



COLORADO LAW
UNIVERSITY OF COLORADO BOULDER

INTERNATIONAL LAW AND RACIAL JUSTICE

UNIVERSITY OF COLORADO, AUGUST 3-4, 2018

We write to invite you to a workshop on international law and racial justice. The conference will take place at the University of Colorado Law School, in Boulder, Colorado, on August 3-4, 2018. Below you will find a description of what we envision as the workshop's central themes, as well as the logistics. We very much hope that you will join us in the effort to theorize the problem of racism in the contemporary practice of international law.

Themes

What are the central problems for contemporary international law? Depending on the terms with which we frame “the contemporary,” the answers are obvious: terrorism, climate change, international organization, empire. These and more prove ready candidates. Today, however, international law is more pluralist than perhaps ever in its long history. This pluralism goes far deeper than in the fragmentation of its many doctrines and institutions.¹ It goes right to the issue of what we conceive the discipline to be about. Take, for example, Andrea Bianchi's recent book, *International Law Theories: An Inquiry into Different Ways of Thinking*. In his tour of what it means to think like an international lawyer today, he surveys no less than thirteen distinctive modes, including Law and Economics, Marxism, Feminism, and TWAIL.² No doubt, with an appetite for going beyond the book's already substantial 320 pages, Bianchi could have detailed even more. There is clearly a whole lot going on in the contemporary study of international law.

This conference, dedicated to the question of *International Law and Racial Justice*, steps into this methodological diversity only to encounter a surprising disconnect. This is a disconnect between an ongoing engagement with racial justice on the side of international institutions, and the virtual abandonment of that question on the side of international legal scholarship, as suggested in works like Bianchi's. On this latter point, it is worth considering

¹ See, e.g., Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006).

² ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* (2016).

how, in all the rumpus currently under way in the pluralism of international law and the interrogation of international legal thought, a *racial* approach is rarely among them. True, TWAIL scholarship continues in its development, both increasing its scope and deepening in its value. However, as insightful roundups of the TWAIL program regularly attest, while “culture” and “ethnicity” regularly feature on the menu, race and racism do not.³ This relative silence on the topic of race was flagged almost twenty years ago in the context of a symposium in the Villanova Law Review, titled “Critical Race Theory and International Law: Convergence and Divergence.” In the introduction to the symposium, Ruth Gordon wrote:

[Critical race theory] places race at the center of American jurisprudence and the American experience...This critique of race and racism in the American legal system has presented a powerful and empowering challenge to traditional legal discourse regarding race and rights. How the Critical Race critique facilitates an understanding of the *international system*, however, has yet to be established with any degree of certainty. Theories that explain and deconstruct America’s peculiar institutions do not necessarily clarify the international plane. Traditional international discourse is framed in terms of formal equality, and race appears to be an almost non-existent factor. *International legal theory rarely mentions race, much less employs it as a basis of analysis.*⁴

Oddly, Gordon’s assessment of international legal scholarship in 2000 is as relevant today as it was then.⁵ Especially when we consider the flowering of perspective that has taken place in the two decades since, the fact that “race” fails to make the lists is all the more puzzling. It is worth asking: in the context of international legal scholarship, what accounts for this general lack of interest in a racial analysis? Why might race prove such an essential category in the study of domestic law, and yet elude international legal theory so consistently?

³ See, e.g., Antony Anghie, *TWAIL: Past and Future*, 10 INTERNATIONAL COMMUNITY LAW REVIEW 479 (2008); James Thuo Gathii, *TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE LAW & DEVELOPMENT 26 (2011).

⁴ Ruth Gordon, *Foreword*, 45 VILLANOVA LAW REVIEW 827, 829-830 (2000).

⁵ To be sure, in the years since the Villanova symposium there have been sporadic interventions. See, e.g., DENISE FERREIRA DA SILVA, *TOWARD A GLOBAL IDEA OF RACE* (2007); HENRY RICHARDSON III, *THE ORIGINS OF AFRICAN AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008); Ediberto Roman, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?* 33 UNIVERSITY OF CALIFORNIA-DAVIS LAW REVIEW 1519 (2000), Gil Gott, *Critical Race Globalism? Global Political Economy, and the Intersections of Race, Nation, and Class*, 33 UNIVERSITY OF CALIFORNIA-DAVIS LAW REVIEW 1503 (2000); Celina Romany and Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of its Normative Assumptions*, 36 CONNECTICUT LAW REVIEW 831 (2004); Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, 42 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 453 (2012).

These questions are especially vexing when we come back to the very different world of international institutions. In this context, the fight against racism in international law that began after World War II continues today. As has been well-documented, the United Nations system first tackled the question of racism when UNESCO issued the first of four, highly influential “statements on the race question.”⁶ A decade later, the International Convention on the Elimination of All Forms of Racial Discrimination entered into force.⁷ At the same time, General Assembly Declarations aimed at Decolonization and Self-Determination were busily prepared and launched. The Committee on the Elimination of Racial Discrimination continues much of that work today, as does the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance.⁸ There is, it’s fair to say, a healthy regard for the problem of racial justice at the level of our global administration. What then could account for the apparent absence of the racism problematic from contemporary international law discourse? Why the disconnect?

We suspect that there are at least two causes for the general lack of interest in using race “as a basis for analysis” in the academic study of international law. First, and as has been regularly discussed, the covert elements of contemporary racism are simply more difficult to define than was the overt racism of the Twentieth Century. Furthermore, racism is widely perceived as a problem of individual prejudice, and no longer a problem of the interstate system—at least, not anymore. Given this intuition about racism as a problem of individual character, with agencies like CERD and the Commission of Human Rights in play, and without a controversy like slavery, apartheid, or Jim Crow to organize the field, the issue is simply too vague. What *is* the problem of racism in international law, today? We know what it was then, but what is it *now*? Is there a problem that still needs international lawyers to theorize and solve it?

A second explanation goes to a going confusion about the relation between cultural domination and racial justice. As we have already mentioned, there is in international legal thought a general preference for analyzing ethnicity or culture over race. In recent decades, advances in biology have shored up the conclusion that race is a proper object of social science, not natural science. There is, in other words, no biological foundation for a thing called “race.” This suggests that while race recedes as myth, ethnicity and culture emerge as the real objects of study, objects of power fit for the social sciences. As a result, the study of ethnicity and culture in international relations covers the gamut. Whatever status racism

⁶ The statements are available at <http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf>.

⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁸ <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/OverviewMandate.aspx>

holds in the international order, the contemporary focus on culture will address it. A separate focus on race is simply unnecessary.

The shift away from race and towards ethnicity and culture seems to make sense. It makes sense, at any rate, only so long as that in the shift we leave not only *race* behind, but *racism* as well. As Richard Ford has argued, however, this is trickier than it seems.⁹ In *Racial Culture*, Ford argued that the U.S. Supreme Court's elevation of cultural diversity as the primary justification for affirmative action crystallized the legal system's fatigue in fighting racism. The *neoracist* problem is therefore the problem of racism *after* ethnicity and culture emerge as the preferred units of analysis, in which courts avoid the question of racial conflict in favor of finding shade in a "diverse" and politically innocuous multicultural landscape. As Ford argued, by re-describing racial subordination as a feature of cultural difference, anti-racist strategies diminish from "what should be an indictment of social practices of exclusion and subordination into a plea for 'tolerance' of a 'diversity'."¹⁰ He added, "In this light it would appear that a central function of 'diversity' is to finesse, if not obscure, the salience of contemporary racism."¹¹ A question: However meritorious is Ford's contention about U.S. law and society, does international legal scholarship face similar problems?

We intend for this symposium on *International Law and Racial Justice* to interrogate these issues, and more. Indeed, while we have flagged the general questions of (1) whether international law has yet to come to grips with contemporary racism, and (2) the relation between the turn to ethnicity and culture and neoracism, we invite a wide variety of explorations.

Logistics & Timeline

We will host the conference at the University of Colorado Law School in Boulder, August 3-4, 2018. We will ask participants to cover their own travel and lodging expenses, though we will cover meals. In future correspondence we will provide information on some suggested hotels. Please submit abstracts to Justin Desautels-Stein (jjdstein@colorado.edu) by **April 1, 2018**.

We look forward to hearing from you!

⁹ RICHARD FORD, *RACIAL CULTURE* (2009).

¹⁰ Ford, *supra* note, at 53.

¹¹ *Id.* at 52.

Sincerely,

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(Organizers)