

## SYMPOSIUM ON RACE, RACISM, AND INTERNATIONAL LAW

### BEYOND COLOR-BLIND INTERNATIONAL ECONOMIC LAW

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This essay makes three claims. First, that the central role of race in international economic law has been erased and much more needs to be done to recover its large footprints in the discipline as well as in the policies and practices that constitute it. Second, that rules of international economic law formally embed racially constructed hierarchies, such as those that subordinate the status of former and current colonies. Further, that this subordination is not merely of the former and current colonies, but also of large swaths of Black and Brown peoples around the world. Third, that international economic law in both the Global North and the Global South has played a key role in the cultural production of racist tropes that justify the continued servitude of the former and current colonies. This subordination ensures that returns to capital serve a small minority of wealthy individuals and corporate entities at the expense of large segments of humanity, particularly Black and Brown peoples.

#### *The Erasure of Race in International Economic Law*

Anyone who peers into books, articles, policy documents, and other international economic law material could very well assume that race is irrelevant. After all, there is seldom any consideration or discussion of race in international economic law academic, policy, and practice circles. I refer to this absence of tracing the large footprints of race in international economic law as “erasure.”<sup>1</sup> This erasure, which is not unique to international economic law, can be attributed to several factors.<sup>2</sup> First, racial justice debates and discussions have been marginalized in academic, policy, and practice circles.<sup>3</sup> Second, international economic law institutions, especially at the international level, have been dominated primarily by white men who have shown no interest in interrogating these issues as a major aspect of their work. At the same time, these institutions have historically excluded and marginalized people of color, especially those who center questions of race in their work. For example, state-to-state arbitration as well as investor-state arbitration, two of the most lucrative areas of practice in international economic law, have been dominated by white men since their modern origins. The exclusion of women as well as Black and Indigenous peoples and people of color in these areas has also

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<sup>1</sup> See, e.g., PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 16 (1997) (noting that “racism’s hardy persistence and immense adaptability” to habits of “human imagination, deflection, rhetoric and hidden license”).

<sup>2</sup> See, e.g., James Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 CHI. INT’L L.J. 71 (2021) (showing the absence of race in the pages of the *American Journal of International Law* between its founding in 1906 and 2022).

<sup>3</sup> E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 15 SUR INT’L J. HUM. RTS. 141, 144 (2018).

historically been reflected in law firms and boards of the leading journals in the field, as well as among lawyers working for governments and in academia.<sup>4</sup>

One international economic law strategy that makes discussion of race a taboo is the rule prohibiting consideration of political factors, otherwise known as the “non-political rule,” embedded in the constitutive documents of both the World Bank (Bank) and the International Monetary Fund (IMF), two of the most powerful international economic law institutions. According to this rule, decision making in both the Bank and the IMF is required to be non-political. Non-political decision making has been interpreted to require racial neutrality notwithstanding the racial inequity embedded in international economic law. This rule requires these institutions to take only economic considerations into account and to refrain from interfering in the domestic jurisdiction of member states. At the height of the anti-apartheid struggle in the late 1960s, the general counsel of the World Bank told the Fourth Committee of the United Nations that the World Bank’s lending to apartheid South Africa was justified by this non-political clause. In other words, that notwithstanding the then emerging consensus about the illegality of apartheid and racial discrimination under international law, the Bank could not stop lending to the apartheid regime, because the non-political clause forbade the Bank to take into account considerations beyond economics.<sup>5</sup>

The World Bank’s silence about race in the face of the brutal repression of Black anti-apartheid campaigners typifies what Layla Saad has defined as white silence: “when people with white privilege stay complicitly silent when it comes to issues of race and white supremacy.”<sup>6</sup> Saad reminds me of Martin Luther King Jr.’s admonition that, “[w]e will have to repent in this generation not merely for the hateful words and actions of bad people, but for the appalling silence of the good people.”<sup>7</sup> Although writing in a different context, Saad nevertheless aptly captures how best to understand the World Bank’s claim of racial neutrality in the face of apartheid:

[W]hite silence is anything but neutral. Rather, it is a method of self-protection and therefore also the protection of dynamics of white supremacy. It protects you, the person with white privilege, from having to deal with the harm of white supremacy. And it protects white supremacy from being challenged, thereby keeping it firmly in place.<sup>8</sup>

Silence about race by white and non-white peoples leaves unchallenged and unspoken the role and power of race in international economic law. As Zinaida Miller has argued in a different context, it is in the self-interest of ruling elites not to openly discuss and debate questions of past responsibility and continuing oppression.<sup>9</sup> Uncovering the hidden role and power of race is an important prerequisite for international economic law academics, practitioners, and policy experts beginning to reckon with the moral and other considerations and obligations that arise from past and ongoing legacies of racial oppression.

#### *Rules of International Economic Law Embed Racial Hierarchies*

The second major point this essay makes is that rules of international economic law embed racial hierarchies. To fully address the racial injustices rooted in rules of international economic law today, we have to center the past—in

<sup>4</sup> Of course, we cannot lose sight of the intersectionality of racial oppression including along gender and class lines. For more on this, see James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610 (2021); see also JAMES GATHII, *DECOLONIZING THE ICJ MAFIA* (forthcoming 2023).

<sup>5</sup> United Nations, *Statements of UN Legal Counsel and I.B.R.D. General Counsel on Relations of UN and I.B.R.D. and Effect of UN Resolutions*, 6 ILM 168 (1967).

<sup>6</sup> LAYLA F. SAAD, *ME AND WHITE SUPREMACY: COMBAT RACISM, CHANGE THE WORLD, AND BECOME A GOOD ANCESTOR* 53 (2020).

<sup>7</sup> Martin Luther King Jr., *Letter from a Birmingham Jail* (1963).

<sup>8</sup> SAAD, *supra* note 6, at 55–56.

<sup>9</sup> Zinaida Miller, *The Injustices of Time: Rights, Race, Redistribution, and Responsibility*, 52 COLUM. HUM. RTS. L. REV. 647 (2021).

large part because it was in the past that racial hierarchies became embedded in current international economic law rules.

As the former UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, has argued, contemporary racial inequalities have their roots in histories of slavery and colonialism.<sup>10</sup> Legacies of slavery and colonialism remain reflected in the disadvantaged status of those who are the descendants of former slaves or of those victimized by imperialism. Understanding the ways in which this history locked in the advantages of predominantly white countries makes it possible to see how once racial inequality was produced under slavery and colonialism, it became self-enforcing across generations—ingrained in global and national institutions and structures that continue to reinforce and generate new forms of racial inequality. Given the embeddedness of racial inequality and its self-enforcing nature, intentional discrimination between individuals is only one aspect of racial discrimination. In other words, racism is not a relic of the distant past that has been transcended by contemporary international law—rather it has a historical rootedness.<sup>11</sup>

It is only by examining colonial histories in the construction of the post-World War II global economic order—including the Bretton Woods institutions—that its racialized origins become visible. Further, it is only by rejecting post-World War II international economic law triumphalist stories about overcoming the past that historical continuities and discontinuities can be more truthfully traced. The post-World War II international economic order is traceable to its precursors, which include the Mandate system of the League of Nations.<sup>12</sup> In other words, the techniques of the Bretton Woods institutions carried forward within them the colonial project of the Mandate system. They did so not through direct colonial control, but rather indirectly through international governance mechanisms, like the World Bank, which reproduced the same hierarchical relationships between the former colonies and their former colonial masters, who now controlled these international financial institutions.<sup>13</sup>

The weighted voting systems of the Bretton Woods institutions also carry forward the hierarchical relationship between former colonies and their colonizers. For example, the president of the Bank is always appointed by the United States, while Europe appoints the managing director of the IMF.<sup>14</sup> Under the IMF's weighted voting system, African countries, which constitute close to 30 percent of the Bank's membership, have a mere 6 percent of voting rights.<sup>15</sup> This unevenness constitutes an “unjust global order with roots in centuries of subjugation of peoples from across Africa and colonialism.”<sup>16</sup>

<sup>10</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (E. Tendayi Achiume), [Report on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance](#), UN Doc. A/74/321 (Aug. 21, 2019).

<sup>11</sup> See also Chantal Thomas, [International Economic Law and Racialized “Others,”](#) 116 AJIL UNBOUND 113 (2022) (but also noting race is not a monolithic framework and at times includes language and culture).

<sup>12</sup> ANTONY ANGHIE, [IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW](#) 193 (2005).

<sup>13</sup> See, e.g., Robert Knox, [Haiti and the League of Nations: Racialisation, Accumulation and Representation](#), 21 MELB. J. INT'L L. 10 (2020); Ntina Tzouvala, [Full Protection and Security \(for Racial Capitalism\)](#), 25 J. INT'L ECON. L. 224 (2022).

<sup>14</sup> For an analysis of this practice, see Jacob Katz Cogan, [Representation and Power in International Organization: The Operational Constitution and Its Critics](#), 103 AJIL 209 (2009).

<sup>15</sup> African Sovereign Debt Justice Network, [Statement on the 2022 Annual Meetings of the IMF and the World Bank: A Call for Governance Reforms](#) (Oct. 10, 2022).

<sup>16</sup> [Update on “This Anti-Black Racism Must End” Campaign](#), CRITICAL INVESTIGATIONS INTO HUMANITARIANISM IN AFRICA (Aug. 31, 2020). According to the letter, “Nigeria alone has a population of 196 million people and a \$1.1 trillion GDP (PPP), but merely 0.65 percent of the voting rights in the World Bank. Qatar with a population of less than 2.8 million people and a \$346 billion GDP (PPP) has more voting power than Nigeria. Ethiopia, one of the twenty-three founding members of the World Bank, with 109.2 million people and a \$253 billion

*International Economic Law's Production of Racist and Subordinating Tropes*

International economic law knowledge production is embedded in development discourse and neo-liberal assumptions of white Western normativity and supremacy. For example, the progress narrative about backward and developed countries at the center of development orthodoxy is based on a teleology that frames the present economic advantage of the Global North as resting on its presumed superior intellectual, political, economic, and social practices.<sup>17</sup> By contrast, non-European political, economic, and social practices are conceptualized as inferior, thereby formalizing racially coded and unequal relationships between the West and the non-West. These accounts of development, built on the erasure of the “violent history of European imperialism (conquest, slavery, genocide, and land and resource expropriation) and the trope of “civilization” claimed by the West,”<sup>18</sup> must be rejected in international economic law.

Ideas, policies, and practices about development, particularly those relating to neo-liberalism, as promoted by the World Bank and international organizations, are predicated on background assumptions of racial neutrality. In the World Bank's perspective, development is a color-blind process under which countries that do well are following its technical prescriptions and those that lag behind are labeled errant and/or kleptocratic. Neo-liberal economic policies, such as those aimed at deregulation, privatization, and liberalization, are heralded as the path toward prosperity. To the extent that the aspirations of developing countries to self-sustaining development depart from the prescriptions of the Bretton Woods institutions, they are characterized as unacceptable wayward departures from the path toward development. Such race-neutral framings make inequality, especially racial inequality, invisible, thereby perpetuating racialized disadvantages and inequalities.

Development doctrine places the blame for lack of development exclusively at the feet of non-Western ideologies, institutions, and practices. This neo-liberal strategy of labeling criticism or opposition to free market reforms and liberal democratic prescriptions as development failures has at least two consequences. First, it shuts the door to examining other explanations of economic disadvantage, such as inherited colonial legacies as well as the dynamics of underdevelopment embedded within the development framework itself. Second, it is based on and reproduces disparaging and implicitly racist stereotypes of non-Western states, their leadership, and their people as lazy, incompetent, and corrupt. The future of international economic law requires deeper probing and exposure of analyses that advance racist tropes under the veneer of neutral, technical assessments.<sup>19</sup>

Both the World Bank and the IMF are key purveyors of neo-liberal economic governance through their conditional lending programs. By conditioning access to finance to the implementation of neo-liberal economic prescriptions, they institutionally transform the priorities of states, particularly in the Global South, by making them more predisposed to serve the narrow profit-making interests of capital rather than those of the majorities of their populations. Because owners of capital—or “investors,” as they are referred to in neo-liberal economic programs—are overwhelmingly from the Global North, countries of the Global South—primarily the former colonies—implement neo-liberal economic programs that privilege the role of private enterprises over public enterprises and the public interest in the Global South.

Consider how the prioritization of sovereign debt payments to creditors is made possible by a whole range of neo-liberal “disciplinary” forces that keep indebted countries on a short leash. These forces include credit rating

GDP (PPP) is allotted 0.08% of the voting rights, which is significantly less than that of Luxemburg with a population of 613,894 and GDP of \$44 billion.” *Id.*

<sup>17</sup> See Siba Grovogui, *Come to Africa: A Hermeneutics of Race in International Relations Theory*, 26 *ALTERNATIVES* 425 (2001).

<sup>18</sup> Jemima Pierre, *The Racial Vernaculars of Development: A View from West Africa*, 122 *AM. ANTHROPOLOGIST* 88 (2019).

<sup>19</sup> See James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 18 *THIRD WORLD LEG. STUD.* 65 (1998–99).

agencies that downgrade the credit ratings of countries that dare to consider restructuring. They also include the IMF, which prevents defaulting countries or countries that do not follow its stringent neo-liberal fiscal consolidation programs from accessing its funding and that of private creditors. The IMF's fiscal consolidation programs require countries to increase taxes and tax collection and to cut social spending.<sup>20</sup> The budgets of countries of the Global South prioritize repayment of massive debts to private creditors overwhelmingly located in the Global North. In effect, the limited budgetary resources of these economies are diverted from funding public services, like education, health, and housing toward debt repayment. Once again, the interests of the poor, disenfranchised majorities of color are subordinated to the economic interests of investors, primarily from the Global North.

*Conclusion: Toward a Racial Capitalism Analysis of International Economic Law*

The production of racialized hierarchies in international economic law is not exhausted by a white-Black paradigm that confines processes of racial subordination to countries in the Global North. In fact, post-colonial states everywhere have continued to reproduce racial hierarchies as part of their governing ideology with adverse consequences, in particular for Indigenous peoples and ethnic and religious minorities. Even the largest non-Western states have reproduced these racial hierarchies as part of their governing strategy. For example, Vincent Wong's scholarship on China focuses on how racial hierarchies have played out in the Xinjiang Uyghur Autonomous Region of China, examining racial capitalism in the context of the development and justification of technologies of repression of Uyghurs and other non-Han native populations.<sup>21</sup>

Indeed, "racial capitalism" is one productive lens through which these issues of race in international economic law are being interrogated.<sup>22</sup> One thread of racial capitalism traces race-making to the processes of dividing humanity into a social hierarchy of different, superior, and inferior "races," which correspond to who is subjected to exploitation and expropriation.<sup>23</sup> This literature also focuses our attention on the rise of racialized divisions of labor and of racialized extraction beyond the industrial revolution, thereby countering the color-blindness that pervades our understandings of development and much of international economic law.<sup>24</sup> Research agendas that take seriously and confront the way race and racial subordination shape international economic law are long overdue.<sup>25</sup>

<sup>20</sup> James Thuo Gathii, *Sovereign Debt as a Mode of Colonial Governance: Past, Present and Future Possibilities*, JUST MONEY (May 13, 2022).

<sup>21</sup> Vincent Wong, *Racial Capitalism with Chinese Characteristics: Analyzing the Political Economy of Racialized Dispossession and Exploitation in Xinjiang*, 3 AFRICAN J. INT'L ECON. L. 1 (2022).

<sup>22</sup> For a recent effort to begin this mapping in international economic law, see James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT'L ECON. L. 199 (2022); see also Mohsen al Attar & Claire Smith, *Racial Capitalism and the Dialectics of Development: Exposing the Limits and Lies of International Economic Law*, LAW CRITIQUE (2022).

<sup>23</sup> See, e.g., Carmen Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127 (2022).

<sup>24</sup> See, e.g., Jennifer Morgan, *Archives and Histories of Racial Capitalism: An Afterword*, 33 SOC. TEXT 153 (2015) (unearthing the central role of reproductive labor—including social and biological reproduction—as well as the unpaid labor of slaves to relations of domination within capitalist society).

<sup>25</sup> For some early international economic law work along these lines, see, for example, STEVEN DEAN, GLOBAL JIM CROW: TAXATION AND RACIAL CAPITALISM (forthcoming 2023) (showing how racial bias helped create and continues to sustain a global tax system that favors wealthy states).