Race, Borders, and Jurisdiction

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Abstract 465
Keywords 465
I. Prologue 466
II. Introduction 468
III. Historical Antecedents 473
IV. The Conjured Contemporary 476
V. Conclusion 481

Abstract

International borders are mechanisms of racialised exclusion and inclusion. Building on my prior work on liberal racial borders, in this essay based on my keynote speech at the AjV-DGIR conference on 'Jurisdiction – Who speaks international law?', I reflect on aspects of the doctrine of jurisdiction as crucial mechanisms through which these borders reinforce a persisting global racialised order.

Keywords

Race – Borders – Jurisdiction

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[1] This essay is a revised version of the keynote address I delivered at the Conference of the Young Scholars in Public International Law (AjV) and the German Society of International Law (DGIR) entitled 'Jurisdiction: Who Speaks International Law?', at the University of Bonn, from 3-4 September 2021. This keynote essay draws heavily but also diverges from my article 'Racial Borders', which the reader can consult for fuller analysis of the legal relationship between race and liberal borders, and for more comprehensive references than are provided here. E. Tendayi Achiume, 'Racial Borders', Geo. L. J. 110 (2022), 445-508. This essay builds on 'Racial Borders' by offering some reflections specifically on the role of *jurisdiction* in racialised exclusion and inclusion. Many thanks to Cooper Christiancy and Zunaira Sadar for their research assistance.

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I. Prologue

On 27 July 1919 a Black teenager named Eugene Williams was swimming in Lake Michigan, Chicago – a city that at the time was fraught 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.[2] During his swim, Williams inadvertently drifted into a part of the water that was unofficially considered to be a 'Whites only' part of the lake. Chicago was not formally segregated, but its territory was without a doubt racial – space and rights were informally but effectively demarcated on a racial basis. A white beachgoer outraged by Williams' act of trespass began throwing rocks at Williams. We might think of this as an act of punishment. But it was also an act of border enforcement.

Williams drowned that day – one rumour was that he died from a blow to the head, another account was that the rock-throwing prevented him from reaching the shore and that this is what ultimately caused his death. The death of Eugene Williams makes vivid the ways in which race operates as spatial and indeed territorial border infrastructure. Even in the absence of any external physical barrier, and indeed in the absence of any individualised assessment of who he was and what rights he might have had in Lake Michigan – his Blackness – the specific social, political, and legal construction inscribed in the colour of his skin – operated as a border. His Blackness marked him as a presumptive territorial, and perhaps jurisdictional, interloper operationalised his personal exclusion, in this case achieved through a fatal stoning.

In early November 2017, the bodies of twenty-six Nigerian girls and women aged between fourteen and eighteen were found floating in the Mediterranean Sea, following their failed attempt to reach Europe alive.[3] Before the burial of the twenty-six Nigerian girls and women in Italy, two were identified by name as Marian Shaka and Osato Osaro. These girls and women joined the tens of thousands of Black Africans and other refugees and migrants who have met their death in the Mediterranean, in large part as the result of a migration governance regime that is calculated to keep as many of these migrants and refugees out, including through their deaths if necessary.[4]

2 Robert Loerzel, 'Blood in the Streets', Chicago Magazine (23 July 2019), available at <https://www.chicagomag.com/>.

3 Angela Giuffrida, 'Teenage Nigerian Girls Drowned at Sea, Italian Autopsies Confirm', The Guardian (16 November 2017), available at <https://www.theguardian.com/>.

4 For data and visualisations on the scale of deaths at Europe's southern borders see Amsterdam University's *Deaths at the Borders Database*, available at <http://www.borderdeaths.org/>.

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European Union (EU) coastguards, and Libyan coastguards funded by the European Union to heavily police the Mediterranean, push migrants and refugees back to Libya where they are detained in EU-funded migrant detention centres.[5] EU and European national coastguards themselves used to do the work of 'pushing back' migrants and refugees but had to outsource these activities to Libyans to avoid establishing legal jurisdiction and thus to avoid liability within the European human rights regional framework.[6]

There are chilling parallels between the death of Eugene Williams and the deaths of Marian Shaka and Osata Osaro, notwithstanding the century that separated them.

What international condemnation there was of the drowning of the 26 Nigerian girls characterised it as a tragedy, as well as a crime attributable to ruthless but organised transnational smuggling and trafficking networks. The problem, according to African and European leaders, was a pathology external to the international order and its governance mechanisms (criminal smuggling and trafficking networks), rather than systemic – a logical and predictable output of the international system. The predominant human rights critique highlighted the brutal conditions of migration, including the harassment and abuse that characterises unauthorised migration and the complicity of European and African governments in consolidating punitive migration governance regimes that, among other things, violate the rights to due process and protection that refugees and others have under international law. But little – if anything – was made of the race of these girls and women, and certainly there was no political or legal critique anchored specifically in postcolonial or racial justice concerns. Yet, their death is a predictable outcome of racially exclusionary migration governance regimes.[7] And their Blackness is a determinant of their death rather than a correlative or coincidental feature, because of what Blackness has been socially, politically, economically, and legally

5 The term 'pushbacks' is regularly used to describe the forceful prevention of migrant and refugee access to Europe via the Mediterranean, but 'pushbacks' is a euphemism that could more realistically be replaced by 'drownings' and 'returns to Libyan territory where African migrants risk enslavement and even death'. Niamh Keady-Tabbal and Itamar Mann convincingly suggest the term 'pushbacks' is a euphemism, among other things, for torture. Niamh Keady-Tabbal and Itamar Mann, '"Pushbacks" as Euphemism', EJIL: Talk! (14 April 2021), available at <https://ejiltalk.org/>.

6 E. Tendayi Achiume and Aslı Ü. Bâli, 'Race and Empire: Legal Theory Within, Through and Across National Borders', UCLA L. Rev. 67 (2021), 1386-1431 (1422-1424).

7 See Achiume, 'Racial Borders' (n. 1) 464-494.

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been constructed to mean and do in our international order, including through borders.[8]

Borders are mechanisms of racialised exclusion and inclusion, and in this essay I reflect on jurisdiction as fundamental component that enables borders to operate this way.

II. Introduction

Jurisdiction is slippery, 'a word which must be used with extreme caution',[9] according to the warning that begins the exposition of the concept of jurisdiction in one public international law treatise. Nonetheless, jurisdiction sits at the heart of public international law, and is among its most foundational concepts. It is concrete and material in its effect – jurisdictional determinations can be life or death determinations. And yet its meaning as a concept, and even its doctrinal bounds, notoriously defy easy definition.

The conventional account is that the jurisdiction of a state, among other things, is its authority over persons, property, or events, and that furthermore, this jurisdiction is exercised on the basis of territory or nationality. A typical account of jurisdiction will highlight that it takes the forms of prescriptive, adjudicative, and enforcement jurisdiction.[10] Although jurisdiction is based on territory and nationality,[11] territoriality dominates the

8 See Achiume, 'Racial Borders' (n. 1) 480-488.

9 Peter Manczuk, *Akehurst's Modern Introduction to International Law* (7th edn, London: Routledge 1997), 109.

10 See for example, Alex Mills, 'Rethinking Jurisdiction in International Law,' BYIL 84 (2014), 187-239 (194-196) ('In the context of the rules on the regulatory authority of states, three types of public international law jurisdiction are usually distinguished […]. The first type of jurisdiction is jurisdiction to prescribe or legislate, or (roughly) the limits on the law-making powers of government – the permissible scope of application of the laws of each state. The second is jurisdiction to adjudicate, or (roughly) the limits on the powers of the judicial branch of government […]. The third is jurisdiction to enforce, or (roughly) the limits on the executive branch of government responsible for implementing law, such as law enforcement agencies […]. The territorial character of enforcement jurisdiction is well established, and an important reflection of the principle of non-intervention in the internal affairs of other states […] [S]tates are recognized as having prescriptive jurisdiction based on one of two types of connecting factors – territoriality […] and nationality […]. The primary source of regulatory authority for states in public international law is usually considered to be territorial.').

11 See, for example, Bernard H. Oxman, 'Jurisdiction of States' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2007), para. 3 ('The fundamental bases for the exercise of jurisdiction by a State are rooted in two aspects of the modern concept of the State itself: defined territory and permanent population […] a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals wherever they may be.').

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exercise of jurisdiction.[12] The exception is, of course, extra-territorial jurisdiction.[13]

In his recent Third World Approaches to International Law critique of jurisdiction, B. S. Chimni notably explores the ways in which 'jurisdiction is a complex social and political concept and its doctrine, rules and practice can have significant class, gender, race and caste effects'.[14] I propose that among its myriad functions, jurisdiction also operates as powerful *racial technology*. I rely on the definition of 'racial technology' offered by Chantal Thomas, who explores race and racialisation as technology to refer to 'the set of knowledge practices involved in the construction, legitimation, and enforcement of social categories – in this case, identity categories'.[15] Jurisdiction functions as a form of racial technology, in the sense that it is among the legal knowledge practices through which racial categories are enforced, which I will explain in more detail below. And as a technology – jurisdiction is a potent conjuring kind. It might seem strange to combine a term as scientifically embedded as 'technology' with a term as mystically embedded as 'conjuring'. Conjuring evokes imagery of spells, incantations, and other

12 See, for example, Mills (n. 10), 198 ('[…] [I]nternational law rules on jurisdiction are traditionally dominated by ideas of territoriality […]'); see also Cedric Ryngeart, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press 2008), 9, 48 ('it is generally accepted that [States] are not entitled to enforce their laws outside their territory, "except by virtue of a permissive rule derived from international custom or from a convention"' and '[i]n customary international law scheme of jurisdiction, the territoriality principle serves as the basic principle of jurisdiction.').

13 Extraterritorial assertations of jurisdiction may be based on the 'universality principle'. Ryngeart (n. 12), at 7. The doctrine of universal jurisdiction allows states to exercise their jurisdiction without territoriality or nationality requirements, for crimes that are thought to be of fundamental concern to the international community, including piracy, war crimes, and crimes against humanity. See also Chimèni I. Keitner, 'Transnational Litigation: Jurisdiction and Immunities' in: Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (online edn, Oxford: Oxford University Press 2013), 794-815 (796). There are, however, concerns about the imperial character of the formal and substantive dimensions of universality. See, for example, Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law', EJIL 18 (2007), 379-408, (389-390).

There is also growing recognition of treaty-based obligations on States to exercise extra-territorial jurisdiction, expanding the scope of accepted jurisdictional principles and in conflict with traditional prohibitive rules on jurisdiction. For a discussion on the legal foundations for human rights obligations beyond national borders, see generally Sigrun I. Skogly and Mark Gibney, 'Transnational Human Rights Obligations', HRQ 24 (2002), 781-798.

14 B. S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective', LJIL 35 (2022), 29-54 (30). Chimni provides an account, among other things, of how historically, the rules of extraterritorial jurisdiction were framed to address the tension between the universal thrust of capitalism (the 'logic of capitalism') and the existence of separate political entities in non-European spaces (the 'logic of territory').

15 Chantal Thomas, 'Race as a Technology of Global Economic Governance', UCLA L. Rev. 67 (2021), 1860-1896.

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mystical devices for making unreal things real, or rendering the inconceivable into the perceived. But jurisdiction does this. It helps make things that might otherwise be unthinkable, into things that become seen as irrefutable truths. Its role in enforcement of racialised exclusion tends also to disappear the racialised nature of this exclusion, as if by magic.

I consider jurisdiction in this light, as a critical component in international law's arsenal of conjuring technology, one that performs a specific imperial function in the creation and maintenance of transnational racial subordination through and across borders. Hence my title, *Race, Borders, and Jurisdiction*.

I want to be explicit about what I mean by 'race' not least because in some parts of the world, to speak of 'race' is effectively taboo. It is a term that some consider offensive, outdated, and inherently divisive.[16]

I highlight two approaches to 'race', that among others, are notably relevant for legal analysis of ongoing discrimination, exclusion, and subordination. Ian Haney-López describes race as 'the historically contingent social systems of meaning that attach to elements of morphology and ancestry'.[17] This definition unequivocally rejects the scientifically and morally discredited notion of biological races,[18] and instead recognises race as a potent social construction. It recognises that the social construction of race is informed by physical features and lineage, not because physical features and lineage are a function of racial variation in biological terms (they are not), but because societies invest morphology and ancestry with social meaning. At the same time, race is by no means simply or even mostly about physical attributes such as colour. It is centrally about the legal social, political, and economic meaning of being categorised as Black, White, Brown or any other racial designation. I thus use the term race to refer to a socially constructed category that has historically attached varied meaning to morphology and ancestry on bases that have no biological validity.

There is a tendency, including in international legal discourse, to treat race as mostly an identity attribute of individuals and groups, and at the same time to ignore the ways in which race operates as a structure of power according

16 A few years ago France, for example, removed the word 'race' from its constitutional provision on equality on the argument that there are no different races and it is outdated to speak as such. See Amna Mohdin, 'France Replaced the Word "Race" With "Sex" in Its Constitution', Quartz (28 June 2018), available at <https://qz.com/>.

17 Ian Haney-López, *White by Law: The Legal Construction of Race* (10th edn, New York: New York University Press 2006), 10.

18 For a discussion of 19th Century pseudoscience on race and its influence on international law, see Justin Desautels-Stein, 'A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights', UCLA L. Rev. 67 (2021), 1536-1578.

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to which privileges and rights are allocated.[19] The work of Aníbal Quijano provides a helpful corrective to this approach. His 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'.[20] In the European colonial context, race structured rights and privileges on hierarchical terms determined by white supremacy. Although formal decolonisation has occurred in most of the world, race persists as a neocolonial structure, one that still allocates benefits and privileges to the advantage of some and the disadvantage of others largely along the same geopolitical and racial lines that characterised the European colonial project.[21] This is by no means a totalising account of the meaning of race, but this structural and material meaning is central to my analysis.[22]

Elsewhere, I have argued that we should understand contemporary liberal borders as *racial borders*.[23] 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. Such borders govern access to legal and political rights through access to geographic territory, and vice versa. Because borders play this racialised gate-keeping role, as I will demonstrate, we should understand today's national borders – especially those of the First

19 For an analysis of this trend in international human rights law, see E. Tendayi Achiume, 'Governing Xenophobia', Vand. J. Transnat'l L. 51 (2018), 333-398 (365-368).

20 Aníbal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America', Nepantla: Views from South 1 (2000), 533-580 (535).

21 For a recent analysis of race as a neocolonial distributor of resources in the context of global natural resource extraction, see E. Tendayi Achiume (Special Rapporteur), 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on Global Extractivism and Racial Equality', (2019) U. N. Doc. A/HRC/41/54.

22 I am also influenced by Patrick Wolfe's conceptualisation of race: 'race is colonialism speaking, in idioms whose diversity reflects the variety of unequal relationships into which Europeans have co-opted conquered populations'. Patrick Wolfe, *Traces of History: Elementary Structures of Race* (London: Verso Books 2016), 5. For a discussion of race as embodied and structural, see Alana Lentin, 'Race' in: William Outhwaite and Stephen Turney (eds.), *The SAGE Handbook of Politicial Sociology: Two Volume Set* (London: SAGE Publications Ltd 2018), 860-878 (866) ('The most unavoidable dimension of race is its attachment to particular bodies. However, […] these are not arbitrary bodies: the reason Black and non-white (brown) bodies are coded as racially inferior has everything to do with the fact that Black and Brown people were to be found in the territories invaded by Europe from which slaves were also taken. And, as the history of immigration to the "West" reveals, this initial linking of "color, hair and bone" to relative power status endures: Black and Brown migrants continue to be those either locked out of the world's wealthy countries or occupying positions of relative domination and exploitation within them.'), citation omitted.

23 Achiume, 'Racial Borders' (n. 1).

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World[24] – as racial technology.[25] The default output of these borders is differential treatment and outcomes on the basis of race, with White supremacy as one important ordering principle (among others) that determines benefit or advantage. Borders preserve and enforce racial hierarchy, and facilitate labour and other forms of exploitation on a racial basis.[26] National borders are also gendered[27] and ableist,[28] but the focus of my analysis is race.

24 I use the term First World to refer to former European colonial powers (including settler colonial nations such as the United States, Canada, and Australia), in keeping with the tradition of Third World Approaches to International Law Scholarship (TWAIL). I use the term 'Third World' to refer to the territories and peoples formerly colonised by the First World. For an exposition of the category 'Third World', including responses to concerns regarding anachronism or offensiveness, see Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography', Third World Legal Studies 1998-1999 Vol. 15 (2000), 1-20 (3-4, 7-11). TWAIL interrogates ways that European colonialism continues fundamentally to structure international law and relations, and uses the terms First and Third World as theoretically and politically productive categories. For helpful background, see James T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', Trade, Law and Development 3 (2011), 26-64; John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press 2017), 21 ('[TWAIL is] a social and political consciousness that bands together a diversity of actors through their common marginalization by the particularities of global North hegemony.'); and Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', International Community Law Review 10 (2008), 371-378 (374-377). For analysis of the meaning, value, and limits of the concept of the 'Third World', see B. S. Chimni, 'Approaches to International Law: A Manifesto', International Community Law Review 8 (2006), 3-27 (4-7); Makau Mutua, 'What Is TWAIL?', ASIL Proc. 94 (2000), 31-38 (31-32); Karin Mickelson, 'Rhetoric and Rage: Voices in International Legal Discourse', Wis. Int'l L. J. 16 (1997), 353-419 (355-362); Reynolds (n. 24), 21-24; and E. Tendayi Achiume, 'Migration as Decolonization', Stanford L. Rev. 71 (2019), 1509-1574 (illustrating the relevance of the Third World and First World categories for understanding historical and contemporary border injustice).

25 Chantal Thomas, for example, offers an account of race as a technology of global economic governance. Thomas (n. 15), 1860-1896. Thomas also provides a useful literature review of scholarship establishing 'that racial differentiation [has] constituted a crucially important mechanism for accumulating profit and for structuring global networks of production, for example by justifying practices of forced labor and by pressing populations and territories into service in the production of cheap raw materials and of markets'. Thomas (n. 15), at 1874.

26 Global migrant labour regimes are characterised by racialised and gendered forms of exploitation and extraction. See, for example, Adelle Blackett, '"The Space Between Us": Migrant Domestic Workers as a Nexus between International Labour Standards and Trade Policy' in: Daniel Drache and Les Jacobs (eds.), *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (online edn, Cambridge: Cambridge University Press 2014), 259-273 (259); Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Ithaca: Cornell University Press 2019), 3.

27 See, for example, Eva Brems, Lourdes Peroni and Ellen Desmet, 'Migration and Human Rights: The Law as a Reinforcer of Gendered Borders', NQHR 37 (2019), 282-287.

28 See, for example, Moria Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', Berkeley J. Int'l L. 34 (2016), 1-43 (arguing that the international human rights regime 'ends up protecting disproportionately those individuals who are mentally willing to assume serious risks and whose bodies are physically able to make the arduous attempt').

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Notably, borders structurally exclude and discriminate on a racial basis as a matter of course, often through facially neutral law and policy, including doctrine buttressed by the doctrine of domestic jurisdiction.[29] Thus in elaborating my account of racial borders and the transnational injustices they perpetuate, in this keynote, I will emphasise the place and role of jurisdiction.

III. Historical Antecedents

Within the territory of a sovereign state, that state exercises exclusive jurisdiction, and an incident of sovereign jurisdiction is the right to exclude non-nationals from its territory on an almost, but not entirely, unfettered basis.[30] As an incident of sovereign jurisdiction, then, the right of territorial exclusion is not only legitimate but fundamental. And, but for the exceptional circumstances when the right to exclude is exercised explicitly on a racial basis, for example, by avowed ethno-nationalist leaders, this formulation of sovereign jurisdiction is treated as having little if anything to do with transnational racial subordination.

History tells a different story.

European imperialism in the 19th Century played a crucial role in producing the migration and mobility regimes that we should consider the progenitors of contemporary regimes. As late as the mid-19th century, immigration was largely unrestricted across the British Empire and its settler colonies. But even during this period, large scale international mobility of Europeans *and* non-Europeans across imperial territories was a function of race and of the economic needs and 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 brutally coerced migration of enslaved Africans for its labour supply – Africans who were designated as property on a racial basis to power settler colonial prosperity. This shift thrust Indians into the role that historians describe as 'the global working class of the British Empire',[31] as millions were contracted as labourers to work across the British colonies in the Caribbean, South East Asia, South Africa, and the Pacific. British treaties

29 Achiume, 'Racial Borders' (n. 1) 488-494.

30 See, for example, Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', EJIL 27 (2016), 901-922 (902).

31 Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality* (Cambridge: Cambridge University Press 2008), 23.

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recognised and protected certain forms of mobility and migration even for non-whites for the purposes of imperial prosperity.[32] However, by the late 19th century, immigration restrictions would ultimately implement a regime of racial segregation on an international scale, with the British self-governing settler colonies leading the charge.

The work of historians Marilyn Lake and Henry Reynolds is instructive in this regard.[33] By the end of the 19th Century, the rise of nationalism and protectionism led Western governments for the first time to start systematically denying admission to certain classes of aliens on a racial basis. The United States in 1790 restricted naturalisation 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 Immigration Restriction 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'.[34] At its modern inception, immigration restriction as we know it was racially purposed.[35]

The late 19th and early 20th centuries were also the period in which an absolutist conception of the sovereign right to exclude non-nationals crystallised, and did so legally to legitimate the exclusion of Asians especially from white settler colonies of the British empire.[36] Eve Lester's doctrinal analysis of early international law reveals how in the work of Vitoria, Grotius, Pufendorf, and Vattel 'the (rights bearing) foreigner was – always and anywhere – a European insider[.]'.[37] With European colonial expansion, however, 'it was the appearance of the foreigner as a racialized (non-European) figure and the desire to regulate [their] labour that led directly to the emer-

32 See, for example, Treaty of Peace, Friendship, and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China (Treaty of Nanking) of 29 August 1842.

33 Lake and Reynolds (n. 31).

34 Article I, An Act to Make Provision for Certain Immigrants (No. 39 of 1855), 'Chinese Immigration Act 1855' (Vic).

35 For example, Karin de Vries and Thomas Spijkerboer chart the colonial and racial genealogy of the European Court of Human Rights' jurisprudence on migration, as well as the contemporary doctrinal ramifications of this genealogy. Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights', NHQR 39 (2021).

36 James A. R. Nafziger, 'The General Admission of Aliens Under International Law', AJIL 77 (1983), 804-847 (809-815). More generally, on the colonial construction of sovereignty doctrine as a mechanism enforcing racial difference for the benefit of European settler and exploitation colonial nations see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2004), 115-268.

37 Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Cambridge: Cambridge University Press 2018), 78.

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gence of restrictive migration laws and then a common law doctrine of "absolute sovereignty"'.[38]

The equality stakes implicated by national border governance in the colonial era – and in particular the racial equality stakes – were perhaps most vividly illustrated in the fate of the Japanese racial equality clause proposed for inclusion in the founding charter of the League of Nations, following the end of the First World War in 1919. Japan's proposal was to include a 'racial equality' clause in the League of Nation's foundational treaty that would have required all members of the League of Nations to grant 'to all alien nationals of States members of the League equal and just treatment in every respect, making no distinction either in law or in fact, on account of their race or nationality.[39] If adopted, this proposal would have enshrined racial equality and equality between nationals and non-nationals in international law, at least for international migrants who were nationals of the member states of the League of Nations. Among the concerns motivating the racial equality clause was the concern that the founding treaty of the League of Nations would entrench the status quo borders and mobility at the time, thereby preserving the dominance of European colonial nations and their control over the world's resources by closing their colonial territories to non-European, and specifically Japanese, foreigners. The language of the proposed clause, which named race and nationality as prohibited bases for differential treatment, makes plain the tight relationship between the categories of race and nationality. Furthermore, I would argue that the language of the clause also speaks to the salient function of nationality, which operates as a proxy for race within the broader context of imperial exclusion and differentiation.

In the lead up to the formation of the League of Nations, Woodrow Wilson in February 1919 joined others in the Anglo-American alliance that rejected the racial equality clause. Note that 1919 was the same year of the killing of Eugene Williams that I described at the beginning of my presentation. Domestic projects of racial subordination of Black people, alongside racialised national exclusion of Asians, were jointly at play in motivating the Anglo-American rejection of the racial equality clause.

Of special interest for international legal scholars, and immigration scholars more broadly, is that opponents of the racial equality clause articulated the concern that this clause 'could be construed as giving jurisdiction to an

38 Lester (n. 37), 82. In her recent manuscript, Ntina Tzouvala advances our understanding of international law's standard of civilisation as advancing a pro-capitalist bias that played an important part in the racial and gendered subordination of colonised nations in the 19th and 20th centuries as well. Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge: Cambridge University Press 2020).

39 Lake and Reynolds (n. 31), 289.

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international body over immigration, naturalization, the franchise, land ownership and marriage',[40] a move that would pose what was perceived as an existential threat to the sovereignty of the settler colonial nations. Immigration and naturalisation – regimes of racialised control over access to the benefits of colonial exploitation – were regimes to be shielded from external scrutiny and challenge, especially scrutiny that might insist on principles of equality and non-discrimination. And the requisite shield was ultimately to be found in the invention of the concept of domestic jurisdiction. Vincent Chetail aptly concludes that it was in this period that 'the very notion of domestic jurisdiction was literally invented by the [United States]' as a means of sheltering its project of racialised exclusion of Asians.[41] In her penetrating genealogy of freedom of movement, Anam Soomro makes the compelling argument that the fate of the racial equality clause evinced 'an emerging Anglo-American consensus on the need to lay down some foundations from which racialized global governance could be conducted without challenge'.[42] She provides a brilliant forensic investigation of the emergence of domestic jurisdiction from the Anglo-American alliance, tracing its subsequent inclusion in the League of Nations and the United Nations Charter, and its legacy through the Universal Declaration of Human Rights.

IV. The Conjured Contemporary

Political theorist Charles Mills, in his book *The Racial Contract*, theorised racial privilege as a form of political domination,[43] and racism as a political system – a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, and rights and duties. Furthermore, he argued that conceptually, 'white supremacy should be thought of as itself a political system'.[44] The logic of this system is 'the differential privileging of […] whites as a group with respect to […] nonwhites as a group, the exploitation of their bodies, land, and resources, and denial of equal socioeconomic opportunities to them'.[45] The operation of this system is neither based on nor requires the intentional participation of all

40 Lake and Reynolds (n. 31), 292.

41 Vincent Chetail, *International Migration Law* (Oxford: Oxford University Press 2019), 52.

42 Anam Soomro, *Speaking of Silences: A Genealogy of Freedom of Movement in International Law*, chapter VII (Ph. D. dissertation on file with author).

43 Charles W. Mills, *The Racial Contract* (Cornell: Cornell University Press 1997), 1-2.

44 Mills (n. 43), 7.

45 Mills (n. 43), 11.

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whites but all whites are nonetheless its beneficiaries. Crucially, Mills articulates white supremacy as an analytically distinctive *global* project, a racial project that operates within and through empire.

Today, even after international law and international relations have formally repudiated racism and racial discrimination, the international order, especially access to the First World, remains fundamentally structured by white supremacy as defined by Mills. And at least one technology that facilitates and shields this racialised order, as if by conjured magic, is international legal doctrine under the umbrella of jurisdiction. The racial history of domestic jurisdiction is largely forgotten, and instead the world conjured by the concept of domestic jurisdiction in the present is that of an ethical liberal, and legitimate entitlement of state sovereignty, even when it plainly results in the racialised exclusion of migrants such as the 26 Nigerian girls whose journey to Europe I began with. Domestic jurisdiction, among other things, continues to operate as racial technology in the 21st Century, sustaining racialised exclusion and extraction of citizens of the Third World and doing so under the cloak of normative legitimacy and legal necessity.

One of the survivors interviewed stated that the motivation for most of the women on the boat from Nigeria was the search for jobs. It is important to note that Europe, like much of the First World, is powered by an economic system that is predicated on labour migration, and arguably even unauthorised labour migration.[46] But rather than provide legal

46 See Cedric Robinson, *Black Marxism: The Making of Black Radical Tradition* (Chapel Hill: University of North Carolina Press 1983), 23 ('There has never been a moment in modern European history [if before] that migratory and/or immigrant labor was not a significant aspect of European economies.'). See also Hein de Haas, 'The Myth of Invasion: the Inconvenient Realities of African Migration to Europe', TWQ 29 (2008), 1305-1322 (1318) (arguing that '[d]ominant policy discourses and media coverage systematically ignore – or obscure – the fact that African migration to Europe, Libya and, increasingly, other Maghreb countries is fuelled by a structural demand for cheap [irregular] migrant labour.'); between 2000 and 2014, migrants accounted for 70 % of the increase in workforce in Europe, tending to be more concentrated in the younger and economically active age groups in comparison with natives, and therefore reducing dependency ratios, see Organisation for Economic Co-operation and Development, 'Migration Policy Debates: Is Migration Good for the Economy?' (May 2014), available at <https://www.oecd.org>; for a discussion on the specific character of unauthorised migrations as labour migrations within global capitalist economics, see Nicholas De Genova, 'Migrant "Illegality" and Deportability in Everyday Life', Annual Review of Anthropology 31 (2002), 419-447 (422, 439-440) (positing that '[u]ndocumented migrations are, indeed, preeminently labor migrations' and the status of 'illegality' is a 'profitable one that effectively serves to create and sustain a legally vulnerable' […] thus providing a 'cheap reserve of labor'); see also Harsha Walia, whose account of border imperialism includes the ways in which '[m]igrant workers provide liberal capitalist interests with cheapened labor without altering the racial order through permanent immigration'. Harsha Walia, *Border and Rule: Global Migration, Capitalism and the Rise of Racist Nationalism* (Chicago: Haymarket Books 2021), 133.

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pathways for this type of migration, European nations, with the support of African governments, have doubled down on the securitisation of European borders, and even of African borders, to keep migrants out.[47] One's nationality determines the range of one's freedom of movement in a way that completely belies frequent claims that assert or imply that all persons are equally without the right of freedom of international movement in our global order. This is because of the robust web of multilateral and bilateral visa agreements that privilege First World passport holders and pre-authorise their movement across the globe.[48] Global rankings of passports according to the extent of entitlements to visa-free travel show that First World countries dominate the top and Third World countries dominate the bottom.[49]

Thus, for many, territorial jurisdiction of birth alone determines whether or not the act of moving across national borders will be a matter of life or

47 For an analysis of the project of African regional containment undertaken by the African Union and European Union see generally Loren B. Landau, 'A Chronotope of Containment Development Europe's Migrant Crisis and Africa's Reterritorialisation', Antipode 51 (2019), 169-186; see also Oliver Bakewell, 'Keeping Them in Their Place: The Ambivalent Relationship Between Development and Migration in Africa', TWQ 29 (2008), 1341-1358 (1342) ('[…] the "development project" in Africa […] has long been associated with the colonial concern about the control of mobility'); for a discussion on how the European Union continues to restrict African youth migrants and the African States' complicity in enforcing such restrictions, see Michael O. Nwalutu and Felicia I. Nwalutu, 'North African States as Agents of Europe's Border Securitization: Tragic Ordeals of Young Refugee and Asylum Seekers from Africa', in: Sabella O. Abidde (ed.), *The Challenges of Refugees and Internally Displaced Persons in Africa.* (Cham: Springer Cham 2021) (contending that '[t]he racially symbolic positioning of whiteness at international borders implies that Europe wields an unlimited power to extend its authority of border surveillance to the North African seaports of Libya, Tunisia, Algeria, Egypt, and Morocco. These ports are patrolled by FRONTEX, [a European Union] border security agency charged with keeping the unwanted vagrant bodies out of mainland Europe.'); for additional analysis of the contributions of FRONTEX to the securitisation of migration in the European Union, see Sarah Léonard, 'EU Border Security and Migration into the European Union: FRONTEX and Securitisation Through Practices', European Security 19 (2010), 231-254; the European Union has recently proposed a new, tighter strategy for the containment of African migrants, see Euro-Med Human Rights Monitor, 'Plans to Send Frontex Guards to Senegal Illegitimate Attempt to Stop Migrants, Asylum Seekers', (24 February 2022), available at <https://euromedmonitor.org>. ('On 11 February [2022], [a] few days before the sixth European Union – African Union summit in Brussels, the EU Commissioner for Home Affairs, Ylva Johansson proposed to Senegal a Status Agreement with Frontex, the EU's Border Agency, that would "allow the deployment of teams of standing corps and technical equipment" especially "to fight smugglers".').

48 See generally Achiume, 'Racial Borders' (n. 1).

49 See Global Passport Power Rank 2019, Passport Index, (archived 29 April 2019), available at <https://perma.cc/WXA7-Q5YV>; for an exploratory analysis of the global ranking of visa-free travel privileges released by the Swiss migration-specialist company, Henley and Partners, see Brendan Whyte, 'Visa-Free Travel Privileges: An Exploratory Geographical Analysis', Tourism Geographies 10 (2008), 127-149.

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death.[50] And because of the persisting racial demographics that distinguish the First World from the Third and the design of the immigration regimes that border these geographies, most white people enjoy dramatically greater rights to freedom of international movement than most non-white people.[51] It is neither arbitrary nor merely coincidental that the 26 Nigerian girls and women were Black. In the context of passports, visa regimes, border externalisation and securitisation policies that in effect privilege First World international mobility,[52] the reality is that the mortal cost of international mobility is, by design, largely a non-white problem.

From the rejection of the racial equality clause of the League of Nations to the present-day, international law has granted states capacious discretion to engage in racialised national exclusion and migration and mobility control. Today, sovereignty-based justifications remain legal shields that enable racial conduct and policy that would in many jurisdic-

50 Citizenship is generally attributed at birth, see Ayelet Shachar, 'Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws' in: Stephen Macedo and Iris Marion Young (eds.), *Child, Family, and State*, American Society for Political and Legal Philosophy 44 (2003), 345-397, (381) ('[T]wo legal principles govern the automatic attribution of citizenship to children: birth to certain parents […] or birth in a certain territory […] [both principles] rely on (and sustain) a prior conception of closure and exclusivity.'); for some nationalities, the act of moving across a border is a death sentence in the most literal sense – for example, according to the International Organization for Migration, in 2015 alone, over 3,770 migrants died trying to cross the Mediterranean, see 'Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015', International Organization for Migration, (31 December 2015), available at <https://www.iom.int>; according to another International Organization for Migration report, African migrants died at the rate of about 25 persons per week, or 1,300 annually, even before embarking on the dangerous sea journeys to Europe or the Arabian Peninsula, see International Organization for Migration, 'Over 7,400 Deaths on Migration Routes Across Africa in Last Five Years, IOM Figures Show' (10 December 2019), available at <https://www.iom.int>; see also Cernadas (n. 11), 185 ('Year after year, in the waters of the Atlantic Ocean and the Mediterranean, there are thousands of deaths of people seeking to migrate from Africa to Europe.').

51 See Achiume, 'Racial Borders' (n. 1), 464-476.

52 See Steffen Mau, 'Mobility Citizenship, Inequality, and the Liberal State – The Case of Visa Policies', International Political Sociology 4 (2010), 339-361 (349) (concluding, from an analysis of the visa regimes of 193 countries, that 'the freedom of movement people enjoy depends greatly on their being citizens of rich democracies'); see also Steffen Mau, Fabian Gülzau, Lena Laube and Natascha Zaun, 'The Global Mobility Divide: How Visa Policies Have Evolved over Time', Journal of Ethnic and Migration Studies 41 (2015), 1192-1213 (1192) (arguing that 'while citizens of OECD countries and rich countries have gained mobility rights, mobility rights for other regions have stagnated or even diminished, in particular for citizens from African countries'); see also Eric Neumayer, 'Unequal Access to Foreign Spaces How States Use Visa Restrictions to Regulate Mobility in a Globalized World', Transactions of the Institute of British Geographers 31 (2006), 72-84 (78) (observing that '[…] OECD passport holders enjoy much fewer restrictions for travelling abroad than their countries impose on passport holders from other countries. OECD countries use their political power to maintain these inequalities.').

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tions amount to prohibited discrimination but for the fact that the conduct or policy is laundered through the categories of nationality.[53] By reserving the regulation of nationality largely to the domestic jurisdiction of nation-states, and maintaining ambiguities in the extent to which states' racialised exclusion of non-nationals is prohibited, states have crafted international law to serve as a permissive doctrinal backdrop to many national legal schemes of racialised exclusion of non-nationals.[54] Within domestic liberal democratic legal frameworks, nationality within immigration regimes remains largely bulletproof as a mechanism for racialised exclusion and differentiation.

As Thomas Spijkerboer notes, those denied access to the global mobility infrastructure have no means of holding excluding states accountable for their exclusion and related consequences, including as a result of the limited reach of jurisdiction in applicable international human rights and refugee doctrine.[55] For example, the European human rights law seems not to apply to those subject to the EU-Turkey deal, through which Europe ensures that Syrian refugee access to Europe is severely restricted, even at the cost of Syrian lives.[56] As a more general matter, access to the global mobility infrastructure, comes with international legal and other protections that are simply not available to those denied access, and especially not to those among the latter group who irregularly pursue entry into the First World. Legal international mobility and migration – which are accessible on a differential basis including on the basis of race – grant to some, access to qualitatively stronger substantive legal and procedural protections within the First World. This is relative to those who are deemed not to fall within the jurisdiction of First World nations, even as these individuals are violently and even fatally subjected to First World militarised borders. Furthermore, even as First World nations rely heavily on jurisdictional claims to evade responsibilities towards international migrants, these nations simultaneously persist in exerting their military, political, and economic coercion and domination far beyond their borders.[57]

In sum, international law tells the following story. The territorial borders of the state in principle mark the zone of its exclusive jurisdiction. The

53 Achiume, 'Racial Borders' (n. 1).

54 In 'Racial Borders' (n. 1) I describe in more detail the respective legal regimes.

55 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualizing the Externalisation of Migration Control', European Journal of Migration and Law 20 (2018), 452-469 (464-465).

56 Spijkerboer (n. 55), 465.

57 For an account of the international legal specifics of this domination and its implications for sovereignty and the right to exclude see Achiume (n. 24).

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territorial and political borders of the state determine who may legitimately lay claim to the state, who may demand the enforcement of rights, who may enjoy the benefits of collective self-determination, and who may have a say within the political community that dictates, at least ostensibly, the terms of one's life.[58]

But this story does not hold true for all nation-states. Jurisdiction creates a shelter for the largely unconstrained exercise of sovereignty within the territory of a nation-state, but does so only for states with effective sovereignty.[59] Effective sovereignty remains the reserve of imperial nation-states, which remain predominantly (though not exclusively) First World nation-states. Jurisdiction also indemnifies them from responsibilities and duties incurred by the extraterritorial exertion of their sovereignty. Imperial nation-states can exert their sovereign will within the territories and politics of subordinate nation states, extracting resources and exploiting bodies, and then use the fiction of territorial sovereign jurisdiction to deny that such intervention incurs their sovereign responsibility. Jurisdiction as it is presently constructed in international law permits First World states the freedom of having their racialised cake and eating it too, all under the guise of a liberal international order. Through migration and border controls, First World states can enforce strong and vicious borders to police access to their territorial and political jurisdictions, but at the same time eviscerate the borders of subordinate states and make a mockery of the latter's sovereign jurisdiction.[60]

V. Conclusion

In conclusion, my aim has been to offer some reflections on the role that jurisdiction plays as a form of racial technology in the sense that it is central among the legal knowledge practices through which racial categories are enforced, and through which the broader architecture of border and migration regimes enforce racialised exclusion, inclusion, and exploitation. B. S. Chimni has cautioned that without meaningful transformation, reforms of

58 Achiume (n. 24).

59 On the contingent and provisional nature of Third World sovereignty, see Aslı Bâli and Aziz Rana, 'Pax Arabica?: Provisional Sovereignty and Intervention in the Arab Uprisings', Cal. W. Int'l L. J. 42 (2012). As Chimni notes, 'the economic and cultural territory of powerful nations extends far beyond their physical territory with a significant bearing on the right to self-determination of weak nations'. Chimni (n. 14) 33.

60 For a case study of this dynamic in the context of NATO and Libya, see Achiume and Bâli (n. 6), 1396-1429.

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jurisdiction doctrine anchored in liberal internationalism 'may only go to further a neo-colonial agenda[.]'.[61] Disrupting racial borders and the role of jurisdiction in their operation calls for nothing short of a transformative agenda.

61 Chimni (n. 14) 31.

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