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SYMPOSIUM ON RACE, RACISM, AND INTERNATIONAL LAW

RACE, INDIGENEITY, AND MIGRATION

*Natsu Taylor Saito**

Race, indigeneity, and migration are integrally related in international law. This relationship can be traced to their origins in a legal system dedicated to facilitating European colonialism and imperial expansion. International law has constructed racial difference and deployed racialized hierarchies to determine who would be permitted to migrate to various parts of the world and what their rights or responsibilities would be in those locations, as well as the status of those already living in the territories at issue. Genealogical inquiry makes it clear that the imposition of racialized hierarchies, the construction of indigeneity, and the restrictions placed (or not placed) on migration in international law have been, and continue to be, functions of a colonial world order. This essay begins by acknowledging the colonial roots of contemporary migration patterns, considers how formal decolonization reified arbitrarily imposed states and state borders, and argues that genuine redress has been sidelined by framing colonial dispossession as poverty and underdevelopment. It concludes that, because the system remains structurally dependent upon racism, xenophobia, and the systemic erasure of indigeneity, remediation of these problems will require the genuine decolonization not only of subordinated peoples, but of international law itself.

Indigeneity refers to peoples with longstanding cultural and spiritual ties to particular lands. In the words of UN Special Rapporteur José Martínez Cobo, Indigenous peoples have "a historical continuity with pre-invasion and pre-colonial societies," and a determination "to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[1] By contrast, migration—as constructed in international law—refers to the relocation of individuals or peoples, often from what they understand as their places of origin, to territories occupied by others. As such, indigeneity and migration would appear to be diametrically opposed phenomena.

In fact, however, the migrations of European colonizers have resulted in the racialized construction of indigeneity and the elimination, dispossession, and dislocation of Indigenous peoples. These developments, in turn, have generated further migrations, sometimes instigated by Euro-derivative states and often despite their resistance. Contemporary international law condemns racial discrimination, recognizes at least some degree of Indigenous sovereignty, and mandates basic protections for migrants, but it has not yet come to terms with its own legacy of empire. As a result, despite facial condemnation of racism and colonialism, the international legal system has not been able to effectively address the complexities of indigeneity and migration in the twenty-first century.

* *Regents Professor Emerita, Georgia State University College of Law, Atlanta, GA, United States.*

[1] José R. Martínez Cobo, Special Rapporteur, Study of the Problem of Discrimination Against Indigenous Populations, Vol. V: Conclusions, Proposals and Recommendations, 29, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (Mar. 1987).

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Colonial Roots

Since Francisco de Vitoria's foundational conceptualization of modern international law, the construct of indigeneity has been used to justify a process in which well over sixty million European colonizers presumed a right to migrate to the ancestral territories of Indigenous peoples and, once there, to appropriate, exploit, and exercise hegemonic control over land, natural resources, and human beings.[2] By 1914, international law had legitimated and regularized the European conquest of some 84 percent of the world.[3] The colonizers claimed a "civilizing mission," based on the racial construction of Indigenous peoples as inherently—and perpetually—"savage" and "uncivilized."[4] As a result, as James Gathii notes, "[c]olonialism has signified and continues to signify the manner in which ideologies based on racial and cultural differences legitimated expropriation, conquest, conversion, and outcomes such as slavery."[5]

While humans have always traveled and interacted with others, modern global migrations are largely the product of empire. Colonial commodification of lands and peoples gave us the transatlantic slave trade, in which more than twelve million Africans were forced into a brutal and often deadly journey to the Europeans' "New World."[6] Settler colonists' insatiable desire for land resulted in genocidal forced removals of Indigenous peoples in North America as well as Australia and Aotearoa (New Zealand).[7] The perceived labor needs of colonial and settler colonial regimes have generated the migration of untold millions within the African continent,[8] as well as globalized diasporas of Asian—particularly, Chinese and Indian—workers.[9] Recent mass migrations through Central America and Mexico highlight how Indigenous peoples continue to be driven from their homelands by neocolonial forces, corporate and governmental.[10] And political, economic, and climate crises bring waves of migrants from formerly colonized territories to the borders of Europe.[11]

States and Borders

The Earth is now divided into approximately two hundred purportedly independent states—political constructions that, between them, subsume over five thousand nations or peoples.[12] Virtually all are either former colonial

[2] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 19–22 (2005); E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL Unbound 142 (2017).

[3] Philip T. Hoffman, Why Did Europe Conquer the World? 2 (2015); *see generally* Marc Ferro, Colonization: A Global History (1997).

[4] Anghie, *supra* note 2, at 3–4; Mark McMillan & Sophie Rigney, *The Place of the First Peoples in the International Sphere: A Logical Starting Point for the Demand for Justice by Indigenous Peoples*, 39 Melb. U. L. Rev. 981, 994–97 (2016).

[5] James Thuo Gathii, *Neoliberalism, Colonialism, and International Governance: Decentering the International Law of Government Legitimacy*, 98 Mich. L. Rev. 1996, 2018 (2000).

[6] Graziella Bertocchi, *The Legacies of Slavery in and Out of Africa*, 5 IZA J. Migration 1, 2 (2016). This figure does not include the large percentage of those captured in the interior who did not survive the journey to the coast.

[7] *See* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 Duke L.J. 660 (1990).

[8] Christopher Szabla, *Entrenching Hierarchies in the Global Periphery: Migration, Development and the "Native" in ILO Legal Reform Efforts*, 21 Melb. J. Int'l L. 334, 343 (2020).

[9] *See* E. Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445, 456–57 (2022).

[10] Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 Cal. L. Rev. 63, 64–70 (2021); *see also* Leti Volpp, *The Indigenous as Alien*, 5 U.C. Irvine L. Rev. 289 (2015).

[11] *See generally* E. Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1509 (2019).

[12] *See* Bernard Nietschmann, *The Fourth World: Nations Versus States*, *in* Reordering the World: Geopolitical Perspectives on the Twenty-First Century 225–27 (George J. Demko & William B. Wood eds., 1994).

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powers, formerly colonized territories, or settler colonial states. Their boundaries, their political, economic, and legal status, and their relationships to each other reflect deeply entangled histories of racialized domination and subordination.[13]

States were the building blocks of the colonial world order, and they continue to dominate international law. Initially, only European states were deemed sufficiently "civilized" to be international legal actors.[14] They claimed an all-encompassing power ("state sovereignty") to create and control territorial borders, erase Indigenous sovereignty within those borders, impose state-based rights and identities, and employ militarized violence within and between occupied territories. These lands were divided according to the interests of the colonizers, with little to no regard for the histories and cultures of the communities being arbitrarily sundered or equally arbitrarily merged.[15] "The connection between a people and their territory, assumed and prescribed by Eurocentric theories of the 'nation-state,'" Tayyab Mahmud observes, "found no room in these configurations."[16]

As unabashed colonial rule became unsustainable, the international legal system equated decolonization with the recognition of independent statehood. However, emerging states were required to accept colonially imposed boundaries as a condition of independence, "a straight-jacket," in Makau Mutua's words, "that continues to deny freedom to millions of Africans."[17] Postcolonial states were now incentivized to defend those borders and to promote national—actually, statist—identities that erase indigeneity and promote exclusionary (and often xenophobic) policies.[18] Formal decolonization thus not only reified colonially imposed borders, but also reinforced the sanctity of states and their presumed right to control migration.[19] Consequently, as Tendayi Achiume notes, "the default manner in which [contemporary national borders] enforce exclusion and inclusion is racially disparate" and "international migration and mobility [remain] racial privileges."[20]

Legal Interventions

Because indigeneity signals prior occupation of—and, potentially, preemptive rights to—colonized lands, colonial powers have employed numerous strategies to eliminate Indigenous peoples outright or to ensure their conceptual disappearance.[21] Even as international authorities claimed to foreswear colonialism during the early twentieth century, the League of Nations' Mandate System treated colonized peoples differently based on their level of "civilization."[22] Firmly embedded in a European worldview that presumes human history to be a linear journey from savagery to civilization (defined by the conquest and control of nature), "progress" has been

[13] *See* Anibal Quijano & Michael Ennis, *Coloniality of Power, Eurocentrism, and Latin America*, 1 Nepantla: Views from South 533, 534–35 (2000).

[14] *See* Makau wa Mutua, *Why Redraw the Map of Africa? A Moral and Legal Inquiry*, 16 Mich. J. Int'l L. 1113, 1123–24 (1995).

[15] *Id.* at 1134.

[16] Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 Brook. J. Int'l L. 1, 26 (2010).

[17] Mutua, *supra* note 14, at 1175.

[18] *See, e.g.*, Organization of African Unity, AHG Res. 16(I) Border Disputes Among African States (July 17–21, 1964) (committing to defend extant state borders). On resistance to this premise, see *Resolutions of the All African People's Conference*, 37 Current Hist. 41, 44–46 (1959) (reproducing Conference Resolutions on Frontiers, Boundaries and Federations, Accra, Ghana, Dec. 5–13, 1958).

[19] *See* Gathii, *supra* note 5, at 2023–24.

[20] Achiume, *supra* note 9, at 448–49.

[21] *See* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. Genocide Res. 387 (2006).

[22] Anghie, *supra* note 2, at 140–50.

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measured by the absorption of Indigenous peoples into "modern" society.[23] In turn, as they were "uplifted," Indigenous peoples have been stripped of their identities and, often, their unique legal status.[24] Thus, for example, in the twentieth century, some institutions—most notably, the International Labour Organization—focused on transforming Native people into workers capable of contributing to industrializing economies.[25] A common contemporary strategy is to collapse indigeneity into "race," transforming peoples with a recognized right to self-determination into "minorities" within statist structures.[26]

The legitimacy of international law derives from its claimed origins in state consent. However, as the Third World majority that emerged in the mid-1900s threatened to use state power to truly transform—perhaps even actually decolonize—the international legal system, it was thwarted at every turn. The current international order asserts a mandate to promote international peace (recognized to require some measure of social justice), stability (meaning the control necessary to maintain the status quo), and development (equated with economic growth and extraction). While appearing benign, these goals have been leveraged to disempower newly independent states' attempts to change the rules or provide redress for colonial harm; to transfer power from inclusive institutions to those controlled by the richest states; and to perpetuate colonial dynamics by distinguishing successful from "failed" states.

Thus, "development functions"—measures that could have addressed the economic consequences of colonial exploitation—were transferred from UN organs to international financial institutions, such as the World Bank and the International Monetary Fund, entities lacking democratic constraints.[27] In the 1970s, a proposed New International Economic Order received overwhelming support in the UN General Assembly, but the world's most economically powerful states refused to acknowledge that it had any binding effect on them.[28] As Antony Anghie notes, relying heavily on its doctrine of state sovereignty, international law not only "legitimized colonial exploitation," but "prevent[ed] any claims for colonial reparations," as well.[29]

Perpetuating the myth of the sovereign equality of states and disregarding centuries of dispossession and exploitation, the world's most powerful states and their leaders have reduced the legacy of colonialism to "poverty" and proceeded to implement decade after decade of "development" programs that pose no risk to the economic status quo.[30] One result is a highly racialized divide between "developed" and "undeveloped" states. In the 1990s, some states subjected to intense economic and political turmoil were characterized as "failed states" and, in a transparent reversion to colonial thinking, considered candidates for UN "conservatorship."[31]

All of this has created a world in which people are compelled to flee economic, political, and ecological catastrophes, many of them Indigenous migrants driven from their traditional lands by extractive industries,

[23] Natsu Taylor Saito, *Different Paths*, 1 J. Law & Pol. Econ. 46, 54–58 (2020).

[24] *See, e.g.,* Kyle Willmott, *Taxes, Taxpayers, and Settler Colonialism: Toward a Critical Fiscal Sociology of Tax as White Property*, 56 L. & Soc'y Rev. 6, 12–13 (2022) (noting that for many years Indigenous individuals who voted in Canada could lose their status, including the right to live on reserve lands).

[25] *See* Szabla, *supra* note 8; Jedediah Kinnison, *Modernizing Conquest* (University of Arizona Doctoral Dissertation, 2021).

[26] Yousef T. Jabareen, *Redefining Minority Rights Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, 18 U.C. Davis J. Int'l L. & Pol'y 119, 130–31 (2011).

[27] *See* Natsu Taylor Saito, *Decolonization, Development, and Denial*, 6 Fla. A & M U. L. Rev. 1, 13–17 (2010).

[28] *See* Ruth Gordon, *The Dawn of a New, New International Economic Order?*, 72 L. & Contemp. Probs. 131, 142–45 (2009).

[29] Anghie, *supra* note 2, at 2.

[30] *See generally* Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 Wis. Int'l L.J. 1 (2004); *Development Agenda "Fails" on Racial Equality and Non-Discrimination*, UN News, (July 5, 2022).

[31] Henry J. Richardson III, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 Temp. Int'l & Comp. L.J. 1, 2–3 (1996).

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agribusiness, and corporatized exploitation.[32] For decades, international institutions have recognized these problems, but remedial measures—other than the "austerities" imposed in the name of development—have largely been relegated to the human rights realm. As formerly (and currently) colonized peoples have gained influence in the international system, we have seen the burgeoning of multilateral treaties, expansions of customary law, global summits, and dozens of expert mechanisms focused on the problems of racism and xenophobia; the rights of Indigenous peoples; racial, national, ethnic, or religious minorities; and migrants and refugees.[33] Thanks to these developments, it is now incontrovertible that *all* peoples have the right to self-determination, that Indigenous peoples have distinctive legal status and rights, and that fundamental human rights are to be accorded to everyone, regardless of nationality or immigration status. Nonetheless, these "rights" are framed as constraints on state power, in terms set by those representing state interests. Because states largely control enforcement mechanisms, human rights are interpreted within the parameters of state sovereignty and "territorial integrity,"[34] thus reinforcing the status quo while ameliorating some of its harshest consequences.

Decolonization

International law provides a framework of anti-discrimination principles and remedial measures superior to those of most UN member states, but has been spectacularly unsuccessful in dismantling structural racism. This failure can be traced to two sources. First, the law rests on foundational principles created by and for those European and Euro-derivative powers whose colonial ventures were made possible by racialized subjugation on a global scale. Second, is its failure to ensure substantive decolonization. Rather than dismantling colonial relationships, restructuring legal institutions, and remediating the harm done by centuries of exploitation, decolonization has been equated simply with independent statehood. Those who have profited most from colonial and imperial exploitation have declared the world to be a level playing field and characterized the devastation of colonized peoples as problems of poverty and "underdevelopment." Settler states have been even more disingenuous, utilizing their economic, military, and political power to prevent international law from acknowledging their regimes as ongoing colonial occupations.

Thanks to this history, the contemporary international legal system remains structurally dependent upon racism, xenophobia, and the systemic erasure of indigeneity. Its anti-discrimination law—articulated and enforced by states that depend upon racialized exploitation, the subordination of internally colonized peoples, and the exclusion of those deemed Other—is simply incapable of ensuring human rights or fundamental freedoms. We cannot change the origins of this system, but we could change these outcomes by acknowledging the extent to which ongoing colonial relations perpetuate racism and xenophobia, by taking steps to remediate the damage done by colonialism, and by moving toward structures of *inter-national* relations unconstrained by colonially derived statism.

Recentering Justice

The contemporary international legal system recognizes that global peace and security depend upon the protection of fundamental human rights. Nonetheless, some 258 million people now live outside their countries of origin, and the number of refugees "forcibly displaced as a result of persecution, conflict, violence, human rights

[32] *See* Riley & Carpenter, *supra* note 10, at 102–05.

[33] For an overview, see UNHCR, *Instruments & Mechanisms*.

[34] *See generally* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, et Cetera*, 68 Fordham L. Rev. 1 (1999).

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violations or events seriously disturbing public order" has more than doubled in the past decade.[35] As individuals, migrants are vulnerable to gendered predation and racialized violence; collectively, they are also the targets of racially disparate state practices that violate international prohibitions on *refoulement* as well as collective expulsion.[36]

Racism and racial violence remain endemic. A 2022 UN report concluded that there has been "little progress combating systemic racism against people of African descent,"[37] and racial disparities are reflected in all measures of well-being as well as consistent patterns of state-sponsored and private violence. Xenophobia and "nativism" persist, their perpetrators intent on asserting preemptive rights to place and space. Racialized violence against Indigenous peoples is commonplace, particularly in regions coveted by extractive industries,[38] and attacks on Indigenous women and girls—a global problem—are perpetrated with impunity.[39]

But the harm suffered by Indigenous peoples who remain on or near their ancestral territories, by those who have been forcibly removed from their homelands, and by persons compelled to migrate for any number of other reasons goes beyond racially disparate treatment and threats of physical violence. Their racialized subordination and exclusion are structurally embedded in international and domestic legal systems in ways that often threaten their very survival. Without the actual decolonization of international law, starting with the recognition of the rights of Indigenous peoples and, particularly, their right to self-determination, we will not be able to eliminate racism or xenophobia, or ensure migrants' rights, because states will continue to perpetuate the status quo by relying on the racial narratives, legal advantages, and dynamics of a global economy skewed by its heritage of colonial exploitation.

[35] UNHCR, Global Trends: Forced Displacement in 2021.

[36] *Id.*

[37] *Little Progress Combating Systemic Racism Against People of African Descent, UN Report*, UN NEWS (Sept. 30, 2022).

[38] Astrid Arellano & Yvette Sierra Praeli, *A Look at Violence and Conflict Over Indigenous Lands in Nine Latin American Countries*, MONGABAY (May 31, 2022); *see also Extractive Projects Cause Irreparable Harm to Indigenous Cultures, Languages, Lives, Speakers Tell Permanent Forum*, UN NEWS, (Apr. 25, 2022).

[39] *See* UN Special Rapporteur on violence against women, Reem Alsalem, Violence Against Indigenous Women and Girls, para. 8 (Apr. 21, 2022).

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