

REVIEW ESSAY

SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS
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I INTRODUCTION

As concerns over COVID-19 grew, an increasing number of Asian Americans as well as migrants of East Asian descent became the targets of violent racist attacks in the United States.¹ This stands in apparent tension with the narrative of the ‘model minority’ that has accompanied Asian Americans for the last few decades. Despite having been the victims of racial discrimination in the past, the story goes, Asian Americans overcame adversity and are now equally or more successful than their white fellow citizens in terms of income, educational achievement and family stability. It is perhaps telling that the opponents of affirmative action programs have recently supported Asian-American claimants in cases against ‘race sensitive’ admissions in higher education, claiming that they unfairly benefit African Americans or Latinx individuals to the detriment of Americans of Chinese, Japanese or Korean descent.²

The book at hand, as well as Natsu Taylor Saito’s scholarship more broadly, shows that this apparent tension between precarious belonging and the imaginary of the ‘model minority’ has been constitutive of the US as a racially stratified settler colony since its very founding.³ More importantly, her intervention offers

¹ See, eg, Andrew R Chow, ‘Violence against Asian Americans Is on the Rise — But It’s Part of a Long History’, *Time* (online, 20 May 2020) <<https://time.com/5834427/violence-against-asian-americans-history/>>, archived at <<https://perma.cc/M56J-8CT3>>.

² In 2019, Harvard University successfully defended its affirmative action program against the claim that it discriminates against Asian Americans: Richard Ford, ‘The Harvard Ruling Misses the Point’, *Boston Review* (online, 1 October 2019) <<http://bostonreview.net/class-inequality-law-justice/richard-ford-harvard-ruling-misses-point>>, archived at <<https://perma.cc/6EKJ-VMNB>>. Nevertheless, this action showed an important change of course by anti-affirmative action groups, which dropped Caucasian applicants in an effort to find more sympathetic ears by pitting people of colour against each other: see Kimmy Yam, ‘70% of Asian Americans Support Affirmative Action. Here’s Why Misconceptions Persist’, *NBC News* (online, 15 November 2020) <<https://www.nbcnews.com/news/asian-america/70-asian-americans-support-affirmative-action-here-s-why-misconceptions-n1247806>>, archived at <<https://perma.cc/W2BV-CYUT>>.

³ Saito has, for example, argued that the qualities attributed to Asian Americans as the ‘model minority’ (hardworking, industrious, family-oriented) are suspiciously similar to those attributed to Asian Americans when they are being demonised as the ‘yellow peril’ (unfairly competitive, cheating, secretive and cliquey): Natsu Taylor Saito, ‘Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity’ (1997) 4 *Asian Law Journal* 71, 71–3.

a detailed account of the role of law — both national and international — in the perpetuation of racism, as well as its usefulness for imagining and fostering our coexistence beyond the narrow confines of the settler state and liberal legalism. In the process, Saito challenges our very idea of a clear and self-evident delimitation between the ‘national’ and the ‘international’. She does so by conceptualising the relationship between the settler state and its minority populations as a colonial one and, by implication, one subject to international legal rules, including the right to self-determination. Overall, her engagement with the discipline of international law has two aspects. The first is contingent upon the particularities of the US legal system, and the second is structural and connected to the links between racism, land and labour both in the US and beyond. In regard to the former, Saito argues that international law — albeit not perfect — offers rules and remedies of greater value to the oppressed and exploited than US domestic law. In regard to the latter, she ‘stretches’ the realm of international law’s applicability by recovering a radical conceptualisation of racist oppression as colonialism and therefore as an international relationship.⁴ In this respect, Saito’s case is not simply a call for the US to follow international law but involves an implicit remaking of the discipline itself.

My reflection will proceed in three steps. First, I will situate Saito’s work within the broader framework of ‘critical race theory’ (‘CRT’) as it was developed in the US and the ambiguous relationship of the movement with critical international law and particularly with critical approaches that centre questions of imperialism and (secondarily) race. Secondly, I will summarise the main contributions of the reviewed publication with a particular emphasis on its contribution to our understanding of what is international law properly so-called. Finally, I will offer some thoughts about the future of research on international law and race/ism. My argument is that if we take seriously Saito’s claim that different forms of racialisation in settler colonies are linked to the imperatives of conquering and exploiting land and labour, it follows that a better understanding of race and international law requires us to concentrate on fields that are not commonly associated with race and racism. These include international trade and international investment law, as well as the law of international financial institutions and, more broadly, the laws governing debt, labour and property on a global level.

II SEPARATED AT BIRTH? CRITICAL RACE THEORY AND CRITICAL APPROACHES TO INTERNATIONAL LAW

Academic conferences are often tedious and stressful affairs. There was, then, something significant about the feelings of ease and familiarity in the room when, in March 2019, scholars affiliated with both the critical race studies and the Third World Approaches to International Law (‘TWAIL’) movements gathered at the University of California, Los Angeles School of Law. Organised by E Tendayi Achiume and Asli Bâli, the conference aimed to bring together two long-lost cousins who have been working on similar issues for decades without directly

⁴ I use ‘inter-national’ to denote relations between communities that are not reducible to interstate interactions.

engaging with each other.⁵ On the one hand, TWAIL scholars, including me, often work under the assumption that CRT is excessively focused on the particularities of the US, ignoring (or, at the very least, downplaying) questions of imperialism. On the other hand, I heard CRT scholars' concerns about TWAIL sidelining questions of race and racism or using postcolonial literature without always reflecting on its blind spots. It quickly became clear to me that this was a meeting unlike most others. Usually, speaking a common disciplinary and theoretical language only conceals our very real differences. In this case, we were separated by our training but united by our political commitments and sensibilities. After all, as many pointed out,⁶ many of us came from cultures that use the term 'cousin' somewhat liberally to denote connections fostered by choice and not necessarily by biology.

Indeed, if there is something bringing CRT and critical, especially Third Worldist, approaches to international law together, it is certainly not their common origin. On the one hand, CRT grew out of the critical legal studies ('CLS') movement in the US.⁷ Drawing from critical theory, structuralism and American legal realism, the CLS movement sought to attack legal formalism by arguing that law was fundamentally indeterminate and, therefore, supposedly objective determinations of its content, especially in the process of adjudication, were both logically incoherent and politically suspect.⁸ CLS made modest advances within US legal academia before being declared 'dead' by the mid-1990s.⁹ Even before the relative decline of CLS, however, the movement had split. Both feminists and legal scholars interested in questions of law and race criticised the predominance of white men within the movement, as well as what they saw as an overly abstract and sterile engagement with theory — notably structuralism — and a dismissal

⁵ The call for papers for the event is available at 'Critical Perspectives on Race and Human Rights: Transnational Re-Imaginings', *The University of New Mexico* (Web Document, 2018) <<http://race.unm.edu/assets/documents/2019-ucla-crs-call-for-papers-conference.pdf>>, archived at <<https://perma.cc/C36G-N9YV>>.

⁶ Many raised this point on that day, but I can clearly remember Michael Fakhri and Asli Bâli making comments along these lines.

⁷ See generally Fleur Johns, 'Critical International Legal Theory' (Research Series No 44, UNSW Law, University of New South Wales, 30 May 2018) 2–8.

⁸ See, eg, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) *Harvard Law Review* 1685; Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977); Karl E Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941' (1978) 62(3) *Minnesota Law Review* 265; Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harvard Law Review* 561; David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1986) 21(2) *New England Law Review* 209; Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Harvard University Press, 1997).

⁹ On the death and the afterlives of CLS, see Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17(4) *Law and Social Inquiry* 779; John Henry Schlegel, 'CLS Wasn't Killed by a Question' (2007) 58(5) *Alabama Law Review* 967; James Gilchrist Stewart, 'CLS Is Haunted! A Perspective on Contemporary Critical Legal Studies' (2020) 32(1) *Law and Literature* 135.

of the role of law and rights as tools of political struggle for the oppressed.¹⁰ This latter schism produced CRT, which has since been one of the most influential strands of the legal left in the US. In fact, some of the founding members of CRT, such as Derrick Bell, Kimberlé Crenshaw, Mari Matsuda and Patricia Williams, feature amongst the most cited US legal scholars of all time and have exerted considerable influence beyond academia.¹¹

Critical race theorists have argued that, far from being an aberration that is gradually being rectified through law, racism has been a constant in the history of the US and its legal system. Writing in the post-segregation era, they have gone to great lengths to show that, far from being ‘post-racial’, US law and courts have, in fact, perpetuated and legitimised patterns of racial domination and exploitation.¹² Furthermore, the CRT movement has challenged the style as well as the substance of legal scholarship. Departing both from doctrinal analysis and abstract theorisation, critical race theorists (along with feminist and Indigenous legal scholars) have often mobilised storytelling and narrative as a way of elucidating injustice and as a means of challenging what they see as male, white and middle-class aesthetic hegemony in law.¹³ In fact, CRT’s method has been as, if not more, controversial than its substantive critique of the law.¹⁴

Unsurprisingly, the unique experience of African Americans as descendants of enslaved people has been central to the work of CRT, including to the ongoing struggles for reparations.¹⁵ At the same time, the CRT network has been producing

¹⁰ See, eg, Mari J Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 323 (‘Looking to the Bottom’); Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); Gary Minda, ‘Neil Gotanda and the Critical Legal Studies Movement’ (1997) 4 *Asian Law Journal* 7; Mari Matsuda, ‘Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics’ in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions, and A New Critical Race Theory* (Temple University Press, 2002) 393.

¹¹ This notably includes the popularisation of the term ‘intersectionality’ and its prevalence within contemporary social justice movements, especially in the anglophone world: Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] *University of Chicago Legal Forum* 139.

¹² See, eg, Derrick A Bell Jr, ‘*Brown v Board of Education* and the Interest-Convergence Dilemma’ (1980) 93(3) *Harvard Law Review* 518; Kimberlé Williams Crenshaw, ‘Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law’ (1988) 101(7) *Harvard Law Review* 1331; Neil Gotanda, ‘A Critique of “Our Constitution Is Color-Blind”’ (1991) 44(1) *Stanford Law Review* 1; Mari J Matsuda, ‘Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction’ (1991) 100(5) *Yale Law Journal* 1329 (‘Voices of America’); Kendall Thomas, ‘*Rouge et Noir* Reread: A Popular Constitutional History of the Angelo Herndon Case’ (1992) 65(6) *Southern California Law Review* 2599; Margaret E Montoya, ‘*Máscaras, Trenzas, y Greñas*: Un/Masking the Self while Un/Braiding Latina Stories and Legal Discourse’ (1994) 17 *Harvard Women’s Law Journal* 185.

¹³ For an exposition and defence of ‘narrative jurisprudence’ in CRT, see Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87(8) *Michigan Law Review* 2411; Mari J Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87(8) *Michigan Law Review* 2320.

¹⁴ The prominent constitutional law and CLS scholar Mark Tushnet penned an 85-page denouncement of the ‘narrative jurisprudence’ method associated with CRT and feminist legal studies in the early 1990s: Mark Tushnet, ‘The Degradation of Constitutional Discourse’ (1992) 81(2) *Georgetown Law Journal* 251.

¹⁵ See, eg, Matsuda, ‘Looking to the Bottom’ (n 10); Rhonda V Magee, ‘The Master’s Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse’ (1993) 79(4) *Virginia Law Review* 863.

legal work that shows that while the oppression of African Americans has been historically unique, it is by no means an isolated case in US history. Rather, all groups that have been racialised as ‘non-white’ have faced various forms of legalised discrimination, ranging from immigration restrictions, exclusion from citizenship, exclusion from the right to property and a quasi-legalised tolerance of violence in the form of both police brutality and unpunished hate crime.¹⁶

CRT might be highly critical of both the US legal system and its legal academy, but at the same time, it has generally remained within their confines. Indeed, critical race scholars have focused almost exclusively on domestic US law, with little preoccupation with international or transnational legal structures and their role in race-making and racial oppression. Importantly, the fact that at least since the mid-20th century the US has been a major (and, for decades, the only) global imperial power has not been the object of close scrutiny or theorisation by CRT. Furthermore, adjudication, especially by the US Supreme Court, has been central in CRT’s scholarly analyses and legal struggles.

In this respect, international law has generally been an afterthought for CRT scholars. When issues of empire are discussed, they often concern the territorial expansion of the US both in the mainland and beyond (including Hawai’i or Puerto Rico).¹⁷ This ‘blind spot’ has created a distance between CRT and critical international legal scholars, including those affiliated with the TWAIL movement. Most genealogies of TWAIL link the movement to Third World(ist) lawyers who have been active since decolonisation (such as George Abi-Saab, Mohammed Bedjaoui, RP Anand or Richard Falk).¹⁸ These lawyers were more often than not affiliated with postcolonial states’ governments, and they combined legal critique with a contributionist ethos seeking to change the content of international law and to reform its lawmaking processes.¹⁹ The contemporary iteration of TWAIL is,

¹⁶ The literature on the topic is vast: see, eg, Matsuda, ‘Voices of America’ (n 12); Robert S Chang, ‘Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space’ (1993) 81(5) *California Law Review* 1241; Elvia R Arriola, ‘LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids’ (1996) 28(2) *University of Miami Inter-American Law Review* 245; Sumi Cho and Robert Westley, ‘Critical Race Coalitions: Key Movements That Performed the Theory’ (2000) 33(4) *UC Davis Law Review* 1377; Margaret E Montoya, ‘A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action’ (2001) 12(2) *Berkeley La Raza Law Journal* 159; Natsu Taylor Saito, ‘Rebellious Lawyering in the Courts of the Conqueror: The Legacy of the *Hirabayashi Coram Nobis* Case’ (2012) 11(1) *Seattle Journal for Social Justice* 89.

¹⁷ Imani Perry, ‘Of Desi, J Lo and Color Matters: Law, Critical Race Theory the Architecture of Race’ (2005) 52(1–2) *Cleveland State Law Review* 139; Sylvia R Lazos Vargas, ‘History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations circa the Spanish American War, 1896–1900’ (2001) 78(4) *Denver University Law Review* 921.

¹⁸ This group of scholars is often referred to as TWAIL I. The origin of this genealogy can be traced in Antony Anghie and BS Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2(1) *Chinese Journal of International Law* 77. For an eloquent account of the achievements and disappointments of early Third World lawyers, see Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1997–98) 16(2) *Wisconsin International Law Journal* 353.

¹⁹ James Thuo Gathii has argued that the contributionism of TWAIL I ‘overstates the participation by diverse constituencies in the creation of global norms, and understates the biases and blind spots that evidence the interests that prevail at crucial stages of implementation of international legal norms’: James Thuo Gathii, ‘TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography’ (2011) 3(1) *Trade, Law and Development* 26, 39.

however, by and large a university-centred phenomenon. As efforts to reform international law failed and postcolonial governments turned increasingly authoritarian and abandoned their (diverse) visions of remaking the domestic and international orders to benefit the oppressed and dispossessed, structural critiques of international law became disassociated from governmental priorities. Academic critique and affiliation with new social movements structure TWAIL's orientation. Even though the US, and especially Harvard Law School, became the training ground for many influential TWAILers (including Antony Anghie, Vasuki Nesiah, Liliana Obregón, James T Gathii and Makau W Mutua), the movement has been international both in its organisational practices and in its scholarly concerns. Even though TWAIL encompasses a broad range of theoretical commitments and sensibilities, it is held together by some core assumptions. First, TWAIL scholars assert that imperialism, which is understood to involve not only direct/military domination but also cultural hegemony and economic exploitation,²⁰ has shaped some core disciplinary concepts. These include 'sovereignty', 'the responsibility to protect' and 'territory'. Additionally, imperialism still exerts considerable influence upon the doctrines, protocols and aesthetics of the field.²¹ Secondly, and relatedly, TWAIL scholarship centres questions of history and avoids drawing a firm line between the past and the present of the discipline.²² Given the structure of the international legal order, as well as TWAIL's emphasis on lawmaking from below and on the importance of institutionally diffused practices of international lawmaking,²³ adjudication occupies limited space within TWAIL's canon. Finally, even though questions of race and ethnicity are raised,²⁴ there has been no

²⁰ The concept of imperialism is nevertheless under-theorised in TWAIL scholarship, as both Robert Knox and James Thuo Gathii have pointed out. In particular, the relationship between political, economic and cultural hegemony remains contested, albeit often in an unacknowledged way: James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9(1) *European Journal of International Law* 184; Robert Knox, 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law' (PhD Thesis, London School of Economics and Political Science, 2014).

²¹ See especially Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16(1) *Leiden Journal of International Law* 1; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

²² For a defence of TWAIL's engagement with history, see, eg, Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (Working Paper 2012/2, Institute for International Law and Justice, University of Melbourne, June 2012).

²³ See, eg, B Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003); Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1(1) *London Review of International Law* 63; Luis Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) 2(1) *London Review of International Law* 3; Ntina Tzouvala, 'A False Promise? Regulating Land-Grabbing and the Post-Colonial State' (2019) 32(2) *Leiden Journal of International Law* 235.

²⁴ See, eg, Makau Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider' (2000) 45(5) *Villanova Law Review* 841; John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press, 2017); Adrian A Smith, 'Migration, Development and Security within Racialised Global Capitalism: Refusing the Balance Game' (2016) 37(11) *Third World Quarterly* 2119; Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press, 2016); Souheir Edelbi, 'Making Race Speakable in International Criminal Law: Review of Lingaas' The Concept of Race in International Criminal Law', *TWAILR: Reflections* (online, 14 April 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/>>, archived at <<https://perma.cc/G6TR-JZCR>>.

systematic interrogation of the intersections between international law, race and empire.²⁵

So far, I have sketched an encounter that has not materialised yet, as TWAIL and CRT scholars orbit each other without ever quite meeting. I will return to this theme in Part III of my essay. For now, it suffices to note the distinctiveness of Saito's work in regard to this so-far missed encounter. Firmly placed within the CRT canon that focuses on the US, Saito has nonetheless been consistently interested in bringing together issues of domestic racial subordination and international law and politics. Two major themes run through her work and culminate in the reviewed book. First, Saito has argued that it is both conceptually impossible and politically undesirable to distinguish between US racism at home and abroad. Her argument is that both domestic and foreign policy in the US have been premised on functions of 'othering',²⁶ while domestic and international racial subordination reinforce each other both ideologically and materially. Since Saito made this argument in 1998, scholarship has indeed documented extensively how techniques of imperial policing that were first deployed overseas during the Cold War later informed militarised and racialised policing in the US,²⁷ as well as the ways in which colonial warfare against Native Americans at home has subsequently shaped US counterterrorism abroad.²⁸ Besides being historically accurate, this interlinking also has a long pedigree. The willingness to draw these links between US imperialism overseas and racism at home was historically one of the major fault lines between the liberal and the radical wings of the civil rights movement. Martin Luther King Jr's decision to speak out against the Vietnam War drove a wedge between him and his liberal allies, who insisted that the struggle for equal rights should be wholly subordinated to US patriotism.²⁹ In terms of law, this political distinction manifested itself through a deferential emphasis on constitutionally protected civil rights (in the case of liberal anti-racists) and

²⁵ Marxist scholars working within and around TWAIL have probably got the closest in articulating a coherent theory about the relationship between law, race and empire by centring the role of capitalism as an organising force for all three: Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4(1) *London Review of International Law* 81 ('Valuing Race').

²⁶ Natsu Taylor Saito, 'Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States' (1998) 1(1) *Yale Human Rights and Development Law Journal* 53, 56 ('Crossing the Border');

This article explores some of the ways in which US foreign policy affects the treatment of those peoples within the United States who are identified as "other" based on socially constructed notions of race, ethnicity, or national origin and how, in turn, the treatment of such groups within the United States influences our foreign policy.

²⁷ See, eg, Julian Go, 'The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century' (2020) 125(5) *American Journal of Sociology* 1193; Stuart Schrader, *Badges without Borders: How Global Counterinsurgency Transformed American Policing* (University of California Press, 2019).

²⁸ On the impact of the 'Indian Wars' on the tactics and imaginaries of the US military, see Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Beacon Press, 2014) 192–5.

²⁹ On the alignment of the National Association for the Advancement of Colored People with the US Cold War agenda and their efforts to suppress radical voices within the civil rights movement, see Gerald Horne, 'Who Lost the Cold War? Africans and African Americans' (1996) 20(4) *Diplomatic History* 613, 621–3. On the overwhelmingly negative reaction to King's denunciation of the Vietnam War by the liberal press and moderate supporters of the civil rights movement, see Henry E Darby and Margaret N Rowley, 'King on Vietnam and Beyond' (1986) 47(1) *Phylon* 43, 49–50.

internationally protected human rights (in the case of radical anti-racists).³⁰ As Saito observes:

These leaders recognized that, in many respects, international law provides more protection for racial and ethnic minorities than does domestic law, particularly regarding economic, social and cultural rights and the rights of ‘peoples’ to self-determination.³¹

This leads me to the second theme of her work: the usefulness of international law, and especially of international human rights law, in the struggles against racism at home. Saito joins a long tradition of critical race scholars in the US who insist on the potential of (human) rights as emancipatory tools.³² It is important to note that she arrives at this conclusion through a markedly different route in comparison to (neo)liberal internationalists, who arguably dominate the field of international human rights today.³³ Indeed, her affirmation of human rights arises out of her suspicion of US constitutional patriotism, which she sees as fundamentally unhelpful to racially subordinated people in the US, not least because of her longstanding intuition that there is something fundamentally international about the relationship between these groups and the US state. The right to self-determination is — provocatively — mentioned along with political and social rights as a distinguishing feature of the international legal order and, in fact, forms the backbone of the reviewed book’s engagement with international law.³⁴

This is a position that is not always easy to reconcile with the sensibilities of critical international legal scholarship. Saito’s emphasis on US exceptionalism when it comes to international law is persuasive on many levels, especially in the current political context.³⁵ However, TWAIL’s emphasis on the synergies between international law and imperialism, as well as its suspicion that the figure of the ‘human’ in human rights is always already gendered and racialised, is in tension with the centring of human rights law as a response to US racism.³⁶ This is a point to which I will return in Part IV. For now, it suffices to note that Saito’s own work offers a window to a more textured understanding of the relationship between international law, race and property. In ‘From Slavery and Seminoles to AIDS in South Africa’, Saito examines the complex and contradictory role of

³⁰ On the turn to human rights as a manifestation of Malcolm X’s internationalism, see Moshik Temkin, ‘From Black Revolution to “Radical Humanism”: Malcolm X between Biography and International History’ (2012) 3(2) *Humanity* 267. On early attempts to articulate the demands of radical black Americans in the idiom of human rights, see Robert Knox and Ntina Tzouvala, ‘Looking Eastwards: The Bolshevik Theory of Imperialism and International Law’ in Kathryn Greenman et al (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, 2021) 27, 45–51.

³¹ Saito, ‘Crossing the Border’ (n 26) 77.

³² For the most prominent rebuttal of the rights-scepticism that characterised the legal left in the US, see Williams, *The Alchemy of Race and Rights* (n 10).

³³ More on this in Part III of this essay.

³⁴ Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (New York University Press, 2020) 199–200 (‘*Settler Colonialism*’).

³⁵ ‘US officials have been intensely involved in drafting all of the major human rights treaties promulgated by the United Nations, but the United States has been notably reluctant to commit to their enforcement’: *ibid* 183.

³⁶ See Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42(1) *Harvard International Law Journal* 201; Vasuki Nesiiah, ‘The Ground beneath Her Feet: “Third World” Feminisms’ (2003) 4(3) *Journal of International Women’s Studies* 30.

international law in the expansion of the concept of property to cover, first, human beings and, subsequently, patents over life-saving medicines.³⁷ The image of international law in this work is a fundamentally ambiguous and contradictory one. On the one hand, the US federal government and its states violated the law in their efforts to maintain the institution of slavery, often violating the sovereignty of their neighbours in the pursuit of fugitive enslaved people.³⁸ At the same time, international treaties have enabled the US to perpetuate and defend its particular form of racial capitalism — for example, through the provision of extensive protections to intellectual property even if this causes thousands of Africans to die from AIDS.³⁹ In the realm of political economy, the relationship between international law and racism reveals itself to be co-constitutive as much as it is antagonistic.

III SETTLER COLONIALISM—RACE—LAW

It is precisely through a centring of political economy that Saito organises the book at hand. The first nine chapters provide a detailed account of the relationship between law, race and political economy in the US. Two claims hold this extensive overview together. First, racism in the US cannot be separated from the original sin of settler colonialism that structures its legal and political system at a fundamental level. Through a close engagement with literature on settler colonialism, Saito notes that its distinctiveness as a social formation is that ‘settler colonists plan not only to profit from but also occupy permanently the territories they colonize’.⁴⁰ This understanding of settler colonialism not as an event but as a structure sheds a different light on the legal systems both of the US and of other settler colonies.⁴¹ Struggles over land shape the legal system of these states, which need to perpetuate the dispossession of their First Nations while also maintaining the collective amnesia and continuous denial of the dubious legal foundations of state sovereignty. The ‘elimination of the native’ becomes a central function of the

³⁷ Natsu Taylor Saito, ‘From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law’ (2000) 45(5) *Villanova Law Review* 1135.

³⁸ *Ibid* 1145–60.

³⁹ *Ibid* 1186:

Slavery, as institutionalized in the United States, was a system in which large economic interests bought, held and sold people as property. The resources of the federal government were employed to protect that investment, despite the knowledge that millions of people would suffer and die as a result of defining and protecting property interests in this manner. Recent decisions to use the resources of the federal government to protect property in AIDS drugs are having a similar effect.

⁴⁰ Saito, *Settler Colonialism* (n 34) 45.

⁴¹ The understanding of settler colonialism as a structure originates in Patrick Wolfe’s groundbreaking work:

When invasion is recognized as a structure rather than an event, its history does not stop — or, more to the point, become relatively trivial — when it moves on from the era of frontier homicide. Rather, narrating that history involves charting the continuities, discontinuities, adjustments, and departures whereby a logic that initially informed frontier killing transmutes into different modalities, discourses and institutional formations as it undergirds the historical development and complexification of settler society.

Patrick Wolfe, ‘Settler Colonialism and the Elimination of the Native’ (2006) 8(4) *Journal of Genocide Research* 387, 402.

settler state, and the legal system operates as a useful means towards this end.⁴² Chapter 4 is dedicated to a careful exposition of these techniques, which range from physical elimination through state and private violence, disease or sterilisation to forced removal, internment, assimilation and even recognition. The inclusion of recognition and assimilation amongst these elimination techniques may raise eyebrows, especially from liberal defenders of (particular forms of) recognition. The idea is, however, directly drawn from the theory and practice of the most radical strands of Indigenous political thought and activism.⁴³ Saito argues that the US state apparatus has used statist definitions of Indigeneity to bring about ‘the numeral reduction of the population’, frequently co-opting Native authorities in this process.⁴⁴ More fundamentally, she suggests that, in its predominant form, recognition transforms ‘hundreds of nations into a single “race”, which is then categorised as a “minority group” within the settler body politic’.⁴⁵ That is, recognition in the US has been inseparable from the subsumption of Indigenous political, cultural and legal subjectivity to the structures of the state or, in other words, has functioned as a way of transforming inter-national relations into national (legal) affairs.

The second major claim of the book is that we can only understand the particular forms of racialisation of different groups in the US if we examine the specific forms of labour and resource exploitation that were enabled through this racialisation. Therefore, the settler drive to appropriate Native land required the physical and conceptual disappearance of Indigenous peoples, while the hyper-exploitation of slave labour and, after the Civil War, of nominally free African Americans required the expansion of the category of ‘blackness’. These divergent political economies were reflected in the ways that law defined Indigeneity and blackness. In regard to the former, ‘the settler state has counted Indigenous people “out of existence” ... by requiring them to prove a particular “degree of Indian blood” — usually one-quarter or one-half — to be recognized as Indians’.⁴⁶ In stark contrast, the desire for more slaves led to expansive legal definitions of ‘blackness’, as well as to the systematic rape and impregnation of enslaved black women.⁴⁷ Furthermore, the ‘one drop’ rule persisted well after the Civil War, leading to the classification as black of individuals with remote African ancestry who were, as a result, subject to slavery or, later, institutionalised discrimination.⁴⁸ At the same time, the abolition of slavery and, later on, de-industrialisation led to African Americans being seen as ‘surplus population’, and therefore the

⁴² Ibid.

⁴³ See especially Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014); J Kēhaulani Kauanui, *Paradoxes of Hawaiian Sovereignty: Land, Sex, and the Colonial Politics of State Nationalism* (Duke University Press, 2018); Nick Estes, *Our History Is the Future: Standing Rock versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso, 2019).

⁴⁴ Saito, *Settler Colonialism* (n 34) 70. ‘By “allowing” tribal authorities some discretion with respect to membership while allocating “benefits” in lump-sum fashion, the settler state has incentivized tribal governments to pare down their membership rolls to maximise benefits for remaining members’: at 71.

⁴⁵ Ibid 71.

⁴⁶ Ibid 70–1.

⁴⁷ Ibid 88–9.

⁴⁸ F James Davis, *Who Is Black? One Nation’s Definition* (Pennsylvania State University Press, 2001).

reproductive capacity of black women became once again the site of state intervention either through (forced) sterilisations or through the incentivisation of birth control by means of welfare provision or even the carceral system.⁴⁹

Similarly, Chapters 7 and 8 concentrate on the subordination of ‘others of color’. Challenging the narrative of the US as a ‘nation of migrants’, Saito reminds us that apart from Indigenous Nations and enslaved Africans, millions were brought forcibly under US jurisdiction and not through a pursuit of the ‘American dream’.⁵⁰ Native Alaskans and Native Hawai’ians, Mexicans inhabiting Texas and the territories incorporated into the US after the 1848 Mexican–American War, Puerto Ricans, Filipinas/os and others did not cross the border, but rather the border moved over them as the US expanded its territorial reach during the 19th century.⁵¹ Others arrived voluntarily, but they were never granted equal access to the nation’s resources and opportunities, even as they participated in and often ‘whitewashed’ the project of settler colonialism. One juridical technique that the book singles out is the exclusion of newcomers from citizenship in ways that reinforce their status as precarious labourers who can be ‘imported’ and expelled in accordance with the needs of their employers.⁵² Even worse, a ‘presumption of foreignness’ constantly follows non-white US residents regardless of their citizenship status. The implications of this presumption vary. Law professor Pat K Chew recounts how she gets repeatedly complimented for her fluency in English, even though her Chinese ancestors arrived to the US more than a century ago.⁵³ Much more consequentially, both past and present mass deportations often target people of colour who are nonetheless US citizens.⁵⁴ This presumption of foreignness reached its apogee with the internment of US citizens of Japanese descent during the Second World War and the affirmation of the constitutionality of this practice by the US Supreme Court.⁵⁵

Having detailed the multi-layered character of racial subordination in the US, Saito then explores the role of law as a tool for contestation and change. Chapter 9 is dedicated to a careful deconstruction of the conviction that ‘any vestiges of discriminatory treatment are best addressed through legal enforcement of the Constitution’s guarantees of due process and equal protection’.⁵⁶ The book at hand departs from this orthodoxy, and it justifies this departure on both juridical and political grounds. In regard to the former, Saito argues that US constitutional jurisprudence has developed sophisticated techniques to foreclose the possibility

⁴⁹ Saito, *Settler Colonialism* (n 34) 107:

[G]overnmental policies have penalized women on welfare for having more children and provided public funding for sterilization but not other forms of birth control. After Norplant, a long-term contraceptive, was approved in 1990, women were offered financial incentives or decreased jail time in exchange for its use.

⁵⁰ *Ibid* 112.

⁵¹ On the largely forgotten history of the US’s territorial empire, see Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* (Farrar, Straus and Giroux, 2019).

⁵² Saito, *Settler Colonialism* (n 34) 123.

⁵³ Pat K Chew, ‘Asian Americans: The “Reticent” Minority and Their Paradoxes’ (1994) 36(1) *William and Mary Law Review* 1, 33. On language and accent and their intersections with US racism and democracy, see Natsu Taylor Saito, ‘“Lift Every Voice”: Mari Matsuda’s Jurisprudence of Antisubordination’ (2012) 18(1) *Asian Pacific American Law Journal* 51.

⁵⁴ Saito, *Settler Colonialism* (n 34) 137.

⁵⁵ *Ibid* 150.

⁵⁶ *Ibid* 154.

of truly emancipatory engagements with the law. These include the plenary power doctrine,⁵⁷ an ever-narrowing understanding of equal protection⁵⁸ and assimilationism.⁵⁹ More fundamentally, a strategy based on the US Constitution ‘would come at the cost of eliminating Indigenous identity and rights, as well as the right of all other peoples to self-determination’.⁶⁰ In other words, heavy reliance on the Constitution reifies the settler state and ratifies narratives about its adaptability and progressive outlook. This emphasis on the Constitution as a site of struggle in turn relies on an understanding of past injustices as ‘inadvertent rather than constitutive’.⁶¹ For Saito, the price of assimilation and cooption is simply too high to pay, even if they facilitate temporary victories.⁶²

In contrast, Chapters 10 and 11 offer a much more positive account of international law, especially human rights. Saito acknowledges the limited effectiveness of international human rights law, but she nonetheless insists that it can operate as a useful tool for the progressive re-imagining of social coexistence.⁶³ This affirmation of the value of international law is, however, neither romantic nor unconditional. Actually existing sovereignty for formerly colonised peoples turned out to be a doubled-edged sword, since ‘colonized peoples — like American Indian nations — ... were now deemed to have had just enough sovereignty to alienate their natural resources’.⁶⁴ Nevertheless, international law is not rejected altogether. Rather, parts of it, notably the right to self-determination, are singled out for their emancipatory potential. Furthermore, Chapter 10 also stresses the availability of a broad range of remedies under international law and the marked difference between this restitutive approach and ‘[t]he US legal system [which] starts from the presumption that most legally cognizable injuries can be redressed with money’.⁶⁵ Saito juxtaposes this approach to the jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights, noting that both bodies have ordered a broad range of legal remedies for human rights violations, including reparations, publication of the judgment, public acknowledgement of responsibility and imposition on states of an obligation to review their legislation and administrative practices in order to ensure future compliance.⁶⁶ For Saito, international human rights law provides much broader protection to the oppressed in comparison to the US Constitution, a fact that partly explains why the US courts have been so resistant to its influence.⁶⁷

Saito’s turn to ‘the international’ draws from the long history and contemporary practice of Indigenous social movements as well as of the movements of other racialised peoples in the US, who have turned to ‘the international’ both for tactical

⁵⁷ Ibid 155–8.

⁵⁸ Ibid 158–63.

⁵⁹ Ibid 163–5.

⁶⁰ Ibid 155.

⁶¹ Ibid 28.

⁶² In slightly different terms, tactical legal choices should not undermine our strategic goals of comprehensive social transformation: Robert Knox, ‘Strategy and Tactics’ (2010) 21 *Finnish Yearbook of International Law* 193.

⁶³ Saito, *Settler Colonialism* (n 34) 166.

⁶⁴ Ibid 189.

⁶⁵ Ibid 176.

⁶⁶ Ibid 178–81.

⁶⁷ Ibid 183–5.

reasons and as a way to assert their sovereignty and to build solidarities that transcend the narrow confines of the nation-state. In the realm of legal theory, this book should be read alongside a growing literature that rethinks the traditional distinctions between the 'national' and the 'international'. Indigenous jurisprudence has been at the forefront of this re-imagination by asserting that the relationships between settler states and their populations should be conceived as fundamentally international.⁶⁸ In this context, Indigenous legal scholars have shown suspicion towards individualistic rights claims or the minoritisation of Indigenous peoples, and they have rather emphasised modes of legal engagement that reaffirm their sovereign status and ability to make law, besides being subjected to it.

This 'troubling' of the delimitation between the national and the international also resonates more broadly. In a recent intervention, Achiume has argued that past and present imperial links between the Global North and the Global South necessitate a rethinking of migration and the laws that govern it.⁶⁹ More specifically, she has questioned the widespread assumption that the people of the South are 'political strangers' in the North and therefore can only claim the right to cross the border in exceptional circumstances.⁷⁰ This idea of 'migration as decolonization' challenges the self-evidence of the nation-state, all the while attempting to mobilise global interconnectedness to benefit the oppressed.⁷¹ Achiume has not been alone in this pursuit. Adom Getachew has recently provided a novel reading of decolonisation not simply as a process of proliferation of the nation-state but also as a failed attempt to reconfigure the international (legal) order. *Worldmaking after Empire: The Rise and Fall of Self-Determination* documents the fundamentally internationalist outlook of nationalist Third World leaders, with sovereignty acting as a first step toward the reconfiguration of international relations.⁷²

⁶⁸ See, eg, Robert A Williams Jr, 'Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace' (1994) 82(4) *California Law Review* 981; Ward Churchill and Sharon H Venne (eds), *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians* (South End Press, 2004); Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Report, 2006); Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' (2016) 44(3) *Federal Law Review* 337. Amar Bhatia has suggested that critical international legal histories/theories would benefit from a sincere engagement with Indigenous international laws: Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14(1) *Oregon Review of International Law* 131.

⁶⁹ E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) *Stanford Law Review* 1509.

⁷⁰ *Ibid* 1529:

[L]iberal political theory and international law come together to reinforce the normativity of national territorial borders, which double as political borders firmly closed to the economic migrant. Theory and law normalize, and arguably even sanctify, the national exclusion of economic migrants and other nonnationals, whom they designate as political strangers.

⁷¹ 'Rather than being political strangers to First World nation-states, Third World persons are, in effect, political insiders, and for this reason, First World nation-states have no right to exclude Third World persons': *ibid* 1549.

⁷² Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press, 2019).

The book at hand is in direct and indirect conversation with these efforts to rethink, challenge and provincialise the state and its self-evidence in domestic and international law alike. In my mind, Saito's principal contribution is her commitment to thinking about race and racism in the US in international terms. In this sense, the book at hand is of interest not only to US legal scholars or to international lawyers interested in race/ism but also to anyone interested in doing legal and political work that questions the distinction between the national and the international and in building solidarities that transcend the nation-state. This intuition that Saito brings to the table is particularly valuable in our political moment. As reactions against globalised capitalism often assume the form of nationalist, nativist and racist solidarities, the book at hand encourages us to reorient our thought in ways that transcend both the nation-state and the geographies of global capitalism. In the next and final Part, I will further reflect on the generative potential of this core contribution and on the ways that it can come to bear on our engagement with international law.

IV INTERNATIONAL LAW BETWEEN RACE AND POLITICAL ECONOMY

As noted above, a major theoretical premise that keeps this rich book together is Saito's refusal to turn race and racism into metaphysical, transhistorical concepts. Rather, the author goes to great lengths to show how specific forms of racialisation originate in different modes of exploitation and dispossession. This move does not involve a reduction of race to class but rather a clear understanding and exposition of the co-constitution of the two.⁷³ These carefully crafted connections between race and political economy could also help us think about international law, since the book at hand largely brackets questions of political economy when it shifts its attention to international law. Even though Chapters 10 and 11 acknowledge the imperial origins of international law, the field is generally portrayed as an unambiguous ally of racialised peoples, rather than a double-edged sword that can enable significant victories but also restrain or even antagonise struggles for meaningful racial justice. In this Part, I seek to raise one objection to the embrace of international law and human rights and, perhaps more importantly, sketch one potential avenue for re-evaluating their promise and perils.

First with the objection: one of the most exciting aspects of Saito's project is her turn to the radical movements of the 1960s and 1970s, which did not struggle for non-discrimination in regard to the existing status quo but rather put forward comprehensive emancipatory visions and, in so doing, 'identified themselves, to some degree or another, with national liberation and anti-colonial struggles in Africa, Latin America, and Asia'.⁷⁴ The turn of these movements to international law and institutions needs to be understood in this context. The decolonisation process resulted in postcolonial states and the socialist block commanding a majority in the UN General Assembly. Left-leaning movements across the world also placed emphasis on the influence of the Soviet Union within the UN, which, in their eyes, differentiated the new international legal order from its

⁷³ For the most developed account of this co-constitution in international legal scholarship, see Knox, 'Valuing Race' (n 25).

⁷⁴ Saito, *Settler Colonialism* (n 34) 17.

predecessors.⁷⁵ The emergence of influential Third World leaders in the stage of global politics gave movements for racial justice both a blueprint for political action and useful allies in the international scene.

It was in this context of transnational leftist euphoria and Third Worldist power that international law and institutions emerged as sites of contestation and creativity. This process of challenge and innovation involved a broad range of international legal fields and concepts and culminated in the efforts to establish a New International Economic Order ('NIEO') in the early 1970s.⁷⁶ The NIEO relied on the presumption that issues of poverty and underdevelopment in the Third World were neither cultural nor endogenous, but rather resulted from the persistence of unjust and exploitative relationships between the metropolises and their formal colonies.⁷⁷ Therefore, a radical restructuring of international law was required in order to bring about a more just and equitable international economic order. However, by the 1980s, the NIEO was over, as was Third Worldism as a political project of collective liberation.⁷⁸ Explosive levels of sovereign debt rendered many postcolonial, especially Latin American, states vulnerable to neoliberal structural adjustment promoted by the World Bank and the International Monetary Fund.⁷⁹ At the same time, calls for postcolonial solidarity could not

⁷⁵ William L Patterson, the black communist lawyer who authored one of the early petitions to the United Nations on behalf of African Americans, summarised this optimistic spirit:

Through the moral, economic, political and ideological power of the new emerging world of socialism, through the national liberation movements of Africa, Asia and Latin America, both the composition of the UN and its character are changing.

William L Patterson, 'Foreword to the New Edition' in William L Patterson (ed), *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government against the Negro People* (International Publishers, 1970) vii, x.

⁷⁶ According to Getachew, the NIEO was the apogee of the Third World's efforts to use sovereignty to reconfigure the international legal, economic and political order: Getachew (n 72) ch 5.

⁷⁷ On the political and economic foundations and demands of the NIEO, see *ibid* 160–71.

⁷⁸ Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (Verso, 2014) 1:

The Third World was not a place; it was a project. Galvanized by the mass movements and by the failures of capitalist mal-development, the leaderships in the darker nations looked to each other for another agenda. Politically they wanted more planetary democracy. No more the serfs of their colonial masters, they wanted to have a voice and power on the world stage.

On the demise of the NIEO and Third Worldism, see Getachew (n 72) 180:

As the conditions that had made these commitments viable dissipated, their political purchase also declined. Emblematic of this emptying of the promise of self-determination was Michael Manley's return to the position of prime minister. Having lost his 1980 reelection as Jamaica still reeled from the consequences of the debt crisis and structural adjustment, Manley assumed the office again in 1989. Converted to the neoliberalism he had resisted in the late 1970s, the erstwhile democratic socialist now insisted, 'If you want a really dynamic, effective economy, the only damn thing you can do is to pursue the market logic completely. ...'

⁷⁹ Manuel Pastor, Jr, 'Latin America, the Debt Crisis, and the International Monetary Fund' (1989) 16(1) *Latin American Perspectives* 79; Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6(1) *Humanity* 1, 8.

rectify the very real divergence of material interests within and amongst Third World states.⁸⁰

The point I want to raise through this diversion is simple: the political conditions that encouraged radical movements to put their faith in international law and institutions have since been eclipsed. This does not at all mean that internationalism is misguided, but rather that international law and institutions are not necessarily the sites where this internationalism is articulated. Nick Estes, a citizen of the Lower Brule Sioux Tribe, has recently provided a comprehensive overview of Indigenous internationalism in Turtle Island, which involves working with, against and beyond international law.⁸¹ Estes puts forward the concept of ‘intercommunalism’, as articulated by the Black Panther Party, as one that also captures the radical praxis of Indigenous peoples beyond the confines of the nation-state.⁸²

In other words, if national law is not the answer, international law is not necessarily either. Saito is, in my view, right in pointing out the comparatively expansive conceptualisations of racialised harm in international human rights law as well as the breadth of remedies available to victims. As a matter of tactics, the advantages of mobilising human rights to counter racism in the US seem significant. However, it is not self-evident that ‘recognition of these legal principles can help us imagine and implement liberatory options outside the constraints of a dominant narrative that depicts current settler colonial realities as right, natural, and inevitable’.⁸³ Rather, both international law in general and human rights in particular can and have been mobilised in order to reify and defend this dominant narrative, instead of challenging it.

Here, I am not going to discuss the links between the capitalist nation-state and international law in general. It suffices to note that critical international lawyers have articulated convincing accounts of the co-constitution between the two, rethinking international law as a force that has contributed to the proliferation of the form of the nation-state and its disciplining along the lines of capitalism and modernity.⁸⁴ Rather, I am more interested in the contradictory role that international human rights law has played in the challenging and reinforcing of white supremacy, including in settler-colonial contexts. The benchmark for my evaluation is drawn from an observation Estes has articulated regarding settler justice: ‘[it] can extract an admission of wrongdoing, but cannot reorder the world

⁸⁰ For a poignant critique of ‘solidarity’ as the unifier of the Third Worldist project from the Bandung Conference to the NIEO, see Umut Özsu, “‘Let Us First of All Have Unity among Us’: Bandung, International Law, and the Empty Politics of Solidarity’ in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 293.

⁸¹ Estes (n 43) 232–44.

⁸² *Ibid* 239.

⁸³ Saito, *Settler Colonialism* (n 34) 166.

⁸⁴ For some examples, see Luis Eslava and Sundhya Pahuja, ‘The State and International Law: A Reading from the Global South’ (2020) 11(1) *Humanity* 118; Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019); Ntina Tzouvala, ‘Civilization’ in Jean d’Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing, 2019) 83; Anne Orford, ‘Food Security, Free Trade, and the Battle for the State’ (2015) 11(2) *Journal of International Law and International Relations* 1.

or redistribute wealth, especially land, back to its rightful owners'.⁸⁵ In other words, I will interrogate if actually existing human rights mechanisms and arguments have contributed to the construction of a fairer international political economy and to the realisation of substantive racial equality and liberation.

Recent histories of human rights have debated the relationship between the ascendance of the field and the rise of neoliberalism with the accompanying explosion of economic inequality.⁸⁶ My focus here is, however, more specific, and concerns the relationship between international law (especially human rights), political economy and racial subordination. Indeed, there are good reasons to doubt unambiguously laudatory evaluations of the field when it comes, for example, to the end of white-minority rule in southern Africa.⁸⁷ This understanding of international law and human rights as polar opposites of white supremacy ignores the role of human rights in either bracketing or directly reinforcing racial subordination in the aftermath of Apartheid.

In the case of Zimbabwe, international human rights law has been mobilised to challenge the redistribution of land, which remained concentrated in the hands of the country's white minority and foreign investors long after independence. Two cases merit close examination: the *Mike Campbell (Pvt) Ltd v Zimbabwe* ('*Campbell*') case handed down by the Southern African Development Community Tribunal and the *von Pezold v Zimbabwe* ('*von Pezold*') award delivered by an international investment tribunal.⁸⁸ In both cases, the applicants challenged not only the violent and chaotic means through which the expropriation and redistribution was conducted but also the very core of the policy. Their claims relied on a range of legal grounds, but they had one thing in common: they argued that the expropriation of their properties violated the prohibition of racial discrimination under international law because it targeted exclusively white farmers.⁸⁹

⁸⁵ Estes (n 43) 243.

⁸⁶ The debate concerns whether human rights have been a 'powerless companion' to the ascendance of neoliberalism, as Samuel Moyn has argued, or whether human rights have been 'fellow travellers' of the neoliberal movement: Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77(4) *Law and Contemporary Problems* 147; Jessica Whyte, 'Powerless Companions or Fellow Travellers? Human Rights and the Neoliberal Assault on Post-Colonial Economic Justice' (2018) 2.02 (June) *Radical Philosophy* 13.

⁸⁷ John Dugard has articulated this unambiguously positive evaluation of international law as follows:

International law will continue to guide and shape South African society. Non-discrimination, respect for human rights, and the right to self-determination have been consistently invoked against apartheid. They are now part of the national consciousness and form the basic principles for the new political dispensation.

John Dugard, 'The Role of International Law in the Struggle for Liberation in South Africa' (1991) 18(1-2) *Social Justice* 83, 91.

⁸⁸ *Mike Campbell (Pvt) Ltd v Zimbabwe (Judgement)* (Southern African Development Community Tribunal, Case No 2/2007, 28 November 2008) ('*Campbell*'); *von Pezold v Zimbabwe (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/15, 28 July 2015) ('*von Pezold*').

⁸⁹ *Campbell* (n 88) 41; *von Pezold* (n 88) [475]-[478].

In both instances, the claimants were successful.⁹⁰ What was conspicuously absent from the reasoning of the tribunals was a legally consequential engagement with the history of land ownership and, more broadly, wealth accumulation in Zimbabwe. The racialised injustices and dispossessions of the colonial era were mentioned briefly⁹¹ before the analysis proceeded to the present day. This contemporary focus was structured around two axes: colour blindness and market-driven mechanisms as the only acceptable exceptions to it. Let me elaborate: in *von Pezold*, the Tribunal was adamant that the expropriation of white settlers and investors' properties was due to their 'skin-color'.⁹² It rejected all arguments that the state of Zimbabwe had inherited an inherently racialised property-holding landscape and that effective land distribution would unavoidably involve those who held the bulk of arable land — in this instance, white settlers and commercial interests.⁹³ Furthermore, the arbitrators acknowledged that racially conscious measures might be legally justifiable, but they insisted that such measures had to take place within the framework of property rights and market mechanisms, and not operate against them.⁹⁴ The *von Pezold* award mentioned, for example, willing seller–willing buyer schemes, incentives and preferential treatment as acceptable methods for the rectification of colonial dispossession and the subordination of Zimbabwe's black population.⁹⁵ This was the case despite (or perhaps because of) the fact that market-based land reform had failed to deliver

⁹⁰ *Campbell* (n 88) 54; *von Pezold* (n 88) [501], [503].

⁹¹ *Campbell* (n 88) 44; *von Pezold* (n 88) [92]–[96].

⁹² *von Pezold* (n 88) [657]:

Accordingly it cannot be said that Zimbabwe has provided a legitimate reason for implementing an unjustified policy that discriminated against the landowners on the basis of their skin-color and foreign ancestral heritage, thereby contravening its obligation *erga omnes* not to engage in racial discrimination.

⁹³ *Ibid* [651] (citations omitted):

The Respondent argues that, if the foreign invaders who stole the land from the African Zimbabwean people had included a neighbouring black African State or the Japanese, the ones from whom land could have been taken today would have included estate owners of the neighbouring black African State or Japanese estate owners and no discrimination would be intended. The Tribunal rejects any such speculation attempting to minimize the racial aspect of Zimbabwe's history, as the fact remains that the estate owners were not of a neighbouring black African State or Japanese. In fact, the Tribunal disagrees with the Respondent's attempts to downplay the significance of the historical distribution of land while also utilising it to justify the aggression displayed by the Settlers/War Veterans.

⁹⁴ *Ibid* [652]–[656].

⁹⁵ *Ibid* [652]:

Some of the examples of policies that the Respondent has cited, which provide incentives and preferential treatment to indigenous persons, are good examples of policies that actually intend to, and lawfully do address such inequalities. However, the Tribunal rejects the Respondent's attempt to align the FTLRP with other legitimate policies that justifiably discriminate by race in order to address historical injustices.

See also at [653]:

The Tribunal does not question the legitimacy of the Lancaster House Agreement and its corresponding policy from 1979–2000 that expropriated land, with compensation, for redistribution.

progress in regard to land redistribution after independence.⁹⁶ As Estes noted,⁹⁷ the effective redistribution of land and wealth emerges as the outer limit of efforts to rectify racialised harm, and, in both *Campbell* and *von Pezold*, it was also considered to be nothing less than a human rights violation. Tellingly, restitution was prioritised as a means of reparation, despite the existence of third-party rights and interests over the expropriated land:

[T]he rights of the third parties currently resident on the land — that is, the Settlers/War Veterans — are fragile at best ...

If the Claimants sought to exercise their rights by having these removed, this may involve conflict, which is, realistically, a matter for the police and local authorities. The Tribunal considers that it must operate on the assumption that there is sufficient rule of law to enable the Respondent to carry out whatever award the Tribunal decides upon, including an award of restitution.⁹⁸

In other words, the colonial violence and unjustness of dispossession was relegated to an unfortunate, but ultimately legally irrelevant, event that did not prevent the formation of valid property rights enjoyed by white settlers. In contrast, the rights of black beneficiaries of redistribution were sidelined because of the violence and illegality of the process that created them.

Unsurprisingly, the engagement of the two tribunals with international human rights law has not gone unchallenged. Achume has criticised ‘the risky allure of colourblindness as a jurisprudential destination’,⁹⁹ especially in regard to the engagement of the *Campbell* case with the *International Convention on the Elimination of All Forms of Racial Discrimination* (‘ICERD’).¹⁰⁰ She asserts that *Campbell* is problematic in terms of doctrinal human rights law since it failed to consider art 1(4) of the Convention, which permits race-based remedies that address existing patterns of racial inequality and subordination.¹⁰¹ Similarly, one could very plausibly argue that the Tribunal’s assertion in *von Pezold* that only market-based remedies for racial inequality are consistent with the prohibition of racial discrimination has less to do with the text, the history or the goals of the

⁹⁶ Sam Moyo and Paris Yeros, ‘Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution’ in Sam Moyo and Paris Yeros (eds), *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America* (Zed Books, 2005) 165, 184:

Over the period 1980–92, market-driven land reform proved its inability to deliver on Zimbabwe’s land question. The process was not only slow and incremental; it also delivered land of low agro-ecological value and imposed onerous fiscal demands on an already constrained state.

⁹⁷ See above n 85 and accompanying text.

⁹⁸ *von Pezold* (n 88) [730], [732].

⁹⁹ E Tendayi Achume, ‘Transformative Vision in Liberal Rights Jurisprudence on Racial Equality: A Lesson from Justice Moseneke’ [2017] *Acta Juridica* 179, 199 (‘Transformative Vision’).

¹⁰⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

¹⁰¹ Achume, ‘Transformative Vision’ (n 99) 181, 195; *ibid* art 1(4). See also E Tendayi Achume, ‘The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts’ in Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press, 2018) 124, 143–4.

ICERD and more to do with the ideological and political commitments of the arbitrators and of international investment law as a whole.

These objections do not imply, however, that *Campbell* or *von Pezold* were aberrations. As Silvia Steininger has demonstrated, foreign investors have been comfortable with mobilising human rights to advance their claims in front of arbitral tribunals, which in turn have been more responsive to these arguments than to human rights concerns raised by the respondent states.¹⁰² Therefore, it is highly doubtful that, in the realm of international political economy, human rights have been an instrument to advance the interests of the most vulnerable, including those of racialised people. As above, this is not a monolithic truth or an uncontested reality. For example, in a recent report to the Human Rights Council, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance focused on global extractivism and its adverse effects on substantial racial equality.¹⁰³ The report foregrounds the links between political economy and substantive racial equality, and it situates contemporary extractivism within the broader historical context of conquest and plunder.¹⁰⁴ In so doing, the Rapporteur documents the ways that the land, labour and resources of some populations are exploited intensely while the benefits of such exploitation flow to the Global North or to domestic elites.¹⁰⁵ This is a truly groundbreaking report, since — as the Rapporteur notes — questions of structural inequality have more often than not been sidelined by the UN human rights system.¹⁰⁶ This indicates the persistence of struggles over the ‘soul’ of human rights. More to the point, it means that if one is convinced that the roots of racism are to be found in the structures of economic domination and exploitation, then international human rights law is a potential but not a clear or unambiguous ally in the struggle for liberation.

V CONCLUSION

Rome is burning. It is burning metaphorically as global capitalism is entering its second major recession in a bit over a decade. It is also burning literally as protestors in all 50 US states are demonstrating against racialised police brutality, only to face new waves of (militarised) police violence and control. Somewhere between metaphor and literal meaning, we find the effects of the accelerating climate catastrophe. I am following the news from the unceded lands of Gadigal and Guring-gai people of the Eora Nation, still learning how to ‘live, work, and

¹⁰² Silvia Steininger, ‘What’s Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration’ (2018) 31(1) *Leiden Journal of International Law* 33, 42–3.

¹⁰³ Tendayi Achiume, *Global Extractivism and Racial Equality: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 41st sess, Agenda Item 9, UN Doc A/HRC/41/54 (14 May 2019).

¹⁰⁴ *Ibid* 6–8 [22]–[28].

¹⁰⁵ *Ibid* 3 [8]:

Poverty and underdevelopment are the predictable result of centuries of economic structuring in which colonial powers have integrated colonial territories and their economies into the global markets under conditions of economic dependency, in collaboration with national elites in the global South and at the expense of the vast majority of their populations.

¹⁰⁶ *Ibid* 5 [17].

love on stolen land'.¹⁰⁷ The book at hand has been a good companion, and it will also be useful to others interested in the relationship between international law and race, especially in the context of settler colonialism. As I explained above, the intellectual contributions of this book are many and important, since it provides both a detailed examination of racialisation patterns in the US and, more fundamentally, a method for thinking about law and racialisation in other contexts by centring questions of labour exploitation and land dispossession. More fundamentally, Saito questions the self-evidence of the nation-state as the necessary terrain and horizon of liberation struggles. My disagreements about her concrete solutions are, therefore, to be read as familial quarrels between long-lost cousins who are nonetheless committed to sharing a common table.

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¹⁰⁷ Sujith Xavier, 'Loving, Working, and Living on Stolen Land: People of Colour, Settler Colonialism & White Supremacy', *reconciliationsyllabus* (Blog Post, 8 December 2018) <<https://reconciliationsyllabus.wordpress.com/2018/12/08/loving-working-and-living-on-stolen-land-people-of-colour-settler-colonialism-white-supremacy/>>, archived at <<https://perma.cc/C75W-CXZR>>.

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