dorr & K Schamlenbach *The Vienna Convention on the Law of Treaties: a commentary* (2012)543-562.

<sup>2</sup> As above.

<sup>3</sup> As above.

<sup>4</sup> As above.

<sup>5</sup> P Thornberry ‘The convention on the elimination of racial discrimination, indigenous peoples and caste/descent-based discrimination’ in J Castellino & N Walsh *International law and indigenous peoples* (2005) 19;D Keane *Caste-based discrimination in international human rights law* (2007) 19.

<sup>6</sup> As above.

<sup>7</sup> As above.

<sup>8</sup> Human Rights Committee (CCPR) ‘Concluding observations on the fourth periodic report of the Democratic Republic of the Congo’ (2017) CCPR/C/COD/4 3.

domestic laws.<sup>9</sup> However, since “colour” is included in the non-discrimination clause of the International Covenant on Civil and Political Rights (ICCPR) and other human rights instruments, certain aspects of these treaties, as well as other measures, may be of particular use in addressing human rights violations in this regard.<sup>10</sup>

Chapter four analysed the above-mentioned aspects and measures and found that they all have the potential to combat the “intra-racial” colourism against Congolese persons with albinism, which violates their right to life.<sup>11</sup> The principle of discriminatory intent not being required and the ratification of the Optional Protocol to the ICCPR allows for victims to bring individual complaints to the CCPR.<sup>12</sup> The adherence to the principle of discrimination in any area regulated by the state will prevent the “intra-racial” colourism which occurs in the private sphere, to perpetuate with impunity in the public sphere.<sup>13</sup> Lastly, measures such as education, disaggregated data and the requirement of effectiveness will bring about and monitor changes in discriminatory attitudes.<sup>14</sup>

### 5.3. Recommendations

#### 5.3.1. Issue a General Recommendation on “colour”

For the first thirty years of state reporting, doubts remained about whether the definition of “racial discrimination” covered less favourable treatment based upon caste or caste-like forms of inequality.<sup>15</sup> These doubts were laid to rest when the Committee on the Elimination of Racial Discrimination (CERD) issued a General Recommendation about descent and thus differentiated one of the five classes of persons protected under the Convention.<sup>16</sup> Therefore, it is recommended

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<sup>9</sup> As above.

<sup>10</sup> S Farrow ‘Colour in the non-discrimination provisions of the Universal Declaration of Human Rights and the two covenants’ (2015) 14 *Washington University Global Studies Law Review* 770.

<sup>11</sup> As above.

<sup>12</sup> D Silverstone et. al *Non-discrimination in international law: a handbook for practitioners* (2011) 106. 19.

<sup>13</sup> As above, 20.

<sup>14</sup> Farrow (n 10 above) 775.

<sup>15</sup> M Banton ‘Colour as a ground of discrimination’ in N Ghanea & A Xanthaki *Minorities, people and self-determination: essays in honour of Patrick Thornberry* (2005) 237

<sup>16</sup> As above.



that the CERD does the same for the ground of “colour” in order to eradicate any confusion on the term and facilitate the increased application of the ground, as and when it is necessary.<sup>17</sup>

### **5.3.2. Increased application of “colour” by treaty bodies**

The practice of the CCPR analysed in this mini-dissertation has demonstrated that the definition of “racial discrimination” has led to the subsuming of “colour” under the ground of “race”.<sup>18</sup> It is, therefore, recommended that the CCPR and other treaty bodies make concluding observations on the ground of “colour” independently so as to clearly demonstrate its function and importance in the protection of human rights violations.<sup>19</sup> This is especially so in those cases based on “intra-racial” colourism as seen with Congolese persons with albinism.<sup>20</sup>

### **5.3.3. Immediate implementation of principles and measures by the DRC**

It is recommended that the DRC begin to implement the measures discussed in Chapter three as soon as possible.<sup>21</sup> Persons with albinism are having their right to life violated due to their “skin colour” and they expect this to be recognised in law as discrimination on the ground of “colour”.<sup>22</sup> In addition, the introduction of these measures will also assist the country in reaching its targets for the predecessor of the Regional Action Plan on Albinism (2017-2021), namely the Plan of Action on Ending Attacks and Discrimination against persons with albinism (2021-2031).<sup>23</sup>

## **5.4. Conclusion**

Overall, it is evident that “colour” and “race” are distinct grounds of prohibited discrimination in theory.<sup>24</sup> However, due to their close relationship, in practice the former is being subsumed under the latter.<sup>25</sup> The “intra-racial” colourism against Congolese persons with albinism demonstrates the need to apply the ground of “colour” independently from “race” in order to combat the

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<sup>17</sup> As above.

<sup>18</sup> CCPR (n 8 above) 3.

<sup>19</sup> As above.

<sup>20</sup> As above.

<sup>21</sup> Farrior (n 10 above) 771-777.

<sup>22</sup> Banton (n 15 above) 247.

<sup>23</sup> African Union ‘Implementation matrix of the plan to end attacks and other human rights violations targeting persons with albinism in Africa 2021-2031’ (2019).

<sup>24</sup> Thornberry (n 5 above) 19

<sup>25</sup> T Jones ‘Shades of brown: the law of skin colour’ (2000) 49 *Duke Law Journal* 1487 94.

violations of their right to life which currently perpetuates with impunity.<sup>26</sup> People with albinism are not ghosts, they are human beings.<sup>27</sup> As Mswela and Nothling-Slabbert put it, “persons with albinism require protection against unfair discrimination...specifically based on their “colour”.<sup>28</sup>

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<sup>26</sup> Under the Same Sun (UTSS) ‘The political and civil rights of people with albinism in the Democratic Republic of Congo’ (2017) 21.

<sup>27</sup> Persons with albinism not ghosts but human beings ‘Albinism: beyond race, ethnicity and gender’ <https://albinism.ohchr.org/about-albinism.html> (accessed on 19 December 2021).

<sup>28</sup> M Mswela & M Nothling-Slabbert ‘Colour discrimination against persons with albinism in South Africa’ (2013) 6 *South African Journal of Bioethics and Law* 26.

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