



TRANS-NATIONAL RE-IMAGININGS

UCLA SCHOOL OF LAW'S INAUGURAL
SERIES OF CONVENINGS ON

*RACE, EMPIRE
AND HUMAN RIGHTS*



The Promise Institute for Human Rights
UCLA School of Law

ABOUT THE PROMISE INSTITUTE

The Promise Institute for Human Rights at UCLA School of Law is the center of human rights education, research and advocacy at UCLA and regionally. We work to empower the next generation of human rights lawyers and leaders, generate new thinking on human rights, and engage our students and research to drive positive real world impact.



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REFLECTIONS

PARTICIPANTS LOOKING BACK ON THE CONVENINGS



The most brilliant ideas are those that, once articulated, seem quite obvious. Of course, our analysis of empire and colonialism in international law must be informed by our deconstruction of race and racialization which, in turn, are integrally, organically, tied to the transatlantic slave trade and ongoing manifestations of colonialism. But most scholars weren't explicitly acknowledging these connections until, in 2019 and 2020, UCLA School of Law's Promise Institute for Human Rights hosted a series of groundbreaking symposia and workshops that brought together scholars, attorneys and activists working in the fields of Critical Race Theory (CRT), Third World Approaches to International Law (TWAIL) and human rights more generally. These convenings provided seminal moments of connection between scholars and fields of study and, perhaps more significantly, between the work we do in the academy and its practical application. We will look back on these convenings as a turning point in our ability to contribute to struggles in communities, both within the U.S. and globally, where the effects of racialization in the interest of colonial and imperial exploitation are felt most intensely.

-Natsu Taylor Saito

The TWAIL and CRT convenings represented a breakthrough in long-running attempts to reinvigorate conversations between these two related fields. I am so grateful to Aslı Bâli and E. Tendayi Achiume for their leadership, vision, and hard work in making this happen.

- Darryl Li

As a transnational labor law professor who started academia with infant children and a spouse living overseas, I did not travel much to conferences across the United States. I was fortunate to be in a city (Montreal) where local labor relations experts brought colleagues in, and provided space for me to share boundary defining work within labour law that grappled with slavery and the Black Atlantic, CRT and TWAIL scholarship; the ensuing Labour Law and Development Research Laboratory sustained that work. Attending UCLA's workshops in 2019 and 2020, once my young people were grown, was a rare opportunity to meet and exchange with many of the scholars whose work I had long admired and engaged. The UCLA meetings were especially generative, and the spirit in the rooms confirmed that each participant understood just how historically foundational the insights would be for our disciplines into the future.

- Adelle Blackett

These two workshops remain some of the best academic events I have attended to date. Professors Bâli and Achiume managed to bring together two important fields of legal research, CRT and TWAIL, in genuine conversation. In my view, the intellectual legacy of these two meetings will continue for years to come, creating new directions for legal research on race and empire at a political moment when serious thinking on these issues is sorely needed.

- Ntina Tzouvala



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INTRODUCTION

From March 2019 to January 2020, under the leadership of the Promise Institute for Human Rights and Professors E. Tendayi Achiume and Aslı Bâli, UCLA School of Law hosted a series of landmark convenings that brought together Critical Race Theory (CRT), Third World Approaches to International Law (TWAIL), and human rights scholars to consider two themes: what a joint TWAIL-CRT approach to international law looks like and how a human rights framework can promote racial justice and equality.

This report pulls together major takeaways from this series of convenings, drawing from the scholarly contributions made at the in-person events and in subsequent publications. It begins by outlining the relevant legal and theoretical frameworks. Next, it traces through the commonalities between CRT and TWAIL and the analytical tools that CRT and TWAIL scholars could share with each other. Finally, it demonstrates what a combined TWAIL-CRT approach uncovers about how race operates within international law, as well as the limits and emancipatory potential of law to dismantle trans-national structures of racial and colonial subordination. This report is intended to be a resource for students, practitioners, and scholars who are interested in thinking critically about race and human rights. It also provides a basis for future conversations, collaborations, and developing a shared research agenda.

A LANDMARK SERIES OF CONVENINGS AT UCLA SCHOOL OF LAW

On March 8, 2019, UCLA School of Law's Promise Institute, Critical Race Studies Program (CRS), International and Comparative Law Program (ICLP), and *Journal of International Law and Foreign Affairs* (JILFA) hosted a one-day symposium entitled *Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations*. The symposium brought together CRT, TWAIL, and human rights scholars, including the former United Nations High Commissioner for Human Rights, to think critically about the role of human rights in achieving racial justice and equality.¹ Some of the papers presented at this symposium were subsequently published in JILFA's Spring 2020 issue.²

Alongside the Critical Perspectives symposium, UCLA School of Law hosted two related workshops. In the first, law students and early-career scholars were given the opportunity to present their work and receive feedback from senior scholars. In the second workshop, entitled *Race, Empire and International Law*, CRT and

¹ *Symposium Archive*, JILFA, <https://uclajilfa.com/2020-symposium/> [<https://perma.cc/5CSE-QFY3>].

² *Volume 24, Issue 1 (Spring 2020)*, JILFA, <https://uclajilfa.com/volume-24-number-1-spring-2020/> [<https://perma.cc/TC2C-HJTU>].

TWAIL scholars came together to think through the convergences and divergences between these two theoretical approaches and consider what a combined analytical approach to international law would bring to bear.

On January 31, 2020, the Promise Institute, ICLP, and UCLA Law Review hosted a second one-day symposium entitled *Transnational Legal Discourse on Race and Empire*. This symposium brought together CRT and TWAIL scholars to continue the conversations initiated at the Race, Empire and International Law workshop. Many of the papers presented here were subsequently published in the Law Review's April 2021 issue.³

This series of convenings explored how the current moment of global crisis could provide the opening needed for structural change. Countries around the world, including the United States, have been facing a resurgence of white supremacy, xenophobia, and right-wing populist nationalism, particularly impacting racially marginalized individuals and groups. The role of international institutions and governance, the international human rights regime, and the United States' status as a global power are increasingly being challenged by new global powers and undemocratic regimes.

At the convenings, participants unpacked how, internationally, race shapes migration, socio-economic and political equality, and states of emergencies, and engaged with these fundamental questions:

"[C]an we meaningfully talk about race globally or transnationally or must race always be engaged locally?"⁴

"Can we meaningfully talk about empire, even European colonial empire, in global terms when important distinctions inhere, for example, between settler and nonsettler colonial projects?"⁵

How can we re-imagine human rights and the role of law and legal institutions by "advancing critical, reconstructive, and even radical engagements with the human rights frame broadly construed, but with a focus on racial justice?"⁶

³ *Print Archive: Volume 67, Issue 6: April 2021; pp. 1386-1895*, UCLA L. Rev., <https://www.uclalawreview.org/archive/> [<https://perma.cc/DR2D-E3TT>].

⁴ E. Tendayi Achiume & Asli Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. Rev. 1386, 1396 (2021).

⁵ *Id.*

⁶ *Id.* at 1395.

ROOTED IN HISTORY: PAST TWAIL-CRT CONVENINGS

The recent series of convenings at UCLA School of Law reflect renewed momentum among CRT and TWAIL scholars to work collaboratively and engage one another on important issues. This is not, however, the first time that scholars from these theoretical traditions sought to develop a shared analytical approach to international law. In October 1999, Ruth Gordon convened the first symposium on *Critical Race Theory and International Law: Convergence and Divergence* at Villanova University School of Law, which considered “how CRT might help us understand, analyze and perhaps transform the international system, and how an international dimension might enrich the Critical Race critique of race and rights.”⁷ This was the first symposium at which CRT and TWAIL scholars formally explored the benefits of methodological cross-pollination.⁸ One of the calls to action from the Villanova symposium, advanced by TWAIL scholar Makau Mutua, was that “CRT scholars must start to write in an international idiom; they must demonstrate that they understand that the conditions of subordination in the United States are part and parcel of the global structure of dehumanization.”⁹ Similarly, as explored later in this report, TWAIL scholars would benefit from using “some of the analytic tools of CRT—including antisubordination, intersectionality, multidimensionality, and antiessentialism.”¹⁰

In the decades since, there have not been many opportunities for CRT and TWAIL scholars to convene around a shared vision of international law. For example, in August 2018, Justin Desautels-Stein, Jim Anaya, and E. Tendayi Achiume led a workshop on *International Law and Racial Justice* at the University of Colorado, Boulder, School of Law that “challenged participants to consider the place of race-centric analysis in contemporary international legal scholarship.”¹¹ This convening followed shortly after a landmark TWAIL symposium convened by Antony Anghie at the National University of Singapore School of Law in July 2018 which, two decades after TWAIL originated at Harvard Law School, interrogated “TWAIL’s past, present, and future.”¹²

⁷ Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 Proc. ASIL Ann. Meeting 260, 261 (2000); see also Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. Rev. 1536, 1538–39 (2021); E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. Rev. 1462, 1465 n.5 (2021).

⁸ Achiume & Bâli, *supra* note 4, at 1393.

⁹ 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, 1641 (2021) (citing Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 Vill. L. Rev. 841, 852 (2000)).

¹⁰ *Id.* at 1621.

¹¹ Achiume & Bâli, *supra* note 4, at 1394.

¹² *Id.* at 1393–94.

OVERVIEW OF THE CORE CONCEPTS

THIRD WORLD APPROACHES TO INTERNATIONAL LAW

Before highlighting the areas of convergence and divergence between CRT and TWAIL, and the ideas that emerged at the UCLA School of Law convenings for collaborating on a research agenda in international law, it is important to understand the legal and theoretical frameworks that informed the discussion.

TWAIL was created in 1996 by a group of Harvard Law School graduate students who, alongside collaborators at other institutions, inaugurated this theoretical approach at a conference the following year.¹³ The “symbolic birthplace of TWAIL” was decades earlier, at the Bandung Conference (Asian-African Conference) in 1955, when “representatives from twenty-nine governments of Asian and African nations gathered in Bandung, Indonesia to discuss peace and the role of the Third World in the Cold War, economic development, and decolonization.”¹⁴ TWAIL’s theoretical origins can also be traced to a history of “Latin American opposition to the domination of the Third World by the industrialized West.”¹⁵

In his seminal piece “What is TWAIL?” (2000), Makau Mutua explained that the Third World has historically “viewed international law as a regime and discourse of domination and subordination, not resistance and liberation.”¹⁶

Mutua summarized that “TWAIL is driven by three basic, interrelated and purposeful objectives.

The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.

Second, it seeks to construct and present an alternative normative legal edifice for international governance.

Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.”¹⁷

¹³ James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3(1) Trade L. & Dev. 26, 28–32 (2011).

¹⁴ *Bandung Conference (Asian-African Conference), 1955*, Dep’t Of State, Off. Of The Historian, <https://history.state.gov/milestones/1953-1960/bandung-conf> [<https://perma.cc/2ZZ5-V35A>].

¹⁵ Makau Mutua, *What Is TWAIL?*, 94 Proc. ASIL Ann. Meeting 31, 31 (2000).

¹⁶ *Id.*

¹⁷ *Id.*

At its core, TWAIL challenges the foundations and assumptions underlying the regime of international law and brings an analysis that recognizes international law as inherently originating from and perpetuating "empire," specifically European colonialism and its present-day manifestations.¹⁸ Empire can be understood as "referring to social, political, and economic interconnection among sovereign nations but on fundamentally unequal terms that structurally benefit powerful nations, while structurally disadvantaging and exploiting subordinated nations."¹⁹ TWAIL scholars have identified that although international law is founded in the sovereign equality of states,²⁰ in reality the sovereignty of Third World states is often undermined when convenient. As described by James Thuo Gathii, one of TWAIL's founders, in the decades since it was conceived, TWAIL "has generated a vibrant ongoing debate around questions of colonial history, power, identity and difference, and what these mean for international law."²¹

What is the Third World?

The term "Third World" can be traced back to the Cold War period, in which some divided the world into three camps: "The First World consisted of the U.S., Western Europe and their allies. The Second World was the so-called Communist Bloc: the Soviet Union, China, Cuba and friends. The remaining nations, which aligned with neither group, were assigned to the Third World."²²

During the decolonization era, as Third World nations demanded independence from their colonizers, the term and transnational community it created took on new political significance. In the context of TWAIL scholarship, the Third World does not reflect a "stable or unchanging, well-defined geographic or even geopolitical formation" but instead tracks "a common experience of political, economic, and social subordination in the global hierarchy of power relations."²³ The Third World is not a place, but a tool, a perspective, and a site of knowledge production that is alternative to the dominant approaches arising from the Global North and the West.

The use of the term "Third World" has been criticized as essentialist, given the lack of homogeneity among formerly colonized nations in the present day and the ways in which post-colonial states also subordinate their

¹⁸ Achiume & Bâli, *supra* note 4, at 1389.

¹⁹ *Id.* at 1389–90.

²⁰ Samantha Besson, *Sovereignty*, Oxford Pub. Int'l L. (Apr. 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> [<https://perma.cc/P9HE-UXCE>].

²¹ Gathii, *supra* note 13, at 27.

²² Marc Silver, *If You Shouldn't Call It The Third World, What Should You Call It?*, NPR (Jan. 4, 2015), <https://www.npr.org/sections/goatsandsoda/2015/01/04/372684438/if-you-shouldnt-call-it-the-third-world-what-should-you-call-it> [<https://perma.cc/ULV2-E4P9>].

²³ Achiume & Bâli, *supra* note 4, at 1388.

populations. However, TWAIL scholars maintain that this term is meant to reflect “the hierarchical ordering of states and regions that arose from the subordination that accompanied colonialism and imperialism.”²⁴ This echoes what CRT scholars, like UCLA Law Professors Devon Carbado and Cheryl Harris, have said: “that it is less important to establish the reason why a particular term is being used in an essentialist way, and that we should instead focus on ‘the ideological motivation for and effects of that essentialism.’”²⁵ On this basis, TWAIL scholars can defend their Third World formulation because it enables an important antisubordination analysis of the international system.²⁶

Since it was created, TWAIL has made significant contributions to international legal scholarship, ranging from “illuminating how historical antecedents of modern international law embodied and advanced colonial logics of racialized exploitation, expropriation, and extermination, to deconstructing the contemporary legacies of these antecedents in different fields of international law.”²⁷ TWAIL scholars “trace the juristic techniques that justified colonial conquest along the axes of European / non-European, colonizer / colonized, civilized / uncivilized, and modernity / tradition.”²⁸ At the same time, they adopt “a historically aware methodology—one that challenges the simplistic visions of an innocent third world, and a colonizing and dominating first world.”²⁹

International legal scholarship, including TWAIL, has sometimes been critiqued as limited when it comes to concepts of race. For example, Justin Desautels-Stein has asked “why are problems of racialization—particularly of nations, global power, and international law and relations—not a more central part of TWAIL?”³⁰ He argued that international lawyers have, despite their attempts to regulate against racism, failed to address “the way in which international legal thought is itself constituted by a structure of racial ideology.”³¹ Similarly, Christopher Gevers has argued that “the very idea of the international is always already racialized in the sense of being articulated against background assumptions about the necessity and naturalness of a white global order.”³² As he described, even some TWAIL scholars, who are focused on questions of colonialism within international law, fail to recognize how the concept of international is itself “a racial imaginary—

²⁴ Gathii, *supra* note 9, at 1638; Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 Third World Legal Stud. 1, 8 (1998-1999).

²⁵ Gathii, *supra* note 9, at 1638-39 (quoting Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 Harv. L. Rev. 2193, 2205 (2019)); Diana Fuss, *Essentially Speaking: Feminism, Nature & Difference*, at xi (1989).

²⁶ Gathii, *supra* note 9, at 1639.

²⁷ Achiume & Bâli, *supra* note 4, at 1389.

²⁸ Gathii, *supra* note 9, at 1612.

²⁹ Gathii, *supra* note 13, at 34.

³⁰ Achiume & Carbado, *supra* note 7, at 1464; Justin Desautels-Stein, *supra* note 7.

³¹ Desautels-Stein, *supra* note 7, at 1540.

³² Achiume & Carbado, *supra* note 7, at 1468; Christopher Gevers, *“Unwhitening the World”: Rethinking Race and International Law*, 67 UCLA L. Rev. 1652 (2021).

—‘White World’... that emerges from and reinforces Global White Supremacy.”³³ Despite these perceived limitations, Achiume and Bâli have argued that “[r]ace and racial subordination have long been a focus of work in TWAIL, implicit in some projects and explicit in others.”³⁴

Example:

Shifting Sovereignty and the Racialization of Libya

In their UCLA Law Review article, Achiume and Bâli illustrated how “a TWAIL-CRT lens surfaces the dual and contingent nature of Third World sovereignty—according to which this sovereignty is formally asserted or vitiated in the international system on terms set by First World nation states.”³⁵

Despite state sovereignty being a core principle of international law, the UN Security Council authorized foreign military intervention in Libya in 2011. The international community justified this intervention in part because it was endorsed by the Arab League. Yet, Libya predominantly identifies as African (not Arab) and aligns with the African Union. In this case, the African Union did not support foreign intervention but instead proposed a non-military solution to the Libyan conflict. Racializing Libya as Arab enabled the international community to justify its decision to invade a sovereign nation.

In subsequent years, the international community’s interests shifted to curbing African migration. Europe demanded that Libya enforce its borders—and therefore assert its sovereignty—to prevent unauthorized migration through Libya to Europe. Again, this narrative was racialized: Libya was perceived as an Arab ‘transit country’ through which Black African migrants were moving.

Tracing the relationship between sovereignty and race illustrates “how different bodies of international law function and thrive as systems of racial governance,” i.e. “the different ways that race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur.”³⁶

³³ Achiume & Carbado, *supra* note 7, at 1468 (quoting Gevers, *supra* note 32, at 1655).

³⁴ Achiume & Bâli, *supra* note 4, at 1392.

³⁵ *Id.* at 1397.

³⁶ *Id.*

CRITICAL RACE THEORY

CRT originated in the early 1970s with the writing of Derrick Bell, who was a civil rights lawyer, the first Black tenured professor at Harvard Law School, and “the movement’s intellectual father figure.”³⁷ Bell and other legal scholars were witnessing the limits of progress achieved in the 1960s civil rights era and recognized “that new theories and strategies were needed to combat the subtler forms of racism that were gaining ground.”³⁸ In spring 1983, UCLA Law Professor Kimberlé Crenshaw and her fellow Harvard Law students, all of whom had studied under Bell, organized an “alternative course” entitled, “Racism and the American Law.”³⁹ Crenshaw and others subsequently organized the first CRT conference in summer 1989, entitled, “New Developments in Critical Race Theory.”

Whereas “empire” is the central analytic category in TWAIL, in CRT “race is the central analytic category for understanding how domestic law, racist science, and literature have for generations justified the dehumanization and discrimination of African Americans.”⁴⁰ Race can be understood as “a social construction, according to which physical features and lineage are imbued with social, political, economic and even legal meaning.”⁴¹

A CRT analysis places emphasis “on interrogation of law as implicated in racial subordination, rather than existing outside of the problem, merely as [a] solution.”⁴² What is distinctive about CRT is its rejection of the dominant anti-discrimination model in the United States, i.e. the idea that individual racists are perpetrators and that the solution is laws that prohibit direct discrimination. Instead, CRT embraces the idea that racism is structural and deeply historical.⁴³ CRT scholars:

³⁷ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, at 6 (3d ed. 2017); Richard Delgado & Jean Stefancic, *Critical Race Theory: Past, Present, and Future*, 51 *Current Legal Probs.* 467, 467 (1998).

³⁸ Delgado & Stefancic, *supra* note 37, at 4.

³⁹ *History of CRT Activism at HLS*, The Bell Collective For Critical Race Theory, <https://orgs.law.harvard.edu/thebellcollective/history-of-crt-activism-at-hls/> [<https://perma.cc/GQU5-5JQY>].

⁴⁰ Gathii, *supra* note 9, at 1612.

⁴¹ Achiume & Bâli, *supra* note 4, at 1390. A number of the articles in the UCLA Law Review symposium issue explored the concept of “racialization”. For instance, Matiangai Sirleaf looked at how the racialization of the COVID-19 pandemic is linked to “past narratives premised on diseased and inferior racialized bodies.” Matiangai Sirleaf, *Racial Valuation of Diseases*, 67 *UCLA L. Rev.* 1820, 1823 (2021). In this analysis, she developed a theoretical framework to understand racial valuation, which is the ascribing of societal value to people or groups on the basis of their race. *Id.* at 1829. In his article, Darryl Li proposed that racialization should be understood “as a process, one that is both transregional (if not global) and specific.” Darryl Li, *Genres of Universalism: Reading Race Into International Law, With Help From Sylvia Wynter*, 67 *UCLA L. Rev.* 1686, 1689 (2021). Li’s analysis began with the Atlantic slave trade—a significant site of racialization that has persistent impacts today—and underscored law’s role in the process of racialization. *Id.*

⁴² Achiume & Bâli, *supra* note 4, at 1390

⁴³ Laura E. Gómez, Professor of L., Rachel F. Moran Endowed Chair in L., UCLA Sch. of L., Address at the UCLA Critical Race Studies Program, Promise Institute for Human Rights, International and Comparative Law Program & Journal of International Law and Foreign Affairs Symposium: Critical Race Perspectives on Race and Human Rights: Transnational Re-Imaginations (Mar. 8, 2019). For introductions to CRT, see generally *Critical Race Theory: The Key Writings That Formed The Movement*, at xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); Delgado & Stefancic, *supra* note 37; Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *Denv. L. Rev.* 329 (2006); Devon W. Carbado, *Critical What What?*, 43 *Conn. L. Rev.* 1593 (2011).

have, among other things, mapped the mutually constitutive relationships among race, racial subordination, and the law; examined law's historical and contemporary role in the construction of race and racial subordination; and exposed the different ways that racial subordination persists including through legal interventions ostensibly tailored to promote equality.⁴⁴

In their seminal book, "Critical Race Theory: An Introduction" (1995), Richard Delgado and Jean Stefancic outline the basic tenets of CRT:

First, "racism is ordinary, not aberrational" which "means that racism is difficult to cure or address."

Second, "[b]ecause racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it."

Third, races are "[n]ot objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient." The "dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market" (this is the concept of differential racialization). Also, "[n]o one person has a single, easily stated, unitary identity" (this is reflected in the concepts of intersectionality and anti-essentialism).

Finally, minority status "brings with it a presumed competence to speak about race and racism" (this is the voice-of-color thesis).⁴⁵

⁴³ Laura E. Gómez, Professor of L., Rachel F. Moran Endowed Chair in L., UCLA Sch. of L., Address at the UCLA Critical Race Studies Program, Promise Institute for Human Rights, International and Comparative Law Program & Journal of International Law and Foreign Affairs Symposium: Critical Race Perspectives on Race and Human Rights: Transnational Re-Imaginings (Mar. 8, 2019). For introductions to CRT, see generally *Critical Race Theory: The Key Writings That Formed The Movement*, at xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); Delgado & Stefancic, *supra* note 37; Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 Denv. L. Rev. 329 (2006); Devon W. Carbado, *Critical What What?*, 43 Conn. L. Rev. 1593 (2011).

⁴⁴ Achiume & Bâli, *supra* note 4, at 1390.

⁴⁵ Delgado & Stefancic, *supra* note 37, at 11.

Although CRT originated in the U.S. legal context, particularly as a way to analyze U.S. constitutional law, over the years, scholars have used CRT to analyze other bodies of U.S. law and laws outside U.S. borders.⁴⁶ Even going back to the work of intellectuals like W.E.B. Du Bois and legal scholars like Henry J. Richardson, U.S. race theorists have “sought to situate domestic race struggle and analysis in its international context.”⁴⁷

⁴⁶ See, e.g., Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 Wash. U. Global Stud. L. Rev. 695 (2015); Adelle Blackett, *Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively*, at McGill, 62 McGill L.J. 1251 (2017); Laura Carlson, *Critical Race Theory in a Swedish Context* 21–49 (Juridisk Tidskrift, Working Paper No. 1, 2012), <https://ssrn.com/abstract=2402587>; Tanya Katerí Hernández, *The Value of Intersectional Comparative Analysis to the “Post-Racial” Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 Conn. L. Rev. 1407 (2011); Joel Modiri, *The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa*, 28 S. Afr. J. On Hum. Rts. 405 (2012); Esther Ojulari, *The Social Construction of Afro-descendant Rights in Colombia*, in *Contemporary Challenges In Securing Human Rights* 19 (Corinne Lennox ed., 2015).

⁴⁷ Achiume & Bâli, *supra* note 4, at 1392.

**BRINGING CRT & TWAIL
TOGETHER:
A SHARED APPROACH
TO INTERNATIONAL
LAW**

CRT & TWAIL: THE "PROVERBIAL TWINS"

CRT and TWAIL already “share a common point of departure”: questioning the neutrality of international and constitutional legal scholarship, particularly when it comes to racially marginalized groups and nations.⁴⁸ CRT “traces the historical accumulation of racial advantages and shows how they shape and structure life chances of privileged Whites today,” with a particular focus on “racist or Jim Crow laws.”⁴⁹ TWAIL focuses on colonialism and “traces how imperialism preserved the economic hegemony of European and American powers as well as how contemporary understandings of economic development reproduce the tropes of alien, colonial, and racist rule in the era of neoliberalism.”⁵⁰ Both CRT and TWAIL have persisted in the face of claims that they are less credible or rigorous theoretical approaches in comparison to dominant legal theories on constitutional and international law. There are several areas of overlap between CRT and TWAIL and “continuities in the historical, political, racial, and disciplinary forces against which those ideas have been articulated.”⁵¹

As Crenshaw described at the Critical Perspectives symposium: “It is an understatement that this conversation is long overdue. Multi-layered interrogations of the relationship between rights regimes, power, and inequalities have been foundational elements of both CRT and TWAIL from the very beginning of both.”

“To what extent should our projects be considered to be like the proverbial twins, separated at birth?”

“What are the circumstances of this separation?”

“What excitement will be generated when we come together to know each other again?”⁵²

⁴⁸ Gathii, *supra* note 9, at 1616.

⁴⁹ *Id.* at 1619–20.

⁵⁰ *Id.*

⁵¹ Achiume & Carbado, *supra* note 7, at 1464.

⁵² Kimberlé Crenshaw, Distinguished Professor of L., Promise Inst. Chair in Hum. Rts., UCLA Sch. of L., Address at the UCLA Critical Race Studies Program, Promise Institute for Human Rights, International and Comparative Law Program & Journal of International Law and Foreign Affairs Symposium: Critical Race Perspectives on Race and Human Rights: Transnational Re-Imaginations (Mar. 8, 2019).

Both CRT and TWAIL Have Challenged the Legalization of White Supremacy

U.S. constitutional law and international law, which are scrutinized by CRT and TWAIL, respectively, are both rooted in and shaped by “racial capitalism”: the idea that race and racism permeate, at a structural level, the institutions of our capitalist system.⁵³ These bodies of law “operate as regimes of power and violence that implicate racism, capitalism, and colonialism.”⁵⁴ The subjects of U.S. constitutional law (“citizens”) and international law (“sovereign nations”) are often perceived as neutral concepts but are in fact conceived in ways that “facilitate, legitimize, and entrench global and domestic orderings of white supremacy.”⁵⁵ Historically, U.S. laws operated to exclude African-Americans from citizenship and their constitutional rights in the same ways that international laws were used to deprive Third World nations of their sovereignty and enable imperial intervention.

CRT asks “which peoples belong to the ‘family of man’ (and therefore deserve citizenship)?”

TWAIL asks “which nations belong to the ‘family of nations’ (and therefore deserve sovereignty)?”⁵⁶

Both CRT and TWAIL Have Illustrated How (Formal) Inclusion Has Often Resulted in Exclusion

In the U.S. context, CRT scholars “focus on the formal inclusion of nonwhite peoples into citizenship (under white dominated domestic terms and norms).”⁵⁷ For instance, even after African-Americans were granted formal citizenship, the U.S. Supreme Court affirmed the constitutionality of “separate but equal” and Jim Crow laws. As a result, the racial subordination of African-Americans has evolved from slavery into Jim Crow, and more recently into mass incarceration.⁵⁸

⁵³ Robin D. G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, Bos. Rev. (Jan. 12, 2017), <https://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [<https://perma.cc/J8EZ-VUS7>]; Cedric J. Robinson, *Black Marxism: The Making Of The Black Radical Tradition*, at 2 (2000); see also Cheryl I. Harris, Response, *Reflections on Whiteness as Property*, 134 Harv. L. Rev. F. 1 (2020) (offering an even more direct engagement of capitalism).

⁵⁴ Achiume & Carbado, *supra* note 7, at 1466.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1471.

⁵⁸ *Id.* at 1472; Michelle Alexander, *The New Jim Crow: Mass Incarceration In The Age Of Colorblindness* (2012).

Similarly, in the international context, TWAIL scholars “focus on the formal inclusion of nonwhite peoples [from Third World nations] into the international society of sovereign nation states (under First World and white dominated international terms and norms).”⁵⁹ TWAIL scholars have illustrated how, despite formal decolonization, Third World nations have remained economically and politically subjugated. First World Nations wield international law, development, and institutions to perpetuate “neocolonial domination.”⁶⁰

Both analyses illuminate how formal inclusion is “not a fundamental reconfiguration of power but rather a particular technology through which to maintain, manage, and legitimize the prior hierarchical domestic and global racial orderings.”⁶¹

Both CRT and TWAIL Contest Neoliberal Claims

“Why can’t Black people properly manage the citizenship they have been given (by white people) and why can’t nonwhite nations properly manage the sovereignty they have been given (by white nations)?”⁶²

CRT and TWAIL scholars reject these dominant neoliberal claims about the individualistic social responsibility and agency of Black people and Third World nations. Instead, they advance “structural accounts of domestic and global inequalities” and foreground “not only the contemporary manifestation of the colonial and slavery/Jim Crow pasts, but also the particular ways in which current legal structures in constitutional law and international law continue to produce ‘proper’ subjects for racial inequality and domination.”⁶³

⁵⁹ Achiume & Carbado, *supra* note 7, at 1471.

⁶⁰ *Id.* at 1473 n.41 (emphasis added).

⁶¹ *Id.* at 1471.

⁶² *Id.* at 1485.

⁶³ *Id.* at 1486.

What is "Neoliberalism"?

"Africa's natural and human resources continue to develop Europe and America: but Africa is made to feel grateful for aid."⁶⁴ —Ngũgĩ wa Thiong'o

The term "neoliberalism" is generally understood to describe the view that "a society's political and economic institutions should be robustly liberal and capitalist."⁶⁵ TWAIL scholars have often critiqued the operation of the dominant neoliberal international financial institutions—the World Bank and the International Monetary Fund. These institutions engage in policy-based lending or "conditionality": as a condition of receiving loans or development aid, countries—often in the Global South—must adopt neoliberal economic policies, like opening up their economies to the international market and decreasing government spending.⁶⁶ At the same time, the international community does not take seriously "ideas about reparations, redistribution, unjust enrichment, and disgorgement," nor acknowledge the persistent impacts of colonialism and slavery in these countries.⁶⁷ Further, "this 'aid,' and the overall sense that Black people and nonwhite nations are not pulling their citizenship and sovereignty weight, fuels domestic and global expressions of white anxiety, white exasperation, and white anger."⁶⁸

Both CRT and TWAIL Still Believe in Law's Emancipatory Potential

At the same time that CRT scholars critique the racial injustice at the root of U.S. law, they remain committed to transforming and using law to achieve social change. They recognize law as a site of power that has been responsible for perpetuating racial subordination, with racially marginalized people being denied their rights under law. At the same time, "the availability of rights can produce a sense of both political identity and political possibility" that should not be ignored.⁶⁹ Similarly, TWAIL scholars do not want to abandon the international legal system entirely, but instead to transform it "to achieve less subordinating and more liberatory ends."⁷⁰

⁶⁴ Ngũgĩ wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* 28 (1986).

⁶⁵ Neoliberalism, *Stan. Encyclopedia of Phil.* (June 9, 2021), <https://plato.stanford.edu/entries/neoliberalism/> [<https://perma.cc/HA5R-AXKE>].

⁶⁶ James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 *Mich. L. Rev.* 1996, 1999 n.10 (2000) (reviewing Brad R. Roth, *Governmental Illegitimacy In International Law* (1999)).

⁶⁷ Achiume & Carbado, *supra* note 7, at 1485.

⁶⁸ *Id.* at 1486.

⁶⁹ *Id.* at 1493.

⁷⁰ *Id.* at 1498.

COMING BACK TOGETHER: A TWAIL-CRT APPROACH TO INTERNATIONAL LAW

"Just as slavery dehumanized Black people as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty."⁷¹

By combining the analytic tools of CRT and TWAIL, scholars gain "a very sharp lens of tracing issues of race and identity in imperial histories, transnational histories, and histories of the global."⁷² In other words "[t]o grapple with the presence of the past, and frame counter-hegemonic futures, they need each other."⁷³

Racial Subordination and the Analytic Tool of "Colorblindness"

CRT scholars uncover racial subordination in part by critiquing colorblindness, i.e., the "idea that race no longer matters in structuring society and lived experience."⁷⁴ CRT scholars explore how U.S. courts refuse to recognize the role that race plays when deciding constitutional law cases. On the other hand, courts reject race as a legitimate basis for governmental decision-making, even when the goal of legislation is to promote substantive equality for racially marginalized groups. Colorblindness is reflective of "formal equality"—that treating people the same is what makes them equal. Conversely, "substantive equality" or "equity" recognizes that marginalized people or groups may need differential treatment in order to experience law in the same way as dominant people or groups. Although U.S. laws governing colorblindness arise from the unique racial logics of the United States, there are similarities in how colorblindness manifests in other domestic and international contexts to invisibilize racial subordination.⁷⁵

⁷¹ Gathii, *supra* note 9, at 1648.

⁷² *Id.*

⁷³ Adelle Blackett with Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Convention*, 67 UCLA L. Rev. 1504, 1506 (2021).

⁷⁴ Achiume & Carbado, *supra* note 7, at 1476.

⁷⁵ Gathii, *supra* note 9, at 1625.

Example: Colorblindness in International Human Rights Law

Achiume's analysis of the South African Development Community Tribunal's Campbell decision from 2008 illuminates the benefits of a TWAIL-CRT approach, which draws on colorblindness. In this case, a white Zimbabwean farmer claimed that his human rights were violated when the government seized his land. The impugned law, the Fast Track Land Reform Program, "authorized the uncompensated, compulsory seizure of agricultural lands" with the goal of redistributing land to Black Zimbabweans.⁷⁶

The Tribunal relied on the non-discrimination principle enshrined in the International Convention on the Elimination of Racial Discrimination and found that the law was de facto discriminatory on the basis of race due to its disproportionate impact on white farmers. This decision was "colorblind"—it considered the law's racially discriminatory impact without engaging with the redistributive goals of the law within the country's historic and current sociopolitical context. During Zimbabwe's colonial past, "land was systematically taken away from Black people and given to white people" and "any intervention to redress that land theft was bound to disproportionately affect white farmers, as ownership had been accrued to them on a de jure racial basis."⁷⁷

As Achiume described, the Tribunal's decision shows how colorblindness "functions to reinforce racial subordination by bluntly invalidating race conscious remedies without which it is impossible to redress persisting neocolonial subordination."⁷⁸

Intersectionality

The concept of "intersectionality"⁷⁹ was originally coined by Crenshaw in 1989 in recognition of the failure of U.S. antidiscrimination law to account for the overlapping marginalization of Black women, whose experiences of discrimination were distinct from both Black men and white women.⁸⁰ Without accounting for the intersectional discrimination faced by Black women, courts were failing to provide appropriate remedies in response to their discrimination claims.

⁷⁶ Achiume & Carbado, *supra* note 7, at 1481.

⁷⁷ *Id.* at 1483 (emphasis added).

⁷⁸ *Id.* at 1482.

⁷⁹ For an overview of intersectionality, see Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 Tulsa L. Rev. 151, 155–57 (2010); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1242–44 (1991); Carbado & Harris, *supra* note 25, at 2222.

⁸⁰ Gathii, *supra* note 9, at 1628–29.

What Is "Intersectionality"?

Intersectionality is a framework that captures how multiple forms of discrimination and systems of subordination combine and interact. It also “addresses the manner in which racism, patriarchy, economic disadvantage and other discriminatory systems contribute to the creation of layers of inequality,” resulting in unique experiences of discrimination and disadvantage between women and men, races and other groups.⁸¹

Similarly, in TWAIL feminist scholarship, “overlapping and interdependent forms of gender subordination and discrimination are a central point of inquiry.”⁸² TWAIL feminists acknowledge that women experience gender discrimination differently depending on where they are in the world, and their resulting positionality under colonial and imperial forces.

Intersectionality and TWAIL feminism, used together, would strengthen each analysis. One place for a TWAIL-CRT research agenda to begin is “studying how issues of class and globalization intersect with other forms of subordination for women in the United States as well as in the Third World.”⁸³

Multidimensionality

Some CRT scholars find intersectionality limiting, insofar as it suggests that a person or group’s different identities (i.e., being Black and being a woman) and resulting oppressions can be understood separately from one another. Responding to these perceived limitations, the concept of “multidimensionality” has been advanced to ensure “an analytic that focuses on how subordinating ‘structures interact, interrelate, and are synergistic and mutually reinforcing.’”⁸⁴ For instance, Athena Mutua has employed multidimensionality to analyze the overrepresentation of Black men in the U.S. criminal justice system, even compared with Black women. Her work suggests that an intersectional approach would presume that Black men are privileged on the basis of gender, when compared to Black women, which does not account for this disproportionate impact.⁸⁵

⁸¹ E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Report on Global Extractivism and Racial Equality*, ¶ 18, U.N. Doc. A/HRC/41/54 (May 14, 2019).

⁸² Gathii, *supra* note 9, at 1629.

⁸³ *Id.* at 1631.

⁸⁴ *Id.* at 1632.

⁸⁵ *Id.* at 1635.

TWAIL scholars may find multidimensionality useful to address a current debate: the failure of TWAIL to fully address the concerns of indigenous peoples within the international legal framework. As TWAIL scholar Amar Bhatia has argued, traditional understandings of colonialism “embraced assimilationist goals inconsistent with the interest of indigenous peoples and thereby erased their distinctive experiences as well as their activism.”⁸⁶ Using multidimensionality, TWAIL scholars can recognize the relative privilege of formerly colonized African and Asian peoples and nations, who have achieved at least formal independence despite being economically subjugated within the international system. Conversely, indigenous peoples, particularly those residing in the United States, Canada, or other settler colonial nations, have not achieved any form of independence from their colonizers.

A TWAIL Approach to CRT Analysis

TWAIL scholars “have analyzed, deconstructed, and critiqued international legal doctrines such as sovereignty and traced the ways they have shaped imperialism in the contemporary global order.”⁸⁷ Their analysis uncovers how subordination—along the lines of race, color, and culture—occurs at the global level.

By bringing a TWAIL lens to their work, CRT scholars would better understand the United States as a colonial and imperial power that subordinates racially marginalized people and nations outside its borders. Some areas that would benefit from a shared TWAIL-CRT analysis are: the (colonial) status of Puerto Rico and its (racially marginalized) population; the ways in which the United States deployed international law to subjugate Black people under slavery; and the ways in which the United States racializes Muslims and other people of color with national security laws and policies, as well as in its overseas interventions in the Global War on Terror.⁸⁸

⁸⁶ *Id.* at 1635–36; see, e.g., Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law With Lessons From the Fourth World*, 14 *Or. Rev. Int'l L.* 131 (2012).

⁸⁷ Gathii, *supra* note 9, at 1642.

⁸⁸ *Id.* at 1642–47.

CASE STUDY: USING A CRT-TWAIL LENS TO ANALYZE MIGRATION AND (RACIAL) BORDERS

This section focuses on just one of the thematic areas explored at the UCLA Law convenings—migration. It highlights some of the UCLA Law Review and JILFA publications arising from the convenings in order to provide concrete examples of what a TWAIL-CRT lens can uncover about how race and empire operate within this international legal issue. Migration, which is often trans-national, is an important and significant body of study with a TWAIL-CRT lens. At both domestic and international levels, the law on migration is inherently racialized and connected to empire. Yet, international scholars have a lot of work to do to excavate what human rights mean in the context of migration. As Achiume has described, the dominant legal scholarship on borders suffers from “racial aphasia,” the inability to speak or think of race, and “colonial amnesia,” the deliberate forgetting of the colonial project.⁸⁹ In the context of migration, international law has underscored the racial contingency of human rights, and TWAIL and CRT scholars must interrogate what is possible within the confines of this legal regime.⁹⁰

⁸⁹ E. Tendayi Achiume, Professor of L., Alicia Miñana Chair in L., UCLA Sch. of L. & U.N. Special Rapporteur on Contemp. Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Address at the UCLA Critical Race Studies Program, Promise Institute for Human Rights, International and Comparative Law Program & Journal of International Law and Foreign Affairs Symposium: Critical Race Perspectives on Race and Human Rights: Transnational Re-Imaginings (Mar. 8, 2019); see also E. Tendayi Achiume, *Racial Borders*, Geo. L. J. (forthcoming 2022) (manuscript at 2, 30), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962563

⁹⁰ For more migration-related topics, see Maxine Burkett’s presentation on climate change and climate-induced migration at Maxine A. Burkett, Professor of L., U. Haw. at Mānoa, Address at the UCLA Critical Race Studies Program, Promise Institute for Human Rights, International and Comparative Law Program & Journal of International Law and Foreign Affairs Symposium: Critical Race Perspectives on Race and Human Rights: Transnational Re-Imaginings (Mar. 8, 2019), and her related research at: Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 Harv. L. Rev. 326 (2021); Maxine Burkett, *Speech: Climate Migration and the Deep Roots of Climate Justice*, 93 Temp. L. Rev. 653 (2021). See also E. Tendayi Achiume, *Race, Refugees and International Law*, in *The Oxford Handbook Of International Refugee Law* (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021).

In his article, **John Reynolds** used a TWAIL-CRT lens to analyze E.U. migration policies to uncover **Europe's "racial borders"** and the particular "racialized regional nationality" that the E.U. has produced.⁹¹ Looking concurrently at how race operates within and alongside European imperialism and neocolonialism, Reynolds argued that "international law's framing of a state of emergency as a threat to the life of the nation strategically motivates exclusion based on race, laundered through the prism of nationality. But even more so than in the context of conventional nation state nationality, in the European (Union) context, this has taken on the form of a racialized regional nationality."⁹²

Zooming in on the topic of racial governance, **Chantal Thomas'** article uncovered how **race functioned as a technology of empire**, as central to the creation and persistence of institutions of global economic hierarchy.⁹³ Thomas explained that the sovereign right to exclude non-citizens, which is a central principle of international law, "shapes the framework of labor migration in today's economy."⁹⁴ Despite an increasingly globalized economy, the regulation of sovereign borders—including in the context of migrant labor—has never been so widespread. Using a TWAIL-CRT lens, Thomas illustrated how the apparent neutrality of regulated borders, whose enforcement enables the exploitation of migrant labor while denying these people citizenship, in fact operates to perpetuate global inequality and particularly the subjugation of racialized people and nations of the Global South.

⁹¹ John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. Rev. 1768, 1772 (2021).

⁹² *Id.* at 1771–72.

⁹³ Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. Rev. 1860 (2021).

⁹⁴ *Id.* at 1882.

Bringing an **intersectional analysis** to the issue of migration, **Catherine Powell** uncovered how race and gender are integral to how borders and nations are constructed.⁹⁵ Centering her analysis on the U.S. immigration system, she demonstrated how the Trump Administration “shifted the border” inward or outward at various points, as a way of denying migrants their rights.⁹⁶ By characterizing Latina migrant women as irresponsible mothers of U.S. ‘anchor babies,’ they were situated “outside the law’s protection, as if they had not crossed the border.”⁹⁷ Conversely, by characterizing Latino and Muslim migrant men as “criminals” or “terrorists,” rather than migrants who have the right to seek asylum in the U.S., the Administration excluded them from U.S. territory and the protection of the law. In both cases, the Trump Administration “manipulate[d] the fluidity of borders, shifting them alternatively inward and outward to opportunistically suit his needs, based on stereotypes of motherhood and masculinity that are raced and gendered.”⁹⁸ This has, despite Trump, led to increased solidarity between racial and gendered groups.

Sherally Munshi’s article “**unsettled**” the very concept of a border that exists in international law.⁹⁹ She focused on the U.S. southern border—both the role it plays in today’s socio-political climate as well as its settler colonial formation—to defamiliarize and delegitimize the border, showing that the real problem is not unauthorized migration but the existence of the nation state itself. Munshi argued that unauthorized migration across the U.S. southern border is “a ‘crisis’ only because it confronts the nation state with the essential instability of our current world order, in which borders preserve and exploit inequalities produced by centuries of colonial capitalism.”¹⁰⁰ Reframed in this way, the unauthorized migrant should be understood as “a political agent, someone whose movement might lead us beyond the deadening impasses of border nationalism and colonial capitalism.”¹⁰¹

⁹⁵ Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 UCLA J. Int’l L. Foreign Affs. 133 (2020).

⁹⁶ *Id.* at 135.

⁹⁷ *Id.*


⁹⁸ *Id.* at 162.

⁹⁹ Sherally Munshi, *Unsettling the Border*, 67 UCLA L. Rev. 1720 (2021)

¹⁰⁰ *Id.* at 1724-25.

¹⁰¹ *Id.* at 1725.

SELECTED TAKEAWAYS FROM CONVENING PARTICIPANTS



Race is a central and defining feature of international law, not just an object of international law to be governed. It is neither a domestic problem nor an international problem. States employ the same forms of subordination and imperial governance within and outside of their borders.

- *Michael Fakhri*

The Black Lives Matter movement, and their open alliances with other racialized groups like Palestinians, Afro-Brazilians, and Indigenous peoples, has revived the possibility of transnational solidarity. The way that they are effectively using the UN system and mechanisms, including testifying before international bodies, is an example of how to use the international legal system to challenge the system and disrupt it from within.

- *Balakrishnan Rajagopal*

Centering race in TWAIL scholarship will require a lot of scholars working together with a trans-national approach and theorizing across national borders. We must be mindful of the voices we put forward. We must include the voices of newer scholars and the subjects of international law who often lack the platform we have.

- *Jaya Ramji-Nogales*

The racial contract, domestically and internationally, has always been upheld by violence. Whiteness is contingent on violence, and so is law. Much of the TWAIL-CRT scholarship is asking, who can move and who can use violence? Laws operate to enable movement and the use of violence by white bodies, while constraining movement and the use of violence by Black bodies.

- *Christopher Gevers*

Over time, there have been multiple “divide and conquer” moments – separating U.S. civil rights from the broader human rights movement, separating civil liberties from civil rights, classifying Mexican-American rights within the boxes of national origin or migration instead of racial oppression. The present challenge is to think about how to bring those conversations back together.

- *Laura E. Gómez*



**CONCLUDING NOTE:
THE UNRAVELLING OF
AMERICAN EMPIRE
AND HOPE FOR
TRANSNATIONAL
SOLIDARITY**

At the Race, Empire, and Human Rights convenings, CRT and TWAIL scholars analyzed the limits of international law, particularly the international human rights law regime, to dismantle structures of racial and colonial subordination in the United States and around the world. At the same time, the scholars remained hopeful about the emancipatory potential of law and a rights-based approach to racial justice. Further, they explored how the current moment of global crisis—including the unravelling of U.S. imperial power—creates an opening for CRT and TWAIL scholars to reimagine law and work towards transformative social change.

These complex themes, and the goals underlying the convenings, are explored in Aziz Rana's keynote¹⁰² and Vasuki Nesiah's response at the UCLA Law Review symposium.¹⁰³ As Nesiah describes:

"Rana tells [the story] of American empire and the tension between twin claims that are also braided in mutually reinforcing myth and muscle—namely, claims to empire on the basis of liberal humanitarianism, democracy, and human rights on the one hand, . . . and the so called war on terror on the other. As competitive co-travelers, these twinned sources of authority have been at the heart of American imperial might at home and abroad.

In Rana's account, the contemporary moment's unraveling of American empire is partly a story about how these contradictions came to a head—of how the authoritarianism of imperial hard power made the mythologies of soft power difficult to sustain. This is true for both dimensions of American empire that he identifies—namely, the settler colonial magical thinking about the promise of liberal constitutionalism as well as the country's aspirations for global primacy.

Rana's account does much to illuminate and clarify the scope of the American empire in this historical moment, while also offering a sharp and cogent articulation of the stakes of [CRT] and [TWAIL] in understanding and navigating present conditions."¹⁰⁴

¹⁰² Aziz Rana, *Keynote Speech*, UCLA Law Review Symposium 2020: *Law and Empire in the American Century*, 67 UCLA L. Rev. 1432 (2021); Achiume & Bâli, *supra* note 4, at 1391 n.13.

¹⁰³ Vasuki Nesiah, *An Un-American Story of the American Empire: Small Places, From the Mississippi to the Indian Ocean*, 67 UCLA L. Rev. 1450 (2021).

¹⁰⁴ *Id.* at 1452.

Responding to Rana, Nesiah's article "functions as a supplement [to Rana's keynote] — a supplement from the South if you will."¹⁰⁵ A cautionary note to CRT and TWAIL scholars, Nesiah warns that the analytic categories of race and colonialism can themselves be limited. She argues that "future of the world after the decline of American empire may not be only about the ashes of liberal humanitarianism—although it is that, too, of course—but also the ashes of received notions of the nation state, modernity, and development that came to define and often cabin postcolonial futures... [and to] rethink possible futures from the margins would require not only challenging Eurocentricism, but also revisiting, decentering, and reinventing established approaches to challenging Eurocentricism themselves."¹⁰⁶

The "genuine political opening" created by the unravelling of American empire calls for transnational solidarity to imagine new institutions and communities.¹⁰⁷ Grassroots activism has been doing the work of building community across borders. For example, Black Lives Matter has explicitly situated the U.S. racial justice movement within systemic forces of racial subordination and imperialism that exist elsewhere in the world, such as the oppression of Palestinians by Israel.¹⁰⁸

In this important moment, "we sit on the eve of the alternative futures of the world after American empire, a moment that is also the eve of the alternative future of CRT and TWAIL."¹⁰⁹

¹⁰⁴ *Id.* at 1452.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1457.

¹⁰⁷ Rana, *supra* note 102, at 1447.

¹⁰⁸ *Id.* at 1446.

¹⁰⁹ Nesiah, *supra* note 103, at 1460.

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