

# U.C.L.A. Law Review

## Genres of Universalism: Reading Race Into International Law, With Help From Sylvia Wynter

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### ABSTRACT

Taking note of the relatively limited accounts of race in contemporary international legal doctrine, this Article posits a thought experiment: What would international legal theorizing look like not from the place of the metropole or the colony, but rather from the journey of the enslaved, from the barracoon to the hold of the slave ship to the plantation? For one possible answer, this Article turns to the work of the Jamaican thinker Sylvia Wynter to consider race in relation to international law in order to argue for the utility of replacing a formalist and state-based notion of universalism with a more open-ended and contestation oriented approach. Such a move would reframe international law's "origin myth" about 1492 from a dyadic account of Western colonizers versus the colonized to a triangular encounter between Europeans, Indigenous Americans, and enslaved Africans. It would also pivot away from understandings of race as a generic form of invidious social differentiation to be managed solely by states as an internal matter to instead theorize legal regimes of racialization in connection with political economy as both distinct and conjoined.

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“We are going to have to struggle for an entirely new definition of  
what it is to be human.”<sup>1</sup>

—Sylvia Wynter

### INTRODUCTION: A MOMENT OF MOVEMENT(S)

What would international law look like if theorized from the institution of slavery—specifically, the system of racialized chattel slavery that emerged in the Atlantic world and was a founding condition of capitalist modernity?<sup>2</sup> Slavery was, after all, a thoroughly legal enterprise—it was structured and enabled by legal mechanisms, and it shaped legal systems in innumerable ways.<sup>3</sup> In the Atlantic context, it was also a key site of racialization, unfolding on a scale that linked disparate continents and cut across manifold jurisdictions. Transnational anti-Black racism as produced by this world poses particular challenges for international legal theorizing. As pan-Africanists have long argued, the geographical dispersion of the Black diaspora among nation states where they are nearly always captive minorities makes resorting to a state-based system such as international law particularly unavailing.<sup>4</sup> The UN Commission on Human Rights

1. Greg Thomas, *PROUD FLESH Inter/Views: Sylvia Wynter*, 4 *PROUDFLESH: A NEW AFRIKAN J. OF CULTURE, POL. & CONSCIOUSNESS* 13 (2006).
2. This premise builds on a voluminous literature. See, e.g., PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993); CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972); C.L.R. JAMES, *THE BLACK JACOBS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (Vintage Books 1989) (1963); ERIC WILLIAMS, *CAPITALISM & SLAVERY* (1944); W.E.B. DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* (1935).
3. Much of the international law scholarship on slavery focuses on abolitionist efforts—whether as instances of early human rights projects or as justification for imperial expansion—rather than the legal architecture of the institution itself. See, e.g., Lauren Benton, *Abolition and Imperial Law, 1790–1820*, 39 *J. IMPERIAL & COMMONWEALTH HIST.* 355 (2011); JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012); see also W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA 1638–1870*, 92–105 (1896). For more recent work highlighting the role of race in the international repression of slavery and its place in histories of international criminal law, see EMILY HASLAM, *THE SLAVE TRADE, ABOLITION AND THE LONG HISTORY OF INTERNATIONAL CRIMINAL LAW: THE RECAPTIVE AND THE VICTIM* (2020); Vasuki Nesiah, *Crimes Against Humanity: Racialized Subjects and Deracialized Histories*, in *THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS* 167 (Immi Tallgren & Thomas Skouteris eds., 2019).
4. See, e.g., Marcus Garvey, *The True Solution of the Negro Problem*, *TEACHING AM. HIST.* <https://teachingamericanhistory.org/library/document/the-true-solution-of-the-negro-problem> [https://perma.cc/Q9ES-W8L8] (“If the Negro were to live in this Western Hemisphere for another five hundred years he would still be outnumbered by other races who

has recognized this challenge by establishing a Working Group of Experts on People of African Descent.<sup>5</sup> But the Working Group's utility at times seems to come despite, rather than through, international law; perhaps its boldest move, supporting reparations for slavery in the United States, references not international law but rather proposed domestic legislation.<sup>6</sup>

This Article argues that as a doctrinal matter, contemporary international law treats race as a generic form of social differentiation to be managed by separate nation states, nearly indistinguishable from ethnicity and national origin. If international law constructs race as a category both local and vague, this Article argues for the importance of theorizing racialization instead as a process, one that is both transregional (if not global) and specific. In order to identify new ways of theorizing race and international law together, this Article turns to Atlantic slavery as a conceptual starting point, inspired by the writings of the Jamaican thinker Sylvia Wynter (1928–).<sup>7</sup> The Atlantic slave trade as a legal assemblage cannot be understood in strictly national terms; it cannot be understood apart from the emergence of specifically anti-Black forms of racism in the contexts of settler colonialism; and it cannot be understood without reference to political economy. For these reasons, theorizing from the history of Atlantic slavery is useful for confronting the key weaknesses in international law's prevailing approaches to race and, by extension, its assumptions about the category of humanity.<sup>8</sup>

As other contributions to this Symposium remind us, the relationship between race and international law is an issue of longstanding concern.<sup>9</sup> It has

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are prejudiced against him. He cannot resort to the government for protection for government will be in the hands of the majority of the people who are prejudiced against him . . . . The future of the Negro therefore, outside of Africa, spells ruin and disaster.”)

5. See Comm'n on Human Rights Res. 2002/68, Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶ 8 (Apr. 25, 2002).
6. See Hum. Rts. Council, Rep. of the Working Grp. of Experts on People of Afr. Descent on Its Mission to the U.S., U.N. Doc. A/HRC/33/61/Add.2, ¶ 94–95 (Aug. 18, 2016).
7. In attempting to theorize international order from the paradigm of slavery, the analysis in this Article is indebted to Adom Getachew's reconstruction of the “dual critique of empire as a form of enslavement and international racial hierarchy” as developed by W.E.B. Du Bois and other Black radicals. ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* 80 (2019).
8. The marginalization and erasure of the Atlantic slave trade has contributed to a parallel fragmentation and methodological nationalism in international labor law. See *Decolonizing Labour Law: A Conversation with Professor Adelle Blackett*, TWAILR: DIALOGUES (Jan. 24, 2021), <https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett> [<https://perma.cc/9DAJ-HVDU>].
9. See, e.g., James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, 67 UCLA L. REV. 1610 (2021); Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021); see also HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008). On the related need to extend recent work on racial capitalism in legal scholarship to

taken on renewed urgency in the past decade against the backdrop of resurgent social movements, especially the movement for Black lives<sup>10</sup> and the Native resistance coalescing around Standing Rock. International law scholars have responded to the moment in various ways, either by attempting to learn from such movements, offering aid to them, or confronting the field's own dubious racial politics.<sup>11</sup>

Less remarked upon, however, has been the stark challenge that these movements implicitly pose to international law itself, including the areas that have tended to regard themselves as progressive, such as human rights, international humanitarian law, and international criminal law. The explosive growth in international lawmaking and institution building in these areas since the end of the Cold War has occasioned both utopian hopes and skeptical pushback.<sup>12</sup> Such debates have largely revolved around the relationship between the Global North and the rest of the world, especially concerning humanitarian intervention and the Global War on Terror. In contrast, the racial justice movements of today—like their predecessors in the 1960s and 1970s—disrupt this schema by representing a Global South within the Global North<sup>13</sup> at a time when prevailing political arrangements in the Euro-American world are more unsettled than they have been in decades. These developments further expose the gap between international law's suitability as a vocabulary for popular demands and

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non-U.S. contexts, see Angela P. Harris, *Foreword: Racial Capitalism and Law*, in HISTORIES OF RACIAL CAPITALISM vii (Destin Jenkins & Justin Leroy eds., 2021).

10. I use the term “movement for Black lives” to refer to a broad social movement and to avoid confusion with certain wellknown institutionalized formations within it, such as the Black Lives Matter Global Network (BLMGN) and the Movement for Black Lives (M4BL) coalition. See BARBARA RANSBY, *MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE TWENTY-FIRST CENTURY* 4–5 (2018).
11. See, e.g., Laura Goolsby, *Why International Law Should Matter to Black Lives Matter: A Draft Petition to the Inter-American Commission on Human Rights on Behalf of the Family of Eric Garner*, 21 U. PA. J.L. & SOC. CHANGE 29 (2018); see also Michael Fakhri & Ntina Tzouvala, *International Law and the Right to Food: What We Can Learn from Racial Justice Movements*, EJIL:TALK! (Aug. 19, 2020), <https://www.ejiltalk.org/international-law-and-the-right-to-food-what-we-can-learn-from-racial-justice-movements> [https://perma.cc/P8MU-GJ25]; Matiangai Sirleaf, *Racing National Security: Introduction to the Just Security Symposium*, JUST SEC. (July 13, 2020), <https://www.justsecurity.org/71373/racing-national-security-introduction-to-the-just-security-symposium> [https://perma.cc/KZ9L-XHND]; Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, EJIL:TALK! (June 26, 2020), <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council> [https://perma.cc/R5KY-SJ2Q].
12. See, e.g., SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).
13. This schema is further disrupted by the normative implications of largescale widespread migration from the Global South to the Global North. See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

international law's institutional praxis as technocratic, exclusionary, and enjoying tenuous legitimacy.<sup>14</sup>

This Article proceeds in two main parts. Part I highlights how the state-centered nature of public international law impedes useful theorization of race, racism, and racialization. In particular, international law fragments race by treating it as a category to be managed at the scale of the nation state; it also flattens race by reducing it to a generic form of invidious social differentiation virtually indistinguishable from ethnicity and national origin. Theorizing from slavery is useful in addressing these two impasses because it necessarily implicates transregional scales and raises questions about distinct regimes of racialization, especially Blackness and Indigeneity. In order to open such an analysis, this Part introduces Wynter's notion of "genres of the human," which can helpfully reframe debates over universalism in international law.<sup>15</sup> The notion of genre—etymologically linked to gender—captures how a Black feminist sensibility can usefully recast questions of universalism and the human subject. Equally important to Wynter's conceptual vocabulary, however, is her method: a historical re-visioning of early Spanish colonialism in the Caribbean, thinking with the rise of what she calls a "triadic model" of society composed of settlers, natives, and slaves.<sup>16</sup> For Wynter, this colonial encounter for the first time pulled the human species into a common destiny, albeit in radically unequal and violent ways that lay at the heart of European humanism. While the ambition of Wynter's theorization is global, it is an engagement with universalism rooted in the specificity of Caribbean modernity, itself shaped by the legacies of slavery and settler colonialism in the Black Atlantic.

In order to address the two impasses of fragmenting and flattening mentioned above, the remainder of this Article draws on Wynter's thought in sketching a "triadic" analysis of international law, where regimes of racialization operate both locally and internationally. Part II revisits a dominant narrative in the history of international law, which treats the Spanish colonization of the

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14. International law in this sense only faces a more intensified version of the dilemmas facing public interest and social movement lawyering generally. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

15. See Sylvia Wynter, *On How We Mistook the Map for the Territory, and Re-Imprisoned Ourselves in Our Unbearable Wrongness of Being, of Désêtre: Black Studies Toward the Human Project*, in NOT ONLY THE MASTER'S TOOLS: AFRICAN-AMERICAN STUDIES IN THEORY AND PRACTICE 107, 116–19, 129 (Lewis R. Gordon & Jane Anna Gordon eds., 2006).

16. Sylvia Wynter, *1492: A New World View*, in RACE, DISCOURSE, AND THE ORIGINS OF THE AMERICAS 5, 9 (Vera Lawrence Hyatt & Rex Nettleford eds., 1995) ("It was on the basis of this triadic model and its dually antagonistic and interactional dynamic that the new syncretizing cultural matrix of the now-emerging world civilization of the Caribbean and the Americas was first laid down.").

Americas after 1492 as a point of origin. In contrast to the tendency to focus on the relations between colonizers and (local) colonized peoples, Wynter draws attention to the concurrent (yet very different) European expansion into sub-Saharan Africa and how debates over the mistreatment of Indigenous peoples helped set the stage for the rise of Atlantic slavery. In this analysis, enslaved Africans disrupt the framework of colonizers versus colonized and their experiences draw attention to the importance of commodification as a legal framework for racial domination. This Part also draws on Wynter's discussion of slave importation licenses—which were significant instruments of international commerce—and how they racialized Black and Indigenous peoples in distinct but conjoined ways.

The Article then concludes with reflections on the ongoing conversation between the traditions of Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) in the legal academy and the challenge of thinking about race without sequestering it within the state or subsuming it into empire.

## I. READING RACE INTO INTERNATIONAL LAW

In theory, the primary subjects of international law are nation states that are sovereign, independent, and equal; race has no part in this scheme.<sup>17</sup> Yet, global hierarchies of power are undeniably racialized in significant part. Indeed, even the term racialized captures this dynamic: It is an implicit admission that race is not the formal basis for power relations, but an insistence that beyond legal doctrine race is nonetheless important in some unspecified way.

Race exists as a doctrinal category in international law mostly as an object of regulation within states rather than a category that also inflects relations between them. Moreover, race is undertheorized as a category and often treated interchangeably with ethnicity and nationality. We can think of these problems as fragmenting race and flattening it, respectively. Even the more critical anticolonial traditions in international law that emphasize national self determination tend to treat race as a category to be abolished and overcome rather than as a source of theorization in its own right. The following Subparts detail these two major impasses in how international law treats race before introducing some aspects of Sylvia Wynter's thought as one possible means of addressing them.

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17. Even in the era of formal colonialism, race was hardly a fixed doctrinal category in international law but rather part of a cluster of shifting concepts often captioned under the broader heading of civilization. See NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (2020).

### A. Fragmenting Race

International law fragments race, reducing it to a problem of internal regulation by nation states. This narrow doctrinal notion of race obscures and legitimizes global racial hierarchy, which is mediated through bilateral relations between nominally independent nation states.

This can be most easily discerned in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Three features of ICERD are worth highlighting. First, the treaty is largely concerned with individual rights, in particular guaranteeing “equality before the law.”<sup>18</sup> This focus on discrimination between individuals, however, distracts from the need to tackle structural power differences between societies. Second, the convention expressly provides that citizenship is a generally permissible basis for discrimination, without addressing how citizenship often operates as a proxy for racial discrimination at the interstate level.<sup>19</sup> Third, ICERD generally imposes obligations on states only with regards to individuals within their “jurisdiction.”<sup>20</sup> In international human rights law, jurisdiction can be read expansively to include extraterritorial application, but even this broader interpretation primarily occurs in situations where the state’s own instruments are acting directly, such as belligerent occupation or peacekeeping operations.<sup>21</sup> Taken together, these three features of ICERD indicate that the convention envisions remedying injustices carried out by governments against individuals living under their direct control, and the overwhelming majority of situations arising under the treaty fit this model. None of this is surprising in light of ICERD’s drafting history, which shows that the impetus for the instrument reflected a lowest common denominator shared by

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18. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

19. *See id.* at art. 1(2) (“This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”).

20. *Id.* at arts. 6, 14. The obligations regarding racial segregation and apartheid, however, are explicitly territorial in nature. *See id.* at art. 3. Moreover, even attempts to read that provision expansively reinforce the tendency to shield powerful states from responsibility for actions conducted beyond their borders. The treaty body charged with elaborating on the convention, the U.N. Committee on the Elimination of Racial Discrimination (CERD), has opined that the article 3 provision on racial segregation and apartheid should also include practices “imposed by forces outside the State.” Comm. on the Elimination of Racial Discrimination, General Recommendation XIX on Article 3, U.N. Doc. A/50/18 at 150 (1995). The likely effect of such an interpretation, however, would be to saddle less powerful states with greater responsibility when they are the loci for effects arising from the decisions of more powerful states.

21. There is, of course, the separate question of complicity in human rights abuses, although even here the tendency in the literature is to look for either participation by state agents or effective territorial control. *See, e.g.,* MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 124–26, 219 (2011).



two broad agendas: concerns over antisemitism among western European states and support for anticolonial movements from newly independent states and the Soviet bloc.<sup>22</sup>

ICERD's fragmented model of race does not easily recognize harms arising from the conduct of powerful states when the primary effects of those actions are experienced by noncitizens outside their territory, and less powerful states notionally consent to these actions. These features, which substantially undermine the effectiveness of ICERD and other human rights treaties, characterize much of the racialized inequality of the international order, including relations of trade, debt, and migration. This was the precise outcome that many anticolonial thinkers feared would result from formal decolonization without a broader transformation of the world order.<sup>23</sup>

ICERD does not ignore the transnational dimensions of race entirely. Its preamble included a condemnation of colonialism, and article 15 authorized the UN Committee on the Elimination of Racial Discrimination (CERD) to consider petitions submitted by formally colonized peoples, as understood within the framework of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>24</sup> Formal decolonization, however, has largely rendered this provision irrelevant. More potentially applicable are the mechanisms under which states may refer each other to CERD for treaty violations<sup>25</sup> or resolve disputes over the interpretation and application of the convention before the International Court of Justice (ICJ).<sup>26</sup> Yet such mechanisms for interstate action have remained largely dormant, testament to the fact that much of the racialized hierarchy in the international legal order depends on the formal compliance of weaker postcolonial governments. The few cases that have emerged in recent years have only underlined this point, as intraregional geopolitics have been far more salient than questions of global racial hierarchy. Georgia and Ukraine have both sought action against Russia under ICERD before the ICJ.<sup>27</sup> Qatar has been

22. See MICHAEL BANTON, INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION 51–62 (1996).

23. See, e.g., KWAME NKRUMAH, NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM (1965); FRANTZ FANON, THE WRETCHED OF THE EARTH 97, 153–54, 174, 201 (Constance Farrington trans., First Evergreen Black Cat ed. 1968) (1963); see also GETACHEW, *supra* note 7.

24. See G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

25. See ICERD, *supra* note 18, at arts. 11–13. This is not an adjudicative mechanism, but rather a mediation framework that can culminate in CERD issuing a report with recommendations.

26. See *id.* at art. 22.

27. See Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 2011 I.C.J. 70 (Apr. 1) (dismissed on jurisdictional grounds); Application of International Convention for Suppression of Financing of Terrorism

embroiled in controversies with Saudi Arabia and the United Arab Emirates at the ICJ and CERD.<sup>28</sup> Perhaps most on point for the original purposes of the treaty has been the dispute before CERD initiated by the state of Palestine against Israel, alleging, *inter alia*, violations of the treaty's prohibition on apartheid.<sup>29</sup>

Palestine's action before CERD presents a useful opportunity to further develop the international law of apartheid, which has also been shaped by the fragmentation of race in international legal theorizing. During the extensive debates over white supremacist regimes in southern Africa, there were, broadly speaking, two conceptual framings for understanding apartheid. The first spoke of apartheid in terms of a policy of segregation, which was consistent with the individual rights model outlined above.<sup>30</sup> The second framing—and one that appeared less frequently in UN resolutions—was to speak of apartheid as a denial of the right to self determination.<sup>31</sup>

This invocation of self determination might seem strange, since independence was formally granted to South Africa in 1910 and asserted unilaterally by Rhodesia<sup>32</sup> in 1965. But antiracist movements argued that devolving power from the British crown to white settlers was better understood as a usurpation of the right to self determination from its rightful holders, the majority Black nations.<sup>33</sup> Demanding self determination was thus consistent with

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and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. 558 (Nov. 8) (deeming claims under ICERD admissible).

28. See Comm. on the Elimination of Racial Discrimination, Admissibility of the Inter-State Communication Submitted by Qatar Against the Kingdom of Saudi Arabia, U.N. Doc. CERD/C/99/6 (Aug. 30, 2019); Comm. on the Elimination of Racial Discrimination, Jurisdiction of the Inter-State Communication Submitted by Qatar Against the United Arab Emirates, U.N. Doc. CERD/C/99/3, ¶ 15 (Aug. 30, 2019); Application of International Convention on Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Provisional Measures, 2018 I.C.J. 406 (July 23).
29. See Comm. on the Elimination of Racial Discrimination, Inter-State Communication Submitted by the State of Palestine Against Israel, U.N. Doc. CERD/C/100/5, ¶ 1.2 (Dec. 12, 2019); *see also* Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, U.N. Doc. CERD/C/ISR/CO/17-19, ¶ 23 (Jan. 27, 2020) (urging Israel to respect the prohibition against apartheid throughout all the territories under its control).
30. See, e.g., G.A. Res. 1761 (XVII) (Nov. 6, 1962).
31. See, e.g., S.C. Res. 581, ¶ 7 (Feb. 13, 1986); S.C. Res. 556 (Oct. 23, 1984); S.C. Res. 417 (Oct. 31, 1977); *see also* S.C. Res. 424 (Mar. 17, 1978) (on Zimbabwe).
32. In 1964, the British-ruled protectorate of Northern Rhodesia gained independence as the Republic of Zambia. The neighboring colony of Southern Rhodesia then sought to rename itself as "Rhodesia."
33. See, e.g., African National Congress, Statement of the African Nation Congress at a 1977 Conference of the African Liberation Movement 4 (Mar. 1977), <http://disa.ukzn.ac.za/pre19770300026021000> [https://perma.cc/5SJV-J7GY] [hereinafter Lisbon Declaration] ("The linkages, in time, between the increasing juridical independence of South Africa and the consolidation of colonial domination over the black majority is neither accidental nor fortuitous.

the program of the African National Congress and other national liberation movements in southern Africa, which continued to describe apartheid as a colonial regime, frequently under the headings of “internal colonialism” or “colonialism of a special type.”<sup>34</sup> Describing apartheid as a form of colonialism also emphasized the system’s ongoing political and economic connections with centers of power in the Global North—connections that were transformed but not disrupted by formal independence. The problem with apartheid was not merely its segregationist and undemocratic aspects—the salient features highlighted by the sanitized histories of apartheid regimes that circulate widely today—but also its role in global hierarchies of race and circuits of capital.

The response of the national liberation movements came to be a consistent call for self determination for majority Black nations.<sup>35</sup> This approach embraced the nation state as a vehicle for liberation from apartheid and colonialism—a framework that did not necessarily challenge international law’s fragmentation of race into a national problem, even if its merits were indisputable. Anticolonial nationalism enabled its own state-based forms of solidarity, whose most prominent example in the international legal struggle against apartheid was the action brought by Liberia and Ethiopia against South Africa before the ICJ.<sup>36</sup> Embrace of the nation state framework also allowed the antiapartheid struggle to exploit the diplomatic rift between the imperial metropole and its wayward former settler colonies, pushing even the UK government under Margaret Thatcher to support symbolic sanctions against South Africa. This split was most dramatic in

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White supremacy . . . is the absolute negation of independence and the principle of national self-determination.”).

34. *Id.* at 2. For more on the debates over theories of “internal colonialism” versus “colonialism of a special type,” see DAVID EVERATT, *THE ORIGINS OF NON-RACIALISM: WHITE OPPOSITION TO APARTHEID IN THE 1950s* 72–97 (2009).
35. See, e.g., Lisbon Declaration, *supra* note 33, at 7 (“[N]ational self-determination, here as in all other national liberation struggles is the decisive issue . . . . Black majority rule is thus merely the form through which the oppressed, colonised peoples of South Africa will achieve the content of their struggle for national self-determination.”).
36. Ethiopia and Liberia in 1960 instituted proceedings in the International Court of Justice (ICJ) against South Africa to challenge its rule over South West Africa (now Namibia) and its racist practices there. The case was dismissed on standing grounds in 1966 but helped set the stage for the ICJ’s 1971 advisory opinion declaring South African rule illegal. See *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. 6 (July 18); *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21). For concerns over self-determination in the ICJ’s 1966 deliberations, see Victor Kattan, “*There Was an Elephant in the Court Room*: Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the South West Africa Cases (1960–1966) After Half a Century,” 31 *LEIDEN J. INT’L L.* 147 (2018). On the applicants’ analysis of racial capitalism in the litigation, see TZOUVALA, *supra* note 17, at 149–54.

the case of Rhodesia, whose 1965 Unilateral Declaration of Independence from Britain led to a state of nonrecognition in international law until the victory of anticolonial forces in 1979.<sup>37</sup> That victory, paradoxically, led to a temporary return to British rule pending full independence as the Republic of Zimbabwe.<sup>38</sup> Race was once again reduced to a problem for national regimes.

The rich and complex relationship between national self determination and racial regimes of colonial rule that characterized the antiapartheid struggle also marks what is arguably its most visible legacy in international law, namely the crime of apartheid. In 1973, the UN General Assembly adopted a convention defining apartheid as a crime under international law.<sup>39</sup> The convention proscribed various acts undertaken “for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”<sup>40</sup> Despite being an international criminal law document defining forms of responsibility for “organizations, institutions and individuals,” the convention presupposed and reinforced a broader anticolonial legal architecture.<sup>41</sup> Its preamble invoked the landmark 1960 General Assembly resolution on the need to end colonialism,<sup>42</sup> and the convention also forged connections between the UN’s human rights and decolonization functions.<sup>43</sup>

37. See VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 181–361 (1990).

38. See *Report of the Southern Rhodesia Constitutional Conference Held at Lancaster House, London September–December 1979*, annex D, ¶2 (Dec. 21, 1979), [https://sas-space.sas.ac.uk/5847/5/1979\\_Lancaster\\_House\\_Agreement.pdf](https://sas-space.sas.ac.uk/5847/5/1979_Lancaster_House_Agreement.pdf) [<https://perma.cc/DJ3C-P2WS>] (“Rhodesia continues to be part of Her Majesty’s dominions. . . . It is for the British Parliament to grant legal independence to Rhodesia.”); see also LUISE WHITE, UNPOPULAR SOVEREIGNTY: RHODESIAN INDEPENDENCE AND AFRICAN DECOLONIZATION 265–67 (2015).

39. See International Convention on the Suppression and Punishment of the Crime of Apartheid arts. I–II, Nov. 30, 1973, 1015 U.N.T.S. 243. Shortly thereafter, apartheid was also defined as a crime under international humanitarian law. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 85(4)(c), June 8, 1977, 1125 U.N.T.S. 3.

40. International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 39, at art. II.

41. *Id.* at art. I(2).

42. *Id.* at pmbl. (“Considering the Declaration on the Granting of Independence to Colonial Countries and Peoples, in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith. . . .”).

43. See *id.* at art. X(1)(c) (empowering the Commission on Human Rights to request information from U.N. organs on measures taken by colonial authorities regarding alleged perpetrators of the crime of apartheid).

The mainstreaming of apartheid as a crime under international law came decades later, when it was incorporated under the broader heading of crimes against humanity in the Rome Statute of the International Criminal Court (ICC).<sup>44</sup> But the international criminal law route has so far yielded little elaboration; no one has ever been prosecuted for the crime of apartheid under international law, and the ICC's formulation largely reduces it to a derivative offense of other crimes against humanity.<sup>45</sup> In light of the fragmenting of race into a nation state problem described above, this marginalization of the crime of apartheid is unsurprising. Indeed, it is no small irony that the symbolic victory of enshrining the crime of apartheid into international law took place through a court that has itself been widely criticized for upholding global hierarchies of race in its near exclusive focus on the African continent.<sup>46</sup>

## B. Flattening Race

Contemporary public international law also flattens race into a generic form of invidious social differentiation. There are many international legal instruments that forbid discrimination on racial grounds.<sup>47</sup> Such prohibitions, however, are nearly always enumerated alongside other proscribed bases of discrimination, such as color, sex, language, or other statuses. The ubiquity with which racial

44. See Rome Statute of the International Criminal Court art. 7(2)(h), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

45. The Rome Statute defines apartheid as “inhumane acts of a character similar to [other crimes against humanity], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. . . .” *Id.* It is unclear if a freestanding conviction for the crime of apartheid separate from other crimes against humanity is even possible. As Vasuki Nesiah argues, the category of crimes against humanity “renders the victim abstract, deracialized, universal—today we might say it is a category that stands for the rallying cry that ‘All Lives Matter.’” Nesiah, *supra* note 3, at 170.

46. See, e.g., Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SEC. (July 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality> [https://perma.cc/29Y2-F6JK] (“Even as the ICC focuses exclusively on cases presumed to rescue and protect Black and Brown bodies, its very foundation—shaped by white supremacy—renders the current work of international criminal law difficult to reconcile with the contemporary global call to center Black lives and experiences and eradicate ongoing structural inequality.”).

47. See, e.g., Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights arts. 2, 4, 24, 26, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 2, 16 (Dec. 10, 1948).

discrimination is proscribed is only matched by the silence around defining or theorizing race as such.

This dynamic is hiding in plain sight in the very name of the legal instrument most obviously dedicated to race, ICERD. ICERD does not purport to define race, nor has the jurisprudence arising under it attempted to do so. Rather, the key concept is racial discrimination, a term of art defined as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>48</sup>

Put another way, racial discrimination is defined as discrimination based on race, as well as on other descent-based categories such as national or ethnic origin. Further, CERD—the treaty body charged with interpreting and elaborating on the convention—has tended toward including a wide variety of subjugated groups without necessarily specifying which of the five enumerated criteria are the bases of the discrimination at work.<sup>49</sup> This tendency toward expansiveness is undoubtedly motivated by progressive impulses to maximize ICERD’s protective reach. At the same time, it is worth noting that the racial discrimination concept has done little to advance the legal theorization of race or racism.<sup>50</sup> Indeed, mentions of race in post-World War II international law have mostly been treated as something of an embarrassment, as jurists faced with parsing the term have been leery of reinforcing discredited notions of race science.<sup>51</sup>

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48. ICERD, *supra* note 18, at art. 1(1).

49. See, e.g., Comm. on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination Against Non Citizens, (Oct. 1, 2002); Comm. on the Elimination of Racial Discrimination on Its Sixty-First Session, General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), U.N. Doc. A/57/18 (Nov. 1, 2002) (on the criterion of descent-based discrimination); Comm. on the Elimination of Racial Discrimination on Its Fifty-Seventh Session, General Recommendation XXVII on Discrimination Against Roma, U.N. Doc. A/55/18, annex V (Aug. 16, 2000); Comm. on the Elimination of Racial Discrimination on Its Fifty-First Session, General Recommendation XXIII: Indigenous Peoples, U.N. Doc. A/52/18, annex V (Aug. 18, 1997); see also David Keane & Annapurna Waughray, *Introduction*, in FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 8–9, (David Keane & Annapurna Waughray eds., 2017).

50. See Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 21 (2019) (“The treaty’s vague language does not define race. . . . [T]he violation prohibited by international law is linked to discrimination on the basis of race without clarity about what that means.”).

51. See, e.g., WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 139–43 (2nd ed. 2009); BANTON, *supra* note 22, at 76–82.

The flattening of race is also evident in international criminal law. The crime of genocide, for instance, covers “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>52</sup> The crime against humanity of persecution refers to acts “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law.”<sup>53</sup> The jurisprudence on these crimes has struggled with theorizing the separate identity categories named therein, especially on the question of whether to use objective definitions or to rely on the subjective perceptions of perpetrators or victims, or some combination thereof.<sup>54</sup>

This focus on whether certain kinds of identity-oriented conduct could be classified as genocide or persecution has overshadowed questions related to theorizing which type of identity is at stake and the distinctions between them. The parsing of identity categories at issue in a particular case has often been treated cursorily at best. The International Criminal Tribunal for Rwanda has on occasion referred to the Tutsi as either a race or an ethnicity but has since settled on the latter designation as a matter of judicially recognized common knowledge.<sup>55</sup> The International Criminal Tribunal for ex-Yugoslavia also recognized Bosnian Muslims as a national group when convicting perpetrators for the crime of genocide.<sup>56</sup> The International Military Tribunal at Nuremberg—created before the codification of the crime of genocide—found that the Nazi persecution of Jews was committed on racial grounds.<sup>57</sup> Missing from this jurisprudence has been any

52. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; *see also* Rome Statute, *supra* note 44, at art. 6; S.C. Res. 955, Statute of the International Criminal Tribunal for Rwanda, annex at art. 2(2) (Nov. 8, 1994) [hereinafter ICTR Statute]; U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, annex at art. 4(2), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

53. Rome Statute, *supra* note 44, at art. 7(1)(h); *see also* ICTR Statute, *supra* note 52, at art. 3(h); ICTY Statute, *supra* note 52, at art. 5(h); International Military Tribunal for the Far East Charter art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280.

54. *See* CAROLA LINGAAS, *THE CONCEPT OF RACE IN INTERNATIONAL CRIMINAL LAW* 103–17, 202–11 (2020).

55. *See id.* at 95–96 (discussing International Criminal Tribunal for Rwanda (ICTR) jurisprudence).

56. *See generally* Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Chamber Judgment, ¶¶ 559–60 (Int’l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001).

57. *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 248 (quoting the National Socialist party program: “Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently, no Jew can be a member of the race.”).

extended consideration of why any of these groups were classified as a race rather than as nationality or ethnicity, or vice versa. This silence is understandable. In addition to the liberal discomfort with race mentioned above, there is no obvious reason why genocide or persecution for reasons of race should differ from that related to ethnicity or any other basis in terms of proving culpability or the gravity of offenses.

That being said, the flattening of race into one element of a generic list of suspect categories of oppression in this way nevertheless raises significant concerns. From an interpretive standpoint, as Carola Lingaas mentions, the lack of a specific conceptualization of the enumerated categories of race, ethnicity, or nationality contradicts the principle of effectiveness, whereby each term should carry a distinct meaning.<sup>58</sup> This is especially important in the context of criminal law, where vagueness in defining protected groups can allow an expansive interpretation of crimes that raises procedural fairness concerns.<sup>59</sup> This problem, however, should not be understood merely in terms of the lack of a statutory definition for race—as many scholars have recognized, attempts to promulgate such a fixed meaning are likely to raise significant problems of their own.<sup>60</sup> Rather, the flattening of race into other forms of difference performs an important yet often unrecognized function: It obscures the particularly transregional, if not global, scale of processes of racialization and their importance in colonial contexts.

It is undeniable that uses of the term race have varied widely across historical contexts and have often been treated synonymously with labels such as ethnicity or nation. But there is one specific and important use of the term that merits attention here: as a major categorization of the human species, one that operates at a scale necessarily exceeding the boundaries and jurisdictions of nation states. Such processes of racialization tend to involve a geographical decontextualization that interrupts sovereignty claims and exceeds national categories. By bringing together large populations from radically far-flung geographies, thereby creating forced intimacies between continents,<sup>61</sup> settler regimes in particular illustrate and

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58. See LINGAAS, *supra* note 54, at 72, 101–03.

59. See *id.* at 103.

60. Deliberations over ICERD's definitions of racial discrimination were influenced by the contentious attempts to define race sponsored by the U.N. Economic, Scientific, and Cultural Organization (UNESCO) in the 1950s and 1960s, which ranged from statements that race is essentially a social construct to biocentric approaches that emphasized genetic variation. See PATRICK THORNBERRY, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* 22–24 (2016).

61. This formulation is indebted to LISA LOWE, *THE INTIMACIES OF FOUR CONTINENTS* 20–21 (2015) (“[T]he intimacies of four continents becomes a way to discuss the coeval global processes of settler colonialism, slavery, and imported colonial labor, as the conditions for



depend upon racialization. This is most striking when considering the Atlantic slave trade, which uprooted individuals of vastly different political communities and transformed them into “Blacks,” or when native peoples are dispossessed of their lands and rendered as mere “Indians.” Whiteness as a global regime of racialization also necessarily exceeds national sovereignty: Western states may be nationalist vis-à-vis each other while nonetheless acting through the logic of race against nonwhite peoples.<sup>62</sup> Racialization has provided one means for nation states to coordinate their actions or develop a sense of common interest, but even the most avowedly racial states cannot make credible claims to representing a racial category on a global basis.<sup>63</sup>

Regimes of racialization have thus been fundamental to the formation of many nation states and have inflected relations between states at the international level. In contrast, categories such as nationality and ethnicity operate at a different scale, deployed in ways that imply a stronger relationship with existing or aspirational nation states. The flattening of race in international law thus dovetails with its fragmentation—both processes reduce race to an object of domestic national regulation in ways that leave international law poorly equipped to deal with the global dimensions of race.

### C. Inscripting Race?

International law’s fragmented and flattened conception of race stems in part from a disproportionate and Eurocentric focus on the Holocaust as the paradigmatic mass atrocity.<sup>64</sup> A more capacious theorization of race and

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British and American national formations of liberty, liberal personhood, society, and government. . .”).

62. For more on this tension, see DUNCAN BELL, *DREAMWORLDS OF RACE: EMPIRE AND THE UTOPIAN DESTINY OF ANGLO-AMERICA* (2020); MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* (2008).

63. The exception that proves the rule here is Zionism, which routinely makes claims on behalf of all Jews worldwide and employs a settlement and immigration policy that explicitly racializes Jews through the Law of Return. At the same time, Zionism asserts itself as a Jewish nationalist movement, while its system of religious law courts treats Jews as a confessional category. The relatively small number and high rate of geographical dispersion of Jews worldwide contributes to the ambiguity as to when they should be thought of as a nation, race, or religious community. See, e.g., Hassan Jabareen, *How the Law of Return Creates One Legal Order in Palestine*, 21 *THEORETICAL INQUIRIES* L. 459 (2020); Roselle Tekiner, *Race and the Issue of National Identity in Israel*, 23 *INT’L J. MIDDLE E. STUD.* 39 (1991); W.T. Mallison, Jr., *The Zionist-Israel Juridical Claims to Constitute “the Jewish People” Nationality Entity and to Confer Membership in It: Appraisal in Public International Law*, 32 *GEO. WASH. L. REV.* 983 (1964).

64. See generally A. DIRK MOSES, *THE PROBLEMS OF GENOCIDE: PERMANENT SECURITY AND THE LANGUAGE OF TRANSGRESSION* (2021); Donald Bloxham & A. Dirk Moses, *Editors’*

international law would benefit from keeping a different historical backdrop in mind, such as the Atlantic slave trade. One possible model for such theorization can be found in the writings of the Jamaican novelist and theorist, Sylvia Wynter. A major figure in Black feminist theory, Wynter's work has had a far-reaching influence on numerous fields.<sup>65</sup> In this Article, I argue that her work also presents a useful site of theoretical reflection about law, and I hope this discussion encourages others legal scholars to engage with her work.<sup>66</sup>

Wynter's life story is also relevant for situating this intervention. Wynter was born in Cuba to Jamaican parents who returned home when she was still a young child. This background influenced her decision to study Spanish literature in the UK, where she joined a Caribbean dance troupe that toured Europe. Wynter later achieved acclaim with her 1962 novel *The Hills of Hebron*. A brief and disillusioning stint working with anticolonial nationalists in British Guyana, coupled with her experience with racial politics in the United States after her

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*Introduction: Changing Themes in the Study of Genocide*, in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 1, 2–5 (Donald Bloxham & A. Dirk Moses eds., 2010); see also HASLAM, *supra* note 3, at 7–10 (challenging the centrality of the Nuremberg and Tokyo tribunals in the history of international criminal law); Souheir Edelbi, *Making Race Speakable in International Criminal Law: Review of Lingaas' The Concept of Race in International Criminal Law*, THIRD WORLD APPROACHES TO INT'L L. REV. ONLINE (Apr. 14, 2020), <https://twailr.com/making-race-speakable-in-international-criminal-law-review-of-lingaas-the-concept-of-race-in-international-criminal-law-%E2%80%A8> [<https://perma.cc/2VWU-BEAR>] (“[T]here is a need to question and subvert the Eurocentric positioning of international criminal law discourse, particularly as it fails to engage with atrocities committed in the context of colonialism including the genocide of the Herero and Nama in southern Africa that preceded the Holocaust as well as genocide committed against Indigenous people.”). For more on Eurocentric notions of racism in widely cited social theory, see ALEXANDER G. WEHELIYE, HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN 53–65 (2014).

65. For some of the more influential texts that have taken up Wynter's thought, see, for example, KATHRYN YUSOFF, *A BILLION BLACK ANTHROPOCENES OR NONE* (2018); WEHELIYE, *supra* note 64; KATHERINE MCKITTRICK, *DEMONIC GROUNDS: BLACK WOMEN AND THE CARTOGRAPHIES OF STRUGGLE* 121–41 (2006); PAGET HENRY, *CALIBAN'S REASON: INTRODUCING AFRO-CARIBBEAN PHILOSOPHY* 117–43 (2000). For a helpful collection of essays about Wynter that include extensive dialogues with her, see SYLVIA WYNTER: ON BEING HUMAN AS PRAXIS (Katherine McKittrick ed., 2015); AFTER MAN, TOWARDS THE HUMAN: CRITICAL ESSAYS ON SYLVIA WYNTER (Anthony Bogues ed., 2005). A collection of essays in the journal *Small Axe* also helpfully reconstructs the trajectory of Wynter's thought in dialogue with her 935-page unpublished manuscript. See generally Aaron Kamugisha, guest editor, *Sylvia Wynter's "Black Metamorphosis": A Discussion*, SMALL AXE: CARIBBEAN J. CRITICISM, March 2016, at 38–145; see also *Special Edition: Sylvia Wynter, A Transculturalist Rethinking Modernity*, J. W. INDIAN LITERATURE Nov. 2001 at 1, 1–171.

66. In her youth, Wynter considered studying law, but various mentors told her that it would be intellectually stultifying, advice for which she would be “very, very grateful” later in her life. David Scott, *The Re-Enchantment of Humanism: An Interview with Sylvia Wynter*, SMALL AXE: CARIBBEAN J. CRITICISM, Sept. 2000, at 119, 128.

relocation there in the 1970s, led Wynter to reconsider her intellectual and political origins in Caribbean Marxism to more explicitly address questions of race and gender.<sup>67</sup> Wynter's competencies and experiences—thinking across Blackness and Indigeneity in both Anglophone and Hispanic imperial contexts—make her a particularly helpful interlocutor for those working in the TWAIL and CRT traditions.

Over the course of several decades, Wynter has developed a theoretical vocabulary for reconsidering questions of the human subject that bear directly on international law's longstanding preoccupation with questions of universalism. Critical interventions regarding international law—to say nothing of law more generally—have long been characterized by a dialectic of “reform and resistance.”<sup>68</sup> On the one hand, there is the impulse to unmask law's universalist claims as a façade for white supremacy, empire, capitalism, patriarchy, or other structures of domination. On the other hand, the total rejection of all universalist claims seems politically regressive and raises serious questions of conceptual coherence, thus encouraging advocacy for a more inclusive and just form of universalism. The TWAIL tradition in particular has excelled at undermining international law's claims to universality as concealing or justifying all manner of abuses, including colonialism, while also effectively invoking non-Western legal traditions as alternative sources of inspiration for thought or action.<sup>69</sup>

Wynter's thought is useful for revisiting this dynamic. She distinguishes the human species from what she calls “Man,” a category that purports to represent the human species but is modeled on white, male, bourgeois, cisheterosexual modernity and thereby produces figures of excluded others. In the early centuries of European colonization, this process of othering was accomplished primarily in terms of religious categories, such as idolaters or pagans; later on, it occurred in the

67. See Derrick White, *Black Metamorphosis: A Prelude to Sylvia Wynter's Theory of the Human*, 16 CLR JAMES J. 127 (2010). For more on Wynter's critiques of Marxism, see, for example, Sylvia Wynter & Katherine McKittrick, *Unparalleled Catastrophe for Our Species? Or, to Give Humanness a Different Future: Conversations*, in SYLVIA WYNTER: ON BEING HUMAN AS PRAXIS 38–41 (Katherine McKittrick ed., 2015); Sylvia Wynter, *Beyond the Categories of the Master Conception: The Counterdoctrine of the Jamesian Poiesis*, in C.L.R. JAMES'S CARIBBEAN 63, 63–67 (Paget Henry & Paul Buhle eds., 1992) [hereinafter Wynter, *Beyond the Categories*].

68. Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 TRADE, L. & DEV. 103, 103 (2011); see also DARRYL LI, *THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY* 15–16 (2020).

69. See, e.g., Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 37 (2000) (“While it is certainly true that a certain degree of universality is inevitable, and even desirable, TWAIL [Third World Approaches to International Law] frowns on attempts to confer universality on norms and practices that are European in origin, thought, and experience.”).

more biological register of race science.<sup>70</sup> Given its universalist aspirations but largely Western provenance, international law has long served as a key site for the articulation of the category of Man. In this respect, ICERD is no exception: It reproduces a notion of Man as a bearer of rights vis-à-vis the nation state in its emphasis on nondiscrimination<sup>71</sup> and recapitulates a biocentric notion of the human species as divided into “racial groups,”<sup>72</sup> even if insisting that such groups should not be targeted for adverse treatment.

For Wynter, however, Man is merely one variant of what she calls “genres of the human,”<sup>73</sup> ways of being that emerge in different material contexts with their own respective knowledge and value systems. The etymological link between *genre* and *gender* is key, as gender provides an example of how biological differences can be inscribed with social meaning.<sup>74</sup> Both gender and race are forms of differentiation produced by genre.<sup>75</sup> In other words, if critiques of international law’s universalism may ultimately demand inclusion or consideration of categories such as race and gender, then Wynter’s discussion of genre is a call to rethink the human altogether. Treating Man as one genre of the human among others serves to relativize dominant forms of universalism as historically contingent and to highlight the forms of exclusion and subjugation they produce. At the same time, Wynter also refers to other ways of life encountered by colonialism as genres of the human, in refusal of the particularizing or ghettoizing label of “cultures.”<sup>76</sup> Wynter’s goal is not to reject all forms of universalism but rather to “relativize Man” in favor of a radically utopian “emergent Human Project.”<sup>77</sup>

Wynter’s thought shows us how relativizing the universalism of international law can be a useful step toward rethinking its historical vistas and its

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70. Wynter distinguishes between what she calls Man 1 (a partially secularized political subject in the post-Renaissance encounter with the New World) and Man 2 (a post-Enlightenment subject that understands humanity primarily in biocentric terms, giving rise to modern notions of economism). See Wynter, *supra* note 15, at 123–25; Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: NEW CENTENNIAL REV. 257, 263–67 (2003).

71. See, e.g., ICERD, *supra* note 18, at art. 5.

72. *Id.* at arts. 1(4), 2(2).

73. Wynter, *supra* note 15, at 117, 129.

74. See *id.* at 117.

75. Wynter “insist[s] that ‘race’ is really a code-word for ‘genre.’ Our issue is not the issue of ‘race.’ Our issue is the issue of the genre of ‘Man.’” Thomas, *supra* note 1, at 20.

76. Wynter, *supra* note 15, at 129.

77. *Id.* at 161, 163. For Wynter, this process continues not only aspects of the Enlightenment tradition, but also the legacy of 1960s racial justice movements, which “were all, fundamentally, struggles against their respective subjects’ discursively and institutionally classified Human Other status.” *Id.* at 160.

conceptual blind spots—or, to echo her formulation, to treat international law as one genre of universalism among others. In an essay on debates over female genital cutting in Africa—perhaps the most iconic flashpoint for debates over universalism versus relativism in human rights—Wynter refers to circumcision as an elementary example of “inscribing practices,” whereby physiological differences (in this case, between sexes) can be used as anchors for encoding forms of social distinction (including and especially race).<sup>78</sup> For Wynter, genital cutting is neither to be defended in the name of culture nor condemned as a deviation from the universal: Rather, it is a clue to how all genres of the human must encode difference, from particular African societies to universal human rights and feminist projects.<sup>79</sup> Following Wynter, we can think of international law as another inscribing practice, an instrument for instituting subjects as particular kinds of humans—including in regimes of racialization.

We can illuminate such processes—and, in the meantime, develop conceptual responses to the impasses of racial fragmentation and flattening described above—by turning to Wynter’s method, and specifically to her essays, which engage in a historical re-visioning of the colonization of the Americas. In the early 1980s, Wynter participated in research sponsored by the Jamaican government in preparation for the 500-year commemoration of Columbus’s first voyage to the Americas. She conducted archival research in Seville and spent a sabbatical year in Jamaica reconstructing the century and a half of Spanish rule on the island prior to British colonialism.<sup>80</sup> This work produced a series of insights that would infuse her writings on categories of the human for the next several decades. For the purposes of this Article, however, Wynter’s reinterpretation of the events of 1492 is especially pertinent for theorizing race and international law, which has also used this date to ground much of its historiography and theorizing.

## II. SLAVERY AND INTERNATIONAL LAW: A NEW WORLD VIEW

In many mythologies<sup>81</sup> of international law that touch on themes of empire and race, 1492 is a pivotal moment representing an encounter between the West

78. See Sylvia Wynter, “Genital Mutilation” or “Symbolic Birth?” *Female Circumcision, Lost Origins, and the Aculturalism of Feminist/Western Thought*, 47 CASE W. RES. L. REV. 501, 516, 521 (1997).

79. Wynter refers to circumcision, or “writing on the flesh” as “the first origins of the techniques of humanization.” Thomas, *supra* note 1, at 27.

80. See Scott, *supra* note 66, at 190–92 (Wynter describing the background of the project).

81. Here I refer to “mythologies” as useful narratives that structure categories and assumptions of legal scholarship. There are, to be sure, ample works of historical scholarship, including by legal academics, that challenge or otherwise do not conform to the narrative outlined here.

and the rest. This mythology works backward from the past two decades of Euro-American global hegemony to reconstruct how other polities were subjected to various forms of exclusion or marginalization in international law. In this narrative, the Spanish colonization of the Americas inaugurated a series of debates as to the legal status of Indigenous peoples that last in one form or another to the present day. This mythology, however, is invested in a telos of national sovereignty that marginalizes slavery, thereby impairing the theorization of race and its relationship with international law.

This mythology appeals to and appears in the work of two influential scholars with radically opposed commitments: Carl Schmitt's *The Nomos of the Earth* is a lamentation for the breakdown of the Eurocentric international order by a Nazi jurist, while Antony Anghie's *Imperialism, Sovereignty and the Making of International Law* is a powerful Third Worldist critique of the colonialist nature of international law. Despite their many differences, these two works share crucial aspects of the 1492 mythology. They both note the 1493 edict by Pope Alexander VI, which deeded nearly all of the newly discovered western hemisphere to the Crown of Castile, as well as the 1494 Treaty of Tordesillas, which accorded lands to the west of a new demarcation line to the Spanish and those to the east to the Portuguese, treaties which inaugurated a proud Western tradition of giving away other people's land.<sup>82</sup> Both works locate Francisco Vitoria's sixteenth-century justifications for Spanish colonization in the Americas as an origin point for modern international law.<sup>83</sup> And both proceed to narrate—albeit in very different ways—an account of how non-Western societies were excluded from full participation in international law, in which they were subject to various forms of conquest and subjugation and unable to participate as equal belligerents in war.<sup>84</sup>

These works, and the others that adopted similar 1492 narratives, have been incredibly generative for critiquing how international law continues to perpetuate inequality and subjugation worldwide. At the same time, however, this fundamentally dyadic structure—the West versus the rest, the colonizer versus the colonized, sovereigns versus non-sovereigns—sets the stage for the forms of racial fragmentation and flattening sketched above. This narrative subsumes race into

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82. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 17 (2004); CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 88–89 (G.L. Ulmen trans., 2003) (1950).

83. See ANGHIE, *supra* note 82, at 13–31; SCHMITT, *supra* note 82, at 101–25.

84. Schmitt is primarily focused on the development of an intra-European legal order based on equality of states, whereby the exclusion of non-Europeans is more or less taken for granted. See SCHMITT, *supra* note 82, at 42, 131–38, 209. Anghie, in contrast, carefully reconstructs various legal doctrines and categories of exclusion and subjugation that now tend to be collectively labeled as “colonialism.” See ANGHIE, *supra* note 82, at 32–87.

empire: Colonized societies are the sites of racial exclusion that will give rise to today's postcolonial nation states. Regimes of racialization that cut across these categories do not fit into this story. What is particularly striking is the near-total absence of the Atlantic slave trade in this narrative; indeed, the African continent only enters the discussion in a significant manner with the 1885 Congress of Berlin.<sup>85</sup> Emerging out of histories of abolition, Haiti and Liberia are exceptions that prove the rule: They are among the few recognized states in the nineteenth century that are not white-ruled, yet are largely ignored for not readily fitting into the narrative of colonialism as mere denial of national sovereignty. Even the Indigenous peoples of the Americas, who play a prominent role as international law's constitutive other in the discussion of Vitoria mentioned above, are largely left aside and treated as functionally extinct after the initial moment of conquest.<sup>86</sup>

In contrast to the conventional narrative, Wynter's writing takes the triadic nature of the societies created by the colonization of the Americas—settlers, slaves, natives—as a starting point. This presents two important clues for crafting a different mythos for international law, one that can make space for race and empire as distinct yet overlapping categories. First, in an essay entitled *1492: A New World View*, Wynter integrates Africa squarely into the narrative of the conquests of the Americas.<sup>87</sup> “The basis of this triadic model,” Wynter reminds us, “was itself established some half a century *before* the voyage of 1492.”<sup>88</sup> Portuguese expeditions around Cape Bojador on the west African coast in the mid fifteenth century were the first achievements to puncture the older cartographies that confined the habitable parts of the planet primarily to Eurasia and north Africa.<sup>89</sup> As Tiffany Lethabo King notes, “[b]y starting on the shores of what is today's Senegal and extending the inaugural moments of conquest back half a century to 1441, Wynter . . . push[es] back the curtains and position[s] Blackness, which was previously positioned just offstage, directly under the spotlight of the epic drama of conquest.”<sup>90</sup>

Second, in a two part essay on the colonist and Dominican friar Bartolomé de las Casas (1484–1566), wellknown for his ardent critiques of Spanish oppression of native peoples, Wynter points out that his efforts helped lead to the very first

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85. See ANGHIE, *supra* note 82, at 90–92; SCHMITT, *supra* note 82, at 214–26.

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

87. Wynter, *supra* note 16.

88. *Id.* at 9.

89. Schmitt notes these voyages in a footnote to the 1493 papal edict only to dismiss their lack of a “global” character. See SCHMITT, *supra* note 82, at 89 n.3.

90. TIFFANY LETHABO KING, *THE BLACK SHOALS: OFFSHORE FORMATIONS OF BLACK AND NATIVE STUDIES* 18 (2019).

license for the importation of enslaved Africans into the western hemisphere.<sup>91</sup> This license “was to be the charter, at one and the same time, of the transatlantic slave trade, and, at a terrible human cost, of the African presence as a constitutive unit of the post-Columbian civilization of the Caribbean and the Americas.”<sup>92</sup> This substitution is largely ignored in the mythology of international law, which has tended to canonize Las Casas as an early champion of human rights and even of anticolonialism.<sup>93</sup>

By bringing Africa and the Atlantic slave trade into the analysis, we can appreciate anew key elements of the mythology mentioned above. The attempts to demarcate territories to the west of Europe between Spain and Portugal did not just divide up what is now Latin America; they also solidified Portuguese territorial claims on the western coast of Africa and kept Spain out of that continent. This set the terms for the slave trade that would unfold over subsequent decades: Portuguese merchants tapped into, expanded, and invigorated existing markets of enslaved persons, sending many of them to the Spanish colonies. Yet because neither Spain nor Portugal formally held territory in the African interior, the destructive and world-changing effects of the slave trade there largely fall out of the dominant international law narrative, making it possible to act as if most of sub-Saharan Africa was untouched by colonialism until the late nineteenth century.

In the following Subparts, this Article draws on and engages with Wynter’s work to craft a different mythology of international law with the Atlantic slave trade at its center in order to address the fragmenting and flattening of race in international legal doctrine, as described above. It seeks to complement Wynter’s theorization of genre with an attention to legal form as it appears in her work.<sup>94</sup>

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91. It is worth noting that small numbers of enslaved Africans also accompanied the conquistadors. See Andrea Weindl, *The Asiento de Negros and International Law*, 10 J. HIST. INT’L L. 229, 231 n.8 (2008). Under discussion here are the first licenses for the importation of enslaved persons specifically to work in the Americas.
  92. Sylvia Wynter, *New Seville and the Conversion Experience of Bartolomé de Las Casas: Part One*, JAM. J., May 1984, at 25, 25.
  93. See, e.g., José-Manuel Barreto, *Imperialism and Decolonization as Scenarios of Human Rights History*, in HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 140, 151–55, 168 (José-Manuel Barreto ed., 2013).
  94. In the spirit of Evgeny Pashukanis’s Marxist theorization of law, the analysis treats legal form as an instrument for mediating exchange under specific relations of production. See EVGENY B. PASHUKANIS, *THE GENERAL THEORY OF LAW AND MARXISM* (Barbara Einhorn trans., Transaction Publishers 2d ed. 2003) (1924). For a helpful engagement with Pashukanis’s work in theorizing the relationship between race, law, and empire that also cites Wynter’s essay on Las Casas, see Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 LONDON REV. INT’L L. 81, 113–14 (2016). The reading proposed here presumes the validity of Knox’s claim about the compatibility of TWAIL and Marxist perspectives and instead attempts



First, by serving to both connect yet keep separate distinct legal regimes and markets, the slave trade provides methods for theorizing legal connections across disparate geographies in ways that are occluded by the fragmentation of race in contemporary international law. Second, the legal form of the slave importation license also provides clues for treating regimes of racialization as distinct, conjoined, and connected to concerns of political economy—all important dynamics lost in international law’s flattening of race.

### A. From Captivity to Commodity

Against the fragmentation of race in contemporary international law, theorizing from the Atlantic slave trade requires thinking about race as a transregional phenomenon connecting diverse jurisdictions. This spatial movement also maps onto a deeper transformation in the legal institution of slavery from a nonracial category based primarily in captivity to the racialized form of commodification that characterized chattel slavery across the Atlantic. As Walter Rodney put it in his classic, *How Europe Underdeveloped Africa*, “Strictly speaking, the African only became a slave when he reached a society where he worked as a slave. Before that, he was first a free man and then a captive.”<sup>95</sup> Here, I would like to springboard from Wynter’s preoccupation with conversion as a religious metaphor to also think about convertibility as a legally structured foundation for commercial activity.

Wynter notes that Las Casas made several proposals between 1516 and 1518 to abolish the *encomienda* system while seeking to ensure that the labor demands of Spanish colonialism were nevertheless met. Such alternative labor sources included enslaved persons, both Black and white, brought from Castile as well as from Africa. Most of these suggestions were not taken up, except the one pertaining to the importation of Black Africans for sugar production.<sup>96</sup> Wynter makes clear that Las Casas’s proposals were not based in any racial animus but rather on using people “who [could] be categorized as ‘justly enslaved’ within the system of classification legitimated by Catholic Christian doctrine.”<sup>97</sup> In Las Casas’s context, slavery was “creedally rather than racially defined.”<sup>98</sup> Indeed, throughout medieval and early modern Europe, slavery was primarily understood

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to think through the diversity of forms of racialization, each with a distinctive relation to law and political economy.

95. RODNEY, *supra* note 2, at 95.

96. See Sylvia Wynter, *New Seville and the Conversion Experience of Bartolomé de Las Casas: Part Two*, JAM. J., Aug.–Oct. 1984, at 46, 47–49.

97. *Id.* at 47.

98. *Id.*

as an extension of captivity resulting from war or raiding.<sup>99</sup> Church doctrine as described by Wynter was grounded in Roman law notions of slavery as essentially the victor exchanging the right under natural law to execute vanquished foes in favor of keeping them in bondage. The Mediterranean region in particular was bound together by complex ties of captivity and ransom running in both directions across the faith divide.<sup>100</sup> Slavery was a contingency (and often a temporary one that could be ended through ransom), and it affected Christians and Muslims alike of many different skin tones. Las Casas's recommendation for the use of enslaved Africans was based on the assumption that they had been "justly captured in war."<sup>101</sup> By 1546, however, the rise of the sugar economy based in racialized slavery brought Las Casas to the conclusion that such an assumption was no longer tenable, and he therefore repudiated his earlier position.<sup>102</sup>

For Wynter, Las Casas's evolving positions on the enslavement of Natives and then Africans were "conversion experiences" in a religious sense.<sup>103</sup> They were both moments where he came to oppose actions whose morality was self-evident to many of his peers, thanks to his unusual ability to recognize the validity of other genres of the human. Yet by framing his opposition to slavery narrowly in relation to certain groups rather than to slavery in itself, Las Casas remained nevertheless trapped in his particular worldview. In other words, conversion was transformative but did not portend a total rupture with all that came before. In this light, Wynter's essay also raises the question of conversion in a different sense: between two different regimes of slavery, from (nonracial) captivity to (racialized) commodity.

Taking seriously the origins of slavery in a legal regime of captivity places the history of international law, and specifically the laws of war, at the center of the analysis. Traces of this history remain an operative part of contemporary international humanitarian law, which permits states to conscript the labor of prisoners of war as well as civilians under belligerent occupation.<sup>104</sup> The everyday

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99. See *id.* at 47, 52.

100. The literature on this era is extensive. See, e.g., DANIEL HERSHENZON, *THE CAPTIVE SEA: SLAVERY, COMMUNICATION, AND COMMERCE IN EARLY MODERN SPAIN AND THE MEDITERRANEAN* (2018); JOSHUA M. WHITE, *PIRACY AND LAW IN THE OTTOMAN MEDITERRANEAN* (2018); GILLIAN WEISS, *CAPTIVES AND CORSAIRS: FRANCE AND SLAVERY IN THE EARLY MODERN MEDITERRANEAN* (2011); LINDA COLLEY, *CAPTIVES: BRITAIN, EMPIRE, AND THE WORLD, 1600–1850* (2002).

101. Wynter, *supra* note 96, at 51.

102. See *id.*

103. Wynter, *supra* note 92.

104. See Geneva Convention Relative to the Treatment of Prisoners of War arts. 49–57, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva

use of enslaved labor for private purposes may at first glance seem very different from state compulsion of labor in wartime, but this apparent divergence is the result of histories of abolition. In various contexts, persons who escaped or were freed from slavery by force were nevertheless commodified as contraband—in other words, potentially free of their private owners but nevertheless at the disposal of the state.<sup>105</sup> In the nineteenth century, thousands of the African “recaptives” on slave ships seized by the British Royal Navy were in turn pressed into military service in West Africa and the West Indies.<sup>106</sup> In other contexts, too, such as the Ottoman and Russian empires, attempts to reform the treatment of enslaved captives required and justified the growth of centralized state authority to implement new international legal obligations.<sup>107</sup> This contestation between public and private also remains in the contemporary laws of war, which insist that “Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.”<sup>108</sup> Expanding on these historical connections between slavery and captivity in the laws of war presents opportunities to highlight parallels with racialized coerced labor in domestic prison contexts as well.<sup>109</sup>

Wynter’s focus on conversion calls to mind the legal mechanisms through which this transformation took place, namely alienability and heritability. Regimes of enslavement have often carried the right to transfer ownership rights to other actors. Alienability, when conceived as market exchange, is also a process of converting captives into currency (sale) or goods (barter) and is connected to

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Convention Relative to the Protection of Civilian Persons in Times of War arts. 51, 96, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

105. See HASLAM, *supra* note 3, at 36 (“The origins of international slave trade repression law lay in the law of prize, the law that regulated the capture and detention of enemy property in war.”); see also KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 124–28 (2015); JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 245–53 (2012).
106. See HASLAM, *supra* note 3, at 2 (“Slaves on ships captured by the [Royal] Navy became recaptives. But the transition to recaptivity did not necessarily represent an assertion of their humanity, nor guarantee their liberation.”); PADRAIC X. SCANLAN, FREEDOM’S DEBTORS: BRITISH ANTISLAVERY IN SIERRA LEONE IN THE AGE OF REVOLUTION, 97–129 (2017). Needless to say, former captives asserted their own rights to pursue lives defined neither by slavery nor by wage labor. See Jake Christopher Richards, *Anti-Slave-Trade Law: ‘Liberated Africans’ and the State in the South Atlantic World, c. 1839–1852*, 241 PAST & PRESENT 179 (2018).
107. See WILL SMILEY, FROM SLAVES TO PRISONERS OF WAR: THE OTTOMAN EMPIRE, RUSSIA, AND INTERNATIONAL LAW, 105–24 (2018).
108. Third Geneva Convention, *supra* note 104, at art. 12.
109. See, e.g., Adelle Blackett & Alice Duquesnoy, *Slavery is Not a Metaphor: U.S. Prison Labour and Racial Subordination Through the Lens of the ILO’s Abolition of Forced Labour Convention*, 67 UCLA L. REV. 1504 (2021).

alienation, or cutting the enslaved person off from their previous social ties.<sup>110</sup> The trans-Atlantic slave trade took alienability and alienation to new and unprecedented heights. After all, enslavement by Europeans on the African continent rarely fit the mold of captivity in the context of war (just or otherwise); instead, the overwhelming majority of individuals enslaved were seized by regional actors under a variety of circumstances and then sold to Europeans. Transfers of enslaved persons between private actors also crossed various borders, spanning and knitting together diverse jurisdictions. This system allowed the mass enslavement of individuals without conquest or direct rule over the areas from which captives were taken—areas that were nevertheless transformed by these external influences. Captives were transferred across an ocean to be part of new economies that overwhelmingly relied on the extraction of their labor and in situations where cultural ties with communities of origin were actively suppressed.

Having produced radical alienation through crossing oceanic thresholds, the racialization of slavery law in the Atlantic was complemented by rules of heritability. In the context of settler colonies without significant preexisting Black populations, the phenotypical distinctiveness of enslaved Africans furnished a basis for the inscription of new social statuses through law as well as other means. The principle of *partus sequitur ventrum*—that the status of a child follows that of the mother (literally, “offspring follows belly”)—effectively turned the wombs of enslaved women into sites of racialized commodity production, converting kin into property.<sup>111</sup> The hereditary transmission of racialized slavery also disrupted the logic of conversion and convertibility: Unlike in the captivity-based slavery in the Old World, here racialization functioned as the mark of slavery or—for those manumitted—the possibility of reenslavement.

Together, alienability and heritability enabled moving captive Africans between continents, between markets, and ultimately between different types of slavery altogether. The Atlantic slave trade produced forms of racialization that bound together very different contexts. Hence, although the interior of the African continent would remain dark and unexplored in the eyes of Europeans well until the late nineteenth century, it was irrevocably shaped by the demands of the slave trade from Las Casas’s time onward and effectively integrated into a world system

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110. For the most influential exposition of this idea, see ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

111. See, e.g., Jennifer L. Morgan, *Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery*, *SMALL AXE: CARIBBEAN J. CRITICISM*, Mar. 2018, at 1, 15 (English Atlantic slave regimes “defined hereditary racial slavery through the irony of a kinlessness born in a woman’s womb”); Dorothy E. Roberts, *The Genetic Tie*, 62 *U. CHI. L. REV.* 209, 225–27 (1995) (on the heritability of racial status and slavery in English colonial law).

of trade.<sup>112</sup> It is unsurprising that the trans-Atlantic slave trade was a prime example of what Marx called primitive (or original) accumulation of capital.<sup>113</sup> Primitive accumulation is not, of course, a story of backwards areas being brought into capitalist modernity, but rather of radically different spaces and modes of social organization being forcibly and unequally tied together by relations of capitalist development. In all of this, the alienability of captives tied together disparate zones while the heritability of racialized status allowed one region to maintain the illusion that Black Africans existed in a different stage of historical development, isolated and unaffected by the other zones.

## B. Black Skin, Red Lands

Wynter's work also provides clues for theorizing alternatives to the flattening of race that takes place in international law. Instead, the international law of the slave trade can be studied as a regime that materially inscribed distinct yet conjoined forms of racialization as Black and Native. As mentioned above, Las Casas's efforts to abolish Indigenous forced labor led to the promulgation of the first license from the Spanish Crown for the importation of enslaved persons from Africa to the Americas.<sup>114</sup> Wynter notes that this type of instrument was called an *asiento*—indeed, it came to be known as an *asiento de negros*, marking the process through which slavery came to be racialized by settler colonialism in the creation of a New World.<sup>115</sup> *Asientos de negros*, a type of legal instrument that evolved through many different forms from 1518 to 1779, were key to the legal architecture of the political economy of Spanish colonialism and, as such, play an important role in the history of international law.<sup>116</sup>

*Asiento de negros* generally gave their holders near exclusive rights to bring enslaved persons from Africa to Spanish colonies, fixing quotas as well as setting

112. For one classic overview of this history and its longterm effects on global patterns of wealth and development, see, for example, RODNEY, *supra* note 2, at 95–113.

113. See KARL MARX, 1 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 915 (Ben Fowkes trans., Penguin Books 1976) (1867) (“The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a preserve for the commercial hunting of blackskins, are all things which characterize the dawn of the era of capitalist production. These idyllic proceedings are the chief moments of primitive accumulation.”).

114. See Wynter, *supra* note 92, at 25.

115. See Demetrius L. Eudell, *From Mode of Production to Mode of Auto-Institution: Sylvia Wynter's Black Metamorphosis of the Labor Question*, 20 SMALL AXE 49 (2016).

116. See Weindl, *supra* note 91, at 231.

prices.<sup>117</sup> Many of the agreements also specified ports from which slave traders could embark and disembark, and some also required the use of Spanish ships, Spanish crews, or both.<sup>118</sup> The earliest *asientos* were granted to favorite courtiers of the crown who had no experience in procuring enslaved persons.<sup>119</sup> And thanks to the 1494 Treaty of Tordesillas, Spain was barred from establishing trading posts on the African continent.<sup>120</sup> As a result, *asiento* holders treated the licenses as speculative property and sold them off to the highest bidder, often Genovese or Portuguese merchants with connections to the trade in African captives.<sup>121</sup> Eventually, the Spanish crown contracted directly with foreign merchants and trading houses, and even foreign governments, most notably Britain (1713–1750). In this respect, *asientos* were instances of public-private contracting as well as acts of treaty-making in international law. They also spurred the development of mechanisms for the crown to resolve disputes with both private actors and foreign governments, making them a significant milestone in the development of international commercial arbitration.<sup>122</sup>

The *asiento* was important for several reasons. The revenue raised was very significant for the crown. And by setting forth a framework for the direct importation of enslaved persons from Africa to the Americas, *asientos* were perhaps the single most important exception to mercantilist policies of the early modern period, which generally sought to restrict trade between European powers and their respective colonial possessions. Not only did *asientos de negros* depart from this pattern by allowing the importation of enslaved persons directly from Africa rather than Spain, but they empowered foreign actors to act as primary agents of this trade and thereby to directly access markets in Spanish colonies. As Andrea Weindl has noted, “For Dutch, English, French, Danish, Swedish and even Brandenburg merchants, the *asiento* trade was the only possibility to get access to Spanish America in a legal way and to purchase American commodities not only in Seville but directly in the New World.”<sup>123</sup> It is also worth noting that *asientos*

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117. See *id.* at 252, n.57.

118. *Id.* at 235.

119. The 1518 *asiento* was granted by seventeen-year-old ruler Charles I to his majordomo and friend, a Flemish aristocrat. See LESLIE B. ROUNT JR., THE AFRICAN EXPERIENCE IN SPANISH AMERICA: 1502 TO THE PRESENT DAY 37 (1976).

120. See *Treaty Between Spain and Portugal Concluded at Tordesillas; June 7, 1494*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR.: THE AVALON PROJECT, [https://avalon.law.yale.edu/15th\\_century/mod001.asp](https://avalon.law.yale.edu/15th_century/mod001.asp) [<https://perma.cc/4YQQ-D38P>].

121. See Weindl, *supra* note 91, at 232; Wynter, *supra* note 92, at 25.

122. See Anne-Charlotte Martineau, *A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System*, 31 LEIDEN J. INT'L L. 219 (2018).

123. Weindl, *supra* note 91, at 236.

were perhaps equally powerful for the illegalities that they facilitated: Scholars have noted that *asiento* holders never met the quotas allotted to them under the contracts, since the prices set, in combination with the inherent risks of maritime shipping, made fulfilling the terms of the agreements unprofitable.<sup>124</sup> Instead, by facilitating non-Spanish access to Spanish colonies the *asientos* were most valuable in creating opportunities for illicit smuggling of contraband of all kinds. The ramifications of this framework went far beyond commerce: The 1713 *asiento*, which gave Britain the exclusive right to bring enslaved persons to Spanish colonies in the Americas as part of the Treaty of Utrecht, was both immensely lucrative and also ceded significant political leverage to a foreign power through control over a crucial supply of labor. As such, the right to hold the *asiento* was also an object of intense geopolitical competition.

In their very form, the *asientos de negros* bear the traces of the racialization of slavery in law. In early modern Spain, the term *asiento*, literally “seat” or “agreement,” denoted an instrument that allowed the crown to raise revenue from private actors in exchange for monopoly rights to sell certain goods.<sup>125</sup> The *asientos de negros* were an especially important subset of such agreements and hence emerged as a genre whose very name connoted and instantiated an emergent regime of racialization. Moreover, the work of racialization was also marked by the fact that the contracts came to be denominated not in numbers of enslaved human beings, but rather in a curious unit of measurement: *piezas de Indias*, or “pieces of the Indies.” A *pieza de India* was said to represent the labor power of a single healthy young man; how this was calculated in terms of women, children, elderly, and infirm individuals varied widely across circumstances.<sup>126</sup> Numerous commentators have remarked that this unit of measurement dehumanized enslaved Africans by reducing them to abstract quantities of commodified labor power (which was also gendered as male),<sup>127</sup> including Wynter herself.<sup>128</sup>

124. See *id.* (“[T]he trade with black labour in the framework of the *asiento* was always a losing deal. Prices were fixed beforehand and the trade to Africa entailed great expenses and risk.”).

125. See *id.* at 230 & n.3.

126. The term *piezas de India* first appeared in the 1662 *asiento*, which was granted to Genovese merchants. See *id.* at 235.

127. The nonequivalence of *piezas* to individuals has also confounded historians’ attempts to measure the scale of the trans-Atlantic slave trade. See, e.g., PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS 22–23* (1969).

128. In an extended appreciation, Wynter characterizes the thought of the Trinidadian Marxist thinker C.L.R. James as employing a “pieza theoretic framework,” which uses the trans-Atlantic slave trade (and its denomination in *piezas*) as a model for theorizing networks of accumulation based on coercive identities (for example, African slaves, the working class, and

What has gone less remarked, however, is the substitution—or conversion—at work here: Just as Las Casas proposed the substitution of enslaved Africans for Indians, this move gave rise to a legal instrument whose very form implies distinct regimes of racialization. In its very name, the *asiento* racializes captive Africans as Black chattel, but does so using units that refer to a place rather than to a people. Colonialism here produces Blackness as a commodity and conjures Indigenous peoples as a misnomer, an absence who leaves only names and traces upon territory. “Thus,” according to Patrick Wolfe, “it is no accident that the most durable names that have been applied to the two colonised populations, Black (or Negro) and Indian, refer to a bodily characteristic and a territorial designation respectively.”<sup>129</sup> In the spirit of this reading, the best work in the tradition of both CRT and TWAIL is attentive to how race is produced not simply as a generically invidious form of social differentiation, but also a distinct set of regimes grounded in a distinctive logic related to political economy. For instance, Cheryl Harris’s landmark *Whiteness as Property* essay similarly distinguished between these two forms of racialization, “the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land.”<sup>130</sup> In drawing attention to the proposed substitution of one form of slavery for another in Las Casas’s interventions and Spanish colonialism more generally, Wynter’s essay provides a useful touchstone for reflecting on how these distinct logics can be interrelated to a broader analysis.

### CONCLUSION

This Article reasoned from the presupposition that in this moment of fascist resurgence and antiracist insurrection, critical theorization of international law can only hope to flourish if tended with water drawn from wells hitherto untapped—including and especially work by thinkers involved in Black and Indigenous studies. Engaging with these fields is important insofar as they center the experiences of populations that are constitutively marginalized in the global nation state order, even after the advent of formal decolonization in the erstwhile Third World.

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consumers) that underlie the modern world. See Wynter, *Beyond the Categories*, *supra* note 67, at 80–82.

129. PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* 4 (2016).

130. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715 (1993). See also VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 15 (1969) (“Because the Negro labored, he was considered a draft animal. Because the Indian occupied large areas of land, he was considered a wild animal. Had we given up anything else, or had anything else to give up, it is certain that we would have been considered some other thing.”).



By focusing on the single example of Sylvia Wynter, this Article attempted to model a form of engagement with questions of universalism and humanity that could bring the insights of such fields into conversation with both CRT and TWAIL traditions. Needless to say, there are many other possibilities for moving international legal theorizing away from territorial conceptions and toward thinking with mobility, specifically the racialized captive mobility of slavery or—perhaps even more pertinent for contemporary legal regimes—indentured servitude. The barracoon, the hold of the slave ship, the auction block, and the plantation are all spatial concepts embedded in this history that scholars in Black studies have used to generate major theoretical interventions across various fields.<sup>131</sup> Further, theorizing international law with race as a global category in mind promises paths to decentering and unsettling its logics of sovereignty<sup>132</sup> and property,<sup>133</sup> as scholars engaged with Indigenous thought and settler legal regimes have long demonstrated.

Beyond the overdue retheorizing of international law with race at the center, this moment highlights the need for scholars in the field to join broader reorientations toward treating insurgent social movements as partners for generating ideas rather than as objects of study or, worse, of disciplining and marginalization.<sup>134</sup> And insofar as such movements challenge the very logic of statehood that undergirds international law, their alternative experiments and visions in recasting the category of the human provide glimpses into alternative futures. The task for international lawyers is to develop relationships grounded in

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131. See, e.g., DEBORAH A. THOMAS, *POLITICAL LIFE IN THE WAKE OF THE PLANTATION: SOVEREIGNTY, WITNESSING, REPAIR* 3–19 (2019); SAIDIYA HARTMAN, *WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN, AND QUEER RADICALS* 28–29, 173–75 (2019); CHRISTINA SHARPE, *IN THE WAKE: ON BLACKNESS AND BEING* 68–100 (2016); Katherine McKittrick, *Plantation Futures*, *SMALL AXE: CARIBBEAN J. CRITICISM*, Nov. 2013, at 1, 1 (2013); SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 110–35 (2008); MCKITTRICK, *supra* note 65, at 65–90.
  132. See, e.g., J. KĒHAULANI KAUANUI, *PARADOXES OF HAWAIIAN SOVEREIGNTY: LAND, SEX, AND THE COLONIAL POLITICS OF STATE NATIONALISM* (2018); AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* (2014); JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* (2011); see also Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *HARV. L. REV.* 1787 (2019); Leti Volpp, *The Indigenous as Alien*, 5 *U.C. IRVINE L. REV.* 289 (2015).
  133. See ROBERT NICHOLS, *THEFT IS PROPERTY!: DISPOSSESSION AND CRITICAL THEORY* (2020); BRENNA BHANDAR, *COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP* (2018); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 *L. & SOC. INQUIRY* 1006 (2016).
  134. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *STAN. L. REV.* (forthcoming 2021) (“[L]egal scholars should take seriously the epistemological universe of today’s left social movements, and their experiments, tactics, and strategies for legal and social change.”).

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frank dialogue with and rigorous accountability to such movements, with an eye to helping concretize shared commitments to solidarity across borders of all kinds.