

## SYMPOSIUM ON RACE, RACISM, AND INTERNATIONAL LAW

### REFLECTIONS ON RACE AND THE AMERICAN SOCIETY OF INTERNATIONAL LAW

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The American Society of International Law (ASIL) is a globally important American professional non-governmental organization, organized by and for international lawyers as a learned society, and influential in its legal interpretations. For its first sixty years, it excluded African Americans. Subsequently, African Americans were allowed incremental but slowly widening participation, though they were still excluded from the *American Journal of International Law* (*AJIL*) Board of Editors. Divesting its stock portfolio to oppose apartheid was a reluctant step toward racial justice in 1986. The rise of a new minority-led racial critique of the Society produced, inter alia, the first African American *AJIL* Board member in 2014, followed by others. It also produced the adoption of the “Richardson Report,” which confirmed the early deliberate African American exclusion, and called for a reparations obligation to Black members. In 2020, new Society statements and priorities toward racial equity and diversity were added to a previous active Black task force (BASIL). However, the Society’s transformation toward racial equity will depend upon its committed defiance of the current historic global white nationalist extremism which threatens to penetrate international law in America and the global community. This essay discusses ASIL’s racial narratives from its origins of deep racial exclusion, through racial incrementalism to policy changes and reparations obligations toward greater equity, as it now confronts global white identity extremism.

The founding of ASIL, in 1906, created a supportive professional organization that was adjunct to American foreign policy, with some members holding high formal government offices to administer the American empire and American global power going into World War I.<sup>1</sup> U.S. dominance—including racial dominance—was expected, as was the prerogative to subordinate non-European peoples abroad. ASIL mirrored domestic U.S. law enforcing white dominance over especially African Americans in a direct historical line from slavery, and it mirrored racial exclusion in its membership. ASIL’s sixty-year refusal to even consider, much less debate, African American membership, while giving limited membership to white women and foreign members of color, highlighted its ingrained opposition to their membership.

#### *Inherited Narratives of Racism*

For centuries, in narratives about European superiority, African-heritage persons have been described as inferior in intelligence and fit for only hard laboring under European-heritage authority. They were assumed to be incapable of understanding nuanced concepts or producing intellectually reputable writing and engaging in theoretical debate. This assigned inferiority defined the European “civilizing mission” toward African peoples,

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<sup>1</sup> The primary work on ASIL’s first century is FREDERIC KIRGIS, [THE AMERICAN SOCIETY OF INTERNATIONAL LAW’S FIRST CENTURY, 1906–2006](#) (2006).

rationalized European slavery and the slave trade, and justified the global domination of African peoples by European colonial systems alongside the coercive discriminatory treatment of Africans located on European territory. Dominant white American fears assigned Black slaves as property to be kept illiterate, then following that failed prohibition, permitted only rudimentary education so as to limit Africans to white, commercial laboring tasks, and prohibit them from challenging the institutionalized slavery and racism governing their lives.

Such intelligence, as Blacks managed to show, was assigned to be measured by white-devolved standards. European-heritage white culture extolled itself for developing intelligence standards as community norms, and for continuously normalizing these criteria for arranging knowledge, and violently opposing in various ways any Black challenge to their normality. Blacks, given some credit for attempting to copy white-approved approaches to intellectual success, were consistently judged as having failed to do so as well as whites, but never given recognition for achievement as flowing from their own innate and critical intelligence. Not until the late 1800s was white dominant culture required to acknowledge a comparative few Black intellectual standouts even by their standards, such as W.E.B. Du Bois securing the first Black Ph.D. from Harvard. Such “standouts” would attract substantial white opposition, condemnation, and governmental attacks. Black intelligence was linked with possibilities of “enemy” alliances, and thus eligible for often violent white suppression.

American governmental and non-governmental organizations enforced the same assumptions of Black inferiority. Leadership positions were reserved for whites. Blacks who did advance notwithstanding these barriers were assumed to be incompetent to handle the top sensitive and complex issues of judgment and representation in the organization. They were surrounded by an atmosphere that presumed their intellectual inferiority, especially regarding the excellence of their work. Their exclusion from white academic, professional, and learned societies compelled emerging Black professional groups to form their own professional societies, including in law. In a slowly emerging national profession of Black lawyers, there were no known Black international lawyers until George Washington Williams, in the late 1880s. Despite his magisterial set of open letters on Belgian violations of international law in their deadly colonial atrocities against the Congolese peoples, American legal organizations gave Williams no professional recognition.<sup>2</sup>

### *Social Equality of Blacks*

From its founding, ASIL was bathed in the widespread narrative that Blacks are not and must not be seen as the social equals of whites. This narrative has always been embedded in American racism since the first arrival of Blacks, down through slavery, in Reconstruction, and post-Reconstruction, where the Ku Klux Klan arose to protect “white womanhood” from Blacks through establishing a reign of terror. The issue of social equality was clarified through the abolitionist movement prior to the Civil War.

Abolitionist debates were relatively unified on freeing Blacks from Southern slavery and destroying institutionalized slavery, and in affirming that Blacks should enjoy basic constitutional rights. But there were intense debates, including among progressive abolitionists, about pushing for the right of Blacks to social equality with whites. Such opposition continued following the Civil War, ranging from wide and deadly Southern white resentment against Blacks under Reconstruction, successfully discharging Southern governance duties, to criticizing Frederick Douglass as the leading Black abolitionist for unapologetically marrying a white wife. This opposition continues today, in mutated forms.

At its birth, ASIL was non-governmental but its leadership featured former high government leaders. It was a white elite organization whose members considered themselves part of that elite group and evaluated new members accordingly—it was a white social organization with professional and learned society activities. New members

<sup>2</sup> See JOHN HOPE FRANKLIN, [GEORGE WASHINGTON WILLIAMS – A BIOGRAPHY](#) (1985).

had to be recommended in writing by two current members. For its first sixty years, the issue of African Americans' admission was enclosed in a notable continuing silence. The inherited white racial narrative of Blacks' inferior intelligence combined with the prohibition that Blacks must not be the social equals of whites—especially in private white groups—produced that silence. This silence was maintained even when ASIL became anxious about increasing its membership and explored ways to do so.

Lastly, the American and global racial context into which ASIL was born was clarified by W.E.B. Du Bois's trenchant projection that the problem of the twentieth century was the problem of "the color line." Drawing on his travels and studies in African and other European colonies, Du Bois saw the color line as derived from the European colonial imperative to maintain consistent white-world control and labor dominance over their African and other colonies of color. It was manifest in the relationship between domestic white democratic politics and the impossibility of democracy, while exploiting black colonial labor abroad. It further rested on setting the welfare of colonized peoples off against white colonial privilege, and on the colonial influence of South Africa as an emerging apartheid state in the 1920s. Du Bois publicly extended his doctrine to the intersection of America's domestic race policy and its colonial foreign policy.<sup>3</sup> From ASIL's birth, its work was structured by and reproduced the color line, which helped create an enormous early core of racism.

#### *From Exclusion to Racial Incrementalism to Possibilities of Racial Equity*

No documentation exists on the first Black members entering the Society. This likely did not occur until after 1960, and possibly not until the removal of the requirement of membership certification in 1968. Periodic membership surveys included growing numbers of white women, plus Society policy decisions against gender discrimination, but not *racial* discrimination. The Society's history after its first sixty years continued to generally omit African Americans, save only for the few unexplained individual Black members' rise to notice from the 1970s.

From the 1970s, ASIL practiced "racial incrementalism" relative to its few African American members. This racial incrementalism itself amounted to a form of racial subordination, and was manifest in the approach to designing panels in ASIL Annual Meetings, where African/African American issues were denied prominence or focused attention, and instead relegated to the inputs of a single panel speaker on a panel devoted to broad and general topics. This approach communicated that complete analysis of African/African American issues was less important than established neo-colonial inherited narratives and their panels of "accepted" white majority international legal subjects. In so doing, it enacted the racial subordination of African-heritage persons and issues under the mantle of racial incrementalism.

With respect to *AJIL*, there was a paucity of articles by African American scholars, of articles critical of Western international jurisprudence from Southern hemisphere vantage points, and of articles reflecting perspectives of African Americans and other American subordinated groups, including women. Individual African Americans slowly began to appear on Annual Meeting panels and in Society Interest Groups, to be selected for the Executive Council by the powerful Nominating Committee, and for Society offices, including for one of the Vice-Presidencies. The Society's only African American President, Clyde Ferguson, was selected in 1978. But the African-heritage struggles around Annual Meeting selection of panels continued, notwithstanding the founding of an Africa Interest Group, in the early 1980s.

The creation of an Africa Interest Group signaled a Pan-Africanist perspective in the coordination of the relatively few, respectively, African and African American members of ASIL, to overcome the marginalization of African-heritage-related issues within the Society. This perspective would be strengthened years later, with more such coordination and demands for more racial equity, by the birth of the Blacks of the American

<sup>3</sup> See W.E.B. Du Bois, *Worlds of Color*, FOR. AFF. (Apr. 1, 1925).

Society of International Law (BASIL) Task Force. This process featured prominent roles by African American and African women, including an elected African American Honorary ASIL President, Judge Gabrielle Kirk McDonald. Racial issues, including a demand on ASIL organizational resources, were clarified by their work, and BASIL has expanded its efforts.

During 1984–1986, the Society reluctantly confronted the global anti-apartheid movement, its fusion with the U.S. civil rights movement, and the Reagan administration's opposition to any sanctions against apartheid-South Africa. When the movement called for organizations holding portfolios containing stocks of corporations doing business in apartheid-South Africa to divest their portfolios of those stocks, the Society and its stock portfolio were faced with demands for divestment by Blacks and others. Insofar as its affected stocks were generally profitable in a comparatively small portfolio, the Society had to decide whether economic profits outweighed this fusion of international and national racial justice.

Notwithstanding the fact that apartheid was defined by international law as a global wrong, conservative whites within the Society and elsewhere opposed the claim that ASIL was obliged to address the racism in one jurisdiction—South Africa—through national *and private* acts that withdrew racism's support in a second national jurisdiction—the United States—even though the two jurisdictions were linked economically and otherwise. African Americans were wronged by South African apartheid on account of official foreign policy linkage and because permitted racism in one state raises the immediate threat—through shared aspirations of racist groups—of racism in other states, especially where racial sub-alterns possess a common diasporic African heritage against white power groups. ASIL had to either face condemnation for discrimination if it refused to divest under an unjust national/international status quo, or publicly divest in a national and international climate in favor of divestment, incorporating the norm that Black rights in the United States rested on both national and international sources of authority sufficient to interrupt the global definitions of invested stock values. Fortunately, in an intense Executive Council decision meeting, ASIL narrowly chose the latter narrative.<sup>4</sup>

By 2011–2012, a racial critique was beginning to gather steam in the Society, led by Blacks and other minorities, with white allies, building on the emergence of BASIL, and additional minorities on the Executive Council. By this time, there had still never been an African American on the *AJIL* Board of Editors. Regarding the latter, two propositions had long been apparent. First, *AJIL* saw itself as a distinct entity, as the embodiment of the highest scholarly ideals of the Society. Second, minorities and others perceived that *AJIL* was excluding African American members because it saw them as collectively lacking sufficient scholarly acumen to serve equally on its Board. This perception recalled inherited white narratives of African Americans' inferior intelligence, such that they could not be expected to achieve the “best” thinking and published writing. These attitudes also framed the false proposition of Black Board membership as a necessary choice between “affirmative action” and the Board's duty to maintain the highest intellectual standards. The claim that equity in Board membership was consistent with, or was necessary for, maintaining such high standards was either rejected, or deflected by dog whistles that “the right Black candidate(s) has not yet appeared.”

Society members who considered a racial critique as essential further saw its necessity as joined to the constitutive problem of the *Journal* operating separately within the Society with minimal accountability. This dynamic morphed into a demand for *AJIL* and its Board to be held accountable to the Executive Council, including for racial equity in nominations and elections for new Board members. These arrangements quickly evolved by Executive Council resolution. The first African American was nominated and elected to the *AJIL* Board in 2014, and would be re-elected for a second term, in the company of a woman of color; subsequently, an African American woman scholar, and later three other African Americans. In 2021, a woman scholar of color

<sup>4</sup> [KIRGIS](#), *supra* note 1, at 439.

was selected as co-editor in chief of the *Journal*, and the following year, *AJIL* elected three African American women, a Black Canadian male, and a Nigerian-born male to the Board. Each election from 2014 was conducted by the Board but finally approved by the Executive Council. The ostensible conflict between racial equity and scholarly quality was facially dissolved in Board discussions now framed by these new decisions.

Conjointly, the Council voted in 2018 to commission a study of the Society's historical exclusion of African Americans and other minorities, including women. Over a two-year long critical study of original ASIL documents beginning with its birth in 1906, a diverse Committee produced a report to the Executive Council. The "Richardson Report" unanimously concluded that ASIL had expressly excluded African Americans from membership until the early 1960s, but had begun to admit white women some decades earlier, and that it owed reparations not in one or a few limited steps but in a follow-on process of Society actions over a reasonable time for the African American exclusions and discouragement from seeking membership.<sup>5</sup> The Report was adopted by Council resolution in 2020, which admitted the Society's wrong of historical racial exclusion, and committed the Society to reparations for rectifying those consequences. The Report and resolution stimulated several follow-up statements on the Society's commitment to new priorities toward equity for African Americans and other minorities, including similar statements by the *AJIL* co-editors-in-chief and Board to govern future action.

### *Beyond The Richardson Report*

ASIL has now formally admitted its historical wrongdoing with the acceptance of the Report and acknowledgement of its obligation of reparations measures of racial equity by both the Society and the *Journal*. Thus, it has avoided, at least formally, the trap of conflating admission of its historical racial wrong and demands for reparation with an alleged "practical present incapacity" to fashion concrete remedies for current and projected consequences of Black exclusion and discrimination. The Report held that ASIL's reparations obligations must comprise a process of progressive remedies, to assure that racial equity will be transformative in the work of both the Society and the *Journal*. New statements and plans for racial equity and diversity since 2020 signal that this process has begun.

One anti-racism imperative is that African-heritage interpretations of international jurisprudence can no longer be only accepted as supplicants to standards of scholastic relevance, authority, and justice as "normalized" by the collective white majority. Challenges to white majority jurisprudential starting points by African-heritage international legal participants must be treated with the same respect and width of public and published exposure as have white scholarly jurisprudential challenges to other white scholarly positions. It remains to be seen how the new *AJIL* equity priorities will address this imperative.

### *Conclusion*

ASIL has now stated new priorities that are nudging the organization toward racial equity. But grave challenges to such priorities are looming. I refer to the current historical inflection of white-identity extremism in the United States and in the intersecting global community. Such extremism is largely fueled by local and national organized demands that governance must once again evolve to rest on European-heritage racial domination of peoples of color, whether of racial minorities in national jurisdictions, or immigrants of color from Southern-tier countries arriving northward, following centuries of colonial migration southward, or through coordinated Northern-tier policies toward Southern-tier peoples. This extremism is a living aggressive, dangerous presence in both U.S. and global governance, and is distorting not only interpretations of international law, but also theorizing about

<sup>5</sup> Data from the Report is pertinent in this essay's analysis. See 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).

international law and “best” approaches to global governance. White European and U.S. narratives dressed in fine academic credentials, and defining the “best” global governance as a globally expanded model of South African apartheid at its zenith, are growing in prominence. They address a basic white-identity dilemma: how to restore white European/U.S. global domination of empire, notwithstanding the formal illegality of colonialism.<sup>6</sup>

Fortunately, strong U.S. and global forces and narratives are dedicated to resisting this race-based extremism. We are in an intense cycle of racially infused conflicts on which the future equitable directions of many societies and organizations ride. ASIL, as a globally prominent private organization of international lawyers and a learned society, now seeking its own transformation to racial equity, is caught up in this historic battle between race-based extremism, and the *resistance* forces against it, striving, among other things, to enhance racial equity as it sustains all human values. This battle leaves little space for organizational passivity in supporting the resistance. ASIL must now sustain continuing decisions about practice, public interpretations of legal doctrine, choices of sponsorship, empowerment of membership, and choices of leadership, whose priorities defy race-based extremism in all its implications. Only in this way will ASIL/*AJIL* amass sufficient value and organizational resources to achieve transformative racial equity among its members, as a basis for advancing international law.

<sup>6</sup> See Henry J. Richardson III, [Martin Luther King's Beloved Community and European Trumpism](#), 53 VAL. U. L. REV. 87 (2018).