Pandemic Borders and Racial Borders:
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About the Author

Inaugural Alicia Miñana Professor of Law. This Keynote address draws heavily on my article *Racial Borders* 110 Georgetown Law Journal 445 (2022), to which I refer readers for detailed references and citations.

Table of Contents

The theme of this Symposium is mapping the dynamic interaction among different bordering technologies in shaping the allocation and enjoyment of human rights in the specific context of the Covid-19 pandemic. I'm going to focus my Keynote on the international legal order and in ways that I hope present a broader frame within which many of the discussions during the Symposium might fit.

There are many different legal accounts of what international borders are, what they do, and why we even have them in the first place. A central premise of international law is the following: the international order is made up of sovereign, independent, and equal nation states, each with a largely unilateral right to exclude non-nationals. There are constraints on this right to exclude that nation states may impose upon

themselves, for example through international refugee law, but the prevailing sovereignty doctrine includes a capacious right to exclude that is most robustly justified on the basis of rights to collective self-determination.

Scholars in the Third World Approaches to International Law (TWAIL) tradition, as well as other post-colonial theorists, have challenged this account of the international order. And they've persuasively argued that, notwithstanding the formal decolonization of much, but obviously not all of the world, neocolonial forms of political and economic interconnection continue to characterize the international order.

TWAIL and other scholars have shown how the international order, including through international law and international institutions, continues to privilege the interests of former colonial powers, which I will refer to as First World nation states, at the expense of formerly colonized peoples and territories, which I will call the Third World, and that such contemporary conditions can be described as neo-colonial empire. In my scholarship, I study the neocoloniality of international borders, including the ways in which these borders intersect with race, and in doing so, I rely heavily on scholarship by critical race theorists. My Keynote today will focus on what I call "racial borders," highlighting the historical racialization of borders and the imperial significance of this racialization in the present.

For those interested in a deeper understanding of the analytical purchase of centering race and empire in the study of international law, I want to point you to the Promise Institute's "Race and Human Rights Reimagined Initiative" website, which provides helpful resources. I also want to highlight that Professor Aslı Ü. Bâli, who moderated one of the earlier panels, and I convened a series of events that were sponsored by the Promise Institute and that resulted in articles that were published in the 64th volume of the UCLA Law Review, and in the twenty-seventh volume of in JILFA, bringing together academic scholarship at the intersection of TWAIL and CRT.

Anibal Quijano's work reminds us that "race" today is the product of centuries long colonial intervention and exploitation, during which "race became the fundamental criterion for the distribution of the world population into ranks, places, and roles in society's structure of power."[1] In the colonial context, race structured rights and privileges on hierarchical terms, determined by white supremacy. Although formal decolonization has occurred in most of the world, race persists

1. Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 Nepantla 533, 535 (2000).

a neocolonial structure, one that still allocates benefits and privileges to the advantages of some and the disadvantage of others, largely along the same geopolitical and racial lines that characterize the European colonial project. This is by no means a totalizing account of the meaning of race, but I offer it because the structural and materialist dimensions of this account are central to the conception of race I rely upon in this Keynote.

The racially disparate impact of Covid globally really evinces the neocoloniality of race transnationally, along the lines of Quijano's account of how we should understand race. Across the globe, Covid deaths and exposure have had the worst impact on racially, ethnically, and religiously marginalized populations. Racialization has also been transnational. In February 2022, only 11 percent of persons in Africa, for example, had received the Covid-19 vaccine compared to the global average of 50 percent. According to one analysis, in October 2021, only 0.7 percent of vaccines had gone to low-income countries at that time, while nearly half had gone to wealthy countries. And just a month earlier, it was reported that 2 percent of Africans, 15 percent of Indians, 63 percent of Europeans were fully vaccinated. Meanwhile, for example, Canada bought five times more vaccine doses from the global pharmaceutical companies than it needed.

In the time that I have, I want to focus on borders with a lens, as I mentioned, that highlights race and empire. And in advancing this account of borders as racialized, imperial technology, I want to center law, especially international law and domestic laws with transnational effects as well as history. And in addition to that, I want to walk through how thinking of borders as racialized imperial technology helps us both make sense of borders in the Covid-19 pandemic context, and also helps us to articulate more precisely the injustices that borders have either made possible or at least legitimated. I also want to note that my analysis privileges race, but the aim of this symposium has been to call attention, not only to race and ethnicity, but to sexual orientation, gender identity, and disability status as bordering access to human rights.

I. Beginning in the Past

Between the 19th and the first half of the 20th century alone, approximately 62 million Europeans immigrated to colonial territories across the world. Historians note that the scale and consequences of even just British Empire migration between 1815 and the 1960s explains a lot about the modern world. And in striking contrast to the

mortal costs that international law imposes on non-European migrants today, European colonial migrants benefited from international and imperial legal regimes that facilitated, encouraged and celebrated white economic migration.

Colonial economic migration brought with it, as we know, genocide, enslavement, exploitation, and other phenomena that transformed the world and laid the foundation and basis for our current global order. European imperialism in the 19th century played a crucial role in producing the migration and mobility regimes that we should consider the progenitors of the contemporary regimes that we have. As late as the mid 19th century, immigration was mostly unrestricted across the British Empire and its settler colonies. And I focus on the British Empire and its settler colonies because they've played an extraordinary role in shaping the contemporary international legal order that we have.

Large scale international mobility of Europeans, and also of non-Europeans across imperial territories, was a function of race and the economic needs and the political desires of metropolitan and settler colonial nations. With slavery's abolition in the first half of the 19th century, the global imperial economy could no longer rely on the brutally coerced migration of enslaved Africans for its labor. And this shift thrust Indians especially into the role of the so-called global working class of the British Empire, as millions were contracted as laborers to work across the British colonies in the Caribbean, Southeast Asia, South Africa, and the Pacific. Millions of Chinese were also recruited to work in the Dutch, Spanish, and British Empires. British treaties recognized and protected certain forms of mobility and migration, even for non-white people, for the purposes of imperial prosperity. For example, recruitment for the British occurred through the Treaty of Nanking, which established qualified freedom of movement for Chinese as an exception to the Chinese emperor's prohibition on immigration. The Burlingame Treaty between China and the United States in 1868 went even further, recognizing freedom of movement and migration as universal rights.

By the late 19th century, however—and this is an outrageously abbreviated history—immigration restrictions would ultimately implement a regime of racial segregation on international scale. The British self-governing settler colonies, including the United States, led the charge. Within and across these colonies conceptions of a universal right to freedom of movement would give way to a more rigorously defended Republican discourse. Historians Marilyn Lake and Henry

Reynolds highlight that this Republican discourse foregrounded "the rights of sovereign [Australian and Californian] male subjects to insist on the Democratic right to determine who could join their self-governing communities."[2] In their seminal book, *Drawing the Global Colour Line*, and inspired by the work and thought of W. E. B. Du Bois, Lake and Reynolds chart "the spread of whiteness as a transnational form of racial identification, that was, as Du Bois noted, at once global in its power and personal in its meaning, the basis of geopolitical alliances and the subjective sense of self."[3] This racial identity was forged in the context of 19th century imperial projects of mass migrations and the mass migrations that attended them. And a transnational imagined community of white men in this period bolstered border protection regimes and the doctrine of national sovereignty.

At the level of legal doctrine, the late 19th and early 20th centuries were also the periods in which an absolutist conception of the right to exclude crystallized. This conception of sovereignty, which is not the only conception of sovereignty that has existed in public international law, but is the one that crystallizes in this period, specifically emerged to underwrite the exclusion of Asians especially, from the white settler colonies of the British Empire, the US included. The *Chinese Exclusion* cases decided by the US Supreme Court in the 1880s are a key component of this legacy, which legitimated a national settler colonial project defined in racial terms. Prior conceptions of sovereignty doctrine had accorded foreign nationals mobility and migration rights, but these prior conceptions were revealed to be racially contingent.

Eve Lester's doctrinal analysis of early international law tracks how, in the works of international legal theorists like Grotius, Vitoria, Pufendorf and Vattel, for example, "the rights bearing foreigner was—always and anyway—a European insider."[4] But with the European colonial expansion, "it was the appearance of the foreigner as a racialized non-European figure, and the desire to regulate her labor, that led to the emergence of restrictive migration laws, and then a common law doctrine of absolute sovereignty."[5] In a comprehensive historical study of modern borders, Adam McKeown further shows how the most basic principles of contemporary border control were initially developed in

2. Marilyn Lake & Henry Reynolds, Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality 26 (2008).

3. *Id.* at 3.

4. Eve Lester, Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia 78 (2018).

5. *Id.* at 82.

the white settler nations, especially between the 1880s and 1910, and such control would eventually become universalized at the foundation of sovereignty and migration control for all states within the international system.

In 1790, the United States restricted naturalization to free white men. In 1855, the British self-governing colony of Victoria, which would later become part of the Federation of Australia, introduced the first immigration restriction in its Chinese Immigration Act, which defined an immigrant as "any male adult native of China, or its dependencies, or any islands in the Chinese seas, or any person born of Chinese parents." What we see, here, is the very definition of an immigrant as racially specified.

Furthermore, techniques of racialized border exclusion were perfected in national jurisdictions before being launched transnationally. For example, national segregationist technology such as the literacy test, which was used to disenfranchise black voters in Mississippi in 1890 would later be transferred from that context to immigration restrictions to prevent the migration of non-white people, first in the United States and then in South Africa, or Natal, and then other British dominions as well. The racial stakes implicated by national border governance in the colonial era were perhaps most vividly illustrated in the fate of the racial equality clause, which was proposed by the Japanese for inclusion in the founding charter of the League of Nations following the end of World War I.

In February 1919, in the lead up to the formation of the League of Nations, Woodrow Wilson joined others in the Anglo-American Alliance that presided over the rejection of the proposal by Japan. This Japanese proposal would've required all members of the League of Nations to grant "to all alien nationals of states, members of the League of Nations, equal and just treatment in every respect, making no distinction either in law or in fact on account of their race or nationality."[6] If adopted, this proposal would have enshrined racial equality between nationals and non-nationals in international law, at least for international migrants who were nationals of member states of the League of Nations. As someone who studies on the International Convention for the Elimination of Racial Discrimination adopted in 1965, I was surprised to learn that in 1919 there had been the possibility for an international treaty that might have prohibited racial discrimination.

6. Nicholas Wisseman, *"Beware the Yellow Peril and Behold the Black Plague": The Internationalization of American White Supremacy and Its Critiques, Chicago 1919*, 103 J. Ill. St. Hist. Soc'y 43, 45 (2010).

In any case, the British settler colonial nations ensured the rejection of the racial equality clause, the US and Australia among them. And for this group, the racially constructed threat of Asian migration was perhaps the most salient concern. These nations, the US among them, feared that international standards on racial equality would give an international body jurisdiction over issues such as immigration and naturalization. Immigration and naturalization, which we might think of as regimes of racialized control over access to the benefits of colonial exploitation, were thus regimes to be shielded from external scrutiny, especially scrutiny that might insist on principles of equality and non-discrimination.

As Anam Soomro in her PhD thesis, the Anglo-American Alliance sought to remove matters of immigration and racial discrimination from international scrutiny and challenge, and this alliance sought to do so through international legal doctrine, specifically through the invention of the doctrine of domestic jurisdiction. And as Vincent Chetail notes, "the very notion of domestic jurisdiction was literally invented by [the United States] with a view to avoiding any interference in its sovereign rights to decide the admission of foreigners."[7] The inter war period turned out to be a period during which racial governance was deeply embedded in regimes of migration governance.

Two points are important to highlight from the historical context that I have very briefly sketched. The first is that border and migration governance regimes were mechanisms for enforcing racialized access to the benefits of colonial exploitation, and for the production of these benefits to a significant extent. These racialized border regimes were thus at the political and economic heart of empire. As a result, legal theory, even narrowly concerned with borders and migration governance in this historical period and in subsequent periods, such as our contemporary one, cannot be complete without some accounting for the extent to which empire shapes borders, and shapes migration as well. Racialized mobility, immobility, inclusion, and exclusion were not incidental or even unfortunate byproducts of colonial empire, but rather, they were imperially productive technologies for creating and allocating the benefits of empire.

The second point that I want to highlight from this history is that in the era of formal colonial empire, the racial operation and function of borders was ultimately perfected through facially neutral legal

7. Vincent Chetail, International Migration Law 52 (2019).

categories, doctrines and policies, including citizenship, nationality, and even sovereignty doctrine as it relates to the right to exclude.

II. Considering the Present

I would like to switch gears, and focus on the present, reflecting on how international migration and international mobility work today. Unfortunately, we live in a world of migration, governance technologies, and regions that achieve racialized exclusion and containment in ways that preserve dynamics originating in the colonial era. I wish it were the case that there had been dramatic rupture in the way that international migration works. Although there is a lot that has changed, there is a lot that has remained the same.

The much reviled, so-called illegal immigrant remains a racialized subject the world over. Whether we ae talking about so-called illegal immigrants in the United States, in Europe, or even in South Africa, illegality of migration in its most contested and polarizing form typically implicates the movements of non-whites. Race is absolutely a factor in determining who is the subject of xenophobic backlash. But even absent explicit, racist, xenophobic backlash, racialized immigration exclusion and subordinate inclusion remain embedded in international and domestic legal frameworks, many of which are treated as facially neutral, and even more so as existential features of liberal democracies.

Contemporary national borders of the international order—an order that I would argue and many others have argued is neocolonial—are inherently racial, by which I mean a default manner in which they enforce exclusion and inclusion, is racially disparate. Furthermore, the racial disparities enforced by national borders still structurally benefit some nations and racial groups at the expense of other nations and racial groups. As a result of legal doctrine developed in the service of the specific imperial and colonial projects that I reference above, today, whiteness continues to confer privileges of international mobility and migration and proximity to whiteness calibrates these privileges. This racial privilege inheres in facially neutral categories that are legal categories and regimes of territorial and political borders, and it also inheres in the rules and practices of national membership and international mobility, and thus, I use the term "racial borders" to refer generally to territorial and political border regimes that disparately curtail movement and political incorporation on a racial basis and sustain international migration and mobility as racial privileges.

Domestic immigration scholars, including CRT scholars, have in various, important ways marked the US racial border regime and Professor Karla MacKanders from the first panel of the Symposium is among them. But I want to highlight that these regimes are *transnational*—they are not unique or confined to the United States. Professor John Reynolds' exposition, for example, of Israel's racial borders illustrates this point. My focus, however, is the current Schengen visa regime that applies to the European Union, home to the former colonial powers that divided up the African continent for their benefits. The Schengen visa regime, among other things determines access to the European Union, creating a divide between nationalities who require entry visas and those who do not. There are two lists the black list and the white list—names that were used officially at the time of their creation and although these names were ultimately withdrawn, they retain some descriptive accuracy.

In 2002, all of Africa was on the visa blacklist. Today, that has largely remained unchanged. The only African countries on the visa exempt list are Mauritius and the Seychelles. Almost all of Asia is on the blacklist, whereas all of North America and most of Latin America are actually on the whitelist. People are often surprised that Latin American countries are on the whitelist, but that actually has to do with Spain having lobbied to maintain access for its former colonial territories. In any case, these visa lists, as others have noted, amount to a system of racialized, national profiling, according to which nationals on the blacklist must on an individual basis, work to overcome their presumptive exclusion via applications, adjudicated through processes that by law are characterized by broad discretion that is barely insulated from racially infused decision making, explicit and implicit.

For those of you who have Third World nationalities, you know exactly what I am describing if you have ever had to apply for a visa to travel to the First World. A recent parliamentary report in the United Kingdom found that African citizens who applied for British visas were twice as likely as the average applicant to be denied a visa and seven times more likely than a North American applicant. And obstacles to approval included poor quality and inconsistent decision making by visa offices, disregard for individual circumstances, strict but inconsistent documentation requirements, and an apparent institutional presumption that African visa applicants, particularly those with limited financial means, intend to violate UK immigration laws. The single most common issue brought to the report's authors was the denial of applications

because of the requirement to prove financial circumstances of the applicant. Notably, this requirement to prove financial circumstances caused problems even when applicants were fully sponsored by prestigious organizations that were providing financial security for these applicants . In other words, even with unequivocal evidence of financial means to sponsor their stay in the UK, suspicion of African applicants prevented them from being able to get visas to travel. The report raised concerns not only about racial discrimination and prejudice in decision making processes, but also gender discrimination as well.

The racialized closure affected by visa regimes has another facet. Continuing with the example of the United Kingdom, its visa restrictions do not affect all Africans equally. More to the point, Africans of European ancestry who are de facto white can use their bloodlines to circumvent restrictions that apply to their black co-nationals. A 2010 study mapped the visa regimes that facilitate the access of white South Africans to the UK and to Europe. The author of this study identified a number of visa categories available to South Africans based on the historical colonial relationship between South Africa and the UK, including what's called the ancestral visa. It is available to South Africans with a grandparent, and in some cases a great grandparent, born in the UK, and grants the bearer five years of work authorization with a path to citizenship. Africa's formerly settled British colonies, including South Africa, Zimbabwe and Kenya, all have citizens of grandparents and great grandparents who were born in the UK, and almost all of the qualifying citizens are likely to be white.

So, if you are a Zambian or a Zimbabwean or a Kenyan, for example, being black or white can determine whether or not you can travel visa free each to the UK. This means, in effect, the benefit of the ancestral visa is allocated on a racial basis to whites, even though British imperial subordination decimated the worlds of so many non-white Africans.

The justification of this differential access to the UK can neither be divorced from empire, past and present, nor from the meaning of race as a structure of imperial privilege. The point I am making is not that countries should not be able to make any determinations about who can have ties to them or not. My point instead is that it is unconscionable that imperial ties, which are characterized by extraordinary political and economic domination, are typically dismissed by former colonial powers, who instead rely on bloodlines to determine privileges of access. The bottom line is that visa regimes are not race neutral—the embody and perpetuate racial privilege.

In November 2021, the discovery of the Omicron variant by South African scientists resulted in a vivid display of the racialized nature of first world borders. By December 4th, the United Kingdom, the United States, Canada, and Germany had imposed blanket bans on foreign nationals coming from southern African countries, including countries in which Omicron had not yet been detected at all. I was in southern Africa when the bans were announced, and it was stunning to see countries in the region that did not even have any Omicron infections at the time also being put on the list. Entire African nations were deemed a diseased threat with no provisions for individualized assessment.

Speaking to what Professor Matiangai has described as the racialization of disease, entire nations were immobilized. And to the extent that the arguments for their immobilization were grounded in justifications regarding lower vaccination rates in regions like the African region, these justifications also belie the operations of other dimensions of border racialization.

As Professor Sirleaf has argued, global vaccine distribution is best characterized as a regime of vaccine apartheid, which she mentioned in her contributions to this Symposium, and which features an international intellectual property rights regime that unjustly denies Global South countries access to vaccine technologies. Vaccine apartheid also implicates an international economic system that has among other things, restructured many of these governments to shrink public healthcare and other essential services that have proven essential for weathering the pandemic. As Professor Sirleaf writes, "using vaccine apartheid to characterize the state of affairs is important because it troubles and renders suspect the use of terms like vaccine nationalism to describe countries hoarding enough supplies to vaccinate their own population several times over. The euphemism of vaccine nationalism conveniently papers over the racialized distributional consequences of vaccine inequities."[8]

In November 2017, media outlets reported the death of 26 Nigerian girls and women, aged between 14 and 18, whose bodies were found floating in the Mediterranean. There were many more individuals on the boat, including some survivors, and at the time that these girls and women were buried, only two of them had been identified by the Italian government when they were being buried.

8. https://www.justsecurity.org/79403/omicron-the-variant-that-vaccine-apartheid-built/

One was a Muslim woman named Marian Shaka, and the other was a Christian woman named Osata Asara. One of the survivors interviewed stated that the motivation for most of the women on the boat from Nigeria was the search for jobs. There was widespread outcry at the death of these girls, and that came from many different corners, from European and African governments, from human rights and humanitarian advocates.

In general, the European approach to migration governance has been the subject of very strong critique, including among human rights advocates within and beyond Europe. But this critique, especially among advocacy organizations pushing for more humane approaches to migration, traditionally a notable absence has been a racial justice critique.

It is important to note that Europe, like much of the First World, is powered by an economic system that is predicated on labor migration, and arguably even on unauthorized labor migration. But rather than provide legal pathways for this type of migration, European nations with the support of African governments, I should note, have doubled down on the securitization of European borders and even of African borders, to keep migrants out of Europe.

In the context of passports, visa regimes, border externalization, securitization policies that in effect, privilege first world international mobility, the reality is that the mortal cost of international mobility is largely a non-white problem. It is neither arbitrary nor coincidental that the 26 girls who perished in the tragedy that I described were Black.

In effect, and as Nicholas De Genova has remarked, Europe's borders are racial, as are many first world borders more generally. We might talk about the racialization of Third World borders, which is also something that is worthy of attention. The borders between imperial hegemons and the regions that they have historically exploited remain racially circumscribed graveyards as a result of the contemporary system of racial borders.

I have been focusing on Europe and Africa, but I could present a similar analysis regarding the US's southern border and its relationship to Central America, for example.

III. Race as a Territorial Border

I want to invite you in the time that I have left to consider the ways in which race itself operates as territorial border infrastructure. If we think about territorial border infrastructure as including walls,

drones, all of these things, I want to invite you to think of race as similarly operating in that way. And in doing so, I want to begin with a historical example.

On July 27th, 1919, a Black teenager named Eugene Williams was swimming in Lake Michigan, Chicago, a city that at the time was fought with racial tension among Blacks and whites, including as a result of the great migration of African Americans fleeing the inhumanity of the Jim Crow South. During his swim, Williams inadvertently drifted into the parts of the water that was unofficially considered to be the whites-only part of the lake. Chicago was not formally segregated, but its territory was without a doubt, racial space where rights informally, but effectively demarcated on a racial basis.

A white beachgoer who was outraged by Williams' act of trespass began throwing rocks at Williams, and we might think of this as an act of punishment, but also an act of border enforcement. Williams drowned that day, and in the aftermath, several Black witnesses urged a police officer, a white police officer who was present, to arrest the white man responsible for Williams' death. The police officer refused to do so, and according to one report, tensions on the beach escalated and a skirmish ensued when the officer arrested a Black man instead. This event triggered six days of protest and racial violence, sometimes referred to as the Chicago Race Riot of 1919, the biggest massacre of blacks by white supremacists across the US during the Red Summer. Williams' death occurred in 1919, which is the same year that the United States, along with Britain and its other former dominions, especially Australia and South Africa, were working hard to consolidate what W.E.B. Dubois described as the global color line. This is the year that they would reject the racial equality treaty that I mentioned above.

One analysis of the Chicago race riots of 1919, and the British Anglo opposition to that racial quality clause, as Nicholas Wisseman has put forward, is that both were triggered by "the perceived impact of migrating people." In the format, the migration north of black people "universalized the kind of anti-black politics that had previously been confined to the south" of the United States, says Wisseman.[9] The rhetoric of white Chicago, including calling on the South to "keep its blacks," with the advice that improving the rights of blacks in the South would help prevent their migration North. Notably, arguments of this sort are regularly deployed today by the European Union in an effort

9. Wisseman, *supra* note 6.

to keep black Africans out of Europe, including through fatal migration interdiction policies in the Mediterranean.

For Williams, even in the absence of any physical barrier designed to police access on a racial basis, and indeed in the absence of any individualized assessment of who he was, what rights he might have had in the lake, his Blackness—the specific social, political and legal construction that was inscribed in the color of his skin, the texture of his hair—operated as a border. His Blackness designated him as an interloper and made possible, and maybe for some even necessitated, his fatal stoning as border enforcement and as a punishment for trespass.

There were no white men literally throwing rocks at the Nigerian girls and women I mentioned in 2017. The Mediterranean is, however, policed by Libyan Coast Guards who are funded by the European Union violently to push migrants and refugees back to Libya, where they are detained in EU funded migration detention centers.

There are no white men literally throwing rocks at Black Africans and refugees in the Mediterranean. But European countries have gone so far as to criminalize aid, even by human rights and humanitarian groups who are trying to assist migrants and refugees in these waters. Preventing the otherwise inevitable deaths of migrants and refugees in these treacherous waters as punishable by law, while creating the conditions and providing the resources that result in the deaths of these migrants and refugees are not.

The Mediterranean is many things to many people, including to Black Africans, It is a site of Black death, such that race, specifically Blackness, is a determinant of death rather than a correlative or a coincidental feature. For the 26 Nigerian girls I mentioned earlier, their race was as much a reason for and means of their exclusion from Europe, as was the physical border machinery that bounds Europe. As black women, part of the social construction of their racial identity in the context of neocolonial empire is the mark of presumptive outsider or subordinate insider status where the nations of the First World are concerned. Access to Europe is mediated by race neutral, but racialized migration policies combined with pervasive racial profiling in immigration enforcement, such that the very bodies of these women operated as borders.

I have focused on Europe, but you can very easily substitute the United States in this analysis and consider the racialized forms of exclusion to which Indigenous, Black and other migrants are subject at the southern border. Their bodies function as territorial borders.

To say race is itself a border is to do a number of things. First, it is to say that no taxonomy of the various technologies that effect international borders, like walls, like fences, etc. can be complete without inclusion of race, and as such, race requires legal and theoretical attention, specifically where questions of legitimate national inclusion or exclusion, international migration, and international mobility are under consideration.

My work as a legal scholar has evolved as a result of my work as United Nations Special Rapporteur on Racism, Xenophobia and Related Intolerance, and vice versa. Both as a scholar and as a U.N. expert, I have found it remarkable how marginal racial justice considerations have been to normative and policy debates about borders and migration. I developed the account of racial borders I have shared briefly in this Keynote, in large part in response to this marginalization of racial justice, even in contexts where the human rights of migrants have been prominently centered. And in my work as Special Rapporteur—both through my thematic and my country reports—I have worked hard to push governments and human rights advocates to deepen norm development and implementation at the intersection of racial justice and equality, and migration.

It has been heartening to witness the ways in which the transnational racial justice uprisings of 2020 have shifted the prominence of racial justice both within and outside of the United Nations, and to see the spillover of concern for these issues in the context of the human rights of migrants. Migrants rights and racial justice organizations and movements are doing important work to contest racial borders, and this work is significantly more prominent than it was even when I first took on the role of Special Rapporteur. It bears repeating, however, that for international legal scholars, for international policy makers, for human rights or migrants' advocates, there can be no comprehensive approach to international migration and international mobility without regard to how race fundamentally shapes both.

Secondly, to mark race as a border is to call attention to the unique ways that race functions as a means of enforcing territorial and political borders of the nation, and the way that borders themselves can function as a means of racial governance, by which I mean governance based on and reinforcing racial hierarchy. Yet today, sovereignty-based justifications remain legal shields that enable conduct and policy that would in many jurisdictions amount to prohibited racial discrimination if the conduct or policy were not laundered through the seemingly neutral categories of nationality and citizenship.

If time permitted, I would provide you with examples of provisions even in international human rights treaties that do this work of prohibiting racial discrimination on the one hand, but then on the other create protected carveouts for racially discriminatory governance through nationality and citizenship distinctions that are de facto (and in some cases de jure) racial distinctions. Instead, I refer you to my article *Racial Borders*, and offer the reminder that to this day international law is crafted to serve as a permissive doctrinal baseline for national legal schemes of racialized exclusion of non-nationals.

Racial borders, irrespective of whether they are underwritten with racist intent, subject politically equal and interconnected persons in the Third World and in the First World to different structures, treatment, and possibilities for self-determination on a racial basis. And persisting neocolonial interconnection means that the contemporary system of racial borders is unjust in many of the same ways that rendered Jim Crow in the American South and apartheid in South Africa and other colonial regimes of racial segregation unjust.

And the point that I'm trying to make here is, when we are accounting for the injustice that is embedded in international migration governance regimes, that accounting should include the ways in which borders keep separate on a racial and geographic basis, groups that remain otherwise bound by political and economic interconnection on unjust terms.

Where does that leave us? I would argue that at least one lesson is to keep clear sight of the fact that racial justice, where borders are concerned, but even arguably more broadly, has to be a decolonial project as Natsu Taylor Saito has argued in her recent book, *Settler Colonialism, Race, and the Law*. And part of what it means to think about racial justice as a decolonial project, is that it requires a commitment to undoing structures of imperial subordination and rethinking and reimagining the political and economic systems that structure our lives, and that bind us together even across borders.

Thank you for the privilege of your attention.