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SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

DIGITAL RACIAL BORDERS

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It is the core and intended function of borders to discriminate. Descriptively, their purpose is to differentiate or distinguish among different categories of persons, sorting those who may enter and belong from those who may not. But it is also a core function of modern borders to discriminate in the normatively prejudicial sense—they allocate fundamental human rights differentially on the basis of race, gender, class, national origin, sexual orientation, and disability status, among others. In this essay, I briefly sketch what I have described elsewhere as the contemporary system of racial borders: border regimes that variously allocate and curtail mobility and migration on a racial basis, largely relying upon facially race neutral mechanisms.[1] Second, I reflect on the increasing prevalence of digital technologies in border regimes and their enforcement, with an emphasis on their racial implications, drawing from my recent report to the UN General Assembly on racial discrimination in digital border enforcement.[2] The contribution of this essay is thus to reflect on the co-constituting and mutually reinforcing effects of racial borders and digital borders, which require specific attention together as digital racial borders.

Racial Borders

Historians of migration from the late nineteenth century onwards provide a genealogy of contemporary international border and migration governance that is instructive for scholars concerned with border discrimination.[3] The discriminatory function of borders, at least (but by no means only) with respect to race, is one that was historically intended. To be clear, by "race" I mean the colonial social construction according to which morphology and ancestry have been deployed to order human beings hierarchically in categories such as Black, White, and so on.[4] From the evolution of the prevailing doctrine of the sovereign right to exclude, to passport nationality as a determinant of international mobility and migration, contemporary borders' building blocks have their origins in careful, transnational strategies rooted in European colonial empire. These strategies sought to govern the mobility

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[1] E. Tendayi Achiume, *Racial Borders*, GEO. L.J. (forthcoming 2022).

[2] Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), UN Doc. A/75/590 (Nov. 10, 2020).

[3] *See, e.g.*, MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY (2008); RADHIKA MONGIA, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE (2018).

[4] *See* IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006); Aníbal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM S. 533, 535 (Michael Ennis trans., 2000).

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of non-Whites for the purpose of colonial exploitation and edification. Neocolonial critiques of international law generally stress the persistence of colonial regimes of subordination even after the period of formal decolonization of Africa and Asia. Where borders are concerned, a significant dimension of their neocoloniality (that is, their reproduction of colonial-era power relations) is their facilitation of racialized inclusion and exclusion.

For example, through elaborate visa regimes, countries in the First World or Global North immobilize citizens of the Third World or Global South, implementing global and regional regimes of de facto racial segregation.[5] With virtually no legal pathways to migration or safe passage to access the European Union, African migrants and refugees, alongside Syrians, Afghans, and others, face the deadly border regime of the Union, or what Nicholas De Genova has aptly described as "Europe's racial borders."[6] The borders of the United States—a country that is at once a settler colonial project and imperial hegemon—similarly exclude and include on a racial basis, as U.S. immigration and critical race scholars have widely detailed.[7] In Asia, racialized and religious exclusion of Rohingya from Myanmar and neighboring countries and the entrenchment of Hindu nationalist commitments in citizenship and immigration policy illustrate the potency of borders as discriminatory technology.[8]

In contemporary public, political, and even international legal discourse, there is a tendency to treat international borders as race neutral unless these borders are overlaid with explicitly racist or xenophobic policies such as those championed by the administration of former U.S. President Donald Trump, Hungarian President Viktor Orbàn, or other far right political projects more aptly fitting the description of illiberal. Yet whether through national origin or nationality restrictions that can and do operate as proxies for race, or through racial profiling and other mechanisms that enact racialized immigration enforcement, the contemporary system of racial borders operates on ostensibly liberal terms.[9] Contributions to this symposium join a growing body of recent international legal scholarship that examines racial discrimination in the ordinary course of border control in liberal democracies, discrimination that is often permitted in law.

Digital Racial Borders

Within the UN human rights system there has been growing recognition of how centrally digital technologies mediate enjoyment of fundamental rights as states and private corporations rely upon these technologies to deliver essential goods and services.[10] Border and immigration enforcement, too, has been subject to rapid digitization, a phenomenon that has only escalated in response to the COVID-19 pandemic. Our age is unquestionably the age of the rise of what other scholars have termed "digital borders"[11]—borders whose infrastructure increasingly relies upon machine learning, big data, automated algorithmic decision-making systems, predictive analytics,

[5] *See* Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 266 (2016), which gives an illuminating example of the implementation of a colonial imperative to tether non-Whites to geographic territories, which ultimately ensured racial exclusion could be achieved through geographic categories.

[6] Nicholas De Genova, *Europe's Racial Borders*, MONITOR RACISM (Jan. 2018).

[7] *See, e.g.*, NATSU TAYLOR SAITO, SETTLER COLONIAL RACISM, AND LAW: WHY STRUCTURAL RACISM PERSISTS ch. 7 (2020).

[8] *See* Michelle Foster & Timnah Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind-Spot of International Law?*, 11 COLUM. J. RACE & L. 83, 86, 96 (2021)

[9] *See* Achiume, *supra* note 1.

[10] *See, e.g.*, Report of the Special Rapporteur on Extreme Poverty and Human Rights (Philip Alston), UN Doc. A/74/493, at 2 (Oct. 11, 2019); Report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression (David Kaye), UN Doc. A/73/348, paras. 36–38 (Aug. 29, 2018); Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), UN Doc. A/HRC/44/57 (Jun. 18, 2020).

[11] *See, e.g.*, Dennis Broeders, *The New Digital Borders of Europe: EU Databases and the Surveillance of Irregular Migrants*, 22 INT'L SOC. 71 (2007).

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and related digital technologies. These technologies form part of identification documents and systems, facial recognition systems, ground sensors, aerial video surveillance drones, biometric databases, and in some places, even part of visa and asylum decision-making processes.

In November 2020, I submitted a report to the UN General Assembly on racial and xenophobic discrimination in digital border and immigration enforcement.[12] In it, I highlighted reports from around the world illustrating direct, indirect, structural, and institutionalized forms of racial and xenophobic discrimination through digital borders.[13] Some of this discrimination occurs as digital technologies are mobilized explicitly in the service of racist and xenophobic ideologies. Social media platforms such as Facebook, Twitter, and WhatsApp, for example, have become staple avenues for advocating violence against refugees and migrants. In some cases, users include photographs and other identifying information in order effectively to mobilize real-word targeting of migrants and refugees. Discrimination also occurs through official border policy, such as the use of biometric databases in the racial profiling of Roma in Europe, or through migrant, refugee, and stateless person exclusion from digital identification systems which are prerequisites for access to basic services in places such as India and Kenya.

In Europe, language recognition software used in refugee status determination processes has been shown to be more error-prone for applicants from the Maghreb, raising concerns that such applicants may be at greater risk of having their claims rejected for lack of credibility on what are ultimately discriminatory bases. Also in Europe, there are examples of invasive data extraction from personal devices—a practice that is impermissible against citizens—targeting only asylum seekers, who then are subject to status hearings in which extracted data is weaponized to undercut their asylum claims. Although "asylum seeker" is not on its face or de jure a racial category, the contemporary configuration of European border and migration regimes means that it is a de facto racialized category, comprised largely of non-White persons, including nationals of Muslim majority countries.

Perhaps less intuitively, discrimination and exclusion are also the product of the logics of bureaucratic and humanitarian efficiency. UN humanitarian, migration, and refugee agencies are among the actors at the center of the expansion and consolidation of digital borders. By the end of 2018, the UN Refugee Agency alone reported the capture and storage of biometric identity for over 7.1 million refugees.[14] The International Organization for Migration reports it is using mobile phone records, geotagging, and social media activity analysis[15] to monitor and track populations on the move with the ostensible aim of better predicting their needs. In this context, researchers have warned of the rise of "surveillance humanitarianism," which refers to increased reliance by humanitarian organizations on digital technologies in their bureaucratic administration, including service provision, with the perverse consequence of excluding refugees and asylum seekers from basic necessities, including access to food.[16] Mark Latonero's research, for instance, highlights testimonies of east African refugees in Europe who recounted the way that minor discrepancies in digital identity databases could have profound human rights consequences: "A misspelled name, for example, can be used as a threat to separate a child from her parents or reject an asylum application."[17] Mirca Madianou uses the term "technocolonialism" to refer to the "constitutive role that data and digital innovation play in entrenching inequalities between refugees and humanitarian agencies and,

[12] Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), *supra* note 2.

[13] The examples that follow are all drawn from my UN Report, and are based on submissions from groups and individuals that responded to a call for illustrative examples of racially discriminatory use of digital technologies in border and immigration enforcement.

[14] *Data of Millions of Refugees Now Securely Hosted in PRIMES*, United Nations High Commissioner for Refugees: Blog (Jan. 28, 2019).

[15] *Big Data, Migration and Human Mobility*, Migration Data Portal (last updated May 5, 2021).

[16] *See, e.g.*, Mark Latonero, Opinion, *Stop Surveillance Humanitarianism*, N.Y. Times (Jul. 11, 2019).

[17] *Id.*

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ultimately, inequalities in the global context," driven in part by corporate profit motives and governments' abdication of human rights responsibilities.[18]

Digital borders have the effect of enhancing the racialized operation of borders by bringing greater precision to and expanding the reach of racial borders. For example, a recent investigation provided damning evidence of the complicity of the European Border and Coast Guard Agency, Frontex, in the violent and often fatal "pushbacks" in the Mediterranean.[19] And the precision and scale of these deadly enforcement actions are arguably aided by border digitization, including enhanced surveillance capabilities. The European Border Surveillance System uses big data to predict, monitor, and control movement across EU borders.[20] And signs point to only further digitization and experimentation with technologies such as affect recognition in ways especially dangerous for non-citizens.[21]

In addition, digital borders reinforce the racially discriminatory nature of existing border regimes by further masking their racially discriminatory nature in the cloak of presumed neutrality that attaches so strongly to technology in the popular and policy imaginary. In the United States, liberal backlash mobilized in opposition against the Trump Administration's border wall has largely been absent in the face of President Biden's commitment to replace the physical wall with "smart" border technology. As movement-based migrants' rights organizations have argued, however, so-called smart border surveillance technologies reproduce the very same racialized forms of exclusion that motivated Trump's physical border wall.[22] Although border digitization may bear the veneer of a more humane approach to traditional border technology, a study of the southern border found that the introduction of "smart" borders resulted in a more than doubling of border deaths.[23] Those dying are almost exclusively Black and Brown migrants and refugees.

In the popular and even policy imaginary, digital technological products such as facial recognition are presumed to be free from human bias. Yet noting the ascendance of facial recognition software in the automation of borders, a recent report, warns that "[e]ven top performing algorithms will erroneously recognize images labelled 'Black women' 20 times more frequently than images labelled 'white men,'" with the effect that "[w]hen applied at scale, implementing facial recognition across all travellers systematizes racial biases inherent in the technology."[24] The stakes here are high. As facial recognition grows to play myriad roles in border enforcement, including identity confirmation, the consequences of misrecognition could range from enhanced surveillance and stigmatization to deportation and refoulement, all of which will occur on racial and gendered bases as a result of the underlying technology.[25]

[18] Mirca Madianou, *Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises*, Soc. Media & Soc'y 4 (Jul.-Sept. 2019).

[19] Nick Waters et. al, *Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks*, Bellingcat (Oct. 23, 2020). For a discussion of the danger of the euphemistic use of the term "pushback," see also Niamh Keady-Tabbal & Itamar Mann, *'Pushbacks' as Euphemism*, EJIL: Talk! (Apr. 14, 2021).

[20] *See, e.g.*, Btihaj Ajana, *Augmented Borders: Big Data and the Ethics of Immigration Control*, 13 J. Info. & Commc'n & Ethics in Soc'y 58 (2015).

[21] *See, generally*, Petra Molnar, Technological Testing Grounds: Migration Management Experiments & Reflections from the Ground Up (Sarah Chandler et. al eds., 2020).

[22] Just Futures Law Center et al., Statement on the Biden Administration's U.S. Citizenship Act of 2021 (Feb. 25, 2021).

[23] Samuel Norton Chambers et. al, *Mortality, Surveillance, and the Tertiary 'Funnel Effect' on the U.S.-Mexico Border: A Geospatial Modeling of the Geography of Deterrence*, 36 J. Borderlands Stud. 443 (2021).

[24] Tamir Israel, Facial Recognition at a Crossroads: Transformation at Our Borders & Beyond 5 (2020).

[25] *Id.*

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A rich and growing body of interdisciplinary scholarship seeks to explain, critique and respond to the racially subordinating effects of digital technologies.[26] From a legal perspective, digital technologies' racially subordinating effects pose a heightened risk to non-citizens in particular, as a result of the broad executive discretion and restricted substantive and procedural rights protections they enjoy, even as a matter of international human rights law. Invoking national security and other concerns related to the ostensible sovereign integrity of states, governments are able to create legal safe harbors for racially unjust migration and border controls generally,[27] thereby subjecting non-citizens to conduct that would be considered racially discriminatory if it were targeted at citizens. In the U.S. domestic context, Anil Kalhan has referred to the phenomenon of immigration surveillance, which pairs digitally boosted surveillance capacities with government evasion of traditional constitutional and related protections that might otherwise be relied upon to protect non-citizens from human rights violations.[28]

Conclusion

Digital borders, then, are digital racial borders.[29] My UN reports on race and technology have sought to map a structural and intersectional international human rights-based approach to fighting racial subordination achieved through technological means.[30] This approach includes moving beyond the tendency of human rights approaches to focus on explicit prejudice in the prohibition of racial discrimination, and instead also targeting facially neutral, complex structures and systems that de facto exclude and subordinate on a racial basis. Implementation of human rights protections such as those enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination, and which I show in my reports have much relevance for digital technologies, is urgent. But on its own, implementation of human rights law can be nothing more than a project of mitigation rather than abolition of unjust structures. The forces driving racially discriminatory digital borders are deeply embedded in society, and include entrenched national security and economic anxieties, and, more broadly, political structures and economic systems that perpetuate transnational inequalities through border regimes. To be clear, the value of mitigating the brutality of digital racial borders is far from trivial. Greater constraints on digital corporations, governments and multilateral agencies would mean saved lives and improved livelihoods for many migrants, refugees and stateless persons. But there can be no technological solution to the inequities of digital racial borders, and

[26] Examples include scholars who comprise the Center for Critical Race and Digital Studies https://criticalracedigitalstudies.com/ and the UCLA Center for Critical Internet Inquiry https://www.c2i2.ucla.edu/home/.

[27] *See, e.g.*, John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. Rev. 1768, 1791 (2021) (describing, for example, the 2015 European Commission emergency summit's instatement of a "hotspot" system that facilitated the rapid designation and deportation of economic migrants, which coincided with several EU member states' declarations of migration-related states of emergency, and reinforced racialized exclusion "laundered through the prism of nationality").

[28] Anil Kalhan, *Immigration Surveillance*, 74 Md. L. Rev. 1 (2014).

[29] Amin Parsa offers a compelling sketch of border technology as racial technology that highlights "the racial organization of [digital border] technologies in order to capture how bordering is a racial technology that deploys a variety of technological 'solutions' or instruments to that end." Amin Parsa, Submission informing the Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), *supra* note 2.

[30] Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), *supra* note 2; Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), *supra* note 10.

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indeed among the greatest drivers of the problem and barriers to fundamental change is "the prevalence of a socio-technical imaginary in which political dilemmas are displaced by the invocation of technological objectivity and progress."[31] Racial injustice inheres in and is constructed by the very nature of borders and the international law that undergirds them,[32] such that undoing digital racial borders must entail a fundamental remaking of international law's rendering of the borders of the nation-state.

[31] Dimitri Van Den Meerssche, Submission informing the Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (E. Tendayi Achiume), *supra* note 2.

[32] Achiume, *supra* note 1.

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