THE IN- OR EXCLUSIVENESS OF INTERNATIONAL LAW

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Summary of Remarks[2]

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I am joining you remotely from Los Angeles, in the United States, and I would like to begin by acknowledging my presence on the traditional, ancestral and unceded territory of the Gabrielino-Tongva, the peoples indigenous to this territory.[3] In beginning with a land acknowledgment, there is a sense in which I have foreshadowed my reflections on the questions posed to us panelists in this session, on the in/ and exclusiveness of international law. One could visit Los Angeles, and indeed one could even live in Los Angeles, but remain entirely oblivious to the ways in which doctrines of inclusion and exclusion in international law have shaped its geography, its demography, its trajectory, and without exaggeration, the totality of this city. But for the Gabrielino-Tongva, however, the indigenous peoples who are the traditional caretakers of this land, the inclusiveness and exclusiveness of international law, its history of excluding non-Europeans for sovereign status,[4] its doctrine of discovery that permitted dispossession and exclusion from property regimes, its ongoing failure to deliver reparations for colonial domination, genocide and enslavement, notwithstanding reparations that were paid to former enslavers and to former colonial powers such as France,[5] inclusion and exclusion quite obviously sit at the very core of international law.

I want to evade the question posed to us to define exclusion in the context of international law and instead speak to what is at stake, or what ought to be at stake when we talk about exclusion and international law, focusing in particular on conversations about racial justice. By focusing on what is at stake, I'm thinking more of organizing principles for the many definitions it would take to account for the different contexts in which we might seek to define exclusion. I am going to speculate that the theme and framing of this session reflect the reverberations of the transnational racial justice uprisings of 2020, which has put questions of inclusion and exclusion front and center in many fora, not least academic institutions and international law associations. For example, the American Society of International Law ("ASIL")—the society that I am a part of—has itself appropriately been the target of demands for such reckoning. A recent study by Professor James Thuo Gathii found that over the course of the existence of the American Journal of International Law ("AJIL"), first published in 1907, "only 64, or 1.25%, of 5,109 AJIL documents substantially engaged with issues of race in the body of

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[2] The following is a summary of remarks delivered by the author in response to the moderator's provocations to the plenary panelists.

[3] For a history of the Gabrielino-Tongva, see THE GABRIELINO-TONGVA INDIAN TRIBE: A CALIFORNIA INDIAN TRIBE KNOWN AS THE DAN GABRIEL BAND OF MISSION INDIANS: HISTORY *available at* https://gabrielinotribe.org/history/ (last accessed February 17, 2023).

[4] See, generally, ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS)(2005).

[5] See, generally, E. Tendayi Achiume, REPARATIONS FOR RACIAL DISCRIMINATION, SLAVERY, AND COLONIALISM, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the United Nations General Assembly, August 2019, A/74/321

their text."[6] And in 2020, ASIL adopted the findings of the Richardson Report, which concluded after the investigations of a taskforce that in the first sixty years of its existence, ASIL "silently but effectively exclude[d] domestic persons of color and others, based on their ethnicity, culture, religion or sexual orientation."[7]

In my role as UN Special Rapporteur on Racism, I was struck during visits to western Europe in particular, how interlocuters often expressed (explicitly and implicitly) the sense that acute racial injustice, exclusion and subordination was a disturbing and uniquely American problem, likely on account of centrality of slavery and its afterlives to the foundations of the U.S. settler colonial project. These sentiments were expressed to me predominantly but not exclusively by white interlocutors, often while I was neck-deep in documenting acute racial subordination in western Europe itself—racial subordination rooted in the contemporary legacies of Europe's own existential reliance on slavery and colonialism.[8] Racial subordination that historically relied upon international law for its operation, and that remains the logical output of our contemporary international law. The European Society of International Law ("ESIL") is a lot younger than ASIL, but if I could, I would invert the usual

[6] James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 Chicago Journal of International Law 71, 75 (2021) . He further notes that AJIL's companion publication, AJIL Unbound fairs only marginally better: "only 11, or 1.94%, of the 568 documents substantially engaged with race in the bodies of their text." Id at 75. A forthcoming AJIL Unbound symposium on Race, Racism and International Law joins other scholarship that seeks to address this lacuna, see, E. Tendayi Achiume and James Thuo Gathii, *Introduction on Race, Racism and International Law*, AMERICAN JOURNAL OF INTERNATIONAL LAW UNBOUND (*forthcoming March* 2023), and joins other recent efforts to interrogate racial, gendered and class-based exclusion in international law. See, e.g., Mohsen al Attar, *Symposium on Systemic Racism and Sexism in Legal Academia: The Promise of Victory*, Opinio Juris May 16, 2022 (introducing symposium on systemic racism and sexism in legal academia with essays "all begin[ning] from the vantage point of international law."); Symposium on Queering International Law, see Grainne de Burca, Introduction to the Symposium on Queering International Law, 116 AJIL Unbound 1 (2022) and the Symposium on Feminist Approaches to International Law, see Catherine Powell and Adrien K. Wing, *Introduction to the Symposium on Feminist Approaches to International Law Thirty Years on: Still Alienating Oscar?*, 116 AJIL Unbound 259 (2022); Dimitrios A. Kourtis, *Symposium on Classism and the International Legal Profession: Three Tactica against Clasism in the Epistemic Community of International Law*, Opinio Juris, Dec. 23, 2022. .

[7] AM. SOC'Y INT'L L., THE RICHARDSON REPORT, FINAL REPORT FROM THE ASIL AD HOC COMMITTEE INVESTIGATING POSSIBLE EXCLUSION OR DISCOURAGEMENT OF MINORITY MEMBERSHIP OR PARTICIPATION BY THE SOCIETY DURING ITS FIRST SIX DECADES (2020) [Hereinafter The Richardson Report] at 10 available at https://www.asil.org/sites/default/files/DEI/RICHARDSON_REPORT_ON_MINORITY_MEMBERSHIP.pdf. It further found that "[ASIL]'s exclusion practices in a continuous half century of internal decisions and policy aims constitute a continuing racially discriminatory policy during that period, for which the Society is responsible." Id. at 11. For additional background on ASIL's exclusion of African Americans and subsequent efforts to address this exclusion see Henry J. Richardson III, *Reflections on Race and the American Society of International Law*, (forthcoming, AJIL Unbound 2023).

[8] For an example analyzing the paradox of racism denialism in places where racism is systemic, see the country report I authored following an official visit to the Kingdom of the Netherlands. E. Tendayi Achiume, Country Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the United Nations Human Rights Council on the KINGDOM OF THE NETHERLANDS, A/HRC/44/57/Add.1 (July 2020)

panelist/audience rules and ask the ESIL members in the audience whether and how (if at all) demands for racial reckoning are reverberating through the society.[9]

Within the context of the United Nations system, too, questions of inclusion and exclusion have been salient. The brutal murder of George Floyd highlighted how systemic racism results in state-sanctioned extrajudicial killings of Black people in the United States, and protests there and elsewhere, including western Europe, led to a Special Session of the Human Rights Council in which I participated.[10] Ultimately, western states ensured within the Council that no robust mechanisms of international accountability would be put in place, effectively signaling that the international system remains one that cannot be relied upon to anchor racial justice and equality for the non-white world.[11] This process and outcome of the Special Session reflect, I would argue, some of the complex and dynamic ways in which our international system sustains racialized exclusion from or access to the purportedly universal human rights established in international law.[12] A growing body of legal scholarship at the intersection of race, racism and international law is mapping this complexity and dynamism across different domains of international law.[13]

In the 2020 public protests around the world, people called for reparations, for decolonization, for abolition and for other demands that go to the core of living perpetual exclusion. Yet within the United Nations, and outside, demands for transformation, decolonization, abolition and a remaking of the very terms of inclusion and exclusion, have been, in many contexts, reduced to equality, diversity and inclusion initiatives ("EDI"), many of which can be tokenistic and performative or subject to what has been termed "elite capture".[14] My point is not that transformation of the personnel and substance of

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[9] At least one account suggests much remains to be done. See Mohsen al Attar, *Tackling White Ignorance in International Law—"How Much Time Do You Have? It's Not Enough,"* Sept. 20, 2022 Opinio Juris available at https://opiniojuris.org/2022/09/30/tackling-white-ignorance-in-international-law-how-much-time-do-you-have-its-not-enough/ .

[10] Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council,* EJIL:Talk!, June 26, 2020; E. Tendayi Achiume, *Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate*, EJIL:Talk!, December 15, 2020.

[11] For analysis of this Special Session, and the positions advanced by Western powers and their allies see, *Transnational Racial (In)Justice In Liberal Democratic Empire*, 134 HARVARD LAW REVIEW FORUM 378 (2021); George Floyd at the UN: Whiteness, International Law, and Police Violence, 7 UC IRVINE JOURNAL OF INTERNATIONAL, TRANSNATIONAL, AND COMPARATIVE LAW 91 (2022).

[12] The Special Session was not entirely ineffectual, including from the perspective of international accountability. It failed to establish an international commission of inquiry, but did ultimately result in the creation of a new human rights mechanism the International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement ("EMLAR"), and the adoption of the Four Point Agenda for Transformative Change of the UN High Commissioner for Human Rights.

[13] Recent examples include James Thuo Gathii and Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction* 25 Journal of International Economic Law 199 (2022)(introducing a special issue on the centrality of race and racism to international economic law); and E. Tendayi Achiume and Asli U. Bali, *Race and Empire: Legal Theory Within, Through and Across National Borders* 67 UCLA Law Review 1386 (2021)(introducing a special issue of the UCLA Law Review on race, empire, and international law).

[14] For a clear and compelling philosophical (and practically useful) analysis of "elite capture," including as it related to racial justice, describing approaches to racial injustice that avoid elite capture see, Olúfémi Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, The Philosopher, December 2022 available at https://www.thephilosopher1923.org/post/being-in-the-room-privilege-elite-capture-and-epistemic-deference. Táíwò defines elite capture as "the control over political agendas and resources by a group's most advantaged people."

international law through careful attention to principles of equity, diversity and inclusion are not important. It is to say that that EDI initiatives are not the end goal, and in fact they are meaningless (and can even be counterproductive) when they are not fundamentally anchored in the project of more just world-making. Questions of inclusion and exclusion are not simply about who is inside or outside, but they are quite centrally about: the very nature of "inside" and "outside"; who determines what is designated "inside" or "outside"; and how "inside" and "outside" have been created and tailored to serve and benefit some and not others. Again, this question of inclusion or exclusion is one about the very nature of international law, international legal institutions, and the study and practice of both.[15] It is about who wields the authority to include and exclude. It is about subordinate inclusion, privileged exclusion, and marginalization upon inclusion. Where EDI efforts are pursued in good faith, they must entail institutional and doctrinal transformation, and genuine examination of not only who is excluded from the proverbial room, but also examination of what the room is and on whose terms it exists.

I would like to conclude my response to this question on a more personal note. To be a black queer African woman in international law is to be a presumptive outsider to the field. There are, of course, other bases of presumptive outsider status and to characterize my status as a presumptive outsider is not to deny the notable privilege I have nonetheless accrued, including through educational and professional opportunities. I would venture to say that my presence on this panel is not unrelated both to the presumptive outsider status I have mentioned, as well as to my relative privilege. I will also nonetheless note that the privileged status of presumptive outsiders is not the same as presumptive insider status as a matter of lived experience. I could recount a number of anecdotes from experiences in my official capacity as Special Rapporteur when my United Nations independent expert credentials were no match for my racial identity and gender expression, but this is neither the time nor the place. My own journey to becoming a law professor, let alone an international law professor, has been a journey that has involved daily confrontation with a field and a profession that has had a much longer history of commitment to a racially and gender exclusive international system than to an inclusive one.

There are, of course, many others who share this experience. Over the years I have connected with early career, non-white scholars in the United States, in Europe (including some based in the Netherlands where this conference is being held), who describe utter alienation from the field, from their senior faculty, and from academic institutions that make it impossible or extremely difficult for them to thrive, let along to produce knowledge on racial justice should that be their area of interest. These early career scholars and students have described defensiveness, outrage, cluelessness and a range of other responses in the face of their attempts to name and address exclusion, especially where race and ethnicity are concerned. I have also borne witness to the tireless efforts of some presumptive insiders to disrupt this status quo. We in this room and in the many other rooms we move through live in entirely different universes from each other, even while existing in the same physical space. While I do not believe every single one of us should be scholars of racial injustice or other structures of inclusion and exclusion, I do believe there is an ethical impetus for *all* lawyers and especially legal knowledge producers and educators, to account for our contributions to perpetuating structures of

[15] Indeed, feminist international legal scholars, for example, have made this very point, see, e.g., Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A Feminist Analysis (Manchester University Press)(2000), as have scholars in the tradition of Third World Approaches to International Law, see, e.g. Anthony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 Stud. Transnat'l Legal Pol'y 185, 191 (2004), (describing TWAIL II scholarship as focused on the proposition that "colonialism is central to the formation of international law.").

exclusion and subordinate exclusion, and to account for the personal and professional benefit we derive from these structures.