Colonialism, Capitalism, and Race in International Law: Introduction to Symposium Issue

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On September 17-18, 2021, amidst another wave of the COVID-19 pandemic, we held a virtual conference on *Colonialism, Capitalism, and Race in International Law* at the University of California, Irvine School of Law. The conference addressed racial constructions and their effects as social, cultural, and legal phenomena in historical and transnational context. It examined the construction of race in international law—both historically and contemporaneously—and thus its ongoing legacy. It combined this analysis with evaluation of the role that international law has and could play as a normative resource to address and to redress institutionalized racial discrimination within countries and at the international level.

In an era where the legacies of colonialism, slavery, human exploitation, and racial discrimination are evident, but also contested, this symposium offers a critical and timely intervention. The authors interrogate the past as they offer pathways forward for the future of international law's engagement with race and racism. Their works are intersectional, unpacking how histories of imperialism, colonialism, and capitalism leave their imprint not only on cultures and communities, but also within them, affecting the lives of vulnerable peoples and groups.

The journal has the privilege of publishing five articles from the conference respectively by José Alvarez, Dire Tladi, Thiago Amparo and Andressa Vieira e Silva, Hirokazu Miyazaki and Annelise Riles, and K.S. Park. The participants in the larger conference also included presentations and commentary by Tendayi Achiume, Aziza Ahmed, James Anaya, Tony Anghie, Asli Bali, James Cavallaro, James Gathii, Jamelia Morgan, Catherine Powell, Sergio Puig, Ji Seong Song, Silvia Serrano, Matiangai Sirleaf, Anna Spain Bradley, and Chris Whytock.

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The symposium begins with **José Alvarez's** article *The Case for Reparations for the Color of COVID*. Alvarez examines how historically disadvantaged populations have suffered disproportionally from the COVID-19 pandemic within states. In particular, Alvarez evaluates how "Black, Latinx, and Indigenous communities in the United States, people identified by pigmentation or Indigenous origins in Brazil, and individuals defined by caste in India" have died in greater numbers and experienced significantly worse health outcomes from COVID-19.[2] The majority of international public health reform advocates have focused on changing global health organizations like the World Health Organization to equalize COVID-19 health outcomes *between* states. Alvarez asserts that reform efforts should also focus on inter-state reforms to equalize health outcomes for disadvantaged populations *within* them.[3]

Alvarez argues that states are obligated under international human rights law to provide effective remedies, including reparations, to individuals within their jurisdictions who are discriminated against in violation of their fundamental rights—like the rights to public health, medical care, and life. States thus must proactively create their own reparations mechanisms to confront COVID-19 related health discrimination or face a multiplicity of individual lawsuits seeking redress from discriminatory COIVD-19 health outcomes.[4] Alvarez notes that the international human rights law definition of "reparations" differs from its colloquial meaning in that it does not require the payment of "full compensatory damages to all victims," but also permits other remedial actions, such as government apologies and legal reform to prevent future harm.[5] Given this definition of "reparations," Alvarez notes that most of the traditional arguments against reparations for Black, Latinx, Indigenous, and other communities in the United States, former colonized nations, and elsewhere for COVID-19 victims "fall away."[6] Alvarez contends that states should proactively create programs to provide reparations to historically disadvantaged groups that have faced discriminatory COVID-19 health outcomes because such programs will provide effective remedies more quickly and effectively than courts.[7]

Dire Tladi's article *Representation, Inequality, Marginalization and International Law-Making: The Case of the International Court of Justice and the International Law Commission* focuses on the tension between formal sovereign equality and practice in the making of international law through international bodies.[8] In practice, certain

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[2] José Alvarez's, *The Case for Reparations for the Color of COVID*, 7 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 7, 11 (2022).
[3] *Id* at 13.
[4] *Id.* at 10-11.
[5] *Id.* at 13.
[6] *Id.*
[7] *Id.*
[8] Dire Tladi, *Representation, Inequality, Marginalization and International Law-Making: The Case of the International Court of Justice and the International Law Commission*, 7 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 60, 90(2022).

states—largely white, Western, and "powerful" states—are institutionally favored to play a dominant role in shaping international law.[9] Tladi illustrates this through his analysis of the International Court of Justice ("ICJ") and the International Law Commission ("ILC"). He maintains that both organizations, even in factually similar cases, tend to reach one set of outcomes when cases implicate the interests of powerful states and a different set when cases only implicate the interests of less powerful ones.[10] To explain this phenomenon, Tladi assesses the representation of different states within the ICJ and ILC. Although the ICJ Statute does not formally require that different regions of the world be represented in its judges, there is regional representation in practice.

Nonetheless, the ICJ is dominated by the powerful, and particularly by white nations that have seats on the United Nations (UN) Security Council.[11] Although the ILC formally allocates membership seats by region, it allocates Western and other white states a higher proportion of seats than their populations would otherwise provide.[12] Tladi examines the important role of the ILC's Special Rapporteurs in driving the Commission's work, and he notes that, historically, more than fifty percent of the Special Rapporteurs have come from Western or other white states.[13] It matters which states are represented in international lawmaking organizations like the ICJ and ILC because lawyers from white, powerful states are "more likely" to hold views that align with those states' interests.[14] Tladi advocates for greater representation of non-white, non-Western, and less powerful states in international lawmaking organizations to advance the ideal of sovereign equality.[15]

Thiago Amparo and **Andressa Vieira e Silva's** article *George Floyd at the UN: Whiteness, International Law and Police Violence* evaluates the discourse at the UN that arose after the murder of George Floyd to question whether the UN is truly committed to addressing structural racism and police violence. While others have criticized the UN and international law for focusing too much on "individual acts of racial discrimination," thereby "erasing" the underlying racist global constructions that perpetuate racism,[16] Amparo and Silva contend that a "series of coping mechanisms" has emerged at the UN that undercuts the goal of confronting structural racism globally.[17]

To demonstrate this, Amparo and Silva use algorithms to analyze speeches given at the UN session convened in the wake of George Floyd's murder as well as the UN High Commissioner for Human Rights' subsequent report. They identify a series of linguistic "coping mechanisms" used at the UN to avoid addressing

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[9] *Id.* at 62, 67.
[10] *Id.* at 71-76, 86.
[11] *Id.* at 76-78.
[12] *Id.* at 79-81.
[13] *Id.* at 82.
[14] *Id.* at 85-86.
[15] *Id.* at 81-83, 90.
[16] Thiago Amparo and Andressa Vieira e Silva, *George Floyd at the UN: Whiteness, International Law, and Police Violence*, 7 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 91, 106 (2022).
[17] *Id.* at 106.

structural racism, such as generalizing discussions about racism so as to avoid calling out specific states for their racist structures; performatively mourning the tragedy of individual acts of racial discrimination so as to avoid digging into the specific historical context, thus treating the acts more like an accident than the result of structural racism and police violence; and using terms like "structural racism" vaguely so that states may claim to be concerned with "structural racism" while not addressing the specifics of underlying racist structures and the means to dismantle them.[18] Amparo and Silva fear that current discourse at the UN and in international law generally around racism and police violence will only lead to attempts to further secure "rights" for non-white people, without addressing "the social, political, legal, and economic conditions" that make existing rights less meaningful for them.[19] To actually change underlying structures of racism and police violence, Amparo and Silva contend that evasive rhetoric and "performative coping mechanisms" that avoid confronting structural racism through international law and institutions must be frontally challenged and jettisoned.[20]

Hirokazu Miyazaki and Annelise Riles' article *Theorizing Intergenerational Justice in International Law: The Case of the Treaty on the Prohibition of Nuclear Weapons* evaluates the divide between supporters of the 1967 Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and supporters of the 2017 Treaty on the Prohibition of Nuclear Weapons ("TPNW"). While the 1967 NPT calls for reducing current nuclear arsenals and is supported by an older generation of activists, the 2017 TPNW calls for banning "all nuclear weapons as a matter of international law" and is supported by a new, younger generation.[21] Some have criticized the 2017 TPNW as unnecessarily "dividing the attention" of states and activists, but Miyazaki and Riles see the TPNW as an improvement over the 1967 NPT because it makes disarmament an issue of humanitarian law for all states rather than an issue of national security for the existing nuclear powers.[22]

To Miyazaki and Riles, the TPNW appropriately frames nuclear disarmament in terms of *intergenerational justice*—the notion that present generations have "an obligation to proceed extremely cautiously in the face of scientific uncertainty about risks of serious irreversible harm to future generations"—similar to the way some have addressed climate change.[23] Furthermore, Miyazaki and Riles view intergenerational justice as a key to bridging the divide between supporters of the 1967 NPT and the 2017 TPNW. They illustrate their argument through two examples where success was achieved by bringing different generations together to collaborate and learn from each other. First, they describe the processes giving rise

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[18] *Id.*
[19] *Id.* at 110.
[20] *Id.* at 110.
[21] Hirokazu Miyazaki and Annelise Riles, *Theorizing Intergenerational Justice in International Law: The Case of the Treaty on the Prohibition of Nuclear Weapons*, 7 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 122, 123 (2022).
[22] *Id.* at 127, 144-45.
[23] *Id.* at 130.

to a resolution in support of the TPNW passed in 2021 by the Chicago City Council after collaboration among "young and old activists."[24] Second, they examine art mural workshops organized by the group Kids Guernica Project in Nagasaki, Japan, where children and adults collaborate to paint "peace murals" that help "pass on atomic bomb survivors' memories of the atomic bombing and their longstanding commitments to the elimination of nuclear weapons to the next generations."[25] Miyazaki and Riles argue that these examples show how the pursuit of intergenerational justice can bring together supporters of the 1967 NPT and the 2017 TPNW and further the cause of nuclear disarmament. Activists from different generations meet and collaborate on "more concrete, achievable" goals like expanding compensation regimes for victims of nuclear weapons and increasing funds for the environmental remediation of nuclear test sites.[26]

Kyung Sin Park's *State Immunity as applied to Colonial Racism and the Japanese Military as Purchaser and Joint Tortfeasor: Case of Korean 'comfort women'* evaluates how courts have used the customary international law doctrine of "state immunity"—which prevents courts from exercising jurisdiction over suits against foreign states—to deny redress for the "comfort women" servicing Japan's military during World War II. He advances two theories on how these women can overcome the state immunity defense. International law has traditionally recognized that state immunity doctrine does *not* apply to commercial activities or torts committed within the territory of the forum territory, and Park details how several courts have refused to apply these exceptions to state immunity to "comfort women."[27]

For example, a U.S. court concluded that the Japanese kidnapping of females for use as "comfort women" did not constitute commercial activity and thus denied invocation of the exception.[28] Additionally, the ICJ refused to apply the "territorial tort" exception to World War II victims when the wrongful acts were committed by "armed forces in the course of an armed conflict."[29] Application of these exceptions, Park contends, must engage with the actual experience of Korean "comfort women" living under Japanese occupation. Most Korean "comfort women" were not taken by force, but instead were deceitfully "recruited" by private contractors hired by the Japanese military and then forced into sex slavery at "comfort stations" that served both the Japanese military and Japanese administrators and other non-military service providers.[30] Similarly, the abuse of Korean "comfort women" was not perpetrated by Japanese "armed forces in the course of an armed conflict." Instead, they were generally "recruited" from territories firmly occupied by the Empire of Japan and forced to serve both the

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[24] *Id.* at 144.
[25] *Id.* at 141.
[26] *Id.* at 145.
[27] Kyung Sin Park's *State Immunity as applied to Colonial Racism and the Japanese Military as Purchaser and Joint Tortfeasor: Case of Korean 'comfort women'*, 7 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 146, 153-156 (2022).
[28] *Id.* at 164-166.
[29] *Id.* at 157.
[30] *Id.* at 166-167.

Japanese military and such non-military service providers. Thus, their exploitation is better understood as acts of "colonial administration" against colonial subjects, where the Japanese government was the primary contractor and the end customer of "comfort services" procured by private sub-contractors.[31] Accordingly, Park argues that Korean "comfort women" should be able to use the territorial tort and commercial activities exceptions to overcome the legal hurdle of state immunity and successfully sue the Japanese government by framing their cases as ones of deceptive commercial activity by a colonial power against its subjects, rather than as cases of kidnapping by military forces during an armed conflict.[32]

This symposium captures a potential inflection point in world history, marked not only by a global pandemic that reveals underlying institutional and infrastructural inequalities, but also by harsh, undeniable realities. The brutalities of racism persist, too often unchecked as matters of international law. Matters of white supremacy and nationalism in law and society are not simply of an unjust past, but concerns that must be addressed today.

The brilliance of these authors' work lies in their perceptive balancing. Their works are grounded in rich analysis, probative empirics, and nuanced visions for what could and should come next, involving transnationally interconnected social movements, diplomacy, and law. The authors leave us with a deep sense of resolve about pathways forward to not only address the past, but chart pathways forward.

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[31] *Id.,* at 161.
[32] *Id.* at 167-168.