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## Racing U.S. Foreign Policy

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# ARTICLES

## RACING U.S. FOREIGN POLICY

Ruth Gordon\*

### I. INTRODUCTION

This essay explores how race has shaped American foreign policy and American perspectives regarding international law.<sup>1</sup> While a number of scholars have analyzed African American perspectives regarding U.S. foreign policy,<sup>2</sup> the goal here is different. My objective is to question how American views regarding race have affected policy decisions and lawmaking in the international arena. It is part of a broader project to inquire into intersections between international law and Critical Race Theory (CRT), a project in which a number of scholars are presently engaged.<sup>3</sup> But before taking up this theme, I would like to engage a CRT tradition, a tradition which validates and celebrates narrative.<sup>4</sup> In this spirit, I will begin with a

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\* Professor of Law, Villanova University School of Law. B.A., J.D., New York University; LL.M., London School of Economics and Political Sciences. I would like to thank the editors of the Tulane School of Law edition of the National Black Law Journal for inviting me to be part of this exciting and provocative symposium and for their warm and gracious hospitality during my visit to the Law School. Additional thanks to the editors of the Columbia Law School edition of the National Black Law Journal for their excellent work on this essay. An earlier version of this paper was presented at the Annual Meeting of the American Society of International Law. This was written before the events of September 11, 2001. I hope to continue to explore this topic in the wake of those events in a future essay.

1. Professor Gerald Horne postulates that U.S. foreign policy in the 20<sup>th</sup> century cannot be properly understood without considering race and racism, just as the evolution of racism in the United States cannot be divorced from a global context. Gerald Horne, *Race From Power: U.S. Foreign Policy and the General Crisis of "White Supremacy"*, 23 *DIPLOMATIC HISTORY* 437, 438 (1999). See also Natsu Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 *YALE HUM. RTS. & DEV. L. J.* 53 (1998) (analyzing connection between American treatment of various communities at home and abroad).

2. See, e.g., Henry J. Richardson III, *The Gulf War Crisis and African-American Interests Under International Law*, 87 *AM. J. INT'L L.* 42-45 (1993). These views have been quite varied, complex, and not necessarily in line with domestic views of race nor American foreign policy goals. See ALEXANDER DECONDE, *ETHNICITY, RACE, AND AMERICAN FOREIGN POLICY: A HISTORY* (1992); GERALD HORNE, *BLACK AND RED: W.E.B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR* (1986); BRENDA GAYLE PLUMMER, *RIISING WIND, BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935-1960* (1996); PENNY VON ESCHEN, *RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937-1957* (1997). See generally Symposium, *African Americans and U.S. Foreign Relations*, 20 *DIPLOMATIC HISTORY* 531 (1996).

3. See Symposium, *CRITICAL RACE THEORY AND INTERNATIONAL LAW: CONVERGENCE AND DIVERGENCE*, 45 *VILL. L. REV.* (2000).

4. See ON NARRATIVE (W. Mitchell ed., 1981); John O. Calmore, *Critical Race Theory*, Archie Shepp, and *Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 *S. CAL. L. REV.* 2129, 2147, 2157 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411-13 (1989); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?* 76 *VA. L. REV.* 95 (1990); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 *VA. L. REV.* 461-62 (1993);

brief chronicle that conveys why CRT has become important to me as a scholar of international law, and as a scholar of color.

My interest in the position of race in the international legal paradigm and in American foreign policy began with my legal education at New York University School of Law where my first formal research paper was a comparative law project that compared South African Apartheid laws and the Jim Crow legal regime which held sway in the United States for almost a century.<sup>5</sup> This interest deepened and evolved during my first legal position, a first year summer internship with the National Lawyers Guild where I worked on Southern Africa issues, and then at a full time position as an attorney with the Lawyers' Committee for Civil Rights Under Law where I was privileged to continue my work in this arena under the brilliant guidance of Gay McDougall.<sup>6</sup> To this then young African American, the lukewarm opposition of the international community to Apartheid in Southern Africa,<sup>7</sup> and the outright hostility of the West to the demands for social and economic justice emanating from the Third World, seemed to be eerily reminiscent of the tepid response to the demands for social and economic

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Steven L. Winter, *The Cognitive Dimension of the Agon: Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225-28 (1992).

5. Ruth E. Gordon, *A Comparison of South African Apartheid Laws and American Jim Crow Laws 1978* (unpublished paper on file with the author). The parallels were actually quite startling and were later chronicled in a much more sophisticated and detailed manner by a number of scholars. See, e.g., A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 487-502 (1990); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1273-79 (1994); Paula C. Johnson, *Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa*, 1 JOURNAL OF GENDER, RACE & JUSTICE 471, 476-96 (1998).

6. Ms. McDougall headed the Southern Africa Project at the Lawyer's Committee for Civil Rights Under Law until the demise of that project that project upon the political liberation of South Africa. She is currently the Executive Director of the International Human Rights Law Group.

7. Actually the opposition to Apartheid was weak only in the West. The newly formed nations that made up the emerging Third World, as well as the communist Second World, were adamantly and vociferously opposed to Apartheid in Southern Africa and engaged in the struggle to eradicate it on all fronts, including the General Assembly and Security Council of the United Nations, the International Court of Justice, and in other international fora. See International Convention on the Suppression and Punishment of Apartheid [hereinafter *Apartheid Convention*], G.A. Res. 3068 (27<sup>th</sup> Sess.) (1973), 1015 U.N.T.S. 243 (1974). The General Assembly and Security Council passed numerous resolutions deploring Apartheid as contrary to the goals of the United Nations and calling for South Africa to eliminate the policy. See, e.g., Sec. Council Res. 181 (7 Aug 1963), Sec Council Res 182 (4 Dec 1963), Sec Council Res 392 (19 June 1976), Sec Council Res 418 (4 Nov 1977), Sec Council Res 473 (13 June 1980), Sec Council Res 569 (26 July 1985); G.A. Res. 1761, 167 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5276 (1962); G.A. Res. 2022, 20 U.N. GAOR Supp. (No. 14) at 150, U.N. Doc. A/6014 (1966); G.A. Res. 2074, 20 U.N. GAOR Supp. (No. 14) U.N. Doc. A/6014 (1966); G.A. Res. 2189 (1967); G.A. Res. 35/206, 25 U.N. GAOR Supp. (No. 48) at 29, U.N. Doc. A/35/L.13 (1980). See also *Aid to Liberation Movements in South Africa Urged; United Nations General Assembly Urges Cooperation in Struggle Against Apartheid*, 31 U.N. CHRON. 74, Feb. 1984; *Security Council Votes Anti-Apartheid Measure*, NY TIMES, July 27, 1985, at A4. Finally, the International Court of Justice was also a participant in this discourse. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 57 (Advisory Opinion of June 21) (denouncing Apartheid as denying fundamental human rights); *1966 South West Africa, Second Phase (Eth. v. S. Afr., Liber. v. S. Afr.)*, 1966 I.C.J. 6, 306-16 (dissenting opinion of Judge Tanaka) (July 18).

justice being made by people of color in the United States. Although the international arena was new to me, this aspect somehow felt quite familiar.

As part of my graduate studies in the mid-eighties, I studied the international law of natural resources, where impassioned debates were raging regarding nationalization, expropriation and control over natural resources.<sup>8</sup> There seemed to be something fundamentally wrong with a system where colonial powers could appropriate resources from colonial possessions at will, come back in a different guise in the post-colonial era and make contracts that were inherently inequitable, and then, according to international law, be entitled to compensation when the nations where those resources were located demanded control over them and a fair price for their exploitation.<sup>9</sup> Although a majority of the world contended to the contrary, international law demanded prompt, adequate and effective compensation.<sup>10</sup> Yet if customary international law is really the practice of states accompanied by *opinio juris*, I could not understand why customary international law was not transformed when the vast majority of states demanded that it be transformed.<sup>11</sup> It seemed that despite sovereign equality, some states were more equal than others in determining the content of

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8. See THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE (Jagdish N. Bhagwati, ed.) (1977); Jonathan Dubitzky, *Recent Developments: The General Assembly's International Economics*, 16 HARV. INT'L L.J. 670, 671 (1975); Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547 (1983); Tim Gebert, *The Principles of Just Compensation for International Takings*, 4 J. INT'L L. & PRAC. 389, 394-96 (1995); S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT'L L. 863 (1961); Maarten H. Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35 (1981); Mark K. Neville, Jr., *The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property*, 13 VAND. J. TRANSNAT'L L. 51 (1980); Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 385-86 (1998) [hereinafter Vandeveld, *Sustainable Liberalism*]. See also Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1963), reprinted in 2 I.L.M. 223 (1963) [hereinafter 1963 Permanent Sovereignty Resolution]; Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974), reprinted in 13 I.L.M. 238 (1974); Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 6 (Special) U.N. GAOR, 28th Sess., Supp. No. 1 at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974); Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975).

9. See also Declaration on the Establishment of a New International Economic Order, *supra* note 8; Charter of Economic Rights and Duties of States, *supra* note 8.

10. See Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 558 (1981); Dubitzky, *supra* note 8; Gebert, *supra* note 8; Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643-45 (1998); Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121-22 (1984); Vandeveld, *Sustainable Liberalism*, *supra* note 8, at 380-81. See also 1963 Permanent Sovereignty Resolution, *supra* note 8; Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117 (1963); Sapphire Petroleum Ltd. v. National Iranian Oil Co., 35 I.L.R. 136 (1967); Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1977); BP Exploration Co. (Libya) v. Libyan Arab Republic, 53 I.L.R. 297 (1979); Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic, 20 I.L.M. 1 (1981); Kuwait v. American Indep. Oil Co. (The Aminoil Arbitration), 21 I.L.M. 976 (1982).

11. The Statute of the International Court of Justice cites international custom as a source of law to be applied by the Court in resolving disputes. The Statute defines international custom as "evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, T.S. 993. In *North Sea Continental Shelf*, the Court discussed the nature of international custom:

international law.<sup>12</sup> Although the colonized may have been granted sovereignty, they were not deemed equal players in this particular contest. It was the assertion of power, pure and simple; and it was power exercised by Europe, by America, and by the West in general, against the colored world. The people of the Third World seemed either condemned to remain mired in poverty, as their wealth was controlled by the West, or they were destined to go bankrupt trying to buy it back.<sup>13</sup> To this then young mind, the entire system manifested the subordination of people of color. It exemplified white supremacy.

I could not find the words to convey these impressions, however, for international law shrouded this debate in such concepts as permanent sovereignty over natural resources, *pacta sunt servanda* and the protection of aliens and their property.<sup>14</sup> Colonialism and imperialism were omitted and

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Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, at 44 para. 77 (Feb. 20). See Michael Byers, *Custom, Power, and the Power of Rules*, 17 MICH. J. INT'L L. 109, 136 (1995) (identifying the two elements of customary international law as state practice and *opinio juris*); J. Patrick Kelly, *The Twilight of International Custom*, 40 VA. J. INT'L L. 449, 451-52 (2000); See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (5th ed. 1998).

12. See ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 64-66 (1971) (stating that some states play a bigger role in the formation of international law than others); Byers, *supra* note 11, at 144; Cedric Grant, *Equity in International Relations: A Third World Perspective*, 71 INT'L AFFAIRS 567, 574 (1995) (describing Third World nations being pushed to margins of international relevance); J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129, 155 (1989) (recognizing that the United States and other Western nations have control over the formation of international law); Douglas J. Sylvester, *Customary International Law, Forcible Abductions, and America's Return to the "Savage State,"* 42 BUFF. L. REV. 555, 612 (noting United States' role in formation of international law has resulted in a body of law that largely reflects American interests and philosophies).

13. For example, the Bilateral Investment Treaty regime has reinforced the principle of prompt, adequate, and effective compensation when foreign property is nationalized. Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 208-09, 231-36 (1988). See also Brice M. Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73, 81-85 (1984). Generally, a BIT "guarantees that covered investment will receive national and most favored nation treatment, prohibits exchange controls and uncompensated expropriation, and obligates host states to submit investment disputes with private investors and treaty disputes with the home state to binding, third-party arbitration." Vandavelde, *Sustainable Liberalism*, *supra* note 8, n. 2. For more on Bilateral Investment Treaties, see generally Adeoye Akinsanya, *International Protection of Direct Foreign Investment in the Third World*, 36 INT'L & COMP. L.Q. 58 (1987); Jose E. Alvarez, *Political Protectionism and the United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 30-39 (1989); Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. REV. 105 (1986); T. Modibo Ocran, *Bilateral Investment Protection Treaties: A Comparative Study*, 8 N.Y. L. SCH. J. INT'L & COMP. L. 401 (1987); Kenneth J. Vandavelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

14. See, e.g., E. Jimenez de Arechaga, *The Duty to Compensate for the Nationalization of Foreign Property*, 2 Y.B. INT'L L. COMM'N 237 (1963); E. Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 181 (1978) [hereinafter Arechaga, *State Responsibility*]; Amy L. Chua, *The Privatization-Nationaliza-*

by omission rendered irrelevant.<sup>15</sup> The fundamental inequities that seemed to be endemic to the international system were difficult to articulate within the language and concepts afforded by international legal discourse, for this dialogue did not afford the language or the conceptual models within which my observations and outrage could be voiced.<sup>16</sup> Or perhaps I should say voiced in a way that mattered, for this debate was structured in a way that insured defeat from the perspective of Third World people.<sup>17</sup> I can still recall my profound frustration, and that of my classmates from African and Middle Eastern countries, as we tried to challenge a paradigm that robbed them of their wealth and then rendered them voiceless to challenge the theft.

But I began to find a voice, my voice, in Critical Race Theory. Race theory helped me frame a response to proposals to employ the UN trusteeship system to assist so called "failed states."<sup>18</sup> The Critical Race critique of race and racism in contemporary discourse helped explain how theories such as redeeming colonialism might surface in contemporary international legal discourse even as we thought colonialism, and the racial subordination that supported it, had perished forever.<sup>19</sup> It helped explain the post-colonial discourse that has been partly responsible for the constitutional debacles in post-colonial Africa.<sup>20</sup>

A symposium was held in October 1999 at Villanova University School of Law. There we examined how CRT might help us understand, analyze,

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*tion Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 225-26 (1995); Dolzer, *supra* note 10; Francesco Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L COMP. L.Q. 255, 267 (1975); Gainer, *supra* note 8; F.V. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980); Guha Roy, *supra* note 8, at 888-89; Kelly, *supra* note 11; Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDC: Trends from 1960 to 1979*, 28 INT'L STUD. Q. 329 (1984); Muller, *supra* note 8; Neville, *supra* note 8, at 63; Patrick Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 488-95 (1991); Davis R. Robinson, *Expropriation in the Restatement Revised*, 78 AM. J. INT'L L. 176 (1984); Leslie L. Rood, *Compensation for Takeovers in Africa*, 11 J. INT'L L. & ECON. 522, 526 (1977).

15. See James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998) (discussing various types of anti-colonial scholarship). See also C.J.R. Dugard, *The Organization of African Unity and Colonialism: An Inquiry into the Plea of Self-Defense as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L.Q. 157, 172-73 (1967); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1139-40 (1995) (advocating U.N. Charter outlawed colonialism); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U.J. INT'L L. & POL'Y 903-11 (1997) [hereinafter Gordon, *Saving Failed States*] (arguing that Mutua's assertion is doubtful because none of the articles of the Charter challenge the validity of colonialism nor does travaux preparatoires reflect intent to outlaw colonialism).

16. See, e.g., Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law*, 8 HOW. L.J. 95 (1962); Gainer, *supra* note 8, at 1565-66; Guha Roy, *supra* note 8, at 866; Rood, *supra* note 14, at 531; Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: A Miracle for Breakfast*, 33 VA. J. INT'L L. 433 (1993) (applying feminist legal theory to international law).

17. See, e.g., Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 181 (1978); Francioni, *supra* note 14; Gainer, *supra* note 8, at 1558; Garcia-Amador, *supra* note 14.

18. Gordon, *Saving Failed States*, *supra* note 15.

19. *Id.* at 926-53.

20. Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CON. L. 3 (1999).

and perhaps transform the international system, and how an international dimension might enrich the Critical Race critique of race and rights.<sup>21</sup> It was a rich and enlightening conversation among brilliant scholars, and the present engaging symposium is continuing and expanding this important dialogue.

Indeed, determining the intersections between Critical Race Theory and international law is challenging, for CRT has been grounded in the American racial quagmire and it embodies and embraces race consciousness.<sup>22</sup> International law and discourse, however, are currently framed in terms of formal equality;<sup>23</sup> race consciousness seems to have been rejected.<sup>24</sup> Although there is an International Covenant against Racial Discrimination,<sup>25</sup> the only recent international legal precedent where the question of race was conspicuous and pivotal was the international battle against Apartheid in southern Africa, and even this movement was sometimes framed by policy makers and attorneys from varied perspectives in terms of anti-communism,<sup>26</sup> domestic jurisdiction, sovereignty and violations of human rights.<sup>27</sup>

21. Symposium, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. (2000).

22. Critical Race theorists seek to re-examine the means through which race and racism have been incorporated into the American consciousness, and to revitalize the tradition of race-consciousness among African-Americans. INTRODUCTION TO CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xiv (Kimberlé Crenshaw et al. eds., 1995). Gary Peller, *Race-Consciousness*, in CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 127 (Kimberlé Crenshaw et al. eds., 1995). The domestic legal discourse now espouses color blindness, however. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* in CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 257 (Kimberlé Crenshaw et al. eds., 1995). The American domination of the international discourse may be partly responsible for this shift expanding to the international sphere.

23. The United Nations is based on the principle of sovereign equality of all its Members. U.N. Charter, Article 2, para. 1 (1945). See also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXXV) 25 GAOR, Supp. (No. 28) 121; reprinted in 9 I.L.M. 1292 (1970); Stephen A. Kocs, *Explaining the Strategic Behavior of States: International Law as System Structure*, 38 INT'L STUD. Q. 535, 539 (1994) (citing sovereign equality of States as one of three central principles of Westphalian legal order).

24. The Pan-Africanist movement, which embodied race-consciousness and the elimination of racial discrimination, joined African anticolonialist aspirations and American antiracist efforts. Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1431 (1997). During the period of decolonization that followed the Second World War, Pan-Africanism was a "potent force" in struggles for independence. P. Mwetwa Munya, *The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 540 (1999) (discussing history of Pan-African movement and how it came to be embodied in present-day Organization of African Unity (OAU)). See also Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, 19 FLETCHER F. WORLD AFF. 27, 30 (1995).

25. This Convention, to which 156 nations are signatories, specifically responded to the South African policy of Apartheid. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Another international agreement that singled out and denounced Apartheid in South Africa was the International Convention on the Suppression and Punishment of Apartheid [hereinafter Apartheid Convention], G.A. Res. 3068 (XXVII) (1973), 1015 U.N.T.S. 243 (1974).

26. See Horne, *supra* note 1, at 455 (utilizing anti-communism as a subterfuge for maintaining white supremacy).

27. Within the human rights framework, Apartheid has been denounced as a crime under international law. Apartheid Convention, *supra* note 25, at Preamble. South African policies, in particular, have been condemned by the international community as denying "fundamental

That international legal theory rarely alludes to race, much less employs it as a basis of analysis, does not mean that race is absent or irrelevant. CRT may be used to deconstruct international legal discourse and reveal racial subordination where it is now camouflaged. The extent to which race is explicitly incorporated into the international legal discourse is unclear. But it is evident that the Third World, the South, the developing countries,<sup>28</sup> the impoverished world,<sup>29</sup> is largely the colored world, and efforts to bring about more than the formal equality accorded to states under international law have been met with profound hostility and resistance. Recall the response to the New International Economic Order,<sup>30</sup> the Charter of Economic Rights and Duties of States,<sup>31</sup> and more recently to the

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human rights . . . [in] flagrant violation of the purposes and principles of the Charter of the United Nations." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 57 (Advisory Opinion of June 21); Apartheid Convention, *supra* note 25, at article 2. See also S.C. Res. 181, U.N. Doc. 5/5386 (1963); S.C. Res. 392, S/Res/392 (1976); S.C. Res. 418, S/Res/418 (1977); S.C. Res. 473, U.N. Doc. S/Res/473 (1980) (Security Council actions against South Africa and its government-imposed policy of apartheid). Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1471-1522 (1996). South Africa argued that Apartheid was a domestic matter and thus within its domestic jurisdiction, thereby depriving the international community of any jurisdiction over the matter. This view was rejected, however, and was a key factor in expanding the domain of international human rights. See, e.g., Jost Delbruck, *The Role of the United Nations in Dealing with Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277, 288-89 (1997); Gassama, *supra*, at 1493-94. See also Kader Asmal, *Democracy and Human Rights: Developing a South African Human Rights Culture*, 27 NEW ENG. L. REV. 287, 292 (1992); Richard B. Bilder and Antonio F. Perez, *Rights in Conflict: The United Nations and South Africa*, 89 AM. J. INT'L L. 658 (1995) (book review); Helen C. Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 251-52 (1987); Joseph L. Miljak, *Forcing Sovereign Conformity: The Comprehensive Anti-Apartheid Act of 1986*, 36 CLEV. ST. L. REV. 261, 280-81 (1988); P. Mwetli Munya, *The International Court of Justice and Peaceful Settlements of African Disputes: Problems, Challenges, and Prospects*, 7 J. INT'L LAW & PRACTICE 159, 184-85 (1998); Winston P. Nagan, *Africa's Value Debate: Kaunda on Apartheid and African Humanism*, 37 ST. LOUIS U. L.J. 871, 879-82 (1993); Kim Robinson, *False Hope or a Realizable Right? The Implementation of the Right to Shelter Under the African National Congress' Proposed Bill of Rights for South Africa*, 28 HARV. CR-CL L. REV. 505, 515 (1993); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 261-62 (1992); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 7-9 (1982).

28. Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL'Y 243, 272-75 (2000); Grant, *supra* note 12, (on defining the term "Third World"); Winston E. Langley, *The Third World: Towards a Definition*, 2 B.C. THIRD WORLD L.J. 1 (1981); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 355-62 (1998); Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, "1998-1999 Third World Legal Stud. 1. For a discussion of hierarchy, see Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. J. INT'L ENV'T'L L. & POL'Y 1, n.1.

29. See Mickelson, *supra* note 28, at 374 (for statistics on impoverishment in the third world); George B. N. Ayittey, Ph.D., *How the Multilateral Institutions Compounded Africa's Economic Crisis*, 30 LAW & POL'Y INT'L BUS. 585, 585-86 (1999); Victoria Britain, *African Debt Payments Imperil 21M Children*, THE GUARDIAN, Feb. 20, 1996, at 16, available in LEXIS, Nexis Library, Curnws File; Makau wa Mutua, *The Interaction Between Human Rights, Democracy and Governance and the Displacement of Populations*, INT'L J. REFUGEE L., 37, 37-38 (Special Issue 1995).

30. Declaration on the Establishment of a New International Economic Order, *supra* note 8; Robert L. Rothstein, *Limits and Possibilities of Weak Theory: Interpreting North-South*, 44 J. INT'L AFFAIRS 159, 172 (1990); MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (United Nations Educational, Scientific and Cultural Organization, 1979).

31. Charter of Economic Rights and Duties of States, *supra* note 8.



Right to Development.<sup>32</sup> These resolutions put economic rights at the center of the international system and this notion has been largely rejected.

Indeed, since decolonization, the nations of the Third World have aspired to create legal obligations as instruments of economic justice, and to establish and maintain a more "just and equitable economic and social order."<sup>33</sup> Despite overwhelming Third World support for these legal concepts, they have been condemned to failure, and have met with overwhelming rejection by Western states, and especially the United States of America.<sup>34</sup> Today the West, as embodied in states and many Non-Governmental Organizations, insists that human rights consist only of individual civil and political rights, while economic and social rights are challenged as being legitimate parts of the rights lexicon.<sup>35</sup>

The question is whether it is only industrialization, technology, or economic wealth in the form of capital or an educated work force that separate the First, Second and Third Worlds; that is, whether these are the sole determinants of hierarchy, and thus the only contemporary mediums of subordination.<sup>36</sup> Or is it possible that racial subordination also plays a part in this mosaic? Does the contemporary international system also encompass subordination of "the other", who is different from self and perhaps not

32. Declaration on the Right to Development, GA Res. 41/128, 41 U.N. GAOR, Supp. (No. 53) U.N.Doc. A/41/925 (1986). The Declaration on the Right to Development aspires to establish development as a human right.

33. See Russell Lawrence Barsh, *A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192, 192-93 (1991); Karin Mickelson, *supra* note 28; James C.N. Paul, *The United Nations Family: Challenges of Law and Development: The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 307 (1995); Simon Payaslian, *The United Nations and the Developing Countries in the 1990s*, 73 U. DET. MERCY L. REV. 525-26 (1996); Emilio O. Rabasa, *The Charter of Economic Rights and Duties of States*, 68 AM. SOC'Y INT'L L. 302 (1975). See also International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 220 (XXI), 21 U.N. GOAR, Supp (No. 16) 49, U.N. Doc. A/6316 (1966); World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Pub. DPI/1394-39339- August 1993-20M (1993).

34. See Gainer, *supra* note 8; James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 141-43 (1999); Ediberto Roman, *Substantive Self-Determination: Democracy, Communicative Power and International Labor Rights Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943, 947-50 (1999).

35. Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT. L. REV. 203 (1992); Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance To Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 330 (1995); Gathii, *supra* note 34; James Gathii and Celestine Nyamu, *Reflections on United States-Based Human Rights NGOs' Work on Africa*, 9 HARV. HUM. RTS. J. 285, 291-96 (1996); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L. & COMP. L.Q. 857 (1994); Mickelson, *supra* note 28, at 374; Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 597, 617 (1996); Jean-Phillipe Therien, *Non-governmental Organizations and International Development Assistance*, 12 CAN. J. DEV. STUD. 263 (1991); Daniel Warner, *An Ethics of Human Rights: Two Interrelated Misunderstandings*, 24 DENV. J. INT'L L. & POL'Y 395, 400-08 (1996). But see International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171; United Nations World Conference on Human Rights: Vienna Declaration and Program of Action, 32 I.L.M. 1661, 1665 (1993).

36. See Grant, *supra* note 12, at 575-77 (on influence of developing countries).

quite as deserving, and if so, how is that "other" constructed?<sup>37</sup> CRT provides valuable insights into subordination<sup>38</sup> and it has introduced and analyzed the concept of intersectionality, which may be highly relevant in dissecting this conundrum.<sup>39</sup> That is, perhaps it is an evolving and unstable combination of technology, economic power, industrialization, as well as racial and cultural perceptions that shape the current global hierarchy.<sup>40</sup> Because race is not the sole determinant of hierarchy does not mean the question of race should be dismissed.<sup>41</sup> The West has consistently defined the terms of the debate and driven the international law-making process and its content,<sup>42</sup> and racial subordination has been an integral part of the history of the West for the last 500 years.<sup>43</sup> A cursory examination of history<sup>44</sup> and consideration of the virulent brand of racism currently raging in Europe against immigrants should dispel doubts regarding this proposition.<sup>45</sup> Race has undoubtedly propelled the culture, history, and law of the

37. Professor Natsu Taylor Saito, for example, adapted "other" to the international context by defining it on the basis of U.S. citizenship rather than on race. See Saito, *supra* note 1, at 57-66.

38. See Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195, 213 n.7 (David Kairys ed., revised ed. 1990) (stating that Critical Race Theory highlights "relationship between law and racial subordination in American society," and "exposes the facets of law and legal discourse that . . . legitimate racial subordination"). For a selection of leading articles discussing this topic, see *CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995), and *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995).

39. Makau wa Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. (2000). Intersectionality seeks to account for the marginalizing effect of identities, such as gender and race, on people whose identity is shaped by more than one dimension. See Kimberlé Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1993); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]. See also Kevin R. Johnson, *Racial Restrictions on Naturalization: the Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142-43 (1996).

40. On race, culture and cultural racism, see Leti Volpp, *Talking "Culture," Gender, Race, Nation and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1611-17 (1996).

41. Another widely-recognized determinant of the global hierarchy of states is economic power. See Alex Y. Seita, *The Intractable State of United States-Japan Relations*, 32 COLUM. J. TRANSN'T'L L. 467, 470-71 (1995). Professor Mutua has analyzed the cultural basis for the hierarchy. See Mutua, *supra* note 35, at 656-57.

42. See D'Amato, *supra* note 12, at 64-66; Kelly, *supra* note 12, at 155; Sylvester, *supra* note 12, at 612.

43. Horne notes that "the process of creating an other was essential to the origins and evolution of white supremacy." Horne, *supra* note 1, at 439. He also notes the global dimensions of the racial discourse. *Id.* at 440. For further discussion of racial subordination, see Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 358-59 (1997); Ian Haney López, *The Social Construction of Race*, 29 HARV. CR-CL L. REV. 1, 39-53 (1994); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness" and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

44. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 73-76 (1999).

45. The anti-immigrant backlash in Europe indicates how complex "race" may be in a particular context. The backlash extends to people of color from the Middle East and Africa, as well as those from Eastern Europe, who may not be Christian and who are Slavic Europeans, rather than Western European. See Jill Lawless, *Immigration and Politics: Xenophobia Wins Votes, Parties Find*, SEATTLE TIMES, May 3, 2000, at A3; Ray Moseley & Tom Hundley, *Right-Wing Views Beginning to Influence Official Policies*, CHI. TRIB., May 7, 2000, at 19; Carol J. Williams, *Danes Cast Cold Eye on Immigrants: Denmark's Tight Controls Reflect Europe's Intensifying Dilemma*.

United States, and it has arguably played a part in shaping and driving U.S. foreign policy and American views of international law.<sup>46</sup> It is to this topic that I would now like to turn.

Part II of this essay will briefly discuss various meanings of race and racism in the United States, as well as early international racial projects that reflect how the American global perspective shaped and was shaped by these racial meanings.<sup>47</sup> Part III turns to domestic and international turning points regarding racial supremacy that dramatically reconfigured prevailing domestic and international racial dynamics. Finally, Part IV will consider how current foreign policies and objectives have been carried out in a world of increasingly complex, contested, and submerged racial meanings.

## II. RACE, RACISM AND WHITE SUPREMACY

Critical race theorists have put forward various constructions of "race", "racism", and how the "other" is defined and categorized.<sup>48</sup> The concept of race transcends phenotype, and pertains to the significance accorded to racial characteristics, rather than the racial characteristics themselves.<sup>49</sup> These meanings arise from social and historical processes, making race historically and socially contingent. Consequently, the meanings of

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*While Industry Sees an Expanding Need for Skilled Labor, Nationalist Appeals Are Closing Doors*, L.A. TIMES, April 28, 2000, at A1. But see Roger Cohen, *Social Democrats Win Re-election in Germany's Largest State*, N.Y. TIMES, May 15, 2000, at A11. On Eastern Europe as part of the Third World, see GLOBAL REACH.

46. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960'S TO THE 1990'S* 54-76 (2d ed. 1994). See also Saito, *supra* note 1, Horne, *supra* note 1, at 437; Antony Anghie, "The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case, 34 HARV. INT'L L.J. 445, 496-98 (1993) [hereinafter Anghie, *Heart of My Home*]; Calmore, *supra* note 4, at 2160; Ford, *supra* note 5; IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) [hereinafter HANEY LÓPEZ, *WHITE BY LAW*]; Ian Haney López, *Race and Erasure: The Salience of Race to Latinos/as*, in *THE LATINO/A CONDITION: A CRITICAL READER* 180, 189 (Richard Delgado and Jean Stefancic, eds., 1998) (discussing *Hernandez v. Texas*, 347 U.S. 475 (1954)); EDWARD W. SAID, *CULTURE AND IMPERIALISM* 190, 197 (1993) (suggesting studying relationship between the "West" and its dominated cultural "other" is "a point of entry into studying the formation and meaning of Western cultural practices themselves").

47. This is by no means a definitive or comprehensive examination of this complex and important topic. See, e.g., OMI & WINANT, *supra* note 46; ANTHONY W. MARX, *MAKING RACE AND NATION* (1998) (comparing constructions of race in South Africa, Brazil and the United States); HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 46; Plummer, *supra* note 2; REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGIN OF AMERICAN RACIAL ANGLO-SAXONISM* (1981); YASSIN EL-AYOUTY, *UNITED NATIONS AND DECOLONIZATION: THE ROLE OF AFRO-ASIA* (1971).

48. OMI & WINANT, *supra* note 46, at 54-76. See also Saito, *supra* note 1, at page (arguing that the relationship between foreign and domestic policy can be more easily deciphered if instead of examining race and citizenship we "think in terms of identification of the 'other' . . . the kind of 'otherness' that is ascribed. . . . on the basis of. . . racial or ethnic characteristics). Professor Horne notes that few have "sought to place the construction of whiteness in the context of U.S. foreign policy - although this global context was highly relevant in this process." Horne, *supra* note 1, at 437; Anghie, *Heart of My Home*, *supra* note 46. For articles discussing race as a legal construction see Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 39; Richard Delgado, *Enormous Anomaly? Left/Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1554-56 (1991); Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393-94 (1991); Gotanda, *supra* note 22; Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997).

49. OMI & WINANT, *supra* note 46, at 55.

race and racism fluctuate and cannot be separated from the historical context in which they arise.<sup>50</sup> "Racism is a social product",<sup>51</sup> as is ethnicity,<sup>52</sup> and thus notions of "otherness", which encompasses race, language and culture "mutate" in response to social and political change.<sup>53</sup>

Throughout most of its history, the United States has been a racial dictatorship where white supremacy<sup>54</sup> was an integral part of the social, economic, and political landscape. This conviction roundly and routinely excluded people of color.<sup>55</sup> This racial dictatorship was characterized by the segregation and the subordination of people of color at all levels of society, sometimes by the use of sheer terror.<sup>56</sup> Moreover, it was anchored and supported by the state.<sup>57</sup> America was proclaimed a white country and the nation was equated with its white population.<sup>58</sup> Americans could proclaim the natural rights of man, yet at the same time rely on religious, political, and eventually scientific principles to demonstrate a natural basis for the existing racial hierarchy, a hierarchy that was reinforced by law.<sup>59</sup> Race was a biological concept, a matter of species.<sup>60</sup> The Negro and the Indian, and later the Mexican and Chinese, were different and inferior to the white man. This difference, this inferiority, was used to justify the blatantly inequitable allocation of political, social, and legal rights.<sup>61</sup> Ethnicity took "on a specifically racial character" as those from Spanish-speaking nationalities became Hispanic and the peoples of Southeast Asia became Asians and

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50. OMI & WINANT, *supra* note 46, at 61, 71.

51. HANEY LÓPEZ, WHITE BY LAW, *supra* note 46 (examining the role of legal institutions and practices in fabricating racial meanings).

52. Plummer, *supra* note 2, at 9. Professor Plummer notes ethnicity is an artifact of a particular configuration of intergroup relations. *Id.*

53. Saito, *supra* note 1, at 55. Professor Saito notes that African Americans have been classified as other based on race, while other groups have been classified as 'other' based on national origin, citizenship or language. *Id.* at 58-59. She chronicles how American mistreatment of racial and other minorities abroad has affected the treatment of the same peoples in the United States.

54. White supremacy has been defined as the conception of the virtual divine right of some of European heritage to dominate all others and all else. Horne *supra* note 1, at 438.

55. OMI & WINANT, *supra* note 46, at 65, 66.

56. Intimidation and sheer terror also played a major role. See, e.g., RACE, LAW, AND AMERICAN HISTORY 1700-1990: LYNCHING, RACIAL VIOLENCE, AND LAW (Finkelman ed., 1992). MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 4-9 (1987); Kevin Gaines, *Black Americans' Racial Uplift Ideology as "Civilizing Mission": Pauline E. Hopkins on Race and Imperialism, in CULTURES OF U.S. IMPERIALISM* 433, 441-43 (Amy Kaplan & Donald E. Pease, eds., 1994); Altina L. Waller, *Community, Class and Race in the Memphis Riot of 1866*, 18 J. Soc. Hist., 233-46 (1984).

57. OMI & WINANT, *supra* note 46, at 66-67; HANEY LÓPEZ, WHITE BY LAW, *supra* note 46.

58. Plummer, *supra* note 2, at 11.

59. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896). See also Gotanda, *supra* note 22, at 259-63.

60. HORSMAN, *supra* note 47, at 43-61 (on scientific theories as a justification for the prevailing racial hierarchy). See also Gordon, *Saving Failed States*, *supra* note 15, at 933-34; Gotanda, *supra* note 22, at 260-62; MARX, *supra* note 47, at 3-4.

61. Gordon, *Saving Failed States*, *supra* note 15, at 934; Horne, *supra* note 2, at 438; HORSMAN, *supra* note 47, at 210. Professor Cornel West postulates that white supremacy is constitutive rather than additive. Cornel West, Afterword to *THE HOUSE THAT RACE BUILT*, (Wahneema Lubiano, ed., 1998).

Pacific Islanders.<sup>62</sup> Race was the common denominator that melded such people into generic masses.<sup>63</sup>

What was an integral part of the domestic sphere was influenced by, and reproduced on, the international stage.<sup>64</sup> Given the domestic milieu, it is not surprising that the historical record is replete with examples of a racialized American foreign policy.<sup>65</sup> This is indicative of how the United States carried out and propounded international legal principles.<sup>66</sup> It began with two international projects that defined America, the enslavement of Africans<sup>67</sup> and the extermination and forced removal of Native Americans.<sup>68</sup> Both could be justified on the ground that such people were lesser beings because of their race.<sup>69</sup> Accordingly, Native Americans were removed and their lands seized in part because they were Indians and considered inferior.<sup>70</sup> When they resisted the expropriation of their lands they were condemned as semi-human savages. This conflict evolved from that of "civilization against savagery" in the eighteenth century, to that of the white race against the colored races in the nineteenth century.<sup>71</sup>

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62. Plummer, *supra* note 2, at 9-10. Whites, however, have been able to retain aspects of their ethnicity. *Id.* See also Keith Aoki, *Foreignness and Asian American Identities: Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L. J. 1 (1996).

63. Plummer, *supra* note 2, at 10.

64. Saito, *supra* note 1, at 64.

65. Horne, *supra* note 1, at 458. See also Saito, *supra* note 1, at 64-65 (citing examples such as the U.S.' support of white supremacist South African governments and its reluctance to respond to famine in Somalia or genocide in Rwanda).

66. Because race was used as a justification for colonial conquest, and international law condoned imperialism, American foreign policy was in accord with international legal principles of the time. See Anghie, *supra* note 44, at 6 (explaining how international law sanctioned imperialism); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1220 (1999) (noting that race, as the "primary marker of difference," provided a rationale for imperialism).

67. Throughout most of the nineteenth century, one-third of the British merchant fleet was engaged in transporting 50,000 blacks a year to the "new world." But American slave holders relied on continuing imports of human beings to a much lesser extent than other parts of the Americas. MARX, *supra* note 47, at 57. The American slave trade ended in 1808. U.S. Const. art. X.

68. HORSMAN, *supra* note 47. See also S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1B3 (1991); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1405 (1997); Albert M. Camarillo, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & LAW 339, 345 (1999) (arguing racial attitudes at that time countenanced the use of "Manifest Destiny" as the rationale for removing Native Americans from their land); Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C.L.REV. 349, 369 (1998); Robert A. Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983).

69. Mahmud, *supra* note 66, at 1219 (noting that colonial powers justified imperialism as a "natural subordination of lesser races to higher ones"); Saito, *supra* note 1, at 64.

70. This view was held whether or not native Americans assimilated. HORSMAN, *supra* note 47. See also Anaya, *supra* note 68, at 1B3; Chang & Aoki, *supra* note 68, at 1405; Camarillo, *supra* note 68, at 345. Iglesias, *supra* note 68, at 369; Williams, *supra* note 68.

71. Anglo-Saxon aggression was hailed as manly, while Indian resistance was condemned as beastly. HORSMAN, *supra* note 47, at 204-5.

By the nineteenth century, slaveholding was increasingly defended by claims that slaves were naturally inferior.<sup>72</sup> Undoubtedly, American slavery was brutal.<sup>73</sup> As W.E.B. Dubois noted:

slaves were not considered men. They had no right of petition. They were divisible like any other chattel. They could own nothing; they could make no contracts; they could hold no property. . . ; they could not legally marry nor constitute families; they could not control their children; . . . they could be punished at will.<sup>74</sup>

As abolitionist forces rallied and the compromise between central federal authority and states rights, which was meant to protect southern slaveholders, began to crumble, explicitly racist imagery and ideology emerged in the mid-nineteenth century to justify the continuation of slavery.<sup>75</sup> This abject racism and the barbarity of American slavery made the segregation that followed the Civil War unsurprising. Blacks were disenfranchised in the South and the Supreme Court declared the legality of segregation in *Plessy v. Ferguson*.<sup>76</sup> Moreover, these legal structures were reinforced by an extra-legal regime of terror that included lynching. These enterprises were legal under international law, where racial subordination was a basis for according plenary authority over indigenous peoples, and under which the slave trade had been legal.<sup>77</sup>

As the United States carried out its "manifest destiny" and expanded beyond the Mississippi river, it confirmed a racial hierarchy that justified the torment of those in the path of its relentless search for land, wealth, and power. Anglo-Saxons were the superior race, the pure race, the race which had a right to fell all those in the way of America's destiny.<sup>78</sup> Mexicans were mongrels who had intermixed with inferior Indians and were thereby unfit to populate or govern the territory that was to become part of America.<sup>79</sup> Because Mexican people were inferior to Anglos, their land and political power could be appropriated and the theft could be rationalized. American Anglo-Saxons had a right to their lands because they were the superior race, the race able to make better use of it.<sup>80</sup> The Texas revolution was in part a race war - it was a struggle between the "glorious

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72. Slaves were first brought to North America in 1619, when colonists found that neither the indigenous population nor white indentured servants met their labor needs. MARX, *supra* note 47, at 47.

73. See *Id.* Manumission was steadily foreclosed as slaveholders sought to implant the idea of permanent slavery of an inferior race.

74. W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA 1860-1880*. They also could not testify in court and could be imprisoned by their owners. The criminal offense of assault and battery could not be committed against a slave. *Id.*

75. MARX, *supra* note 47, at 59 (discussing abolitionist movement and movements in favor of returning slaves to Africa).

76. Slavery was concentrated in the South, and thus there were relatively few blacks in the North, where they faced rampant discrimination. MARX, *supra* note 47, at 56.

77. See Gordon, *Saving Failed States*, *supra* note 15, at 934-37.

78. Professor Horsman asserts that the encounter between Americans and Mexicans in the Southwest led to a clearly formulated idea of Americans as a part of the Anglo-Saxon race. HORSMAN, *supra* note 47, at 208.

79. *Id.* at 210. That Mexicans were a mixed population was an essential element of their weakness as a race. California Mexicans were viewed as shiftless, ineffective, idle, thriftless, despicable, imbecilic, lazy, ignorant, vicious and dishonest. *Id.* at 210-12.

80. *Id.* at 210.

Anglo-Saxon race and an inferior Mexican rabble.”<sup>81</sup> Mexicans were increasingly lumped with Blacks and Indians, and the Alamo and other events increased the venom with which Mexicans were condemned.<sup>82</sup> The racial affinity of Texans and Americans were a constant refrain by those who favored the annexation of Texas.<sup>83</sup>

The “American Century” dawned as the frontier was receding in North America, and new vistas for expansion were sought.<sup>84</sup> Part of this expansion entailed sweeping away darker peoples wherever they were found.<sup>85</sup> The war of 1898 with Spain, as well as the decision to interfere in the internal affairs of Hawaii during this period led to a robust debate in the U.S. regarding “white supremacy.”<sup>86</sup> It was even argued that Hawaii should be annexed as a counterweight to Japan and other Asian powers such as China.<sup>87</sup>

The explicitly racial nature of American immigration law and policy has been well documented and analyzed by a number of scholars, especially with respect to Chinese and Japanese peoples.<sup>88</sup> U.S. commercial expansion in the Caribbean, Central America, and the South Pacific after the Spanish American war extended the domain of racist ideology, as apologists for imperialism used Social Darwinism to rationalize domination of the peoples of the islands and littoral.<sup>89</sup>

How the United States carried out the census in the Philippines at the turn of the last century aptly illuminates how a racial theme permeated

81. *Id.* at 213.

82. *Id.* at 215, 214.

83. *Id.* at 217.

84. See Horne, *supra* note 1, at 441 (stating War of 1898 with Spain and annexation of Hawaii marked beginning of “American Century”). See also DONALD W. WHITE, *THE AMERICAN CENTURY: THE RISE AND DECLINE OF THE UNITED STATES AS A WORLD POWER* 8-12 (1996).

85. Horne, *supra* note 1, at 446 (asserting those who assisted Cecil Rhodes and his ilk in Southern Africa, did so partly because it was reminiscent of the American frontier). Theodore Roosevelt, the President who led America into the American Century, was obsessed with notions of race and was friends with some of the leading racial theorists of this era. *Id.* at 442. Race was viewed as a global phenomenon and the Japanese defeat of Russia in 1905 was believed to be a genuine challenge to white world supremacy in that people of color began to imagine that they could throw off the burden of white rule. *Id.* at 442.

86. Horne, *supra* note 1, at 441.

87. Horne, *supra* note 1, at 444. Moreover, in March, 1896, Ethiopia soundly rebuffed an invasion by Italy, also precipitating a crisis for white supremacy. *Id.* at 445. On this triumph as evidence of Ethiopia’s backwardness, see Plummer, *supra* note 2, at 13.

88. See Aoki, *supra* note 62; Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT’L L. 58 (1998); Joan Fitzpatrick & William McKay Bennett, *A Lion in The Path? The Influence of International Law on The Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); Kenzo S. Kawanabe, *American Anti-Immigrant Rhetoric Against Asian Pacific Immigrants: The Present Repeats The Past*, 10 GEO. IMMIGR. L.J. 681 (1996); James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT’L L. & POL’Y. 227 (1995); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997).

89. Plummer, *supra* note 2, 13-14.

U.S. foreign policy.<sup>90</sup> Americans believed they were charged with developing the native "other" in the Philippines and in the American psyche considerations of color and race subsumed religious and other differences. Consequently, they proceeded to racialize the peoples of the Philippines. In the American mind, the Negroids were aboriginal black dwarfs who were so racially distinct as to be historically removed from the rest of the population. They were primitive men who had succumbed to the more culturally sophisticated and physically better endowed Malaysians, who were later checked by the Catholic Spaniards. Americans explained the racial diversity of the Philippine population in terms of the inevitable retreat of darker skinned and, to them, more savage inhabitants, in the face of advancing groups of lighter skinned and more civilized and physically superior conquerors. The effect of racializing the social structure and cultural history of the Philippines was to position the country as naturally destined for conquest and the United States as manifestly destined to colonize it.<sup>91</sup>

The end of the 19<sup>th</sup> century was a catastrophe for Africa and the African diaspora. As Europeans carved up Africa at the Berlin conference in 1885, the disenfranchisement of black Americans in the United States continued and intensified.<sup>92</sup> After the Berlin conference in 1885, when 14 European powers, with the blessings of the United States, agreed to the division of African territory, the great powers gave themselves authority to engage in military conquest in Africa. Wars were fought and won in Dahomey, Benin, and Tanganyika, even as Ethiopia defeated Italy.<sup>93</sup> The imperial project was partly justified on racial grounds, and it reproduced the racial ideology found in America and embodied in European imperialism around the globe.<sup>94</sup> Both imperialism and colonialism were legal under international law. As Professor Anghie has brilliantly and cogently demonstrated, international law divided the world into European and non-European realms with rights accorded only to the former; thus, duties were owed only to those of the same race - to other Europeans.<sup>95</sup> Non-Europeans could not legally oppose the sovereign will of European states, for international law recognized "backwards races" only to the extent necessary to determine European rights over such peoples.<sup>96</sup> As a consequence,

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90. This account is taken from Vicente L. Rafael, *White Love, Surveillance and Resistance in U.S. Colonization of the Philippines*, in *CULTURES OF U.S. IMPERIALISM* 185 (Amy Kaplan & Donald E. Pease, eds., 1994).

91. See *id.* at 200. Both the 1898 War with Spain and the annexation of Hawaii were heavily infected with race. Horne, *supra* note 1, at 441.

92. Plummer, *supra* note 2, at 13-15, 35. See also A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1980).

93. Plummer, *supra* note 2, at 13. France defeated Dahomey (1893), and Britain defeated Benin (1897) and the Ashanti Kingdom (1895-1900). Germany carried out expeditions against the Maji Maji in Tanganyika and King Leopold of Belgium cut off the arms of those who refused forced labor in the Congo Free State. *Id.*

94. For a full discussion of these concepts, see Gordon, *Saving Failed States*, *supra* note 15; Anghie, *Heart of My Home*, *supra* note 46. All colonial projects were in part racial projects for without exception, colonizers encountered indigenous peoples who had different racial characteristics from themselves. Particular encounters differed, however, depending on the civilizations engaged in the encounter and whether a settler community emerged. Gordon, *supra* note 20, at 536-37.

95. Anghie, *Heart of My Home*, *supra* note 46, at 493.

96. Gordon, *Saving Failed States*, *supra* note 15, at 936.



Europeans could freely lay claim to their wealth, land and labor and challenges to such claims could arise only vis a vis other European states; the people themselves were denied sovereignty and sovereignty is the essence of international law.<sup>97</sup> Whites justified imperialism, colonialism, and the exclusively European nature of sovereignty on the grounds of a racial and cultural hierarchy that subordinated non-white peoples.<sup>98</sup> Those of European ancestry were civilizing the barbarian colored and thus undertaking the "white man's burden."<sup>99</sup> As in the United States of America, people of color around the globe had no rights the white man was bound to respect.<sup>100</sup>

Yet, there were varied and vociferous voices of protest. After the First World War, self-determination was not contemplated for the people of Africa, Asia, or the Middle East, and most remained subject to imperial or colonial rule.<sup>101</sup> Although similar arguments to those favoring rights for national minorities in Europe were raised,<sup>102</sup> colored people were deemed incapable of self-government and this inadequacy was often ascribed to their race.<sup>103</sup> Certain people were simply not yet ready for civilization, which was defined as European, Australian, Canadian, South African, American, and essentially as white.<sup>104</sup> Because they were denied sovereignty, colonies, mandates, and protectorates for people of color were sustained, even as the right to self-determination was beginning to be recognized for national minorities in Europe.<sup>105</sup>

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97. See Anghie, *Heart of My Home*, *supra* note 46, at 496-98. See also U. O. UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA 19-21 (1979) (noting that people of color lacked sovereignty); Gordon, *Saving Failed States*, *supra* note 15, at 935-37 (explaining that only European states were fully sovereign, and thus non-European states did not have standing to challenge European states through international law); Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. INT'L L. & COM. 65, 75-76 (1995) (discussing sovereignty as a means to international personality and the impact of this doctrine on struggles of indigenous peoples to gain voice in international law).

98. See Gordon, *Saving Failed States*, *supra* note 15, at 932-33; Mahmud, *supra* note 66, at 1220.

99. See BASIL DAVIDSON, BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE (1993); EL-AYOUTY, *supra* note 47, at 3; Gordon, *Saving Failed States*, *supra* note 15, at 934.

100. Dred Scott, 60 U.S. at 407 (1857).

101. See S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 840 (1990); Ruth E. Gordon, *Some Legal Problems With Trusteeship*, 28 CORNELL INT'L L.J. 301, 317 (1995) [hereinafter Gordon, *Problems With Trusteeship*]; Gordon, *Saving Failed States*, *supra* note 15, at 940-41 (1997); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133 (1995); J. Oloka-Onyango, *Heretical Reflections on the Right of Self-Determination: Prospects and Problems For A Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 159-61 (1999); Ediberto Roman, *supra* note 34.

102. See Plummer, *supra* note 2, at 15.

103. See Gordon, *supra* note 15, at 932-34; See also Oloka-Onyango, *supra* note 101; See Roman, *supra* note 34, at 953.

104. See Gerrit W. Gong, *The Standard of "Civilization,"* in INTERNATIONAL SOCIETY 22 (1984) (explaining that the nineteenth century standard of "civilization" was a European standard equated with European civilization).

105. See Gordon, *Saving Failed States*, *supra* note 15, n. 227. See also H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP (1948); UMOZURIKE, *supra* note 97, at 79-94.

### III. TURNING POINTS AT HOME AND ABROAD

The Second World War ultimately marked a turning point in racial constructions, both at home and abroad, as racial supremacy was discredited in the wake of the defeat of fascism.<sup>106</sup> But race was an integral part of that war and shaped policies at home and abroad. On the American home front, Japanese Americans were consigned to internment camps for the crime of being Japanese. This policy was upheld by the United States Supreme Court.<sup>107</sup> During the war against Japan, Japanese people were characterized by negative racial images that were strikingly similar to those ascribed to African Americans.<sup>108</sup> Although the enemy in Europe was contemptible and deadly, they were still people; they were to be repelled because they were Nazis, perhaps because they were German, but not because they were white.<sup>109</sup> The Japanese, however, were viewed as repulsive, subhuman, animals, reptiles and insects.<sup>110</sup> Such articulations were part of a discourse that racially stigmatized the Japanese, as America defined "us" versus "them."<sup>111</sup> Indeed some believed that failing to defeat Japan would lead to an "Asiatic flood" into the Americas.<sup>112</sup>

Yet the Second World War, which in the U.S. was fought by a segregated Army, revealed cracks in the armor of the colonizers.<sup>113</sup> Resistance to imperialism, colonialism, and white supremacy grew, and the discourse evolved both domestically and internationally.<sup>114</sup> In the United States, African Americans were becoming restless, having fought for democracy abroad while still being subjected to racial subjugation at home.<sup>115</sup> The ensuing decades were a harbinger of racially-based social movements in the United States that posed radical challenges to the dominant racial order.<sup>116</sup>

106. Horne, *supra* note 1, at 441. The holocaust also demonstrated "the deadly implications for whites who were not viewed as being at the top of the racial pyramid." *Id.* at 443.

107. *Korematsu v. United States*, 323 U.S. 214, 226 (1944). Statutes authorizing reparations are 50 U.S.C.S. app. ' 1989 (1988), 50 U.S.C.S. app. ' 1981 (1982). See also Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385 (1998); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 63 (Kimberlé Crenshaw et al. eds., 1996); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1998); Eric K. Yamamoto, *Korematsu Revisited — Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

108. See JOHN W. DOWER, *WAR WITHOUT MERCY: RACE & POWER IN THE PACIFIC WAR* 79, 81 (1982) (describing American views of Germans and Japanese during Second World War).

109. *Id.* at 81-82.

110. *Id.* at 81. They were referred to as monkeys, baboons, gorillas, apes, dogs, mice, rats, rattlesnakes, cockroaches and vermin, and portrayed as inherently inferior men and women who were characterized by primitivism and childishness. *Id.*

111. *Id.* at 82.

112. See Horne, *supra* note 1, at 453.

113. See EL-AYOUTY, *supra* note 47, at 5-6 (describing the weakened colonial powers' inability to protect their colonies following World War II); Gordon, *Saving Failed States*, *supra* note 15, n.218.

114. See Horne, *supra* note 1, at 453. See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1981).

115. It became increasingly difficult to explain why African Americans should fight to maintain the American system of racial oppression. Horne, *supra* note 1, at 453.

116. See Aoki, *supra* note 62; Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994).

These movements eventually destabilized the prevailing racial order and a comprehensive process of reform ensued.<sup>117</sup> The fifties and sixties also witnessed waves of decolonization across the globe.<sup>118</sup> Things would never again be entirely as they had been. Internationally, the U.S. turned to the struggle against communism, which ostensibly was non-racial,<sup>119</sup> yet anti-colonialists were often identified as communists and could be attacked on these grounds.<sup>120</sup> Nevertheless, the struggle against communism also abetted and perhaps drove America to discard the more egregious aspects of white supremacy, including state support for segregation.<sup>121</sup>

The domestic civil rights struggle and the international push towards decolonization, irrevocably altered the ideologies of white supremacy, white privilege, and the discourses that surrounded them.<sup>122</sup> The nature of race and racism in America changed and one result has been that overt racism has become taboo.<sup>123</sup> Although race continues to pervade all aspects of American life, albeit in constantly evolving, intricate and multi-dimensional ways, the racialized nature of our culture, political institutions, and social relationships has become almost imperceptible to the majority.<sup>124</sup> White supremacy and white privilege<sup>125</sup> are now recognized, for the most part, only by those who suffer its consequences.<sup>126</sup> Moreover, the meaning of race and racism are currently contested in the United States and their content is no longer agreed upon.<sup>127</sup> The current neo-liberal racial paradigm attempts to eliminate race as a significant dimension of polit-

117. See OMI & WINANT, *supra* note 46, at 96-97.

118. See NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* 52 (1993) (noting that five African colonies gained independence between 1956-1958, sixteen in 1960, and another seven by 1962); Gordon, *Saving Failed States*, *supra* note 15, at 953-55.

119. See Horne, *supra* note 1, at 454.

120. See *Id.*

121. It became increasingly untenable to attack the Soviet Union on human rights grounds while racial segregation continued unabated and African Americans were subjected to lynching and unabashed terror. See *Id.* See also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 117 (1988).

122. See Plummer *supra* note 2; RACE, LAW, AND AMERICAN HISTORY 1700-1990: THE ERA OF INTEGRATION AND CIVIL RIGHTS 1930-1990 (Finkelman ed., 1992); MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987). On privilege, see STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

123. See John A. Powell, *The Racing of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 109 (1997).

124. See Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1660-702 (1995).

125. Privilege in a number of contexts, including race has been explored in some depth by Stephanie Wildman, Trina Grillo, Margalynne Armstrong and Adrienne Davis. See, e.g., WILDMAN, *supra* note 122.

126. OMI & WINANT, *supra* note 46; Mahoney, *supra* note 124, at 1660-67; Powell, *supra* note 123, at 109.

127. OMI & WINANT, *supra* note 46, at 54, 55, 70, 71. For example take racism. Whites often equate color consciousness with racism, and the absence of such consciousness with color blindness. Non-whites tend to view race and racism as a system of power that is central to history and everyday experiences, while whites view it as peripheral. See *supra* note 41 for other efforts to define race and racism. The New York Times recently printed a series of articles entitled, "How Race is Lived in America," beginning June 4, 2000. See *Race in America*, N.Y. TIMES, June 4, 2000, at 18, available in 2000 WL 21823431.

ics in an attempt to avoid divisive politics.<sup>128</sup> Indeed, I would venture that many international lawyers would argue that introducing race into an analysis of international affairs and international law is divisive and contrary to the formal equality contained in the international legal paradigm and the international human rights discourse. As neo-liberals seek to ignore race, however, the neo-conservative position is one of a colorblind society.<sup>129</sup> Unfortunately, attempts to eliminate race from the dialogue only mask a false universalism that ignores the increasing complexity of racial politics and racial identity in American society.<sup>130</sup>

#### IV. THE CONTEMPORARY INTERNATIONAL LANDSCAPE

If race continues to shape the core of the domestic sphere, and Critical Race Theorists would maintain that it does, surely it is manifested in how we view the international, for ideology invariably crosses borders. Consider the cases of Kosovo and Rwanda. NATO launched a massive air war against the Federal Republic of Yugoslavia to quell the possibility of genocide and ethnic cleansing in the province of Kosovo.<sup>131</sup> NATO maintained that it was undertaking humanitarian intervention, and thus the use of force was arguably legal under international law.<sup>132</sup> My purpose here is not

128. OMI & WINANT, *supra* note 46, at 147.

129. OMI & WINANT, *supra* note 46, at 56, 57. See also Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 39; Gotanda, *supra* note 22; Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (1994) (using narrative to discuss whether concept of race should be eliminated).

130. OMI & WINANT, *supra* note 46, at 152-57. See also T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing colorblind strategies are likely to deny or fail to appreciate contributions race-consciousness can make in creating new cultural narratives that would support serious efforts aimed at achieving racial justice); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Natsu Saito Jenga, *Unconscious: The "Just Say No" Response To Racism*, 81 IOWA L. REV. 1503 (1996); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 235 (Kimberlé Crenshaw et al. eds., 1996) [hereinafter Lawrence, *The Id, the Ego and Equal Protection*]; Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F.L. REV. 889 (1995). But see Reginald Leamon Robinson, *Celebrating Our Emerging Voices: People of Color Speak: "Expert" Knowledge: Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145 (2000).

131. NATO launched a series of air strikes on Serbian targets in Kosovo beginning March 24, 1999. See *Historical Overview: NATO's Role in Relation to the Conflict in Kosovo* at (last updated July 15, 1999) <http://www.nato.int/kosovo/history.htm>; Dr. Javier Solana, NATO Secretary General, *Press Statement following the Commencement of Air Operations*, Mar. 24, 1999, Press Release (1999) 041, (last visited June 26, 2000) at <http://www.nato.int/docu/pr/1999/p99-041e.html>; *Conflict in the Balkans: NATO Leaders Focus on Genocide as Legal Basis for Bombing. Ugly Word Helping to Create a New Model of Law to Justify Other, Similar Interventions*, THE GLOBE AND MAIL (Toronto, Can.), Apr. 9, 1999, at A10; *Victim of Serbia — or NATO?* ECONOMIST, Apr. 3, 1999, at 11, available at 1999 WL 7362352; Charles Babington, *Clinton: Goal Is To Contain Milosevic; No Time Limit Set On NATO Airstrikes*, WASH. POST, Mar. 25, 1999, at A1, available at 1999 WL 2207344; Francis X. Clines, *NATO Opens Broad Barrage against Serbs as Clinton Denounces Yugoslav President*, NY TIMES, Mar. 25, 1999, at A5, available at 1999 WL 9876445; Barton Gellman, *U.S., Allies Launch Air Attack On Yugoslav Military Targets; Two MiGs Reported Shot Down*, WASH. POST, Mar. 25, 1999, at A1, available at 1999 WL 2207292.

132. The Special Committee on Peacekeeping Operations of the United Nations General Assembly released a press release the day following the commencement of NATO's air strikes in Kosovo, noting that NATO acted without authorization of the Security Council and therefore was

to debate the legality, wisdom, or competence of the NATO military action in Kosovo, although others have done so.<sup>133</sup> Rather, it is to compare Kosovo with another case that surely merited intervention if we deem humanitarian intervention permissible under international law.<sup>134</sup> In 1994, the United Nations, in large part because of American intransigence, failed to intervene in Rwanda where approximately 800,000 people were slaughtered<sup>135</sup> and five million people were displaced.<sup>136</sup> Indeed, the world has not witnessed genocide of this magnitude since the Second World War.<sup>137</sup>

in clear violation of the United Nations Charter. See *Peacekeeping Operations Should Be Implemented in Strict Compliance with Charter Principles*, Representatives in Peacekeeping Committee Stress, GA/PA/160, Mar. 25, 1999. For additional information regarding the air strikes and NATO's arguments in support of its campaign, see Charles Babington & William Drozdiak, *Belgrade Faces the 11<sup>th</sup> Hour, Again; U.S. Sends Envoy as NATO Readies an Aerial Assault*, WASH. POST, Mar. 22, 1999, at A1, available at 1999 WL 2206748; Norman Kempster, *Crisis in Yugoslavia: Leaders and Scholars Clash Over Legality International Law; U.S., Others Say U.N. Charter, Resolutions Back NATO Action, Many Experts Disagree*, L.A. TIMES, Mar. 26, 1999, at A26, available at 1999 WL 2142809; *Lawyer Sam's War*, ECONOMIST, Apr. 24, 1999, at 30, available at 1999 WL 7362645. See also Aaron Schwabach, *Yugoslavia v. NATO, Security Council Resolution 1244, and the Law of Humanitarian Intervention*, 27 SYRACUSE J. INT'L L. & COM. 77, 78, 91-92 (2000); Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 3 (2000).

133. See Sofaer, *supra* note 132; Schwabach, *supra* note 132. See also Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J. TRANSNT'L L. & POL'Y 153 (1999); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND J. TRANSNT'L L. 1231 (1999); Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COM. L. 9 (1999); Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (2000); Ved P. Nanda, Thomas F. Muther, Jr., and Amy E. Ecker, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda, and Liberia B Revisiting the Validity of Humanitarian Intervention Under International Law Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 846-51 (1998).

134. See Ruth Gordon, *Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TX. INT'L L.J. 43, 43-48 (1996); Gordon, *Problems with Trusteeship*, *supra* note 101, at 330; David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundation of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 235 (1994); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM & MARY L.R. 1743-45 (2000); Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti B Revisiting the Validity of Humanitarian Intervention Under International Law Part I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 886 (1995).

135. *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, at [http://www.un.org/News/oss/rwanda\\_report.htm](http://www.un.org/News/oss/rwanda_report.htm) (last visited May 18, 2000).

136. Pamela Constable, *World Response to Rwanda Crisis Questioned; Critics Cite Lack of Plan, Will to Intervene*, BOSTON GLOBE, July 28, 1994, at 18, available at 1994 WL 5987931; Joe Lauria, *Inaction by UN Cited in Report on Rwanda Killings*, BOSTON GLOBE, Dec. 17, 1999, at A2, available at 1999 WL 30400899; Keith B. Richburg, *Rwanda Again Surpasses Itself in Tragedy*, WASH. POST, July 16, 1994, at A1, available at 1994 WL 2430175; Paul Richter, *Rwanda Violence Stumps World Leaders Africa: Though Clinton and Boutros Boutros-Ghali Have Made Guarded Threats, Calls for Action Have Been Eerily Absent*, L.A. TIMES, April 30, 1994, at 13, available at 1994 WL 2160357; *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* at [http://www.un.org/News/oss/rwanda\\_report.htm](http://www.un.org/News/oss/rwanda_report.htm) (last visited May 18, 2000).

137. Genocide is defined as any of the following:

acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group:

- (a) [k]illing members of the group;
- (b) [c]ausing serious bodily or mental harm to members of the group;
- (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) [i]mposing measures intended to prevent births within the group;
- (e) [f]orcibly transferring children of the group to another group.

If we subscribe to the principle of humanitarian intervention, why was such intervention not warranted in Rwanda, which surely was an egregious and critical case? We might ask why these lives were less worthy of saving. An additional query might be whether the war crimes tribunal, established to try those who took part in this slaughter, was more than an afterthought, and if it would have been established if not for the Yugoslav tribunal established to try war crimes in Bosnia.<sup>138</sup> If there was a possibility of genocide on the scale witnessed in Rwanda against a European population, and especially against a Christian Western European population, would the West have taken action to prevent or halt it, wherever it was taking place? I believe there would have been intervention, and I would venture to guess that most would agree with this conclusion. Wherein lies the difference?

One reply might be that the United Nations Security Council must first find a threat to international peace and security before humanitarian intervention can be undertaken and such a finding is a political question under the Charter of the United Nations.<sup>139</sup> In the absence of such a finding, intervention is illegal.<sup>140</sup> But this returns us to the central thesis of this essay. American foreign policy, in this instance, becomes international law

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Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, article 2, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951). For example, during the Biafran war in Nigeria in the mid-1960's, some 30,000 Ibo were massacred in the course of two pogroms, sparking a secessionist movement that led to a bloody civil war. See Mutua, *supra* note 15, n.239. See also Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 595-96 (1987); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 40 (1998); Peter Cunliffe-Jones, *Nigerian Rebel Leader, 30 Years On, Defends War for "Survival"*, Agence Fr.-Presse, Jan. 9, 2000, available at 2000 WL 2709433.

138. See Makau wa Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 174 (1997). Professor Mutua also notes that Eastern European Bosnians did not rate the same treatment as Western Europeans and thus they were left to be slaughtered. *Id.* at 173-75. Perhaps Kosovo was Western atonement for this sin.

139. The United Nations Charter provides:

[T]he Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air sea, or land forces of Members of the United Nations.

UN Charter at article 42. See also Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989); Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 522 (1994); Frederic L. Kirgis, Jr., *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 512 (1995); Ravi Mahalingham, *The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOREIGN AFF. 221 (1996).

140. In June 1999, the U.N. Security Council established a peacekeeping mission in Kosovo, calling for the replacement of Serbian police and military forces with an international security force, and the creation of an "international civil presence" to oversee an interim administration of the region. See Sec. Council Res. 1244, 54<sup>th</sup> Sess., 4011<sup>th</sup> mtg., U.N. Doc. S/RES/1244 (June 10, 1999) (deploying "international civil and security presences" for an initial period of one year). See also Schwabach, *supra* note 132, at 80-83 (discussing the terms and impact of Resolution 1244). As authorized by the Security Council's resolution, the Secretary-General subsequently outlined the plan for administering the Kosovo mission (known as the United Nations Interim Administration Mission in Kosovo, or UNMIK). See Sec. Council Res. 672, S/1999/672 (12 June 1999); Sec. Council Res. 779, S/1999/779 (12 July 1999) (detailing situation in Kosovo at time and delineating mission's authority, activities, structure, and components).

because the United States currently dominates the Security Council.<sup>141</sup> American foreign policy concerns and interests will determine the content of international norms regarding whether or not humanitarian intervention is warranted in a particular case.<sup>142</sup> Because the United States regularly takes the position that assisting certain peoples is not within its national interest,<sup>143</sup> and I would maintain that "interest" is shaped in part by racialized views of the other, the racial ideology of the United States is being reproduced internationally and directly determines the content of international norms. In this case, it would seem that if international law permits humanitarian intervention, then all lives would be equally valuable and worth saving. That has not been the case, however, and fits within a view that routinely and systematically ignores Africa and deems it not important to the American national interest.<sup>144</sup> Recall that Secretary General Boutros Boutros-Ghali had to cajole the Security Council into taking action in Somalia, and he did so by comparing the lack of action in Africa with UN efforts in the former Yugoslavia, an enterprise that was deeply flawed, but an effort that was made nonetheless.<sup>145</sup>

I believe this lack of interest will continue despite recent American overtures towards Africa.<sup>146</sup> Moreover, it is characteristic of American at-

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141. See Bridget Case, *Keeping the Peace: The United Nations' Security Council and the Goal of a Multilateral Security System*, 17 SUFFOLK TRANSNT'L REV. 116, 127-32 (1994); Richard Falk, *The United Nations and the Rule of Law*, 4 TRANSNT'L L. & CONTEMP. PROBS. 611, 626 (1994); John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT'L L.J. 129, 167-170 (2000); Richardson, *supra* note 2, at 77-78; Richard E. Rupp, *Cooperation, International Organizations, and Multilateral Interventions in the Post-Cold War Era: Lessons Learned from the Gulf War, the Balkans, Somalia, and Cambodia*, 3 UCLA J. INT'L L. & FOREIGN AFF. 183, 200-01 (1998); Burns H. Weston, *Security Council Resolution 678 & Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 523-25 (1991).

142. See Case, *supra* note 141, at 127-32; Falk, *supra* note 141, at 626; Quigley, *supra* note 141 at 167-70; Richardson, *supra* note 2, at 77-78; Rupp, *supra* note 141, at 200-01; Weston, *supra* note 141, at 523-25.

143. See RANDALL ROBINSON, *DEFENDING THE SPIRIT A BLACK LIFE IN AMERICA* 240-41 (1998). See also Lynne Duke, *Emerging Black Anti-War Movement Rooted in Domestic Issues*, WASH. POST, February 08, 1991, at A27; Richardson, *supra* note 2, at 53-54.

144. President Clinton was the first American president to visit Africa. See Suzanne Daley, *Clinton in Africa: The Reaction; Jaded See South Africa As 'Flavor of the Month'*, N.Y. TIMES, March 28, 1998, at A5; Howard W. French, *Africa Enduring Rebirth Awaits Clinton's Arrival*, N.Y. TIMES, March 22, 1998, at 1; John F. Harris and Lynne Duke, *Clinton's Goal in Africa: Changing Perceptions; President Will Visit 6 Nations in 11 Days*, WASH. POST, March 22, 1998, at A1; Elizabeth Shogren, *Clinton Vows To Help Keep S. Africa Free; Diplomacy: First Visiting U.S. President Lauds Post-Apartheid Gains and Pledges Continued Support*, L.A. TIMES, March 27, 1998, at A4; Roger Simon, *Clinton Ends Visit By Touring Slave Port; Africans Praised For Their Role in Building the U.S.*, CHI. TRIB., April 3, 1998, at 1.

145. See Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 47th Sess., U.N. Doc. S/24868 (1992) (proposing to the Security Council several courses of action it could take in Somalia, and urging a decision); Mark R. Hutchinson, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 HARV. INT'L L.J. 624-34 (1993) (fully discussing UN Security Council's role in Somalia); Stanley Meisler, *Los Angeles Times Interview; Boutros Boutros-Ghali; Leading a Revived United Nations Toward Peace in a Changing World*, L.A. TIMES, Dec. 27, 1992, at M3 (discussing United Nations' "paralysis" during Cold War and present U.N. "inaction" in Bosnia and Somalia).

146. In January 2000, the United States used its one month presidency of the Security Council to examine the plight of Africa. A national summit on Africa was held in Washington, D.C. in March 2000 which was attended by President Clinton and many other high level officials. The African Growth and Opportunity Act, a trade bill, has become law. Eric Schmitt, *Bill to Push*

titudes towards black people at home and throughout the diaspora.<sup>147</sup> For example, the United States brought a complaint against the European Union over imports of bananas from the Caribbean.<sup>148</sup> The United States understands that winning this dispute means destroying the sustenance of small producers in Caribbean nations for whom selling bananas is their sole livelihood.<sup>149</sup> Not a single banana is grown in the United States and thus this dispute is to protect American capital, not American jobs.

Asian people have been consistent objects of racism, fear and castigation in the United States.<sup>150</sup> Consider that almost all of the wars fought by the United States since 1940 have been against Asian nations, and bear in mind that America leveled two Japanese cities with atomic bombs.<sup>151</sup> Observe the profound unease by American policy makers, the media, and the public at large with the ascension of Japan in the nineteen eighties and of China today.<sup>152</sup> No similar discomfort is evident as European nations consolidate to become a world power to rival the United States, trade disputes

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*Africa Trade Is Approved*, N.Y. TIMES, March 16, 1998, at A9; Eric Schmitt, *House Supports Trade Benefits To Aid Africa*, N.Y. TIMES, July 17, 1999, at A1; Eric Schmitt, *Senate Passes Trade Bills For Caribbean and Africa*, N.Y. TIMES, November 4, 1999, at A11. See also Nick Anderson, *Trade Bill Aiding Third-World Nations Sails Through House; Commerce: Some Observers Believe Expected Passage in Senate and Approval by the President is a Positive Signal For China*, L.A. TIMES, May 5, 2000, at C3; R. W. Apple Jr., *Into Africa*, N.Y. TIMES, March 24, 1998, at A10; James Bennet, *Sorry About That; Africa Gets the Clinton Treatment*, N.Y. TIMES, March 29, 1998, section 4, page 1; Suzanne Daley, *Clinton in Africa: The Reaction; Jaded See South Africa As 'Flavor of the Month'*, N.Y. TIMES, March 28, 1998, at A5. For a tracking report on the African Growth and Opportunity Act for the years 1997 and 1998 see 105 BILL TRACKING H.R. 1432; for the years 1999 and 2000 see 106 BILL TRACKING H.R. 434. See also Hunter R. Clark, *African "renaissance" and U.S. Trade Policy*, 27 GA. J. INT'L & COMP. L. 265, 268-71 (1998); A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT'L L.J. 1706, 1711 (1995) (stating that following Cold War, Africa was no longer important to U.S.).

147. See ROBINSON, *supra* note 143, at 108-11, 193, 232 (citing Rhodesia, South Africa, Namibia, Haiti, Rwanda and Nigeria as examples where America has shown little or no interest in plight of Africans).

148. See Regime for the Importation, Sale, and Distribution of Bananas, Decision By the Arbitrators, WT/DS27/ARB (April 9, 1999).

149. See Mark Fineman, *Caribbean Island Wants to Go to Pot to Replace Bananas; St. Vincent "ganja" Puts Food on Table*, ARIZ. REPUBLIC, Jan. 29, 2000, at A33 (portraying anger in Caribbean over United States efforts to stop Europe's preferential treatment of Caribbean bananas when forty percent of St. Vincent's population is already unemployed); Larry Rohter, *Trade Storm Imperils Caribbean Banana Crops*, N.Y. TIMES, May 9, 1997, at A6; Bob Herbert, *In America; Banana Bully*, N.Y. TIMES, May 13, 1996, at A15; Elizabeth Olson, *World Trade; U.S. Backed in Banana Dispute*, N.Y. TIMES, Jan. 28, 2000, at C4.

150. See Keith Aoki, *supra* note 62; Keith Aoki, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM AND MARY L. REV. 1, 8-24 (1994); Saito, *supra* note 43.

151. See Horne *supra* note 1, at 438 (noting atomic bombs were dropped in Asia, not Europe). Casey Frank, *Truman's Bomb, Our Bomb*, 19 FLETCHER F. WORLD AFF. 131, 137-40 (1995) (discussing Truman, the role of race, and the political and social background behind the decision to use the atomic bomb).

152. Horne asserts that there is a general crisis of white supremacy because of Asia's return to a preeminent position in the global economy. Horne, *supra* note 1, at 461. Indeed the rise of Japan was always viewed with great trepidation in a nation where white supremacy held sway. The very existence of a modern capitalist nation in Asia raised questions about the essential premises of white supremacy and was one of the reasons Japan was viewed as a dire threat. See *Id.* at 448. For a chronicle of how African Americans historically viewed this equation, see *id.* at 447-452.



with the European Union notwithstanding.<sup>153</sup> The European Union is not viewed as a looming menace, even as it is viewed as an economic rival. Do perceptions of the Asian "other" play a role in how we deal with China on a broad range of issues, including human rights, trade, and national security?<sup>154</sup>

This small sample serves as a backdrop to a very complex question. For the reasons behind all of these scenarios are varied and complex; none are based solely on perceptions of race. Nonetheless, I believe race figures into each of these calculations on some level. This is not to say that those who make American foreign policy, or formulate American positions on international law, are being overtly racist. If anything, those who are interested and involved in international affairs are more likely than most Americans to seek out and accept difference. Thus, my point is not to ascribe racial animus or bias to those who shape these processes. Indeed, I doubt race is ever discussed or even consciously contemplated by these women and men.<sup>155</sup> If only it were so simple.

I am contending that certain racial perceptions are part of the American context and subtext; they are simply a part of us and who we are.<sup>156</sup> It is part of our identity, and it is our ideology. We all come to our respective public roles with ourselves, and we are shaped by culture, environment, history, and particular social milieus. Race is the predominant American paradigm, one that is at the center of our existence as a people whether it is conscious or unconscious, whether it is acknowledged or unacknowledged.<sup>157</sup> We see race when we see others. And we see it in a particular context because we live, work and exist in America, with its particular racial history and framework. Race is visible and it has meaning. The content of that meaning, and what we choose to do with what we see is another matter, but we all notice race and take it into account. I believe the racial ideology of America is reflected in our foreign policy and in how we view the international legal system, even if it is no longer overt or consciously acknowledged. Race shapes our perceptions, our reactions, our recommendations, and our solutions. It helps determine who is expendable, what is important and whether we act or falter. We must name and understand this construct if we are to transform it and if we are to define and bring about some measure of social and economic justice.

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153. Roger Cohen, *U.S. - Europe Relations: Tiffs Over Bananas And Child Custody*, N.Y. TIMES, May 28, 2000, at section 4, page 1. *But see* Grant, *supra* note 12, at 574 (arguing that despite their economic rivalry, the United States, Japan and the European Union are all "fingers on a single political hand of the Group of Seven, which is egregiously influential in the multilateral financial sphere.")

154. There may of course be honest policy differences between these nations. The question I am raising here is the lense through which those differences are viewed.

155. See Ian Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (explaining that the theory of institutionalism is rooted in the concept that human behavior is not consciously motivated).

156. See López, *supra* note 155. See generally DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

157. Lawrence, *The Id, the Ego and Equal Protection*, *supra* note 130.