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Making Room for Critical Race Theory in International Law: Some Practical Pointers

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Articles & Essays

MAKING ROOM FOR CRITICAL RACE THEORY IN INTERNATIONAL LAW: SOME PRACTICAL POINTERS

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In the last two decades, new forms of transformative social action have emerged throughout the world. [P]opular movements or new social movements either with new political and ideological agendas—sometimes called “postmaterialistic,” such as ecology, peace, antiracism, antisexism—or, particularly in peripheral countries, with old “materialistic” agendas—around economic survival Most of these movements have been locally based, but have developed transnational ties of various sorts with movements in other parts of the world.¹

All too often, human rights languages become stratagems of imperialistic foreign policy through military invasions as well as through global economic diplomacy. Superpower diplomacy at the United Nations is not averse to causing untold suffering through sanctions whose manifest aim is to serve the future of human rights. The United States, the solitary superpower at the end of the millennium, has made sanctions for the pro-

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1. BONAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 266-67 (1995).

*motion of human rights abroad a gourmet feast at the White House and on Capitol Hill.*²

I. INTRODUCTION

THESE two vignettes juxtapose social movements and rights discourse; the one hopeful, the other somewhat skeptical. Both vignettes, by implication, raise the possibilities and limitations of the pursuit of rights as a mode of struggle, as well as their consequences for the transnational embrace of a rights agenda, however defined. In this vein, this paper analyzes how the critique of race in the United States by critical race theorists has some relevance for the international law project, particularly with respect to international human rights. It raises the possibilities of a critical race perspective within a global, legal and economic arrangement, in which people of color overwhelmingly are situated in the poorer, developing countries, and where people of Caucasian ancestry inhabit the affluent, industrialized countries.³

This disparity may be regarded as an over-generalized point with respect to race. In many ways, it no longer makes sense to speak of the United States or Britain as "white countries."⁴ The mass migrations of the past few decades have rendered such characterizations crude.⁵ In any

2. Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANS-NAT'L L. & CONTEMP. PROBS. 125, 147 (1998).

3. See OUR GLOBAL NEIGHBORHOOD, THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 18-23 (1995) (contrasting post World War II increase in quality of life in United States and Europe with increase in poverty in Latin America and Africa); see also Stuart Hall, *The West and the Rest: Discourse and Power*, in MODERNITY: AN INTRODUCTION TO MODERN SOCIETIES 184 (Stuart Hall et al. eds., 1996) (discussing, in depth, the history of development of western world and interaction between Western and Non-western world). It has been noted that:

There are severe, potentially catastrophic economic inequities between the North and the South In 1960 the richest one-fifth of the world's population enjoyed thirty times the income of the poorest fifth; by 1989 the richest fifth was receiving sixty times the income of the poorest The ratio of 20:80 or worse dominates our world today The 80% majority of humanity in the South gets the 20% or less scraps from the tables of the affluent Among them, some 1.2 billion now live in absolute poverty, or the very margins of survival itself

Geoffrey Grenville-Wood, *An Agenda for United Nations Reform*, in UNITED NATIONS REFORM: LOOKING AHEAD AFTER FIFTY YEARS 2, 15 (Eric Fawcett & Hanna Newcombe eds., 1995) (quoting speech of Erskine Childers).

4. For a discussion on the effects of immigration on the nation-state, see Ahmet Icduyqu, *Citizenship at the Crossroads: Immigration and the Nation-State*, in GLOBALIZATION THEORY AND PRACTICE 150 (Eleonore Kofman & Gillian Youngs eds., 1996).

5. See, e.g., Kenzo S. Kawanabe, *American Anti-Immigrant Rhetoric Against Asian Pacific Immigrants: The Present Repeats the Past*, 10 GEO. IMMIGR. L.J. 681, 682-83 (1996) (comparing anti-Asian immigrant rhetoric used against Chinese in America during nineteenth century with anti-immigrant rhetoric of today and its effects on Asian Pacific immigrants); Frank Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 811 (1996) (noting that in

event, it could be argued that the situation of Japan renders such characterizations inaccurate.⁶

Despite these contradictions and nuances of demography, the concentration of economic and political power, even in countries such as the United States and Britain, with huge ethnic minorities, remains in the hands of whites and is reinforced by an ideology which normalizes such power.⁷ This reality informs much of critical race theory, including the attempts of critical race scholars to infuse an understanding of the persistence of the structures of racism, and the law's methodological limitations in erasing such structures.⁸

In addition to assessing the pertinence of critical race theory in unmasking international law's colonial, racist and patriarchal underpinnings, this paper attempts to suggest practical ways in which a critical race theory approach can enrich the international legal system, by giving a voice to the voiceless and by addressing the conditions of marginality in which much of the developing world⁹ is trapped.

America, whites will soon find themselves racial minorities); *see also* George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 1 (1999) (discussing American belief that immigrants should assimilate into American mainstream).

6. *See, e.g.*, Christian Hougen, *The Problems and Promises of Japan's Economic Growth-Led Foreign Policy in Perspective*, 21 FLETCHER F. WORLD AFF. 133, 136-45 (1997) (discussing Japan's rapid industrialization and ability to come to aid of United States by financing gaps in American foreign trade, American military protection and operations of multilateral organizations).

7. *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (arguing that property rights are "contingent upon, intertwined with, and conflated with race").

8. *See* Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 768 (1988) (noting that property right in "whiteness" is recognized and upheld by courts and society).

9. I will use the terms "developing world," "underdeveloped world," "the South" and "Third World" interchangeably, recognizing the dialectal tensions around these terms. *See, e.g.*, ROBERT A. MORTIMER, *THE THIRD WORLD COALITION IN INTERNATIONAL POLITICS* 1, 1 (1984) (arguing that concept "Third World" merely highlights political coalition of countries similarly situated economically); *see also* Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 337 (1996) (challenging concept of unanimous non-European identity in world politics). I am using the term, merely as a descriptive one, to indicate the marginalization of the majority of the world's population. As Julius Nyerere, the late former President of Tanzania, has noted:

[T]he Third World consists of the victims and the powerless in the international economy Together we constitute a majority of the world's population, and possess the largest part of certain important raw materials; but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rule-making we are recipients not participants.

Julius K. Nyerere, *South-South Option*, in *THIRD WORLD STRATEGY: ECONOMIC AND POLITICAL COHESION IN THE SOUTH* 9, 10 (Altat Gauhar ed., 1983).

This paper will do three things. First, it will peruse the contemporary global situation with respect to international law and human rights. Second, it will assess the contribution of critical race theory in advancing an understanding of, and solution to, America's predicament of race. Third, it will suggest ways in which these approaches may engage with contemporary attempts to deal with the human rights endeavor globally.

Other contributors to this volume will be focussing on the epistemological questions of critical race theory and international law. Thus, my paper will be purposely practical.

II. SNAPSHOTS OF GLOBALIZATION, INTERNATIONAL LAW AND HUMAN RIGHTS

International law had ceased to be a European law only to become a law of the great powers, thanks to the policy of the exclusive clubs both within and without the international organizations. While it may in principle no longer have been serving political colonization, it did not cease for all that to be a means of economic domination and an excuse for it. In actual fact, it modified only the form, not the substance of domination. The latter has been more subtly introduced into the legal rules governing the economic relations between developed and developing countries.¹⁰

At this particular, historic moment, international law has been subjected to fairly vigorous critiques.¹¹ Although these critiques emanate from different sources, they share certain goals. The most significant of these goals are to unmask the veneer of equality and neutrality of international law and to expose international law's colonial trappings.¹² In other

10. MOHAMMED BEDJAQUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 59-60 (Holmes & Meier, 1979).

11. See David S. Berry, *Interpreting Rights and Culture: Extending Law's Empire*, 4 RES PUBLICA 3 (1998) (combining Dworkin's "theory of legal interpretation" with Donnelly's "universalist vision of international human rights" to resolve conflicts between international human rights and traditional cultures); Thomas Skouteris, *Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship*, 10 LEIDEN J. INT'L L. 415, 415-20 (1997) (criticizing "NAIL," or New Approaches to International Law).

12. See, for example, Antony Anghie, *Finding The Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 7 (1999), which states:

My argument is that what passes now as the defining dilemma of the discipline, the problem of order among states, is a problem that has been peculiar, from the time of its origin, to the specificities of European history. Additionally, the extension and universalization of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied. Within the axiomatic framework of positivism, which decrees that European states are sovereign while non-European states are not,

words, they have attempted to point to the dominance of the first (read Western) world in global politics and, therefore, the practice of its handmaidens, international lawyers.¹³ These critiques have also exposed the patriarchal institutions and values embedded in international law, which serve to continue the marginalization of women, both in the substance of the law, as well as in its procedures and implementation.¹⁴ Some scholars have examined the whole project of international law, and particularly its relationship to, and implications in, international relations and global politics.¹⁵

These thoughtful critiques have enriched the intellectual landscape for international lawyers, legal scholars and policy makers;¹⁶ their practi-

there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilizing mission, the process by which peoples of Africa, Asia, the Americas, and the Pacific were finally assimilated into European international law.

See also, A. Riles, *The View from the International Plane: Perspective and Scale in the Architecture of the Colonial Encounter*, 6 LAW & CRITIQUE 39, 39-54 (1995), which analyzes the international legal strategy of the colonial era. Similarly, Shelley Wright, an Australian feminist, stridently asserts:

Any claim that human rights are "universal and indivisible" must be prepared to answer the assertion of many Third World, non-white and/or feminist international scholars that human rights have a very specific history They are a direct outgrowth of the capitalist, colonialist history of post-medieval Europe and that they are part of the export of oppressive and, in some cases, genocidal policies of European colonists.

Shelley Wright, *International Human Rights Standards and Diversity in Local Practices*, cited in Will Kymlicka, *Human Rights and Ethnocultural Journal*, 4 REV. CONST. STUD. 213, 214 (1998).

13. See Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435, 435 (1998) ("International lawyers have, in many respects, served as the handmaidens of the changes wrought by globalization.").

14. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 614 (1991) (indicating that discipline of international law has resisted feminist analysis); see also Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 857, 857 (1992) (presenting bibliography of works in effort to stimulate research in field of women's international human rights); Andrew M. Deutz, *Gender and International Human Rights*, 17 FLETCHER F. WORLD AFF. 33, 33 (1993) (recognizing "divorce between the articulation of human rights as universal and the implementation of them as particular" regarding women).

15. See David Kennedy, *The Disciplines of International Law and Politics*, 12 LEIDEN J. INT'L L. 9, 9 (1999) (exploring "the idea that the professional and intellectual disciplines which have developed in the United States to advance insight into international affairs also have characteristic blind spots and biases which leave professionals and intellectuals working within them more sanguine about the status quo than they might otherwise be"); see also MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 3-52 (1999) (discussing power in international law and interaction of law and politics).

16. One only has to examine the program and proceedings of the annual meeting of the American Society of International Law in the last two years to ascertain a sense of this rich body of scholarship. See AMERICAN SOCIETY OF INTERNA-

cal effects, however, have been difficult to quantify. Without engaging in simplistic and superficial cause and effect analysis, a survey of international legal scholarship in the last few years suggests a rigorous dialectic about the field of international law, its structures, purposes, rules and implementation.¹⁷ These influences in scholarly debate are tangible results, easily measured. In contrast, however, no such easy conclusion arises with respect to international law in practice. In other words, it is difficult to measure the impact of these critiques in such areas as international rules regarding the environment, international copyright law, or the law of the seas.¹⁸

Nonetheless, one area of international law has burgeoned, both rhetorically and substantively: international human rights law.¹⁹ One only has to peruse the proliferation of human rights instruments in the last two decades to sense the vigor with which certain human rights principles and values have been incorporated in international human rights legal instruments.²⁰ The universality of these princi-

TIONAL LAW PROCEEDINGS (1998) (citing critiques throughout volume); AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (1999) (same).

17. See David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417, 417 (1994) (providing bibliography of works on "new approaches to international law"); see also Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 811 (1990) (recognizing that prior to 1985, "mainstream law reviews published almost nothing about international law").

18. Maybe these are immeasurable ruminations incapable of specificity. In other words, without an articulation of particular, practical rules or measures, the influence of this critical scholarship cannot be ascertained. See IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 162-78 (1998) (discussing maritime delimitation); *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 659 (David G. Victor et al. eds., 1998) (analyzing wide variety of international environmental regimes and implementation experiences).

19. See Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 687 (1996) (providing thoughtful examination of international human rights law developments).

20. See generally THE UNITED NATIONS, *HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS* (1997); UNESCO, *HUMAN RIGHTS, MAJOR INTERNATIONAL INSTRUMENTS* (1999). In this light, Upendra Baxi, an Indian scholar, has commented:

No preceding century of human history has been privileged to witness a profusion of human rights enunciation on a global scale. Never before have the languages of human rights sought to supplant all other ethical languages. No preceding century has witnessed the proliferation of human rights norms and standards as a core aspect of what may be called the politics of intergovernmental desire. Never before has this been a discourse so varied and diverse that it becomes necessary to publish and update regularly, through the unique discursive instrumentality of the United Nations system, in ever exploding volumes of fine print, the various texts of instruments relating to human rights.

Baxi, *supra* note 2, at 125.

ples,²¹ as well as their implementation and efficacy in reducing human rights violations,²² have been subjected to considerable debate.

Whatever our opinions on these matters, there is no doubt about the primacy of human rights as "the language of progressive politics,"²³ confidently providing an "emancipatory script"²⁴ for those engaging in struggles in the pursuit of human rights. A prominent Indian legal scholar has referred to the discourse of human rights seeking to "supplant all other ethical languages."²⁵

The passage of these various human rights instruments undergird the role of the state in promoting and protecting human rights, and punishing those who transgress human rights principles.²⁶ The state, therefore, assumes the role of chief protector of human rights principles and is the principal conduit through which human rights principles are conveyed, channeled and challenged.²⁷ In furtherance of their roles, states devise

21. See Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 419 (1984) (arguing that there should be fundamental universality of basic human rights, tempered by recognition of possible need for limited cultural variations); see also Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5-18 (1997) (discussing current debate between nation-states about universality and cultural relativity); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461, 474-78 (1997) (discussing universalist and pluralist positions on human good).

22. See M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Enquiry*, 39 VA. J. INT'L L. 1069, 1072 (1999) (questioning efficacy of international law litigation in domestic courts in United States); Christopher C. Joyner, *The United Nations and Democracy*, 5 GLOBAL GOVERNANCE 333, 333 (1999) (discussing how effectively United Nations promotes democracy worldwide).

23. See Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, 1 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 1, 1 (1997) (using "language of progressive politics" to refer to human rights issues in international law).

24. *Id.*

25. Baxi, *supra* note 2, at 125.

26. For an explanation of the principle of state responsibility, see ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39-46 (1994); Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN 167-88 (Rebecca Cook ed., 1994), discussing the implementation of obligations to "respect and protect particular human rights" and to "change domestic laws" in countries where religious practices and customary laws are "most likely to violate the international human rights of women," and Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 229 (1987), analyzing the Covenant on Economic, Social and Cultural Rights drafted by the Commission on Human Rights of the Economic and Social Council of the United Nations in 1954.

27. See Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 740 (1999) (stating that "[e]very single state has ratified at least one treaty containing legal obligations to protect human rights"). See generally Alston & Quinn, *supra* note 26, at 156-222 (examining "the nature and scope of the obligations of state parties under Parts I, II and III of the Covenant [on Economic, Social and Cultural Rights]" (clarification added)).

the appropriate mechanisms to satisfy their obligations under the relevant human rights instruments.²⁸

The shortcomings of this model, the statist approach to human rights implementation, have been articulated.²⁹ One such shortcoming has been the discrepancy between the nature of procedural and substantive violations, and their private counterparts. Public violations of human rights, that is, those violations committed by state actors, are ordinarily subjected to appropriate punitive measures.³⁰ However, those committed by private actors in the private realm, are shielded from state intervention.³¹

A further deficiency of the statist model can be seen in the growing recognition of the limitations of the state either in promoting human rights values, or in preventing their violation.³² This limitation can be explained, in part, by the particular global economic configuration of this historic moment: a dominant economic paradigm of the free market unfettered by significant governmental restraint.³³ These developments have sorely tested the traditional role and capability of the state.³⁴ It has been noted that:

28. See generally OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND IN PRACTICE* (1991) (detailing vast area of international legal rules and principles, their political context and implementation).

29. See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 110 (1991) (criticizing limits of sovereign-centered approach to international law); see also Karen Knop, *Why Rethinking the Sovereign State Is Important for Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 26, at 153 (arguing for re-examination of contemporary emphasis on state sovereignty under international law, particularly with respect to involvement of women in pursuing international human rights law).

30. See Alston & Quinn, *supra* note 26, at 206-09 (discussing Article 5 of the Covenant on Economic, Social and Cultural Rights, which provides safeguards against abuses); HIGGINS, *supra* note 26, at 146-68 (outlining policies and procedures in enforcing international law).

31. See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 26, at 85 (condemning "human rights framework that construes the civil and political rights of individuals as belonging to public life while neglecting to protect the infringements of those rights in the private sphere of familial relationships").

32. See Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56, 58-60 (1999) (acknowledging notion of state as "ultimate guardian of its population's welfare"). See generally THE ROLE OF THE NATION STATE IN THE TWENTY-FIRST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANIZATIONS AND FOREIGN POLICY (Monique Casternans-Holleman et al. eds., 1998) (providing numerous articles dealing with human rights and difficulties of various nation-states in imposing and enforcing human rights initiatives).

33. See Santos, *supra* note 23, at 1 (questioning whether globalization is new phenomenon, or whether it is just imperialism or modernization with new label).

34. See generally Dennis Altman, *Globalization, the State and Identity Politics*, 7 PACIFICA REV. 69 (1995) (analyzing forces that characterize modern era and "help explain the apparent crisis of all state institutions").

Three forces seem to characterise the modern era which together help explain the apparent crisis of all state institutions: a growing strengthening of international capitalist structures which override the ability of elected national governments to control the economy; a retreat from seeing the public sphere as one which can provide essential services and its replacement by a growing emphasis on privatised (i.e. money making) ventures; and an upsurge of particularist identities, which threaten the social cohesion of national states (and in some cases their very continuance).³⁵

In the developed world, this global free market paradigm has led to affluence for some and a very optimistic picture by all indicators.³⁶ Most of the so-called third-world, however, experiences this free market paradigm through weakened state institutions resulting from the structural adjustment programs of the World Bank and the International Monetary Fund ("IMF"),³⁷ as well as "crushing indebted-

35. *Id.* at 69. For a further discussion of how outside actors influence the power of a state to control human rights concerns, see Jochnick, *supra* note 33, at 63.

36. For a comprehensive treatment of the affluence of, and disparities between, the wealthy and poor countries, see BEDJAOUI, *supra* note 10. Bedjaoui cites the following example:

Production of dog foods in the United States represented in 1967 about the equivalent of the average income per man in India for each dog in America The amount of food wasted by the Americans in one year, and thrown into their dustbins, would be sufficient to feed all the countries of the immense African continent for a month.

BEDJAOUI, *supra* note 10, at 31. *But see* Pierre Sauvé, *Open Markets Matter*, 21 WORLD COMPETITION 57, 57 (1998) (stating that countries today experience great anxiety in developing policies to alleviate obstacles to free trade and investment).

37. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (outlining need for integrated analysis of economic, social and political activities and relevant organizations, and interconnectedness of economic, political and social freedoms); *see also* Susan George, *The Debt Boomerang*, in 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 29-34 (Kevin Danaher ed., 1994) ("The economic policies imposed on debtors by the major multilateral agencies [i.e., the World Bank and IMF] and packaged as 'structural adjustment' have . . . caused untold human suffering and widespread environmental destruction, emptying debtor countries of their resources and rendering them less able each year to service their debts" (clarification added)); Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation*, 21 BROOK. J. INT'L L. 837, 856 (1996) (discussing women's rights in international law); Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630, 634 (1997) (examining "the disparate impact of SAPs [Structural Adjustment Programs] on women and the resulting unacceptable feminization of poverty in many countries with economies in transition" (clarification added)). Mahoney states:

Structural adjustment programs imposed by the International Monetary Fund and the World Bank . . . have caused disproportionate disadvantage to women because their theories, strategies and solutions for development, growth and underdevelopment tend to ignore women and the role they fulfill in their societies.

ness,"³⁸ namely, huge debts resulting from excessive loans.³⁹

These structural adjustment initiatives, dependent upon an ideological and financial framework, create the "global space"⁴⁰ for international capital. They embrace the imperatives for governments to reduce regulatory controls, for example, lower labor standards, and to reduce or remove state intervention in the provision of basic foodstuffs and services.⁴¹ In short, structural adjustment programs demand a less interventionist state with respect to welfare and rights, but not necessarily to facilitate the requirements of capital mobility.⁴²

Loan conditionalities force national governments to dismantle regulatory controls, restrict subsidies to tax holidays for investors, and build appropriate transport and communications infrastructure. The efforts made to facilitate the movement of capital along transnational global circuits are matched only by less successful efforts to restrain the movement of labor through migration.⁴³

Accompanying this paradigm is the liberal legal framework with its trappings of constitutionalism.⁴⁴ This liberal legal paradigm, both within nation states and as part of the international legal order, has been subjected to thoughtful critiques by feminist, post-colonial and other critical scholars.⁴⁵ These critiques all question the judicialization of politics,

Mahoney, *supra*, at 852-53.

38. See BEDJAOUI, *supra* note 10, at 41 (using "crushing indebtedness" to refer to "desperate" and "intolerable" situation that Third World countries are in as result of enormous national debt).

39. See JAMES H. MITTELMAN & MUSTAPHA KAMAL PASHA, OUT FROM UNDERDEVELOPMENT REVISITED: CHANGING GLOBAL STRUCTURES AND THE REMAKING OF THE THIRD WORLD 26 (1997), stating that:

[T]he mature capitalist countries have lent the underdeveloped world over half a trillion dollars. Debt service of all third world countries increased from 13.3% of exports of goods and services in 1970 to 20.4% in 1990. The greater the burden of debt service, the more the capacity to repay diminishes.

Prof. Chantal Thomas covers these issues in greater detail in this volume.

40. Gracia Clark, *Implications of Global Polarization for Feminist Work*, 4 IND. J. GLOBAL LEGAL STUD. 43, 47 (1996).

41. See Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe*, 4 IND. J. GLOBAL LEGAL STUD. 59, 60 (1996) (noting that "[s]ome 800 million people are starving across the globe, while women represent about sixty percent of the billion or so people earning \$1.00 or less a day").

42. See Clark, *supra* note 40, at 47 (arguing for recognition of diversity of women's position within global system, as well as diversity of feminist struggle).

43. *Id.*

44. See generally DANIEL J. ELAZAR, CONSTITUTIONALIZING GLOBALIZATION: THE POSTMODERN REVIVAL OF CONFEDERAL ARRANGEMENTS (1998).

45. See, e.g., David Katona, *Challenging the Global Structure Through Self-Determination: An African Perspective*, 14 AM. U. INT'L L. REV. 1439, 1467 (1999) (questioning likely success of African Growth and Opportunity Act in pursuing economic development in Sub-Saharan Africa); see also, e.g., Tayyab Mahmud, *Postcolonial*

namely the idea that legal institutions are the primary venues for securing rights.⁴⁶ These critical scholars have also questioned the proliferation of programs around the world dedicated to open governance and the rule of law.⁴⁷ It has been noted that,

[a]lthough numbers are hard to find, it appears spending on 'rule of law' injection projects around the world now rivals food aid, refugee assistance, humanitarian aid of all sorts. Military assistance has itself turned increasingly to providing legal assistance, the need for good discipline and clear rules of engagement merging, in a post-CNN world, into compliance with international humanitarian norms. Indeed, the United States military may now provide more training in international law and human rights than all the world's non-governmental organizations put together.⁴⁸

Despite its importance in strengthening state institutions,⁴⁹ legal formalism plays a powerful ideological role in channeling political aspirations and immobilizing grassroots political struggle.⁵⁰

Much of critical race theory concerns itself with the limitations of law's methodology, process and implementation.⁵¹ Implicit in much of

Imaginaries: Alternative Development or Alternatives to Development?, 9 TRANSNAT'L L. & CONTEMP. PROBS. 25, 25-34 (1999) (arguing that race, development and post-coloniality are inescapably intertwined, and that radical critique of development must incorporate alternatives to development); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1, 3 (1999) (criticizing liberal legal paradigm as entrenching structural inequalities through model of formal equality).

46. See Boaventura de Sousa Santos, *The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts*, in GLOBALIZATION AND LEGAL CULTURES 49 (J. Feest ed., 1999) (outlining increasing prominence and visibility of courts, and "global call for the rule of law and the reform of the judicial system").

47. See Kennedy, *supra* note 15, at 106 (noting that more attention is paid to maintaining "the law of a New World Order" than nutritional concerns or any type of humanitarian aid).

48. *Id.* at 106-07.

49. See Neil J. Kritz, *The Rule of Law in the Postconflict Phase: Building a Stable Peace*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 587 (Chester A. Crocker et al. eds, 1996) (arguing for importance of emerging international standards that define rule of law).

50. See generally YASH GHAI, GLOBALISATION AND THE POLITICS OF RIGHTS (unpublished paper on file with the author). For a provocative critique of the use of international human rights law to effect fundamental change to people's lives, see Tony Evans & Jan Hancock, *Doing Something Without Doing Anything: International Human Rights Law and the Challenge of Globalisation*, 2 INT'L J. HUM. RTS. 1, 18 (1998).

51. See, e.g., Derrick Bell, *Racial Realism-After We're Gone: Prudent Speculations on America in a Post Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 393 (1990) (arguing that despite progress in civil rights for Blacks, "real" Black status has failed to adequately improve); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2000-07 (1990) (arguing that minorities have better chance of securing real rights in political process).

the critique is the law's failure to translate formal legal rights into substantive socio-economic rights.⁵² In this critique of the international legal order, critical race scholars may have some impact.⁵³

III. CRITICAL RACE THEORY AND INTERNATIONAL LAW: THE RECONSTRUCTIONIST PROJECT: HOW DOES CRT GO OFFSHORE?

Poverty finally risks dividing the world into two blocs, that of the powerful minority and that of the immiserated majority. The sentiment of injustice that it creates and maintains will become more and more deep-rooted, such that it is at least wise to fear an explosion.⁵⁴

In looking at the way forward, the so-called "Reconstructionist Project,"⁵⁵ and examining the issues, I am making the following assumptions: that free market liberalism will remain dominant for the foreseeable future;⁵⁶ that the United States will be the dominant superpower for the next decade or so;⁵⁷ that the resources of the United Nations, the World Bank and other international organizations will be increasingly affected and controlled by human rights criteria (albeit unevenly imposed);⁵⁸ that

52. See Bell, *supra* note 51, at 395-97 (discussing contemporary irrelevance of once-inspiring landmark legal gains for Blacks).

53. For a discussion of the global applicability of CRT, see *infra* notes 67-81 and accompanying text.

54. Karen Michelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 402 (1998) (quoting Keba M'Baye, *Le droit u developpement Comme un Droit de l'Homme*, 5 REVUE DES DROITS DE L'HOMME 505 (1972)).

55. I have taken this term directly from the panel in which I participated at the Villanova Law Review Symposium. See generally Henry J. Richardson III, *Using Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. (2000) (analyzing Southern Africa Tripartite Agreement under international law sponsored by United States).

56. See, e.g., Frank Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 73-75 (1999) (evaluating interplay and impact of free markets, that is, globalization in its present configuration and human rights law); see also, e.g., Reginald Ezetah, *The Right to Democracy: A Qualitative Enquiry*, 22 BROOK. J. INT'L L. 495, 501-02 (1997) (criticizing role of free market liberalism in undermining social and economic rights).

57. See BAMIDELE A. OJO, *HUMAN RIGHTS AND THE NEW WORLD ORDER* 57 (1997) (describing United States as "top dog" in post Cold War politics); see also Lea Brilmayer, *Transforming International Politics: An American Role for the Post Cold War World*, 64 U. CIN. L. REV. 119, 123 (1995) (exploring conflict between United States assuming role of "private individual" over that of "public citizen" in relation to international affairs and moral and ethical obligations attendant to United States' role as dominant superpower); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 42 (raising questions about United States as dominant superpower without resources either to maintain that power or to care for its own citizenry).

58. See, e.g., Ibrahim J. Gassama, *Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT'L L.J. 287, 289 (1997) (arguing for United Nations supervision to increase attention on

international human rights activists—principally from the United States, Western Europe and Australia (to a lesser extent)—will largely determine the human rights agenda of these bodies and will be the prime determinants of their execution;⁵⁹ that these human rights criteria will increasingly have a large impact on the domestic programs of developing nations;⁶⁰ and that nations in Africa and other nations of color—with a few exceptions, mostly in Asia⁶¹—will lack power in economic, political and military terms to offset these extraterritorial influences—some of which will be good, some bad, and some untimely.⁶² Moreover, the “interface” of globalization and the North-South economic divide will lead to “aberrant and intolerant circumstances.”⁶³ Consequently, scholars argue that:

With the end of the Cold War, market imperatives rather than political calculation will increasingly determine the flow of funds between North and South, exacerbating social and economic inequalities and abandoning large parts of the world (most of Africa; parts of southern and central Asia; much of Central America) to continued marginality and poverty⁶⁴

human rights abuses); see also, e.g., Patricia Armstrong, *Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making*, 88 AM. SOC'Y INT'L L. PROC. 277, 280-81 (1994) (outlining distinctions between “good” and “bad” governance).

59. See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1341-51 (1999) (outlining benefits and pitfalls of increasing involvement of non-state actors in pursuance of human rights); see also Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 333, 335-38 (1997) (drawing distinction between globalization that involves grassroots organizing for human rights and one imposed from above); Dianne Otto, *Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 371, 411 (1993) (warning that imposition of human rights norms from outside may be seen by some developing countries as another form of Western imperialism).

60. See Mertus, *supra* note 59, at 1369 (noting great influence of rights norms dissemination on state agendas); see also Kwadwo Appiagyei-Atua, *International Human Rights and Developments NGO's in Africa: In Pursuit of a Global Order or Global Governance?*, 13 INT'L INSIGHTS 65, 65-70 (1997) (calling for non-governmental organizations involved in human rights on one hand, and development, on other, to bridge their artificial distinctions).

61. See GHAI, *supra* note 50, at 6 (discussing economic, military and political power of Asian countries in context of human rights influences); see also F. Zaharia, *Culture Is Destiny—A Conversation with Lee Kuan Yew*, 73 FOREIGN AFF. 109, 122 (Mar./Apr. 1994) (including China and Japan with United States and Western Europe on list of “great powers”).

62. See Michelson, *supra* note 54, at 397-417 (investigating possibilities of “third world approach” to international law).

63. Altman, *supra* note 34, at 69.

64. *Id.*

South Africa will most likely be an exception to this pattern. That is, in part, because of the large presence of persons of European ancestry and the dominant role they play in the economy there.⁶⁵

In this context, we must think about the issues of marginality and poverty and the global relevance of critical race theory. In this context, we must look at critical race theory and the issues of race globally. In other words, because the experience with race in the United States looms large,⁶⁶ what does that signify for the application of critical race theory globally?

At its most simplistic level, the experience of race in the United States, that is, the institutionalization of racism, has generated three different models to challenge the racist status quo: the primary one concerns the civil rights struggle, another concerns the human rights movement and the last concerns critical race theory. All of these different⁶⁷ approaches and their interplay with race may provide guidance for the application of critical race theory globally.

IV. RACE AND THE HUMAN RIGHTS MOVEMENT⁶⁸

The following discussion assumes that most international human rights activists in the United States either became involved in human rights work through their participation in the civil rights struggle or were largely influenced by the Civil Rights Movement. In other words, buoyed by the possibilities and the successes (albeit limited) of the Civil Rights Movement in the United States, many activists could turn their attention to international concerns. And particularly since the 1980s, all kinds of global injustices and catastrophes have captured the imagination of

65. See Maina Peter, *Regional Integration in Africa in the 1990's: The Impact of South Africa Within the Region*, in DEMOCRACY, HUMAN RIGHTS AND ECONOMIC DEVELOPMENT IN SOUTHERN AFRICA 359, 368 (Nico Steytler ed., 1997) (noting strength of South African economy and relation to number of inhabitants of European ancestry). South Africa is the second largest economy in Africa and by all economic indicators outshines all of Africa. See *id.* (detailing parameters and effects of South African economy); see also Irving Leonard Markovitz, *Uncivil Society, Capitalism and the State in Africa*, in CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES 21, 23 (Nelson Kasfir ed., 1998) (discussing development and ramifications of South African economy).

66. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (discussing development and status of race relations in United States); Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219 (1998) (examining how presence of race affects fulfillment of America's promise).

67. Arguably, these are not really "different" approaches or models; they all have some connection with the Civil Rights Movement—either as sources of inspiration (as with the human rights movement) or as a focus of critique (as with critical race theorists). In other words, what the Civil Rights Movement accomplished, or failed to accomplish, serves as a reference point.

68. Because I see some practical value in the gains made by the Civil Rights Movement in the United States, gains that may be useful for marginalized communities globally, I will focus on that discussion later in this paper.

human rights activists in the West, who have utilized emotional and other resources to pursue rights beyond their borders.

The anti-apartheid struggle is one pronounced case in point. It is now recognized that even though South Africans inside South Africa fought long and hard to overthrow apartheid there, the global efforts by a plethora of groups outside the country were very important.⁶⁹ The 1980s represented the heady days of the anti-apartheid struggle in the United States. In the mid-1980s, an impressive coalition of community activists, non-governmental organizations, church groups, the Congressional Black Caucus and sympathetic legislators passed the comprehensive Anti-Apartheid Act,⁷⁰ a package of sanctions that played no small part in the demise of the minority white government.⁷¹

But the international human rights movement in the United States also reflects a disenchantment of civil rights groups and individuals with the local civil rights agenda or lack of it. In the last few decades, local civil rights activists have witnessed a slow erosion of many of the gains accrued during the civil rights struggle.⁷² Arguably, much of the energy of the civil rights community has been expended in defending attacks on welfare rights, women's rights (especially the right to abortion), labor rights and rights to education.⁷³ All of these rights affect people of color to some degree. The most vociferous battles, however, have emanated from the programs and policies of affirmative action.⁷⁴ Challenges to affirmative

69. See Ibrahim Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGO's and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1467-69 (1996) (crediting U.N., other countries and human rights groups for international pressure against apartheid). These efforts culminated in the U.N. declaring apartheid "a crime against humanity." *Id.* at 1488 (describing U.N. resolution containing phrase as "most noteworthy and controversial").

70. See *id.* at 1509 (noting passage of Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-117 (repealed 1993) required override of presidential veto).

71. See *id.* at 1509-12 (analyzing how economic sanctions undermined South African government). See generally THE STRUGGLE FOR LIBERATION IN SOUTH AFRICA AND INTERNATIONAL SOLIDARITY (E.S. Reddy ed., 1992).

72. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 52-73 (1996) (highlighting Supreme Court decisions increasing scrutiny of affirmative action programs). For a thoughtful analysis of the racial divisions in American society, see generally ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992), examining the role that race does or does not play in education, crime and politics.

73. See, e.g., JONATHAN KOZOL, DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS (1997) (analyzing increasing disparities between poor and wealthy school districts); see also, e.g., SUSAN FALUDI, BACKLASH (1991) (examining societal backlash against panoply of rights won by women); Richard Delgado, *Reply Essay: Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating*, 71 B.U. L. REV. 525 (1991) (surveying suggested community responses to United States Supreme Court increasing restrictions on rights of poor and marginalized minorities).

74. See generally EDLEY, *supra* note 72 (outlining increased constitutional scrutiny of affirmative action programs); GERTURDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION (1991) (reviving arguments for affirmative action in

action have been among the most successful,⁷⁵ and have generated the most debilitation for civil rights activists.⁷⁶ Consequently, much of the organizational efforts around the pursuit of global human rights reflects a disillusionment of local civil rights activists with the domestic civil rights agenda, or in the perceived failure to sustain the limited gains of the Civil Rights Movement.⁷⁷

Despite its laudable global efforts, the human rights movement remains problematic, not in terms of the principles and values it promotes, but in terms of the relative absence of people of color in the dominant circles of the movement in the United States and the North generally.⁷⁸ This has been occasioned perhaps by the split of liberals in the United States between human rights groups and civil rights groups, and the perhaps understandable tendency of human rights groups in the West to give

wake of recent oppositional political climate); DINESH D'SOUSA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995) (examining origins of racism and validity of Black stereotypes in America); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994) (analyzing underlying bases for arguments against affirmative action, including racial guilt).

75. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995) (requiring strict scrutiny for any race-based classifications imposed by government actor). See generally *City of Richmond v. Croson*, 488 U.S. 469 (1989) (rejecting city set-aside requirement for minority subcontractors under Fourteenth Amendment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down minority teacher percentage preservation policy in layoff provision of collective bargaining agreement because it was not narrowly tailored to its intended purpose).

76. See, e.g., Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Is Not Enough*, 32 CONN. L. REV. 1, 63-69 (1999) (exhorting whites to assume privileges attendant to their race, and to be more assertive about fighting racism).

77. See EDLEY, *supra* note 72, at 52-73 (highlighting Supreme Court decisions increasing scrutiny of affirmative action programs). I recognize that this is a rather generalized point dependent more on anecdote and innuendo than hard statistical data. Despite this, the statistical data reveal a proliferation of non-governmental organizations, both in the United States and abroad, pursuing the goals of international human rights. See Mertus, *supra* note 59, at 1336 (noting increased participation by non-governmental organizations in human rights agendas); see also Maria Luisa Bartolomei, *The Globalization Process of Human Rights in Latin America Versus Economic, Social and Cultural Diversity*, 25 INT'L J. LEGAL INFO. 156, 166 (1997) (listing Argentinian families and Roman Catholic Church among notable groups active in human rights struggles).

78. Of all the major non-governmental organizations in the United States that focus on the pursuit of international human rights, only one is headed by a person of color, namely, the International Human Rights Law Group, which is headed by Gay McDougall. See *International Human Rights Law Group: Overview* (visited Sept. 5, 2000), <<http://www.hrlawgroup.org/site/-overview.html>> (listing McDougall as Executive Director). Outside of the United States, Adama Dieng, a West African lawyer, headed the International Commission of Jurists. He was one of the few people of color to lead a major international non-governmental organization. He stepped down in May of 2000. I am excluding from my observations the major U.N. bodies and organizations such as TransAfrica, whose major purpose is lobbying. See Aaron Myers, *TransAfrica* (visited Sept. 5, 2000) <http://www.africana.com/tt_431.htm> (describing organization as "lobby that focuses on U.S. policy toward Africa and the Caribbean").

lower priority to the other needs of people in the developing world when weighing these needs against those of human rights.⁷⁹

This latter problem is perhaps all the worse because the human rights movement in the West is built upon a developed economic and political model, which did not, for example, come into being before the end of racial segregation, slavery, denial of the rights of women to vote, or even before the Supreme Court started applying provisions of the Bill of Rights, including the First Amendment, to the states.⁸⁰ Moreover, it is arguable that human rights activists in the United States are not accountable to any constituency—unlike the situation of local civil rights activists, who have at least modest claims to the representation of local constituencies.⁸¹

V. RACE AND CRITICAL RACE THEORY

To explore the relevance of critical race theory to an analysis of international human rights law, it may be apposite here to consider its relevance and influence in the United States. Critical race theory took root among some legal scholars of color in the late 1980s.⁸² Their theory incorporated “an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies.”⁸³ In addition, much of critical race theory is “marked by deep discontent with liberalism, a system of civil rights litigation and activism, faith in the legal system, and hope for progress.”⁸⁴

Despite their scholarship being assigned a theoretical label and the confluence of their concerns about the interplay of race and law, the single labeling under the rubric “critical race theory” conceals the richness

79. See Richard Falk, *Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries*, UNIVERSAL HUM. RTS. Apr./June, 1979, 3, 16-28 (exploring objectives and priorities of Western human rights groups). I am, of course, referring to the primacy given individual rights over socio-economic rights in the West. See Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 2 (1986) (stating that socio-economic rights are “second generation” rights).

80. See Prakash Shah, *International Human Rights: A Perspective from India*, 21 FORDHAM INT'L L.J. 24, 36-37 (1997) (discussing critiques of Western human rights agendas).

81. See generally Davison M. Douglas, *Freedom: Constitutional Law: The Quest for Freedom in the Post Brown South: Desegregation and White Self-Interest*, 70 CHI.-KENT L. REV. 689 (1994) (discussing various levels of community involvement in campaigns to desegregate public schools in North Carolina).

82. See Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 721 n.34 (1992) (noting first critical race theory conference convened in 1989).

83. Derrick A. Bell, *Who's Afraid of Critical Race Theory?* 1995 U. ILL. L. REV. 893, 906 (1995).

84. Richard Delgado, *Critique of Liberalism*, in CRITICAL RACE THEORY: THE CUTTING EDGE 1 (1995).

and diversity of the body of work that the label incorporates.⁸⁵ A leading critical race scholar has thus elucidated:

Critical race theory is not uni-perspectival; there is no single consensus of a characterization of the theory. Certainly the name "critical race theory" suggests some connection to critical legal theory, yet its name derives more directly from the name "critical theory" by which some refer to the tenets of the Frankfurt School of Philosophy of Habermas and Marcuse. The contributors to critical race theory have resisted defining themselves.⁸⁶

In summary, therefore, although the works of many scholars are encapsulated in the body of work designated as critical race theory, there are significant variations, methodologies and perspectives.⁸⁷ The unifying theme is a concern with the legacy of racial subordination in the United States and its reflection in law's edifice.⁸⁸

85. See *id.* (incorporating major critical race theory writings); see also CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (same); CRITICAL RACE FEMINISM: A READER (Adrien Wing ed., 1997) (same).

86. Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1096 n.5 (1992).

87. I have outlined the diversity of the works by many scholars who have been labeled as critical race theorists. For further examples, see *supra* note 85. Nevertheless, for the purposes of this discussion, I will sweep with a broad theoretical brush and refer to critical race theory as a body of work that reflects greater convergences than differences among its scholars.

88. See, e.g., Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 239-58 (1989) (discussing racism and its correlation with laws of United States). Although critical race theory has its origins in an analysis of the legacy of white racism towards people of African descent, critical race theory has increasingly come to embrace the perspectives of indigenous communities and other marginalized minority groups. See *id.* (discussing oppression by whites of Indian tribes in United States); see also Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, in CRITICAL RACE FEMINISM: A READER, *supra* note 85, at 203, 213 (raising awareness of racial stereotypes of Asian Pacific women); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1247 (1993) (analyzing critical race theory from perspective of Asian Americans); Berta Esperanza Hernandez-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 898-99 (1997) (highlighting variant discrimination of Latinas based on being "White" or "Black" Latino); Darren Leonard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 4 (1999) (discussing lesbian activists' demands for higher visibility of their agenda). See generally Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 19 B.C. THIRD WORLD L.J. 349 (1998) (examining commonalities between Asian and Latino critical race theory issues).

The Critical Race Project has also been initiated in Canada, where scholars have utilized critical race theory in their attempts to analyze racial subordination in Canada. See generally CAROL A. AYLWARD, CANADIAN CRITICAL RACE THEORY

With respect to critical race theory, it is not clear how to define it either in international terms or even in terms of its meaning in the United States. Critical race scholars have subjected the American legal system, including its vast array of civil rights laws and its claims to equality, to thoughtful and vigorous critique.⁸⁹ These critical race scholars have unmasked the many unquestioned assumptions inherent in American law. Perhaps two of critical race theory's dominant features are the narratives of individuals⁹⁰ and, to date, its lack of programs.⁹¹ The first is positive and the second is negative.

With respect to the first, it is clear that many in the West, and especially in the United States, respond less to statistics and more to the plight of the individual, that is, the individual sufferer. Critical race theory has made the narrative center stage, although in some cases the narrative has focused more on the experiences of the narrator than of some individual who has suffered in some particularly exceptional way.⁹² Fortunately, this

(1999) (exploring racial subordination in Canada under critical race theory model).

89. See generally CRITICAL RACE THEORY, *supra* note 85 (analyzing United States law in context of critical race theory); CRITICAL RACE FEMINISM, *supra* note 85 (collecting works on critical race theory).

90. See generally PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (exploring, through narrative, limits of law in ensuring rights to racial minorities); Richard Delgado, *Storytelling for Oppositionalists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (exploring use of stories to promote racial reform).

91. Two things have led me to this conclusion: first, my research assistant conducted a search of federal case law across the country, including the United States Supreme Court, to locate decisions that mentioned critical race theory. This search proved fruitless. This, however, may just indicate that judges do not explicitly mention critical race theory, but may in fact cite the work of an individual scholar who identifies as a critical race theorist. In addition, the search did not include state courts. Second, I had a series of conversations with civil rights lawyers who commented that they do not find much of critical race theory useful in their endeavors in the courts. Of course, the latter point is obvious, based on the skepticism of many critical race theorists of the utility of civil rights litigation.

92. I am making a distinction between extraordinary and ordinary victims of racial subordination or discrimination. I am not suggesting that "minor" infringements or dignity ought to be seen as any less than "major" ones, especially with respect to the individual affected. However, the panoply of pain and humiliation to which individuals are subjected based on race or ethnicity range from slight infractions to gross violations of human rights. For a disturbing account of the parade of indignity and offense that many "successful" African-Americans are constantly subjected to, see ELLIS COSE, THE RAGE OF THE BLACK MIDDLE CLASS (1995), which explores African American experiences with racism. Institutionalized systems of racial oppression carry with them a certain banality, so that particular forms of expression become accepted practice (although highly offensive for the recipients). These forms I distinguish from gross violations of human rights, which carry with them a level of opprobrium, even from individuals who are not traditionally at the receiving end of racism. For a related discussion on the distinction between extraordinary and ordinary victims of apartheid in South Africa, see DAVID DYZENHAUS, JUDGING THE JUDGES: JUDGING OURSELVES (1998), which discusses victimization during South African apartheid epidemic.

also corresponds with the tendency of the media in recent years to report the news in terms of what happened to one or two individuals. Even in the case of the large exodus of refugees from Kosovo, the American media often reported the story in terms of the life of one or two individual refugees. This is a lesson that people of color should perhaps learn to apply.⁹³

As for the lack of programs, this is a serious defect. Beyond sophisticated critique, lawyers need to engage the law in a very constructive way.⁹⁴ They need to be able to draft regulations and law. They need to anticipate the impact of different laws; they need to be able to act as judges who appropriately develop the law as well as interpret it. Lawyers need to operate in the private sector to find creative ways to advance both the public and private sectors. At the dawn of South Africa's democracy, these were the skills needed; they played no small part in the political transition there.⁹⁵

VI. RACE AND THE CIVIL RIGHTS MOVEMENT

For some practical ideas, it may be worth looking at the Civil Rights Movement, where a minority was confronted with pursuing equality in the face of resistance from a hostile majority.⁹⁶ This was done in many ways. One particularly effective method was to promote procedural safeguards when it was impossible to obtain substantive rights.⁹⁷ For example, in many areas such as higher education or welfare or employment, disclosure

93. A recent example to highlight the point surfaced during particularly horrendous floods in Mozambique that devastated the country. The American media was slow to pick up the story, but coverage was improved when a Mozambican woman who had been stranded in a tree for a few days gave birth just before she was rescued by helicopters. See *As Aid Is Delivered in Mozambique, Some Question Delay*, N.Y. TIMES, Mar. 7, 2000, at 6 (commenting on aid to flood victims).

94. The point is not to eschew legal theory, but rather to suggest that if law is going to be used as an instrument to transform people's lives, then critical race scholars who are engaged in that endeavor are implicated in their outcomes. In other words, their tasks are more than deconstruction, but should include reconstruction. And as law professors, our skills, our methodologies, indeed all our endeavors involve our chosen profession.

95. See Christina Murray, *Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court*, in SOUTH AFRICA'S CONSTITUTIONS AND THE ENFORCEMENT OF RIGHTS (Penelope E. Andrews & Stephen Ellman eds., forthcoming) (describing particularly difficult task lawyers confronted negotiating South Africa's Constitution).

96. For an interesting and highly readable account of the Civil Rights Movement, see generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS: 1954-63* (1988). For critiques of the civil struggle and particularly the failures of the Civil Rights Movement in substantively redressing the structural inequalities that plague minorities, especially African-Americans, see DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992), and DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992), which provides new goals for the civil rights struggles.

97. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663-768 (2d ed. 1988) (analyzing procedural due process).

of the impact of ordinary private and public actions was required.⁹⁸ In terms of poverty law, this resulted in disclosure statements. In environmental law, this resulted in environmental impact statements.⁹⁹ Perhaps, in looking at the workings of international organizations, critical race theorists need to identify areas where procedural safeguards could be obtained even though the substantive claim is unable to be realized.¹⁰⁰

To peruse some examples: perhaps in the area of refugee assistance, it may be strategic to require the United Nations (U.N.) to make an equity assessment or equality impact statement whenever it undertakes additional assignments. At least, this will force the member nations and the U.N. staff to recognize at the outset whether U.N. resources are being utilized adequately and fairly or whether they are being skewed to the benefit of those who are less needy.¹⁰¹ Because the global crisis of refugees is one of the most serious, this is not an insignificant concern. With reference to this issue of refugee inequity, discrepancies have been demonstrated of late with respect to the crises in the Balkans, and in Africa, where the United Nations High Commissioner for Refugees is spending eleven times more on refugees in the Balkans than in Africa.¹⁰² Moreover, international appeals for humanitarian assistance for Africa are often not met with the same eagerness as those for Eastern Europe.¹⁰³

98. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (requiring hearing before welfare benefits are terminated); see also *Wheeler v. Montgomery*, 397 U.S. 280, 281-82 (1970) (confirming *Goldberg* and applying rule to termination of old age benefits).

99. See The National Environmental Policy Act, 42 U.S.C. § 4332(2)(c)(i) (1970) (mandating environmental impact statement). The Act states its purpose as:

[A] national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the nation.

Id. For a discussion of these impact statement requirements, see FRANK P. GRAD, 4 TREATISE ON ENVIRONMENTAL LAW § 9.02 (1998).

100. See *Mutua*, *supra* note 19, at 590 (discussing international procedural safeguards). In the U.N., for example, this may be particularly useful where there may be huge differences among member nations about the content of a right. See *id.* at 590 (noting member nations' inability to agree on scope, content or philosophical bases of human rights).

101. For a thoughtful discussion on rendering international humanitarian intervention more effective, see Ruth E. Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia and Haiti*, 31 TEX. INT'L L.J. 43, 53 (1996) (discussing appropriate humanitarian intervention role of the U.N.).

102. See Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?* 93 AM. J. INT'L L. 841, 847 ("[T]he UNHCR is spending about 11 cents a day per refugee in Africa. In the Balkans, the figure is \$1.23, more than eleven times greater." (citing T. Christian Miller & Ann M. Simmons, *Relief Camps for Africans, Kosovars Worlds Apart*, L.A. TIMES, May 21, 1999, at A1)).

103. See Chinkin, *supra* note 102, at 847 (noting that Kosovo's appeals have been substantially met while those for Africa have been largely ignored). Chinkin points out:

To raise a further example: it is now clear that developing nations are likely to be the ones subjected to sanctions from the U.N.¹⁰⁴ Perhaps the U.N. should be required to do impact statements to assess its overall impact on the most vulnerable members of the society, particularly those who do not have the means and/or resources to challenge the targeted government.¹⁰⁵

In the case of sanctions, perhaps another procedural benefit would be to have them be in existence for a limited time but capable of being renewed by another vote by members. In addition, there could be a requirement that before each vote, the U.N. would have to make an impact assessment of humanitarian need, equity or other such facts. The point is that, like the civil rights and environmental movements, critical race theorists should perhaps think about both procedural and substantive safeguards, recognizing that both are valuable.

VII. CRITICAL RACE THEORY: THE WAY FORWARD

Our discursive debates also need to include *our* locations as privileged inhabitants of the West, even as part of the Third World in the West, or as part of the South in the North. We need to critically interrogate whether and how domestic United States categories and analyses travel, if at all. For example, "the positioning of 'minorities' and marginal groups within U.S. society at the 'bottom' by critical race theorists would pose different questions regarding accountability if our 'bottom' were perceived by inhabitants of other parts of the world as part of the 'top' in the industrialized North."¹⁰⁶

[The U.N.'s] consolidated humanitarian appeal for Kosovo is \$690 million, of which 58% has been met, while \$2.1 billion has just been pledged for regional construction. A U.N. appeal for \$25 million for Sierra Leone met profound international indifference and a mere 32% of the appeal has been covered.

Id. (citing Victoria Brittain, *Unrealistic Humanitarians*, GUARDIAN, Aug. 4, 1999, at 16).

104. See Joy K. Fausey, Comment, *Does the United Nation's Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?*, 10 CONN. J. INT'L L. 193, 196 (1994-95) (discussing how sanctions impose upon nation's individuals, despite claims that sanctions only affect nations). The most publicized of the U.N. sanctions are those against Iraq. See *id.* (describing restrictions imposed upon Iraq for human rights violations). The effects of the sanctions against the populace, especially children, have been raised. See *id.* (noting social ramifications of U.N. sanctions in Iraq).

105. See *id.* (suggesting that U.N. should consider societal disparities in context of program development). Similarly, the structural adjustment programs of the IMF and the World Bank have wreaked havoc in the developing countries; might it not be too far fetched to consider impact statements to reveal their human impact. See *id.* (discussing objectives and ramifications of impact statements).

106. Sharon K. Hom, *International Law Moves in a Cross-Discipline Register*, 92 AM. SOC'Y INT'L L. PROC. 99, 102 (1998).

This is the context within which an analysis of critical race theory and international law is located. In other words, the hegemony of the United States in global economics, politics and law implicates the manner in which a critical race perspective may enter the global stage on which human rights discourse is increasingly insisting on a less minor role.

As I have mentioned before, the influence of critical race theory in this country has been somewhat limited. It has been of fairly significant theoretical value, but this has largely been confined to a few academics in law faculties. Despite their limited influence, the writings of critical race scholars have generated substantial attention from both liberal and conservative scholars.¹⁰⁷

The speakers at this symposium have all indicated the convergences and divergences between international law and critical race theory. For critical race theorists, the challenge is to excavate the spaces and silences in international law that exclude people of color and to fill those spaces and silences, both symbolically and substantively.

At the outset, this paper indicated how international law has been and continues to be subjected to thoughtful critique.¹⁰⁸ Critical race theory therefore follows a critical tradition established in international law, following in the footsteps of critical legal studies,¹⁰⁹ new approaches to international law,¹¹⁰ international legal feminism,¹¹¹ new approaches to comparative law,¹¹² and the postcolonial and sexuality project.¹¹³

107. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745 (1989) (analyzing recent writings on effect racial differences have in scholarly influence and prestige in legal academia); see also RICHARD A. POSNER, *OVERCOMING LAW* 368-84 (1995) (discussing, through nuance, narrative and empathy, different approaches available under critical race theory); Daniel Subotnik, *What's Wrong with Critical Race Theory?: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL'Y 681, 681-87 (1998) (reaching dramatically different policy judgments than critical race theory advocates after reviewing history of critical race theory); Lloyd R. Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301, 301 (1992) (suggesting that difficulty in judging achievements in emerging Black legal scholarship, or critical race legal scholarship, is based on its insulation from outside review and critical appraisal).

108. For further discussion of critiques of international law, see *supra* notes 11-54 and accompanying text.

109. See, e.g., Purvis, *supra* note 29, at 81 (introducing history of recent international legal scholarship); Trimble, *supra* note 17, at 813 (discussing nations' need for better comprehension of international law).

110. See Kennedy & Tennant, *supra* note 17, at 417-18 (presenting collection of new approaches to international law).

111. See Cook, *supra* note 14, at 857 (discussing published works "on the development, interpretation, and implementation of women's international human rights").

112. See generally Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255 (examining emerging issues in comparative law).

113. See Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189, 190 (1993) (arguing that feminist legal scholars, despite providing powerful critical voices, have not challenged global contradictions in their efforts to articulate feminist project); see also Tayyab

All of these approaches have attempted to excavate, debunk and deconstruct the myths of equality and neutrality in international law.¹¹⁴ These scholars have suggested new methodologies to incorporate the concerns of marginalized groups,¹¹⁵ and have suggested new approaches to incorporate these concerns in theory and praxis.¹¹⁶ As mentioned previously, there is vast, innovative literature about these matters.¹¹⁷ The question, therefore, arises: What can critical race theory offer? Does critical race theory provide a vocabulary for transformation? And more significantly: Of what practical value would these perspectives be? What are the possibilities of critical race theory engaging with local struggles? Implicit in the critique of critical race theory of the American legal system is the law's neglect of marginalized communities, largely communities of color.¹¹⁸ It is therefore not too implausible to assume that its focus in international law would be on how communities of color are situated within the global configuration. Its primary focus therefore will be the intersection of global economics and politics with rights and the Third World.¹¹⁹

VIII. A TENTATIVE AGENDA

We have for over a century been dragged by the prosperous West behind its chariot, choked by dust, deafened by the noise, humbled by our own helplessness, and overwhelmed by the speed. We agreed to acknowledge that this chariot-drive was progress, and that progress was civilization. If we ever ventured to ask, "progress towards what, and progress for whom," it was consid-

Mahmud, *Migration, Identity and the Colonial Encounter*, 76 OR. L. REV. 633, 634 (1997) (re-examining some fundamental questions surrounding phenomenon of migration). See generally B. COSSMAN & R. KAPUR, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996) (discussing feminist project as it relates to India).

114. For an exploration and categorization of these different approaches, see Kennedy, *supra* note 15, at 14-16 (framing disciplines of international law, comparative law and international economic law).

115. See *id.* (same).

116. For a passionate plea to utilize our resources in a constructive way, see Hom, *supra* note 106, at 105, supporting "the exploration of a reconstructive agenda," which she calls "trafficking justice," in which "the daily choices we make . . . are concrete, site-specific opportunities for 'doing justice' in the here and now."

117. An Australian international scholar has described international legal theory as "a blossoming academic industry." Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT'L L. 615, 615 (1996) (providing poignant review of THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

118. See generally Regina Austin, *"The Black Community," Its Lawbreakers and Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing disproportionate number of African-Americans in criminal justice system).

119. For an explanation of the use of "Third World," see *supra* note 10 and accompanying text.

ered to be peculiarly and ridiculously oriental to entertain such ideas about the absoluteness of progress. Of late, a voice has come to us bidding us to take count not only of the scientific perfection of the chariot but of the depth of ditches lying across its path.¹²⁰

International law is fundamentally a political and a practical enterprise. Although driven by theory and ideology, it is the consequence of hard-nosed political bargaining and compromise.¹²¹ International law is not democratic, despite the formal facade of one vote, one member at the U.N.¹²² One only has to look at the make-up of the Security Council, where five members have powers of veto on decisions made by the General Assembly, consisting of one hundred and fifty plus member states.¹²³

However, despite these political shortcomings in global governance, political lobbying by non-governmental organizations has at times proven effective in pursuing human rights.¹²⁴ They have in fact injected into a system long viewed as bureaucratic, and its processes, cumbersome, an energy and excitement filled with possibilities for marginalized groups and individuals globally.¹²⁵ These international non-governmental organizations have, in their activism, demanded that the U.N. live up to its commitments enshrined in the first twentieth century document of international human rights, the Universal Declaration of Human Rights.¹²⁶ Evidence of

120. Nikhil Aziz, *The Human Rights Debate in an Era of Globalization: Hegemony of Discourse*, BULL. CONCERNED ASIAN SCHOLARS, 1995, at 9 (citing Rabindranath Tagore, *Social Movements and the Redefinition of Democracy*, in INDIA BRIEFING 131 (Philip Oldenburg ed., 1993)).

121. See Baxi, *supra* note 2, at 125-28 (discussing proliferation of "Age of Human Rights" in twentieth century on global scale).

122. For a thoughtful discussion of the fallacy of equality in international law, see Maxwell Chibundu, *Affirmative Action and International Law*, 15 L. CONTEXT 11 (Vol. 2, 1999) (arguing formal, sovereign equality of states under international law belies economic disparities existing among states).

123. See U.N. CHARTER art. 2 (setting forth principles upon which U.N. was founded); see also Otto, *supra* note 59, at 376 (same).

124. See generally THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE U.N. SYSTEM (Peter Willetts ed., 1996) [hereinafter THE CONSCIENCE OF THE WORLD] (outlining status of NGOs at U.N. and their role in variety of areas, including women's rights, children's rights, environment and refugees); THE NGOS, THE U.N. AND GLOBAL GOVERNANCE (Thomas Weiss & Leon Gorden eds., 1996) (analyzing relationship between NGOs and U.N., and their overall participation in global governance); THE LEGITIMACY OF THE UNITED NATIONS: TOWARD AN ENHANCED LEGAL STATUS OF NON-STATE ACTORS (Theo C. Van Boven et al. eds., 1996).

125. See generally THE CONSCIENCE OF THE WORLD, *supra* note 124 (discussing efforts of NGOs).

126. See G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Res. p. 1, at 71, U.N. Doc. A/810 (1948). For a discussion of the responsibilities that attach to human rights, see generally Mary Maxwell, *Toward a Moral System for World Society: A Reflection on Human Responsibilities*, 12 ETHICS & INT'L AFF. 179 (1998) (commenting on "Universal Declaration of Human Responsibilities" as proposed by InterAction Council).

the success of their endeavors abound;¹²⁷ the most visible is the lobbying conducted by non-governmental organizations committed to women's human rights. In the last two decades, global activity in the pursuit of women's human rights has been unprecedented. This is reflected in numerous global conferences arranged under the auspices of the U.N.,¹²⁸ the number of U.N. documents committed to the pursuit of women's human rights,¹²⁹ and the amount of literature emanating from the U.N. and its agencies committed to women's human rights.¹³⁰ Much of the success of these lobbying efforts by women activists through the non-governmental sector was possible because of a concerted, strategic alliance of women activists and feminist scholars, the latter often acting as consultants and "experts."¹³¹ This is possibly a lesson that critical race theorists could

127. See Ved P. Nanda, *The Human Rights Era at Fifty: Looking Back and Looking Forward*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 69, 78 (1997) (outlining critical role played by NGOs in stemming threat of nuclear weapons and landmines).

128. The United Nations Decade for Women (1975-1985) represented a concerted effort to achieve objectives of equality, development, peace, employment, health and education for women. See generally *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.94/35 (1980) (detailing steps taken to achieve equality for women globally); *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.116/28/REV.1 (1985) (analyzing progress made in pursuit of women's rights).

The Fourth World Conference on Women, held in Beijing in 1995, was by far the most significant U.N. Conference for Women during the decade. Women lobbied the governmental delegations extensively and organized a parallel non-governmental conference to coincide with the formal proceedings. The conference produced the *Beijing Declaration and Programme of Action*, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 (1995), available at <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a—20.en>>. For a discussion of the Beijing Conference, see Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 U.N. World Conference on Women, Beijing, China*, 84 Ky. L.J. 1249, 1249-50 (1995/1996) (discussing both CEDAW and Beijing Conference).

129. See, e.g., *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980) (discussing U.N.'s efforts to eliminate gender-based discrimination); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item III, U.N. Doc. A/RES/48/104 (1993) (discussing efforts made to eliminate violence against women).

130. See, e.g., UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945-1996* (1996) (tracing U.N. history of confronting problems faced by women and campaigning for advancement of feminist issues).

131. These alliances have been fraught with difficulty and often much rancor. See generally Isabelle R. Grunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991-92) (calling on Western feminists to be more cognizant of their limitations when dealing with "outsider cultures" and suggesting an intellectual mode of engagement that she entitles, "World Travelling"); Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201 (1994) (recalling difficulties that arose during Vienna Conference when Western and Third World femi-

heed. In this vein, the following are some of the areas of international human rights law to which critical race theorists could make a valuable contribution.¹³²

Critical race theorists could become involved in the continuing efforts by Third World scholars and activists to rescript the hierarchy of rights to ensure that economic and social rights are not continually relegated to a secondary place on the rights stage,¹³³ and that human rights in fact are linked to economic development.¹³⁴ Second, critical race theorists could continue to deconstruct those perennial claims of human rights law: universalism, sovereignty and equality, and subject them to the vigorous critique they have accomplished in the United States.¹³⁵ Third, they could focus attention on extra-governmental institutions that continually impact the human rights of individuals, sometimes benignly, as in the case of international non-governmental organizations, and sometimes negatively, as in the case of multinational corporations.¹³⁶ Finally, they could focus their attention on the U.N., and particularly its enforcement bodies and

nists attempted to strategize around issue of violence against women). A particularly useful perspective is the critique leveled at feminists for their failure to focus on race and class. See Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1924 (1994) (noting that "both formal equality strategies and affirmative action strategies disproportionately benefit those women at the top of the female hierarchy . . .").

132. This is in addition to the already impressive contribution by critical race scholars. See, e.g., Ruth E. Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U.J. INT'L L. & POL'Y 903, 915 (1997) (suggesting that critical race perspective critically assess statehood and sovereignty).

133. See generally BEDJAOUI, *supra* note 10 (discussing "new international economic order, its meaning, its importance and other observations"); see also Thomas, *supra* note 45, at 2-10 (analyzing areas of international law and policy needing restructuring of discourse); J. Oloka-Onyango, *Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 2 (1995) (discussing need to devote more attention to human rights previously neglected).

134. See generally Jack Donnelly, *Human Rights, Democracy, and Development*, 21 HUM. RTS. Q. 608 (1999) (exploring relation between human rights and economic development); DAVID GILLIES, *BETWEEN PRINCIPLE AND PRACTICE: HUMAN RIGHTS IN NORTH-SOUTH RELATIONS* (1996) (examining prosperous industrial countries' unwillingness to sacrifice economic interests in protest of human rights abuses); Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?* 4 BUFF. HUM. RTS. L. REV. 25 (1998) (arguing social rights form an important part of one's human rights under an economic development framework).

135. See generally CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 84 (presenting a compilation of excerpted works on critical race theory).

136. See Jochnick, *supra* note 32, at 64-68 (providing legal framework to hold non-state actors accountable for their roles in creating and sustaining poverty); see also Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 958 (1996) (discussing global governance in light of international corporations). But see William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368, 368 (1996) (arguing that foreign investment in country can contribute to good human rights practices).

mechanisms', to investigate how a critical race theory perspective may be brought to bear on the institution and its enforcement procedures.¹³⁷

Critical race theorists could also interrogate local concerns here in the United States that have international implications. For example, even though the death penalty has raised widespread debate because its imposition disproportionately affects African American males, an added concern is its violation of international human rights.¹³⁸ This is one international human rights issue that has resulted in widespread opprobrium from the international community, particularly this country's European allies.¹³⁹ Critical race theorists may have an important contribution in highlighting this issue and shaping the debate.

One significant global event in which critical race theorists may have an immediate opportunity to engage with international human rights law, is the upcoming United Nations Fourth World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be held in South Africa in the summer of 2001.¹⁴⁰ The U.N. General Assembly has directed that the conference be "action oriented,"¹⁴¹ and the conference announcement states its aim as follows:

[T]o focus on practical steps to eradicate racism by considering how to ensure that international standards and instruments are applied in efforts to combat it. It will also formulate recommendations for further action to combat bias and intolerance.¹⁴²

137. An analogous investigation was undertaken to assess how the U.N. ignores women's concerns. See Charlesworth et al., *supra* note 14, at 622 (comparing U.N. structures with those of national states that restrict women to insignificant and subordinate roles).

138. See generally Amnesty International, *The Death Penalty in the United States*, available at <http://www.web.amnesty.org/rmp/dplibrary.nsf/index> (providing link to U.S.A.'s *Hour of Shame*, AMR 51/127/2000, 10/08/2000).

139. See Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. TIMES, Feb. 26, 2000, at A8 (describing European sentiment that death penalty should not be revived). There are other examples as well. The debate surrounding immigrants' rights and the continued exploitation of immigrant workers raises concerns about their international human rights implications. See, e.g., Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER, RACE & JUST. 1, 30-36 (1999) (raising issues that female immigrant workers face daily, which are virtually ignored by feminist and academic migration scholars).

140. See generally UNITED NATIONS, DEPARTMENT OF PUBLIC INFORMATION, WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, SOUTH AFRICA 2001 (1999) [hereinafter SOUTH AFRICA 2001].

141. See generally SOUTH AFRICA 2001, *supra* note 139.

142. *Id.* In addition, the conference announcement outlines the following aims and objectives:

To review progress made against racial discrimination, to re-appraise obstacles to further progress and to devise ways to overcome them;

To consider how to ensure the better application of existing standards to combat racial discrimination;

To increase awareness about racism and its consequences;

The International Convention on the Elimination of all Forms of Racial Discrimination,¹⁴³ the centerpiece of the United Nations human rights armory to fight racism, will be the main focus of the event, although the conference also plans to "highlight global efforts to promote the rights of migrants."¹⁴⁴ Of particular interest to critical race theorists, and in line with their innovative scholarship,¹⁴⁵ the conference intends to focus on the intersectionality of race, gender, disability or age.¹⁴⁶

This conference provides a propinquitous opportunity for critical race theorists to engage with critical scholars and human rights activists from around the globe to interrogate the increasing possibilities of a human rights agenda in the United States in line with global developments. The imperatives of globalism and the organizational space that has been spurred by the increasing network of human rights, non-governmental organizations, provides an exciting entry point for critical race theorists to pursue a global agenda to eradicate racism. The most salient, immediate benefit may be an exploration of possible theoretical and practical strategies to pursue those goals within the United States.

IX. CONCLUSION

If critical race theory is perceived to, and will in fact be, of any relevance to marginalized peoples both within the United States and globally, then some of the concerns with which it has been most preoccupied will somehow need to shift. Critical race theorists have paid substantial attention to the failure of American law and its legal institutions to live up to the lofty principles set out in the Bill of Rights and have adequately addressed the legacy of colonialism (with respect to America's indigenous population), slavery (with respect to African-Americans) and subordination and discrimination (with respect to other minorities of color).¹⁴⁷ They have also described the panoply of indignities which members of

To make recommendations on how the activities and mechanisms of the United Nations can be more effective in fighting racism;

To review the political, historical, economic, social, cultural and other factors which have contributed to racism;

To make recommendations with regard to new national, regional and international measures that could be adopted to fight racism; and

To make recommendations concerning how to ensure that the United Nations has sufficient resources to be able to carry out an effective program to combat racism and racial discrimination.

Id.

143. *Opened for signature* Dec. 16, 1966, 660 U.N.T.S. (adopted by the United Nations General Assembly in New York on Dec. 21, 1965, entered into force on Jan. 4, 1969).

144. See SOUTH AFRICA 2001, *supra* note 139.

145. See CRITICAL RACE FEMINISM: A READER, *supra* note 85, at 11 (attempting to bring together legal writings of women of color).

146. See SOUTH AFRICA 2001, *supra* note 140.

147. For further discussion of the Civil Rights Movement in the United States, see *supra* notes 96-105 and accompanying text.

minority groups constantly confront.¹⁴⁸ Critical race theorists have focussed on the indignities of being law professors, and of general slurs and slights, which arise from the physical attributes of being a person of color in the United States.¹⁴⁹ Critical race scholars have also interrogated the conditions of criminality and marginality that plague communities of color in the United States.¹⁵⁰ They have, for example, focused their attention on the disproportionate number of African American males in the criminal justice system in the United States.¹⁵¹ Critical race theorists have also endeavored to expose the stereotype of the Black welfare queen, and the obnoxious racial animus accompanying such stereotyping.¹⁵² They have focused their attention on the conditions of economic marginality and the violence of poverty endemic amongst indigenous communities.¹⁵³

These valuable insights have provided a script for re-imagining and re-configuring rights discourse within the United States. Their application globally, however, is of limited utility, since they preface American historical and contemporary conditions. In other words, these issues and their articulation may not have similar global resonance.¹⁵⁴

148. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982) (arguing that tort liability for racial insults is permissible and necessary).

149. See Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, in CRITICAL RACE FEMINISM: A READER, *supra* note 85, at 96-97 (discussing precarious position Black women occupy in legal education). See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (arguing that resistance to racism and sexism can take various forms and should be work of all women regardless of race); Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, The Life of One Blackwoman in the Legal Academy*, 28 HARV. C.R.-C.L. L. REV. 259, 261 (1993) (suggesting Black women can have only dysfunctional relationships in legal academy).

150. See Mari J. Matsuda, *Crime and Affirmative Action*, 1 J. GENDER, RACE & JUST. 309, 311 (1998) (arguing failure of equality shapes material world of crime); see also *Developments in the Law-Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1476 (1988) (discussing barriers that victims of discrimination face when seeking judicial relief).

151. See, e.g., Regina Austin, *"The Black Community," Its Lawbreakers and Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992) (arguing that "black criminals are pitied, praised, protected, emulated, or embraced if their behavior has a positive impact on the social, political, and economic well-being of black communal life"). According to Austin, Black criminals are "criticized, ostracized, scorned, abandoned, and betrayed" if their behavior does not positively impact Black communal life. *Id.*; see Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1611 (1985) (revealing prejudices of criminal juries largely hidden from judicial and critical examination).

152. See Dorothy E. Roberts, *The Value of Black Mothers' Work*, in CRITICAL RACE FEMINISM: A READER, *supra* note 85, at 312, 313 (discussing lasting social value of Black mother figure).

153. See generally Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) (discussing genocide in context of Native American experience).

154. This is particularly the case with respect to the bifurcation of issues as majority versus minority(ies). In most of the developing world, the discourse of race, ethnicity and color (where the discourse exists in these terms) is of a differ-

Critical race theory has engaged only in a limited way in a thorough critique of the economic structures that underpin the American economic system and the role of American economic and foreign policy globally.¹⁵⁵ It may be useful for critical race scholars to scrutinize the economic, political and cultural hegemony of the United States at this historic moment, and its global repercussions.¹⁵⁶ Thus, in order to have some impact on global issues, critical race theorists will have to shift their focus somewhat, because the conditions of economic marginality are of particular concern to the global community of critical scholars.¹⁵⁷ Critical race theorists, therefore, have to engage in the critique of the international economic arrangements that continue to subordinate and subjugate large parts of the globe, particularly in the South.¹⁵⁸

There is ample space both in international human rights discourse, as well as in policy and practice, to incorporate and expand the project of critical race theory. This is, however, contingent upon some reorientation on the part of critical race theorists in line with the comments raised earlier. This will enrich both the international law project and a critical race theory agenda in the United States and abroad.

ent flavor. This is also the case with respect to reparations for slavery; the Atlantic slave trade was not the only trafficking in humans. See RONALD SEGAL, *ISLAM'S BLACK SLAVES: THE OTHER BLACK DIASPORA* (2001) (detailing Islamic slavery in earlier centuries, as well as contemporary slavery in the Sudan and Mauritania).

155. Within critical race theory, there have been thoughtful critiques of the American economic system and how it marginalizes people of color. See, e.g., Bell, *supra* note 8, at 776-77 (stating that "the rhetoric of freedom so freely voiced in this country is no substitute for the economic justice that has been so long denied"); see also, e.g., Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA, Not!*, in *CRITICAL RACE FEMINISM: A READER*, *supra* note 85, at 317 (exploring relationship between law and social reality of subordination through concept of "structural violence").

156. For further discussion, see *supra* note 57 and accompanying text.

157. For further discussion of suggestions for implementing critical race theory, see *supra* notes 55-67 and accompanying text.

158. For further discussion of the critiques of critical race theory, see *supra* notes 42-67 and accompanying text.

