Volume 45 | Issue 5 Article 2

2000

Critical Race Theory and International Law: The View of an Insider-Outsider

Makau Mutua

Keynote Address

CRITICAL RACE THEORY AND INTERNATIONAL LAW: THE VIEW OF AN INSIDER-OUTSIDER*

MAKAU MUTUA**

I. INTRODUCTION

TODAY international law is in a deep crisis. At no other time in its five centuries has the discipline of international law been under such severe challenge. At the center of the crisis is the legitimacy of international law itself. Although the last decade has witnessed the apparent triumph of markets and the consolidation of Western domination of the globe, the rules of "international governance" have been exposed anew as inequitable, oppressive, destructive and highly hierarchically ordered by race. New streams of scholarship and action are now seeking to reconceptualize and restructure both domestic and international law. At the core of this agitation are critical race theory ("CRT") and Third World approaches to international law ("TWAIL"). Both represent an enormous possibility for the fundamental rethinking of international law.

A casual examination of CRT[1] and international law[2] deceptively indicates two contradictory, if convergent, thrusts. At first blush, CRT is lo-

* In October 1999, a draft of this paper was presented as the Keynote Address at the Thirty-Fourth Annual *Villanova Law Review* Symposium on "Critical Race Theory and International Law: Convergence and Divergence," held at Villanova University Law School.

** Professor of Law, State University of New York at Buffalo School of Law; Director, Human Rights Center, SUNY at Buffalo; S.J.D., (1987), Harvard Law School; LL.M., (1985), Harvard Law School; L.L.M., (1984), University of Dar-es-salaam; LL.B., (1983), University of Dar-es-salaam.

1. *See generally* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1419 (1998) (stating that Critical Race Theory or CRT is recent genre of scholarship that exposes "shortcomings of civil rights legal scholarship and social reforms anchored to formal rather than substantive change"). For important works on Critical Race Theory, see generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT at xvii-xxviii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter KEY WRITINGS], discussing the emergence of CRT, and CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995), collecting recent writings on CRT.

2. *See generally* CHARTER OF THE UNITED NATIONS: COMMENTARY & DOCUMENTS 707-08 (Leland M. Goodrich et al. eds., 3d & rev. ed. 1969) (quoting Statute of International Court of Justice art. 38, as defining international law as legal code found in international custom, international conventions, general principles of international law recognized by "civilized nations," and judicial decisions and teachings of most highly qualified publicists of various nations); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1986) (defining rule of international law as

cated in a particular cultural and political space.[3] It is born out of the American saga of racist and sexist subordination and resistance. As an intellectual movement, it is steeped in European-American postmodernism.[4] A cursory survey of CRT denies its universality and reveals a myopia in terms of its origins, concerns, purposes and subjects. In fact, CRT is so site and context specific that it does not immediately make any universal claims of itself.

On the face of it, therefore, CRT has thus far only concerned itself with the struggles of various minority groups in the United States.[5] One area of particular focus for CRT has been the black experience in the United States.[6] This focus seems to be very narrowly defined and would

international custom, international agreement or general principles common to major legal systems of world).

3. *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (describing Supreme Court decisions on racial discrimination). CRT rises as a direct challenge to an American post-civil rights legal and political culture that misidentifies and distorts the character and nature of legal reforms purporting to address racial and gender inequities. In other words, CRT is a stream of scholarship that bares the duplicity of the neutrality of the law. *See generally id.* (arguing that from 1954 to 1978 Supreme Court viewed racial discrimination not as social phenomenon, but as misguided conduct of particular actors).

4. *See generally* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751 (1992) (stating as philosophic construction, postmodernism stresses fluidity in understanding social conditions so that identities of all sorts are contextual, highly complex and contingent on variety of factors, including interplay of social, historical and cultural forces).

5. *See generally* ADRIEN K. WING, CRITICAL RACE FEMINISM: A READER (1998) (detailing how women of color confront race, gender and class discrimination within white male patriarchal and racist system); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (using racial critique to argue that isolating women's experience independent of race, class and sexual orientation silences voice of black women); Leila Hila, *What is Critical Race Feminism*, 4 BUFF. HUM. RTS. L. REV. 367 (1997) (book review of WING, CRITICAL RACE FEMINISM: A READER (1998)) (stating that critical race feminism demonstrates how race and gender interact to influence identity and discrimination against women of color); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (invoking concept of structural violence to argue that legal interpretations of conflicts between Title VII and NLRA have been detrimental to women of color); Symposium, *Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175 (1991) (stating that women of color must identify with struggles of other American activist movements).

6. *Cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (arguing black women are excluded from feminist theory and antiracist policy because both fail to reflect interaction of race and gender). *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (exploring race and gender dimensions of violence against women of color); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999) (arguing that groups on bottom of various hierarchical structures shift depending on issue or group involved).

appear to be of no immediate utility to a global population of some six billion people, three quarters of whom live in the developing or so-called "Third World." But CRT has also developed a theoretical methodology that is useful in studying the struggles of other subordinated groups.[7] Sexual minorities, for example, have deployed this methodology in their struggle for social justice.[8] Two of these key innovations by CRT—multidimensionality[9] and intersectionality[10]—are tools that debunk essentialist constructions and allow for a more nuanced understanding of the use of identities as social and legal phenomena. They help unpack various oppressions and assist in the forging of new and multidimensional sites of resistance.

International law, on the other hand, is by definition "universal,"[11] even though its authors have no doubt about its Christian and European origin.[12] Unlike CRT, which is an idiom of resistance and liberation, international law has been a medium of conquest and domination. The most critical phases in the development of international law took place during the Age of the Empire,[13] when most non-European peoples were

---

7. *See generally* Patricia A. Cain, *Stories From the Gender Garden: Transsexuals and Anti-discrimination Law*, 75 DENV. U. L. REV. 1321 (1998) (employing feminist legal theories to determine whether experiences of transsexuals and transgendered persons fall within existing legal structures); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (using critical perspectives of CRT to devise argument that exclusion of Asian Americans from political and legal process has impoverished politics and law); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997) (considering race and ethnicity as integral components when developing sexual orientation legal scholarship).

8. *See, e.g.*, Symposium, *InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory*, 75 DENV. U. L. REV. 1129 (1998) (using interdisciplinary approach to examine subordination based upon sexual orientation).

9. Multiplicity recognizes that any one individual simultaneously carries a basket of identities, some of which may be contradictory.

10. Intersectionality is a further development of multidimensionality and points to the cross-cutting, intersecting and interacting identities that produce multilayered, multidimensional social hierarchies and situations.

11. *See* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999). A prominent new voice in international legal scholarship has written that the "association between international law and universality is so ingrained that pointing to this connection appears tautological." *Id.*

12. *See* 1 HERBERT ARTHUR SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 12 (1932). The British, for example, regarded international law as the province of Christian nations and the Society of Nations, and the original European who developed it, as its fathers and framers. According to Oppenheim, international law "is in its origin essentially a product of Christian civilisation . . . ." 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 4-5 (Arnold D. McNair ed., 4th ed. 1928).

13. *See generally* ERIC HOBSBAWM, THE AGE OF EMPIRE (1987) (stating that age of colonialism lasted from 1875 to start of World War I).

subjected to European domination and colonialism.[14] By the end of the nineteenth century, any doubts about the "universality" of international law were erased by the European imperial conquest and the forcible embrace of all states—in Africa, Asia, the Americas and the Pacific—by this new legal code of international governance. International law is, therefore, Eurocentric in that it issues from European thought, culture and experiences.[15] This specificity denies international law universality.

Today, however, international law is universal in its geographic scope and application. Its guardians present it as a coherent and reasonable body of rules which are universally applicable to all humanity, without regard to nationality, culture, religion and philosophy.[16] Unlike CRT, international law explicitly holds itself out as universally human and thus, it automatically and forcibly embraces all human societies. Underlying this assumption is a feeling of inevitability. Who, for example, can imagine an "international community" without law, a predictable set of norms that govern the relationships between states? In fact, international law is so ubiquitous today that most of the same non-European states and peoples who have been its principal victims claim it as a shield and medium of international exchange.

Like all discourses and paradigms that rest on the mantle of universality, international law claims for itself a higher moral plane in which good and eternal truths can be realized.[17] In this case, order and stability can be assured on a global scale. Implicit in international law is the warning that no group, nation, state or people can achieve progress without mem-

14. *See generally* Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 931 (1997) (stating that by 1914 Europe held 85% of earth in some form of dependency); Christopher Weeramantry & Nathaniel Berman, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1515, 1526 (1999) (stating that colonial scramble in Africa began in 1885).

15. *See* Anghie, *supra* note 11, at 2 (stating that by 1914 people of Asia, Africa and Pacific were assimilated into system of European law derived from European thought and experience).

16. *See id.* at 1 (stating that international law applies to all states regardless of culture, belief system and political organizations).

17. *See* JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE 4-5 (Theodore Salisbury Woolsey ed., 1886) (stating that international law is identical with natural law and, therefore, both are law of God). Pomeroy, an important early writer on international law, traced it to Christian morality and to God's endowment of man with "universal conscience and intellect . . . [the ability to] discern and approve great and abstract principles of right, truth, and justice," from which "a perfect system of positive law" could be built to rid society of evil. *Id.* at 4. But in justification of colonization of non-European peoples, Pomeroy notes that:

> It seems to be a law of Providence that the peoples who are unfitted to develop the resources of the earth shall give way to those that have the stronger race life, the most enduring persistence, the energy which transforms the forest and the wilderness into the farm, the village, and the city.

Id. at 96-97.

bership in the "society" of nations, in essence "international society." Put differently, assimilation in international law is a *sine qua non* for civilization. International "reality" suggests that to step out of international law is to in effect opt out of "civilized" society and to become a "rogue" or "pariah" nation, state or society.

These two basic assumptions, the particularity and specificity of CRT, and the universality and internationality of international law, are the focal points of my interrogation. Are these assumptions correct, and if so, to what extent? I want to argue that the reverse is most likely true. While CRT has an enormous emancipatory potential universally, international law has largely been developed and deployed as a vehicle for advancing particular interests, for the benefit of specific peoples, cultures and regions and, as a consequence, for the detriment of particular interests, peoples, cultures and regions.

This Keynote Address makes the point that international law has largely been an instrument for fostering "unfreedom" and for enhancing and aggravating human suffering, not for alleviating it. But it also contends that international law need not be an instrument for exclusion and exploitation, and asserts that it can and should speak to more noble ideals. I want to suggest that CRT has a large emancipatory potential at the global level, a potential that can be tapped and deployed as part of the project for the reconstruction of international law. But this is only possible if there is intellectual synergy and deliberate complicity between CRT and Third World studies broadly defined and, in this particular case, a marriage of interests between CRT and TWAIL.

II. THE CATALYTIC INSIDER-OUTSIDER

Third World scholars come to the disciplines of CRT and international law with a considerable degree of discomfort and an in-built sense of alienation.[18] Neither CRT, as a historically specific legal or intellectual conversation, nor international law, as a totalitarian code for global governance, have germinated in the African garden. To be sure, my native ears are not deaf to many of the substantive issues addressed by both disciplines. I have a keen interest in the relationships among states, citizens and international institutions. Furthermore, matters of identity construction and the role of the law in creating social hierarchies are indigenous to precolonial Africa. My alienation comes not from these facts, but from the particularized historical, cultural and intellectual traditions and tongues in

18. As an outsider looking in, I see both Critical Race Theory and international law as "Western" discourses, and as particularized methods and doctrines that either deal with a specific Western problem or seek to advance certain Western interests. To the extent international law addresses me, for example, I am deemed a "thing," an object that must be controlled.

which both CRT and international law are steeped. It is in that sense that I am an outsider, even to CRT.[19]

Though an outsider to CRT and international law, I am in a very real sense an insider to both. I am part of an international elite that personally benefits from the norms and structures of international law. My reality is not that of marginal and down trodden citizens in Latin America, Africa, Asia, or, for that matter, North America. I do not strain under the daily avalanche of the cruelties of globalization, state repression and abuse. But I am an African—a black African who lives in the United States. The reality of being black in the United States exacts a daily price without regard to station in life. Clearly, that price varies according to one's station. But one can pay the ultimate price for just being black in any case, as the Diallo tragedy so clearly demonstrated.[20] CRT has a special meaning and application to my life as I live it and as others, mainly whites, would have me live it in the United States. At the end of the day, I am a black person, a black man, in these United States. That is why I also cast myself as an insider to CRT.

But I am also an outsider because of that other consciousness that I carry, the consciousness of the historical, political and cultural realities of the Africa that I am a part of, indeed of the Third World to which I belong, as distinct from the West. In international law, I see a system of ordering and understanding the world, a system and normative edifice that makes me accurately aware of my subordinate and marginal place in it as an "other."[21] How does one, for example, understand the rhetoric of European powers at the 1884 Berlin Conference in which Africa was carved up for colonization? In their attempts to put a "human face" on the brutality and barbarism of the colonial project, the imperial powers inserted in Article 6 of the Conference, that:

> All powers exercising the rights of sovereignty or an influence in the said Territory [the Congo basin] engage themselves to watch over the conservation of indigenous populations, and the amelio-

19. To borrow from Critical Race Theory, I bring to both projects–CRT and international law–an "outsider jurisprudence" of my own. *Cf.* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-24 (1989) (discussing emerging minority jurisprudence, particularly that of women and people of color).

20. *See* Herbert Lowe & Tom Brune, *Jackson: Vestibule Tells Diallo Story*, NEWSDAY, Mar. 7, 2000, at A03 (discussing details of Diallo incident, in which four white undercover New York Police Department officers fired 41 bullets and killed Amadou Diallo, unarmed black African, as he stood in vestibule of his Bronx apartment); Dave Saltonstall, *Prez Says Diallo Race Case*, DAILY NEWS, Mar. 2, 2000, at 2 (same). Incredibly, a jury acquitted all four officers, even on manslaughter charges. There is no doubt that the officers would not have assassinated Diallo had he been a white man in a white neighborhood.

21. *Cf.* Anghie, *supra* note 11 (stating that international law falls into European historical continuum in which European experiences are universalized in "civilizing" mission).

> ration of their moral and material conditions, and to strive for the suppression of slavery and especially of the negro slave trade.[22]

Some of the statements made at the Berlin Conference are simply chilling. Prince Bismarck, for example, noted that "all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce."[23] These are remarkable statements by white rulers gathered to "legitimize" one of the most blatant thefts of all time. Never mind that the subjects of the meeting–Africans and their states–were not at the Berlin Conference! This is the history of international law that makes me feel as though I am an afterthought to the discipline, as a "thing" that international law defines, accommodates, exploits, tolerates and controls. It is "their" international law, a discourse that calls and treats me like a savage and strips me of my dignity and humanity.

There is, however, a paradox. I would be lying if I said that I did not need a species of international law. I need international connectiveness to challenge the global white racial hierarchy that dominates Africa in particular and the Third World in general. Exploitation and repression, for the past five centuries, have been a global phenomenon.[24] The response to them must also be coordinated on a global basis. In a strange twist, international law may facilitate this process by default. The norms, processes, structures and institutions that operate under the broad rubric of international law are porous enough to allow a certain degree of mobilization. Such efforts may lead to a better understanding of global hierarchies and inequities, and more refined and sophisticated struggles to transform those oppressions.

There are pragmatic reasons to use international law as well. How, for example, do my claims, rights and privileges get mediated by international society if I step out of international law? In other words, as part of the international society, how can I secure my human dignity outside the framework of international law? Would I lose my international legal personality, say, as did the inhabitants of the former republic of Somalia, who are now, for all purposes, stateless? Does it matter to them that they are not "connected" to the rest of the world or that they are not participants in major international organs like the United Nations (U.N.) and the international financial institutions? Is it important, for example, that they cannot engage in international travel because they have no formal state to

22. General Act of the Treaty of the Berlin Conference on West Africa, Feb. 26, 1885, *translated in* Official Documents, 1909 AM. J. INT'L L. (Vol. 3, Supp.).

23. M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION 332 (photo. reprint 1969) (1926).

24. *See* Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1114 n.5 (1995) (discussing European domination of Africa and the creation artificial, incoherent states).

issue passports that other states would honor? Have they been left out and locked out? Are they worse off than countries in Africa or elsewhere in the Third World? It is partially because of the implications of these vexing questions that I want to be an insider as well.

III. CRITICAL RACE THEORY

As I understand it, CRT is a project of outsider jurisprudence. It concerns itself with social justice for "outsider" groups, that is, groups that have traditionally been subordinated in the United States. Heavily influenced by elite black women—who come from one of the most subordinated groups in American society—CRT has primarily dedicated itself to anti-racist and anti-sexist struggles, and has served mainly to express the short comings of civil rights and social reforms that signify formal, but not substantive change.[25] It is therefore a very specific form of scholarship.

CRT is driven primarily by anti-subordination and employs multidimensionality and intersectionality to free analysis from the strictures and blindness of single category/identity analysis. Thus, CRT is currently an inclusive method. It seeks to take into account many of the variables that create powerlessness, marginalization, debilitating and degrading social hierarchies and exclusion.[26] In effect, what it does is to universalize and globalize—by its holistic method–the struggles against subordination. Its specific location belies the universal tools of analysis that it has contributed to the disaggregation of complex social and legal phenomena.

The universalization that I refer to here is not, of course, geographical. It rather refers to CRT's ability to acknowledge and account for many of the indicia of subordination in the struggle against powerlessness. Thus, while the origin and purpose of CRT are particular, its instincts and goals are universal in that they aim to universally advance and protect human dignity without regard to the category/identity under attack. CRT says that no category/identity should be left out in understanding or fighting against exploitation and subordination. This method knows no geographic, spatial or cultural boundaries. Because many of these categories exist in societies outside the United States, it would be useful for social,

25. *See* KEY WRITINGS, *supra* note 1, at xiii ("[CRT] embraces a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more specifically, in American society as a whole.").

26. According to its key authors, Critical Race Theory is held together by two basic and common interests:

> The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as the "rule of law" and "equal protection." The second is a desire not merely to understand the vexed bond between law and racial power but to change it.

Id.

political and legal scholars and activists elsewhere to study the CRT method and explore what aspects of it might inform or advance their own struggles.

Herein lies the emancipatory potential for CRT to shed some light on the reconceptualization of international law. This is a method which can be particularly useful in understanding the many multi-faceted and layered injustices and oppressions that the international legal, political, cultural and economic orders impose on societies all over the world and, particularly, in the Third World.

IV. INTERNATIONAL LAW

In contrast to CRT, international law is the system, the jurisprudence of "insider" groups and dominant global interests. It is the normative center and the legitimating code of conduct for international society. Rooted in a deep-seated sense of European and global predestination, international law is founded on European biases that treat the universe as a theater for European and North American military, political, economic and cultural interests.[27] This global, white European supremacy over non-European peoples is premised on Europe as the center, Christianity as the fountain of civilization, the innateness of capitalist economics, and political imperialism as a necessity.[28]

In this scheme of international law, Europe is the geographical center of the world, the point of reference; every other country or region is described as "remote"—the "Far East" or the "Middle East"—all relationships to their location to Europe. Christianity is the moral and naturalist foundation of civilization, and the reason without which full humanity is unattainable; thus, the coupling of Christianity to the colonial project and the fusion of church, state and empire are achieved. Capitalism is constructed as innate in humans, and, therefore, the basis for the regimes of the ownership, protection and distribution of global resources. Finally, political imperialism is an indispensable paradigm in the ordering of the relationship between Europeans and non-Europeans, with the manifest duty of the European to convey the gifts of civilization to backward and uncivilized races.

International law orders the world into the European and the non-European, and gives primacy to the former. This is done by creating the

27. *See* David Slater, *Contesting Occidental Visions of the Global: The Geopolitics of North-South Relations, in* 4 BEYOND LAW—MAS ALLA DEL DERECHO 100 (1994).

28. *See* Mohamed Bedjaoui, *Poverty of the International Order, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 152, 154 (R. Falk et al. eds., 1985) (capturing these biases). Bedjaoui states:

> This classical international law thus consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical aspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law).

Id.

notion of the hierarchy of cultures and peoples. The fundamental principles of international law evidence this inflexible view of the discipline. Sovereignty and statehood are defined in such a way as to exclude or subordinate non-European societies.[29] Membership in international society is a prerogative of European powers, which alone decides who belongs to this international society and can therefore enjoy the privileges of international law. The creation and re-creation of states, as well as their recognition, has largely been a prerogative of the American-European alliance. In 1967, for example, the "international community" refused to recognize Biafra, the Ibo-dominated state, which broke off from the Nigerian post-colonial state, even though Tanzania and several other African states made a strong case for secession.[30] In contrast, no hurdles prevented European states in the early 1990s from recognizing the states resulting from the fall of the Soviet Union and the collapse of Yugoslavia.[31]

What the world has witnessed in the last five centuries is the universalization of an international law that is particular to Europe and seeks not universal justice, but an international legal order that erects, preserves and embraces European and American domination of the globe. It is impossible to provide any other reading for the racialization of international law by its chief authors, the Europeans and the Americans.

Even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism. The human rights corpus is driven by what I have called the savage-victim-savior metaphor, in which human rights is a grand narrative of an epochal contest that pits savages against victims and saviors.[32] In this script of human rights, democracy and western liberalism are internationalized to save savage non-Western cultures from themselves and to "allevi-

29. In order to justify colonialism, international law denied sovereignty to non-European states.

30. Biafra seceded from Nigeria on May 30, 1967, setting off a civil war that lasted until 1970 in which an estimated 250,000 civilians were killed. *See generally* WOLE SOYINKA, THE OPEN SORE OF A CONTINENT: A PERSONAL NARRATIVE OF THE NIGERIAN CRISIS (1996) (discussing secession of Biafra from Nigeria as well as historical and current tyrannical regime that may lead to Nigeria's downfall); *see also* Makau wa Mutua, *Can Nigeria Be One?*, WILSON Q. 91, 92 (Summer 1996) (discussing incoherence of Nigerian state and the need for recreating it); *The Tanzania Government's Statement on the Recognition of Biafra, in* FOREIGN POLICY OF TANZANIA—1961-1981: A READER 275, 275-79 (S.S. Mushi & K. Mathews eds., 1981) (discussing causes of and results from two military coup d'e'tat that led to Biafra's independence); David Ijalaye, *Was Biafra at any Time a State in International Law?*, 65 AM. J. INT'L L. 551, 551 (1971) (addressing case for Biafran statehood following its secession).

31. *See* Makau wa Mutua, *Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State*, 21 BROOK. J. INT'L L. 505, 505 n.1 (1995) (tracing dysfunctional nature of African state to its contrived creation).

32. *See generally* Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. (forthcoming 2001).

ate" the suffering of victims, who are generally non-Western and non-European.[33]

In the human rights idiom, the European West becomes the savior of hapless victims whose salvation lies only in the transformation of their savage cultures through the imposition of human rights. Attempts to craft a truly universal regime of rights, one that reflects the complexity and the diversity of all cultures, have generally been viewed with indifference or hostility by the official guardians of human rights.

V. TWAIL AND CRT

Since 1945, the U.N. has played a key role in preserving the global order, which the West dominates. Today the U.N. Security Council and its indefensible structure has become the exclusive property of the United States, Britain and France. The global political agenda has been narrowed to the interests of these powers. In the area of international trade, the World Trade Organization ("WTO")[34] and the free trade regime of the General Agreement on Tariffs and Trade ("GATT")[35] now fuel globalization.[36] The adverse effects of globalization, which disproportionately negatively impact the Third World, have cemented an unjust international, political and economic order. In other words, injustice has been globalized and internationalized on a scale hitherto unprecedented. Transnational corporations and multilateral institutions now exploit Third World states to escape accountability and the prohibitions of both domestic and international law. For example, investment and trade deals often disregard the environment and erode the rights of workers.[37]

In light of these dire circumstances, what is to be done? I propose these positions as starting points. The Third World, which hosts most of humanity, needs international law. That point is beyond dispute. In the era of globalization, the world is just going to become a smaller place. As such, efforts must be directed at transforming the nature of globalization, not reversing it. This, I believe, can only be done by reconceptualizing

33. *See id.* (discussing details of savage victim–savior metaphor construct).

34. *See generally* Marrakesh Agreement Establishing the World Trade Organization, signed at Apr. 15, 1994, 33 I.L.M. 13 (1994).

35. *See generally* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

36. *See* Robin L. Cowling, *Pic, Pops and the Mai Apocalypse: Our Environmental Future as a Function of Investors' Rights and Chemical Management Initiatives*, 21 HOUS. J. INT'L L. 231, 275 (1999) (discussing promotion of unregulated flow of money and goods across international borders that is being shaped by such pacts as NAFTA and GATT).

37. *See generally* ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000) (discussing relationship between trade law and human rights law); HUMAN RIGHTS AND ECONOMIC GLOBALIZATION: DIRECTIONS FOR THE WTO (Malini Mehra ed., 1999) (addressing question of whether human rights impact international trade policy).

and restructuring international law. In this task of reconceptualization, CRT offers synergistic possibilities to TWAIL, the one movement that has the potential to lead the charge for the transformation of international law.

The idea of TWAIL is old and yet, new. At the core of TWAILian thinking are several key interests and assumptions. First, TWAIL captures a stream of scholarship and action by Third World academics, policy-makers, statesmen, organizations and states whose central purpose is the exposure and elimination of norms, processes and institutions that subordinate the Third World to the European West. Second, TWAIL seeks to create conditions–both intellectual and material–that will usher a new compact of international law. TWAIL, therefore, disavows white supremacy or any other racial hierarchies and opposes all hegemonic doctrines and practices that foster exploitation and the dehumanization of Third World cultures, communities and philosophies. But TWAIL is not simply a defense, nor is it a reaction, to the imperial projects of the West. It is driven by the impetus to transform–from within–Third World cultures, philosophies and practices that are inimical to human development. It is in this sense that TWAIL is an old idea which has now been given a new momentum by current international realities.

TWAIL rejects the traditional frames used to develop and sustain international law and seeks a framework based on genuine universalization. TWAIL repudiates the masking of the project of enlightenment in international liberalism. That mask cannot resolve the central contradictions frozen in the international legal order: that of hierarchical relationships between the West and the rest, between the European and the non-European. That façade is not sufficient to conceal the phantom of sovereign equality between states, political and economic imbalances between peoples and states, and the paternalism of imperial projects such as human rights that foist a false consciousness on the world.

As I see it, the CRT methodology of challenging form that does not deliver substance, of attacking all bases for subordination, of fighting for a legal order that delivers actual social justice, must be incorporated in the work of TWAIL. Even more important CRT and TWAIL thinkers must join hands, cross-fertilize and draw from each other. CRT scholars must start to write in an international idiom; they must demonstrate that they understand that the conditions of subordination in the United States are part and parcel of the global structure of dehumanization.

There is hope for such collaboration; in 1988, the Multilateral Agreement on Investment ("MAI")[38]—which would have given unparalleled

38. For more on the MAI, see Stephen Kobrin, *The MAI and Clash of Globalizations*, FOREIGN POL'Y 97 (Fall 1998); *Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice; Working Paper Submitted by J. Oloka-Onyango & Deepika Vdagama*, U.N. ESCOR Subcomm. on Prevention of Discrimination and Protection of Minorities, 51st Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1999/11 (1999).

rights to investors, but severely injured labor, human rights and the environment-was withdrawn after the globalized opposition by environmental, consumer-protection, human rights and labor organizations. CRT could have had a significant contribution to this debate, both at the domestic and international levels. It is such collaboration between TWAIL and CRT that I call for now; it is only through such a synergy and coalition between us and our allies that we will be able to restructure international law. Conversation between the two appears to be starting. A recent publication lamented the lack of scholarship that connects globalization to racial power and economic domination, and called for work that would seriously examine the "processes that produce globalized racial stratification."[39] We should stop talking about it and start doing it.

39. KEY WRITINGS, *supra* note 1, at xxx.