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Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other

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ABSTRACT

This Article argues that issues of race and identity have so far been underemphasized, understudied, and undertheorized in mainstream international law. To address this major gap, this Article argues that there is an opportunity for learning, sharing, and collaboration between Critical Race Theorists (CRT) and scholars of Third World Approaches to International Law (TWAIL). Such a collaboration, this Article argues, would produce a very sharp lens of tracing issues of race and identity in the imperial, transnational, and global histories of international law and their contemporary continuities. By adopting a framework of studying race and identity in a global context, this Article will tie together and connect the domestic and the international. It will connect transnational histories between locations inside and outside the United States that have undergirded and reinforced White supremacism, as well as anticolonial resistance, domestically and internationally. Taking such an approach overcomes the wide variety of segregated and insular conceptualizations and definitions of race and identity within CRT and TWAIL respectively. Building a TWAIL/CRT global/transnational race/histories project will create productive insights about ideologies of racial domination and racial injustices in a domestic, international, and transnational context. By combining the insights of CRT and TWAIL, it becomes possible to theorize imperialism and racism beyond those currently embodied in each approach.

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INTRODUCTION

Scholars of Third World Approaches to International Law (TWAIL) trace the juristic techniques that justified colonial conquest along the axes of European/non-European, colonizer/colonized, civilized/uncivilized, and modernity/tradition. For Critical Race Theorists (CRT), by contrast, race is the central analytic category for understanding how domestic law, racist science, and literature have for generations justified the dehumanization and discrimination of African Americans.[1] While TWAIL scholars focus on how European expansion and exploitation of non-European peoples constructed an imperial international law, CRT scholars focus on how Whiteness as a normative reference point has defined the legacy of White entitlement and the subordination and oppression of African Americans, but also other non-White people.[2]

This Article argues that there is an opportunity for learning, sharing, and collaboration between CRT and TWAIL scholars. Both reject linear progress as having overcome slavery and colonialism.[3] Both expose the discursive and material continuities and discontinuities of Jim Crow and imperial international law. And both critique the continuity of the ideology that non-Whites/non-Europeans belong to an inferior subhuman race in their respective fields. For example, CRT scholars do this by showing how the U.S. Supreme Court has constitutionalized racial inequality.[4] TWAIL scholars do this by showing how

1. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369 (1988) ("The failure . . . to consider race in their account of law and legitimacy is not a minor oversight: race consciousness is central not only to the domination of Blacks, but also to whites' acceptance of the legitimacy of hierarchy and to their identity with elite interest. Exposing the centrality of race consciousness is crucial to identifying and delegitimating beliefs that present hierarchy as inevitable and fair. Moreover, exposing the centrality of race consciousness shows how the options of Blacks in American society have been limited, and how the use of rights rhetoric has emancipated Blacks from some manifestations of racial domination.").
2. *See id.*
3. For CRT, see *id.* at 1333 ("[F]ocus on the continuing disparities between Blacks and whites might call, not for celebration, but for strident criticism of America's failure to make good on its promise of racial equality."). For TWAIL, see James Thuo Gathii, *Decolonising International Law: Development, Economic Growth and the Politics of Universality by Sundhya Pahuja*, 107 AM. J. INT'L L. 494, 498 (2013) (book review) (noting that "notwithstanding guarantees of sovereign equality and self-determination, post–World War II reforms continued the legacy of imperialism and Eurocentricism within international law").
4. *See, e.g.*, Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 650 (2014) ("Affirmative action was originally conceived as a remedy for past race discrimination against [B]lacks and other minorities. Yet instead of upholding the voluntary efforts of universities, localities and the federal government to provide some remedy

rules of international law institutionalize the colonizer/colonized legacy in their basic doctrines and institutional forms.[5] Both embody a commitment to reform of law while recognizing the dangers of legal retrenchment of racism and colonialism.

Yet, CRT and TWAIL scholars have not consistently collaborated to explore how White superiority justified not just slavery and Jim Crow, but colonial conquest around the world as well. Domestic U.S. law was constructed on assumptions that White identity embodied the ideal expression of humanity, in terms of morality, progress, and civilization. Likewise, imperial international law was constructed on the basis of White racial superiority—as rational stewards of the territories of non-Europeans—and on the basis of racist myths of indigenous savagery, primitivism, and pathology.[6] Hence, just as slavery dehumanized Blacks as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.[7] A TWAIL lens also pierces through the myth that the United States's nineteenth century colonial possessions over Puerto Rico and the Philippines, among others, did not constitute imperialism, but a type of democratic tutelage.[8] American intellectuals, politicians, and businesspeople of the period argued that

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for our history of race discrimination, the [Supreme] Court has, with the exception of *Grutter*, uniformly rejected and even disparaged such efforts."). Juan Perea then concludes that "[t]his is what the evidence shows. We should trust the evidence, not the rhetoric. We should see the Court not as a court of justice or equality, but rather as a primary def ender of white privilege and racial inequality." *Id.* at 651.

5. In discussing the mandate system of the League of Nations, Antony Anghie concludes that "we might see in both the Mandate System and in its successors, the BWI [Bretton Woods Institutions], the reproduction of the basis premises of the civilizing mission and the dynamic of difference embodied in the very structure, logic and identity of international institutions." ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 193 (2004).

6. *Id.* at 101–02 (showing "the process by which non-European states are deemed to be lacking in sovereignty and hence excluded from the family of nations and of law; and the racialization of the vocabulary of the period, in terms not only of the explicit distinctions between civilized and uncivilized, advanced and barbaric, but in terms of the integration of these distinctions into the very foundations of the discipline").

7. *Id.* at 103 ("Sovereignty was therefore aligned with European ideas of social order, political organization, progress and development. . . . [i]n contrast, lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory.").

8. *See generally* JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING: ELITE POLITICAL CULTURE IN THE PHILIPPINES AND PUERTO RICO DURING U.S. COLONIALISM (2008) (arguing that the United States had a policy of tutelage under which the inhabitants of the United States' colonial possessions could be taught to build and maintain democracy as a condition for being granted self-government).

the direct domination of the "lesser races" by the "superior races" was inevitable.[9] The boundaries of CRT have expanded beyond the Black-White binary to focus on the racialized dehumanization and discrimination of Latina/os and Asian Americans, as well as Arabs and Muslims.[10]

This Article proposes to leverage the lenses that CRT provides to understand race in domestic law and the tools TWAIL provides to understand imperialism in international law. By adopting a framework of studying race and identity in a global context, this Article will tie together and connect the domestic and the international. It will connect transnational histories between locations inside and outside the United States that have undergirded and reinforced White supremacism, as well as anticolonial resistance, domestically and internationally. Taking such an approach overcomes the wide variety of segregated and insular conceptualizations and definitions of race and identity within CRT and TWAIL respectively. Building a TWAIL/CRT global/transnational race/histories project will create productive insights so that TWAIL scholars can see more sharply how ideologies of racial domination are a source of national injustices, and CRT scholars can more clearly see how imperial history is—like racism—a source of transnational racial injustices. By combining the insights of CRT and TWAIL, it

9. Julian Go, *American Colonial Empire: The Limit of Power's Reach*, ITEMS & ISSUES, Fall/Winter 2003, at 18, 18 (arguing that "[i]mmediately after the Spanish-American war, countless intellectuals, statesmen, and colonial officials made haste to claim that overseas empire—and more specifically, the direct domination of the 'lesser races' by the 'superior races'—was inevitable. The inevitability arose not from the threat of terrorism but from the forces of increased globalism and presumptions of racial superiority").

10. *See, e.g.*, Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1998); LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007) (showing how Mexican Americans have been constructed as a race); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1189 (1997) (reviewing LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996)), (arguing that the Black-White binary excludes non-White groups that fall outside its purview); Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 19 B.C. THIRD WORLD L.J. 349, 352 (1998) [hereinafter Iglesias, *Out of the Shadow*] (discussing the contributions APACrit/LatCrit cross-fertilizations can make toward the articulation of a broader and more inclusive framework for the production of outsider scholarship and coalitional politics and therefore can "shed new light on structures and processes of domination, whose logic, histories and modes of operation might otherwise remain invisible"). On the importance of international law for LatCrit theory, see Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996) [hereinafter Iglesias, *International Law*]. On racialization of Arab and Muslim people, see Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61 (2005).

becomes possible to theorize imperialism and racism beyond those insights currently embodied in each approach.[11]

This Article proceeds as follows. Part I discusses the convergences and divergences in the agendas of CRT and TWAIL with respect to how they discuss race and identity. Part II explores how the analytical tools of CRT—racial subordination, intersectionality, multidimensionality, and anti-essentialism—can be used to better amplify and illuminate new directions in TWAIL and CRT scholarship. In discussing how an antisubordination lens could better illuminate certain TWAIL themes, the Article uses the example of an international judicial decision from Southern Africa that found that White farmers had been discriminated against because the Constitution of Zimbabwe had authorized the seizure of their land in favor of Black farmers.[12] The discussion on intersectionality focuses on TWAIL and TWAIL-inspired feminist and LGBT scholarship and its relationship with insights from CRT. The Article discusses how multidimensionality could inform TWAIL analysis of multiple bases of subordination to include that of indigenous peoples. In discussing essentialism and antiessentialism, the Article argues that the use of the term Third World in TWAIL can be defended on the grounds that conceding to claims that it is essentialist would inhibit innovative antisubordination analysis of the international legal order. Part III then discusses payoffs for CRT that could arise from applying TWAIL's analytical methods to probe the United States as a colonial power with respect to Puerto Rico. In addition, it explores how TWAIL could help CRT uncover the imperial nature of the United States and how these insights might be expanded to include examining the racialization of U.S. foreign relations law.

11. Learning from other collaborations among critical movements demonstrates that collaboration does not mean TWAIL or CRT losing their respective identities. *See* Iglesias, *Out of the Shadow,*, *supra* note 10, at 351 (discussing the contributions Asian Pacific American critical legal scholarship and Latina/o critical legal theory cross-fertilizations can make toward the articulation of a broader and more inclusive framework for the production of outsider scholarship and coalitional politics, therefore "shed[ding] new light on structures and processes of domination, whose logic, histories and modes of operation might otherwise remain invisible"). On the importance of international law for Latina/o critical legal theory, *see generally* Iglesias, *International Law, supra* note 10.

12. *Campbell v. Republic of Zim* 2008 (2) SADCT 2 (S. Afr.) http://www.saflii.org/sa/cases/SADCT/2008/2.html [https://perma.cc/9EYC-D45L].

I. CONVERGENCES IN HOW CRT AND TWAIL DISCUSS RACE AND IDENTITY

TWAIL has been in existence just over two decades now, and CRT for just over three decades.[13] Both started off marginalized in their respective disciplines,[14] but each has slowly grown into full-fledged scholarly movements, though still regarded with a measure of skepticism in the mainstream of their disciplines.[15] As I noted above, there is much common ground between CRT and TWAIL. Both share a common point of departure—deeply skeptical and critical of the mainstream position in their respective fields—from the idea that that European modernity for TWAIL and Whiteness for CRT are neutral, universal, and raceless baselines of which non-Europeans for TWAIL and Black people for CRT fall short.[16] Under these assumptions, non-Europeans have ethnic, cultural, and traditional attachments, and they should aspire towards European modernity that is presumed neutral and universal. Like much of domestic law, mainstream international lawyers ignore or underplay international law's role in past and

13. For a recent analysis of their first few decades, see generally Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011); James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL), in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2021).

14. One example of this marginalization arose in 1999 when the American Journal of International Law published a symposium on method in international law. Critical approaches like TWAIL were omitted. Henry Richardson wrote to the co-editors-in-chief of that journal that he:

> was sadly disappointed that critical race theory/Latino critical legal theory (CRT/LCT) was omitted totally from that discussion, even to the absence of a single footnote. That omission crucially distorts the symposium by ignoring the emergence in the last two decades of new approaches to international law, based on determinations by people of color that in order to erase embedded systematic discrimination they must become jurisprudential producers and not merely remain jurisprudential consumers.

Henry J. Richardson III, *Letter to the Editor*, 94 AM. J. INT'L L. 99, 99 (2000). For another recounting of this episode, see Jeanne M. Woods, *Introduction: Theoretical Insights From the Cutting Edge*, 104 AM. SOC'Y INT'L L. 389 (2010). In part because of Richardson's intervention, when a book on method in international law arising from that symposium was published, a contribution from Bhupinder Chimni and Antony Anghie, two TWAIL scholars, was included. *See generally* Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003).

15. For CRT, see Carbado, *supra* note 13. For TWAIL, see Gathii, *supra* note 13. *See also* Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CANADIAN J.L. & JURIS., 475, 476 (2007) ("[T]here is almost no recognition of [the intellectual contribution of] TWAIL in mainstream [international law] scholarship").

16. *See infra* notes 17–30 and accompanying text.

continuing racial discrimination as well as the continuing effects of this discrimination.[17] CRT and TWAIL play a corrective role in both respects.

Before discussing how TWAIL and CRT can learn from each other in Part II and Part III, I want to begin by observing some commonalities among them. Race is one of the core elements of TWAIL's agenda, especially in tracing the legacies of colonialism and imperialism in international law. For readers interested in a more detailed discussion of TWAIL's engagement with race, Part III of this Article provides that. This Part of the Article briefly highlights only some of the work done in TWAIL and CRT with a view to emphasizing their convergences.

Antony Anghie's important 2004 book, *Imperialism, Sovereignty and the Making of International Law*, foregrounds uncovering the juristic techniques of imperialism in international law.[18] In particular, Anghie showed how Francisco de Vitoria, the Spanish theologian of the sixteenth century, accounted for differences between Indians and the Spanish in cultural terms and how the resulting dynamic of difference between Europeans and non-Europeans produced the sovereignty doctrine.[19] By contrast to TWAIL, CRT prioritizes uncovering colorblindness in how law is racially constituted and how mainstream and even critical scholars avoid analyzing the racial power of law.[20] In tracing the imperial roots of international law, TWAIL scholars like Anghie are not oblivious to the racist underpinnings of the origins of imperial international law.[21] Thus, after discussing the various techniques positivist jurists from Europe deployed to account for non-European peoples in the nineteenth century, Anghie concludes that it is not sufficient "to claim that the racism of the nineteenth century has been transcended by the achievement of sovereign statehood by the non-European world."[22] From this TWAIL perspective, the dynamic of difference deployed by

17. Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 53 (2019) (arguing that race "remains a neglected topic within international legal scholarship").
18. Anghie, *supra* note 5, at 313–14 ("[T]he techniques and methods of imperialism are never consecutive, as it were: that is, all the techniques and methods of imperialism continue to co-exist in the present and, in given circumstances, may easily be resurrected.").
19. *Id.* at 13–31.
20. Kimberlé Williams Crenshaw, *Unmasking Colorblindness in the Law: Lessons From the Formation of Critical Race Theory*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 52, 52 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019) ("[T]he history of . . . Critical Race Theory (CRT) emerged as an intellectual response to colorblindness in the context of institutional struggles over the scope of equality and the content of legal education."). For a full account, see generally Crenshaw, *supra* note 1.
21. *See* Gathii, *supra* note 13 and the discussion in Part III *infra*.
22. Anghie, *supra* note 5, at 109.

international lawyers of the nineteenth century and before were racist.[23] Thus, for TWAIL scholars, race is on the agenda as it is for CRT scholars. Perhaps the difference might be that that while CRT scholars emphasize race as a central analytical category, for TWAIL scholars, the construction of colonialism and imperialism and their enduring legacies are their central analytical points of departure. In TWAIL, therefore, race takes a variety of forms including culture and society. In other words, TWAIL scholars trace the different forms that racialization takes in international law.[24]

For TWAIL scholars, the enduring distinctions made between Europeans and non-Europeans or White and non-White people is what created the racial distinctions from which the development of international law drew.[25] After all, it was this racial logic that associated Whiteness or being European with the attributes of civilization and modernity such as Christianity, settled agriculture, and ownership of land. Since non-Europeans lacked these attributes, this racial logic justified the dispossession of their lands and their colonization. From a TWAIL perspective, Europe established a "geopolitical order in which it had already defined or was defining itself as modern and the centre [sic] of history."[26] In short, TWAIL's agenda in tracing the colonial imprint and legacy of international law and CRT's agenda of uncovering supremacy overlap quite substantially. While White supremacy is a social order created to protect White privilege for CRT, for TWAIL scholars, international law is a social, political, and economic order constituted to protect the interests of formerly colonial powers and the business interests of their elites.[27]

As I elaborate with specific examples below, CRT provides a toolkit that can be leveraged to more directly and sharply analyze racialization in the colonial and imperial continuities and discontinuities on which TWAIL focuses.[28] Such an

23. *Id.* at 7 ("[P]ractices of racial discrimination, economic exploitation, territorial dispossession and cultural subordination were all central to the imperial project . . . .").
24. Thus, Anghie has a whole section subtitled "Colonialism and the racialization of sovereignty." *Id.* at 100.
25. *Id.* at 103 ("[U]nderstanding . . . the role of race and culture in the formation of basic international law doctrines such as sovereignty is crucial to an understanding of the singular relationship between sovereignty and the non-European world.").
26. CHARLES NGWENA, WHAT IS AFRICANNESS? CONTESTING NATIVISM IN RACE, CULTURE AND SEXUALITIES 59 (2018).
27. *See, e.g.*, B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 4 (2004) (arguing that which "exercises the greatest influence in IIs [international institutions] today . . . is that of the transnational fractions of the national capitalist class in advanced capitalist countries with the now ascendant transnational fractions in the Third World playing the role of junior partners").
28. *See* Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 843 (2000) (articulating the same and arguing that CRT has

analysis would not only enrich TWAIL's agenda of uncovering how international law obscures its colonial and racist history, but it would also aid TWAIL in exploring the ongoing legacies of racial oppression and disparity embedded within its rules and doctrines today. The productivity of adding tools from CRT to allow TWAIL to more sharply focus on race can be gleaned from the following example. One CRT scholar has argued that ending legal segregation, as one wing of American civil rights progressivism campaigned for in much of the twentieth century, decontextualized racist outcomes from the "larger political, economic, spatial, and sociological contexts in which schools and students were situated . . . . [and in so doing] removed educational inequality from the history of systematic, institutionalized, often state-sanctioned or state-initiated patterns of discrimination in housing markets, real estate lending, zoning, and employment."[29] It is precisely this type of contextualization that takes into account how inequalities are historically and racially produced in ways that are also gendered and have class outcomes that would profitably result from leveraging both CRT and TWAIL in our projects.

CRT and TWAIL are concerned about different racial regimes. For CRT, the focus is racist or Jim Crow laws. For TWAIL, the focus is colonialism. All these racial regimes marginalize, discriminate against, and subjugate a variety of non-White and non-European people. CRT rejects the linear narrative of racial progress that civil rights overcame Jim Crow. Instead, CRT emphasizes the reform/retrenchment dynamic—that is, that racial reform and racial retrenchment are key dialectics of American politics.[30] Similarly, TWAIL rejects the idea that colonial rule overcame imperialism and colonialism.[31]

CRT and TWAIL explicitly reject race neutral accounts of legal liberalism in domestic and international law, and instead show how race is constituted by law,

"developed a theoretical methodology that is useful in studying the struggles of other subordinated groups").

29. Leah N. Gordon, *Causality, Context, and Colorblindness: Equal Educational Opportunity and the Politics of Racist Disavowal*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 224, 229 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019).

30. Crenshaw, *supra* note 1, at 1361 (critiquing scholars who failed to acknowledge that the retrenchment or reversal of affirmative action was not simply class structure preservation or merely the outcome of hegemonic domination, but rather is "connected to racism, that is, white supremacy and racial stratification").

31. James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. J. 26, 39 (2011) ("TWAIL-ers . . . do not regard international law as having been cleansed of its imperial legacy by post–World War II guarantees of self-determination and sovereign equality for non-European countries and peoples, however, they also do not regard international law as simply an apology masking the raw power and philosophical commitments of its western progenitors.").

social relations, and the ideology of a dominant race. They show how law constructs degenerate races as well as Whiteness. In this respect, CRT and TWAIL therefore share a common and abiding disbelief in the neutrality of law. For both, law is central to constructing, justifying, and enforcing slavery, colonialism, and apartheid.[32] CRT traces the historical accumulation of racial advantages and shows how they shape and structure life chances of privileged Whites today.[33] TWAIL traces how imperialism preserved the economic hegemony of European and American powers as well as how contemporary understandings of economic development reproduce the tropes of alien, colonial, and racist rule in the era of neoliberalism.[34] For CRT, de jure legal progress in abolishing racist laws does not automatically lead to the de facto racial progress in abolishing racism.[35] From a CRT perspective, the presence of people of color

32. Antony Anghie and B.S. Chimni argue that "methodologies that purport to be 'universal' and that rely on concepts posited as having the same valence everywhere . . . often prove to be narrow and particular, a mechanism for advancing certain unacknowledged but specific interests as being for the universal good." Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, *in* THE METHODS OF INTERNATIONAL LAW 185, 210 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004). *See also* Woods, *supra* note 14, at 390 ("[C]ritical race and Third World theorists must question, challenge, and reject fundamental tenets of the canon, such as legal scholarship's claim to ideological neutrality, aspirations of abstract universality, and the fiction of state consent that informs legal positivism. They dispute supposedly neutral social values that may reflect only dominant Northern views. Together with feminists, they interrogate the moral assumptions that underlie international structures and question the pre-ordained model of humanity that shapes prevailing concepts of human dignity. They share an emphasis on social and historical context.") (footnotes omitted).

33. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1780 (1993) ("[E]xposing the critical core of whiteness as property as the unconstrained right to exclude directs attention toward questions of redistribution and property that are crucial under both race and class analysis. The conceptions of rights, race, property, and affirmative action as currently understood are unsatisfactory and insufficient to facilitate the self-realization of oppressed people.").

34. James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 1998 THIRD WORLD LEGAL STUD. 65, 67–68 (1998–1999) ("[G]ood governance agenda presents its technical and economic jargon as an ideologically neutral and universal antidote to the 'turmoil', 'chaos', corruption, authoritarianism and 'disorder' of the post-colonial African experience. The invocation of such imagery has become key to legitimizing this neo-liberalism as the best, or perhaps the only alternative to sub-Saharan Africa's predicament.").

35. Crenshaw, *supra* note 1, at 1368 (arguing that "[a]rticulating their formal demands through legal rights ideology, civil rights protestors exposed a series of contradictions—the most important being the promised privileges of American citizenship and the practice of absolute racial subordination. Rather than using the contradictions to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real, and demanded to exercise the 'rights' that citizenship entailed. By seeking to restructure reality to reflect American mythology, Blacks relied upon and

in influential positions, such as the election of Barack Obama as President of the United States, is not evidence of the eradication of racial inequalities.[36] The majority White population in the United States blames Black people and people of color for the continuing reality of racial inequality.[37] Similarly, international law, and its projects such as neoliberalism, blames non-European nations for their inequality.[38] CRT and TWAIL uncover this.

Having noted the similarities between CRT and TWAIL, it is important to note they both have different techniques, methods, and approaches. As I will explore in Part II below, some of the analytic tools of CRT—including antisubordination, intersectionality, multidimensionality, and anti-essentialism—can and have provided insights that can expand the scope of TWAIL scholarship.

II. WHAT CRT'S ANALYTICAL TOOLS CAN BRING TO TWAIL

This Part of the Article explores what CRT can bring to TWAIL. I want to begin by noting that TWAIL does not engage in race minimizing narratives or fail to consider race as already alluded to above. However, TWAIL exists in the context of mainstream approaches to international law that ignore or minimize how to account for race and identity.[39] Those dominant approaches fail to consider the fundamentally racialized nature of the modern world.[40] They

ultimately benefited from politically inspired efforts to resolve the contradictions by granting formal rights.").

36. Kimberlé Williams Crenshaw, *How Colorblindness Flourished in the Age of Obama*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 128, 129 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019) (arguing that while "the celebratory dimension of the 'Obama phenomenon' pulled counties people into its orbit, the colorblind rhetoric of racial denial stripped ongoing efforts to name and contest racial power of both legitimacy and audience").

37. WILLIAM RYAN, BLAMING THE VICTIM xii (rev. updated ed. 1976) ("[T]he specific ideology of *Blaming the Victim* [was being used] as a major weapon to slow down progress toward equality.").

38. Gathii, *supra* note 34, at 67–68.

39. Bradley, *supra* note 17, at 53 (arguing that race "remains a neglected topic within international legal scholarship"). See also, Gathii, James Thuo, Studying Race in International Law Scholarship Using a Social Science Approach (February 26, 2021). Chicago Journal of International Law, Vol. 22, No. 1, 2021, Available at SSRN: https://ssrn.com/abstract=3793974 (arguing that the American Journal of International Law, the premier international law journal in the United States has neglected publishing scholarship examining race in international law).

40. Duncan Bell, *Introduction: Empire, Race and Global Justice*, *in* EMPIRE, RACE AND GLOBAL JUSTICE 10 (Duncan Bell ed., 2019) (quoting Charles Mills as saying that racial ideologies "'circulate globally, assumptions of nonwhite inferiority and the legitimacy of white rule are taken for granted, a shared colonial history of pacts, treaties, international jurisprudence, and

implicitly or explicitly deny, disregard, and depoliticize race analogous to the mainstream approaches in domestic law that do the same.[41] Therefore, the systematic failure to appreciate how race has shaped modern law is a challenge in both U.S. domestic law as it is for international law. That said, CRT foregrounds race as an analytical category, while colonial continuities and discontinuities are a major analytical focus for TWAIL.

This Part proceeds as follows. First, it examines how CRT discusses race differently from TWAIL. It then proceeds to explore potential applications of CRT analytical tools in a TWAIL/global context. The analytical tools examined include antisubordination, intersectionality, multidimensionality, and essentialism/anti-essentialism, which CRT scholars use to overcome mainstream single category identity analysis. In so doing, CRT is able to take into account the multiple ways in which "powerlessness, marginalization, debilitating and degrading social hierarchies and exclusion" are created.[42] The examination of these analytical tools is by no means intended to be an exhaustive discussion or elaboration. In addition, I do not suggest that there is consensus in the vast CRT literature about the precise contours of these analytical tools. There is a vast literature that intensely debates and contests these analytical tools within CRT and related literature that readers can refer to.[43] My goal is to point to the potential for more systematically exploring how the respective theorizations in TWAIL and CRT could enrich and deepen their respective insights and hopefully inspire more full-fledged elaborations and explorations.

A. How CRT Discusses Race Differently From TWAIL

CRT more readily critiques how the "race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the

a racial-religious conception of being the bearers and preservers of civilization provide common norms and reference points'").

41. Ida Danewid, Race, Capital, and the Politics of Solidarity: Radical Internationalism in the 21st Century, 43–44 (Aug. 2018) (Ph.D. dissertation, London School of Economics) (http://etheses.lse.ac.uk/3848/1/Danewid__race-capital-and-the-politics.pdf [https://perma.cc/3CXM-ZVKC]) (noting that as "anti-colonial scholars and practitioners such as Césaire, Cabral, and Fanon remind us, willful amnesia sits at the heart of the colonial project—because it sanctions the idea, not only that the world is *post*colonial and *post*racial, but also that the long history of colonialism, racialized indentured servitude, Indigenous genocide, and transatlantic slavery have left no traces in culture, language, and knowledge production").

42. Mutua, *supra* note 28, at 848.

43. *See, e.g.*, CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francosco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).

condition of the Black underclass."[44] For CRT, the way in which "white race consciousness perpetuates norms that legitimate Black subordination" is an important reference point for understanding the limits of rules of formal equality and equal opportunity to understand the structural nature of racial exclusion.[45] CRT challenges the manner in which formal equality under U.S. law obscures Black disempowerment and fails to remedy slavery and its continuing legacy.[46] Similarly, TWAIL challenges how the formal equality of States obscures colonial and postcolonial plunder of resources and the ways that international law perpetuates the subordination of formerly colonial countries. Since race has not been the central analytic category for TWAIL in the manner in which it has been for CRT, there is room for learning, sharing, and collaboration.[47] In addition, CRT's critique of colorblindness in law and other disciplines in the United States is a powerful lens that could enrich TWAIL scholarship to more sharply focus on race. CRT critiques American law for making race and racial domination invisible.[48] CRT scholarship exposes how American law pretends to have transcended racism while at the same time systematically channels opportunities and resources along racial lines that benefit Whites at the expense of Black people.[49] In so doing, American law naturalizes and protects White preferences and privileges as an inevitable order.[50] Rather than demonstrating the

44. Crenshaw, *supra* note 1, at 1383.
45. *Id.* at 1384.
46. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (arguing a commitment to formal equality perpetuates Black disempowerment and that it provides cover for racist choices by judges).
47. Darryl Li calls for unpacking the baggage of postcolonial theory that has informed much of the work in international law, such as the dichotomy between sovereign/nonsovereign and colonizer/colonized. DARRYL LI, THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY 13 (for example, noting that "there is no single 'Islamic universalism' or 'Western universalism' as such, but rather multiple universalist projects whose primary idioms may describe themselves as broadly Islamic or Western and which strive for the ability to invoke such categories with a force that is convincing") (2020).
48. In this respect, CRT shares much in common with approaches that explore how racial "domination survives by covering its tracks, by erasing its own history[,]" and in doing such, these approaches "encourage[] us to think of the mystic boundaries separating, say, West from East, White from Black, Black from Asian, or Asian from Hispanic, as timeless separations, as divisions that have always been and will always be." Matthew Desmond & Mustafa Emirbayer, *What Is Racial Domination?*, 6 DU BOIS REV. 335, 338 (2009).
49. *E.g.*, Harris, *supra* note 33, at 1767 ("[The] Supreme Court's rejection of affirmative action programs on the grounds that race-conscious remedial measures are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment—the very constitutional measure designed to guarantee equality for Blacks—is based on the Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks.").
50. *Id.* at 1775 (1993) ("Treating whiteness as the basis for a valid claim to special constitutional protection is a further legitimation of whiteness as identity, status, and property. Treating

centrality of race in shaping opportunities and life chances, American law designates racism as a personal predilection.[51] However, as Cheryl Harris has shown:

> [the] legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes. Rather, the law has established and protected an actual property interest in whiteness itself, which shares the critical characteristics of property and accords with the many and varied theoretical descriptions of property.[52]

In the United States, therefore, Cheryl Harris and other CRT scholars have demonstrated how Whiteness was legally produced, protected, and institutionalized by the social, material, and other advantages and privileges that were at the same time denied to Black people.[53]

For example, housing segregation along racial lines in major cities in the United States is not a natural or necessary state of affairs. Rather, it is both a vestige of slavery and the direct result of policies—including officially sanctioned private violence—and laws at the federal and state level that constructed, justified, and enforced segregation in ways that benefited Whites and segregated Blacks to the least desirable housing and neighborhoods.[54] The next Subpart explores how CRT scholars explore these vestiges of slavery and their continuities through the lens of racial subordination.

1. Racial Subordination

Before proceeding to examine some of the ways in which CRT's analytical tools could be useful in a TWAIL context, I do not mean to suggest the general applicability of CRT outside the United States. Consider colorblindness, a CRT analytical tool that seeks to uncover racial subordination, to illustrate the limits and potential of using CRT analytical tools beyond the United States.[55] By

white identity as no different from any other group identity when, at its core, whiteness is based on racial subordination ratifies existing white privilege by making it the referential base line.").

51. Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1214 (2004) ("CRT's understanding of racism [is] as a product of institutional, ideological, and cultural sources, rather than atomistic acts by 'bad' individuals.").
52. Harris, *supra* note 33, at 1724.
53. *Id.* at 1741–42. *See also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, vii–ix (2017).
54. ROTHSTEIN, *supra* note 53, at vii–ix.
55. According to Michael Omi and Howard Winant, "[r]ace is both a social/historical structure and a set of accumulated signifiers that suffuse individual and collective identities, inform social practices, shape institutions and communities, demarcate social boundaries, organize

racial subordination, CRT scholars refer to at least two types of legally sanctioned forms of domination of Blacks by Whites: first, symbolic domination under which Blacks are denied social and political equality notwithstanding their accomplishments, and second, material subordination under which "discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks on almost every level."[56] My point is that, although colorblindness "is regulated through specific national logics of race," colorblindness nevertheless "shares fundamental similarities that transcend borders," and that can therefore travel "across time, national contexts and genres" particularly in the manner that it makes racial subordination invisible.[57] Thus, "what appear[s] to be vastly different racial regimes and sociopolitical contexts produce strikingly similar dominant racial strategies and ideologies."[58] In short, racism is not fixed, "immutable, and constant across time and space;"[59] rather, it fluctuates. It "assumes different forms in different historical moments."[60]

One example of a productive application of theorizing racial subordination outside the United States using a CRT lens is Tendayi Achiume's article analyzing the 2008 *Campbell* decision of the Southern African Development Community (SADC) Tribunal.[61] In that decision, the SADC Tribunal, an international court in Southern Africa, found that a provision of the Constitution of Zimbabwe that allowed the government to take land from White farmers was racially discriminatory against them and therefore impermissible under international law.[62] Specifically, the Tribunal found the government of Zimbabwe had engaged

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the distribution of resources," MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 125 (3rd ed. 2015). In Nicholas De Genova's apt formulation, "race is not a fact of nature; it is a sociopolitical fact of domination." Nicholas De Genova, *The "Migrant Crisis" as Racial Crisis: Do* Black Lives Matter *in Europe?*, 41 ETHNIC & RACIAL STUD. 1765, 1770 (2018). Importantly, race thus conceived is not reducible to skin color (which is a marker of racism), but instead describes a relation of subordination drawn along the line of the human. *Id.*

56. Crenshaw, *supra* note 1, at 1377.

57. Marzia Milazzo, *On the Transportability, Malleability, and Longevity of Colorblindness: Reproducing White Supremacy in Brazil and South Africa, in* SEEING RACE AGAIN: COUNTERING COLOBLINDNESS ACROSS THE DISCIPLINES 5, 122 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019) (arguing that although colorblindness "is regulated through specific national logics of race . . . [it] shares fundamental similarities that transcend borders").

58. *Id.* at 122.

59. Desmond & Emirbayer, *supra* note 48, at 344.

60. *Id.*

61. E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY 124 (Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen eds., 2018).

62. *Campbell v. Republic of Zim* 2008 (2) SADCT 4 at 54 (S. Afr.) http://www.saflii.org/sa/cases/SADCT/2008/2.html [https://perma.cc/9EYC-D45L].

in unfair racial discrimination against the White farmers inconsistent with Article 6(2) of the SADC Treaty, which outlaws discrimination based on race.[63] The Tribunal's analysis also referred to the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) in elaborating what constitutes discrimination on the basis of race.[64] Achiume argues that, while the Tribunal's decision was a plausible reading of the ICERD, the decision failed to take into account other plausible interpretations of the ICERD[65] that were more resonant with the history of racial subordination in which a minority of white Zimbabweans owned and controlled "almost all of the country's prime arable land."[66] In addition, as Achiume notes, these farmers had acquired that land under "now universally condemned colonial law."[67]

Here, Achiume is referring to the manner in which the racist subjugation of the peoples of Zimbabwe involved the seizure of their land.[68] Achiume is critical of the Tribunal's invalidation of Zimbabwe's land reforms to give Black Zimbabweans some of the White-owned land based on an analysis that argued the de facto differentiation, or the mere racial classification, between Whites and Blacks constituted unlawful racial discrimination.[69] Achiume argues that the

63. *Id.*
64. *Id.* at 46–47.
65. For example, Article 1(4) of the International Convention on the Elimination of Racial Discrimination (ICERD) provides that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Achiume, *supra* note 61, at 143–44 & n.112. *See also* Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571 (1997) (arguing that the nonself-executing doctrine denies U.S. citizens access to remedies under ICERD). In its 2014 report on the United States, the CERD Committee was very critical of the United States for its restrictions on the use of special measures (affirmative action)." *See* G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, ¶ 7 (Jan. 4, 1969), https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx. [https://perma.cc/72GF-TE2E].
66. Achiume, *supra* note 61, at 127.
67. *Id.* at 140.
68. *Id.* at 127 (arguing that "British colonial rule in Zimbabwe entrenched a deeply unequal, racialized land ownership structure").
69. *Id.* at 140 ("[T]he decision can be read as declaring unlawful land reform laws that in effect disparately impact white farmers, even when land ownership is concentrated among whites whose title originates in now universally condemned colonial law.").

ICERD could also have been read to allow such racial differentiation since it has a clause that arguably permits undoing historical racial subordination.[70] In other words, Achiume is arguing that the mere fact of racial classification cannot by itself be sufficient to constitute a violation of the rights of White farmers. By basing its decision on an anticlassification rationale that favored the White farmers, rather than an antisubordination rationale that would have upheld redistribution of land to Black farmers, the Tribunal foreclosed a race-conscious remedy.[71] Achiume is therefore critical of the Tribunal's failure to consider the possibility that a race conscious remedy was "necessary to achieve substantive equality for groups historically subordinated on account of their race."[72]

The importance of Achiume's argument lies in the fact that the overwhelming analysis of that important SADC Tribunal decision assumes that the unfair discrimination argument in favor of the rights of the White farmers had been decided correctly. Borrowing from CRT's critique of the U.S. Supreme Court's anticlassification interpretation of equal protection made it possible for Achiume to see beyond the SADC Tribunal's analysis and clarify how the *Campbell* decision cut against the widespread support for land redistribution in Southern Africa. Achiume instead argues that the fact that the Mugabe government targeted the SADC Tribunal with a view to terminating its existence is much better understood as arising from the fact that the *Campbell* decision was politically dissonant with the broad support for land reform in the Southern African region.[73] In other words, the fact that the Tribunal did not attract broad political support when the government of Zimbabwe targeted it for termination was a reflection that civil society groups, political parties, and others—who would have otherwise sought to save the Tribunal from Mugabe's machinations to bring its existence to an end—did not support the outcome in the *Campbell* decision. Hence, rather than offering a standard account of how the legal analysis of the Tribunal exceeded its jurisdictional remit, Achiume places the decision in the context of the highly unequal and racialized history of land ownership in Southern Africa and makes the case that the outcome of the case would have been different from an antisubordination perspective.[74] While she

70. *Id.* at 143 ("Article 1(4) of ICERD permits race-based remedies to redress racial subordination . . . .").
71. *Id.* ("[T]he very treaty the Tribunal relied upon for its racial discrimination finding—permits race-conscious remedies where these are necessary to achieve substantive equality for groups historically subordinated on account of their race.").
72. *Id.*
73. *Id.* at 135.
74. *Id.* at 146 ("[U]nderstanding the relationship between context and the Mugabe regime's successful contraction of the SADC Tribunal's authority requires moving beyond audience

does not support the violent and abrupt nature of the Zimbabwean land reform program, she nevertheless argues that the *Campbell* decision defied the historical, social, and political context of unequal land ownership between Blacks and Whites.[75] In so doing, she was able to bring attention to the centrality of race in the analysis of the *Campbell* case and the broader context within which it arose like no other scholars had been able to do.[76]

2. Intersectionality

Another CRT lens that can be productive for TWAIL is intersectionality.[77] When considering intersectionality, CRT scholars examine "how regimes of sameness and difference have circumscribed the space Black women have had to assert themselves as both particularized and generalizable subjects of discrimination" under U.S. antidiscrimination law.[78]

Under this understanding, Black women were too different to represent a class of plaintiffs that included White women or Black men in antidiscrimination cases.[79] Kimberlé Crenshaw referred to this as the difference dimension of intersectionality.[80] On the sameness prong of intersectionality, Crenshaw argued that case law under U.S. federal law showed that where there were allegations of racism in employment cases, the courts assumed that Black women were subject to that racism in the same way that Black men were.[81] The courts also assumed,

practices, also to consider norms, beliefs, and motivations of key audiences. The sociopolitical dissonance of *Campbell* in the context of unresolved postcolonial land reform and racial inequality in southern Africa is a fundamental piece of the SADC backlash puzzle.").

75. *Id.* at 125.

76. *Id.* at 140–41 (arguing that the SADC Tribunal "poorly adjudicated the issue of race-conscious remedies in postcolonial land reform. By invalidating Amendment 17 in the manner it did, the decision can be read as declaring unlawful land reform laws that in effect disparately impact white farmers, even when land ownership is concentrated among whites whose title originates in universally condemned colonial law. This is not an outcome stipulated by international law. A less dissonant decision would have been narrower, focusing on the Mugabe regime's violations in the implementation of Amendment 17, without ruling that this provision itself constituted unlawful racial discrimination.").

77. For an overview of intersectionality, see Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 155–57 (2010); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

78. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2222 (2019).

79. *Id.* at 2221.

80. *Id.*

81. *Id.*

illustrating another aspect of the sameness dimension, that if White women were subject to sexism in the work place, then Black women were impacted by it in identical ways.[82] A major takeaway of this CRT intersectionality analysis is that "Black women's discrimination claims are measured based on their correspondence or lack of correspondence with the experiences of white women (as the embodiment of feminism) and Black men (as the embodiment of antiracism)."[83] Intersectionality therefore exposes how antidiscrimination law measures Black women's racial discrimination based on a baseline of Black men and their sex discrimination on the baseline of White women.[84] Such analysis, CRT theorists argue, limits the scope of remedies available to Black women in race and sex discrimination cases since "some courts frame those claims as efforts to seek 'preferential treatment' in the sense that Black women seek protection on multiple grounds."[85] By contrast, when White men bring antidiscrimination cases, even when they have intersectionality built into them—both race and sex—courts are unlikely to argue they are seeking preferential treatment as they do when Black women bring such claims.[86]

Intersectionality as a CRT framework has been criticized for focusing on Black women, race, and gender and for not being able to capture the dynamic and contingent processes of identity formation.[87] In this respect, TWAIL scholarship overlaps very well with CRT responses to these critiques. There may be ways in which CRT could further reinforce its intersectionality analysis by combining forces with TWAIL and TWAIL-inspired feminist analysis. With respect to the criticism that intersectionality focuses too much on Black women, race, and gender, TWAIL feminist scholarship proceeds from the view that overlapping and interdependent forms of gender subordination and discrimination are a central point of inquiry.[88] In addition, in response to U.S.-style White feminism and its

82. *Id.*
83. *Id.* at 2223.
84. *Id.* ("In this respect, Black men and white women (like the 'man' in MacKinnon's analysis) operate as baselines.").
85. *Id.* at 2224.
86. *See id.*
87. *See* Devon W. Carbado, *Colorblind Intersectionality*, *in* SEEING RACE AGAIN: COUNTERING COLOBLINDNESS ACROSS THE DISCIPLINES 200, 202 (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz eds., 2019) ("As to the first criticism concerning the scope of intersectionality, the simple response is that intersectionality does not necessarily and inherently privilege any social category . . . . Ironically, the claim that intersectionality is just about [B]lack women reproduces a version of the representational problem Crenshaw interrogated.").
88. *See* Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189, 210 (1993) ("American feminist legal academics must critically examine issues central to feminist theory and practice in an international context.

claims of universality, early TWAIL feminist scholarship emphasized that the commonality of women's experiences could not serve as a template for feminism in the Third World.[89] Critical Race Feminists argue that the identities of women of color are multiplicative—in the sense that they possess multiple consciousness—based on their intersectional identities.[90] For these TWAIL feminists, it is simplistic and inaccurate to sweep women from many parts of the world under one feminist umbrella.[91] Like Critical Race Theorists, Critical Race Feminists examine women's experiences through race and gender "lenses" simultaneously.[92]

Indeed, TWAIL feminist scholars quite easily draw on the multiple intersections of oppression that women are subjected to.[93] In questioning White feminism's universalist claims, TWAIL feminists draw on the multiple experiences of women of color including Black, queer, transgender, lesbian women, as well as their anticolonial, anti-imperialist, and anticapitalist stances.[94] It is not surprising, therefore, that, in a recent edition of his classic international law text, Bhupinder Chimni finds common cause between his Marxist TWAIL approach and feminism.[95] Chimni argues that the first wave of international law feminism failed to grapple with imperialism and its negative consequences for the

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They need to acknowledge and confront the theorizing, the struggles and the lives of 'Third World' women. To do so, they must situate feminist scholarship and political intervention in the global framework and examine tensions, and also shared understandings, between 'Third World' and 'First World' women . . . . As we work towards gendered understandings of the regulation of sexuality, class, race, nationality and ethnicity, feminist internationality demands that, in turn, we examine how gender is itself implicated by these other discourses of power.").

89. *See id.* at 200.

90. *See, e.g.*, Adrien Katherine Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, 10 WASH. U. J.L. & POL'Y 19, 24–25, 29–30 (2002). On multiple consciousness, *see* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

91. *See id.* at 20 (noting that the author's use of the term "women of color" refers to "groups both inside and outside the United States," and "[i]n the American context . . . include[es] African Americans, Latinas, Asian, and Native Americans, as well as Arabs, Muslims, and any other group that is being socially constructed as people of color").

92. *See id.* at 24–25.

93. *See* Nesiah, *supra* note 88, at 200.

94. *See* J. Oloka-Onyango & Sylvia Tamale, *"The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691, 697–98 (1995). For a view challenging TWAIL to take LGBT issues on board, see, for example, Dianne Otto, *The Gastronomics of TWAIL's Feminist Flavourings: Some Lunch-Time Offerings*, 9 INT'L CMTY. L. REV. 345, 349 (2007).

95. *See* B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 360 (2017).

women of the Global South.[96] For Chimni, if that generation of feminists had more systematically engaged with TWAIL scholarship, it would have guarded against the tendency to universalize the experience of White women in the Global North.[97] Thus, Chimni argues in favor of integrating class, gender, race—and indeed other identity categories—for a critical project in international law.[98] Therefore, this could be another point of departure for a TWAIL/CRT research agenda: studying how issues of class and globalization intersect with other forms of subordination for women in the United States as well as in the Third World.

In addition, TWAIL feminist and TWAIL-inspired LGBT scholarship dovetails well with CRT's inquiry of colorblind intersectionality and its related analytic multidimensionality. To explain what colorblind intersectionality is, Devon Carbado uses the example of how a White navy officer in the United States became the posterchild for the gay rights campaign, even though it was a Black gay officer who first publicly challenged the then "Don't Ask, Don't Tell" policy of the Clinton Administration.[99] That a Black man could not be the representative gay man around which gay rights advocacy could be structured speaks to how this agenda made racial discrimination invisible or colorblind. Carbado argues that—under this form of colorblind intersectionality—"masculinity is one axis along which middle-class gay men can shore up, express, and naturalize their whiteness."[100] Carbado therefore alerts us to how intersectional identities can be deployed to enhance privilege and in doing so extends and affirms our understanding of the complexity and fluidity of identity.

Having briefly defined CRT's analytic of colorblind intersectionality and shown how TWAIL-affiliated feminist scholars and critical race feminists have critiqued White feminist and other types of colorblind analysis, in the next Subpart this Article proceeds to examine how CRT's multidimensionality theory relates to and may inform TWAIL-inspired LGBT and indigenous peoples' scholarship.

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96. *See id.* at 359–60 (arguing that the feminist international scholarship of Hilary Charlesworth and Christine Chinkin did "not explore the critical relationship between the deep structures of capitalism and imperialism and international law").
97. *See id.* at 360, 369 (arguing that Charlesworth's and Chinkin's failure to examine "exploitation of women in the economic 'South' . . . founds the privileged position of the imperial feminist").
98. *See id.* at 503 (arguing that the promise of a contextual approach to international law lies in "formulating an intersectional and composite notion of class as it prevents an arbitrary privileging of class relations irrespective of the social oppression being addressed. The contextual view recognizes that there are multiple social bases for women's oppression or racial oppression and that class oppression is often not its most significant cause.").
99. Carbado, *supra* note 87, at 216.
100. *Id.* at 216, 219.

3. Multidimensionality

One CRT theorist defines multidimensionality as an analytic that focuses on how subordinating "structures interact, interrelate, and are synergistic and mutually reinforcing."[101] Another proponent of multidimensionality theory argues that he prefers multidimensionality because "it more effectively captures the inherent complexity and irreversibly multilayered nature of everyone's identities and of oppression. While the term intersectionality suggests a separability of identities and oppressions, the scholarship in this area has forcefully taught us otherwise."[102]

Analogous to the analysis of colorblind intersectionality, in the TWAIL context Ratna Kapur has exposed how postcolonial sexual subjectivities are problematically constructed and deployed in human rights advocacy and the liberal media.[103] In so doing, Kapur showed how racial and cultural assumptions inform LGBT human rights pursuits.[104] The context for her discussion is how same-sex marriage is deployed "as evidence of the primitiveness or backwardness of non-Western, developing countries, against the more civilized, evolved approach of Western/liberal democracies."[105] She argues that this West/non-West framing deflects attention from the way in which Christian evangelicals from the United States have been integrally involved in the construction of an anti-gay agenda in African countries such as Uganda, Kenya, or Nigeria.[106] In this framing, international LGBT human rights advocacy has associated freedom and liberal values with the West, while African, Islamic, and non-Western societies and their leaders have been cast as retrogressive and barbaric, all the time while

101. *See* Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 348 (2013).

102. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997) (emphasis omitted).

103. *See* RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 63, 65–66 (2020).

104. *See id.*

105. *Id.* at 63.

106. *See id.* Kapur notes that "[i]t is not Islamic orthodoxy but rather this type of Christian evangelicalism that is driving a homophobic agenda easily received within a context where conservative gender and sexual norms, constituted partly by the legacies of the colonial past, continue to resonate in the postcolonial present." *Id.* at 63–64. For example, the economic sanctions and the withdrawal of foreign aid by countries whose largely White evangelical Christians are centrally implicated in producing or reinforcing homophobia mean that we have to more rigorously scrutinize the conservative gender and sexual norms from these countries. *See id.* at 64.

overlooking the ways in which homophobia continues to be a feature of Western liberal democracies.[107]

Kapur argues that such LGBT activist interventions outside the West have reproduced the binaries between those societies that are viewed as progressive and civilized, on the one hand, and those societies that remain in a state of transition until the human rights of LGBT persons within them are secured, on the other.[108] According to Kapur, in this problematic framing, "'[q]ueer' serves not as a signifier of sexual identity or sexual subversion, but merely as a defused inscription of socio-political difference within a larger modality of hierarchical regulation and governance."[109] This characterization repeats a familiar colonial trope of the civilized and uncivilized.[110] Moreover, LGBT human rights advocacy has become entwined with exclusionary and highly aggressive agendas that threaten freedom and that justify violent militarism.[111] According to Kapur, these interventions come at the cost of erasing the "subjectivity and choice for those marked by such interventions as simultaneously in need of rescue and threatening to the prevailing social norm."[112] She therefore concludes that the pursuit of an LGBT agenda based on the experiences of the United States and Europe has "erase[d] or marginalize[d] articulations of non-Western perspectives on sex and sexuality, while also reinforcing the purported civilizational superiority of Western states."[113]

Sylvia Tamale's *African Sexualities: A Reader* addresses "what [it] means to research the politics of sexualities and gender in African contexts, both with a sense of the colonial . . . gazes which configured African embodiment as simultaneously

107. Kapur points to the protests in Paris in 2013 where vast rallies opposed the move to legalize same-sex marriage. *See id.* She also points to the persistence of discriminatory initiatives against LGBT people in the United States, despite the legalization of same-sex marriage. *See id.*

108. *See id.*

109. *Id.* at 65–66 (illustrating the "exclusionary politics and the recurrent predication of rights recognition for LGBT subjects against the politics of Empire, racism and militarism"). Kapur argues that the "new locus of LGBT rights is centrally fixed within a security discourse that reproduces binaries based on racial and cultural exclusions, and also finds its justification in the rescue of the sexual subaltern from what is viewed as the primitive, homophobic 'Other.'" *Id.* at 66.

110. *See id.*

111. *Id.*

112. *Id.*

113. *Id.* This criticism "suggests that the gay rights movement, which produces a particular kind of tolerable homosexual—the 'gay international'—is nothing more than a neo-colonial enterprise that annuls the possibility of a valid, authentically postcolonial, non-Western narrative of queer sexuality, rights claims and identity politics." *Id.* at 66–67.

exotic and bestial."[114] Her book goes beyond the assertion that the term "minority" should include LGBT individuals.[115] She asserts:

> [F]ar from being marginal victims of patriarchal and postcolonial systems, African writers and researchers who take gender and sexualities seriously constitute a critical, dynamic, and fabulously diverse set of interlocutors whose ideas cataly[z]e not simply a conversation about rights but a political kaleidoscope of possibilities for remapping African epistemologies of the body.[116]

Like CRT scholars of the intersectionality and multidimensionality theories as we shall see below, Tamale argues that researching human sexuality must be accompanied by a gendered analysis.[117] She argues that class, age, religion, race, ethnicity, culture, locality, and disability all influence the sexual lives of men and women.[118] She urges "[r]esearchers in the field of sexuality [to] remember that the concepts of sexuality and gender, as normatively used, denote both power and dominance."[119] "[T]o speak of gendered sexualities and/or sexualized genders . . . . [would] allow[] for in-depth analyses of the intersections of the ideological and historical systems that underpin each concept, an important factor in knowledge production."[120]

Tamale argues that the foregoing characterizations of gendered sexualities in Africa are not universally embraced.[121] She notes that "[m]any researchers still view sexuality within the narrow spectrum of the sex act without exploring the extraneous factors that impact and shape our multifarious sexualities."[122] She agrees with scholars of African sexuality that urge a reading of the multiple sexualities "to disperse the essentialism embedded in so much sexuality research."[123] "Reference to sexuality in the plural does not simply point to the

114. Jane Bennett, *"Worst Woman of the Year": Sylvia Tamale Publishes African Sexualities: A Reader*, AWID (Oct. 10, 2011), https://www.awid.org/news-and-analysis/worst-woman-year-sylvia-tamale-publishes-african-sexualities-reader [https://perma.cc/8SXU-WAG2].
115. *Id.*
116. *Id.*
117. Sylvia Tamale, *Researching and Theorizing Sexualities in Africa*, *in* SEXUALITY AND POLITICS: REGIONAL DIALOGUES FROM THE GLOBAL SOUTH 16 (Sonia Corrêa, Rafael de la Dehesa & Richard Parker, eds., 2014) ("Sexuality and gender go hand in hand; both are creatures of culture and society, and both play a central, crucial role in maintaining power relations in our societies.").
118. *Id.*
119. *Id.* at 47.
120. *Id.*
121. *Id.* at 17.
122. *Id.*
123. *Id.*

diverse forms of orientation, identity, or status."[124] It is a move that does not seek to essentialize, but it "is a political call to conceptualize sexuality outside the normative social orders and frameworks that view it through binary oppositions and labels."[125] These "dimensions of sexuality include sexual knowledge, beliefs, values, attitudes and behaviors, as well as procreation, sexual orientation, and personal and interpersonal sexual relations."[126]

In this respect, the discussion of sexuality in the non-Western context as advanced by both Kapur and Tamale has similarities with one of the offshoots of intersectionality theory: multidimensionality theory. Like multidimensionality theory, Kapur and Tamale are exploring "[t]he idea that intersecting social systems are mutually reinforcing."[127] Citing racial profiling, "higher rates of hyper incarceration, death by homicide and certain diseases, suicide rates, and high unemployment" as contexts in which Black men face harsher treatment as compared to Black women, Athena Mutua's account of multidimensionality explores the intersection of race and gender for Black men especially.[128] She challenges the assumption in intersectionality theory that Black men were privileged by sex (relative to Black women) but oppressed on account of their race.[129] Multidimensionality explicitly embraces the mutually reinforcing structures of oppression and subordination.[130]

Multidimensionality, which Darren Hutchinson calls a post-intersectionality theory, has potential utility for a current debate within TWAIL.[131] Scholars studying indigenous peoples in international law have critiqued TWAIL scholarship for not having an adequate theory of subordination as reflected by the failure of TWAIL scholarship to adequately address the concerns of indigenous peoples. Amar Bhatia, for example, makes the case that there is an absence of indigenous peoples in TWAIL's retelling of international legal

124. *Id.*
125. *Id.*
126. *Id.*
127. *See* Mutua, *supra* note 101, at 348.
128. *Id.* at 346.
129. *Id.*
130. *See id.* Athena Mutua notes that even Kimberlé Crenshaw acknowledged "the multidimensionality of Black women's experience with the [antidiscrimination] single-axis analysis that distorts these experiences." *Id.* at 349 (quoting Crenshaw). According to Mutua, subordinating "structures interact, interrelate, and are synergistic and mutually reinforcing." *Id.* at 348.
131. *See* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309–11 (2001).

history.[132] He argues that TWAIL's retelling of international legal history embraces a solidarity of decolonized African and Asian states that subsumes within it indigenous peoples and their legal traditions and practices.[133] In this sense, by examining the multidimensional nature of colonial subordination to include indigenous peoples, Amar Bhatia offers a corrective to decolonizing movements and their attendant scholarship that, in his view, embraced assimilationist goals inconsistent with the interest of indigenous peoples and thereby erased their distinctive experiences as well as their activism.[134]

Like multidimensionality scholars who examine multiple reinforcing structures of subordination, TWAIL scholars who examine indigenous peoples show how African and Asian peoples simultaneously occupy a privileged position because decolonization granted them political independence while continuing to be economically subordinated in the global economic system.[135] By contrast, indigenous people continue to be subordinated within Africa and Asian nation states, within Western settler countries like the United States and Canada, and within the global economic system.[136] In a significant sense, this critique of TWAIL for underplaying the subordination of indigenous peoples is closely linked to the importance postcolonial theory places on the postcolonial nation state and its subjects who successfully seized privileges denied to them under

132. *See, e.g.*, Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law With Lessons From the Fourth World*, 14 OR. REV. INT'L L. 131 (2012).

133. *Id.* at 136.

134. *Id.* at 157–59.

135. *See* Joel M. Ngugi, *The Decolonization–Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L L.J. 297 (2001).

136. *Id.* at 315 ("In the Third World, instead of the formerly oppressed groups critically questioning the legal order that enabled the entrenchment of a diabolic rule as the one just past, the emerging states became impatient to attain 'statehood' as defined by the former oppressor. The need to enter the 'family of nations' was suddenly a deeply desired goal. No more questions were being asked about the paradox of an international legal order that had acquiesced to, even mandated their earlier subjugation. Indeed, the reverse happened. The emerging states quickly mastered the rules of the game and garnered the tools of the former 'master.' Alien concepts such as 'sovereignty' were soon in use against further attempts by those segments of the populations that felt dissatisfied with the emerging order. The same means used by the departing conqueror in an era just past to stunt self-determination were now in use by a different conqueror. The indigenous peoples, aspiring for their genuine existence as before, came against a new conqueror more determined than the foreign conqueror to give in to their aspirations. The original conqueror has succeeded prodigiously. A whole history of colonization and subjugation were to be given short shrift. All attempts at further 'disintegration' were deemed to be a *de trop* menace to the 'state.'") (footnote omitted). *See also* Mohammed Shahabuddin, *Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9 ASIAN J. OF INT'L L. 347 (2019) (arguing that "far from being a corrective to potential "chaos", the continuation of arbitrarily-drawn colonial boundaries undermines the legitimate right to self-determination of numerous ethnic minorities in postcolonial states and often results in violent ethnic conflicts").

colonial rule and whose goal was to remake the colonial state in the postcolonial period, rather than undo it.[137] It is in this respect that native lands seized by colonizing powers and the indigenous peoples who lived on them remained to be exploited and reoccupied by the postcolonial elites.[138]

Similarly, CRT scholarship has not generally included indigenous perspectives. While indigenous peoples have been racialized, their oppression is not easily reducible to race or labor exploitation. Rather, the racialization of indigenous peoples was designed to eliminate them with a view to appropriating their lands and claims to it—through genocide, ethnocide, and for those that remained, the requirement to be compulsorily assimilated into White America.[139] From this perspective, indigeneity is not simply another form of identity or relic from the past, but a fundamental critique of the dominant legal and economic order that excludes and erases indigenous peoples, particularly in settler colonial States including those in the Americas and in the South Pacific as well as in places like South Africa.[140] Thus, a key indigenous demand is not merely racial equality in a settler colonial state, but rather self-determination and autonomy.[141]

B. Essentialism and Anti-Essentialism

The use of the term Third World in TWAIL has been subject to sustained debate.[142] The upshot of that debate is that the term is essentialist. Critics of the

137. *Id.*

138. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 19 (2012).

139. *See generally* Carmen Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES, FORTHCOMING: CLIMATE JUST. ANTHROPOCENE 108, 115 (2021), https://doi.org/10.35295/osls.iisl/0000-0000-0000-1137 [https://perma.cc/S7G7-KSVH] (arguing in part that "the logic of anti-Native racism was the elimination of the Native in order to appropriate indigenous lands"); Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 108 (2014).

140. I thank my colleague Carmen Gonzalez for our fruitful discussions that helped me clarify this and other points in this Article. For an analysis of the tension between the status tribes of as sovereign nations and racialized groups, see Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004); Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1371 (2002). *See also* James Thuo Gathii, The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix) (Twenty-Second Annual Grotius Lecture) 114 *Proceedings of the ASIL Annual Meeting*, 165–87. doi:10.1017/amp.2021.87 (arguing that international law scholarship has had an epistemic silence with regard to the voices of Indigenous scholars of international law).

141. PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE U.S. AND PUERTO RICO (2007).

142. *See* Gathii, *supra* note 13. *See also* Prabhakar Singh, *Indian International Law: From a Colonised Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT'L L. 79, 97, 102 (2010) (arguing that "Third World" as "a new currency for identifying the deprived of both the North and the

use of the term Third World argue that it presupposes that all former colonies are homogeneous.[143] Further, they argue that the term inaccurately naturalizes and reifies the Third World as a collectivity that in 2021 is inaccurate relative to the 1950s and 1960s.[144] In any event, now as in the 1950s and 1960s, the critics argue, the Third World does not share any common essence.[145] On this view, the use of the term Third World is argued to be an outdated vision that held sway with Third World leaders in the optimistic decolonization moment of the 1950s and 1960s.[146]

In response, TWAIL scholars argue that use of the term Third World is not intended to connote the true essence of a Third World as a coherent geographical space that is historically fixed in time.[147] As Jean and John Comaroff argue, the Third World is not a geographical area, but rather an intellectual and epistemological alliance between those who are categorized as "oppressed" and marginalized in the intellectual community.[148] Balakrishnan Rajagopal explains that the conception of the Third World in TWAIL is one that locates its origins in the hierarchical ordering of states and regions that arose from the subordination that accompanied colonialism and imperialism.[149]

Rajagopal's point is very important. It coincides with a CRT insight that helps respond to essentialist critiques of the use of the term Third World, that is, to think of the term Third World as an antisubordinating term whose goal is to disrupt and hopefully dismantle the hierarchies upon which the contemporary unequal and racist global order is based. In a recent article, Devon Carbado and

South" that transcends the nation state and serves as "a unified category of the famished of both the First and the Third World").

143. *See* Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996) (challenging the concept of a unanimous non-European identity in world politics).

144. For a collection of essays pushing back against the use of the term Third World in the period beyond the decolonization era of the 1950s and 1960s, see generally AFTER THE THIRD WORLD? (Mark T. Berger, ed., 2009).

145. *See, e.g.*, José E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIOJURIS (Sep. 28, 2010), http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris [https://perma.cc/QK9U-E97A] (arguing that TWAIL's field of application is too broad and restricted to the Third World). *See* John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CANADIAN J.L. & JURIS. 383, 386 (2014) (arguing that TWAIL-ers are less interested in setting themselves apart, leading them to be so open to diverse views that they have lost their meaning).

146. *See* Gathii, *supra* note 13.

147. *See id.*

148. Jean Comaroff & John L. Comaroff, *Theory from the South: Or, How Euro-America Is Evolving Toward Africa*, 22 ANTHROPOLOGICAL F. 113, 115 (2012).

149. Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD LEGAL STUD. 1, 8 (1998–1999).

Cheryl Harris invoke Diana Fuss[150] to argue that it is less important to establish the reason why a particular term is being used in an essentialist way, and that we should instead focus on "the ideological motivation for and effects of that essentialism."[151] Drawing inspiration from this insight that Carbado and Harris make, TWAIL scholars can add another argument in response to the essentialist critique of the term Third World: that we have to avoid unreflectively dismissing the use of the term Third World because it would inhibit innovative antisubordination analysis of the international legal order. Indeed, as Vijay Prashad has argued, the idea of the Third World galvanized a sociopolitical movement that "made the identity of the Third World comprehensive and viable."[152] In other words, without building a coalition of African, Asian, and Central and South American countries, the force of anticolonialism would have been difficult to sustain. As such, the Third World is comprised of a broad coalition bound less by race than by their common colonial and anticolonial history.[153]

Algeria, one of the leaders of the Third World in the early 1960s, well understood the importance of building a united Third World coalition that could not be split by the cold war powers, including the United States, the Soviet Union, and China.[154] As a leader of the Third World coalition in this period, Algeria deemphasized its Arab-Muslim identity and argued instead that Third World solidarity had to be conceptualized as political rather than in racial or geographical terms as the Chinese would have wanted.[155] As Jeffrey James Byrne has argued, "Algerians, Yugoslavians, Cubans, and others saw the Third World as a political project open to anyone who shared its goals."[156] Josip Tito of

150. DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE, xi (1989).
151. Carbado & Harris, *supra* note 78, at 2205.
152. VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD 13 (2007).
153. *Id.* at 33. This point is related to how the term "strategic essentialism" has been used in some contexts. On strategic essentialism as originally used by Gaytri Spivak, see Gaytri Spivak, *Subaltern Studies: Deconstructing Historiography, in* THE SPIVAK READER 203 (Donna Landry & Gerald MacLean, eds.,1996).
154. JEFFREY JAMES BYRNE, MECCA OF REVOLUTION: ALGERIA, DECOLONIZATION AND THE THIRD WORLD ORDER 214 (2016).
155. Mao Tse-Tung warned Black Africa "that white, northern, and industrialized peoples like the Russians and Yugoslavians could never truly share the concerns of the Southern Hemisphere." *Id.* at 213. For Mao's argument that we are of the same race, *see* RADCHENKO SERGY, TWO SUNS IN THE HEAVENS: THE SINO-SOVIET STRUGGLE FOR SUPREMACY, 1962–1967 82 (2009). For the argument made by China at the time that "we non-whites must hold together," see W. A. C. Adie, *China, Russia, and the Third World*, 11 CHINA Q. 200, 213 (1962).
156. BYRNE, *supra* note 154, at 214. Byrne notes that "Algerians vaulted continents, the color line, and the Cold War in their determination to avoid the confinements of identity politics, on the one hand, and 'great power chauvinism," on the other." *Id.* In short, Algerians promoted an international cosmopolitan Third World agenda—while at the same time pursued an "intolerant nationalism" at home. *Id.* at 223.

Yugoslavia, who wanted to keep the Soviets at bay at the time of the Bandung conference, deemphasized Yugoslavia's European identity and preferred a political criteria for membership of the Third World.[157] It was this desire for Third World solidarity and unity in the struggle against colonialism and racialism that was a linchpin of the 1955 Third World Bandung Conference.[158]

This unity shows even Third World leaders understood the practical importance of coalitional politics or essentialism—as scholars of identity politics would characterize it—for a united front in opposing colonialism and imperialism. It is unsurprising that colonizing powers also understood the strategic importance of the "'fixity' in the ideological construction of an othered, conquered people to achieve both the representation of the discovery of an unchanging order as well as its disorder and degeneracy."[159] Essentialism therefore is a stratagem that the colonizing and formerly colonized resorted to so that they could advance their interests.

III. WHAT TWAIL'S ANALYTICAL TOOLS CAN BRING TO CRT

A central TWAIL insight is that rules of international law reproduce racial structuring of world politics, particularly along the European/non-European axis.[160] TWAIL scholarship argues that race is a relationship or construct of domination, and TWAIL scholarship challenges international law to take into account its role in ratifying and embracing racial slavery and colonial conquest.[161]

157. According to Mark Atwood Lawrence, as "the leader of a European nation . . . [Tito] rejected the notion that such a movement should be limited to Asia and Africa, preferring political rather than geographical or racial criteria for membership. Tito's approach was obviously self-interested, for he desperately needed allies to bolster his defiance of the Soviet bloc." Mark Atwood Lawrence, *The Rise and Fall of Nonalignment*, *in* THE COLD WAR IN THE THIRD WORLD 139, 144 (Robert J. McMahon ed., 2013).

158. PRASHAD, *supra* note 152 at 49 ("Unity for the people of the Third World came from a political position against colonialism and imperialism, not from any intrinsic cultural or racial commonalities. If you fought against colonialism and stood against imperialism, then you were part of the Third World. Sukarno's views found common currency among most of the delegates to the Bandung meeting, whether of the Left (China), the center (India and Burma), or the Right (Turkey and the Philippines)."). This point accords with Ann Laura Stoler, *On Political and Psychological Essentialisms*, 25 *ETHOS* 101, 105 (1997), to the effect that essentialist "thinking may . . . ready us to carve social categories at some broad cognitive joints, but it is historically specific relations of power that ensure that cognitive propensities are realized as political ones."

159. Ngwena, *supra* note 26, at 52. *See also* HOMI K. BHABHA, *The Other Question: Stereotype, Discrimination and the Discourse of Colonialism*, *in* THE LOCATION OF CULTURE 94, 94 (1994).

160. *See* ANGHIE, *supra* note 5.

161. Indeed, as Aníbal Quijano explains:

> [I]f we observe the main lines of exploitation and social domination on a global scale, the main lines of world power today, and the distribution of resources and

For TWAIL, international law is the product of a combination of the colonial project and anthropologically reified definitions of the primitive.[162] It is this racialized primitiveness of the non-European that justified conquest and subjugation.[163] These deeply racialized discourses presumed the West was superior and civilized but were also predicated on assumptions of White supremacy, in which White was pure, neutral, and rational while the others were impure, abnormal, and degenerate.[164]

In 2000, Ruth Gordon observed that "CRT may be a valuable means of deconstructing international legal discourse and revealing racial subordination where it is now camouflaged or hidden."[165] That year, she also organized a symposium on CRT and international law that produced an excellent volume of reflections on how international law could fruitfully engage with CRT to more fully uncover race.[166] In the keynote address at that 2000 CRT/International Law Symposium that Ruth Gordon organized, Makau Mutua argued that "CRT scholars must start to write in an international idiom; they must demonstrate that they understand that the conditions of subordination in the United States are part and parcel of the global structure of dehumanization."[167]

CRT scholars have also been cognizant of the international legal dimensions of their project. Thus, the introduction to the CRT's 1995 publication, *CRT: The Key Writings That Formed a Movement*, anticipated the utility of CRT beyond the United States and urged scholars to explore "processes that produce globalized racial stratification."[168] A subsequent CRT volume devoted an entire part of the

> work among the world population, it is very clear that the large majority of the exploited, the dominated, the discriminated against, are precisely the members of the 'races', 'ethnies', or 'nations' into which the colonized populations, were categorized in the formative process of that world power, from the conquest of America and onward.
>
> Aníbal Quijano, *Coloniality and Modernity/Rationality*, 21 CULTURAL STUD. 168, 168–69 (2007).

162. *See* Anghie, *supra* note 5, at 3–12 and 310–20.
163. *Id.*
164. *Id.*
165. Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 AM. SOC'Y INT'L L. PROC. 260, 261 (2000); *see also* Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000) (making the case that CRT could be a useful analytic framework for international law, particularly international human rights, and engaging in questions of development and poverty in the Third World).
166. Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 827–29 (2000).
167. Mutua, *supra* note 28, at 852.
168. *Introduction, in* CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT xxx (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

book to Globalization and included a chapter by leading CRT/TWAIL international scholar Henry J. Richardson III.[169]

The purpose of this Part of the Article is to show why it would be productive for CRT to take into account TWAIL's agenda of tracing subordination along the color, race, and cultural lines in a global context. This line of inquiry converges with new imperial and transnational histories such as those of settler colonialism that make connections between different colonies and in so doing show greater attention to the entanglements of metropolitan and colonial worlds.[170] Expanding CRT's gaze to embrace transnational histories—as well as the connections and webs of circulation between locations that have undergirded and reinforced White supremacism and anticolonial resistance—could yield new analytic insights into the nature of the United States as a colonial and imperial power.

To do so, CRT could borrow from the way that TWAIL scholars have analyzed, deconstructed, and critiqued international legal doctrines such as sovereignty and traced the ways they have shaped imperialism in the contemporary global order. Take the example of the U.S. possession, Puerto Rico, that was ceded to the United States following the Spanish American War in the 1898 Treaty of Paris.[171] In a series of U.S. Supreme Court decisions, referred to as the *Insular Cases*, Puerto Rico was declared to be an unincorporated territory of the United States, but subject to Congress's absolute authority.[172] Since Puerto Rican was not deemed to be part of the United States, its inhabitants were declared to be Puerto Rican rather than U.S. citizens.[173]

The Supreme Court's finding that Puerto Rico is "a territory appurtenant and belonging to the United States"[174] is a very familiar strategy of colonial empires explored in TWAIL scholarship. From a TWAIL perspective, the judicial determinations surrounding Puerto Rico's status in the United States are eerily familiar in the colonial discourses deployed by other colonial powers in Asia, Africa, and Australia when their authority was challenged by those under colonial

169. CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY, *supra* note 43, at 288–302, 303–78.

170. *See* RADHIKA MONGIA, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE (2018).

171. Treaty of Paris, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

172. Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JURÍDICA U.P.R. 225 (1996).

173. Downes v. Bidwell, 182 U.S. 244, 287 (1901) ("We are therefore of opinion that the Island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . ."). For an analysis of these cases, see Ramos, *supra* note 172.

174. *Downes*, 182 U.S. at 287.

rule.[175] In each of these contexts, European colonial powers justified retaining or holding on to non-European territories rather than allowing statehood because they were populated by "inferior races." In fact, the Supreme Court explicitly justified retaining control over Puerto Rico on these grounds.[176] Scholars have argued that such justifications were necessary to satisfy White settler populations while marginalizing and dispossessing local populations such as Mexicans and Native Americans.[177] This marginalization and expansion indicated the persistence and extension of slavery.[178]

This stratagem deployed by the United States under which Puerto Rico was pulled in opposite directions—increasingly tied to the United States and insistently defined as not part of it—is a very familiar story in TWAIL scholarship. There is a near perfect symmetry between the justifications used by U.S. judges over Puerto Rico with those used by British judges to argue that the barbaric and racially inferior populations of colonial possessions in Africa and Asia did not deserve the protection of the rights of birth right citizenship, such as judicial review.[179] Thus, the very coupling of the status of colonial territories to the racial

175. Orlando Patterson, *Rethinking Black History*, 41 HARV. EDUC. REV. 297 (1971) (arguing that the history of minority communities in international law must be comparative). Similarly, Henry J. Richardson III's scholarship traces the Black experience not just in the United States but around the world. *See* James T. Gathii, *Henry J. Richardson III: The Father of Black Traditions of International Law*, 31 TEMP. INT'L & COMP. L.J. 325 (2017).

176. In *Downes*, regarding whether Puerto Rico came within the revenue clauses of the U.S. Constitution, the Supreme Court held that:

> [i]f those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

Downes, 182 U.S. at 287.

177. CRT scholars argue that "racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest." Harris, *supra* note 33, at 1715.

178. CÉSAR J. AYALA & RAFAEL BERNABE, PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898 (2009).

179. *See* James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1057 (2007) (analyzing cases challenging colonial rule from Africa and how they overlapped with cases from the United States in the early twentieth century). For discussions on Australia and other British colonies, see, for example, ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010).

status of the individual inhabitants is a shared technique of empire, whether American or British or beyond.[180]

From a TWAIL perspective, Puerto Rico is very much like protectorates under British colonial rule. Like Puerto Rico, protectorates were tied to the British empire, but since they were not yet fully annexed as colonies, they were insistently defined as not part of the British empire.[181] Under the theory of British imperial law, protectorates were considered to be an interlude between formal annexation—to become fully-fledged British colonies—and the precolonial status.[182] As W. E. Hall, a British international lawyer, argued, this ambiguous status of protectorates was a stratagem that allowed the British empire to avoid the financial burden of its colonial possessions since technically they were not formally part of the empire.[183]

Take the example of a British case on protectorates from early twentieth century in East Africa that sounds eerily similar to the *Insular Cases* surrounding the status of Puerto Rico, *Ol le Njogo v Attorney-General.*[184] Here, British judges found the East African Protectorate to be a foreign country outside the dominion of the British crown.[185] Yet, at the time, the British had unlimited powers—civil, criminal, and judicial—over the East African Protectorate.[186] According to British colonial judges, non-British peoples could not seek relief from a British court because they did not have "birthright" citizenship.[187] The court argued the Maasai, who had brought the case to enforce treaty rights with the British, were aliens, not subjects. To justify this finding, the Colonial judges argued that the:

> idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of the law, is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that the Protectorate is over a

180. Notably, César Ayala and Rafael Bernabe tie one of the Insular Cases, *Balzac v. Puerto Rico*, 258 U.S. 298 (1922), to eight of the judges who decided *Plessy v. Ferguson*, 163 U.S. 537 (1896), suggesting the vast scope for a long overdue research agenda between CRT, LatCrit, TWAIL and other critical types of scholarship. AYALA & BERNABE, *supra* note 178. *See also* Go, *supra* note 8; Ramos, *supra* note 172.

181. *See* Gathii, *supra* note 179, at 1034 (noting that although the East African Protectorate "was really a part of the British Empire," British colonial courts held that it was "a foreign country outside the dominions of the Crown" and that in fact "the Crown or its representatives had unlimited powers in the protectorate").

182. *Id.* at 1033.

183. *Id.*

184. Ol le Njogo v. Att'y Gen. (1913) 5 L.R.K. 70 (Kenya). This case is examined at length in Gathii, *supra* note 179.

185. Gathii, *supra* note 179, at 1046.

186. *Id.* at 1034.

187. *Id.* at 1038.

> country in which a few dominant civilised [sic] men have to control a great multitude of the semi-barbarous.[188]

The upshot of the comparative analysis between Puerto Rico's status and the status of British protectorates shows that there are similarities in the ways colonial empires were organized to prevent colonized peoples from holding colonial governments accountable. The fact that race was a major justification in declining to hold White colonial governors responsible for violating the rights of their non-White subjects—in the Americas, Africa, and beyond—provides potential that TWAIL analysis might enable CRT to more powerfully uncover the status of the United States as a colonial power no less than European colonial powers of another era.

Carrying out a TWAIL agenda on themes that are traditionally within the remit of CRT could also be very productive in further interrogating how international law was deployed by Black people under slavery, a project that Henry Richardson III has inaugurated with groundbreaking research.[189] The continuities of the United States' racist policies in U.S. foreign policy have been explored,[190] but combining CRT and TWAIL's analytic tools can help probe this further. There is one other promising line of inquiry that can fruitfully combine TWAIL and CRT analytical tools. This is in exploring how we can help uncover our understanding of the manner in which national security laws and policies in the United States racialize Muslims and other people of color.[191] This requires investigating these and other connections between domestic and international law,[192] because—as

188. *Ol le Njogo* 5 L.R.K. at 97.

189. HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008).

190. An incomplete list includes Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27 (2003); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993); Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT'L BLACK L.J. 1 (2002); and Gordon, *supra* note 165.

191. One classic TWAIL inspired piece of scholarship is Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119 (1994). *See also* LI, *supra* note 47. Li placed Muslims not only at the center of his narrative on the Global War on Terror, but also in the middle of what all the analysis of Balkan wars referred to as a European war. *Id.* at 7–9 (noting that the book "seeks a broader horizon that takes into account global hierarchies of race . . . by highlighting the region's [Europe's] links to the darker-skinned peoples to the south and east").. He further noted that the extreme visibility of detention in places like Guantanamo not only denied the United States the flexibility in its Global War on Terror, but also brought the United States' allies on board as the jailers who in turn helped to sustain that war. *Id.* Darryl Li also expanded our understanding of the global war on terror by highlighting the universalist visions of pan-Islamism advanced by jihadists. *Id.* at 10.

192. Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1, 13 (1999);

Amna Akbar has argued—there is no domestic law without international law.[193] Such an analysis of racialization would go beyond analysis of legal doctrine in domestic and international law to focus on how these regimes are constituted by racialized assumptions and presuppositions, sometimes more obvious than others.[194] In addition, such scholarship could inquire into the racialized histories and historical inequalities between Whites and non-White groups, as well as within and between these groups, within regimes of national security, immigration, and citizenship. Indeed, CRT and TWAIL scholarship in international law is increasingly beginning to focus on such issues. For example, it examines how the nonself-executing doctrine embraced in U.S. courts to foreclose the application of international law was designed to limit the scrutiny not only of slavery, but also of segregation, lynching[195] and, most recently and environmental racism.[196] In a rare win, circumventing the nonself-executing doctrine that has prevent United Nations treaties and human rights machinery from scrutinizing conduct within the United States, in June 2020 voted to establish an independent commission of inquiry to establish the facts and circumstances related to systemic police violence in the United States and elsewhere following the murder of George Floyd.[197] The promise of such an analysis that examines the

Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1218 (2000) (tracing race in the context of international economic law); *see* James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 1010 (2000) (tracing the racially and culturally constitutive aspects of market restructuring under the aegis of neoliberalism in the 1990s in Africa).

193. *See* Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. Rev. 834, 848 (2015).

194. Lat-Crit theory has undertaken some important work in this area. *See, e.g.*, Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1076 (2005); Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 265 (1998).

195. Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091, 1099 (2000).

196. Carmen G. Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 281, 284 (2017), (discussing *Mossville Environmental Action Now v. United States*, an environmental racism case pending before the Inter-American Commission on Human Rights as of 2017, and arguing that the United States' refusal to sign human rights treaties, its extensive use of reservations, understandings, and declarations to limit the application of the treaties it does sign, and the judicially created distinction between self-executing and nonself-executing treaties make domestic enforcement impossible).

197. In its June 2020 Resolution A/HRC/ 43/L.50, the United Nations Human Rights Council decided to:

> establish an independent international commission of inquiry, to be appointed by the President of the Human Rights Council, to establish the facts and

racialized limits of the nonself-executing doctrine is that it counters mainstream foreign relations doctrinal scholarship that renders race and identity invisible. The power of combining TWAIL and CRT lenses would be to unearth how rules of international and foreign relations law are mobilized in seemingly race neutral terms to privilege the interests of western states, White elites, and private capital at the expense of peoples of color, their territories, and their interests.[198]

Finally, unlike TWAIL, CRT has largely not been concerned with the economic underpinnings of the racial state.[199] By contrast, a major focus of TWAIL scholarship is on the economic relationships between former colonies and their metropolitan powers,[200] and the postcolonial stakes in how development programs from modernization to neoliberalism, and beyond, have been constructed to favor the interests of northern industrialized economies and the elites of the Third World.[201] For example, some recent TWAIL scholarship traces the origins of customary international law to this history of capitalism.[202] The recent focus on racial capitalism[203] in law and political economy within the

> circumstances relating to the systemic racism, alleged violations of international human rights law and abuses against Africans and people of African descent in the United States of America and other parts of the world recently affected by law enforcement agencies, especially those incidents that resulted in the deaths of Africans and of people of African descent, with a view to bringing perpetrators to justice . . . .

U.N. H.R.C. Res. A/HRC/43/L.50., at 3 (June 17, 2020). *See also* Yasmin Sooka & Christoper Gevers, *FW De Klerk Has a Case to Answer*, INDEP. ONLINE (July 4, 2020), https://www.iol.co.za/sundayindependent/analysis/fw-de-klerk-has-a-case-to-answer-50449267?fbclid=IwAR0iQqNcN_0sWM9Zvkn_1I2PJ2d10SP5O58RgQC96_FTWc4BlaSi6wi43MQ [https://perma.cc/3DU9-F5WN].

198. Notably, an important new field of comparative foreign relations law has emerged. A recent book with 46 chapters does not contain a single chapter or sustained analysis of issues of identity and/or race even though the U.S. Foreign Relations paradigm is the defining framework for the book. *See* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019).

199. One example of a significant exception is Cheryl I. Harris's *Whiteness as Property*. Harris, *supra* note 33.

200. *See, e.g.*, James Thuo Gathii, *Third World Approaches to International Economic Governance*, *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 255 (Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds., 2008).

201. *See, e.g.*, BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011); LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015); KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002); MICHAEL FAKHRI, SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW (2014).

202. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1 (2018).

203. *See, e.g.*, Gonzalez, *supra* note 139.

United States academy, in addition to the work that TWAILers have done, is something from which CRT can learn.

CONCLUSION

This exploratory Article has argued that while CRT and TWAIL provide a set of analytical tools that converge in how they focus on identity and race, each of them provides possibilities that could enhance and enrich the other. After outlining the convergences and divergences in how TWAIL and CRT discuss race and identity in Part I, Part II of the Article explored how analysis of racial subordination, intersectionality, multidimensionality, and essentialism from CRT could offer TWAIL pathways to focus more sharply on race. Part III of the Article argued that TWAIL's focus on racialization of empire offers CRT possibilities for exploring the United States as a colonial and imperial power. Using the example of Puerto Rico, one of the United States' colonial possessions, I argued that TWAIL offers a fruitful framework for understanding similar forms of colonial empire engaged in by European powers in the non-European world. Further, a TWAIL analysis offers potential for probing the nature of the U.S. empire embedded in U.S. foreign relations law. TWAIL scholars have only partially explored the racialized nature of U.S. foreign relations law, and therefore much potential remains to probe that field that is currently dominated by doctrinal analysis that does not investigate its imperial nature and character.

Thus, the first major argument advanced in this Article is as follows. Just as slavery dehumanized Black people as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty. The agenda of tracking connections across historical periods and across different geographical locations that show "repeating and structurally similar domestic political and legal agendas"[204]—such as the Americas and Africa—does not often center race and identity in its explorations of global ordering. The potential and power of TWAIL/CRT collaboration is that it would go beyond merely tracking connections between different colonies and repeating governance agendas and techniques, because it would provide a very sharp lens of tracing issues of race and identity in imperial histories, transnational histories, and histories of the global.

204. Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics*, 21 J. HIST. INT'L L. 7, 30 (2019).

The major claim made here, then, is that issues of race and identity have so far been underemphasized, understudied, and undertheorized in mainstream international law as well as by historians of empire.[205] While this Article notes that notions about race have been shifted across time and location, it has proceeded from the premise that race as function of power has, since the eighteenth century, "become a dominant lens through which humans see and understand [themselves]."[206] TWAIL and CRT could learn about how to trace the centrality of race from the subaltern scholars whose scholarship has put the "'politics of difference'—racial, class, gender, ethnic, national, and so forth"—at the center of their analysis.[207] Like subaltern scholars, TWAIL and CRT are well-positioned to continue to contribute to the study of the racial dimensions of their fields and to move their respective fields forward. These inquiries will generate insights, such as how the privileging of Europe or the West/the United States has generated and continues to generate norms and practices that structurally subordinate those outside the Europe/the West/the United States in ways that institutionalize hierarchies of race, class, and gender. Without such sustained inquiries, the integral role of race in constituting both domestic and international law will continue to be understudied and misunderstood.[208]

Ultimately, TWAIL and CRT can learn from each other as critical movements. In addition, both can learn from each other on how to deal with pushback and backlash from mainstream and conservative scholarly and political movements or when their respective scholarship crosses disciplinary fields into the headwinds of debates in other fields.[209] This collaboration is long overdue. Take,

205. Notable exceptions among historians include Radhika Mongia. *See, e.g.*, MONGIA, *supra* note 170.

206. Omar H. Ali, *Constructing Race in World History*, OUPBLOG (Feb. 26, 2016), https://blog.oup.com/2016/02/race-world-history [https://perma.cc/7H48-EDNU].

207. Gyan Prakash, *Writing Post-Orientalist Histories of the Third World: Perspectives from Indian Historiography*, 32 COMPAR. STUD. SOC'Y & HIST. 383, 406 (1990).

208. An example of the utility of bringing race into thinking about global and domestic studies is CHARLES W. MILLS, THE RACIAL CONTRACT (1997) (arguing that the racial contract has provided the theoretical architecture justifying an entire history of European atrocity against non-Whites, from David Hume's and Immanuel Kant's claims that Blacks had inferior cognitive power, to the Holocaust, to the kind of imperialism in Asia that was demonstrated by the Vietnam War).

209. For example, Lauren Benton repeatedly refers to Third World Approaches to International Law as "so-called TWAIL," thereby revealing a rather dismissive attitude as to whether or not TWAIL should be recognized as an approach to international law. Benton, *supra* note 204. She noted, "Orford's position is presented as a defence [sic]of the so-called TWAIL school (Third World Approaches to International Law), best represented by Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005)." *Id.* at 11 n.7. "The somewhat disconnected follow up to some of the arguments of so-called TWAIL scholars is an example." *Id.* at 24.

for example, the potential for a sustained research agenda that examines the intersection of the United States' domestic and foreign policies through the lens of race. While there are scholars such as Henry Richardson III and Ruth Gordon, as noted earlier, whose scholarship has focused on this intersection, much remains to be done. Scholars outside of international law have done some great work that could inspire a new generation of scholarship.[210] Finally, both could also learn from each other about how best to build alliances between themselves as well as with other critical movements. This alliance is necessary to counter the all-too-often mainstream efforts to provincialize, define, and box critical approaches—especially when they delve into issues of race and identity—as marginal and irrelevant, rather than as significant contributions that challenge expand their respective fields.

210. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN-AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003); CAROL ANDERSON, BOURGEOIS RADICALS: THE NAACP AND THE STRUGGLE FOR COLONIAL LIBERATION, 1941–1960 (2015).

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