

# THE UNMAKING OF “CONFLICT:” A CRT-TWAIL ANALYSIS OF THE CASES OF COLOMBIA AND PALESTINE(-ISRAEL)

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## ABSTRACT

*This Article applies a CRT-TWAIL analysis to the cases of Colombia and Palestine. Critical Race Theory studies how race holds legal meaning. Third World Approaches to International Law examines how colonialism became modern international law. Through two case studies of “conflict,” this Article presents the instrumentality of an applied joint CRT-TWAIL analysis. A CRT-TWAIL framing of the case study of Afro-Colombians, Indigenous Colombians, and the “armed conflict” in Colombia shows how transitional justice fails to address colonial*

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From March 12-20, 2022, through NYU Law’s Law Students for Justice in Palestine, I participated in PalTrek, a program organized by PalTrek National. With other students from NYU, Columbia, and Harvard graduate schools, I witnessed firsthand the Israeli settler-colonial military occupation and apartheid regime whose objective is the genocide of Indigenous Palestinians, as explicitly seen since October 8, 2023. UN NEWS, *Rights Expert Finds ‘Reasonable Grounds’ Genocide is Being Committed in Gaza* (Mar. 26, 2024), <https://news.un.org/en/story/2024/03/1147976> [<https://perma.cc/38BQ-YMC6>]; see “*A Textbook Case of Genocide’: Israeli Holocaust Scholar Raz Segal Decries Israel’s Assault on Gaza*,” DEMOCRACY NOW! (Oct. 16, 2023), [https://www.democracynow.org/2023/10/16/raz\\_segal\\_textbook\\_case\\_of\\_genocide](https://www.democracynow.org/2023/10/16/raz_segal_textbook_case_of_genocide) [<https://perma.cc/4UXF-DPS4>].

In occupied Palestine, I immersed myself in the counternarrative conversation to advocate for Palestinian liberation. This article contributes to that counternarrative work. I wrote the first draft of this article in spring 2022 for a Critical Race Theory seminar. A lot has changed but the call remains the same: free Palestine.

I am grateful to the RLSC editors for welcoming scholarship about Palestine in a time of extreme censorship of Palestinian voices and content. See, e.g., “*Toward Nakba as a Legal Concept’: Meet the Palestinian Lawyer Censored by Columbia and Harvard*,” DEMOCRACY NOW! (June 5, 2024), [https://www.democracynow.org/2024/6/5/harvard\\_columbia\\_law\\_school\\_nakba\\_censorship](https://www.democracynow.org/2024/6/5/harvard_columbia_law_school_nakba_censorship) [<https://perma.cc/GF35-74LF>]; and <https://perma.cc/P2LK-77EH>] (including the censored article which is a necessary read).

I am grateful for the editors’ work on this article. All errors remain mine.

*racism. A CRT-TWAIL framing of the case study of Palestine under the Zionist, racialized, and militarized order reveals how occupation law can obfuscate Palestinian self-determination. The Article demonstrates that in uncovering the reality of legalized and racialized “conflicts,” a joint CRT-TWAIL lens can create networks of solidarity between similarly positioned groups worldwide to decolonize the law.*

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## I.

## INTRODUCTION

*“What we are is a majority that has been excluded. In fact, that word, ‘minorities,’ continues to be imposed by colonialism to say that we Black [people] and Indigenous people were minor; so, I do not accept that others say that we are minorities. Minorities are the 47 families that have governed this country; but we, the excluded, the impoverished and racialized, the violated who have never been guaranteed their rights, are the majority in this country.”*

– *Francia Márquez, Afro-Colombian Vice President; human rights and environmental activist*<sup>1</sup>

*“I belonged to a people who had been brought to ruin by a fiercely parochial settler movement feeding on the drug of racist hatred and aggression that it had brought with it from Europe, a movement that in a relatively short time had put us in desperate flight across our borders, reduced us to being squatters in other peoples’ lands, and tried to hound us out of history.”*

– *Fawaz Turki, Palestinian-statesian author*<sup>2</sup>

Black scholars such as Derrick Bell and Kimberlé Crenshaw are credited with creating Critical Race Theory (“CRT”) in the United States in the late twentieth century.<sup>3</sup> CRT is an intellectual approach for unpacking systemic and legalized

1. Quote translated by the author. Márquez became Colombia’s first Afro-Colombian Vice President in June 2022. Jesús A. Rodríguez, *An exclusive with Colombia’s First Black VP*, POLITICO (Jan. 20, 2023, 11:59 AM EST), <https://www.politico.com/newsletters/the-recast/2023/01/20/colombia-vice-president-francia-marquez-00078746>. [<https://perma.cc/KUL7-TG9C>]

2. Mamdouh Nofal, Fawaz Turki, Haidar Abdel Shafi, Inea Bushnaq, Yezid Sayigh, Shafiq al-Hout, Salma Khadra Jayyusi, & Musa Budeiri, *Reflections on Al-Nakba*, 28 J. PALESTINE STUD. 5, 9–10 (1998).

3. Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDWEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [<https://perma.cc/8NKK-Q9LF>]; Penelope Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855, 871 (2000); Jelani Cobb, *The Man Behind Critical Race Theory*, THE NEW YORKER (Sept. 13, 2021), <https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory> [<https://perma.cc/6QLG-84UU>]; Jane Coaston, *The intersectionality wars*, VOX (May 28, 2019, 9:09 AM EDT), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/L733-XYQT>]; see also Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 848 (2000) [hereinafter Mutua, *Critical Race Theory and International Law*] (adding that CRT is “[h]eavily influenced by elite [B]lack women—who come from one of the most subordinated groups in [U.S.] society”).

race relations in the United States, often but not necessarily Black-white relations.<sup>4</sup> Scholars use CRT to critically analyze how the intersection of race, law, and society functions in racially stratified ways.<sup>5</sup> The political project of the United States of America operates as an exceptionally<sup>6</sup> racialized society, with its history of racial terror and subordination—mainly inflicted on Black people—through state-sanctioned private behavior or legitimized and codified public action.<sup>7</sup> Thus, CRT is a necessary modality through which to challenge American exceptionalism,<sup>8</sup> hold the United States accountable for its revisionist history of race domestically and imperialism globally, and prompt it to reckon with its truth.<sup>9</sup>

4. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: THE CUTTING EDGE* 1–3 (3d ed. 2013).

5. See, e.g., E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 *UCLA L. REV.* 1386, 1390 (2021) (“CRT scholars have, among other things, mapped the mutually constitutive relationships among race, racial subordination, and the law; examined law’s historical and contemporary role in the construction of race and racial subordination; and exposed the different ways that racial subordination persists including through legal interventions ostensibly tailored to promote equality.”).

6. Here, I use the word “exceptionally” as a subversion of “American exceptionalism” to argue not that the United States is special in its superiority to other nation-states but rather that it is unique in its historically abhorrent white-Black binary and denial thereof and is thus democratically inferior. I do not mean to downplay the racist regimes of Colombia and Israel; in fact, the global export of U.S. anti-Black and anti-Muslim racist rhetoric has influenced these regimes. See also E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 *UCLA L. REV.* 1462, 1499 (2021) (“Under U.S. exceptionalism, the very conditions of possibility for the establishment of the United States as a particular kind of racialized democracy—one that normalized and constitutionalized both slavery and the appropriation of Native lands—are at best footnotes.”); ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 79 (2016) [hereinafter DAVIS, *FREEDOM IS A CONSTANT STRUGGLE*] (“This use of the war on terror as a broad designation of the project of twenty-first-century Western democracy has served as a justification of anti-Muslim racism; it has further legitimized the Israeli occupation of Palestine; it has redefined the repression of immigrants . . .”).

7. For a thorough examination of how this history of racial control has evolved, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

8. See Stephen M. Walt, *The Myth of American Exceptionalism*, *FOREIGN POL’Y* (Oct. 11, 2011, 12:40 AM), <https://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/> [<https://perma.cc/ZLK3-ECCN>] (“Most statements of ‘American exceptionalism’ presume that America’s values, political system, and history are unique and worthy of universal admiration. They also imply that the United States is both destined and entitled to play a distinct and positive role on the world stage.”). The United States’ use and appropriation, too, of “America” further exemplify its exaggerated self-importance, as “America” is *an entire region* that includes Latin America, whose history and existence get effectively erased. This is why I use the term “statesian” to denote U.S. nationality. See Karina Martinez-Carter, *What Does ‘American’ Actually Mean?*, *THE ATLANTIC* (June 19, 2013), <https://www.theatlantic.com/national/archive/2013/06/what-does-american-actually-mean/276999/> [<https://perma.cc/5664-JLPV>] (“In Latin America, ‘American’ means anyone from the American continent. U.S. citizens claiming the word are considered *gauche* or imperialist.”).

9. This is likely why CRT is being attacked. See, e.g., Fabiola Cineas, *What the hysteria over critical race theory is really all about*, *Vox* (June 24, 2021, 10:50 AM EDT), <https://www.vox.com/22443822/critical-race-theory-controversy> [<https://perma.cc/A3K2-RVR>]

CRT, as a field of inquiry that appreciates lived realities and confronts power dynamics, can prove valuable beyond U.S. borders.<sup>10</sup> That is, the approach of CRT and its tenets can serve a twofold purpose: (1) to assist marginalized groups in other nation-states that also operate under constructed racial hierarchies and use the law, typically constitutional law, to perpetuate a racialized exclusionary status quo; and (2) to challenge the limitations of and reconstruct international law when it has supported—either directly or indirectly—the oppressor(s) of marginalized groups.<sup>11</sup>

Third World Approaches to International Law (“TWAAIL”), which is a movement of international law and policy practitioners concerned with issues broadly related to the Global Majority,<sup>12</sup> does some of this work by “support[ing] the decolonisation of the lived realities of the peoples of the Global [Majority].”<sup>13</sup> The TWAAIL network examines how European expansion and exploitation—past and

(“What the fight against critical race theory really shows is how Republicans are threatened by the progress that has been made with respect to racial justice and are uncomfortable with what it might actually look like to confront and eradicate racism.”).

10. While this paper proposes the transboundary travel of ideas, recognizing that borders exist—however superficially and brutally established—I am a proponent of open borders, which would facilitate the travel of social theories and movements. See Aisha Dodwell, *7 Reasons Why We Should Have Open Borders*, NEW INTERNATIONALIST (Nov. 29, 2017), <https://newint.org/blog/2017/11/29/why-open-borders> [<https://perma.cc/2CPX-CCDT>] (the seven reasons are: “[1] borders are a form of global apartheid, [2] borders produce violence but do not stop immigration, [3] blaming migrants for low wages divides workers and creates a race to the bottom, [4] more migrants would be able to return home safely, [5] open borders would make the world a richer place,” [6] free movement should be for everyone, and “[7] capital, big business and the rich already have open borders”). For an exciting discussion on migration as a form of reparations for the legacy of colonial enterprises, see E. Tendayi Achiume, *Migrations as Decolonization*, 71 STAN. L. REV. 1509 (2019).

11. See Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 848–49; Achiume & Bâli, *supra* note 5, at 1390; see also Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 4, at 555–61.

12. While no term is perfectly adequate, I prefer to use “Global Majority”—coined as a result of Rosemary Campbell-Stephens’ work—over “Third World” or “Global South,” but I am working with TWAAIL’s existing language to explain a compartmentalized world order. ROSEMARY CAMPBELL-STEPHENS, GLOBAL MAJORITY; DECOLONISING THE LANGUAGE AND REFRAMING THE CONVERSATION ABOUT RACE (2020), available at <https://www.leedsbeckett.ac.uk/-/media/files/schools/school-of-education/final-leeds-beckett-1102-global-majority.pdf> [<https://perma.cc/BYK2-8WLE>] (“Global Majority is a collective term that first and foremost speaks to and encourages those so-called to think of themselves as belonging to the global majority. It refers to people who are Black, Asian, Brown, dual-heritage, [I]ndigenous to the global south, and or have been racialised as ‘ethnic minorities’. Globally, these groups currently represent approximately eighty per cent (80%) of the world’s population making them the global majority now, and with current growth rates, notwithstanding Covid-19 and its emerging variants, the global majority is set to remain so for the foreseeable future.”).

13. *Founding Statement*, TWAAILR, <https://twailr.com/about/founding-statement/> (last visited July 14, 2024) [<https://perma.cc/KMS7-ZRHT>]. TWAAILR is the first journal and website dedicated entirely to TWAAIL scholarship.

present—of non-Europeans have enshrined an imperial international law.<sup>14</sup> It has produced continuous debates about power, colonial history, difference, identity, as well as their meanings in international law.<sup>15</sup>

The approach of TWAIL can serve a twofold purpose: (1) “to unpack and deconstruct colonial legacies of international law” and (2) “to decolonize the material realities of the peoples of the [Global Majority] by, in part, constructing new and alternative legal futures.”<sup>16</sup> While TWAIL scholars all start from the premise that international law has an imperial nature, “problems of racialization” might be less of a “central part” of their studies; so, while race as a construct can be linked to legalized empire, this link is not always explicitly laid out in TWAIL scholarship.<sup>17</sup> Thus, by CRT interrogating the legal meaning of race, CRT complements TWAIL analysis’ of how colonialization—often racially charged—laid the groundwork for international law.<sup>18</sup>

The contemporary world is highly interconnected because of globalization, technological advancements, and colonial legacies and imperial debris.<sup>19</sup> Hence, this article joins CRT with TWAIL to explore how the global racial order makes “conflicts”—that are connected—by deconstructing said order into its elements of power, law, race, and empire,<sup>20</sup> such that the unmaking of “conflicts” can contribute to liberation work. Examination of Colombia and Palestine, both of which are

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14. James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, 67 UCLA L. REV. 1610, 1612 (2021) [hereinafter Gathii, *Writing Race and Identity in a Global Context*].

15. James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 27 (2011) [hereinafter Gathii, *TWAIL*].

16. Sujith Xavier, Amar Bhatia, Usha Natarajan, & John Reynolds, *Placing TWAIL Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access*, 33 WINDSOR Y.B. ACCESS JUST. v (2016).

17. Achiume & Carbado, *supra* note 6, at 1464. See Achiume & Bâli, *supra* note 5, at 1389–90.

18. See Achiume & Bâli, *supra* note 5, at 1389–90.

19. See Natsu Taylor Saito, *Critical Race Theory as International Human Rights Law*, 93 PRC. ANN. MEETING, AM. SOC’Y INT’L L. 228, 228 (1999) (“As we recognize that the borders of our nations are not impermeable, but instead quite porous, we are forced to recognize the inadequacies of our analyses, to see how our shortcuts are catching up with us . . . [h]owever, we have not envisioned or articulated what kind of ‘globalized’ world we want to see. . . .”). Here I use Laura Stoler’s coined term “imperial debris” to challenge the notion that the past is past. See generally ANN LAURA STOLER, *IMPERIAL DEBRIS: ON RUINS AND RUINATION* (2013) (claiming that ruins are not just evidence of the past and introducing “ruination” as the process through which imperial powers remain today).

20. Here, empire carries both historical and contemporary meanings. It refers to colonialism, neocolonialism, and imperialism. Empire is not just the violent conquest of another people’s territory and resources through war and genocide but also the (continued) enforced dependence of people, usually in the Global Majority, on Western economic and political systems, including military, humanitarian, technological, and financial aid. See generally ANN LAURA STOLER, *DURESS: IMPERIAL DURABILITIES IN OUR TIMES* (2016) (challenging the view that colonial histories are legacies of a dead past and arguing that they are active and violent forces today).

under “conflict”<sup>21</sup> and are subject to “peace accords,”<sup>22</sup> in this way can be transformative and valuable to other marginalized groups whose struggles are reduced to ahistorical conflicts.

Part II will put CRT methods in conversation with TWAIL methods, showing how racial realism and counternarrative are key strategies for identity reclamation and visibility to resist inaccurate historical accounts and obscured racialized realities. Part III will foreground two case studies of “conflict,” presenting the instrumentality of an applied joint CRT-TWAIL analysis in the process. Part IV provides a case study of Afro-Colombians, Indigenous Colombians, and the “armed conflict” in Colombia, showing the limitations of transitional justice to narratively contend with the “conflict” as an extension of colonial racism. Part V lays out a case study of Palestine under Israel’s Zionist, racialized, and militarized order, displaying the manipulation of occupation law to obfuscate Palestinian existence and self-determination through “conflict.” The article demonstrates that a joint CRT-TWAIL lens can uncover the realities of “conflict” that are legalized, colonized, and racialized (at various levels) and, in so doing, create networks of solidarity between similarly positioned groups around the world to decolonize the law.

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21. I place the word “conflict” in quotes to suggest that it is erroneous to characterize the cases of Colombia and Palestine as “conflicts” because doing so might suggest that the sides in opposition in each case are equal in power and support, which is incorrect. When “conflict” is colloquially understood as “a situation in which people, groups or countries disagree strongly or are involved in a serious argument,” the situation’s power imbalance is eclipsed. *Conflict*, OXFORD LEARNER’S DICTIONARIES, [https://www.oxfordlearnersdictionaries.com/definition/english/conflict\\_1](https://www.oxfordlearnersdictionaries.com/definition/english/conflict_1) (last visited Oct. 14, 2024) [<https://perma.cc/PMP4-2X8G>]. See Steven Cohen, *Rewriting the History of Plan Colombia*, NACLA (July 17, 2015), <https://nacla.org/news/2015/07/17/rewriting-history-plan-colombia> [<https://perma.cc/VRC7-LCYR>] (disproving U.S. Army General Kelly’s op-ed on the success of Plan Colombia by explicating how “[o]utside the so-called Greater Middle East, no country has received more U.S. military aid and training in the past three decades,” thereby allowing the Colombian military to commit human rights violations in its fight against the FARC and rendering the United States complicit); Lolita C. Baldor, Tara Copp, & Matthew Lee, *US warns Israel to boost humanitarian aid into Gaza or risk losing weapons funding*, AP NEWS (Oct. 15, 2024, 5:43 PM EDT), <https://apnews.com/article/israel-gaza-humanitarian-aid-blinken-austin-887ae388a022215f71309ab6def12103> [<https://perma.cc/T6T4-B64Y>] (“The Biden administration has warned Israel that it must increase the amount of humanitarian aid it is allowing into Gaza within the next 30 days or it could risk losing access to U.S. weapons funding. . . . The United States has spent a record of at least \$17.9 billion on military aid to Israel. . . .”).

22. See Antony J. Blinken, *Fifth Anniversary of Colombia’s Peace Accord*, U.S. DEP’T STATE (Nov. 24, 2021), <https://www.state.gov/fifth-anniversary-of-colombias-peace-accord/> [<https://perma.cc/9R49-YZFM>]; *The Oslo Accords and the Arab-Israeli Peace Process*, OFF. HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Oct. 5, 2024) [<https://perma.cc/TQ69-VT5V>]. In contrast, 2022 NYU PalTrek participants spoke with a Jordanian Valley villager who described the Oslo Peace Accords as the “Pieces Accords” because they paved the legal way for an apartheid regime. Moreover, all the guides gave “alternative tours,” which entails their engagement in counternarrative work.



## II.

CRT AND TWAIL: A NOVEL ANALYTIC LENS<sup>23</sup>A. *Theorizing CRT*

CRT is a theory and practice—an intellectual and civil rights project framed by “an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies.”<sup>24</sup> CRT scholars formatively identified racism as historical and structural, “witness[ing] the limits of the 1960s U.S. civil rights movement.”<sup>25</sup> They thus ask questions like: (1) how the law constructs race; (2) how the law protects racism and upholds racial hierarchies; (3) how the law reproduces racial inequality; and (4) how the law can dismantle race, racism, and racial inequality.<sup>26</sup>

The origins of CRT are equally as crucial as its theoretical methodology. It is true that CRT is a response to U.S. racism. It is *also* true that it has a theoretical methodology, namely multidimensionality and intersectionality, that carries valence for peoples outside of the United States to debunk essentialism and comprehend “the use of identities as social and legal phenomena.”<sup>27</sup> Multidimensionality recognizes that people carry multiple identities, and intersectionality recognizes that those identities in their multiplicity can interact and intersect in ways that produce social hierarchies.<sup>28</sup>

Therefore, CRT is a response to Western norms from people who live in Western society but who are treated as colonial subjects.<sup>29</sup> Education law professor Steven L. Nelson summarizes the six tenants of CRT laid out in the writings of prominent CRT theorists Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Crenshaw:

- (1) the recognition that racism is endemic to society and that race and racism are permanent fixtures in the United States [a recognition that is first needed to topple these phenomena eventually],
- (2) a critique of narratives that argue for objectivity, merit, neutrality, and colorblindness, (3) the confronting of ahistoricism and the intentional effort to provide non-dominant narratives as

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23. This section is schematic, highlighting the most prevalent themes of CRT and TWAIL to analyze the *infra* case studies.

24. Andrews, *supra* note 3, at 871 (quoting Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 906 (1995)).

25. S. Priya Morley, *Connecting Race and Empire: What Critical Race Theory Offers Outside the U.S. Legal Context*, 69 UCLA L. REV. DISC. (LAW MEETS WORLD) 100, 104 (2022).

26. *Id.* (citing Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS’N (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/)) [<https://perma.cc/WR3N-MXV8>].

27. *See* Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 843.

28. *Id.* at 843, n. 9–10.

29. *See id.* at 848 (calling CRT “a project of outsider jurisprudence,” as its aims are social justice for subordinated or “‘outsider’ groups” in the United States).

contextualization for contemporary experiences, (4) the acknowledgment of the depth, worth, and independent validity of the experiences and knowledge of peoples subjected to racialized oppression, (5) the explicit acknowledgment that research that considers race is inherent disciplinary [*sic*], and (6) an effort to work towards identifying, naming, and combating racial and racialized oppression.<sup>30</sup>

CRT can “universalize” anti-subordination struggles with its “inclusive” and “holistic method.”<sup>31</sup> The skeletal purpose of CRT’s social justice framework is to understand and change the relationship between white supremacy and legal systems.<sup>32</sup> Thus, CRT’s potential as a tool for global liberation and its importance in becoming accessible to other marginalized groups worldwide—withstanding where their oppression stems—have become more apparent. Indeed, the relationship between white supremacy and the law is a global phenomenon<sup>33</sup> enshrined in world history and manifests in myriad ways, notably how international law was created, upheld, and employed.

### B. Approaching TWAIL

TWAIL—also an intellectual and theoretical framework developed by a decentralized network of scholars and activists—has “trace[d] the juristic techniques [in international law] that justified colonial conquest along the axes of European/non-European, colonizer/colonized, civilized/uncivilized, and modernity/tradition,”<sup>34</sup> asking if the international institutions that followed the period of decolonization have “led to the sovereign equality of formerly-colonized states

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30. Steven L. Nelson, *Towards a Transnational Critical Race Theory*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 303, 306 (2020) (viewing that “CRT is an inter-, multi-, and transdisciplinary approach—that includes law, sociology, history, etc.—to address the role of race and racism in education law, policy, and practice.”). See also DELGADO & STEFANCIC, *supra* note 4, at 61, 123, for a demonstration of how “oppositional storytelling can alter how we construct legal reality” and conquest, colonialism, economic exploitation, and white self-interest can drive legal relations.

31. See Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 848.

32. *Id.* at 848 n.26.

33. See Chandran Nair, *Racism In America Should Not Take Center Stage in the Global Fight Against White Supremacy*, TIME (July 20, 2021, 11:17 PM EDT), <https://time.com/6082168/white-privilege/> [<https://perma.cc/V33C-WSJ9>] (“The application of critical race theory and other insights into structured discrimination would help unravel much about how white privilege operates on the world stage.”); Benjamin Talton, *Black Americans Have Long Led the Global Battle Against White Supremacy*, AFRICAN AM. INTELL. HIST. SOC. (Feb. 24, 2021), <https://www.aaihs.org/black-americans-have-long-led-the-global-battle-against-white-supremacy/> [<https://perma.cc/68NU-TCRB>].

34. Gathii, *Writing Race and Identity in a Global Context*, *supra* note 14, at 1612; see also Christopher Gevers, “Unwhitening the World”: Rethinking Race and International Law, 67 UCLA L. REV. 1652 (2021) (showing that the “international” of the 19<sup>th</sup>-century reinvention of international law was a racial imaginary, namely a “White International” that both came from and buttressed “Global White Supremacy”).

within the international system.”<sup>35</sup> TWAIL scholars have proffered answers “for why international law espouses sovereign equality as the world it purports to govern becomes increasingly unequal.”<sup>36</sup> Fundamentally, the field recognizes that international law has a “mutually constitutive relationship with empire.”<sup>37</sup> The seminal scholarship of TWAIL founding parents Makau Mutua and Antony Anghie exemplifies how TWAIL functions.<sup>38</sup>

Makau Mutua criticizes the “historical pattern [that] is undeniable” of international law: “the colonial administrator, the Bible-wielding Christian missionary, the merchant of free enterprise, the exporter of political democracy, and now the human rights zealot.”<sup>39</sup> Since its inception, international law has operated under the guise of universality.<sup>40</sup> Mutua explains that international law critically developed “during the Age of the Empire” when non-Europeans were under European colonialism, rendering impossible its “universality.”<sup>41</sup> Although its institutions are located physically and intellectually in Europe—further negating international law’s universality—it largely achieves its universalizing objective insofar as many “non-European states and peoples who have been its principal victims” are now forced to use it as a “medium of international exchange.”<sup>42</sup>

For example, within international law, the dominant narrative or “normal script” paints international human rights law (“IHL”) as the defeat of evil; but glaringly, the field was not developed until the rise of Adolf Hitler and Nazism, as until then, the hegemonic Anglo-European powers that developed IHL had not viewed their enterprises of slavery or colonization in América, Asia, or Africa

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35. Morley, *supra* note 25, at 105, 116 (using a TWAIL-CRT lens to understand how recent Haitian migration through the Western Hemisphere is connected to Haiti’s colonial history and how international refugee protections disproportionately hurt racialized migrants).

36. Usha Natarajan, Laura Betancur-Restrepo, Amar Bhatia, John Reynolds, Ntina Tzouvala, & Sujith Xavier, *Third World Approaches to International Law Review: A Journal for a Community*, 1 TWAIL REV. 7, 8 (2020) (introducing the first issue of the Third World Approaches to International Law Review, which as of 2024, is on its fourth issue); *see also* Noura Erakat, John Reynolds, Samera Esmeir, Richard Falk, Ardi Imseis, Usha Natarajan, Vasuki Nesiah, Munir Nuseibah, & Diala Shamas, *Roundtable: Locating Palestine in Third World Approaches to International Law*, 52 J. PALESTINE STUD. 100, 100 (2023) (“TWAIL has subsequently evolved to offer more robust critiques of the postcolonial state and the form and material failures of decolonization.”).

37. Achime & Bâli, *supra* note 5, at 1389.

38. Gathii, *TWAIL*, *supra* note 15, at 28. For a history of TWAIL, *see id.* at 38, which summarizes that “[o]ne of TWAIL’s central insights is bringing the *problématique* of colonialism to the center [because] by having exercised substantial economic, military, political power over the former colonies, Europe and the United States have established patterns of dominance that persist today.”

39. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 201, 218 (2001). *See also id.* at 214 (“[I]nternational law itself was founded on the preeminence of four specific European biases: geographic Europe as the center, and Christianity, mercantile economics, and political imperialism as superior paradigms”) [hereinafter Mutua, *Savages, Victims, and Saviors*].

40. *See* Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 843.

41. *Id.* at 844.

42. *Id.*

as sufficiently evil to warrant creation of IHRL.<sup>43</sup> Yet, the United Nations (“U.N.”), Western-dominated, universalizes principles “which are European in identity” like human rights grown “out of Western liberalism and jurisprudence.”<sup>44</sup> The U.N. describes the Universal Declaration of Human Rights (“UDHR”) of 1948 as foundational and inspirational, and 80% of U.N. member states “have ratified four or more [international human rights treaties], giving concrete expression to the universality of the UDHR and international human rights.”<sup>45</sup> The United States has failed to ratify most.<sup>46</sup> Ironically, non-European states might turn to the U.N. to resolve human rights issues, but the U.N. preserves the global order with “the U.N. Security Council [UNSC] and its indefensible structure [becoming] the exclusive property of the United States, Britain and France.”<sup>47</sup> The U.N. Charter entrusts the UNSC to maintain international peace and security, and its decisions are binding on U.N. member states.<sup>48</sup> The UNSC has five permanent members (“the P5”)—the United States, the United Kingdom, France, China, and Russia—that gained this status when the U.N. was founded after World War II.<sup>49</sup> The P5 all have veto power whereas the UNSC’s ten elected members do not.<sup>50</sup> Critics believe, inter alia, that “the veto gives undue deference to the political interests of the P5, leading to inaction in the face of mass

43. Mutua, *Savages, Victims, and Saviors*, *supra* note 39, at 210–11 (adding that Amnesty International was established to handle Europe’s human rights violations); Nelson, *supra* note 30, at 309.

44. Mutua, *Savages, Victims, and Saviors*, *supra* note 39, at 214–15.

45. *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [<https://perma.cc/DRZ7-KAQN>] (last visited Oct. 15, 2024).

46. The United States has ratified four of eighteen international human rights treaties. *Treaty Ratification*, ACLU, <https://www.aclu.org/issues/human-rights/treaty-ratification> [<https://perma.cc/B4GT-KXML>] (last visited Oct. 15, 2024); OFF. HIGH COMM’R HUM. RTS., RATIFICATION OF THE 18 INTERNATIONAL HUMAN RIGHTS TREATIES 1–2 (2020), *available at* <https://www.ohchr.org/sites/default/files/Documents/Issues/HRIndicators/MetadataRatificationStatus.pdf> [<https://perma.cc/ZX4R-2454>].

47. Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 851.

48. *What is the Security Council?*, UNITED NATIONS, <https://main.un.org/securitycouncil/en/content/what-security-council> [<https://perma.cc/P6GS-7P89>] (last visited Oct. 15, 2024) (“When a complaint concerning a threat to peace is brought before it, the Council’s first action is usually to recommend that the parties try to reach agreement by peaceful means. The Council may: set forth principles for such an agreement; undertake investigation and mediation, in some cases; dispatch a mission; appoint special envoys; or request the Secretary-General to use his good offices to achieve a pacific settlement of the dispute. When a dispute leads to hostilities, the Council’s primary concern is to bring them to an end as soon as possible. In that case, the Council may: issue ceasefire directives that can help prevent an escalation of the conflict; dispatch military observers or a peacekeeping force to help reduce tensions, separate opposing forces and establish a calm in which peaceful settlements may be sought. Beyond this, the Council may opt for enforcement measures, including: economic sanctions, arms embargoes, financial penalties and restrictions, and travel bans; severance of diplomatic relations; blockade; or even collective military action.”).

49. *The UN Security Council*, COUNCIL FOREIGN RELS., <https://www.cfr.org/backgrounder/un-security-council> (updated Sep. 9, 2024, 1:50 PM EST).

50. *Id.*

atrocities.”<sup>51</sup> It is, therefore, vital to unpack and reconceptualize international law, a mission for which CRT proves highly useful.

Antony Anghie similarly emphasizes that colonialism is central to forming and universalizing international law.<sup>52</sup> Anghie affirms that European history and experience developed international law, comprised of various principles and doctrines, that expanded to the non-European world which had theretofore lived outside of codified European international law.<sup>53</sup> He examines how the Treaty of Westphalia of 1648 developed “the classical concept of sovereignty, which stipulated that all sovereigns are equal and that sovereign states have absolute power over their own territory.”<sup>54</sup> History has, of course, told us that European colonialism impeded worldwide sovereignty and independence,<sup>55</sup> but Westphalian sovereignty via decolonization spread with emerging sovereign states from the previously colonized societies of América, Asia, and Africa, thereby rendering international law’s concept of Westphalian sovereignty “international.”<sup>56</sup> Put simply, “sovereignty doctrine expels the non-European world from its realm, and then proceeds to legitimise the imperialism that resulted in the incorporation of the non-European world into the system of international law,” in theory on equal terms.<sup>57</sup> Anghie supports his proposition by looking at how “backward” colonies were placed under the Mandate Powers, primarily Britain and France, of the League of Nations post-World War I, such that “Third [W]orld sovereignty . . . was created in a way that could continue to serve Western interests.”<sup>58</sup> And when some “Third World societies” acquired full sovereignty and became “postcolonial state[s],” their economic dependence on the West placed them in a subordinate position in the international system.<sup>59</sup>

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51. *Id.*

52. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 742 (2006).

53. *Id.* at 740.

54. *Id.*

55. See Max Fisher, *MAP: How Every Country in the World Celebrates its Version of July 4<sup>th</sup>*, VOX (July 3, 2014, 12:10 PM EDT) <https://www.vox.com/2014/7/3/5867599/heres-a-map-of-other-countries-versions-of-4th-of-july> [<https://perma.cc/E6KU-TR4D>]; Matt Rosenberg, *Independence Day for Every Country on Earth*, THOUGHTCO., <https://www.thoughtco.com/independence-birthday-for-every-country-1435141> [<https://perma.cc/2YWA-3U2J>] (updated Oct. 20, 2018).

56. Anghie, *supra* note 52, at 740.

57. *Id.* at 741 (expanding that “these mechanisms of exclusion are as essential a part of the sovereignty doctrine as the mechanisms of incorporation and transformation, colonialism and decolonisation that are the subject of the conventional histories of international law.”).

58. *Id.* at 746–47.

59. *Id.* at 749; see Jason Hickel, Dylan Sullivan, & Huzaifa Zoomkawala, *Rich Countries Drained \$152tn from the Global South Since 1960*, AL JAZEERA (May 6, 2021), <https://www.aljazeera.com/opinions/2021/5/6/rich-countries-drained-152tn-from-the-global-south-since-1960> [<https://perma.cc/J9FF-2RR4>]. The authors lend support to the “dependency theory” that argues that imperialism has never ended because “underlying patterns of colonial appropriation remain[] in place and continue[] to define the global economy.” They add:

Anghie's analysis continues into the 21<sup>st</sup> century, contending that the "War on Terror" is an extension of the civilizing mission that animated international law.<sup>60</sup> In articulating the "War on Terror," the United States was willing to use "pre-emptive force against 'rogue states'" to rebuild international law and make the Middle East "peace-loving democracies."<sup>61</sup> Such a venture demonstrates a return to the civilizing mission, the "formative structure of international law," and formulating a new type of imperialism "that asserts itself in the name of 'national security', as self-defence."<sup>62</sup> Mutua describes international law as a "medium of conquest and domination,"<sup>63</sup> calling for the human rights movement to be more self-critical about its troubling rhetoric and history.<sup>64</sup> TWAILers challenge international law as an extension of the civilizing mission and yet another iteration of imperialism whereby Eurocentric ideals are oppressively imposed on a global

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Over the whole period from 1960 to today, the drain totalled \$62 trillion in real terms. If this value had been retained by the South and contributed to Southern growth, tracking with the South's growth rates over this period, it would be worth \$152 trillion today.

.....

Rich countries have a monopoly on decision-making in the World Bank and IMF, they hold most of the bargaining power in the World Trade Organization, they use their power as creditors to dictate economic policy in debtor nations, and they control 97 percent of the world's patents. Northern states and corporations leverage this power to cheapen the prices of labour and resources in the global South, which allows them to achieve a net appropriation through trade. During the 1980s and 1990s, IMF structural adjustment programmes cut public sector wages and employment, while rolling back labour rights and other protective regulations, all of which cheapened labour and resources. Today, poor countries are structurally dependent on foreign investment and have no choice but to compete with one another to offer cheap labour and resources in order to please the barons of international finance. This ensures a steady flow of disposable gadgets and fast fashion to affluent Northern consumers, but at extraordinary cost to human lives and ecosystems in the South.

*Id.*

60. Anghie, *supra* note 52, at 750.

61. *Id.* (analogizing President George W. Bush's justification for invading Iraq to the father of international law, Francisco de Victoria's justification of Spain's conquest of Indigenous peoples).

62. *Id.* National security measures have been adopted to fight not just "Islamic terrorism" but also communism and have been the source of diplomatic relationships. VINCENT BEVINS, *THE JAKARTA METHOD* 63 (2020) ("It was the nascent alliances between the USSR and radical Arab nationalist regimes, we know now, that formed the basis for a growing US-Israel alliance."); *see* Parts IV.B-C and V.B-C.

63. Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 843.

64. Mutua, *Savages, Victims, and Saviors*, *supra* note 39, at 202, 236 (explaining at 236 that "[w]hile it is incorrect to equate colonialism with the human rights movement, at least in terms of the methods of the two phenomena, it is not unreasonable to draw parallels between them with respect to some of their motivations and purposes. Colonialism was driven by ignoble motives while the human rights movement was inspired by the noblest of human ideals. However, both streams of historical moment are part of a Western push to transform non-European peoples.").

scale.<sup>65</sup> Hence, TWAIL serves as a “counter-hegemonic discursive tool that allows us to interrogate and contest the various ways in which [geopolitical] power is used . . . [and] that opens up meaningful if imperfect opportunities for shoring up the emancipatory potential of international law.”<sup>66</sup>

By critically unmasking the function of international law, scholars and activists can begin to change it.<sup>67</sup> For instance, in proposing alternatives, José-Manuel Barreto expresses that parochial human rights “need[] to be transformed by a dialogical encounter with the voices that it has . . . kept at the margins.”<sup>68</sup> Meanwhile, Benjamin P. Davis proposes that a decolonial theoretical approach to human rights can provide a critical rather than paternalistic model.<sup>69</sup> Renowned Palestinian-statesian activist and human rights attorney Noura Erakat explains as well that although international law derives from the colonial order and ergo serves as a structural detriment to those who were and continue to be colonized, it is inaccurate to conclude that the law *can only be used* as an oppressive tool, which falsely assumes that the law is fixed, “impervious to interpretative manipulation.”<sup>70</sup>

### C. CRT- TWAIL: Filling in the Gaps

Similarly to how CRT challenges the legal structure and social fabric of the United States, TWAIL critiques the hegemonic practices of international law that are reminiscent of the old colonial order wherein the “Third World”<sup>71</sup> is subordinated to the “First World.”<sup>72</sup> TWAIL centers on the lived experiences of those treated as Third World subjects, which aligns with CRT’s counternarrative

65. Nelson, *supra* note 30, at 308 (“A key focus area of TWAIL scholarship is linking current international law to the colonial project that commenced at or around the sixteenth century as the transatlantic slave trade.”).

66. Achiume & Bâli, *supra* note 5, at 1388 (internal citations omitted).

67. Erakat, Reynolds, Esmeir, Falk, Imseis, Natarajan, Nesiah, Nuseibah, & Shamas, *supra* note 36, at 101 (TWAILers have further “explored the subjection of the Palestinians to a position of ‘international legal subalternity;’ the limits of sovereignty as a statehood project; international law as a site of complicity and contestation; the depoliticization, paradoxes, and ambiguities of human rights; the role of the laws of war and human rights in facilitating systemic economic harm; and the exclusionary edges of settler-colonial constitutionalism.”).

68. José-Manuel Barreto, *Decolonial Thinking and the Quest for Decolonising Human Rights*, 46 *ASIAN J. SOC. SCI.* 484, 494 (2018).

69. Benjamin P. Davis, *What Could Human Rights Do? A Decolonial Inquiry*, 9 *TRANSMODERNITY: J. PERIPHERAL CULTURAL PROD. LUSO-HISP. WORLD* 1, 14 (2020).

70. NOURA ERAKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* 7 (2019) (emphasis added).

71. As Nelson says, “Third World remains a useful term if only to shed light on the way that policies treat differently peoples in oppressed, colonized, and marginalized places and spaces. Third World does not suggest a monolithic lived experience for peoples subjected to Third World treatment.” Nelson, *supra* note 30, at 310–11.

72. Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 852; Nelson, *supra* note 30, at 307.

element.<sup>73</sup> Where CRT primarily confronts the construction of race and racism as informing and being informed by constitutional law, TWAIL primarily confronts empire and imperialism as informing and being informed by international law.<sup>74</sup> CRT begins with a sociological question of how race carries legal meaning, while TWAIL begins with a historical question of how colonialism morphed into modern international law—inherently connected questions that require a combined analysis.<sup>75</sup>

Yet, as former U.N. Special Rapporteur on Racism E. Tendayi Achiume and TWAIL scholar Aslı Bâli explain, when TWAIL and CRT are jointly employed to “bear on legal engagement with *race and empire*,”<sup>76</sup> a more malleable and transformational approach to IHRL can take shape. Acclaimed founding TWAIL scholar James Thuo Gathii also writes that combining TWAIL and CRT unearths how international law rules “are mobilized in seemingly race neutral terms to provide the interests of western states, [w]hite elites, and private capital at the expense of peoples of color, their territories, and their interests.”<sup>77</sup> Mutua has also determined that other subordinated groups can use CRT’s theoretical methodology to approach their struggles,<sup>78</sup> whether in domestic or international spaces.

Through its different methods,<sup>79</sup> CRT takes account of the conditions that create powerlessness, marginalization, and exclusionary social hierarchies, such that it is as useful outside the United States as inside, and can “globalize [. . . ] the struggles against subordination” like racism.<sup>80</sup> By contrast, the way international

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73. Nelson, *supra* note 30, at 314 (citing B.S. Chimni, *The Past, Present, and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT’L L. 499, 50 (2007)).

74. See Achiume & Bâli, *supra* note 5, at 1389–91; Morley, *supra* note 25, at 106 (adding that both U.S. constitutional law and international law are rooted in and formed by racial capitalism).

75. See Achiume & Bâli, *supra* note 5, at 1389–90.

76. *Id.* at 1391 (emphasis added); see also Achiume & Carbado, *supra* note 6, at 1464 (questioning why the colonization question is absent from CRT and why the problem of racialization is not central to TWAIL).

77. Gathii, *Writing Race and Identity in a Global Context*, *supra* note 14, at 1647. For example, Gathii argues for a CRT-TWAIL analysis “between Puerto Rico’s status and the status of British protectorates [to] show[] that there are similarities in the ways colonial empires were organized to prevent colonized peoples from holding colonial Governments accountable.” He explains that CRT-TWAIL scholarship does examine how the United States’ non-self-executing doctrine was created to limit the scrutiny of slavery, segregation, and lynching, and U.S. courts embrace the doctrine to prevent the application of international law. But in June 2020, the U.N. Human Rights Council circumvented the U.S. non-self-executing doctrine that has prohibited U.N. bodies from investigating conduct within the United States, by voting to establish an independent commission to inquire about U.S. systemic police following the murder of George Floyd. Gathii writes that “[t]he promise of such an analysis that examines the racialized limits of the nonself-executing doctrine is that it counters mainstream foreign relations doctrinal scholarship that renders race and identity invisible.” *Id.* at 1645–47.

78. Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 843 (adding that sexual minorities have used CRT’s methodology of multidimensionality and intersectionality to fight for social justice).

79. Some of these are intersectionality, racial realism, and counternarrative.

80. Mutua, *Critical Race Theory and International Law*, *supra* note 3, at 848.



law reinforces empire through systems of guardianship, relationships of economic dependence, and measures of national security, while espousing ideals of equal sovereignty and human rights, makes it an uncritical, or even disingenuous, system of dominance with global reach.<sup>81</sup> In other words, CRT’s goals are universal, and from this starting point, it interacts with international law.<sup>82</sup> Mutua, hence, suggests that there should be “a marriage of interests between CRT and TWAIL,” as “CRT has a large emancipatory potential at the global level . . . that can be tapped and deployed as part of the project for the reconstruction of international law.”<sup>83</sup> Achiume and CRT scholar Devon W. Carbado list six parallels between CRT and TWAIL:

(1) they contest the legalization of white supremacy; (2) they mark and problematize the degree to which regimes of inclusion can operate as mechanisms of exclusion; (3) they stage important critiques of colorblindness; (4) they engage and repudiate neoliberal, racialized claims about the social responsibility and agency of Black people and African nations;<sup>84</sup> (5) they confront perceptions that both literatures exist outside the boundaries of the presumptively neutral scholarly conventions of constitutional law and international law; and (6) they “remain[] invested in reconstruction and transformation of and within law, seeking to maximize law’s emancipatory potential for racial justice and substantive equality, while remaining clear-eyed about the limits and costs of such engagements and the need to effectuate change in other arenas, such as social movements.”<sup>85</sup>

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81. *See id.* at 849 (describing the international law as “the system, the jurisprudence of ‘insider’ groups and dominant global interests . . . the normative center and the legitimating code of conduct for international society”).

82. *See id.* at 848–49.

83. *Id.* at 845, 852 (urging CRT scholars to write in an international idiom that “demonstrate[s] that they understand that the conditions of subordination in the United States are part and parcel of the global structure of dehumanization.”).

84. Here, it is evident that CRT and TWAIL primarily acknowledge and understandably confront the racial and imperial subordination of Black peoples, which is historic and global. But the liberation of Black people will inevitably yield the liberation of all, including Indigenous Palestinians and Native communities. Achiume and Carbado do acknowledge that there are “axes along which one might fairly lodge critiques of TWAIL and CRT, including through interrogations of both fields’ limited engagement with [I]ndigeneity and—sometimes—dichotomous representations of ‘the west and rest (in the TWAIL literature) and ‘the white and the non-white’ (in the CRT literature).” Achiume & Carbado, *supra* note 6, at 1465 (internal citations omitted). However, these concerns do not imply that a CRT-TWAIL framework is inapplicable to analyzing other forms of racism. Rather, it sets the stage to do like work in other contexts and indeed is useful as this paper will soon show.

85. *Id.* at 1462, 1465–66 (the article is organized into “six moments:” “Moment I: Foundational Racial Capitalism; Moment II: Formal Equality and Racial Inclusion; Moment III: Colorblindness; Moment IV: Social Responsibility and Agency; Moment V: Quasi and Second-Class Scholarship; and Moment VI: Reconstruction and Transformation.”).

Whereas CRT challenges U.S. society and constitutional law, TWAIL challenges global governance and international law. These two distinct geographic and legal spaces nonetheless have commonalities of oppression vis-à-vis global superpowers that inform each other. CRT and TWAIL imagine futures in which these spaces might also have commonalities of *transformation*. Indeed, presenting “conflicts” (and their corollaries, “humanitarian crises” and “racial unrest”) as isolated events independent of the global racial order allows the order to survive undetected in different loci. The term “conflict,” defined as “fight, battle, war,”<sup>86</sup> can be reductive and mischaracterize situations,<sup>87</sup> as the study of the application of the term to Colombia and Palestine will demonstrate.<sup>88</sup> Recognizing the global racial order’s role in the making of “conflicts” that are connected is transformative and can unleash the agency of marginalized groups across cases. Understanding the synergies between CRT and TWAIL and heeding these scholars’ calls, I now turn to the case studies of Colombia and Palestine to underline just how invaluable “the insights to be gained from a TWAIL-CRT analysis” can be in other geopolitical scenarios.<sup>89</sup>

#### D. What Gaps are Filled Here?

Without an applied CRT-TWAIL lens, the international (humanitarian) law mechanisms at tension here (*see* Part IV.B. and Part V.B. *infra*) go unchallenged; namely, the limitations of transitional justice and occupation law as international law mechanisms. International law is a set of rules, norms, and standards<sup>90</sup> often found in conventions and treaties.<sup>91</sup> In theory, international law is “central to promoting economic and social development, as well as to advancing international peace and security,” and one of the U.N.’s “greatest achievements.”<sup>92</sup>

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86. *Conflict*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/conflict> [<https://perma.cc/V7YA-EF7U>] (last visited Oct. 18, 2024).

87. *Supra* note 21.

88. *Infra* Parts. IV. and V.

89. Achiume & Bâli, *supra* note 5, at 1386, 1391 (“offer[ing] a concrete example of the analytic payoff of a TWAIL-CRT analysis through a brief consideration of the Libyan case, where humanitarian intervention, counterterrorism, and migration control regimes in international law cannot be fully assessed absent engagement with empire and race.”). A joint CRT-TWAIL analysis should also be applied—though hinted at in the conclusion—to the United States in which race and empire cannot be divorced either, as the Atlantic Slave Trade was a product of European colonization; and where Black and Native people are treated as colonial subjects, and where there are colonial subjects in Puerto Rico, Guam, Hawai‘i, Alaska, American Samoa, the Northern Mariana Islands, and U.S. Virgin Islands; and where people from countries subject to U.S. imperial power are forced to migrate to the United States where they are arguably recolonized.

90. Malcolm Shaw, *International Law*, BRITANNICA, <https://www.britannica.com/topic/international-law> [<https://perma.cc/KP9Y-QET8>] (updated Oct. 13, 2024).

91. *International Law and Justice*, UNITED NATIONS, <https://www.un.org/en/global-issues/international-law-and-justice> [<https://perma.cc/3R2J-XJZH>] (last visited Oct. 15, 2024).

92. *Id.*

Transitional justice is a “comprehensive policy” founded on “truth, justice, reparations, and guarantees of non-recurrence”<sup>93</sup> to help countries confront systematic human rights violations,<sup>94</sup> such as those that occur in a “conflict.” Transitional justice aims to recognize victims, strengthen the rule of law, and promote civic trust and reconciliation.<sup>95</sup> In the case of Colombia, the transitional justice system as an international human rights remedy falls short of addressing the state’s cyclical, legalized violence against those racialized as subversives.<sup>96</sup>

In turn, occupation law is dictated by the 1907 Hague Regulations, the Fourth Geneva Convention, Additional Protocol I to the four Geneva Conventions, and customary international humanitarian law (“IHL”).<sup>97</sup> Occupation law governs how an “enemy territory” captured through an “armed conflict” should be administered “pending the conclusion of a final political settlement.”<sup>98</sup> It proclaims to set out how the occupying power must treat the civilian population and its property while effecting dominance over the occupied territory.<sup>99</sup> An occupying power must ensure public safety while respecting the laws of the country it occupies; must respect occupied people’s lives, property, and religious practices; must not act as a sovereign; and must not transfer its own civilian population into the occupied area nor forcibly transfer people out of the occupied territory.<sup>100</sup> Occupations must be temporary and “cannot transfer any sovereign rights in the territory to the” occupying power.<sup>101</sup> In the case of Palestine, international occupation law normalizes Israel’s legalized ethnic cleansing of Indigenous Palestinians who are racialized as terrorists.<sup>102</sup>

Analyzing the “conflict” cases of Colombia and Palestine through a CRT-TWAIL framework can help scholars and activists see links that were otherwise invisible: (1) how distinct contemporary ruling parties adopted the racial strata of European colonial operations, (2) how the international system, even when acting under a “humanitarian” architecture, perpetuates racialized rhetoric and enforces the status quo, and (3) how the norms of international law that claim to be emancipatory are inadequate. Revealing these legalized realities allows Afro- and

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93. PABLO DE GREIFF, *PATHFINDERS FOR PEACEFUL, JUST & INCLUSIVE SOCIETIES, THE APPLICABILITY OF TRANSITIONAL JUSTICE IN PRE-CONFLICT CONTEXTS* 4 (2021).

94. VIRGINIE LADISCH & ANNA MYRIAM ROCCATELLO, *INT’L CTR. FOR TRANSITIONAL JUST., THE COLOR OF JUSTICE: TRANSITIONAL JUSTICE AND THE LEGACY OF SLAVERY AND RACISM IN THE UNITED STATES* 2 (2021).

95. DE GREIFF, *supra* note 93, at 4.

96. *Infra* Part. IV.D.

97. Ata R. Hindi, *Unlawful Occupations? Assessing the Legality of Occupations, including for Serious Breaches of Peremptory Norms*, 4 TWAIL REV. 1, 14 (2023).

98. Ardi Imseis, *Prolonged Occupation: At the Vanishing Point of the Jus ad Bellum/Jus in Bello Distinction*, 58 TEX. INT’L L.J. 33, 36 (2023) [hereinafter Imseis, *Prolonged Occupation*].

99. *Id.*

100. Hindi, *supra* note 97, at 14–15.

101. *Id.* at 15.

102. *Infra* Part V.D.

Indigenous Colombians and Indigenous Palestinians to challenge the perception of their situations as merely clashes over land and nationalisms of survival—nationalisms that are misguided and carry deadly consequences. In reality, their conditions originate from *mestizaje* in Colombia<sup>103</sup> and European nationalism and antisemitism in occupied Palestine.<sup>104</sup>

The first step in applying a CRT-TWAIL analysis is to recognize that these two “conflicts” are neither separate nor anomalies, but rather are caused by a global racial order. As such, the situations of Afro- and Indigenous Colombians and Indigenous Palestinians can be redefined, and their outcomes ultimately changed. Afro- and Indigenous Colombians and Indigenous Palestinians can promulgate counter-hegemonic conversations and hold the West accountable for its role in their subjugation; they can reshape their societies and demand that their self-determination be legally respected; and finally, they can aim to transform international law so that it embodies its ideals. While a CRT-TWAIL lens highlights the foundation of the international system—namely other governments and legal structures—it also unleashes the power of the Global Majority, that is, activists and other marginalized groups. CRT-TWAIL can allow racialized peoples to unite on shared struggles, similarities, and structural connections.<sup>105</sup>

### III.

#### CRT-TWAIL ANALYTIC APPLICATION: THE CASES OF COLOMBIA AND PALESTINE

*“[The call for self-determination] is a call that implicates an attachment to the land as a means of memory, existence, and dignity.”*

– Noura Erakat<sup>106</sup>

In November 1947, Colombia abstained from voting for the partition of Palestine; and in 2018, during Juan Manuel Santos’ presidency, Colombia recognized Palestine as a free, independent, and sovereign state.<sup>107</sup> In 2024, Colombia’s first

103. See Edward Telles & Stanley Bailey, *Understanding Latin American Beliefs about Racial Inequality*, 118 AM. J. SOC. 1559, 1560 (2013).

104. See EDWARD SAID, *THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969-1994* 251 (1994) [hereinafter SAID, *THE POLITICS OF DISPOSSESSION*].

105. See DAVIS, *FREEDOM IS A CONSTANT STRUGGLE*, *supra* note 6, at 20.

106. ERAKAT, *supra* note 70, at 20.

107. Ignacio Klich, *Colombian Recognition of Palestine: a Historical Perspective*, OPEN DEMOCRACY (Aug. 22, 2018), <https://www.opendemocracy.net/en/democraciaabierta/colombian-recognition-of-palestine-historical-perspective/> [https://perma.cc/K4TJ-6M8Y].

leftist President Gustavo Petro vowed to break diplomatic relations with Israel after calling its siege of Gaza genocidal.<sup>108</sup>

Historically, however, Colombia had been one of Israel’s closest Latin American partners until Petro’s election in 2022.<sup>109</sup> In 2021, U.S.-backed conservative President Iván Duque not only allied with the U.S.-funded “Zionist settler-colonial project in Palestine” but also politically repressed his dissenters by deploying U.S.-created ESMAD (Mobile Anti-Disturbances Squadron - *Escuadrón Móvil Antidisturbios*) soldiers onto protesters.<sup>110</sup> Moreover, in the 1980s, Colombia bought Israeli Kfir fighter jets that its air force used to attack the *Fuerzas Armadas Revolucionarias Colombianas* (“FARC” - Colombian Revolutionary Armed Forces).<sup>111</sup> Carlos Castaño, one of the co-founders of the *Auto-Defensas Unidas de Colombia* (“AUC” - Auto-Defense Units of Colombia), the umbrella organization of Colombia’s paramilitaries responsible for 80% of human rights violations in Colombia since 1980, also trained in Israel.<sup>112</sup> The United States similarly

108. *Colombia’s President says Country will Break Diplomatic Relations with Israel over War in Gaza*, AP, <https://apnews.com/article/colombia-petro-israel-netanyahu-hamas-palestinian-cfcd89c649ad8111977d3cb5bc60bf> [<https://perma.cc/D5U8-4JCA>] (updated May 2, 2024, 3:55 AM EDT).

109. *Id.*

110. *From Colombia to Palestine, Resist Imperialist Crimes!, Samidoun Solidarity Statement with the People of Colombia*, SAMIDOUN PALESTINIAN PRISONER SOLIDARITY NETWORK (May 6, 2021), <https://samidoun.net/2021/05/from-colombia-to-palestine-resist-imperialist-crimes-samidoun-solidarity-statement-with-the-people-of-colombia/> [<https://perma.cc/Y5RB-TD4V>]. See Secretary Antony J. Blinken and Colombian President Iván Duque Márquez at the 200<sup>th</sup> Anniversary of U.S.-Colombian Relations Celebration, U.S. DEP’T STATE (June 15, 2022), <https://www.state.gov/secretary-antony-j-blinken-and-colombian-president-ivan-duque-marquez-at-the-200th-anniversary-of-u-s-colombian-relations-celebration/> [<https://perma.cc/EP6X-WDNW>] (Blinken remarking that Colombia with President Duque was designated as a “Major Non-NATO Ally,” the countries are economically bound together, and that the United States’ “Plan Colombia” to assist Colombia with “drug cartels and insurgent groups” became “Peace Colombia”); Jonathan Maters & Will Merrow, *U.S. Aid to Israel in Four Charts*, COUNCIL FOREIGN RELS., <https://www.cfr.org/article/us-aid-israel-four-charts> [<https://perma.cc/QF92-7R78>] (updated May 31, 2024, 9:00 AM EST) (noting that the United States was the first country to recognize Israel in 1948, is committed to Israel’s security and has given hundreds of billions in foreign aid, and Israel is a “major non-NATO all[y]”); Kurt Hollander, *Petro Is Trying to Rein in Colombia’s Infamous Riot Police*, JACOBIN (Apr. 16, 2024), <https://jacobin.com/2024/04/gustavo-petro-police-reform-esmad> [<https://perma.cc/XL72-LJMA>] (explaining that the ESMAD was formed in 1999 as part of the United States’ Plan Colombia that hypermilitarized the country by merging the police with the military, leading to violence against and assassinations of protesters, and “aid[ing] the government in its fight against political and social opposition, especially among the Afro-Colombian and [I]ndigenous populations”).

111. *Colombia’s President says Country will Break Diplomatic Relations with Israel over War in Gaza*, *supra* note 108.

112. Les W. Field, *The Colombia-Israel Nexus: Toward Historical and Analytic Contexts*, 52 *LATIN AM. RES. REV.* 639, 639–40 (2017) (internal citations omitted).

trained, funded, and employed the AUC to protect its political, neoliberal, and corporate interests in Colombia.<sup>113</sup>

The peoples of the Indigenous lands that are now Colombia and Palestine are both fighting for liberation from imperial, capitalist, white supremacist systems with domestic and global iterations.<sup>114</sup> As countries described as being “in conflict,” Colombia and Palestine have been subjected to—albeit in inapposite ways, as this paper’s analytic framing underscores—the norms of IHL. These norms are part of the human rights corpus “applicable in armed conflict.”<sup>115</sup>

Colombia and Palestine are thus bound, first, insofar as Israel has funded and trained the Colombian parastate. Moreover, they are connected through the practices of (1) state dispossession of ancestral land, (2) race-neutral false narratives that bolster “national security” programs supported by imperial powers (to wit, U.S. intervention), and (3) overindulgent (at worst) or limited (at best) legal frameworks. Regarding this third point, a CRT-TWAIL analysis of Colombia will show the shortcomings of transitional justice,<sup>116</sup> and that of Palestine will show the false promises of occupation law.<sup>117</sup> Transience frames both these legal structures—Colombia is meant to transition into democracy and Palestine out of temporary occupation. The temporality of “conflict” binds them. Through the deconstruction of “conflict,” this section provides brief examples of the instrumentality and emancipatory nature of a unified CRT-TWAIL approach so that it can be utilized as a new global mode of study and action. Here, a combined CRT-TWAIL lens is crucial for unmasking the reality of Afro- and Indigenous Colombians and Indigenous Palestinian experiences to transform sociolegal structures.

113. See OLIVER VILLAR & DREW COTTLE, COCAINE, DEATH SQUADS, AND THE WAR ON TERROR: U.S. IMPERIALISM AND CLASS STRUGGLE IN COLOMBIA 9–16, 50–54, 107–13 (2011) (suggesting that the United States’ involvement in Colombia was not about fighting the war on terror and drugs, but about the lucrative cocaine trade which led to the creation of a “narco-state” under a “narco-bourgeoisie” interested in monopolizing cocaine production, such that the FARC who challenged the monopoly was targeted by U.S. economic interests that wanted to maintain an imperialist dynamic over Colombia and gain from the trade).

114. See, e.g., OLÚFEMI O. TÁÍWÒ, RECONSIDERING REPARATIONS 10 (2022) (arguing that we live in a “global racial empire,” a social system “as large as the globe” built by “the converging processes of trans-Atlantic slavery and colonialism”).

115. Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT’L REV. RED CROSS 94, 94 (1993); see INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW?, OPINION PAPER 2024 5 (2024) (explaining that neither Articles 2 or 3 common to the Geneva Conventions define “armed conflict” but they do differentiate between the IHL rules that apply to international armed conflicts and non-international armed conflicts.); see Imseis, *Prolonged Occupation*, *supra* note 98, at 35 (“IHL consists of a multitude of general rules recognized as customary international law and therefore binding on all states and is codified to a large extent in the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, along with its annexed Regulations, the four 1949 Geneva Conventions, including the Convention Relative to the Protection of Civilian Persons in Time of War, and the 1977 Additional Protocol I to the Geneva Conventions.”).

116. *Infra* Part IV.C.

117. *Infra* Part V.C.

## IV.

COLOMBIA: THE LEGACY OF COLONIAL RACISM IN THE ARMED CONFLICT  
UNADDRESSED BY TRANSITIONAL JUSTICEA. *The Dominant Narrative*

The Colombian armed conflict is often described as leaving about “220,000 dead, 25,000 disappeared, and 5.7 million displaced over the last half century.”<sup>118</sup> The FARC and ELN (*Ejército de Liberación Nacional* - National Liberation Army) formed as leftist militant groups in the 1960s that took up arms against the government after a politically violent decade.<sup>119</sup> They relied on kidnappings, violence, and extortion for “leverage and income,” and the cocaine trade supplied them with most of their revenue.<sup>120</sup> In the 1980s, “[r]ight-wing paramilitary groups with links to the state military emerged . . . as landowners organized to protect themselves from the guerrilla groups” with the largest group being the AUC.<sup>121</sup> They were also involved in the cocaine trade.<sup>122</sup> Colombia supplied nearly 90 percent of the world’s cocaine in the early 2000s.<sup>123</sup>

In 2000, the United States approved the aid package, “Plan Colombia,” to help “combat guerrilla violence, strengthen [Colombia’s] institutions, and stem drug production and trafficking;”<sup>124</sup> although in 2016 the White House characterized the plan as “instrumental” for “subsequent peace talks,” others believe it caused more deaths and displacement.<sup>125</sup> In 2002, President Álvaro Uribe cracked down on leftist rebel groups;<sup>126</sup> in 2024, prosecutors charged him with witness bribery and fraud for “‘offering cash or other benefits to selected witnesses of criminal acts’ so that they would not tell the truth in a case that links him to

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118. Claire Klobucista & Danielle Renwick, *Colombia’s Civil Conflict*, COUNCIL FOREIGN RELS. (Jan. 11, 2017, 7:00 AM EST), <https://www.cfr.org/backgrounder/colombias-civil-conflict> [<https://perma.cc/22NB-D39H>] (Jan. 11, 2017, 7:00 AM EST). See also Ronnie Lovler, *Retelling the Conflict in Colombia Through a Human Face*, INT’L MEDIA SUPPORT (Sept. 25, 2013), <https://www.mediasupport.org/retelling-the-conflict-in-colombia-through-a-human-face/> [<https://perma.cc/A6EP-M584>] (presenting Proyecto Rosa, a journalistic endeavor that tells the real stories of the “disappeared and the displaced” in Colombia); HECTOR PERLA & JORDAN BAZAK, COUNCIL ON HEMISPHERIC AFFS., *THE COLOMBIA-FARC AGREEMENT: A FRAGILE STEP TOWARD A SUSTAINABLE PEACE I* (2016), available at <https://coha.org/the-colombia-farc-agreement-a-fragile-step-toward-a-sustainable-peace/> [<https://perma.cc/6BZT-K79M>] (summarizing the history, the Peace Accord process, and the then-expected challenges).

119. Klobucista & Renwick, *supra* note 118.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

paramilitary groups.”<sup>127</sup> President Juan Manuel Santos, who was Uribe’s Defense Minister, reached a ceasefire and peace deal with the FARC in 2016, focused on (1) FARC members’ future political participation; (2) their reintegration into civilian life; (3) illegal crop eradication; (4) transitional justice; (5) FARC members’ disarmament; and (6) implementation of the peace deal.<sup>128</sup> Santos, a conservative politician, won the Nobel Peace Prize in 2016 for ending the “conflict.”<sup>129</sup>

There are many missing pieces from this dominant narrative. A CRT-TWAIL examination of the Colombian “armed conflict,” nonetheless, has emancipatory potential by revealing the racialized aspects of the “conflict,” otherwise conveyed as race-neutral in a self-defined racially mixed country. A CRT-TWAIL examination also reveals the deficiencies of a colorblind transitional justice mechanism that claims to deal with mass human rights atrocities.

### B. Colonization, Mestizaje, and the “Armed Conflict”

Like in much of Latin América and the Caribbean (“LAC”), Spain colonized the land that is now Colombia, creating a “castelike” system that still has lingering effects today with Indigenous and African peoples on the bottom.<sup>130</sup> Spanish colonization was marked by the mass enslavement, near-extirmination, and spiritual conquest of Indigenous and African people, violence against women, and the brutal quashing of colonial rebellions.<sup>131</sup> The colonial caste system was documented in *casta* paintings that “distinguish[ed] socio-economic features concerning race” and satisfied European curiosity “about the New World.”<sup>132</sup>

Because of colonization, today, nearly half of Colombia’s population identifies as *mestizo*, or of mixed European and Amerindian descent,<sup>133</sup> a *casta* classification. *Mestizaje* (miscegenation) in LAC is not only a contemporary classification but a historic ideological project that encouraged racial mixing as key to the

127. *Colombia's Former President Uribe Charged with Bribing Witnesses*, LE MONDE (May 25, 2024, 9:22 am), [https://www.lemonde.fr/en/international/article/2024/05/25/colombia-s-former-president-uribe-charged-with-bribing-witnesses\\_6672611\\_4.html#](https://www.lemonde.fr/en/international/article/2024/05/25/colombia-s-former-president-uribe-charged-with-bribing-witnesses_6672611_4.html#) [https://perma.cc/QAL6-AEM5].

128. Klobucista & Renwick, *supra* note 118.

129. *Juan Manuel Santos Facts*, NOBEL PRIZE <https://www.nobelprize.org/prizes/peace/2016/santos/facts/> [https://perma.cc/MF7K-7T75] (last visited Aug. 21, 2024).

130. Field, *supra* note 112, at 644.

131. See Matthew Restall, *Legitimised Violence in Colonial Spanish America*, in THE CAMBRIDGE WORLD HISTORY OF VIOLENCE, VOL. III 1500-1800 CE 408, 412–13, 415, 417, 419, 420, 422 (2020) (framing the violence as premised on wealth, status, and an ideological justification that legitimized it through the law).

132. Susana B. Escobar Zelaya, *The Remains of Castas in Latin America*, 2 GLOB. INSIGHT 12, 12 (2021).

133. Field, *supra* note 112, at 644. See also Emiliano Rodríguez Mega, *The Rise of The Mixed-Race Myth In Latin America*, 600 NATURE 374 (2021) (explaining how Mexico, Brazil, Nicaragua, and Colombia mostly identify as *mestizo*).



nation-making process.<sup>134</sup> *Mestizaje* might appear progressive (vis-à-vis U.S. race relations). In reality, *mestizaje* encourages interracial mixture to achieve whiteness and homogenizes nation-states; thereby denying Afro and Indigenous identities and “masking persistent racial discrimination and [the] underlying racial hierarch[y]” introduced by violent European colonization and racial capitalism.<sup>135</sup> Yet, despite *mestizaje* Colombia is estimated to have the second-largest Afro-descendent community in Latin América.<sup>136</sup> In Colombia, nevertheless, nationalism has thrived on the status quo of *mestizaje*, defined by regional and class identities such that the highland Andean region, where wealthier and whiter people live, has the most economic-political power.<sup>137</sup> A small white (or *mestizo*) elite, *la oligarquía* (oligarchy), has therefore largely ruled modern-day Colombian politics and economy.<sup>138</sup>

Running on a campaign to confront *la oligarquía* and create a genuinely unified Colombia, in 1948, radical presidential candidate Jorge Eliécer Gaitán was assassinated, ushering in *la Violencia* (“the Violence”).<sup>139</sup> The bloody period resulted in the creation of the Communist FARC in 1964, which was composed of small farmers and land workers.<sup>140</sup> The FARC, Colombia’s largest leftist guerrilla group, uplifted the interests of “politically and economically disenfranchised” communities, which were necessarily landless peasants (*campesines*).<sup>141</sup> The FARC intended to represent Colombia’s rural poor against Colombia’s wealthy class and challenged the privatization of Colombia’s natural resources.<sup>142</sup> Even before the FARC was properly organized, the state met the dissident armed left with official military tactics and unofficial paramilitary terror.<sup>143</sup> Tasked with defending the status quo, *i.e.*, the interests of “landed elites,” the AUC fought “the subversive other,” who was not just the guerrilla or narco-business but also social movement leaders and members of low-income rural and urban communities who

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134. Telles & Bailey, *supra* note 103, at 1560; see Field, *supra* note 112, at 644.

135. Telles & Bailey, *supra* note 103, at 1560 (internal citations omitted). See Esther Ojulari, *The Social Construction of Afro-Descendant Rights in Colombia*, in CONTEMPORARY CHALLENGES IN SECURING HUMAN RIGHTS 19, 20 (Corinne Lennox ed., 2015).

136. Nina Bries Silva, *Discovering What is Already Known: The Afro-Colombian Ancestral Justice System Before the Special Jurisdiction for Peace*, 18 INT’L J. TRANSITIONAL JUST. 141, 143 (2024).

137. See Field, *supra* note 112, at 644.

138. *Id.*

139. *Id.*

140. *Id.*; *Who are the Farc?*, BBC (Nov. 24, 2016), <https://www.bbc.com/news/world-latin-america-36605769> [<https://perma.cc/5MUU-JZY5>].

141. Field, *supra* note 112, at 644; see also MARIO A. MURILLO, COLOMBIA AND THE UNITED STATES: WAR, UNREST AND DESTABILIZATION 57 (2003) (the FARC also promoted a new agrarian program to counter the influence of U.S.-backed economic-military offensives in Colombia).

142. Klobucista & Renwick, *supra* note 118 (recording that the other guerrilla group, the ELN was composed of “students, Catholic radicals, and left-wing intellectuals who hoped to replicate Fidel Castro’s communist revolution”).

143. Field, *supra* note 112, at 645.

lived in profitable territories.<sup>144</sup> In addition to combatting leftist guerrillas and others deemed “the enemy,” the state-sanctioned paramilitaries expropriated peasant lands for domestic and foreign capital, engaging in a “large-scale cross-country, counter-agrarian reform” in certain regions like Urabá and Chocó.<sup>145</sup>

Interaction between these three actors—the leftist guerrillas, the right-wing paramilitaries, and the national army—characterized Colombia’s “conflict.” The International Committee of the Red Cross, relying on IHL treaties, jurisprudence, and doctrine, proposes the definition of non-international armed conflicts as:

*protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*.<sup>146</sup>

Applying a CRT-TWAIL lens, one can see that Colombia’s case is much more nuanced—the “conflict” is circular. Spanish colonization gave Colombia one of the most disproportionate rates of land ownership in Latin América<sup>147</sup>—inequality that continued post-independence as white and *mestizo* elites who had “managed the land for the Spanish crown” held onto the land and privatized large amounts of it to pay off the new country’s debts;<sup>148</sup> then the unequal land ownership compelled the landless to take up arms and demand land reform, only for the state to use the “conflict” to again expropriate rural land from the already

144. *Id.* at 645–46 (internal citations omitted).

145. *Id.* at 640, 646 (internal citations omitted).

146. INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN *INTERNATIONAL HUMANITARIAN LAW?*, OPINION PAPER 5 (MARCH, 2008), available at <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/opinion-paper-armed-conflict.pdf> [<https://perma.cc/BH6S-ZWYZ>] (emphasis in original).

147. See, e.g., JEAN-PAUL FAGUET, FABIO SÁNCHEZ TORRES, & MARTA-JUANITA VILLAVECES, LSE DEP’T INT’L DEV., *THE PARADOX OF LAND REFORM, INEQUALITY AND DEVELOPMENT IN COLOMBIA*, WORKING PAPER SERIES NO. 17–181, 14 (2017) (“The distribution of land in Colombia is deeply rooted in its colonial experience . . .”); Tim Robustelli, *Challenges to Rural Land Reform in Colombia*, NEW AMERICA (Oct. 15, 2018), <https://www.newamerica.org/future-land-housing/blog/challenges-rural-land-reform-colombia/> (“Land distribution in Latin America is the most unequal in the world—with Colombia as the worst.”).

148. Jarrod Demir, *Understanding the Causes of Colombia’s Conflict: Land Ownership*, COLOMBIA REPORTS (Apr. 3, 2018), <https://colombiareports.com/understanding-the-causes-of-colombias-conflict-land-ownership/> [<https://perma.cc/9WAR-KYAQ>]; *Who are the Farc?*, *supra* note 140.

racialized landless.<sup>149</sup> This high rate of land grabbing compounds the problem of land inequality.<sup>150</sup>

The uncritical depiction of the Colombian “conflict” is that of a battle between insurgent demands for socioeconomic equality (supported by narcotrafficking) and national security measures (also supported by narcotrafficking).<sup>151</sup> Other accounts portray the “conflict” as a “struggle for territorial, economic and military control” that “affect[ed] all sectors of society” with incidental racialized and gendered impacts.<sup>152</sup> However, a CRT-TWAIL analytic reframing shows the “conflict” as an extension and product of the deep-rooted global racial colonial order,<sup>153</sup> complacently adopted by the Colombian state, which has since relegated Afro-Colombian and Indigenous populations to the most remote areas of the country far from governmental protection.<sup>154</sup> For example, the “conflict” directly brought violence to coastal Urabá and Chocó, historically and traditionally

149. Rebecca Bratspies, ‘*Territory is Everything*’: *Afro-Colombian Communities, Human Rights and Illegal Land Grabs*, 4 COLUM. HUM. RTS. L. REV. ONLINE 290, 309–11, 316–20 (2020) (examining how multiple administrations’ aerial spraying to kill coca production destroyed all the crops that Afro- and Indigenous communities relied on for subsistence and created health problems; and “mega-projects,” birthed from government-international financial institution partnerships, are “slated for Afro-Colombian territory” through forced displacement and land grabbing).

150. *Id.* at 295–97.

151. See, e.g., Angel Rabasa & Peter Chalk, *Drugs and Insurgents in Colombia*, RAND (2001), [https://www.rand.org/pubs/research\\_briefs/RB69.html](https://www.rand.org/pubs/research_briefs/RB69.html) [<https://perma.cc/3YMU-5N7W>] (“Drug trafficking and political insurgency in Colombia could well confront the United States with the most serious security challenge in the Western Hemisphere since the Central American wars of the 1980s.”); Daniel F. Runde & Carl Meacham, *Preparing for Peace in Colombia: An Economic and Security Imperative for the United States*, CTR. STRATEGIC & INT’L STUD. (June 24, 2014), <https://www.csis.org/analysis/preparing-peace-colombia-economic-and-security-imperative-united-states> [<https://perma.cc/HT6A-F66Q>] (“As with any country involved in violent civil conflict, many Colombians want FARC members to be held accountable for their perpetration of violent crime, worrying that ex-combatants will be rewarded for their bad behavior as soon as they agree to drop arms, with completing the peace process taking precedence over justice for victims.”).

152. Violence and Discrimination Against Women in the Armed Conflict in Colombia, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, Doc. 67 ¶ 34–35 (2006).

153. See Julia Zulver, *Afro-Colombian Women’s Organisations in Post-Accord Colombia: Gendering and Racialising Violent Pluralism Across the Conflict Continuum in Bogotá, Colombia*, 7 ALTERNATAS 31, 31 (2020); Paul Gootenberg & Isaac Campos, *Toward a New Drug History of Latin America: A Research Frontier at the Center of Debates*, 95 HISPANIC AM. HISTORICAL REV. 1, 7–9, 18–19 (2015) (discussing the link between colonialism and the development of a market for Latin American drug exports); see also Manuel Rueda, *Reclaiming Colombia’s Black History, one Tour at a Time*, THE WORLD (Aug. 31, 2021, 1:30 PM EDT), <https://theworld.org/stories/2021-08-31/reclaiming-colombia-s-black-history-one-tour-time> [<https://perma.cc/M6D6-SS56>] (“In Cartagena, [tour guide Alex] Rocha has been trying to change the historical narrative for several years using less radical methods: He leads tours that focus on the city’s Afro-Colombian history, and tries to show visitors how Cartagena’s [colonial port city] past connects with the present.”).

154. See Gimena Sánchez-Garzoli, *Ethnic Communities are the Pathway to Peace in Colombia’s Abandoned Areas*, WASH. OFF. LATIN AM. (Oct. 31, 2019), <https://www.wola.org/analysis/ethnic-communities-pathways-peace-colombia/> [<https://perma.cc/B34M-XAUT>]; Bries Silva, *supra* note 136, at 2 (“The tensions generated by economic interests over their territories and their deficient legal protection intensified the violence against these communities and weakened their cultural practices, social organization and system of justice.”).

majority Afro-Colombian regions.<sup>155</sup> In this way, under a narrative that delegitimizes legitimate demands on the state by highlighting only the crimes of “hostile rebels” and not of the AUC, Colombia sanctioned a racialized, vicious dispossession of land with immense (coerced) civilian support.<sup>156</sup>

Notably, after former President George W. Bush declared the “War on Terror,” then-Colombian President Álvaro Uribe began spreading propaganda that portrayed the “conflict” as state defense against “leftist narco-terrorists.”<sup>157</sup> Under his administration, “Plan Colombia,” the United States’ security aid package, “launched a scorched-earth counteroffensive” against the FARC, “escalating the war.”<sup>158</sup> With support from the United States, Uribe relatedly developed the policy of “Democratic Security,” founded on “investment promotion and social cohesion,”<sup>159</sup> wherein anyone accused of collaborating with the guerrillas was considered a security target.<sup>160</sup> Uribe’s administration wanted Colombia to be attractive to Western investors who would have state protection from the so-called “narco-terrorists” who were necessarily outside of Colombia’s social fabric.<sup>161</sup> CRT-TWAIL helps one see that the idea of “social cohesion” is reminiscent of the

155. See *Urabá, A Contemporary History of Violence and Territory*, PBI COLOMBIA (Jan. 15, 2018), <https://pbicolombia.org/2018/01/15/uraba-a-contemporary-history-of-violence-and-territory/> [<https://perma.cc/Q4ED-39KN>] (explaining that much of the land in Urabá belongs to Afro-Colombians whose ancestors have lived there since the Atlantic Slave Trade, many of whom “opted to live according to their African heritage (cimarronismo) and . . . took refuge in the deep jungles”); Philipp Wesche, *Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision*, 33 J. ENV’T. L. 531, 535 (2021) (stating that Chocó’s population is 87% Afro-descendant and 10% Indigenous).

156. See VILLAR & COTTLE, *supra* note 113, at 119, 123.

157. See Maria Alejandra Silva, *Alvaro Uribe: The Most Dangerous Man in Colombian Politics*, COUNCIL HEMISPHERIC AFFS. (Oct. 20, 2017), [https://www.coha.org/alvaro-uribe-the-most-dangerous-man-in-colombian-politics/#\\_edn8](https://www.coha.org/alvaro-uribe-the-most-dangerous-man-in-colombian-politics/#_edn8) [<https://perma.cc/ATZ5-BN62>]; VILLAR & COTTLE, *supra* note 113, at 1.

158. Nick Miroff, ‘Plan Colombia’: How Washington Learned to Love Latin American Intervention Again, WASH. POST (Sept. 18, 2016), [https://www.washingtonpost.com/world/the\\_american/plan-colombia-how-washington-learned-to-love-latin-american-intervention-again/2016/09/18/ddaeae1c-3199-4ea3-8d0f-69ee1cbda589\\_story.html](https://www.washingtonpost.com/world/the_american/plan-colombia-how-washington-learned-to-love-latin-american-intervention-again/2016/09/18/ddaeae1c-3199-4ea3-8d0f-69ee1cbda589_story.html) [<https://perma.cc/UH82-US9B>]; see Natalie Cosoy, *Has Plan Colombia Really Worked?*, BBC (Feb. 4, 2016), <https://www.bbc.com/news/world-latin-america-35491504> [<https://perma.cc/GS93-ANUS>] (Plan Colombia did not stop coca production although it helped aerially fumigate over 1.6 million hectares of coca with the controversial herbicide glyphosate; it increased violence and human rights violations; it turned some of the soldiers it trained into mercenaries; and some suspect that the militarized plan strengthened the Colombian military when peace was being negotiated, thus “postpon[ing] the prospect of peace for another decade”).

159. *An Interview with Álvaro Uribe Vélez*, 3 PRISM 139, 140 (2012).

160. Heather Hanson & Rogers Romero Penna, *The Failure of Colombia’s ‘Democratic Security’*, NACLA (Sept. 25, 2007), <https://nacla.org/article/failure-colombia%27s-democratic-security> [<https://perma.cc/8WZV-9P6M>] (demonstrating that “Uribe’s ‘Democratic Security’ strategy [was] based on and [drew] support from the same political discourse as the Bush Administration’s War on Terror,” whereby the Colombian government, relying on U.S. government funding, would negotiate with paramilitaries but full-on attack the FARC and, moreover, implemented constitutional reforms that curtailed everyone’s civil liberties).

161. *An Interview with Álvaro Uribe Vélez*, *supra* note 159, at 141.

smokescreen of *mestizaje*—that is, “equality” exists if everyone stays quiet. What resulted from this policy, as proof to the international system (read: Western) that the Colombian government was dedicated to obliterating the FARC, was an alarming number of *falsos positivos* (“false positives”): “innocent people extrajudicially killed by members of the Colombian army, and then falsely labelled as enemy combatants.”<sup>162</sup>

Such harmful, legally substantiated narratives perpetuate the myth of Colombian social cohesion, democracy, and *mestizaje*. Colombian racial stratification instigated rather than just exacerbated the “conflict.” Indeed, in Chocó, the paramilitaries have permanently displaced several Afro-Colombian communities from the few historical villages that remain for the benefit of national and multinational corporations.<sup>163</sup> The Colombian government declared “subversive” communities that were marginalized and thus racialized because of their disenfranchisement, thereby rationalizing its state-sanctioned aggression and displacement;<sup>164</sup> and the United States agreed. Paradoxically, the state understood that pervasive socioeconomic and racial inequality existed that would make many, as a last resort for social change, become “a subversive enemy.” CRT-TWAIL shows that rather than promote structural reform, the state chose to use the conditions it historically created to punish specific segments of the population.

### C. Transitional Justice

In 2016, the Colombian government and the FARC signed a peace agreement, seemingly ending the half-century “armed conflict”<sup>165</sup> that had made Colombia the country with the most internally displaced persons in the world.<sup>166</sup> The Colombian state has developed a transitional justice system as it strives to transition “out of conflict” and into a “peaceful” society. The system is interwoven into

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162. Mariana Palau, *The ‘False Positives’ Scandal that Felled Colombia’s Military Hero*, PULITZER CTR. (Nov. 25, 2020), <https://pulitzercenter.org/stories/false-positives-scandal-felled-colombias-military-hero> [<https://perma.cc/97VV-PD6M>].

163. Field, *supra* note 112, at 646.

164. *Id.* at 648.

165. Sánchez-Garzoli, *supra* note 154.

166. “According to the Government, there were 7.4 million registered IDPs in Colombia at the end of 2016, an increase of some half a million from the beginning of the year, with no IDP returns or other decreases reported. As a result, Colombia remained the country with the largest IDP population.” UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 36–7 (2017); see William Spindler, *Forced Displacement Growing in Colombia Despite Peace Agreement*, UNHCR (Mar. 10, 2017), <https://www.unhcr.org/en-us/news/briefing/2017/3/58c26e114/forced-displacement-growing-colombia-despite-peace-agreement.html> [<https://perma.cc/7M6N-NDX4>] (Afro- and Indigenous Colombians “account for 10% and 3% respectively of the 7.4 million internally displaced persons (IDPs) in Colombia.”). As of 2023, Colombia remained one of the countries with the highest numbers of internally displaced people, with 6.9 million IDPs. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2023 25 (2024).

domestic law<sup>167</sup> and Reparations, Responsibility and Victimhood in Transitional Societies heralds it as the most comprehensive in the world.<sup>168</sup> The peace agreement, the *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* (Final Agreement for the Termination of the Conflict and Construction of a Stable and Lasting Peace) established the *Sistema Integral de Verdad, Justicia, Reparación y No Repetición* (“SIVJRNR” - Comprehensive System of Truth, Justice, Reparation, and Non-Repetition).<sup>169</sup> The SIVJRNR has three mechanisms: (1) *la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición* (“CEV” - The Truth, Coexistence and Non-Repetition Commission), (2) *la Unidad para la Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado* (“UBDP” - Search Unit for Persons Presumed Disappeared in the context and because of the armed conflict), and (3) *la Jurisdicción Especial para la Paz* (“JEP” - the Special Jurisdiction for Peace).<sup>170</sup> The JEP prosecutes and punishes those who committed “the most serious crimes.”<sup>171</sup>

The four pillars of the “holistic notion” of transitional justice are: truth, justice, reparations, and guarantees of non-recurrence, wherein “they are parts of a whole.”<sup>172</sup> On the truth pillar, states have often utilized truth commissions to satisfy their responsibility to victims and society to investigate wrongdoing and make the record public.<sup>173</sup> The justice pillar incorporates accountability and deterrence, and states have often used the criminal legal system.<sup>174</sup> Reparations means that victims are entitled to “be made whole from the damage caused by state wrongdoing,” by having their rights and property restored, being rehabilitated through legal and social services, being compensated, or receiving official apologies.<sup>175</sup> Guarantees of non-recurrence often involve constitutional reform.<sup>176</sup> Transitional

167. NELSON CAMIL SANCHEZ & ADRIANA RUDLING, REPARATIONS, RESPONSIBILITY AND VICTIMHOOD IN TRANSITIONAL SOCIETIES, REPARATIONS IN COLOMBIA: WHERE TO? 9–10 (2019).

168. *Id.* at 5–7 (Colombia has the most comprehensive and ambitious reparations program in the world that is integrated into a comprehensive transitional justice system).

169. Juan Carlos Botero & Mateo Merchán, *Rethinking Peace and Justice: Lessons from the Colombian Transitional Justice Experience*, JUST. IN CONFLICT (Apr. 27, 2020), <https://justiceinconflict.org/2020/04/27/rethinking-peace-and-justice-lessons-from-the-colombian-transitional-justice-experience/> [https://perma.cc/33QE-BKY7].

170. MIN. JUSTICIA, *Sistema Integral* (Sept. 12, 2024, 3:11 PM), <https://www.minjusticia.gov.co/programas-co/justicia-transicional/Paginas/OJTC-Sistema-Integral.aspx> [https://perma.cc/V5HH-NCQH].

171. Botero & Merchán, *supra* note 169 (“the *Special Jurisdiction for Peace (JEP)*, the latter being the mechanisms to prosecute and punish those responsible for the most serious crimes committed in the context of the armed conflict (Art. 5. Legislative Act 01 of 2017).”).

172. Pablo de Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE 31, 32, 34 (Melissa S. Williams, Rosemary Nagy & Jon Elster, eds., 2012).

173. Laurel E. Fletcher, *What Can International Transitional Justice Offer U.S. Social Justice Movements*, 46 N. KY. L. REV. 132, 135 (2019).

174. *Id.*

175. *Id.*

176. *Id.* at 135–36.

justice is a mechanism of social integration and an accountability tool.<sup>177</sup> Arguably, the concept of transitional justice was developed after the fall of authoritarian regimes in Latin América in the late twentieth century and has since achieved international status (*i.e.*, by the U.N., states, and civil society organizations worldwide),<sup>178</sup> as IHRL and IHL are the U.N.’s normative foundation.<sup>179</sup>

While a transitional justice framework prioritizes victims or survivors of “undemocratic” governments, CRT-TWAIL helps reveal that it falls short of addressing historical violence in the context of Colombia.<sup>180</sup> Transitional justice mechanisms focus on the proximate past and spectacular harms inflicted by individuals, rather than structural and often legalized state harm.<sup>181</sup> TWAIL scholar and human rights advocate Matiangai Sirleaf finds inherent problems in the state-centric approach of transitional justice insofar as it places responsibility on the state to identify and resolve problems, but state solutions can often be insufficient.<sup>182</sup> Transitional justice systems do not effectively address colonial violence or draw a historical continuum,<sup>183</sup> thereby failing to offer “meaningful avenues for decolonization and rectifying ongoing injustices centered on land dispossession.”<sup>184</sup> In other transitional justice systems, to be sure, international documents “only infrequently trace causal chains from land grabs by colonial authorities, to postcolonial land inequalities, to contemporary mass violence.”<sup>185</sup>

A significant limitation of transitional justice is the absence of race-based analysis and recognition of racism as the core cause of mass atrocities, if not a mass atrocity in and of itself. Achiume and Sirleaf critique transitional justice’s focus on “changes to public legitimating regimes” and the limiting conditions of

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177. DE GREIFF, *supra* note 93, at 4.

178. Brianna McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, OPINIOJURIS (May 6, 2020), <http://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/> [<https://perma.cc/BJZ8-6KUW>]; see also Fletcher, *supra* note 173, at 134.

179. U.N. Secretary-General, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, 3 (March 2010), available at <https://digitallibrary.un.org/record/682111?ln=en&v=pdf> [<https://perma.cc/UU46-M59M>].

180. For an anthropological analysis of how “the pervasive-ness of colonial legacies – the initial exclusion of Indigenous and Afrodescendant peoples, the staunch defence of conservative gender binaries by many voters, and the feudal power of the landowning elite – has undermined the [transitional justice] process at different stages,” see Claire Wright, Bill Rolston, & Fionnuala Ní Aoláin, *Navigating Colonial Debris: Structural Challenges for Colombia’s Peace Accord*, 11 PEACEBUILDING 62, 75 (2023).

181. Zinaida Miller, *Transitional Justice, Race, and the United States*, JUST SEC. (June 30, 2020), <https://www.justsecurity.org/71040/transitional-justice-race-and-the-united-states/> [<https://perma.cc/3BPU-S2FC>] [hereinafter Miller, *Transitional Justice*].

182. Matiangai V. S. Sirleaf, *Palestine as a Litmus Test for Transitional Justice*, INT’L J. TRANSITIONAL JUST. 1, 7 (2024).

183. Miller, *Transitional Justice*, *supra* note 181.

184. Sirleaf, *supra* note 182, at 7-8.

185. Miller, *Transitional Justice*, *supra* note 181.

white supremacy and racism.<sup>186</sup> Transitional justice expert Zinaida Miller expresses that a state's desire to "heal" may prevent the "radical restructuring" that systemic racism demands, and instead "yield[s] minimalist change" when truth is "partial," justice is "narrow," and reformism is "inevitable."<sup>187</sup> The South African Truth and Reconciliation Commission, for instance, neglected to account for race and prosecuted gross human rights violations in lieu of the system of racial apartheid; as such, South Africa continues to struggle with interconnected legacies of colonization, racism, and inequality.<sup>188</sup>

To overcome the colorblindness of a traditional transitional justice mechanism and a race-neutral narrative of the "conflict," Afro-Colombian women especially—who have a history of fighting for recognition as a distinct racial group rather than being lumped into a rural ethnic category<sup>189</sup>—demanded to have a seat at the peace negotiation table to codify transformative race-conscious policies.<sup>190</sup> To turn Achiume and Sirleaf's critique of transitional justice systems around, in this case, Afro-Colombian women strived to show that social change can come from bottom-up grassroots organizing rather than from solely top-down legal institutions.<sup>191</sup> Since 2012, they advocated being included in peace negotiations to share their peace process vision that both recognized historic racial and gender injustices as the "conflict's" underlying forces and included provisions to address and remedy them.<sup>192</sup> Despite their efforts, they were never granted a permanent seat, and while the Colombian government eventually included an "Ethnic Chapter" in the Final Agreement, it only accepted four of the twenty proposed pages.<sup>193</sup>

The Final Agreement received pushback. Notably, INGOs such as U.S.-based Human Rights Watch ("HRW") opposed the first version of the Final Agreement, claiming it provided blanket immunity because "perpetrator[s] who cooperated

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186. Matiangai Sirleaf & E. Tendayi Achiume, *Reflecting on Race, Racism and Transitional Justice*, INT'L J. TRANSITIONAL JUST. 1, 4-5 (2024).

187. Miller, *Transitional Justice*, *supra* note 181.

188. *Id.*

189. See Ojulari, *supra* note 135, for a CRT analysis of the institutionalization of Afro-descendant rights in Colombia in the 1990s; Bries Silva, *supra* note 136, at 4-5 (explaining that Afro-Colombians and their ancestral justice systems were excluded from constitutional debates in the 1990s and had to be represented by their Indigenous peers).

190. Lisa Davis, *Third Party at the Table: Afro-Colombian Women's Struggle for Peace and Inclusion*, 4 COLUM. HUM. RTS. L. REV. 363, 367 (2020) [hereinafter Davis, *Third Party at the Table*].

191. Cf. Sirleaf & Achiume, *supra* note 186, at 5 (criticizing transitional justice for its "tendency to view social change as coming from legal institutions . . ." which "oversells [those institutions'] capacities but also causes a focus on top-down theories and visions for change as opposed to bottom-up and grassroots efforts and organizing").

192. Davis, *Third Party at the Table*, *supra* note 190, at 367; see Zulver, *supra* note 153, at 41 (affirming that "violence against Afro-Colombian women was more than simply a question of conflict-related violence . . . , it was based in historical, colonial legacies of racism.").

193. Davis, *Third Party at the Table*, *supra* note 190, at 369.



completely and fully” could receive lighter sentences.<sup>194</sup> The Colombian conservatives, including those who disseminated anti-terrorism rhetoric, also criticized the Final Agreement for attempting to impose a “gender ideology.”<sup>195</sup> Given HRW’s objections to accountability, the Washington Office on Latin America asserted that HRW did “real damage” to the success of the Final Agreement’s first version.<sup>196</sup> Such incursion by Western actors brings to mind TWAILers’ critique of international law structures and those who claim ownership over them. A CRT-TWAIL analysis of what led to the first version’s rejection shows how “transitional justice mechanisms [can] conduct international law’s civilizing mission”<sup>197</sup> insofar as HRW, in the representation of IHRL, encouraged a punitive mechanism in Colombia. Retribution in the name of justice had to be prioritized over the FARC’s (and Santos’ government’s) desire for peace because “bad, subversive, terroristic” non-state actors in a Global Majority country must be punished.<sup>198</sup> Miller writes that often foreign “experts import international justice practices to a given context [in which] the local [is rendered] as . . . politicized[] and naïve[, and e]xpertise and knowledge extraction play out across a ‘North-South gap’ into which issues of colonialism disappear.”<sup>199</sup> Here, foreign meddling with the support of and by Colombian conservative elites into how IHL should be administered, absent any race lens—with total amnesia of U.S.-“Plan Colombia’s” repercussions—can be considered an imperial endeavor that countered the locals’ supposed naiveté.

The fact that the first version was ultimately rejected demands “the necessity of decolonizing transitional justice.”<sup>200</sup> Repudiation allowed for the Final Agreement to be revised in a way that was more palatable to conservatives in Colombian society<sup>201</sup> and Western institutions that helped influence its perception. Two months later, in addition to other changes, the Final Agreement, whose provisions initially all had a gender and racial framing derived from Afro-Colombian women’s activism, was stripped of its robust racial- and gender-focused lens.<sup>202</sup> As an illustration, amongst other semantic but significant changes, the revised

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194. *Id.* at 369–71; *see* Botero & Merchán, *supra* note 169 (commenting that the Final Agreement proposed a novel, mixed-justice model that balances “the demands of justice and peace through the prosecution of the most serious and massive crimes from a restorative rather than a retributive (punitive) justice approach,” in which there is punishment *and* “victims and those responsible are expected to negotiate reconciliation and reintegration into their communities, understanding crime not simply as a transgression of the law, but as an assault on the people and the community”).

195. Davis, *Third Party at the Table*, *supra* note 190, at 365.

196. *Id.* at 371.

197. Sirleaf & Achiume, *supra* note 186, at 4.

198. *See id.* at 4 (citing Yuvraj Joshi, who signals how U.S. exceptionalism allows for the U.S. government to support transitional justice in Colombia “while failing to contend with the country’s centuries-long imposition of state-sponsored racial violence”).

199. Miller, *Transitional Justice*, *supra* note 181.

200. *Id.*

201. Davis, *Third Party at the Table*, *supra* note 190, at 364–66.

202. *Id.*

Final Agreement replaced some of the use of “Afro-Colombian” and “Indigenous” communities with “ethnic” or “most vulnerable” communities,<sup>203</sup> posing some obstacles for each to make their unique claims.

The Final Agreement does have an *Instancia Especial de Alto Nivel con Pueblos Étnicos* (IEANPE - Special High Level Body for Ethnic Peoples), which succeeded in creating racial-responsive indicators to implement the Ethnic Chapter, but Duque’s government did not sufficiently fund or recognize the *Instancia Étnica*.<sup>204</sup> The mere acknowledgment of historic colonial injustice, land dispossession, and the serious impacts of the “conflict” that “ethnic peoples” have suffered<sup>205</sup> does nothing when the 2018-2022 administration of President Duque weakly executed the Final Agreement. President Duque, a member of Uribe’s party, opposed the peace deal and campaigned to modify it.<sup>206</sup> A year into his administration, he had implemented “fewer than a quarter of the agreement’s nearly 600 provisions,” and he “objected to the effective immunity granted” to people accused of atrocities who submit to the JEP.<sup>207</sup> Such lack of commitment creates instability and violence, and even some former FARC members relinquished Senate seats and took up arms again, blaming the “government’s failure to keep promises.”<sup>208</sup> Failure to administer the Final Agreement with budget cuts and lack of consultation with Afro- and Indigenous communities is a direct way the state is negating support to and repeating a cycle of neglect of its racialized populations.<sup>209</sup>

Disregarding the Final Agreement because of its “leniency” illustrates the overarching dismissal of Afro-Colombians’ calls to confront sociolegal racism. Indeed, it underscores how “reliance on the law to make offenses cognizable obscures the political and the contextual;”<sup>210</sup> in this case, individual punishment superseded efforts to address the racial and class inequality that Spanish colonization engrained in Colombia. Duque’s government diminished the Final Agreement to the “disarmament and integration of fighters” to meet U.N. measures of peace process success, thereby failing to tackle the structural issues that led to the “conflict.”<sup>211</sup>

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203. *Id.* at 376.

204. *Id.* at 378–79.

205. FINAL AGREEMENT TO END THE ARMED CONFLICT AND BUILD A STABLE AND LASTING PEACE: 6.2 CHAPTER ON ETHNIC PERSPECTIVES 217 (2017).

206. Juan Arredondo, *The Slow Death of Colombia’s Peace Movement*, THE ATLANTIC (Dec. 30, 2019), <https://www.theatlantic.com/international/archive/2019/12/colombia-peace-farc/604078/> [<https://perma.cc/TEX2-SV7Y>].

207. *Id.*

208. *Id.*

209. See Sánchez-Garzoli, *supra* note 154.

210. Sirleaf & Achiume, *supra* note 186, at 5.

211. See Sánchez-Garzoli, *supra* note 154.

D. *Summarizing a CRT-TWAIL Application for Colombia*

As of 2023, Colombia was the most dangerous country for human rights defenders and social leaders.<sup>212</sup> These community leaders include human rights, land, and environmental defenders, and community activists, many of whom come from Afro- and Indigenous communities.<sup>213</sup> Amid international criticism, Duque’s administration responded by again accusing leftist guerrillas of the violence or recasting social leaders as leftist militants<sup>214</sup> rather than acknowledging the state’s failures. Historically, right-wing governments in Colombia have designated protestors, particularly Afro- and Indigenous Colombian demonstrators and human rights workers, as subversive and criminal.<sup>215</sup> Any political opposition is labeled part of “the enemy within,” which refers to sympathizers or collaborators of “leftist guerrillas and terrorists” but is usually applied to those whom the right considers “its enemies.”<sup>216</sup> In response, Petro’s leftist government wants to end the misinformation about and stigmatization of protestors and decrease the country’s kind and amount of ammunition and nonlethal weapon purchases.<sup>217</sup>

An applied CRT-TWAIL lens demonstrates the cyclical nature of violence in Colombia, even when different periods do not seem linearly connected. The Spanish’s quashing of Indigenous and African rebellions, *la oligarquía*’s land dispossession of Afro- and Indigenous Colombians, and rightwing governments’ abuse of political dissidents, such as Afro- and Indigenous protestors, reveal that the “conflict” was not an aberration but a reaction to a long history of legalized violence against racialized subversives (or “terrorists”). One sees, too, that transitional justice, as an international human rights remedy, appeases Western concerns over the democratic nature of a state rather than address that state’s colonial land dispossession and racial hierarchies. The Colombian state must meaningfully consult and work directly with Afro- and Indigenous communities so that the Final

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212. FRONTLINE DEFENDERS, GLOBAL ANALYSIS 2023/24 8 (2024), available at [https://www.frontlinedefenders.org/sites/default/files/1578\\_fld\\_ga23\\_online\\_u03.pdf](https://www.frontlinedefenders.org/sites/default/files/1578_fld_ga23_online_u03.pdf) [<https://perma.cc/6ELC-J6C2>] (reporting that in 2023 Colombia had the highest number of documented killings of HRDs and that at least 18 social and community leaders were killed).

213. See *At Least 78 Rights Defenders Killed in Colombia in 2021 – UN*, REUTERS (Jan. 13, 2022), <https://www.reuters.com/world/americas/about-80-rights-defenders-killed-colombia-2021-un-2022-01-13/> [<https://perma.cc/V8RY-B6WF>]; *Colombia’s Social Leaders are Still Being Killed During the Quarantine*, AMNESTY INT’L (June 22, 2020), <https://www.amnesty.org/en/latest/news/2020/06/lideres-sociales-nos-siguen-matando-durante-cuarentena/> [<https://perma.cc/DR2E-J4MG>].

214. See *At Least 78 Rights Defenders Killed in Colombia in 2021*, *supra* note 213; Hollander, *supra* note 110 (“Right-wing governments and official media in Colombia have long labeled protestors (in particular indigenous and Afro-Colombian demonstrators, students, journalists, and human rights workers) as subversives and criminals, and political opposition as part of ‘the enemy within.’ The term ‘the enemy within’ refers to those who collaborate or sympathize with leftist guerrillas and terrorists, but has ended up being applied to anyone whom the Right sees as its enemies.”)

215. Hollander, *supra* note 110.

216. *Id.*

217. *Id.*

Agreement does not exist only as a symbolic document that does not adequately engage with the country's colonial-era racialized structure and signal the need to decolonize transitional justice by way of introducing a race-conscious replicable model.

## V.

### PALESTINE: BOTH RENDERED NON-EXISTENT BUT RACIALIZED UNDER COLONIAL ZIONIST OCCUPATION

#### A. *The Dominant Narrative*

Dominant accounts of the “Israeli-Palestinian conflict” usually begin with the 1940s when the U.N. partitioned Palestine in 1947 and Israel was created or “declared independence” in 1948.<sup>218</sup> Other accounts recognize that Britain took control of Palestine after the Ottoman Empire’s fall and planned to make a home for Jewish people in Palestine because “[t]o Jews Palestine was their ancestral home, but Palestinian Arabs also claimed the land.”<sup>219</sup> Skirmishes “between Jewish and Arab militias” intensified, and “five Arab countries attacked Israel” a day after it declared statehood.<sup>220</sup> The new state was meant to be a haven for Jewish refugees fleeing the Holocaust.<sup>221</sup> In the process of creation, “[h]undreds of thousands of Palestinians fled or were forced out of their homes in what they call *al-Nakba* (the “Catastrophe,” in Arabic).<sup>222</sup> In the “Arab-Israeli War,” Israel gained more territory, excluding the Gaza Strip and the West Bank.<sup>223</sup> An exodus of Jewish people from Arab countries to Israel followed.<sup>224</sup> In 1949, Egypt gained control over Gaza; and in 1956, Egypt cut Israel off from shipping when it nationalized the Suez Canal, so Israel invaded Egypt and then withdrew, except from Gaza.<sup>225</sup>

In 1967, during the “Six-Day War,” Israel once more “gained control of the Gaza Strip and the Sinai Peninsula[ and h]undreds of thousands of Palestinians fled those territories or were displaced.”<sup>226</sup> In 1979, Egypt and Israel signed a “peace treaty” and Israel withdrew from the Peninsula; in 1987, Palestinians

218. Ctr. Preventive Action, *Israeli-Palestinian Conflict*, COUNCIL FOREIGN RELS., <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> [https://perma.cc/S58S-WBZC] (updated June 10, 2024).

219. *Israel Gaza War: History of the Conflict Explained*, BBC (Apr. 5, 2024), <https://www.bbc.com/news/newsbeat-44124396> [https://perma.cc/TZ5U-UJM2].

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Eta Yudin, *The Forgotten Exodus of Jews from Arab Lands*, TIMES OF ISRAEL (June 7, 2022, 9:57 PM), <https://blogs.timesofisrael.com/the-forgotten-exodus-of-jews-from-arab-lands/> [https://perma.cc/5F58-P3CQ] (last visited Sept. 12, 2024).

225. Emma Bubola, *Here is a Timeline of the Clashes between Palestinian Militants and Israel.*, N.Y. TIMES, <https://www.nytimes.com/2023/10/07/world/middleeast/israel-gaza-conflict-timeline.html> [https://perma.cc/6GUK-MR5L] (last visited Sept. 12, 2024).

226. *Id.*

launched the First *Intifada* (uprising) against Israel, and the Muslim Brotherhood created Hamas.<sup>227</sup> In 1993, the Palestinian Liberation Organization (“PLO”) signed the Oslo Accords to end the “conflict based on a two-state solution,” but Hamas, “which opposed the deal, launched a series of suicide bombings in Israel.”<sup>228</sup> A Second *Intifada* began in 2000; in 2005, “Israeli troops pulled out of Gaza, but Israel came under criticism for restricting the movement of Palestinians coming in and out of the strip.”<sup>229</sup>

Dominant accounts grossly oversimplify,<sup>230</sup> render Israel’s actions passive and reactive rather than colonial, and are prevalent in Western media, which leans pro-Israel.<sup>231</sup> But a combined CRT-TWAIL analysis further contributes to liberatory discourse that is working to cement Palestinian existence and unveil the reality of Zionism as a white supremacist, settler-colonial project that is both actively and passively encouraged by the “international system.” As a strategic approach, CRT-TWAIL can contest the status quo framing of Palestine-Israel as a complex, “untouchable [race-neutral] topic.”<sup>232</sup>

### B. Colonization, Zionism, and Ethnic Cleansing

To vaguely call Palestine-Israel a “conflict” is to overlook and deemphasize the most salient parts of this history, such as apartheid and the Israeli military occupation of Gaza and the West Bank, which is the “longest in modern

227. *Id.*

228. *Id.*

229. *Id.* (adding that since 2005, there have been more clashes in which Palestinians “are dead” after Israel responds to “terrorism”).

230. Rashid Khalidi explains that “. . . the conflict is portrayed as, at best, a straightforward, if tragic, national clash between two peoples with rights in the same land. At worst, it is described as the result of the fanatical, inveterate hatred of Arabs and Muslims for the Jewish people as they assert their inalienable right to their eternal, God-given homeland.” *THE HUNDRED YEARS’ WAR ON PALESTINE: A HISTORY OF SETTLER COLONIAL CONQUEST AND RESISTANCE* 9 (2020).

231. See, e.g., Adam Johnson & Othman Ali, *Coverage of Gaza War in the New York Times and Other Major Newspapers Heavily Favored Israel, Analysis Shows*, *THE INTERCEPT* (Jan. 9, 2024, 6:00 a.m.), <https://theintercept.com/2024/01/09/newspapers-israel-palestine-bias-new-york-times/> [<https://perma.cc/K7AZ-TKV5>] (reporting on an empirical analysis finding that, in the first six weeks after October 7, 2023, “[m]ajor U.S. newspapers disproportionately emphasized Israeli deaths in the conflict; used emotive language to describe the killings of Israelis, but not Palestinians; and offered lopsided coverage of antisemitic acts in the U.S., while largely ignoring anti-Muslim racism in the wake of October 7”); Holly M. Jackson, *The New York Times Distorts the Palestinian Struggle: A Case Study of anti-Palestinian Bias in US News Coverage of the First and Second Palestinian Intifadas*, 17 *MEDIA, WAR & CONFLICT* 116, 116 (2023) (“provid[ing] a methodologically novel, large-scale proof of historical bias against Palestine in a newspaper of international importance – *The New York Times* (NYT) – during the First and Second Palestinian Intifadas”); Ruben Durante & Ekaterina Zhuravskaya, *Attack When the World Is Not Watching? US News and the Israeli-Palestinian Conflict*, 126 *J. POL. ECON.* 1085, 1085 (2018) (“find[ing] that Israeli attacks are more likely to occur when US news on the following day is dominated by important predictable events”).

232. Yasmien Abu-Laban & Abigail B. Bakan, *Anti-Palestinian Racism: Analyzing the Unnamed and Suppressed Reality*, 44 *PROJECT MIDDLE EAST POL. SCI.* 143, 143 (2021).

history.”<sup>233</sup> Foundationally, it is essential to understand the system to which Indigenous Palestinians are subjected. Zionism is Israel’s “narrative and political structure,” premised on the belief that Jewish people cannot live peacefully with non-Jews, a conclusion drawn from rampant European antisemitism,<sup>234</sup> but that has “internalized and reproduced” antisemitic tropes.<sup>235</sup> The Zionist answer then is “an ethnically defined political state [that] can ensure . . . Jewish survival.”<sup>236</sup> Consequently, the inquiry of Zionism cannot be divorced from European colonization and supremacy.<sup>237</sup> International law scholar Victor Kattan affirms that “without colonialism the state of Israel would most likely not exist today and [Arab and Jewish] nationalisms could never have clashed.”<sup>238</sup>

As Kattan has observed, the father of Zionism, Theodore Herzl, appealed to the European colonial order to secure territory for a Jewish state, proposing Palestine for Jewish religious and historical reasons as well as European imperial aims<sup>239</sup>—making Israel a product of “European colonial expansion.”<sup>240</sup> The “Great Powers” of World War One “reshape[d] the world,” bringing Africa and Asia under their control, with the British ruling Palestine and proposing that it become a “Jewish national home.”<sup>241</sup> With the Balfour Declaration that “was codified into the League of Nation’s British Mandate for Palestine,”<sup>242</sup> the British sponsored the eventual creation of Israel without consulting or even acknowledging Indigenous Palestinians, while white European Zionists immigrated and became settlers in Palestine, claiming *they* were natives of the land.<sup>243</sup> That Palestine was seen as a “land without people”<sup>244</sup> is indicative of the legal fiction of *terra*

233. LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA 2* (2005).

234. Abu-Laban & Bakan, *supra* note 232, at 146.

235. ERAKAT, *supra* note 70, at 27; *see also* Rabea Eghbariah, *Towards Nakba as a Legal Concept*, 124 COLUM. L. REV. 887, 908–09 (2024).

236. Abu-Laban & Bakan, *supra* note 232, at 146.

237. MASSOUD HAYOUN, *WHEN WE WERE ARABS: A JEWISH FAMILY’S FORGOTTEN HISTORY* 193 (2019).

238. VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949 I* (2008).

239. ERAKAT, *supra* note 70, at 27–28; *see* Eghbariah, *supra* note 235, at 908–09.

240. KATTAN, *supra* note 238, at 2; *see* Khalidi, *supra* note 230, at 10 (“The Jewish state, Herzl wrote, would ‘form a part of a wall of defense for Europe in Asia, an outpost of civilization against barbarism.’”).

241. KATTAN, *supra* note 238, at 3.

242. Eghbariah, *supra* note 235, at 911.

243. ERAKAT, *supra* note 70, at 26, 38–39, 236; KATTAN, *supra* note 238, at 3.

244. EDWARD SAID, *THE QUESTION OF PALESTINE* 9 (1979) [hereinafter SAID, *THE QUESTION OF PALESTINE*]; *see also* Jamal Nabulsi, *Reclaiming Palestinian Indigenous Sovereignty*, 52 J. PALESTINE STUD. 24, 35 (2023) (“the Zionist myth that Palestine was ‘a land without people for a people without land’ . . . ultimately seeks to suggest is that Palestinians were not a people capable of holding sovereignty over the lands that they lived on prior to Zionist settlement. In order to justify its settlement, Zionism had to discursively sever the political connection between the Palestinian

*nullius* (“nobody’s land”) under international law that empowered European colonization in Australia, and North and Latin America.<sup>245</sup> The settler-colonial state<sup>246</sup> of Israel, marked by the “colonial erasure” of Palestine,<sup>247</sup> is therefore another face of European colonial domination—colonial domination that in seeking “to resolve the Jewish refugee crisis,” used Palestine to deflect its own anti-semitism.<sup>248</sup>

A CRT-TWAIL analysis helps to highlight the tension between the results of the racialization of Palestinians and Zionists. Racialization here goes beyond the white/non-white binary,<sup>249</sup> instead closely following the civilized/non-civilized binary<sup>250</sup> that TWAILers criticize of international law’s framework. Palestinian-

body and the land of Palestine.”); see generally Noura Erakat, *Taking the Land without the People: The 1967 Story as Told by the Law*, 47 J. PALESTINE STUD. 18, 20 (2017) (“aim[ing] to show how Israel strategically deployed Occupation Law to incrementally take the land without the people of Palestine and has applied UNSCR 242 to retroactively legitimate those colonial takings in a political framework shaped by U.S. intervention”).

245. The British Australian project and U.S. “Manifest Destiny” relied heavily on this principle. RULE OF LAW EDUCATION CENTRE, TERRA NULLIUS, LEGAL SOVEREIGNTY, AND THE EFFECT OF BRITISH ATTITUDES ON INDIGENOUS PEOPLE (2022), available at <https://www.ruleoflaw.org.au/wp-content/uploads/Terra-Nullius.pdf> [<https://perma.cc/2632-ZSHN>]; Khalidi, *supra* note 230, at 11; see also CHARLES W. MILLS, THE RACIAL CONTRACT 41–53 (25th ed. 2022).

246. John Reynolds, *The Life of the Law in Palestine*, 8 INT’L DIALOGUE: A MULTIDISCIPLINARY J. WORLD. AFFS. 47, 52 (2018) (“The settler colonial analytic is ‘an essential lens to understand the myriad forms of dispossession experienced by Palestinians from the late nineteenth century’ and one that allows us to historicize the colonization of Palestine as a process that began long before 1948.”) (citing Brenna Bhandar & Rafeef Ziadah, *Acts and Omissions: Framing Settler Colonialism in Palestine Studies*, JADALIYYA (Jan. 14, 2016), <https://www.jadaliyya.com/Details/32857> [<https://perma.cc/M5TS-XGYW>]).

247. ERAKAT, *supra* note 70, at 23.

248. See *id.* at 46.

249. In WHEN WE WERE ARABS: A JEWISH FAMILY’S FORGOTTEN HISTORY, Massoud Hayoun demonstrates how the racialization of Palestinians and Zionists goes beyond this binary. He notes,

When a Palestinian teenager, Ahed Tamimi, was jailed in February 2018 for slapping an Israeli soldier and that arrest drew attention to scores of similar child imprisonments, Israeli authorities suggested that she and her family were not truly Palestinian or Arab because she had light skin and blond hair. Despite the fact that many Arabs, especially Palestinian Arabs, have fair skin and blond hair, this was part of Israel’s push to imply that third parties had inserted themselves into the [situation]”).

HAYOUN, *supra* note 237, at 255. A person could appear “white” but nonetheless be Palestinian. Conversely, someone can be an Israeli Jew yet nonetheless be Arab. The contours of race in the context of Israel-Palestine defies the white/non-white binary; reducing these contours to those binary terms oversimplifies and obscures how racism actually manifests in reaction to perceived nationalisms.

250. For example, in a recently deleted social media post, Israeli Prime Minister Benjamin Netanyahu wrote that following October 7, 2023, the situation between Israel and Palestine was a war between “the children of light and the children of darkness.” The distinction seemingly alludes to a biblical prophecy but likewise appeals to notions of civility—the descendants of European Jewish people are enlightened and Indigenous Palestinians are barbaric. Edward Luce, *Netanyahu is an Albatross Around Biden’s Neck*, IRISH TIMES (Nov. 2, 2023),

statesian scholar and diplomat Fayez Sayegh detailed that “Zionist racial identification produces three corollaries: racial self-segregation, racial exclusiveness, and racial supremacy,”<sup>251</sup> such that Palestinians are separate, inferior, and to be colonized.<sup>252</sup> The British agreed inasmuch as the League of Nations’ Mandate system, which supposedly granted eventual sovereignty to colonies, did not afford Palestine the “privilege” of sovereignty.<sup>253</sup> Israel’s creation was thus marked by its own racial formation, which served to transform Ashkenazi Jewish refugees—not European enough because of their Jewishness—into settlers and ultimate citizens of the new state.<sup>254</sup> The transformation of Ashkenazi Jewish refugees into Israeli Jewish citizens obscured Mizrahi Jewish people (*i.e.*, Arab Jews) in the region, making their dual identities or nationalisms incompatible.<sup>255</sup> For example, Iraqi Jewish Professor Avi Shlaim explained that “Zionism not only turned the Palestinians into refugees; it turned the Jews of the East into strangers in their own land.”<sup>256</sup>

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<https://www.irishtimes.com/world/us/2023/11/02/edward-luce-netanyahu-is-an-albatross-around-bidens-neck/> [<https://perma.cc/VV8J-UZXU>]. On October 9, 2023, in an announcement, Defense Minister Yoav Gallant stated “[w]e are fighting human animals” and that Israel was “imposing a complete siege on Gaza,” such that there would be “no electricity, no food, no water, [and] no fuel.” Sanjana Karanth, *Israeli Defense Minister Announces Siege On Gaza To Fight ‘Human Animals’*, HUFF. POST (Oct. 9, 2023 2:16 PM EDT), [https://www.huffpost.com/entry/israel-defense-minister-human-animals-gaza-palestine\\_n\\_6524220ae4b09f4b8d412e0a](https://www.huffpost.com/entry/israel-defense-minister-human-animals-gaza-palestine_n_6524220ae4b09f4b8d412e0a) [<https://perma.cc/7E56-MJZY>]. Gallant’s characterization of Palestinians as “human animals” exemplifies Mutua’s discussion of the racialized savage as part of the savage-victim-savior prism. Mutua, *Savages, Victims, and Saviors*, *supra* note 39, at 202, 207 (explaining how in this prism, “savages and victims are generally non-white and non-Western, but “[t]he abominations of the savage are presented as so cruel and unimaginable as to represent their state as a negation of humanity”).

251. Eghbariah, *supra* note 235, at 923 (citing FAYEZ A. SAYEGH, *ZIONIST COLONIALISM IN PALESTINE* 1–2 (1965)).

252. The late prominent Palestinian-statesian philosopher and political activist Edward Said explores the civilized/uncivilized binary. In *THE QUESTION OF PALESTINE*, *supra* note 244, at 3–4, he discusses “Orientalism,” meaning how “the Orient [in which Palestine is located] represented a kind of indiscriminate generality for Europe, associated not only with difference and otherness, but with the vast spaces, the undifferentiated masses of mostly colored people, and the romance, exotic locales, and mystery of ‘the marvels of the East.’”

253. “In 1922, the new League of Nations issued its Mandate for Palestine, which formalized Britain’s governance of the country. In an extraordinary gift to the Zionist movement, the Mandate not only incorporated the text of the Balfour Declaration verbatim, it substantially amplified the declaration’s commitments. The document begins with a reference to Article 22 of the Covenant of the League of Nations, which states that for ‘certain communities . . . their existence as independent nations can be provisionally recognized.’ It continues by giving an international pledge to uphold the provisions of the Balfour Declaration. The clear implication of this sequence is that only one people in Palestine is to be recognized with national rights: the Jewish people. This was in contradistinction to every other Middle Eastern mandated territory, where Article 22 of the covenant applied to the entire population and was ultimately meant to allow for some form of independence of these countries.” Khalidi, *supra* note 230, at 34.

254. See Abu-Laban & Bakan, *supra* note 232, at 146–47.

255. Eghbariah, *supra* note 235, at 914–15, n. 107–08.

256. *Id.* at 914 (quoting AVI SHLAIM, *THREE WORLDS: MEMOIRS OF AN ARAB-JEW* 296 (2023)).



In this way, Zionism is white enough to be a racializing *and* colonial project:

Zionism proposes that all Jews in the world are one group based on hereditary descent alone, regardless of any personal or familial connection to the specific territory in question. It invests in Jewish nationality a certain property—including rights to land, citizenship, employment, life, and housing—that is based on the continuous and systematic dispossession of Palestinians, who are marked as nomadic and fungible “Arabs.”<sup>257</sup>

Such a marking renders Palestinians stateless, which not only cements their racialization as non-existent, non-white others that threaten the Zionist agenda,<sup>258</sup> but also paved the way for the violence that followed and the ongoing Zionist weaponization of antisemitism<sup>259</sup> to justify their actions on the world stage.<sup>260</sup>

With racialization comes racism. As a racialized people, Palestinians experience a “cultural racism” that builds on color racism “a set of antagonistic or demeaning stereotypes based on alleged or real cultural traits,” so that cultural racism against Palestinians is shaped by anti-Arab and anti-Muslim racism.<sup>261</sup> This is what academics Yasmeen Abu-Laban and Abigail B. Bakan call “systemic anti-Palestinian racism,” which is fundamentally coded by antisemitism.<sup>262</sup> That is, in conflating anti-Zionism with antisemitism, Zionists view Palestinians’ (and

257. Noura Erakat, Darryl Li, & John Reynolds, *Race, Palestine, and International Law*, 117 *AJIL UNBOUND* 77, 78, 80–81 (2023) (adding that U.N. Resolution 3379 recognized Zionism as a form of racism in 1975 despite the United States’ objection, but in 1991 the PLO agreed to repeal the resolution “as a precondition for entering the Oslo Peace Process”).

258. See Abu-Laban & Bakan, *supra* note 232, at 145.

259. For example, Israeli Holocaust and Genocide Studies Professor Raz Segal warns that the “blanket assertion by pro-Israel advocates” that Gaza solidarity encampments are antisemitic “is intended as a political cudgel,” yet “the weaponization of antisemitism intensifies the discrimination and exclusion against vulnerable communities in the U.S.—including Jews.” *How Weaponizing Antisemitism Puts Jews at Risk*, *TIME* (May 14, 2024, 6:57 AM EDT), <https://time.com/6977457/weaponizing-antisemitism/> [<https://perma.cc/M3ZS-UJV3>]. He argues that “many Jews feel more unsafe today because of the policies of the right-wing government of Prime Minister Benjamin Netanyahu and claims that Israel represents Jews anywhere.” *Id.* Furthermore, Israel’s weaponization of antisemitism draws on the International Holocaust Remembrance Alliance (IHRA)’s “deeply problematic ‘working definition of antisemitism.’” *Id.* The IHRA’s definition focuses on Israel and excludes white supremacists, which makes it a “particularly insidious weapon to target people whom white supremacists in the U.S. also single out: Muslims and Arabs.” *Id.*

260. See Abu-Laban & Bakan, *supra* note 232, at 147–48 (“The Israel/Palestine Racial Contract works to assign a common interest between Israel and its allies like the United States, while absenting the Palestinians as non-white, stateless, and subjects who should be repressed and their claims suppressed.”).

261. *Id.* at 143.

262. *Id.*; see also Abdallah Fayyad, *It’s not Islamophobia, it’s Anti-Palestinian Racism*, *VOX* (June 5, 2024, 6:30 AM EDT), <https://www.vox.com/policy/352663/anti-palestinian-racism-islamophobia-antisemitism> [<https://perma.cc/39ZW-MNDF>] (“Anti-Palestinian racism focuses specifically on Palestinians’ culture, heritage, and their movements for liberation, often manifesting through suppressing speech and activism related to the Palestinian cause.”).

frequently, Jewish academics' and activists')<sup>263</sup> criticism of and threats against what they claim to be the Jewish homeland as “anti-Jewish,” such that they must repress and suppress Palestinians in ways that are often Islamophobic (*see infra* Part C).<sup>264</sup> But antisemitism is trivialized when it is weaponized “to exploit Jewish suffering” in pursuit of the delegitimization of Palestinian human rights claims.<sup>265</sup> Indeed, Abu-Laban and Bakan crucially note that “[o]ne racialized group cannot be emancipated through the violent racialization of another.”<sup>266</sup>

With racialization comes the assertion of Palestinian Indigeneity. Diaspora Palestinian writer and researcher Jamal Nabulsi expresses that while Palestinian Indigeneity precedes Zionist colonialism, it “emerges in opposition” to it.<sup>267</sup> He elaborates that:

[Before] Zionist settler colonialism, Palestinian [I]ndigeneity was a given—it did not need to be articulated as it simply was. However, when the Zionist settler arrives on the shores of Palestine, making exclusive claims to the land, the articulation of a Palestinian [I]ndigeneity is then required to counter these claims.<sup>268</sup>

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263. *See, e.g.*, Natasha Lennard, *Meet the First Tenured Professor to Be Fired for Pro-Palestine Speech*, THE INTERCEPT (Sept. 26, 2024, 5:00 a.m.), <https://theintercept.com/2024/09/26/tenured-professor-fired-palestine-israel-zionism/> [<https://perma.cc/QDJ9-XZUV>] (explaining how Muhlenberg College, a U.S. institution, terminated Jewish tenured professor, Maura Finkelstein, for an anti-Zionist Instagram repost after a campaign called for her termination, “accusing her of ‘Jew hatred’”); Alasdair Soussi, *‘Not in my name’: The European Jews condemning Israel’s war on Gaza*, ALJAZEERA (Oct. 23, 2023), <https://www.aljazeera.com/features/2023/10/23/not-in-my-name-the-european-jews-condemning-israels-war-on-gaza> [<https://perma.cc/62P8-2A56>] (demonstrating how pro-Palestinian European and Israeli Jewish people face accusations of antisemitism or lying about their Jewish identities).

264. Aaron Winter, a Jewish op-ed writer, expressed how “[t]he targets of [rising racism and] hate have been migrants and Muslims – not only from the far right, which has also long targeted Jews and continues to be a threat, but also from wider mainstream politics and the media.” Aaron Winter, *Conflating Antisemitism and Anti-Zionism Emboldens the Far Right*, OPEN DEMOCRACY (Dec. 19, 2023, 11:21am), <https://www.opendemocracy.net/en/israel-palestine-gaza-antisemitism-anti-zionism-fears-far-right-aaron-winter/> [<https://perma.cc/V7NL-BK84>]. He recalls how, in November 2023, three Palestinian students in Vermont were shot for wearing keffiyehs, the traditional Palestinian scarf. *Id.* Winter adds that “when Palestinians and others protest what is occurring, they are accused of being antisemitic, even genocidal, themselves – because of the Hamas attack that they are accused of supporting, or the bad faith reading of ‘from the river to the sea’. This is despite the fact that Likud’s own original 1977 platform states ‘between the Sea and the Jordan there will only be Israeli sovereignty.’” *Id.*; RUTGERS UNI. L. SCH. CTR. FOR SEC., RACE & RTS., PRESUMPTIVELY ANTISEMITIC: ISLAMOPHOBIC TROPES IN THE PALESTINE-ISRAEL DISCOURSE 48–53 (2023) (examining how Islamophobia powers and maintains “spurious accusations of antisemitism” used by Israeli lobbyists and Zionists to quiet criticism of Israel).

265. Abu-Laban & Bakan, *supra* note 232, at 147.

266. *Id.*

267. Nabulsi, *supra* note 244, at 31.

268. *Id.* at 30–31 (elaborating that Lana Tatour “highlights the need to emphasize the political nature of Palestinian [I]ndigeneity and to reject the severely limiting definition of [I]ndigeneity in international law.”).

With Palestinian Indigeneity embodying the land of Palestine, Palestinian Indigeneity both challenges Zionist fragmentation *and* “articulates the power to reclaim all Palestinians as Indigenous to all of Palestine,” encompassing their right to remain and their right to return.<sup>269</sup> Because Indigeneity is necessarily “a political relationship to the structure of settler colonialism,” or put another way, because Indigeneity is articulated to counter and distinguish from settler colonialism, Israelis cannot claim Indigeneity.<sup>270</sup> Nabulsi is clear that the objective of Palestinian Indigenous sovereignty is the “decolonization of Palestine, not assimilation into an Israeli state imagined as liberal.”<sup>271</sup>

Yet, on November 29, 1947, the U.N.—with most colonial powers voting in favor<sup>272</sup>—passed Resolution 181 that partitioned the land of Palestine giving the Jewish community—30% of the land’s population—55% of Palestine.<sup>273</sup> Neither Indigenous Palestinians nor Zionists approved of the partition, resulting in Zionist paramilitaries using British colonial military methods to acquire Palestinian territory through the violent displacement of Indigenous Palestinians.<sup>274</sup> Without regard to the “inalienable Palestinian right to self-determination” or Palestinian existence, Zionists effectively replaced the British as colonial overseers of the land, unveiling the fallacy of the U.N.’s “formula for peace.”<sup>275</sup> But Israel as “the historic homeland of the Jewish people” meant that Zionists had “an exclusive right to national self-determination in it.”<sup>276</sup> TWAIL scholar and former UN official Ardi Imseis argues that Resolution 181 “introduced a rupture in the purportedly new international legal order” of justice and peace and cemented Palestine’s “ILS [international legal subalternity] condition in the U.N. system.”<sup>277</sup> In this way, the fate of Palestine embodied the relationship between empire and international law.

269. *Id.* at 26, 30 (drawing his suggestion from Indigenous theorizing, Palestinian thought, and state sovereignty).

270. *Id.* at 31–2.

271. *Id.* at 26.

272. See *United Nations General Assembly Resolution 181*, THE AVALON PROJECT, [https://avalon.law.yale.edu/20th\\_century/res181.asp](https://avalon.law.yale.edu/20th_century/res181.asp) [<https://perma.cc/CZ6N-3N46>] (last visited Aug 4, 2024) (countries in favor were, *inter alia*: Australia, Belgium, Byelorussian S.S.R., Canada, Denmark, France, Luxemburg, Netherlands, New Zealand, Norway, Sweden, Ukrainian S.S.R., Union of South Africa, U.S.A., and U.S.S.R.).

273. ERAKAT, *supra* note 70, at 46.

274. *Id.* at 46–50.

275. See Erakat, Reynolds, Esmeir, Falk, Imseis, Natarajan, Nesiiah, Nuseibah, & Shamas, *supra* note 36, at 108.

276. Reuters, *Israel Adopts Divisive Law that Declares only Jews Have the Right of Self-determination*, NBC NEWS (July 19, 2018, 1:05 AM EDT), <https://www.nbcnews.com/news/world/israel-adopts-divisive-law-declares-only-jews-have-right-self-n892636> [<https://perma.cc/CE56-PFCB>] (on the 70th anniversary of Israel’s creation, Israel passed a law declaring “that only Jews have the right of self-determination in the country” and removed Arabic as an official language).

277. Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine’s International Legal Subalternity*, 57 STAN. J. INT’L L. 1, 4, 12–13 (2021) (terming “international legal subalternity (ILS), the defining feature of which is that the promise of justice

In *al-Nakba* (the “Catastrophe”), what Palestinians counter-narratively call what occurred in 1948, Israel destroyed Palestinian villages and displaced more than 750,000 Palestinians from their native land.<sup>278</sup> Then controlling 77% of Palestine, everything but the West Bank, Gaza, and East Jerusalem, Israel “declared its independence” in 1948 and became a U.N. member state in 1949.<sup>279</sup> Ignoring Israel’s brutality and redefined colonial order, which included “pit[ting Arab] countries’ national security apparatus against” Mizrahi Jewish communities<sup>280</sup> and forcing them to seek safety in Zionist-controlled Palestine,<sup>281</sup> the U.N. legitimized Israel’s sovereignty and statehood while delegitimizing Palestine’s existence.<sup>282</sup> A CRT-TWAIL framing that is attentive to anti-Palestinian racism is useful for understanding how post-1948 dispossession, occupation, and repression of Palestinian rights are interlocking products of a legally legitimated and ongoing colonizing project and racist ideology.<sup>283</sup>

Following *al-Nakba*, Israel quickly established an “ethno-religious hierarchy” with a civil law framework that legalized the dispossession and removal of Palestinians, and the transformation of their land into “Israeli land.”<sup>284</sup> For example, the Absentees’ Property Law of 1950 “rendered absentee property eligible for confiscation and possession by a custodian of state land.”<sup>285</sup> The Law of Return (1950) and the Nationality Law (1952) nationalized the Jewish identity while denationalizing Palestinians, further contributing to Palestinian forced exile and the refugee crisis.<sup>286</sup> With “a dispossessed European Jewish population” legally welcomed and encouraged to settle on Palestinian land also came the “‘whitening’

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through international law is repeatedly proffered to a global subaltern class—here represented by the Palestinian people—under a cloak of political legitimacy furnished by the international community through the U.N., but its realization interminably withheld. This withholding is performed through the application of what might be called an international rule by law—as distinct from the rule of law—characterized by the cynical use, abuse, or selective application of international legal norms under a claim of democratic rights-based liberalism, but with the effect of perpetuating inequity between hegemonic and subaltern actors on the system.”)

278. See Josep Lobera & Cristóbal Torres-Albero, *Functions of Collective Narratives in a Terrorist Conflict. The Israeli-Palestinian Case*, 64 DADOS REV. CIÈNC. SOC. 1, 13 (2021) (internal citations omitted); see also Eghbariah, *supra* note 235, at 926–28.

279. ERAKAT, *supra* note 70, at 52; Eghbariah, *supra* note 235, at 930 (internal citations omitted).

280. Jewish Arab author and journalist Massoud Hayoun explains that “Zionist agents were engaged in a multipronged effort to inspire Jewish Arabs to move to Palestine, sometimes even by firebombing Arab capitals,” thus “provok[ing]” “the criminalization of Jewish Arab communities” who became suspect in Arab countries. *Supra* note 237 at 175.

281. For example, the bombing of Jewish sites in Baghdad in 1950—what would be regarded as anti-semitic hate crimes—is now attributed to Zionist agents. But then, it “provoke[d] Jewish Iraqi fears about remaining in their ancestral homeland” when they did not know who was desecrating their holy sites. *Id.* at 186–87.

282. ERAKAT, *supra* note 70, at 52–54.

283. Abu-Laban & Bakan, *supra* note 232, at 143.

284. ERAKAT, *supra* note 70, at 55, 58–59.

285. *Id.* at 55.

286. *Id.* at 58–59.

[of] power and privilege,”<sup>287</sup> rendering inferior the Palestinian *and* Mizrahi Jewish populations.<sup>288</sup> In other words, Israel continued its ethnic cleansing campaign through a forced ethno-religious homogenization of Palestinian land, disguised as part of the project to create a homeland for the Jewish people. While international law does not recognize ethnic cleansing as an independent crime, that Israel designed purposeful policies,<sup>289</sup> such as those of the 1950s, to “remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas” demonstrates an ethnic cleansing campaign.<sup>290</sup>

### C. Occupation Law

What has occurred during and since 1967, however, is where a CRT-TWAIL examination has the greatest utility. The inadequacy and permissibility of

287. Abu-Laban & Bakan, *supra* note 232, at 147.

288. The whiteness of Zionism also stratifies Arab, Black, and Asian Jewish people. See HAYOUN, *supra* note 237, at 215–17 (Jewish Arabs have fewer economic and educational opportunities, are profiled by the police, and even attacked, such that “[y]ou would be hard-pressed to find a more powerful illustration of the absurdity of both the concept of phenotypic race and the murderous anti-Palestinian racism not just perpetrated by individual Israelis but fostered by Israel’s administration.”); ERAKAT, *supra* note 70, at 127 (“Having adopted a racist approach towards non-Jews, Zionism soon came to draw a color-line or a racial line among the Jews themselves.”) (quoting Fayeze Sayegh, founder of Palestine Research Center).

289. *Amid International Inaction, Israel’s Systematic ‘Demographic Engineering’ Thwarting Palestinians’ Ability to Pursue Justice, Speakers Tell International Conference*, UN (July 1, 2021), <https://press.un.org/en/2021/gapal1439.doc.htm> [<https://perma.cc/MBG3-9E3A>] (“Home demolitions, evictions and the denial of citizenship are just some of the ways Israel has pursued its systematic policy of ‘demographic engineering’ over 54 years. . . .”). Settler violence is also a *de facto* ethnic cleansing policy. Alice Panepinto & Triestino Mariniello, *Settler violence: Israel’s ethnic cleansing plan for the West Bank*, AL JAZEERA (Feb. 26, 2024), <https://www.aljazeera.com/opinions/2024/2/26/settler-violence-israels-ethnic-cleansing-plan-for-the-west-bank> [<https://perma.cc/8XBF-22L8>] (“Supported by the Israeli security forces and aided and abetted by the government, settler violence is a central part of the Israeli state’s policy and plan to ethnically cleanse the occupied Palestinian territory in order to establish full sovereignty over it and enable settlement expansion – despite settlements being illegal under international law.”).

290. *Ethnic Cleansing*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocide-prevention/definition> [<https://perma.cc/T5KS-JHKP>] (last visited Oct. 20, 2024). *But see* Eghbariah, *supra* note 235, at 978. Eghbariah argues that the *Nakba* should be its own legal concept because ethnic cleansing, occupation, apartheid, and genocide do not properly encapsulate “the question of Palestine.” He writes:

Also, ‘ethnic cleansing’ is an accurate term only insofar as the positionality of the *cleanser*—the one performing the act of ‘cleansing’—is concerned. It does not tell us much about what happens to those *cleansed* or what structures of violence they become trapped in. Inversely, as a conceptual term, ‘ethnic cleansing’ does not tell us much about what happens to those who are *not* cleansed, or perhaps not cleansed *yet*. Indeed, the victims and potential victims of ethnic cleansing are reduced to the fantasies of their victimizers. Once subjected to ethnic cleansing, they disappear beyond the purview of the paradigm; they cease to exist in time or space and simply become a ‘refugee problem.’

*Id.*

international occupation law (as well as other international law norms like self-determination, state sovereignty, and self-defense),<sup>291</sup> and Israeli narratives of security and self-defense, converged to render Palestinians a racialized and sovereign-less people—but whose revolutionary spirit is not extinguished.<sup>292</sup> In *al-Naksah* (“the Setback”), what Palestinians counter-narratively call what occurred in 1967, Israel invoked occupation law and extended its military jurisdiction into East Jerusalem (an area that is ethno-religiously symbolic for both Jewish people and Muslims),<sup>293</sup> the West Bank, and Gaza (as well as Egypt’s Sinai Peninsula and Syria’s Golan Heights).<sup>294</sup> Such occupation law renders Palestinians “foreign civilians” in Israel,<sup>295</sup> or more accurately, “undocumented immigrants on their own ancestral land.”<sup>296</sup> The foreign entity of Israel justified *al-Naksah*, ironically but in true colonial fashion, as an act of necessary self-defense against “brown Arab territorial hostility” and security protection from Palestinian resistance, both of which occupation law legitimizes.<sup>297</sup>

The 1907 Hague Regulations and the Fourth Geneva Convention express that occupation law is upheld by two principles: temporariness and non-sovereignty. The occupying power is limited to being the “*de facto* administrative authority . . . for . . . the protected population . . . [but] is prohibited from altering the status of the occupied territory.”<sup>298</sup> There is no established time limit for an occupation’s duration.<sup>299</sup> The occupying power is not entitled, under any circumstances, to territorial sovereignty.<sup>300</sup> However, because IHL allows for military occupation, “it necessarily follows that occupation as such does not *ipso facto* represent an illegal

291. For more U.N. legitimacy of Israel’s militarized settler-colonial state and U.S. intervention in the “Middle East,” a European-invented geographic and ideological region, *see, e.g.*, S.C. Res. 242 (Nov. 22, 1967), 338 (Oct. 22, 1973); G.A. Res. 3236 (Nov. 22, 1974), 3237 (Nov. 22, 1974), 3379 (Nov. 10, 1975) (failed to pass); Geneva Peace Conference of 1973; G.A. Dec. 2625, U.N. Doc. A/8018 (Oct. 24, 1970). *See* ERAKAT, *supra* note 70, at 113; Nick Danforth, *How the Middle East was Invented*, WASH. POST (May 19, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/05/19/the-modern-middle-east-is-actually-only-100-years-old/> [<https://perma.cc/9G35-GX3N>].

292. ERAKAT, *supra* note 70, at 220, 228. *See* SAID, *supra* note 104, at 251 (“Like Zionism itself, post-1948 Palestinian nationalism has had to achieve formal and ideological prominence well before any actual land had been gained. Strange nationalisms these, conducted for years in exile and alienation, for years protective, stubborn, passionately believed in. The major difference is that Zionism was a hothouse flower grown from European nationalism, anti-Semitism, and colonialism, while Palestinian nationalism, derived from the great wave of Arab and Islamic anti-colonial sentiment, has since 1967, though tinged with retrogressive religious sentiment, been located within the mainstream of secular post-imperialist thought.”).

293. Moshe Maoz, *The Zionist/Jewish and Palestinian/Arab National Movements: The Question of Legitimacy—a Comparative Observation*, 18 ISRAEL STUD. 30, 37 (2013).

294. ERAKAT, *supra* note 70, at 63, 65.

295. HAJJAR, *supra* note 233, at 2.

296. DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at 58.

297. ERAKAT, *supra* note 70, at 63, 67–68.

298. Imseis, *Prolonged Occupation*, *supra* note 98, at 36–38.

299. *Id.* at 37.

300. *Id.* at 38.

state of affairs.”<sup>301</sup> Imseis’ analysis of prolonged occupation is instrumental in proposing an alternative to exploring the illegality of prolonged occupation. He argues that prolonged occupation collapses the distinction between *jus in bello* (the law governing how force is used in armed conflict) and *jus ad bellum* (the law governing the right to resort to force).<sup>302</sup> Since 1967, Israel has altered the status of the Occupied Palestinian Territories (“OPT”) and denied occupied Palestinians self-determination by transferring Israelis into the OPT to fulfill Israel’s public goal of annexation.<sup>303</sup> As Imseis evaluates, such violation of “the *in bello* law can result in *de facto* annexation of an occupied territory which, in turn, constitutes a violation of the *ad bellum* principle prohibiting the acquisition of territory through the use of force.”<sup>304</sup> Otherwise, IHL does not identify occupations as “lawful” or “unlawful” in accordance with the “strict separation of *jus in bello* from *jus ad bellum*.”<sup>305</sup> Arguably, IHL’s failure to name occupation as unlawful is either, at best, an oversight or, at worst, intentional.

Occupation law is supposed to be an inherently short-term vehicle of IHL that purports to “facilitate [a] transition from wartime to peacetime.”<sup>306</sup> In other words, occupation is akin to a ceasefire.<sup>307</sup> But Noura Erakat explains that despite

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301. *Id.* at 41.

302. *Id.* at 47. He contextualizes:

The conventional wisdom requires the distinction between the *ad bellum* and *in bello* law on the theory that to collapse them would frustrate the object and purpose of IHL, which is to limit the means and methods of armed conflict and to protect persons who are not, or are no longer, directly participating in such conflict. Because of its humanitarian purpose, IHL and its application must remain agnostic as to who is legally to blame for the commencement of armed conflict under the *ad bellum* law. If it were otherwise, so goes the thinking, the incentive of parties to armed conflict to abide by the *in bello* law would be reduced under the weight of competing accusations of aggressive war, thereby resulting in greater harm during the course of war to persons otherwise entitled to be treated humanely in line with the *in bello* rules.

But prolonged occupation challenges this rationale. *Id.* at 35.

303. *Id.* at 43.

304. *Id.* at 42, 45 (“It seems to me that the yardstick of the *jus cogens* norms requiring respect for the right of peoples to self-determination, the inadmissibility of the acquisition of territory through force, and the obligation to refrain from imposing regimes of alien subjugation, domination and exploitation is key in helping us answer this question. These norms underpin the modern law of occupation, namely that occupation represents a temporary condition, and that the occupying power does not, by virtue of the occupation, possess any right of sovereignty over the territory occupied. Therefore, where the facts of any prolonged occupation establish that an occupying power is violating its obligations under IHL with the effect of systematically violating its obligation to respect the right of the occupied population to self-determination or engaging in acts of annexation of the territory in question, a strong case can be made that such an occupation must be regarded as illegal. If I am right in this assessment, it affirms that situations of prolonged occupation may portend a collapse of the fundamental distinction between the *jus in bello* and the *jus ad bellum*, hitherto a largely unquestioned proposition of general international law.”).

305. Hindi, *supra* note 97, at 21.

306. ERAKAT, *supra* note 70, at 69–70.

307. HAJJAR, *supra* note 233, at 2.

“occupation law requir[ing] maintaining the status quo ante until the establishment of peace enables the reversion of a displaced sovereign’s authority, Israel insist[s] that there [i]s no sovereign to restore in the West Bank and Gaza and that it would apply the humanitarian provisions of occupation law” discretionarily, legally making Palestinians in the OPT neither citizens of Israel nor sovereigns under occupation.<sup>308</sup> Although occupation law is applied in the West Bank and Gaza, the OPT are the West Bank, Gaza, *and* East Jerusalem and the Golan Heights.<sup>309</sup>

Upon further CRT-TWAIL examination, occupation law cloaks colonization—no longer overtly acceptable—in international legality under different terminology.<sup>310</sup> Lisa Hajjar, an expert in the sociology of law and conflict, explains that because “military rule over a ‘foreign’ population is legally unacceptable,” occupation law can permit annexation under the guise of temporariness.<sup>311</sup> However, the way that military occupation is legally upheld “perpetuates conflict because it negates the occupied population’s right to self-determination.”<sup>312</sup> The weakness of occupation law, therefore, allows Israel to indefinitely continue the “whitening,” theft, and erasure of Palestinian land by encouraging “civilian settlement under the auspices of temporality.”<sup>313</sup> Israel treats its civilians as “protected persons,” despite occupation law excluding the occupying power’s nationals from such a category.<sup>314</sup> But until Israel enters a “permanent peace agreement”—which begs the question of peaceful for whom—the international system permits “temporariness” and racial vilification of prolongedly occupied Palestinians from

308. ERAKAT, *supra* note 70, at 63, 179 (analyzing “conflict,” writing “Israel asserted its right to use lethal force but refused to classify the conflict as war, neither a civil war (‘non-international armed conflict,’ NIAC) nor a war against a liberation movement (‘international armed conflict,’ IAC). States, national liberation movements, and regional organizations had contemplated both scenarios during the Diplomatic Conferences held between 1974 and 1977, and developed legal frameworks to regulate them, as captured in Additional Protocols I and II to the Geneva Conventions. Israel never ratified those treaties. Recognizing the confrontation as a NIAC or an IAC would recognize the Palestinian use of force as legitimate if deployed within the bounds of applicable law. So, instead, Israel claimed it could wage almost war against a population (Palestinians) that had no legal right to fight back. Israel refused to recognize its confrontation with Palestinians as a civil war, or NIAC, because that would unravel the false partition separating Israel from the Occupied Territories. Such recognition would acknowledge Israel’s maintenance of a singular, discriminatory government, thus exposing it to more pointed claims of pursuing a policy of creeping annexation and overseeing an apartheid regime. While Israel has denied that Palestinians are part of Israel’s civilian jurisdiction, it simultaneously continues to insist they are not sufficiently outside it to be recognized as sovereign and independent.”).

309. *Quick Facts: Israeli Annexation of Occupied Land & International Law?*, INST. FOR MIDDLE EAST UNDERSTANDING (June 22, 2020), <https://imeu.org/article/quick-facts-israeli-annexation-of-occupied-land-international-law> [<https://perma.cc/4N2V-CMLJ>].

310. See HAJJAR, *supra* note 233, at 2 (describing that through a military occupation, “the Israeli state has never claimed or sought the right to represent Palestinians in the West Bank and Gaza, only the right to rule them”); ERAKAT, *supra* note 70, at 219 (“[C]ontemporary colonialism works *through* rather than *entirely against* freedom.”) (quoting Glenn Coulthard).

311. HAJJAR, *supra* note 233, at 2.

312. *Id.*

313. ERAKAT, *supra* note 70, at 84.

314. *Id.* at 86.



whom Israeli settlers must be protected.<sup>315</sup> Indeed, IHL does not obligate an end to occupation.<sup>316</sup> Kattan explains that "international law gave the Zionists the legitimacy they craved, as manifested in the Balfour Declaration, the British Mandate of Palestine and the UN Partition Plan,"<sup>317</sup> but occupation law must also be added to this list.

A "peace" agreement between the PLO<sup>318</sup> and Israel eventually came in the Oslo Accords of 1993. Zinaida Miller writes that the Accords redesigned the Israeli-Palestinian situation "into a series of problems to be negotiated and resolved in an international arena, mediated and managed by external actors."<sup>319</sup> Here is then another case in which foreign actors dictate how progress and human rights must take shape, even when they had theretofore failed to act on behalf of the colonized. Because the Accords effectively "ended the intifada, which embodied not terrorism or violence but the Palestinian right to resist" and right to self-determination, in exchange for Israel's mere recognition of the PLO, Edward Said basically described the agreement as a sham.<sup>320</sup> That is, the PLO acquired nothing

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315. *Id.* at 64.

316. Hindi, *supra* note 97, at 33. He contends instead that the obligation to end occupation is "commonsensical and implied through other conventional and customary IHL rules [. . . like] peremptory norms and the obligations of Israel and third States upon violation of such norms." *Id.* Hindi explores how Israel's occupation is unlawful because it seriously breaches several peremptory norms, such as the right to self-determination and the prohibitions of annexation, racial discrimination, and apartheid. *Id.*

317. KATTAN, *supra* note 238, at 3.

318. The Palestinian Liberation Organization has been the national representative of the Palestinian people since 1964, and it runs the Palestinian National Authority, which is the semi-autonomous government established in 1993 that manages the Palestinian territories. Zack Beauchamp, *What is the Palestinian Liberation Organization? How about Fatah and the Palestinian Authority?*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/2018/11/20/18080054/palestinian-liberation-organization-israel-conflict> [<https://perma.cc/2PBU-QE2P>].

319. Zinaida Miller, *Perils of Parity: Palestine's Permanent Transition*, 47 CORNELL INT'L L.J. 331, 334, 338 (2014) (elaborating that "[o]ne could tell a story in which Oslo represented nothing more than the continuation of an unequal regime premised on Israeli territorial expansion and control of Palestinian life and in which occupation was simply repackaged and resold under other names and with other tools. One could also tell a story of Oslo as a dramatic break in a decades-long conflict that would have found a peaceful resolution had one or both sides, or elements thereof, not stood in its way. While each of these stories has elements of truth, neither accounts for the significant influence that international actors and ideas have had. Both suggest that the essence of the story is occupation, whether continuing or ending. Yet the international role in governing Palestine suggests that while occupation remains essential for understanding the situation, it has been displaced as the sole interpretive framework and basis for governance. Instead, a new regime defined by a commitment to negotiations between ostensibly equal partners, state-building based upon a specific version of economic development, and gradualist change has taken hold. Its greatest effect may have been not ending or continuing the occupation but changing the terms of the debate. The Oslo regime intimated that occupation would end while shifting attention from the political project of ending occupation.") [hereinafter Miller, *Perils of Parity*].

320. Edward Said, *The Morning After*, 15 LONDON REV. BOOKS, 21 Oct. 1993, <https://www.lrb.co.uk/the-paper/v15/n20/edward-said/the-morning-after> [<https://perma.cc/EH8V-2MFH>] ("So first of all let us call the agreement by its real name: an instrument of Palestinian surrender, a Palestinian Versailles.").

but “ghettoized sovereignty across the OPT without any guarantee of independence” or clarity on when, how, and if Israel would withdraw from the OPT.<sup>321</sup> The Oslo Accords divided the West Bank into three jurisdictional areas. In Area A, the Palestinian Authority (“PA”) has all civil and security authority; in Area B, civil power was transferred to the PA, but security authority was left to Israel; and in Area C, which makes up 60% of the West Bank, Israel has full civil and security authority.<sup>322</sup> The Accords, therefore, facilitated Israel’s ongoing settler-colonial expansion, which entered a *de jure* apartheid regime “under the veneer of peace-making.”<sup>323</sup>

Under the Rome Statute and Apartheid Convention, acts that amount to apartheid “must be committed to (create or) maintain an ‘institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.’”<sup>324</sup> Adherents to the dominant narrative of Israel’s “right to existence” do not see how Israel’s development of Jewish settlements in the West Bank and the construction

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321. ERAKAT, *supra* note 70, at 160–61, 165.

322. *Id.*; Miller, *Perils of Parity*, *supra* note 319, at 349–56.

323. ERAKAT, *supra* note 70, at 168, 210, 213.

324. AMNESTY INT’L, ISRAEL’S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY 47–48 (2022). Article II of the Apartheid Convention provides that “... the term ‘the crime of apartheid,’ which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them...” The inhumane acts are: “(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: (i) By murder of members of a racial group or groups; (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.” Conversely, Article 7 of the Rome Statute explains that apartheid is committed when “inhumane acts of a character similar to those referred to in paragraph 1” (acts that constitute crimes against humanity) are committed “in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”

of the wall for “security” and relinquishment but complete control of Gaza, declared a “hostile entity” by Israel,<sup>325</sup> is apartheid. But it is precisely that—as Palestinians are racialized as a threat to Israel, the control, dispossession, fragmentation, and segregation to which they are subjected amounts to an apartheid system.<sup>326</sup> Apartheid ensures that Israel can exist while systematically denying Palestine’s right to exist.<sup>327</sup> Notably, the U.N. and INGOs like Amnesty International have in recent years labeled Palestine-Israel an apartheid regime, but their delay is consistent with their historic approach to Israel’s practices<sup>328</sup>—assuaging periods of outrage without taking concrete action. A case in point is the ongoing expansion of Israeli settlements in the West Bank,<sup>329</sup> despite the 2016 passage of U.N. Security Resolution 2334 that “unequivocally condemned” such settlements.<sup>330</sup> As Miller writes, the “vocabulary of temporary governance” of occupation law and the Oslo Accords strategically “prolong[s] a situation that permits exploiting territory . . . offer[ing] asymmetrical entitlements to the stronger party despite formal protections or rights accorded to the weaker.”<sup>331</sup> The case of Palestine evidences IHL’s failure to fulfill its obligations. Or perhaps CRT-TWAIL demonstrates that IHL functions as intended: with new temporal vocabularies, it reinforces racial empire in localized ways by supporting or authorizing colonial endeavors.

Since 1993 and the “War on Terror,” Palestinian racialization has taken yet another shape, rooted in dehumanization and even Islamophobia. Global powers depict Palestinian resistance to decades of militarized ethnic cleansing as “backwards,” “uncivilized,” and “in absolute contradistinction to so-called Western

325. ERAKAT, *supra* note 70, at 194–96 (“Upon its unilateral disengagement, Israel argued that it no longer occupied the territory and, therefore, could no longer conduct police operations there, making necessary the use of military force as a measure of first resort: in effect, Israel declared war on Gaza.”).

326. AMNESTY INT’L, *supra* note 324, at 61.

327. For example, Israel’s separation policy of “isolat[ing] Palestinians living in the Gaza Strip from the rest of the OPT and Israel . . . ‘helps prevent the establishment of a Palestinian state.’” *Id.* at 80.

328. *See id.*; ERAKAT, *supra* note 70, at 217 (explaining that in 2017, the U.N. Economic and Social Commission for Western Asia released a report that declared that Israel practices apartheid towards *all* Palestinians, but Israel and the United States forced the U.N. to shelve the report, which was still leaked); Eghbariah, *supra* note 235, at 946–47 (lamenting that Amnesty’s report does not connect apartheid with colonialism or self-determination, and “[a]n understanding of Israeli apartheid has inescapably remained an *analogy*, one that is rooted in and confused with the manifestations of apartheid in South Africa”) (emphasis in original).

329. *Israel Advances Plans for 3,000 New Homes in West Bank Settlements*, BBC (Oct. 27, 2021), <https://www.bbc.com/news/world-middle-east-59062909> [<https://perma.cc/A8KS-TDLW>] (“More than 600,000 Jews live in 145 settlements built since Israel’s occupation of the West Bank and East Jerusalem in the 1967 Middle East war. Most of the international community considers the settlements illegal under international law, though Israel disputes this.”).

330. ERAKAT, *supra* note 70, at 1.

331. Miller, *Perils of Parity*, *supra* note 319, at 407.

civilization.”<sup>332</sup> Placing Palestinian “violence at the forefront” by equating resistance with terrorism intentionally minimizes and obscures the “Palestinian struggle for freedom and self-determination,” which are actually the central issues at play.<sup>333</sup> With the rise of Hamas (*Harakat al Muqawama al Islamiyya - Islamic Resistance Movement*) as the governing political party in Gaza which has not hesitated to use armed struggle,<sup>334</sup> Israel and Western powers have conflated other forms of Palestinian resistance with Hamas and disregarded Hamas’ political standing.<sup>335</sup> Armed resistance is a legitimate revolutionary tactic when employed by white people but deemed terroristic when employed by Muslim Arabs.<sup>336</sup> The irony of force is that Israeli officials helped create Hamas to act as a “counterweight” to the PLO’s leftists and secularists<sup>337</sup> and thus “weaken Palestinian hope for statehood.”<sup>338</sup> That Hamas exists (for there would be no Hamas if there were no Israel) shows how Israel has sought denial of Palestine’s existence and justification for its violence.

Here, a CRT-TWAIL understanding of the Zionist narratives of security and self-defense, not as necessary to combat antisemitism (which is of course a global

332. Amjad Iraqi, Tamara Ben-Halim, Jamil Hilal, Refqa Abu-Remaileh, & Samar Batrawi, *What Are the Elements of a Strategic Palestinian Narrative and Discourse?*, AL-SHABAKA POL’Y CIRCLE 3 (2019).

333. DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at 8.

334. See ERAKAT, *supra* note 70, at 140–43, 196.

335. *Id.* at 202.

336. See, e.g., Patrick J. Kiger, *7 Events that Enraged Colonists and led to the American Revolution*, HISTORY, <https://www.history.com/news/american-revolution-causes> [https://perma.cc/E3BD-CK83] (updated Sept. 5, 2023) (“Colonists didn’t just take up arms against the British out of the blue. A series of events escalated tensions that culminated in [the United States’] war for independence.”); Samya Kullab, *Chaos in Russia is Morale Booster for Ukraine as it Pushes on with Early Stages of Counteroffensive*, AP (June 26, 2023, 1:18 AM EDT), <https://apnews.com/article/russia-ukraine-war-morale-7cd580835746a4d0c66edf662e4faa20> [https://perma.cc/4X93-SD2Z] (“The armed rebellion against the Russian military may have been over in less than 24 hours, but the disarray within the enemy’s ranks was an unexpected gift and timely morale booster for Ukrainian troops.”); see also Caroline Mala Corbin, *Terrorists are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017).

337. Mehdi Hasan & Dian Sayedahmed, *Blowback: How Israel went from Helping Create Hamas to Bombing it*, INTERCEPT (Feb. 19, 2018, 7:00 a.m.), <https://theintercept.com/2018/02/19/hamas-israel-palestine-conflict/> [https://perma.cc/AZ9T-92QN].

338. DEMOCRACY NOW!, “*Divide and Rule*”: *How Israel Helped Start Hamas to Weaken Palestinian Hopes for Statehood* (Oct. 20, 2023), [https://www.democracynow.org/2023/10/20/divide\\_and\\_rule\\_how\\_israel\\_helped](https://www.democracynow.org/2023/10/20/divide_and_rule_how_israel_helped) [https://perma.cc/UJG9-4R7R] (adding that “[s]uccessive Israeli governments have linked Palestinian resistance generally, and Hamas specifically, to 9/11 and to terrorism, and has used that link in order to reinforce and reentrench its occupation. What we have to understand here is that this isn’t an effort to try to quell, to destroy Hamas specifically. This is an effort to pursue an ethnic cleansing campaign in the Gaza Strip and beyond the Gaza Strip, as we see the violence rising in the West Bank. The effort to link Hamas’s attack to 9/11 is really to give cover to pursue genocidal tendencies that the Israeli political establishment has articulated long before October 7th.”).

problem),<sup>339</sup> but as tools that reflect a global racial order, is highly instructive.<sup>340</sup> An “alibi for domination,” Israel’s purported need for extreme security “to prevent terrorism”<sup>341</sup> renders all Palestinians suspect and subject to the possibility of legalized lethal force as a first resort.<sup>342</sup> Israel employs a propaganda policy known as *hasbara* to paint a picture in the international arena that “Israel has the right to defend itself” (but *ipso facto* Palestine does not), thereby normalizing its illegal occupation, equating any criticism of Israel with antisemitism, and painting its military violence as a reaction rather than as the instigation.<sup>343</sup> Western material and rhetorical support for Israel’s policy<sup>344</sup> supports Anghie’s theory that the “War on Terror” extends from international law’s civilizing mission, wherein Israel must be saved from the “typical Middle Eastern aggressor” or “Islamic extremist.”<sup>345</sup> This Zionist narrative explains how “ Hamas rockets” are decontextualized—from Hamas’ Israeli origin and resistance against occupation—and recontextualized as blanket “brown terror” against, not a military superpower, but a settler colony symbolic of “exceptional[ized] suffering.”<sup>346</sup> Accordingly, an

339. See Peter Gottschalk, *Hate Crimes Associated with Both Islamophobia and anti-Semitism have a Long History in America’s Past*, CONVERSATION (June 3, 2019, 8:39am EDT), <https://theconversation.com/hate-crimes-associated-with-both-islamophobia-and-anti-semitism-have-a-long-history-in-americas-past-116255> [<https://perma.cc/S3GA-XX37>].

340. See Shahd Hammouri, *Defense or Domination: The Categories of Israel’s Occupation*, CRIT. LEG. THINKING (May 18, 2021), <https://criticallegalthinking.com/2021/05/18/defense-or-domination-the-categories-of-israels-occupation/> [<https://perma.cc/EE5F-B4LG>] (expressing that the use of “self-defense” both “presumes the existence of a legitimate interest to protect [and] that the parties are roughly on equal military strength,” while “[t]he use of . . . terrorist to describe Hamas or other actors in Palestinian resistance is a classic example of de-territorialisation . . . willfully placing a given subject under the wrong category[ such that t]he term terrorist is *de facto* interlinked with the term enemy.”).

341. Jean-Pierre, *Palestinian Nationalism and Israeli Society*, 17 J. PALESTINE STUD. 199, 199 (1987).

342. ERAKAT, *supra* note 70, at 178.

343. Tanzil Chowdhury, *‘Hasbara’: an Exercise in the Impossible*, OPEN DEMOCRACY (Aug. 29, 2014), <https://www.opendemocracy.net/en/north-africa-west-asia/hasbara-exercise-in-impossible/> [<https://perma.cc/3MQQ-WPLB>].

344. See, e.g., Matt Wade, *Which side? Countries that back Israel – and those that oppose it*, SYDNEY MORNING HERALD (Oct. 11, 2023, 8:00pm), <https://www.smh.com.au/world/middle-east/which-side-countries-that-back-israel-and-those-that-oppose-it-20231011-p5ebiz.html> [<https://perma.cc/ZL8W-WJJ8>].

345. I am not attributing the quotes to the cited sources but rather repeating the dominant narrative. Anghie, *supra* note 52, at 750 (describing how the War on Terror is an “imperial venture”); see ERAKAT, *supra* note 70, at 193 (“Had the United States maintained its opposition to [Israel’s] targeted killings and to the framework of ‘armed conflict short of war,’ Israel’s actions might have remained somewhere between a controversial proposition and a violation of international law. However, because of diminishing U.S. protest, which culminated in U.S. adoption of that assassination policy, Israel’s violations steadily escaped the zone of brazen violations and moved into the scope of legitimacy. Assassination shifted from being the policy of one rogue state to being a policy of targeted killing by the world’s superpower in what it called the Global War on Terror.”).

346. I place Hamas rockets and brown terror in quotes to exemplify the dominant narrative that is often anti-Muslim, anti-Arab, and anti-Palestinian. Chowdhury, *supra* note 343.

uncritical description of Palestine-Israel as a “race-neutral battle over native land” is no longer tolerable.

#### D. Summarizing a CRT-TWAIL Application for Palestine

In April 2022 and April 2023, during the Muslim holy month of Ramadan, Israeli forces violently raided the Al-Aqsa Mosque in occupied East Jerusalem and arrested and wounded hundreds of Palestinian worshippers.<sup>347</sup> Israel also bombed Gaza, damaging several homes in a refugee camp in April 2022,<sup>348</sup> and in May 2023, after the death in Israeli custody of notable Palestinian prisoner Khader Adnan “following an 87-day hunger strike.”<sup>349</sup> Major Western news sites once again characterized this violence as “clashes”<sup>350</sup> as part of a “conflict,” which obscures the historical power imbalance and ongoing nature of the *Nakba*<sup>351</sup> that Palestine faces. Today, the Zionist project is comprised of Israel’s continuous denial of Indigenous Palestinian belonging and right of return, increasing development of illegal Jewish settlements in the West Bank leading to noncontiguous Palestinian landmasses, construction of a separation barrier, restriction on Palestinian movement, and creation of an “open-air prison” in Gaza.<sup>352</sup> Since Hamas resisted

347. Dalia Hatuqa & Alia Chughtai, *Timeline: Al-Aqsa Raids, Closures and Restrictions*, AL JAZEERA (Apr. 20, 2022), <https://www.aljazeera.com/news/2022/4/20/timeline-raids-closures-and-restrictions-on-al-aqsa> [<https://perma.cc/DB7D-9YY2>; *Israeli Forces Carry out Violent raid at Al-Aqsa Mosque*, AL JAZEERA (Apr. 5, 2023), <https://www.aljazeera.com/gallery/2023/4/5/israeli-forces-carry-out-violent-raid-at-al-aqsa-mosque> [<https://perma.cc/269U-YJ38>].

348. *Israeli Fighter Jets Attack Gaza for Second Time in a Week*, AL JAZEERA (Apr. 21, 2022), <https://www.aljazeera.com/news/2022/4/21/israel-palestine-conflict-israeli-warplanes-attack-gaza> [<https://perma.cc/A9L7-BK6P>].

349. *Israel bombs Gaza as Tensions Rise over Death of Khader Adnan*, AL JAZEERA (May 2, 2023), <https://www.aljazeera.com/news/2023/5/2/israel-bombs-gaza-as-tensions-rise-over-death-of-khader-adnan> [<https://perma.cc/6PQJ-LCKD>].

350. See, e.g., Associated Press, *Clashes Erupt Again Near the Al-Aqsa Mosque in Jerusalem*, NPR, <https://www.npr.org/2022/04/17/1093233899/jerusalem-violence-al-aqsa-mosque> [<https://perma.cc/N9FR-F43X>] (updated Apr. 17, 2022, 7:16 PM ET); *New Clashes at Jerusalem’s Al-Aqsa Mosque Compound*, FRANCE 24 (Apr. 22, 2022, 8:26 AM), <https://www.france24.com/en/live-news/20220422-new-clashes-at-jerusalem-s-al-aqsa-mosque-compound> [<https://perma.cc/B2CA-Q4ZC>]; Reuters, *Israeli War Planes Strike Gaza After Rocket Attack*, U.S. NEWS (Apr. 20, 2022, 9:09 p.m.), <https://www.usnews.com/news/world/articles/2022-04-20/israeli-war-planes-strike-gaza-after-rocket-attack> [<https://perma.cc/SC3L-ND8F>]; *Clashes erupt inside al-Aqsa mosque and holy site in Jerusalem*, CNN (Apr. 5, 2023), <https://www.cnn.com/videos/world/2023/04/05/exp-hadas-gold-al-aqsa-clashes-fst-040501aseg1-cnni-world.cnn> [<https://perma.cc/NA72-KV3X>].

351. Lobera & Torres-Albero, *supra* note 278, at 13; see generally Eghbariah, *supra* note 235, at 990.

352. ERAKAT, *supra* note 70, at 195, 211, 237; Roald Høvring, *Gaza: The World’s Largest Open-air Prison*, NORWEGIAN REFUGEE COUNCIL (Apr. 26, 2018), <https://www.nrc.no/news/2018/april/gaza-the-worlds-largest-open-air-prison/> [<https://perma.cc/YEC5-6GLL>].

against<sup>353</sup> Israel on October 7, 2023, the Zionist project also includes genocide<sup>354</sup> with 37,396 Gazans killed (although many are yet to be identified) as of June 19, 2024.<sup>355</sup> Moreover, 84,932 are injured, about 1.7 million are displaced, and 1.1 million are projected to face “catastrophic” food insecurity as of June 2024.<sup>356</sup> The *New York Times* keeps calling it a “conflict”<sup>357</sup> or “Israel-Hamas War,”<sup>358</sup> which obscures the reality of Palestinians resisting a colonial, occupation, and apartheid structure without sovereignty for themselves and at an inordinate disadvantage of resources and power.<sup>359</sup>

In applying a CRT-TWAIL analysis, it is possible to imagine an opening for an Indigenous Palestinian racial counternarrative that showcases the true ethnic cleansing perpetrated by the Zionist enterprise, upheld by international law, and dismantles the narrative of Palestinians as “terroristic” Arabs.<sup>360</sup> Irish TWAIL scholar John Reynolds summarizes it perfectly:

For in the story of Palestinian displacements, the role and reality of Israel’s law is clear. Territory is occupied by force and earmarked for settlement. Land is recategorized by legal order of the military. The Supreme Court rules that the village should be evicted and demolished. Such processes illustrate the collusion of law as the companion of force in the colonization of land.<sup>361</sup>

353. According to the Cambridge dictionary, ‘resist’ means “to fight against something or someone that is attacking you” and “to refuse to accept or be changed by something.” *Resist*, CAMBRIDGE, <https://dictionary.cambridge.org/dictionary/english/resist> [<https://perma.cc/V5AP-EMFXC>]. Moreover, “the right to resist foreign domination” exists under IHL, though there are limits. *Palestinians and the Right to Resist*, CANADIANS FOR JUST. & PEACE IN THE MIDDLE EAST (Aug. 2023), [https://www.cjpme.org/fs\\_236/](https://www.cjpme.org/fs_236/) [<https://perma.cc/FD2V-YF5H>]. The word choice, “resisted against,” however, fits perfectly given the historical context laid out herein.

354. Muhammad Abu Salmiya, *Stop the Gaza genocide immediately*, 403 THE LANCET 2286, 2286 (2024) (“Gaza has now been described as a graveyard of children by the UN.”).

355. Rasha Khatib, Martin McKee, & Salim Yusuf, *Counting the Dead in Gaza: Difficult but Essential*, 404 THE LANCET 237, 237 (2024).

356. *Reported impact snapshot | Gaza Strip (12 June 2024)*, UN OFF. COORDINATION OF HUMANITARIAN AFFS. (June 12, 2024), <https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-12-june-2024> [<https://perma.cc/8MW4-HPY4>].

357. See, e.g., Erika Solomon, *The U.N. Report on Israeli and Palestinian War Crimes: What We Know*, N.Y. TIMES, <https://www.nytimes.com/2024/06/13/world/middleeast/gaza-war-crimes-israel-hamas.html> [<https://perma.cc/8WQN-J798>] (updated June 14, 2024, 11:54 a.m. ET); Bubola, *supra* note 225.

358. The New York Times has a section dedicated to news about the “Israel-Hamas War.” *Israel-Hamas War News*, N.Y. TIMES, <https://www.nytimes.com/news-event/israel-hamas-gaza> [<https://perma.cc/FU7R-Z64C>] (last visited Oct. 20, 2024).

359. “Palestine doesn’t have a lot of the characteristics that a state needs to have. It doesn’t have sovereignty. It doesn’t really control its own borders. It’s not able to behave as a state. You could argue that that’s because Israel doesn’t let it. . . .” Jackie Northam, *Why hasn’t there been a Palestinian state?*, NPR (June 13, 2024 4:10 PM ET), <https://www.npr.org/2024/06/13/nx-s1-4985829/why-hasnt-there-been-a-palestinian-state> [<https://perma.cc/457F-WK4V>].

360. See Iraqi, Ben-Halim, Hilal, Abu-Remaileh, & Batrawi, *supra* note 332, at 3.

361. Reynolds, *supra* note 246 at 57.

With this understanding, it is possible to explore how “the Palestinian struggle [as] local/particular and simultaneously global/exemplary”<sup>362</sup> can achieve this latter status by Palestinian resistance becoming a model for other racialized decolonial struggles,<sup>363</sup> and uncovering the complicity of the normative hierarchy of international law.

## VI.

### COLOMBIA AND PALESTINE: MOVING FORWARD

A joint CRT-TWAIL framing underscores the following. The case of Colombia demonstrates how the legacy of Spanish colonization fertilized the “armed conflict,” and with support from the United States, Colombian elites depicted rebels as terrorists. The transitional justice system, as an international tool, has failed to adequately address the country’s racism and was subject to weakness because of Western actors and conservative elites who demanded stronger punishment for said rebels. The case of Palestine is a straightforward consequence of European colonization. Despite European antisemitism, the Western world has consistently supported the ongoing Zionist occupation and settler-colonial project that have paradoxically racialized and negated the existence of Indigenous Palestinians as colonial subjects and terrorists. Accounts of “spectacular violence” are minimized to “conflict” with total disregard of Zionism’s “slow violence”<sup>364</sup> of displacement, fragmentation, and ethnic cleansing in the land.

362. ERAKAT, *supra* note 70, at 240.

363. See, e.g., Gabrielle Gurley, *Black Lives Matter, Palestinian Resistance, and the Ties That Bind*, THE AM. PROSPECT (May 21, 2021), <https://prospect.org/world/black-lives-matter-palestinian-resistance-and-the-ties-that-bind/> [<https://perma.cc/9K7V-F7B3>] (“Palestinian[-]staterians] living in Ferguson and greater St. Louis recognized the ritualized terror inflicted on Michael Brown and the people of Ferguson by local police (which had coincided with an [*sic*] fresh outbreak of fighting between Israelis and Palestinians).”); Pam Bailey & Mahmoud Alnaouq, *Gaza Protesters: Palestine and Venezuela in ‘One Trench,’* THE NEW ARAB (Feb. 20, 2019), <https://english.alaraby.co.uk/opinion/gaza-protesters-palestine-and-venezuela-one-trench> [<https://perma.cc/7ZC7-KUQJ>] (“Venezuelans and Palestinians share a common struggle in their resistance to US imperialism.”); Alastair Sloan, *Is Myanmar Becoming Another Palestine?*, MIDDLE EAST MONITOR (May 17, 2017), <https://www.middleeastmonitor.com/20170517-is-myanmar-becoming-another-palestine/> [<https://perma.cc/Q749-N6FM>] (noting similarities in the desire to establish Buddhist and Jewish ethno-religious states, self-defense rhetoric, the statelessness and denied freedom of movement of the Rohingya and Palestinians, and the “complete indifference of the international community”); see also DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at 114 (some years ago, several young Palestinians “organized Freedom Rides, recapitulating the Freedom Rides of the 1960s by boarding segregated buses in the occupied territory of Palestine and being arrested as the Black and white Freedom Riders were in the sixties. They announced their project to be the Palestinian Freedom Riders.”).

364. Here I use Rob Nixon’s concept of slow violence, oft-ignored, as compared to spectacular violence, which is sensational and invites public activism. See generally ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2011) (proposing that the slow violence of environmental threats such as climate change and deforestation exacerbates the vulnerability of poor people and ecosystems in part because of the world’s inattention).



In the case of Colombia, Afro- and Indigenous Colombians and their allies can demand that the domestic transitional justice mechanism adopt race-conscious policies that confront the human rights violations that not only occurred during the “armed conflict” but are woven into the history of what became Colombia. Some work has started, but it is slow-moving. In August 2022, with “macro-case 05,” the JEP “paved the way for holding interjurisdictional dialogues with the Afro-Colombia justice system” after it adopted *Protocolo de relacionamiento entre la JEP y los pueblos negros, afrocolombianos, raizal y palenquero* (Protocol 001 of 2021 for the Interaction Between the Special Jurisdiction for Peace and Black, Afro-Colombian, Raizal People, and Palenque People).<sup>365</sup> In spite of former President Duque’s lack of political will to realize the Final Agreement, any advances are owed to the efforts of civil society organizations and communities.<sup>366</sup> The case signals to Colombia’s “ordinary justice system” and transitional justice system to interact with Afro- and Indigenous communities.<sup>367</sup> Because transitional justice systems are often replicated in other countries as comprehensive policies, transitional justice can be decolonized to challenge systemic racism. Such replication would contribute to genuine South-South exchanges instead of top-down imposition.

Palestinians and allies can call for the decolonization of the international system as a whole and of occupation law specifically (amongst other norms) so that it can do more than just slap Israel on the wrist. Amid genocide, some actors have taken steps. On December 29, 2023, South Africa argued before the International Court of Justice (“ICJ”) that Israel’s unchecked and unpunished direct and public incitement to genocide violates the 1948 Genocide Convention’s prohibition of acts of genocide and failure to prevent genocide.<sup>368</sup> Colombia, Palestine, Mexico, Nicaragua, Libya, and Spain have requested to join the case.<sup>369</sup> On May 20, 2024, the International Criminal Court’s Prosecutor, Karim Khan, accused Israeli Prime Minister Benjamin Netanyahu and his Defense Minister Yoav Gallant of war

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365. Bries Silva, *supra* note 136, at 9.

366. Carolina Jiménez Sandoval, *Colombia’s Peace Accord is not Weak, It’s Duque who Insists on Weakening it*, WASH. OFF. LATIN AM. (OCT. 6, 2021), <https://www.wola.org/analysis/colombia-peace-accord-is-not-weak-its-duque-who-insists-on-weakening-it/> [https://perma.cc/H755-RC8Q].

367. Bries Silva, *supra* note 136, at 9.

368. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Israel), Application Instituting Proceedings, 2023 1, 65 (Dec. 28).

369. Joseph Wilson, *Spain Applies to Join South Africa’s Case at top UN Court Accusing Israel of Genocide*, AP, <https://apnews.com/article/spain-israel-icj-genocide-case-67d4d9b8ecf6fd88e718319a5d93465a> [https://perma.cc/ZP67-2MQ6] (updated June 6, 2024, 9:18 M EDT). Analysis of the case is beyond the scope of this article, but multiple experts have opined on its merits. See e.g., *Top Experts’ Views of Int’l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case)*, JUST SECURITY (Jan. 26, 2024) <https://www.justsecurity.org/91457/top-experts-views-of-intl-court-of-justice-ruling-on-israel-gaza-operations-south-africa-v-israel-genocide-convention-case/> [https://perma.cc/7Y3H-SCEF].

crimes against humanity and “stunning[ly]” sought warrants for their arrest.<sup>370</sup> On July 19, 2024, the ICJ issued its advisory opinion on the legal consequences arising from Israel’s policies and practices in the OPT, finding that Israel’s occupation is unlawful.<sup>371</sup> However, calls for a “ceasefire”—which traditionally means formalizing an end to “armed violence between warring parties for a certain period of time” and for which IHL does not provide much guidance<sup>372</sup>—do not capture the power imbalance; and, if successful, must not demand a transitional justice system that Colombia’s case exposes as inappropriate and inadequate. Moreover, Palestine need not be recognized as a state in the U.N. system, which some argue is effectively an empty gesture and acceptance of the global racial order,<sup>373</sup> for the Palestinian struggle to enter the mainstream discourse.

The boycott, divest, and sanction movement (“BDS”) is a valuable mainstream strategy.<sup>374</sup> The Global Majority must require that their governments, corporations, and universities participate in the movement, which began as a grassroots initiative in 2005 and was inspired by the formidable BDS movement that fought South African apartheid.<sup>375</sup> The Palestinian Boycott National Committee has called for others—states, people, and institutions—to participate in the movement until Israel ceases its occupation of Arab lands, provides meaningful equality

370. Farnoush Amiri, *House Passes Proposal Sanctioning top War-Crimes Court After it Sought Netanyahu Arrest Warrant*, AP, <https://apnews.com/article/international-criminal-court-netanyahu-congress-war-crimes-1114b8fd0c6b9f3a83c3ed5919da3836> [https://perma.cc/T3EP-84WG] (updated June 4, 2024, 9:11 PM EDT). *But see* Nadeen Ebrahim, *After Vetoing Three Prior UN Resolutions on Gaza, US sees its own Ceasefire Proposal Rejected*, CNN (Mar. 22, 2024, 3:24 PM EDT), <https://www.cnn.com/2024/03/22/middleeast/us-gaza-ceasefire-proposal-veto-intl/index.html> [https://perma.cc/AEH2-DYKC]. The United States consistently vetoed resolutions that called for a ceasefire in “the Gaza war,” which supports Mutua’s critique of the U.N. Security Council as the exclusive property of the United States in Part II.B. *supra*.

371. *ICJ Opinion Declaring Israel’s Occupation of Palestinian Territories Unlawful is Historic Vindication of Palestinians’ Rights*, AMNESTY INT’L (July 19, 2024), <https://www.amnesty.org/en/latest/news/2024/07/icj-opinion-declaring-israels-occupation-of-palestinian-territories-unlawful-is-historic-vindication-of-palestinians-rights/> [https://perma.cc/44SR-DYAS] (Erika Guevara Rosas, Amnesty International’s Senior Director for Research, Advocacy, Policy and Campaigns, stating that “[t]he occupation is a key pillar of the system of apartheid that Israel uses to dominate and oppress Palestinians”).

372. Marika Sosnowski, *What exactly is a ceasefire, and why is it so difficult to agree on one in Gaza?*, THE CONVERSATION (Nov. 15, 2023 2:06 PM), <https://theconversation.com/what-exactly-is-a-ceasefire-and-why-is-it-so-difficult-to-agree-on-one-in-gaza-217683> [https://perma.cc/S3GA-XK37].

373. See Gëzim Visoka, *Statehood and Recognition in World Politics: Towards a Critical Research Agenda*, 57 COOPERATION & CONFLICT 133, 135 (2021) (proposing that “future research [on state recognition] . . . move [away] from perceiving recognition as a singular act associated with power, privileges and gatekeeping features of dominant states” to alternatively serving as “an assemblage of discourses, performances and entanglements that capture the pluriverse nature of recognition and diplomatic agency of aspirant states.”).

374. Angela Davis discusses how students on U.S. college campuses strengthened the BDS movement, which has in turn permitted students to challenge prison privatization. DAVIS, FREEDOM IS A CONSTANT STRUGGLE *supra* note 6, at 43.

375. See ERAKAT, *supra* note 70, at 228.

to its Palestinian citizens, and fulfills Palestinian refugees’ right of return.<sup>376</sup> Because BDS has its shortcomings within Palestine-Israel with Palestinian businesses running the risk of being inadvertently boycotted, other traditional strategies are similarly valuable and include mobilizing and joining solidarity rallies, protests, marches, and encampments, amplifying Palestinian stories, signing petitions and lobbying politicians, and organizing teach-ins.<sup>377</sup>

Occupation law should also be eliminated because it normalizes occupation rather than serves those under it. Palestinian lawyer and scholar Rabea Eghbariah offers “an initial legal framework to remedy the ongoing Nakba: Recognition, Return, Reparations, Redistribution, and Reconstitution,”<sup>378</sup> which metamorphoses the tenets of transitional justice. The *Nakba* and the injustices of Zionism must first be recognized, the right of return of Palestinians must be realized, victims of the ongoing *Nakba* must be repaired to ensure that the ongoing *Nakba* does not maintain itself, material resources must be redistributed, and to dismantle the *Nakba* regime and advance an egalitarian democracy the polity must be reconstituted.<sup>379</sup>

## VII.

### CONCLUSION: A WORLDWIDE CRT-TWAIL SOLIDARITY NETWORK

This article analyzes the case studies of Afro- and Indigenous Colombians challenging the narrative of the “armed land conflict” and *mestizaje*, and of Indigenous Palestinians challenging the racial narrative of Zionism and “yet another isolated Middle Eastern conflict” through a practical combined CRT-TWAIL framework. The aims here are twofold: of theory and of praxis. Theoretically, the article challenges the implication of the global racial order in the making of conflicts, sustained by race and empire. It is forward-looking so that people, whether self-defined as CRT or TWAIL activist-scholars and those without an academic orientation, take on the marriage of CRT-TWAIL as theoretical support for their liberation work. Such a strategy, grounded in race-based counternarratives that dispel the global grip of white supremacy on sociolegal structures, can also create global networks of solidarity between racialized groups who are fighting similar battles.

Inasmuch as “conflict” is a euphemism for colonial racial structures like occupation, “racial unrest”<sup>380</sup> is a euphemism for the racialized colonial subjugation

376. *Id.*

377. See *Resources*, US CAMPAIGN FOR PALESTINIAN RIGHTS, <https://uscpr.org/resources/> [<https://perma.cc/PHY7-JF28>] (last visited Oct. 15, 2024).

378. Eghbariah, *supra* note 235, at 990.

379. *See id.*

380. Bill Hutchinson, *Milestone Year of Racial Unrest and Protests ends with Police, Demonstrators Facing new Hurdles*, ABC NEWS (Dec. 29, 2020, 6:00 AM), <https://abcnews.go.com/US/milestone-year-racial-unrest-protests-ends-police-demonstrators/story?id=74591675> [<https://perma.cc/B2M6-WLZ2>].

of Black people in the United States. In *Freedom is a Constant Struggle*, political activist, philosopher, and academic Angela Davis invites readers to think about the creation of global networks of solidarity. Black and Native people in the United States are also “systematically choked by an enduring white supremacy that thrives on oppression and settler colonialism, and is backed by drones, the dispossession of territory and identity,” mass incarceration, and resource grabs.<sup>381</sup> Colonial oppressive white supremacy has “choked” various peoples across continents who can see themselves reflected in each other. CRT-TWAIL helps bring to light the importance of this form of intersectionality and transnational solidarity, where “national security” supports the militarized training and violence of the U.S. police that can be linked to the actions of the Israeli<sup>382</sup> and Colombian police and military. Illustratively, the violent, disproportionate, and “authoritarian” response of the NYPD—which has traveled to Israel to train<sup>383</sup>—to pro-Palestine college student encampments in spring 2024, is “reminiscent” of police repression of 2020 George Floyd protesters.<sup>384</sup> As there is racist police violence against Black men and protesters in the United States, the Palestinians also experience the same under the Israeli military.<sup>385</sup>

The United States currently has the highest incarceration rate in the world, and Black people make up a disproportionate percentage of the country’s incarcerated population.<sup>386</sup> But during the First *Intifada* from 1987 to 1993, when Palestinians launched a mass resistance protest against the occupation, Palestine-Israel had the world’s highest per capita incarceration rate.<sup>387</sup> As for Colombia, political elites and the international system criticized the first version of the Peace Agreement as being too lenient on perpetrators.<sup>388</sup> Incarceration rates illustrate how the law and global white supremacy operate in tandem to “define the permissible by establishing what is punishable,”<sup>389</sup> including protests against these racial-legal regimes. Instead of isolating their battles, Black and Native people in what is now the United States, Afro- and Indigenous people in what is now Colombia, and Indigenous Palestinians in their land can cultivate “political alliances”

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381. DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at xi.

382. *See id.* at 20.

383. Edith Garwood, *With Whom are Many U.S. Police Departments Training? With a Chronic Human Rights Violator - Israel*, AMNESTY INT’L (Aug. 25, 2016), <https://www.amnestyusa.org/updates/with-whom-are-many-u-s-police-departments-training-with-a-chronic-human-rights-violator-israel/> [<https://perma.cc/PCG7-AVZZ>].

384. Natasha Lennard, *I’ve Covered Violent Crackdowns on Protests for 15 Years. This Police Overreaction Was Unhinged.*, THE INTERCEPT (May 1, 2024, 4:14 p.m.), <https://theintercept.com/2024/05/01/nyc-gaza-college-protests-police-outside-agitators/> [<https://perma.cc/G2XM-J3SS>].

385. DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at 45.

386. *United States Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/B7JU-55Z8>] (last visited Aug. 9, 2024).

387. HAJJAR, *supra* note 233, at 3.

388. DAVIS, *Third Party at the Table*, *supra* note 190, at 369–70.

389. HAJJAR, *supra* note 233, at 3.

and “transnational solidarities”<sup>390</sup> against the iterations of race and empire in their own contexts, towards a more liberated global context. The work has begun. For example, Palestinian activists shared crucial advice to Ferguson protesters on how to deal with the U.S.-stamped tear gas with which they had also dealt.<sup>391</sup> But there is much more work to do.

Applying a CRT-TWAIL reframing to the struggles and structural connections of other marginalized groups can contribute to this project. To begin, the struggles of Afro- and Indigenous Colombian and Indigenous Palestinian communities might resonate with Black and Native communities in the present-day United States as they demand reparations<sup>392</sup>—an element of transitional justice—for the legacy of colonization, slavery, stolen land, and “colorblind” institutions like mass incarceration. Reparations can “remedy the consequences of collective violence”<sup>393</sup> from the global racial order. Tendayi Achiume’s scholarship contains a CRT-TWAIL analytic lens in that she argues that “the pursuit and achievement of reparations for slavery and colonialism require a genuine ‘decolonization’ of the doctrines of international law that remain [legal] barriers to reparations,” and as such, function as “neocolonial law.”<sup>394</sup> In recognizing the need to form solidarities, the racialized communities discussed herein can strive towards collectively decolonizing their situations.

A joint CRT-TWAIL analysis that deconstructs the workings of race and empire through legal settings like “conflict” can thus be a powerful tool for marginalized groups whose histories and identities have been erased or whose suffering has been normalized through the law.

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390. DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note 6, at 139.

391. *Id.* at 139–40.

392. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/D2LF-ARZJ>]. Notably, reparations for Black folks must work in tandem with reparations for Native peoples. Frank Pommersheim, *Not one Without the Other: Reparations for African-Americans and Indigenous Peoples*, INDIAN COUNTRY TODAY (June 21, 2021), <https://ictnews.org/opinion/not-one-without-the-other-reparations-for-african-americans-and-indigenous-peoples> [<https://perma.cc/KCF4-QJMY>] (“Regardless of risk and cost, the fundamental and massive injustice of slavery and the theft of Indigenous peoples [*sic*] lands remain central to the founding of the United States and to its ongoing history. Enduring justice and meaningful reconciliation are likely to be best achieved by a comprehensive national reckoning that joins, not separates, these twin evils, these inextricable original sins.”).

393. Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 377, 377 (Cheryl Lawther, Luke Moffett, & Dov Jacobs, eds., 2017).

394. U.N. Secretary-General, *Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, ¶ 10, U.N. Doc. A/74/321 (Aug. 21, 2019).