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

Forthcoming 67 UCLA Law Review (2020)

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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.[2] 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.[3]

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.[4] Both expose the discursive and

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[2] *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1331, 1369 (1988) arguing that "[t]he 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."

[3] *Id.*

[4] For CRT *see id.* at 1333 arguing that a "focus 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 Gathii, *Book Review: Decolonising International Law: Development, Economic Growth and the Politics of Universality, Sundhya Pahuja (2011),* 107 AM. J. INT'L L. 498 (2012) (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").

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.[5] TWAIL scholars do this by showing how rules of international law institutionalize the colonizer/colonized legacy in its basic doctrines and institutional forms.[6] 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.[7] Hence, just as slavery dehumanized African Americans as degenerate and outside the boundaries of humanity in the construction of the United States as a white racial state, European/white

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[5] *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. PITTSBURGH L. REV. 583, 650 (2014) arguing that "[a]ffirmative action was originally conceived as a remedy for past race discrimination against blacks and other minorities. Yet instead of upholding the voluntary efforts of universities, localities and the federal government to provide some remedy 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 defender of white privilege and racial inequality." *Id.* at 651.

[6] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 193 (2005). In discussing the mandate system of the League of Nations, 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 caviling mission and the dynamic of difference embodied in the very structure, logic and identity of international institutions."

[7] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 101–102 (2005) (showing "the process by which non-Europeans states are deemed 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").

international law was constructed to superintend over backward non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.[8] Needless to point out, a TWAIL lens also pierces through the myth that the United States' nineteenth century colonial possessions over the non-European peoples of Puerto Rico and the Philippines, among others, did not constitute imperialism, but a type of democratic tutelage.[9] American intellectuals, politicians and businesspeople of the period argued that the direct domination of the "lesser races" by the "superior races" was inevitable.[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

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[8] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 103 (2005) (noting that since "[s]overeignty was therefore aligned to 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 territory").

[9] JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING: ELITE POLITICAL CULTURES 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 U.S.' colonial possessions could be taught to build and maintain democracy as a condition for being granted self-government).

[10] Julian Go, *American Colonial Empire: The Limit of Power's Reach*, 4 ITEMS & ISSUES 18–23 (2003) (arguing that immediately 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). *Id.* at 18.

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

This Article proceeds as follows. Part I discusses the convergences and divergences in the agenda 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 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. The discussion on intersectionality focuses on TWAIL and TWAIL inspired feminist and LGBT scholarship and its relationship with insights from CRT. On multidimensionality, the Article discusses how it 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 U.S. as a colonial power with respect to Puerto Rico. In addition, it explores how TWAIL could help CRT uncover the imperial nature of the U.S. and how these insights might be expanded to include examining the racialization of U.S. foreign relations law.

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[11] Learning from other collaborations among critical movements demonstrates that collaboration does not mean TWAIL or CRT losing their respective identities. *See* 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, 351 (1998) (discussing the contributions APACrit/LatCrit crossfertilizations 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 LATCRIT theory, see Elizabeth M. Iglesias, *International Law, Human Rights and Latcrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1996).

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.[12] Both started off marginalized[13] in their respective disciplines, but each has slowly grown into full-fledged scholarly movements, though still regarded with a measure of skepticism in the mainstream of their disciplines.[14] 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—that European modernity for TWAIL and whiteness for CRT are neutral, universal, and raceless baselines that blacks for CRT and non-Europeans for TWAIL fall short of.[15] 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 continuing racial discrimination

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[12] For a recent analysis of their first few decades, see Devon W. Carbado, *Critical What What?* 43 CONNECTICUT 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 2020).

[13] 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 noting 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). 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). For another recounting of this episode, see Jeanne M. Woods, *Theoretical Insights at the Margins of International Law: TWAIL and CRT* (2011).

[14] For CRT, see Devon W. Carbado, *Critical What What?*, 43 CONNECTICUT L. REV. 1593 (2011). For TWAIL, see 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 2020). See also Sunter, A., *TWAIL as Naturalized Epistemological Inquiry*, 20 CANADIAN J. L. & JURISPRUDENCE 475–507 (2007) (arguing that "there is almost no recognition of TWAIL's intellectual contribution in mainstream international law scholarship").

[15] See discussion below in the text between footnotes 15 and 29.

as well as the continuing effects of this discrimination.[16] CRT and TWAIL play a corrective role in both respects.

Before discussing how TWAIL and CRT could 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 as elaborated in the paragraph below. For readers interested in a more detailed discussion of TWAIL's engagement with race, Part III of this Article does 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.[17] In particular, Anghie showed how Francisco de Vitoria, the Spanish theologian of the 16th 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.[18] By contrast to TWAIL, CRT prioritizes uncovering color blindness in how law is racially constituted and how mainstream and even critical scholars avoid analyzing the racial power of law.[19] In tracing the imperial roots of international law, TWAIL scholars like Anghie are not oblivious of the racist underpinnings of the origins of imperial international law.[20] Thus, after discussing the various techniques positivist jurists from Europe deployed to

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[16] Anna Spain Bradley, *Human Rights Racism*, 32 HARVARD HUM. RTS. J. 53 (2019) (arguing that race "remains a neglected topic within international legal scholarship").

[17] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 313–14 (2005) (arguing that "the techniques and method 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").

[18] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 13–31 (2005).

[19] Kimberlé Crenshaw, *Unmasking Colorblindness in the Law: Lessons From the Formation of Critical Race Theory*, *in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 229 (Kimberlé Crenshaw et al. eds., 2019). Crenshaw argues that the "the 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." *Id.* at 52. For a full account, see Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1331 (1988).

[20] See note 11 above and the discussion in Part III below.

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."[21] From this TWAIL perspective, the dynamic of difference deployed by international lawyers of the nineteenth century and before were racist.[22] 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 worlds, TWAIL scholars trace the different forms that racialization takes in international law.[23]

For TWAIL scholars, the enduring distinctions made between Europeans and non-Europeans or white and nonwhite is what created the racial distinctions upon which the development of international law drew from.[24] 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 center of history."[25] In short, the agenda of TWAIL in tracing the colonial imprint and legacy of international law and CRT's agenda of uncovering white supremacy overlaps quite substantially. While white

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[21] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 109 (2005).

[22] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 7 (2005) (arguing that the "practices of racial discrimination, economic exploitation, territorial dispossession and cultural subordination were all central to the imperial project").

[23] Thus, on page 100 of his book, Anghie has a whole section subtitled "Colonialism and the racialization of sovereignty." *Id.* at 100.

[24] ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 103 (2005) (arguing that an "understanding of 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").

[25] CHARLES NGWENA, WHAT IS AFRICANNESS? CONTESTING NATIVISM IN RACE, CULTURE AND SEXUALITIES 59 (2018).

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.[26]

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 that TWAIL focuses on.[27] Such an analysis would enrich TWAIL's agenda of uncovering how international law obscures its colonial and racist history but also the ongoing legacies of racial oppression and disparity embedded within its rules and doctrines today. The productivity of adding tools from CRT for 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 American civil rights progressivism campaigned for in much of the 20th 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, and often state-sanctioned or state-initiated patterns of discrimination in housing markets, real estate lending, zoning, and employment."[28] 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: racist or Jim Crow laws and policies as CRT does, and colonialism as TWAIL does. All these

[26] *See, e.g.*, B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 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").

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

[28] Leah N. Gordon, *Causality, Context, and Colorblindness: Equal Education Opportunity and the Politics of Racist Disavowal, in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 229 (Kimberlé Crenshaw et al. eds., 2019).

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 dialectic of American politics.[29] Similarly, TWAIL rejects the idea that colonial rule overcame imperialism and colonialism.[30]

CRT and TWAIL explicitly reject race neutral accounts of legal liberalism in domestic and international law, and instead showed how race is constituted by law, 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 was central to constructing, justifying, and enforcing slavery, colonialism, and apartheid.[31] CRT traces the historical accumulation of racial advantage and shows how they shape and structure life chances of privileged

[29] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1331, 1361 (1988) (critiquing scholars who failed to acknowledge that the retrenchment or reversal of affirmative action was not simply a class structure preserving or merely the outcome of hegemonic domination, but rather is "connected to racism, that is white supremacy and racial stratification").

[30] 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) (arguing that "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").

[31] Antony Anghie and B.S. Chimni argue that "[m]ethodologies that purport to be 'universal' and that rely on values posited as having the same valence everywhere . . . often prove to be narrow and particular, a mere 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 210 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004). *See also* Jeanne M. Woods, *Introduction: Theoretical Insights from the Cutting Edge*, 104 AM. SOC. INT'L L. PROC. 389, 390 (2010) (arguing that "critical 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. With feminists, they interrogate the moral assumptions that underlie international structures and question the preordained model of humanity that shapes prevailing concepts of human dignity. They share an emphasis on social and historical context") (footnotes omitted).

whites today.[32] 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.[33] For CRT, de jure legal progress in abolishing racist laws does not automatically lead to the de facto racial progress in abolishing racism.[34] From a CRT perspective, the presence of people of color in influential positions, such as the election of Barrack Obama as President of the United States, is not evidence of the eradication of racial inequalities.[35] The majority white population in the United States blames black people and people of color for the continuing reality of racial inequality.[36] Similarly, international law, and its projects such as neo-liberalism, blames non-European nations for their inequality.[37] CRT and TWAIL uncover this.

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[32] *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1780 (1993) (arguing that "exposing 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").

[33] James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 18 THIRD WORLD LEGAL STUDIES 67–68 (1998-1999) (arguing that the "good 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").

[34] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1368 (1988) (arguing that "articulating 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 ultimately benefited from politically inspired efforts to resolve the contradictions by granting formal rights")

[35] Kimberle Williams Crenshaw, *How Colorblindness Flourished in the Age of Obama, in* SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 128, 129 (Kimberlé Crenshaw et al. 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").

[36] WILLIAM RYAN, BLAMING THE VICTIM xii (Revised Updated Edition, 1972) (arguing that "the specific ideology of Blaming the Victim as a major weapon being used to slow down progress toward equality").

[37] James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 18 THIRD WORLD LEGAL STUDIES 67–68 (1998-1999).

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. To do so, I want to begin by noting that TWAIL does not engage in race minimizing narratives or fail to consider the 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.[38] Those dominant approaches fail to consider the fundamentally racialized nature of the modern world.[39] They implicitly or explicitly deny, disregard, and depoliticize race analogous to the mainstream approaches in domestic law that do the same.[40] 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

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[38] Anna Spain Bradley, *Human Rights Racism*, 32 HARVARD HUM. RTS. J. 53 (2019) (arguing that race "remains a neglected topic within international legal scholarship").

[39] Duncan Bell, *Introduction, in* EMPIRE RACE AND GLOBAL JUSTICE 10 (Duncan Bell ed., 2018) (quoting Charles Mills to the effect 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 a racial-religious conception of being the bearers and preservers of civilization provide common norms and reference points").

[40] IDA DANEWID, RACE, CAPITAL, AND THE POLITICS OF SOLIDARITY: RADICAL INTERNATIONALISM IN THE 21ST CENTURY 43–44 (London School of Economics, unpublished Ph.D. dissertation, Aug. 2018), *available at* http://etheses.lse.ac.uk/3848/1/Danewid__race-capital-and-the-politics.pdf (noting that as "anticolonial 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").

include antisubordination, as well 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"[41] are created. 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 these 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.[42] My goal is to gesture at 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 condition of the Black underclass."[43]. For CRT, the way in which "white race consciousness perpetuates norms that legitimate Black subordination"[44] 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] 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.[46] white race consciousness perpetuates norms that legitimate Black

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[41] Mutua, *supra* note 5, at 848.

[42] *See, e.g.*, Kimberlé Crenshaw et al., *Introduction, in* CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT xxx (Kimberlé Crenshaw et al. eds., 1995); FRANCISCO VALDES, CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).

[43] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1383 (1988).

[44] *Id.*

[45] *Id.*

[46] 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/non-sovereign and

subordination is revealed 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 and zero in on race. CRT critiques American law for making race and racial domination invisible.[47] CRT scholarship exposes how American law pretends to have transcended racism while at the same time systematically channeling opportunities and resources along racial lines that benefit whites at the expense of Black.[48] In so doing, American law naturalizes and protects white preferences and privileges as an inevitable order.[49] Rather than demonstrating the centrality of race in shaping opportunities and life chances, American law designates racism as a personal predilection.[50] 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

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colonizer/colonized. DARRYL LI, THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY (2020).

[47] 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 approaches encourages 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).

[48] *E.g.,* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1767 (1993) (arguing that 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").

[49] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1775 (1993) (arguing that "[t]reating whiteness as the basis for a valid claim to special constitutional protection is a further legitimation of whiteness as identity, status, and property. Treating 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").

[50] Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1214 (2004) (arguing that "CRT's understanding of racism as a product of institutional, ideological, and cultural sources, rather than atomistic acts by "bad" individuals").

> characteristics of property and accords with the many and varied theoretical descriptions of property.[51]

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.[52]

For example, housing segregation along racial lines in major cities in the United States is not a natural or necessary state of affairs.[53] 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 that segregated African Americans to the least desirable housing and neighborhoods.[54] The next section 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 that the general applicability of CRT outside the United States. Let me use colorblindness, a CRT analytical tool that seeks to uncover racial subordination, to illustrate the limits and potential of using CRT analytical tools beyond the US.[55] By racial subordination, CRT scholars refer to at least two types of legally sanctioned forms of domination of Blacks by Whites. First, symbolic domination

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[51] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724 (1993).

[52] *Id.* at 1741–42. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA vii–ix (2017).

[53] *Id.*

[54] *Id.*

[55] According to Michael Omi and Howard Winant, "race, not as a pre-political, biological characteristic, but a social construct brought into being by social, economic, and political forces. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2014). In Nicholas De Genova's apt formulation, "race is not a fact of nature, but a socio-political fact of domination." 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. Nicholas De Genova, *The "migrant crisis" as racial crisis: do* Black Lives Matter *in Europe?*, 41 ETHNIC & RACIAL STUD. 1765, 1770 (2018).

under which Blacks are denied social and political equality notwithstanding their accomplishments.[56] Second, material subordination under which symbolic domination, "discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks on almost every other level."[57] 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.[58] Thus, "what appears to be vastly different racial strategies and sociopolitical contexts produce strikingly similar dominant racial strategies and ideologies."[59] In short, racism is not fixed, "immutable, and constant across time and space;" 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 in unfair racial discrimination against the white farmers inconsistently with Article 6(2) of the SADC Treaty which outlaws discrimination

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[56] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARVARD L. REV. 1377 (1988).
[57] *Id.*
[58] *See* Marzia Milazzo, *On the Transportability, Malleability and Longevity of Color-Blindness: Reproducing White Supremacy in Brazil and South Africa, in* SEEING RACE AGAIN: COUNTERING COLOBLINDNESS ACROSS THE DISCIPLINES 122 (Kimberlé Crenshaw et al. eds., 2019) (arguing that although colorblindness "is regulated through specific national logics of race . . . [it] shares fundamental similarities that transcend borders").
[59] *Id.*
[60] Harris, *supra* note 14, at 1715.
[61] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018).
[62] Campbell v. Republic of Zimbabwe, SADC (T) Case No. 2/2007, Judgement (Nov. 28, 2008).

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 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.'[65] In addition, as Achiume notes, these farmers had acquired that land under "the now universally condemned colonial law."[66]

Here, Achiume is referring to the manner in which the racist subjugation of the peoples of Zimbabwe involved the seizure of their land.[67] 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.[68] Achiume argues that the ICERD could also have been read to allow such racial differentiation since it has a clause that arguably permits undoing historical racial subordination.[69] In other words, I read Achiume as 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

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[63] Campbell v. Republic of Zimbabwe, SADC (T) Case No. 2/2007, Judgement (Nov. 28, 2008).
[64] Campbell v. Republic of Zimbabwe, SADC (T) Case No. 2/2007, Judgement (Nov. 28, 2008).
[65] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018).
[66] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018).
[67] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018) (arguing that British colonial rule in Zimbabwe entrenched a deeply unequal, racialized land ownership structure").
[68] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY 93 (Karen Alter et al. eds., 2018) (arguing that "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 now universally condemned colonial law").
[69] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* International Court Authority (Karen Alter et al. eds., 2018). (arguing that "… Article 1(4) of ICERD permits race-based remedies to redress racial subordination").

farmers, rather than an antisubordination rationale that would have upheld redistribution of land to black farmers, the Tribunal foreclosed a race-conscious remedy.[70] 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."[71]

The importance of Achiume's argument lies in the fact that the overwhelming analysis of that important SADC Tribunal decision has taken it as a given 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 analysis that narrowly attributed the demise of the SADC Tribunal's expansive interpretation of its jurisdiction rather than to 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.[72] 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

[70] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018) (arguing that "the 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").
[71] *Id.*
[72] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018).

would have been different from an antisubordination perspective.[73] While she 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 black and whites.[74] 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.[75] In the next section, I proceed to examine another CRT tool, intersectionality.

2. Intersectionality

Another CRT lens that can be productive for TWAIL is intersectionality.[76] By 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.[77]

Under this understanding, black women were too different to represent a class of plaintfss whether they were white women or black men in antidiscrimination cases.[78] Kimberle Crenshaw referred to this as the difference

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[73] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts, in* INTERNATIONAL COURT AUTHORITY (Karen Alter et al. eds., 2018) (arguing that "understanding the relationship between context and the Mugabe regime's successful contraction of the SADC Tribunal's authority requires moving beyond audience practices, also to consider norms, beliefs and motivations of key audiences. The socio-political dissonance of *Campbell* in the context of unresolved post-colonial land reform and racial inequality in southern Africa is a fundamental piece of the SADC backlash puzzle").

[74] *Id.*

[75] *Id.* (arguing that Scholars to date have taken for granted the legal soundness of the SADC Tribunal's application of international human rights law in *Campbell*, which can be read to preclude race-conscious land reform even where this reform seeks to undo racialized land ownership structures rooted in colonial policy in the region. I challenge *Campbell*'s racial discrimination analysis, arguing that a more nuanced approach is required by international human rights law and for southern Africa).

[76] 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).

[77] 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).

[78] *Id.* at 2221.

dimension of intersectionality.[79] 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, black women were assumed to be subject to that racism in the same way that black men were.[80] The other aspect of sameness was that if white women were subject to sexism in the work place, courts assumed that black women were impacted by it in identical ways.[81] The CRT upshot of this 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)."[82] 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.[83] 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."[84] By contrast, when white men bring antidiscrimination cases even when they have intersectionality built into them—both race and sexual orientation—courts are unlikely to argue they are seeking preferential treatment as they do when Black women bring such claims.[85]

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.[86] In this respect, TWAIL scholarship overlaps very well with CRT responses to these critiques. There may be ways in

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[79] *Id.* at 2221.
[80] *Id.* at 2221.
[81] *Id.* at 2221. (arguing that if sexism is operating within a particular workplace, it will necessarily impact white women and Black women in identical ways [because they have the same sex]").
[82] *Id.* at 2223.
[83] *Id.* at 2221 (arguing that "In this respect, Black men and white women [like the "man" in MacKinnon's analysis] operate as baselines").
[84] *Id.* at 2224.
[85] *Id.*
[86] Devon W. Carbado, *Colorblind Intersectionality, in* SEEING RACE AGAIN: COUNTERING COLOBLINDNESS ACROSS THE DISCIPLINES 220 (Kimberlé Crenshaw et al. eds., 2019).

which CRT could further reinforce its intersectionality analysis by combining forces with TWAIL and TWAIL inspired feminist analysis. With respect to the first 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.[87] In addition, in response to U.S. style white feminism and its claims of universality, early TWAIL feminist scholarship emphasized the commonality of women's experiences could not serve as a template for feminisms in the third world.[88] Critical Race Feministsargue that the identities of women of color are multiplicative, [89] 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

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[87] Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. L. WOMEN'S J. 210 (1993) (arguing that "American feminist legal academics must critically examine issues central to feminist theory and practice in an international context. 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").

[88] Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. L. WOMEN'S J. 189 (1993).

[89] Adrien Katherine Wing, *Global Critical Race Feminism Post 9–11: Afghanistan*, 10 WASH. U. J. L. & POL'Y 19, 20 (2002) (hereinafter *Global CFR: Afghanistan*).

[90] On multiple consciousness, see Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

[91] *Global CFR: Afghanistan* at 20 (noting that when Wing uses the "term women of color, [she] refer[s] to groups both inside and outside the United States" and "[i]n the American context," she is "including 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 Global CFR: Afghanistan*, *supra* note 89, at 25.

[93] Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. L. WOMEN'S J. 210 (1993).

experiences of women of color including black, queer, transgender, lesbian, 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 women of the Global South.[96] For Chimni, if that generation of feminists had more systematically engaged with TWAIL scholarship, that would have guarded against the tendency to universalize the experience of white women in the Global North.[97] Chimni argues therefore in favor integrating class, gender, and race 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. That a black man could not be the representative gay man around which gay rights advocacy

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[94] 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, 700 (1995). For a view challenging TWAIL to take LGBT issues on board, see Dianne Otto, *Gastronomics of TWAIL's Feminist Flavourings: Some Lunch-Time Offerings*, 9 INT'L COMM. L. REV. 345 (2007).

[95] BHUPINDER CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2d ed. 2017).

[96] *Id.* at 360 (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] *Id.* at 360 (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] *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 basis for women's oppression or racial oppression and that class oppression is often not its most significant cause").

could be structured around speaks to how this agenda made racial discrimination invisible or colorblind. Devon Carbado argues under this form of colorblind intersectionality that "masculinity is one axis along which middle-class gay men can shore up and express and naturalize their whiteness."[99]

Having defined CRT's analytic of colorblind intersectionality, in the next Section this Article proceeds to examine how CRT's multidimensionality theory relates to and may inform TWAIL inspired LGBT and indigenous peoples' scholarship.

3. Multidimensionality

One CRT theorist defines multidimensionality as an analytic that focuses on how subordinating "structures interact, interrelate, and are synergistic and mutually reinforcing."[100] 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."[101]

Analogous to the analysis of colorblind intersectionality, Ratna Kapur in the TWAIL context has exposed how postcolonial sexual subjectivities are problematically constructed and deployed in human rights advocacy and the liberal media.[102] In so doing, Kapur showed how racial and cultural assumptions inform LGBT human rights pursuits.[103] 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."[104] She argues that this West/Non-

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[99] Carbado, *supra* note 30, at 219.
[100] Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 348 (2013).
[101] 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).
102 RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS FREEDOM IN A FISHBOWL (2018).
[103] *Id.*
[104] *Id.* at 63.

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.[105] 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 overlooking the ways in which homophobia continues to be a feature of Western liberal democracies.[106]

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.[107] According to Kapur, in this problematic framing, queer 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."[108] This characterization repeats a familiar colonial trope of the civilized and uncivilized.[109] Moreover, LGBT human rights advocacy has become entwined with exclusionary and highly aggressive agendas that threaten freedom and that justify violent militarism.[110] According to Kapur, these interventions come at the cost of erasing the "subjectivity and choice for

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[105] 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 aid by the home countries of citizens centrally implicated in producing or reinforcing homophobia in countries being punitively targeted by such measures require that both the injury and the restorative/rehabilitative interventions be rigorously problematized. *Id.* at 64.

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

[107] *Id.*

[108] *Id.* at 65–66 (listing examples of 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.

[109] *Id.*

[110] *Id.*

those marked by such interventions as simultaneously in need of rescue and threatening to the prevailing social norm."[111] She therefore concludes that the pursuit of an LGBT agenda based on the experiences of the United States and Europe has erased or marginalized articulations of non-Western perspectives on sex and sexuality, while also reinforcing the purported civilizational superiority of Western states.[112]

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 exotic and bestial."[113] Her book goes beyond the assertion that the term "minority" should include homosexual individuals.[114] She asserts that

> far 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 catalyze not simply a conversation about rights but a political kaleidoscope of possibilities for remapping African epistemologies of the body.[115]

Like CRT scholars of intersectionality and multidimensionality theories as we shall see below, Tamale argues that researching human sexuality must be accompanied by a gendered analysis.[116] She argues that class, age, religion, race, ethnicity, culture, locality, and disability all influence the sexual lives of men and

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[111] *Id.*

[112] *Id.* One of these critiques suggests that the gay rights movement, "which produces a particular kind of tolerable homosexual—the 'gay international'—is nothing more than a neocolonial 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.

[113] 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].

[114] *Id.*

[115] *Id.*

[116] Sylvia Tamale, *Researching and Theorizing Sexualities in Africa, in* AFRICAN SEXUALITIES: A READER 16 (2011) [hereinafter *Researching and Theorizing Sexualities in Africa*] ("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.").

women.[117] She urges researchers in the field of sexuality to remember that the concepts of sexuality and gender, as normatively used, denote both power and dominance.[118] To speak of gendered sexualities and/or sexualized genders would allow for an in-depth analyses of the intersections of the ideological and historical systems that underpin each concept, an important factor in knowledge production.[119]

Tamale argues that the foregoing characterizations of gendered sexualities in Africa are not universally embraced.[120] She notes that "many researchers still view sexuality within the narrow spectrum of the sex act without exploring the extraneous factors that impact and shape our multifarious sexualities."[121] She agrees with scholars of African sexuality that urge a reading of the multiple sexualities to dispense with the "essentialism embedded in so much sexuality research"[122]. Reference to sexuality in the plural does not simply point to the diverse forms of orientation, identity, or status.[123] It is a move that does not seek to essentialize but also a political call to conceptualize sexuality outside the normative social orders and frameworks that view it through binary oppositions and labels. Tamale argues that "thinking in terms of multiple sexualities is crucial to disperse the essentialism embedded in so much sexuality research."[124] These dimensions of sexuality "include sexual knowledge, beliefs, values, attitudes, and behaviors, as well as procreation, sexual orientation, and personal and interpersonal sexual relations."[125]

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 "intersecting social systems" that are

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[117] *Id.*
[118] *Id.* at 47.
[119] *Id.*
[120] *Id.* at 17.
[121] *Id.* at 17.
[122] *Id.* at 17.
[123] *Id.* at 17.
[124] *Id.*
[125] *Id.*

"mutually reinforcing."[126] Using examples such as racial profiling, "higher rates of hyper incarceration, death by homicide and certain diseases, suicide rates, and high unemployment of black men as compared to black women," Athena Mutua's account of multidimensionality explores the intersection of race and gender of African American men especially. 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. Multidimensionality explicitly embraces the mutually reinforcing structures of oppression and subordination.[127]

Multidimensionality, which Darren Hutchinson calls a post-intersectionality theory, has potential utility for a current debate within TWAIL.[128] Scholars studying indigenous peoples in international law that have critiqued TWAIL scholarship for not 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 history.[129] 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.[130] 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

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[126] Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*,13 NEV. L.J. 341, 348, 354 (2013).

[127] Athena Mutua notes that even Kimberlé Crenshaw acknowledged "the multidimensionality of Black women's experience with [antidiscrimination] single-axis analysis that distorts these experiences." *Id.* at 349. According to Mutua, subordinating "structures interact, interrelate, and are synergistic and mutually reinforcing." *Id* at 348.

[128] Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 311 (2001).

[129] *See, e.g.,* Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OREGON REV. OF INT'L L. 131 (2012).

[130] Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OREGON REV. INT'L L. 136 (2012).

assimilationist goals inconsistent with the interest of indigenous peoples and thereby erased their distinctive experiences as well as their activism.[131]

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.[132] By contrast, indigenous people continue to be subordinated within Africa and Asian nation states, within Western settler States like the United States and Canada, and within the global economic system.[133] 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 nationstate and its subjects who successfully seized privileges denied to them under colonial rule and whose goal was to remake the colonial state in the postcolonial period, rather than undo it.[134] It is in this respect that native lands seized by colonizing powers and the indigenous peoples that lived on them remained to be exploited and reoccupied by the postcolonial elites.[135]

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[131] Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OREGON REV. INT'L L. 157–159 (2012).

[132] *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 (2002).

[133] 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. 315 (2002) (arguing that "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 selfdetermination 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").

[134] *Id.*

[135] Eve Tuck & K. Wayne Yang, *Decolonization is not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC. 1, 19 (2012).

B. Essentialism and Anti-Essentialism

The use of the term Third World in TWAIL has been subject to sustained debate.[136] The upshot of that debate is that the term is essentialist. Critics of the use of the term Third World argue that it presupposes that all former colonies are homogeneous.[137] Further, they argue that the term inaccurately naturalizes and reifies the third world as a collectivity that in 2020 is inaccurate relative to the 1950s and 1960s.[138] In any event, now as it was in the 1950s and 1960s the critics argue, the Third World did not share any common essence.[139] 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.[140]

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.[141] 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

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[136] *See* 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 2020). *See also* Prabhakar Singh, *Indian International Law: From a Colonised Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT'L L. 1, 98, 102 (2010) (arguing that "Third World" as "a new currency for identifying the deprived of both the North and the South" that transcends the nation-state and serves as "a unified category of the famished of both; the first and the third world").

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

[138] 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 Mark T. Berger, *After the Third World? History, Destiny, and the Fate of Third Worldism*, 25 THIRD WORLD Q. 9 (2004).

[139] *See, e.g.*, Jose E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIOJURIS (Sep. 9, 2010), http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/ [https://perma.cc/QK9U-E97A. Alvarez argues that TWAIL's field of application is too broad and restricted to the Third World. *Id.* *See* John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CAN. J.L. & JURIS. 1 (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).

[140] *See* 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 2020).

[141] *See* 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 2020).

marginalized in the intellectual community.[142] 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.[143]

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 Cheryl Harris invoke Diana Fuss[144] 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."[145] 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."[146] 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.[147]

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[142] Jean Comaroff & John L. Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa*, 22 ANTHROPOLOGICAL F. 113 (2012).
[143] Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD LEGAL STUD. 1 (1998–99).
[144] DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE xi (1989).
[145] Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2205 (2019).
[146] VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD 13 (2007).
[147] *Id.* at 33.

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.[148] 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.[149] 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."[150] Josip Tito of 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.[151] 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.[152]

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[148] JEFFREY JAMES BYRNE, MECCA OF REVOLUTION: ALGERIA, DECOLONIZATION AND THE THIRD WORLD ORDER 214 (2016).

[149] Mao Tse Tung warned black Africa "that white, northern, and industrialized people like the Russians and Yugoslavians could never truly share the concerns of the Southern hemisphere." JEFFREY JAMES BYRNE, MECCA OF REVOLUTION: ALGERIA, DECOLONIZATION AND THE THIRD WORLD ORDER 214 (2016). For Mao's argument that we are of the same race, see RADCHENKO SERGY, TWO SUNS IN THE HEAVENS: SINO-SOVIET STRUGGLE FOR SUPREMACY 1962–7 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).

[150] JEFFREY JAMES BYRNE, MECCA OF REVOLUTION: ALGERIA, DECOLONIZATION AND THE THIRD WORLD ORDER 214 (2016). 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.

[151] According to Marl A. Lawrence, *The Rise of the Nonaligned Ideal, in* THE COLD WAR IN THE THIRD WORLD 144 (Robert McMahon ed., 2013), 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."

[152] VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD 34 (2007) ("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 Stoler, *ON POLITICAL AND PSYCHOLOGICAL ESSENTIALISMS*, 25 *ETHOS* 10 (1997), to the effect essentialist "thinking may . . . ready us to carve social categories at some

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.[153] 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."[154] Essentialism therefore is a stratagem that the colonizing and formerly colonized resorted to so that they could advance their interests. That does not mean that racism is fixed, "immutable, and constant across time and space," but rather that it fluctuates. It "assumes different forms in different historical moments."[155]

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.[156] TWAIL scholarship argues that race is a relationship or construct of domination and challenges international law to take into account its role in ratifying racial slavery and colonial conquest and its continued embrace of the legacy of slavery and colonialism in present day international law.[157] For

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broad cognitive joints, but it is historically specific relations of power that ensure that cognitive propensities are realized as political ones."

[153] VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD 34 (2007). *See* ROBERT A. MORTIMER, THE THIRD WORLD COALITION IN INTERNATIONAL POLITICS 1 (1984) (arguing that the concept of the Third World merely highlights political coalition of countries similarly situated economically).

[154] Homi K. Bhabha, *The Other Question: The Stereotype and Colonial Discourse*, 24 SCREEN 52 (1983).

[155] MICHAEL OMI AND HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 63 (1994).

[156] *See* ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW (2005).

[157] Indeed as Anibal 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 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 STUDIES 168–69 (2007).

TWAIL, international law is the product of a combination of the colonial project and anthropologically reified definitions of the primitive.[158] It is this racialized primitiveness of the non-European that justified conquest and subjugation.[159] 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.[160]

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."[161] 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.[162] In the keynote address at that 2000 CRT/International Law conference that Ruth Gordon organized at Villanova Law School, 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."[163]

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

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[158] *See* ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW (2005).

[159] *See* ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW (2005).

[160] *See* ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW (2005).

[161] Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 PROCEEDINGS OF THE ANN. MEETING AM. SOC. OF INT'L L. 261 (2000); *see* 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).

[162] Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000).

[163] Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 852 (2000).

racial stratification."[164] A subsequent CRT volume devoted an entire part of the book to Globalization and included a chapter by leading CRT/TWAIL international scholar, Henry J. Richardson III.[165]

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.[166] 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, as well as 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.[167] 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.[168] Since Puerto Rican was not deemed to be part of the United States, its inhabitants were declared to be Puerto Rican rather than United States citizens.[169]

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[164] Kimberlé Crenshaw et al., *Introduction, in* CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT xxx (Kimberlé Crenshaw et al. eds., 1995).
[165] FRANCISCO VALDES, CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).
[166] *See* RADHIKA MONGIA, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE (2018).
[167] Treaty of Paris, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.
[168] Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996).
[169] 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

The Supreme Court's finding that Puerto Rico is "a territory appurtenant and belonging to the United States"[170] is a very familiar strategy of colonial empires explored in TWAIL scholarship as I discuss more fully below. 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 rule.[171] 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.[172] Scholars have argued that such justifications were necessary to satisfy white settler populations[173] while marginalizing and dispossessing local populations such as Mexicans and Native Americans. This marginalization and expansion indicated the persistence and extension of slavery.[174]

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

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cases, see Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996).

[170] *Downes*, 182 U.S. at 287.

[171] Orlando Patterson, *Rethinking Black History*, 41 HARV. EDUC. REV. 315 (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 Gathii, *Henry J. Richardson III: The Father of Black Traditions of International Law*, 31 TEMPLE INT'L & COMP. L. J. 325 (2017).

[172] According to the Suprreme Court, in *Downes*, 182 U.S. at 287, regarding whether Puerto Rico came within the revenue clauses of the Constitution, "If 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."

[173] CRT scholars argue that "racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest." *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1715 (1993).

[174] CÉSAR AYALA & RAFAEL BERNABE, PUERTO RICO IN THE AMERICAN CENTURY (2009).

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.[175] Thus, the very coupling of the status of colonial territories to racial status of the individual inhabitants is a shared technique of empire, whether American or British or beyond.[176]

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 – essentially a foreign country.[177] Under the theory of British imperial law, Protectorates were considered to be an interlude between formal annexation—to become fully-fledged British colonies—and something in between.[178] As H.E. Hall, a British international lawyer, argued, this ambiguous status of protectorates was a stratagem that allowed the British to avoid the financial burden of its colonial possessions since technically they were not formally part of the empire.[179]

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, *Ole Njogo v AG*.[180] Here, British judges found the East

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[175] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007) (analyzing cases challenging colonial rule from Africa and how they overlapped with cases from the United States in the early twentieth century). For Australia and other British colonies, see, for example, ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010).

[176] Notably, César Ayala and Rafael Bernabe tie one of the Insular cases, the Balzac decision, to eight of the judges who decided Plessy v. Ferguson suggests to me the vast scope for a long overdue research agenda between CRT, Lat-Crit, TWAIL and other critical types of scholarship. AYALA & BERNABE, *supra* note 88. See also, Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996); JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING: ELITE POLITICAL CULTURES IN THE PHILIPPINES AND PUERTO RICO DURING U.S. COLONIALISM (2008).

[177] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1034 (2007) (noting that although the East African Protectorate "was really a part of the British Empire," British colonial courts held that it was outside the dominions of the Crown and that in fact the Crown "and its representatives had unlimited powers in the protectorate").

[178] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007)

[179] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007)

[180] Njogo v. Att'y Gen., No. 91 of 1912, 5 E.A.L.R. 70 (1914). This case is examined at length in James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007).

African Protectorate to be a foreign country outside the dominion of the British crown.[181] Yet, at the time, the British had unlimited powers over the East African Protectorate—civil, criminal, and judicial. [182]According to British colonial judges, non-British peoples could not seek relief from a British court because they did not have "birth-right citizenship."[183] 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 [but that it was] is made less difficult if one remembers that the protectorate is over a country in which a few dominant civilized men have control over a great multitude of the semi-barbarous.[184]

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, in Africa and beyond provides potential that TWAIL analysis might provide to 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 African Americans under slavery, a project that

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[181] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1046 (2007)
[182] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1034 (2007)
[183] *See* James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1038 (2007)
[184] *Njogo*, No. 91 of 1912, 5 E.A.L.R. 70.

Henry Richardson III has inaugurated with groundbreaking research.[185] The continuities of the United States' racist policies in U.S. foreign policy have been explored,[186] 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 that national security laws and policies in the United States racialize Muslims and other people of color.[187] This requires investigating these and other connections between domestic and international law,[188] because, as Amna Akbar has argued, there is no domestic law without international law.[189] 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—sometime more obvious than others.[190] In addition, such scholarship could inquire into the

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

[186] 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 TEMPLE INT'L & COMP. L.J. 27 (2003); Henry J. Richardson, III, *The Gulf 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(2003); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000).

[187] One classic TWAIL inspired piece of scholarship is Ileana Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119. *See* DARRYL LI, THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY (2020) (placing Muslims not only at the center of his narrative on the Global War Against Terror, but also in the middle of what all the analysis of Balkan wars referred to as a European war. Further noting that the 'extreme visibility' of detention in places like Guantanamo not only denied the United States the flexibility in its Global War Against Terror, but also brought the U.S.'s allies on board as the jailers who in turn helped to sustain that war. Darryl Li also illuminatingly shows expands our understanding of the global war on terror by highlighting the universalist visions of pan-Islamism advanced by jihadists).

[188] Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1999); Chantal Thomas, Cr*itical Race Theory and Postcolonial Development Theory: Observations on Methodology*, VILL. L. REV. 1195 (2000) (tracing race in the context of international economic law); *see* James 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 (2000) (tracing the racially and culturally constitutive aspects of market restructuring under the aegis of neoliberalism in the 1990s in Africa).

[189] Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015).

[190] 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 (2005); Gil Gott, *A Tale of New Precedents: Japanese American Interment as Foreign Affairs Law*, 19 B.C. THIRD WORLD L.J. 179 (1998).

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. The promise of such an analysis is that it would counter 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 interests.[191]

CONCLUSION

This exploratory Article has argued that while CRT and TWAIL provide a set of analytical tools that converge in the manner that 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 how 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 argue 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

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[191] Notably, an important new field of comparative foreign relations law has emerged. A recent book with over 46 chapters does not contain a single chapter or sustained analysis of issues of identity and/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 (Cutis Bradley ed., 2019).

nature and character. Thus, the first major argument advanced in this article is as follows. That just as slavery dehumanized African Americans 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 superintend over backward 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, (e.g. the Americas and Africa), that show 'repeating and structurally similar domestic political and legal agendas'[192] do not often center race and identity in their 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. 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.[193] 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 eighteenth century 'become a dominant lens through which humans see and understand themselves.'[194] 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.[195] Like sub-altern scholars, TWAIL and CRT are well-positioned to continue to contribute to the study the racial dimensions of their fields across historical periods and locations as well as in the contemporary period so as that

[192] Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics,* 21 J. HIST. INT'L L. 24 (2019).
[193] Notable exceptions among historians include Radhika Mongia, INDIAN MIGRATION AND EMPIRE: A COLONIAL GENEALOGY OF THE MODERN STATE (2018).
[194] Omar H. Ali, *Constructing Race in World History*, OUP Blog (Feb. 26, 2016), *available at* https://blog.oup.com/2016/02/race-world-history/.
[195] Gyan Prakash, *Writing Post-Orientalist Histories of the Third World: Perspectives from Indian Historiography*, 32 COMP. STUD. SOC'Y & HIST. 406 (1990).

they can move their respective fields forward. The insights such inquiries generate 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/West/the United States in ways that institutionalize hierarchies of race, class and gender. Without such sustained inquiries, the integral role race in constituting both domestic and international law will continue to be under-studied and misunderstood.[196]

Ultimately, the point of this Article is that 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 in their respective fields or when their respective scholarship crosses disciplinary fields into the headwinds of debates in other fields.[197] The scope for this collaboration are long overdue. Take 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.[198] Finally, both could also learn

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[196] An example of the utility of bringing race into thinking about global and domestic studies is CHARLES W. MILLS, THE RACIAL CONTRACT (1997) (in which Charles W. Mills argues 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).

[197] For example, Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics,* 21 J. HIST. INT'L L. 6, 18 (2019) (repeatedly referring to TWAIL as so-called Third World Approaches to International Law (TWAIL), thereby revealing a rather dismissive attitude as to whether or not TWAIL should be recognized as an approach to international law). See for example on footnote 7 on page 6 noting "Orford's position is presented as a defence 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)." She further notes "The somewhat disconnected follow up to some of the arguments of so-called TWAIL scholars is an example." *Id.* at 18.

[198] *See, e.g.*, 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 (2014); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

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.