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Connecting Race and Empire: What Critical Race Theory Offers Outside the U.S. Legal Context

S. Priya Morley

ABSTRACT

The renewed solidarity across movements and borders in recent years underscores the importance of transnational understandings of racial justice. This is particularly true in the current moment, in which global crises such as migration and climate change are laying bare the persistent impacts of structural racism and colonial subordination around the world. In this Essay, I argue that Critical Race Theory (CRT)—specifically its race-centered lens—offers valuable analytical insights for practitioners and scholars working on human rights issues across borders, including migration. To start, I draw from the scholarship produced at a series of landmark convenings on CRT, Third World Approaches to International Law (TWAIL), and human rights, held at UCLA School of Law in 2019 and 2020, to illustrate how a TWAIL-CRT lens can be applied to uncover the racial and colonial logics that pervade international law and its application. Next, I trace the overlap between CRT and TWAIL, and highlight important analytical insights they offer each other. Finally, I use this lens to explore my own research, conducted with U.S. and Mexican civil society organizations, on the migration of Haitian women through the Western Hemisphere. Through this analysis, I exemplify what it looks like when human rights practitioners and scholars center race, and its connection with empire, in their work.

AUTHOR

S. Priya Morley is the Racial Justice Policy Counsel at the Promise Institute for Human Rights at UCLA School of Law, where she provides leadership on academic, advocacy, and policy initiatives at the intersection of racial justice and human rights. Before joining UCLA in 2021, Priya was an Arthur Helton Global Human Rights Fellow at NYU School of Law, researching the experiences of Black African and Haitian migrants in Mexico, including anti-Black racism and gender-based discrimination. She is grateful to Professor Aslı Bâli for providing helpful comments on a draft of this Essay, as well as to the *UCLA Law Review* team for their invaluable support during the publication process.



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INTRODUCTION

In recent years, we have witnessed the “transnational dimensions of even domestic racial subordination.”¹ Protests against anti-Black racism and police violence in the United States have reverberated around the globe. In the face of domestic resistance, activists turned to the United Nations Human Rights Council² and other international bodies to seek justice and hold the state accountable for racial violence.³ U.S. racial justice activists explicitly aligned the Black Lives Matter movement with other racialized and marginalized groups in the United States and around the world, including Palestinians.⁴ Black migrants

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1. E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378, 397 (2021).
 2. The principles of equality and non-discrimination, including on the basis of race, are central tenets of international human rights law. The Universal Declaration of Human Rights (UDHR) states that “all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin.” *Conferences on Racism*, U.N., <https://www.un.org/en/conferences/racism> [https://perma.cc/46RE-JNCY]. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, para. 1 (Dec. 21, 1965), <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> [https://perma.cc/G5C4-PUMT]. They are enshrined in the core human rights treaties, including the UDHR which forms part of the international customary law that binds all nations. *Universal Declaration of Human Rights: The Foundation of International Human Rights Law*, U.N., <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [https://perma.cc/5HLK-76XF].
 3. For example, in summer 2020, Philonise Floyd testified at a landmark urgent debate held by the U.N. Human Rights Council on “racially inspired human rights violations, systemic racism, police brutality, and violence against peaceful protests” in the United States. U.N. Human Rights Office of the High Commissioner, Human Rights Council Holds an Urgent Debate on Current Racially Inspired Human Rights Violations, Systemic Racism, Police Brutality and Violence Against Peaceful Protests (June 17, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25971&LangID=E> [https://perma.cc/8N8U-XH6F]. In this international forum, Floyd demanded “justice for the murder of his brother [George Floyd] and the many other Black people who have been subject to the regime of racial extrajudicial killings endemic in the United States.” Achiume, *supra* note 1, at 378.
 4. Hansi Lo Wang, *The Complicated History Behind BLM’s Solidarity With the Pro-Palestinian Movement*, NPR (June 12, 2021, 8:39 AM), <https://www.npr.org/2021/06/07/1003872848/the-complicated-history-behind-blms-solidarity-with-the-pro-palestinian-movement> [https://perma.cc/LXB8-3X5Q]; Aziz Rana, *Keynote Speech*, UCLA Law Review Symposium 2020: *Law and Empire in the American Century*, 67 UCLA L. REV. 1432, 1446 (2021).

stranded in Tijuana, Mexico waiting to seek asylum in the United States adopted the language “*No puedo respirar*” (“I can’t breathe”), situating their struggle within the same racial logics oppressing Black Americans.⁵ This renewed solidarity across movements and borders underscores the importance of transnational understandings of racial justice. This is particularly true in the current moment, in which global crises such as migration and climate change are laying bare the persistent impacts of structural racism and colonial subordination around the world.

In this Essay, I argue that Critical Race Theory (CRT)—specifically its race-centered lens—offers valuable analytical insights not only in the U.S. legal context, but also for practitioners and scholars working on human rights issues across borders, including migration. To start, I draw from the scholarship produced at a series of landmark convenings on CRT, Third World Approaches to International Law (TWAIL), and human rights, held at UCLA School of Law in 2019 and 2020,⁶ to illustrate how a TWAIL-CRT lens can be applied to uncover the racial and colonial logics that pervade international law and its application. Next, I trace the overlap between CRT and TWAIL, and highlight important analytical insights they offer each other. Finally, I use this lens to explore my own research on Haitian migration through the Western Hemisphere, illustrating what it can look like when human rights practitioners and scholars center race, and its connection with empire, in their work.

I. CRT IN GLOBAL CONTEXT

CRT is an academic and legal framework that arose in the U.S. legal context in the early 1970s and foregrounds race as the “central analytic category for understanding how domestic law, racist science, and literature have for

5. Paulina Olvera Cáñez, Ebony Bailey & Leslie Meyer, *Commentary: “No Puedo Respirar.” The Black Lives Matter Movement is Growing in Tijuana*, SAN DIEGO UNION (June 25, 2020, 3:53 PM), <https://www.sandiegouniontribune.com/opinion/commentary/story/2020-06-25/commentary-no-puedo-respirar-the-black-lives-matter-movement-is-growing-in-tijuana> [https://perma.cc/S2ZR-5ZRN].

6. On March 8, 2019, UCLA School of Law’s Promise Institute for Human Rights (Promise Institute), Critical Race Studies Program (CRS), International and Comparative Law Program (ICLP), and *Journal of International Law and Foreign Affairs* (JILFA) hosted a one-day symposium entitled *Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations*. Symposium, *Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations*, 24 J. INT’L L. & FOREIGN AFF. 1 (2020). Alongside the *Critical Perspectives* symposium, UCLA School of Law hosted two related workshops. On January 31, 2020, the Promise Institute, ICLP, and *UCLA Law Review* hosted a second one-day symposium entitled *Transnational Legal Discourse on Race and Empire*. Symposium, *Transnational Legal Discourse on Race and Empire*, 67 UCLA L. REV. 1386 (2021).

generations justified the dehumanization and discrimination of African Americans.⁷ Race can be understood as “a social construction, according to which physical features and lineage are imbued with social, political, economic and even legal meaning.”⁸ Early CRT scholars had witnessed the limits of the 1960s U.S. civil rights movement to respond to systemic racism. The dominant antidiscrimination model that arose in U.S. law during this period focuses on accountability for acts of direct discrimination and situates antidiscrimination laws as a solution to racism. Conversely, CRT scholars recognize racism as structural and deeply historical, interrogating “law as implicated in racial subordination, rather than existing outside the problem, merely as [a] solution.”⁹ CRT scholars ask questions like: “How does the law construct race?; How has the law protected racism and upheld racial hierarchies?; How does the law reproduce racial inequality?; and How can the law be used to dismantle race, racism, and racial inequality?”¹⁰ CRT scholars have traditionally scrutinized U.S. constitutional law, asking questions about which individuals and groups have been entitled to (or denied) citizenship and afforded constitutional rights and what role race has played in this delineation.¹¹ Over time, CRT scholarship has evolved to analyze other bodies of U.S. law and laws outside U.S. borders.¹²

Whereas CRT centers race in its analysis of (domestic) law, TWAIL uncovers how international law originated in and still perpetuates empire,¹³ a term that encompasses the European colonial powers of the past and the settler- and neo-colonialism of the present day.¹⁴ TWAIL was created by Harvard Law School graduate students in 1996, but its “symbolic birthplace” was the Bandung Conference (Asian-African Conference) held in 1955 “to discuss peace and the role of the Third World in the Cold War, economic development, and

7. 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).

8. E. Tendayi Achiume & Asli Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. REV. 1386, 1390 (2021).

9. *Id.*

10. 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.

11. E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1466 (2021).

12. Achiume & Bâli, *supra* note 8, at 1390.

13. Empire can be understood as “referring to social, political, and economic interconnection among sovereign nations but on fundamentally unequal terms that structurally benefit powerful nations, while structurally disadvantaging and exploiting subordinated nations.” Achiume & Bâli, *supra* note 8, at 1389–90.

14. *Id.*

decolonization.”¹⁵ TWAIL also has roots in “Latin American opposition to the domination of the Third World by the industrialized West.”¹⁶ TWAIL scholars “trace the juristic techniques [in international law] that justified colonial conquest along the axes of European/non-European, colonizer/colonized, civilized/uncivilized, and modernity/tradition.”¹⁷ They ask questions like whether the decolonization period, and the international law and institutions that have arisen from it, has actually led to the sovereign equality of formerly-colonized states within the international system.¹⁸ Or is the sovereignty of these Third World states contingent on whether it serves the interests of First World nation-states?¹⁹ While many TWAIL scholars analyze how international law subordinates racialized nations and their citizens, race is not always central to their analytical framework. TWAIL scholarship can therefore be enriched by the race-centered lens of CRT.²⁰

There has recently been renewed momentum to explore how the logics of race and empire operate together within international legal issues. From March 2019 to January 2020, under the leadership of the Promise Institute for Human Rights and Professors E. Tendayi Achiume and Asli Bâli, UCLA School of Law hosted a series of landmark convenings that brought together CRT, TWAIL, and human rights scholars to consider two broad themes: what a joint TWAIL-CRT approach to international law looks like and how a human rights framework can promote racial justice and equality.²¹ At the convenings, participants unpacked how race shapes migration, socio-economic and political equality, and states of

15. Makau W. Mutua, *What is TWAIL?*, 94 PROC. ASIL ANN. MEETING 31, 31 (2000); *Milestones: 1953–1960: Bandung Conference (Asian-African Conference)*, 1955, OFFICE HISTORIAN, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1953-1960/bandung-conf> (last visited Mar. 8, 2022) [<https://perma.cc/4QJL-MQRS>].

16. Mutua, *supra* note 15.

17. Gathii, *supra* note 7, at 1612.

18. See Achiume & Bâli, *supra* note 8 for an analysis of Libya’s “shifting sovereignty” depending on whether it was in the interests of Europe the United States to respect its sovereignty. See also the definition of sovereignty in SAMANTHA BESSON, *Sovereignty*, OXFORD PUBLIC INTERNATIONAL LAW (Apr. 2011) (“The United Nations (UN) system itself is based . . . on the principle of sovereign equality of its Member States as guaranteed in Art. 2(1) UN Charter. Provided States have supreme authority within their territory, the plenitude of internal jurisdiction, their immunity from other States’ own jurisdiction and their freedom from other States’ intervention on their territory, but also their equal rank to other sovereign States are consequences of their sovereignty.”).

19. Achiume & Bâli, *supra* note 8, at 1397.

20. *Id.* at 1391.

21. See *Symposium Archive*, J. INT’L L. FOREIGN AFF., <https://uclajilfa.com/2020-symposium> [<https://perma.cc/DJ7X-JJRN>]; *Symposium*, 24 UCLA J. INT’L L. FOREIGN AFF. i (2020); Achiume & Bâli, *supra* note 8, at 1396.

emergencies at an international level. They explored how the current moment of global crisis could provide the opening needed for structural change.

II. A TWAIL-CRT ANALYSIS THAT CONNECTS RACE AND EMPIRE

As explored at the recent UCLA School of Law convenings, CRT and TWAIL overlap and have developed in response to similar structures of oppression.²² Their “common point of departure” is rejecting the dominant view that situates “European modernity for TWAIL and Whiteness for CRT [as] neutral, universal, and raceless baselines of which non-Europeans for TWAIL and Black people for CRT fall short.”²³ Instead, CRT and TWAIL acknowledge that U.S. constitutional law and international law, respectively, are both rooted in and shaped by racial capitalism²⁴ and “operate as regimes of power and violence that implicate racism, capitalism, and colonialism.”²⁵ In this context, both CRT and TWAIL have shown the limits of formal inclusion—namely, the granting of citizenship to Black Americans and the granting of sovereignty to formerly colonized nations.²⁶ In neither case did formal inclusion end the political, economic, or racial subordination of these groups or nations. Instead, it often operated to perpetuate and legitimize structural inequality.²⁷

In a similar vein, both CRT and TWAIL, implicitly or explicitly, have challenged formal equality and the notion of colorblindness in law, which denies that race is a legitimate basis on which to make distinctions.²⁸ Colorblindness can operate to invisibilize the racial subordination that exists in society.²⁹ On the

22. See generally Achiume & Carbado, *supra* note 11 and Gathii, *supra* note 7 for more analysis of these two analytical frameworks and their overlap.

23. *Id.* at 1616.

24. Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <https://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [<https://perma.cc/SPH5-UB4U>]; CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2* (2000); Cheryl I. Harris, *Reflections on Whiteness as Property*, 134 HARV. L. REV. F. 1 (2020).

25. Achiume & Carbado, *supra* note 11, at 1466.

26. *Id.* at 1471–73.

27. *Id.* at 1471.

28. *Id.* at 1476.

29. Tendayi Achiume’s analysis of the South African Development Community Tribunal’s *Campbell* decision from 2008 shows the benefits of a TWAIL-CRT lens and, particularly, how to do a colorblindness analysis outside of the United States context. This case was about a white Zimbabwean farmer who claimed that the government violated his human rights by seizing his land. This seizure occurred under a Zimbabwean law that allowed the government to seize land from white farmers, without compensation, as part of a drive to redistribute land to Black Zimbabweans. The Tribunal found the impugned law to be de facto discriminatory on the basis of race, because it disproportionately impacted white farmers, and therefore violated the non-discrimination principle in the International

contrary, substantive equality or equity recognizes that differential treatment can be necessary to allow racialized and otherwise marginalized groups to experience the law in the same way as dominant groups.

Although CRT and TWAIL scholars identify law as complicit in subordination, they remain committed to transforming law and believe in its potential to effect social change.³⁰ By combining CRT's race-centered analysis with TWAIL's empire-centered analysis, we gain "a very sharp lens of tracing issues of race and identity in imperial histories, transnational histories, and histories of the global."³¹ For example, the concept of intersectionality was originally coined by CRT scholar Kimberlé Crenshaw to describe the ways that Black women experience different and overlapping forms of discrimination, including on the basis of gender and race, which were not being accounted for in U.S. antidiscrimination law.³² TWAIL feminist scholarship similarly engages with the ways that racialized women experience discrimination differently depending on where they are in the world, and given the neocolonial and imperial subordination that may impact them there.³³ Combining these analyses, we can see "how issues of class and globalization intersect with other forms of subordination for women" in the United States and globally.³⁴

An analysis that draws on both CRT and TWAIL can illuminate how race operates as a distinct axis of subordination at the global level. Traditionally, TWAIL scholars "have analyzed, deconstructed, and critiqued international legal doctrines such as sovereignty and traced the ways they have shaped imperialism in the contemporary global order."³⁵ For instance, Achiume and Bâli analyzed how the international community effectively vitiated Libya's

Convention on the Elimination of Racial Discrimination. In her analysis, Achiume showed that the Tribunal's decision was colorblind, because it found the law to have a discriminatory impact against the white farmer without situating the law and its intent within Zimbabwe's historic and current sociopolitical context. When Zimbabwe was under British rule, land was taken from Black people and given to white colonizers, effectively granting property rights on the basis of race. The Tribunal did not account for this racial colonial past or the redistributive aims of the impugned law. Achiume & Carbado, *supra* note 11, at 1481–83. Achiume's analysis illustrates how colorblindness "functions to reinforce racial subordination by bluntly invalidating race conscious remedies without which it is impossible to redress persisting neocolonial subordination." *Id.* at 1482.

30. *Id.* at 1493–98.

31. Gathii, *supra* note 7, at 1648.

32. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Gathii, *supra* note 7, at 1628–29.

33. *Id.* at 1629.

34. *Id.* at 1631.

35. Gathii, *supra* note 7, at 1642.

sovereignty when it authorized foreign intervention into the country in 2011, then subsequently asserted its sovereignty when demanding that Libya enforce its own borders and impede unauthorized African migration to Europe.³⁶ Their analysis shows “the dual and contingent nature of Third World sovereignty—according to which this sovereignty is formally asserted or vitiated in the international system on terms set by First World nation states.”³⁷

By bringing a CRT lens to their analysis, however, Achiume and Bâli were also able to highlight how this shifting sovereignty is racialized. The international community legitimized foreign intervention into Libya in part because the Arab League had endorsed it. Yet, the African Union, with which Libya aligned itself, had been advocating for a non-military solution instead of intervention. By reframing Libya as Arab and not African, the international community was able to characterize its intervention as legitimate. Subsequently, when the European Union’s focus shifted to preventing unauthorized African migration, the narrative was again racialized. The migrants were framed as Black Africans moving through Libya, an Arab transit country, to reach Europe. In this context, Europe now sought to partner with Libya to ensure that it enforced its borders and prevented Africans from transiting through the country. Achiume and Bâli’s analysis connects race with empire and shows how “race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur.”³⁸

III. UNDERSTANDING HAITIAN MIGRATION IN THE WESTERN HEMISPHERE THROUGH A TWAIL-CRT LENS

As outlined above, a TWAIL-CRT lens, which centers race and its relation to empire, is helpful for human rights scholars and practitioners to understand the subordination of racialized people and nations that occurs across borders. In this Part, I draw from this framework to explore my own research, conducted in partnership with United States and Mexican civil society organizations, on the migration of Haitian women through the Western Hemisphere. In recent years, there has been an increasing number of Haitians (and a smaller but also increasing number of Africans from various countries)³⁹ traversing Latin America to Mexico, often with the intention of transiting through Mexico and

36. Achiume & Bâli, *supra* note 8.

37. *Id.* at 1397.

38. *Id.*

39. CAITLYN YATES & JESSICA BOLTER, MIGRATION POL’Y INST., AFRICAN MIGRATION THROUGH THE AMERICAS: DRIVERS, ROUTES, AND POLICY RESPONSES 1 (2021).

seeking asylum in the United States.⁴⁰ While it is not possible in the context of this Essay to explore the manifold ways that colonialism, imperialism, and structural racism impact their migration and the laws that regulate it, I hope that this analysis nevertheless illuminates some of the benefits of a TWAIL-CRT approach.

Haiti suffers from the persistent impacts of colonial and imperial exploitation. During colonization, France implemented a plantation-based agricultural economy on the island that dispossessed Indigenous peoples, relied on the labor of hundreds of thousands of enslaved Africans, and initiated the widespread deforestation, land degradation, and resource extraction that continues to impact Haiti today.⁴¹ In 1804, Haiti won independence from France through the world's only successful slave revolt. In Haiti as elsewhere, however, the postcolonial world presented a "rearticulation of that hierarchy on neocolonial terms."⁴² France demanded the "repayment" of a massive "debt"—which included the property rights that French colonizers asserted in the actual bodies of emancipated Haitians—in exchange for recognizing the new Black republic's sovereignty.⁴³ This financial burden, which took 122 years to repay, crippled the nation's economy and ability to develop.⁴⁴

40. For statistics and a more in-depth analysis of Haitian and African migration, see S. PRIYA MORLEY, NICOLE PHILLIPS, BLAINE BOOKEY, MOLLY GOSS, ISAAC BLOCH & BRYNNA BOLT, *A JOURNEY OF HOPE: HAITIAN WOMEN'S MIGRATION TO TAPACHULA, MEXICO* (2021), <https://cgrs.uchastings.edu/sites/default/files/A-Journey-of-Hope-Haitian-Womens-Migration-to%20Tapachula.pdf> [<https://perma.cc/3E33-79RR>] [hereinafter *JOURNEY OF HOPE*]; S. PRIYA MORLEY, MOLLY GOSS, YUSUF ABDULKAREEM, TSION GURMU & KATHERINE LA PUENTE, "THERE IS A TARGET ON US." THE IMPACT OF MEXICO'S ANTI-BLACK RACISM ON AFRICAN MIGRANTS AT MEXICO'S SOUTHERN BORDER (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf> [<https://perma.cc/D5AD-5VAC>].

41. Ann Crawford-Roberts, *A History of United States Policy Towards Haiti*, BROWN U. LIBR.: CTR. FOR DIGIT. SCHOLARSHIP, <https://library.brown.edu/create/modern-latinamerica/chapters/chapter-14-the-united-states-and-latin-america/moments-in-u-s-latin-american-relations/a-history-of-united-states-policy-towards-haiti> (last visited Mar. 8, 2022); GLOB. JUST. CLINIC & HAITI JUST. INITIATIVE, *BYEN KONTE, MAL KALKILE? HUMAN RIGHTS AND ENVIRONMENTAL RISKS OF GOLD MINING IN HAITI* 24 (2015), https://chrgi.org/wp-content/uploads/2016/09/byen_konte_mal_kalkile_human_rights_and_environmental_risks_of_gold_mining_in_haiti.pdf [<https://perma.cc/G5X6-9EPW>] [hereinafter *GOLD MINING IN HAITI*].

42. Achiume & Carbado, *supra* note 11, at 1473.

43. *GOLD MINING IN HAITI*, *supra* note 41.

44. See Paul Farmer, *Who Removed Aristide?*, 26 LONDON REV. BOOKS (Apr. 15, 2004), <https://www.lrb.co.uk/the-paper/v26/n08/paul-farmer/who-removed-aristide> (last visited Mar. 8, 2022). Although Haiti has demanded that France return this "debt," France has refused. AQ Editors, *France Refuses to Pay Back Haiti's "Independence Debt,"* AMS. Q. (Aug. 17, 2010), <https://www.americasquarterly.org/blog/france-refuses-to-pay-back-haitis-independence-debt> [<https://perma.cc/A7E4-GN8L>].

The racialized exploitation and economic subjugation of Haiti persisted after independence and through subsequent periods of United States occupation and foreign intervention. From 1915 to 1934, the United States military invaded and occupied Haiti, continuing to control the country's finances until 1947.⁴⁵ During this imperialist period, the United States relied on exploitative peasant labor; created and shaped Haiti's national institutions, like the army, which still exist today; and opened the country up to foreign investment, particularly by U.S. sugar companies.⁴⁶ After a brief return to democratic rule, Haiti fell into a decades-long dictatorship under the Duvaliers, which was "an economic, political, social, and moral disaster" that lasted until 1986.⁴⁷ In the intervening years, Haiti oscillated between democracy and military *coups d'état*, which were used to justify frequent intervention by the United States and other international actors.⁴⁸ As well, the Haitian government's ability to control the country's economy and resource exploitation was constrained by the dominance of U.S. sugar companies and the economic policies Haiti adopted at the behest of international financial institutions in exchange for foreign aid. The extractivism economy impacts Haiti and:

is not merely about the economic and material processes of natural resource extraction, it also has an impact on political and social relations (including race and gender relations) and advances particular cultural and normative world views that define the daily lives of many people and deeply influences their possible futures.⁴⁹

The confluence of foreign interference and instability in Haiti was exacerbated when a 7.0 magnitude earthquake struck Port-au-Prince in 2010, killing as many as 300,000 people and causing damage that displaced over a

45. *A Brief History of Hispaniola*, CNN, <https://edition.cnn.com/interactive/2016/04/world/haiti-timeline/haiti-timeline-snippet.html> [<https://perma.cc/WRL7-PZ7E>]; Vincent Joos, *Haiti's Deadly Riots Fueled by Anger Over Decades of Austerity and Foreign Interference*, CONVERSATION (July 26, 2018, 6:38 AM), <https://theconversation.com/haitis-deadly-riots-fueled-by-anger-over-decades-of-austerity-and-foreign-interference-100209> [<https://perma.cc/6PDJ-JEPM>].

46. Farmer, *supra* note 44; Christopher Woolf, *When America Occupied Haiti*, WORLD (Aug. 6, 2015, 4:30 PM), <https://www.pri.org/stories/2015-08-06/when-america-occupied-haiti> [<https://perma.cc/R89M-6QWD>].

47. GOLD MINING IN HAITI, *supra* note 41, at 25.

48. *Id.*; JOURNEY OF HOPE, *supra* note 40, at 37.

49. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance), *Global Extractivism and Racial Equality*, ¶ 11, U.N. Doc. A/HRC/41/54 (May 14, 2019). The same report defines the term "extractivism economy" as referring to "the industries, actors, and financial flows, as well as to the economic, material and social processes and outputs, associated with the globalized extraction of natural resources. The extractivism economy includes mineral and fossil fuel extraction, and monocultural large-scale agricultural, forestry and fishery operations. *Id.* at ¶ 6.

million people.⁵⁰ There have been widespread criticisms about whether the subsequent influx of foreign aid was administered effectively—or even at all⁵¹—by international actors or the Haitian government.⁵² The international humanitarian intervention that followed the earthquake has also been widely scrutinized, for reasons including the cholera outbreak that was caused by United Nations peacekeepers.⁵³ Since the 2010 earthquake, Haiti has continued to face persistent political and economic instability, with pervasive human rights violations committed by state and non-state actors, including sexual and gender-based violence.⁵⁴ In 2021, the instability culminated in Haitian President Jovenel Moïse being assassinated and, shortly after, the country was struck by another earthquake and tropical storm that killed and displaced thousands.⁵⁵ Amidst escalating instability and violence, foreign powers like the United States and France have been engaged in diplomacy around the transition of power, evoking histories of foreign intervention.⁵⁶

Since the 2010 earthquake, Haitians have been fleeing their country of origin in search of safety and security—many initially going to Brazil, then Chile, and more recently overland from South America to Mexico and the United

50. JOURNEY OF HOPE, *supra* note 40, at 38.

51. Maria Abi-Habib, *Why Haiti Still Despairs After \$13 Billion in Foreign Aid*, N.Y. TIMES (Aug. 16, 2021), <https://www.nytimes.com/2021/07/08/world/11haiti-foreign-aid.html> [<https://perma.cc/UR45-26SK>].

52. Jonathan M. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster*, PHILANTHROPY NEWS DIG. (June 17, 2013), <https://philanthropynewsdigest.org/off-the-shelf/the-big-truck-that-went-by> [<https://perma.cc/SUZ5-Z9Q5>]; GOLD MINING IN HAITI, *supra* note 41, at 26.

53. Camila Domonoske, *U.N. Admits Role in Haiti Cholera Outbreak That Has Killed Thousands*, NPR (Aug. 18, 2016, 1:27 PM), <https://www.npr.org/sections/thetwo-way/2016/08/18/490468640/u-n-admits-role-in-haiti-cholera-outbreak-that-has-killed-thousands> [<https://perma.cc/A63H-7GUU>].

54. Natalie Kitroeff & Michael Crowley, *U.S. Habit of Backing Strongman Allies Fed Turmoil in Haiti*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/07/18/world/americas/haiti-united-states-jovenel-moise.html> [<https://perma.cc/N33Q-EKRJ>]; *Strong Earthquake Rocks Haiti, Killing Hundreds*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/live/2021/08/14/world/haiti-earthquake> [<https://perma.cc/AEL7-9MEA>]; HUM. RTS. FIRST & HAITIAN BRIDGE ALL., BIDEN ADMINISTRATION'S DANGEROUS HAITIAN EXPULSION STRATEGY ESCALATES THE U.S. HISTORY OF ILLEGAL AND DISCRIMINATORY MISTREATMENT OF HAITIANS SEEKING SAFETY IN THE UNITED STATES (2021), <https://www.humanrightsfirst.org/sites/default/files/BidenAdministrationDangerousHaitianExpulsionStrategy.pdf> [<https://perma.cc/VDD2-4CAF>].

55. Anatoly Kurmanaev, *Floods, Hunger, Violence: A Power Struggle is the Least of Haiti's Worries*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/16/world/americas/haiti-president-politics.html> [<https://perma.cc/F5UW-DXR4>].

56. Vera Bergengruen, *Haitian-Americans Say Biden Is Turning His Back on a Country He Promised to Help*, TIME (Feb. 1, 2022, 7:00 AM), <https://time.com/6143221/haiti-political-crisis-biden-administration> [<https://perma.cc/TL3A-86DY>].

States. As I have argued elsewhere,⁵⁷ the migration route that Haitians have taken since the 2010 earthquake has been influenced in large part by structural racism and xenophobia, and laws that enabled South American countries to benefit from cheap Haitian labor. From 2010 to 2018, around 130,000 Haitians migrated to Brazil.⁵⁸ Many entered on work visas to fulfill a demand for labor as Brazil prepared to host the 2014 FIFA World Cup and 2016 Olympics.⁵⁹ Fewer than 7000 Haitians were granted refugee status over this period, in part because fleeing the earthquake did not meet the legal definition for asylum.⁶⁰ Brazil fell into an economic recession in 2014, and the demand for Haitian labor decreased.⁶¹ Many Haitians lacked employment or permanent legal status and, in a context of increasing racism and xenophobia in the country, were forced to migrate again—either to neighboring countries or north to Mexico and the United States.⁶²

From 2014 on, the number of Haitians migrating to Chile began to increase.⁶³ A shift in immigration laws allowed Haitians that entered the country on a tourist visa to subsequently obtain a work visa once they found employment.⁶⁴ As of December 2019, over 185,000 Haitians had migrated to Chile—the first time that the country had a sizable and visible Black population—though none were granted refugee status.⁶⁵ Many Haitians faced discrimination and struggled to find secure employment and, due to their precarious immigration status, often faced exploitative conditions. As their visibility increased, so did anti-immigrant sentiment.⁶⁶ After President Sebastián Piñera took office in 2018, his government changed Chile’s immigration laws to specifically restrict Haitian immigration.⁶⁷ In subsequent years, many Haitians have been forced to leave Chile and take a long, dangerous route north to Mexico and the United States.

Since 2019, Haitian, African, and other migrants arriving at Mexico’s southern border have been met with more restrictive Mexican immigration

57. S. Priya Morley, *Haitian Migration Through the Western Hemisphere: A Racial (In)justice Analysis*, OPEN GLOB. RTS. (Oct. 25, 2021), <https://www.openglobalrights.org/haitian-migration-through-the-western-hemisphere-a-racial-injustice-analysis> [<https://perma.cc/Z9XL-JQWA>].

58. JOURNEY OF HOPE, *supra* note 40, at 44.

59. *Id.* at 45.

60. *Id.* at 44.

61. *Id.* at 45.

62. *Id.* at 50–51.

63. *Id.* at 49.

64. *Id.* at 50–51.

65. *Id.* at 49.

66. *Id.* at 51–52.

67. *Id.* at 52.

enforcement that has impeded their transit to the U.S.-Mexico border.⁶⁸ This has been described as the “Mexican wall.”⁶⁹ Starting in 2019, in large part due to economic pressure exerted by the United States in the context of trade negotiations, Mexico deployed its militarized National Guard force to prevent migrants from continuing their journey north. This led to a significant increase in apprehensions and detentions, particularly in the southern Mexican state of Chiapas.⁷⁰ While this impacts all migrants, it has uniquely impacted Haitian, African, and other Black and Indigenous migrants. Immigration officials routinely identify and stop people based on their skin color and language. On this basis, Black and Indigenous migrants are identifiable as non-citizens when traveling without documentation, which can lead to their apprehension and detention by immigration officials.⁷¹ In some egregious cases, this racial profiling has led to the unlawful apprehension, detention, and even deportation of Afro-Mexicans and Indigenous Mexicans.⁷²

In another move to prevent migrants from reaching the United States border, in 2019 immigration officials in the Guatemala-Mexico border city of Tapachula, Chiapas stopped issuing the exit permits that had previously enabled these populations to travel through Mexico to seek asylum in the United States. As a consequence, increasing numbers of Haitians and Africans were stuck in Tapachula as they waited for their cases to be processed in the Mexican immigration system. While in Mexico, these populations face direct and structural racial and gender-based discrimination within the immigration system, as well as in the context of housing, employment, healthcare, and education—all of which makes the country an inadequate place of refuge.⁷³

68. S. Priya Morley, *Reckoning With Racism Against Black Migrants in Mexico*, OPEN GLOB. RTS. (Feb. 16, 2021), <https://www.openglobalrights.org/reckoning-with-racism-against-black-migrants-in-mexico> [https://perma.cc/8GZZ-GP75].

69. Journey of Hope, *supra* note 40, at 31.

70. *Id.* at 32–33.

71. MORLEY, GOSS, ABDULKAREEM, GURMU & LA PUENTE, *supra* note 40, at 34.

72. For an overview of these practices, see generally TANYA DUARTE, ABRAHAM GÓMEZ PASCENCIA, ANNA JOSEPH, ELIZABETH OREM, “BECAUSE OF THE COLOR OF MY SKIN AND THE WAY I SPEAK SPANISH”: THE INM’S DETENTION AND DEPORTATION OF INDIGENOUS AND AFRO-DISCENDANT MEXICANS (2020), <https://imumi.org/wp-content/uploads/2020/11/The-INMs-Detention-and-Deportation-of-Indigenous-and-AfroDescendant-Mexicans.pdf> [https://perma.cc/Z86E-L8T8].

73. For research on this concept, see MORLEY, GOSS, ABDULKAREEM, GURMU & LA PUENTE, *supra* note 40 and JOURNEY OF HOPE, *supra* note 40 including the descriptions provided by the Assembly of African Migrants, who organized to identify and protest their treatment in Tapachula, Mexico, including racial discrimination by Mexican immigration officials.

Nevertheless, as of January 2022, Haitians (and their Brazilian- and Chilean-born children) had become the largest asylum-seeking population in Mexico.⁷⁴

The “Mexican wall” is just one manifestation of how the United States border and migration controls have been “externalized” or reverberated into the region in recent years, particularly impacting Haitians.⁷⁵ In particular, the use of expedited removal proceedings⁷⁶ alongside the Title 42 public health order⁷⁷ has enabled U.S. immigration officials to apprehend, detain, and in some cases deport Haitian and other migrants without full consideration of their asylum claims, in violation of international law.⁷⁸

This issue was laid bare in fall 2021 when thousands of Haitians arriving at the U.S.-Mexico border—many of whom had migrated from Chile to Mexico—were met with explicitly racialized violence at the hands of U.S. Customs and Border Patrol officers.⁷⁹ Thousands of Haitians have since been deported from the United States—a total of at least 20,000 deportations to Haiti

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74. Andrés Ramírez (@AndresRSilva_), TWITTER (Feb. 2, 2022, 3:46 AM), https://twitter.com/AndresRSilva_/status/1488841197472915457?s=20&t=6LRiJHNStYZljcBoB4-gqA [<https://perma.cc/T4JG-DZXT>].
75. Among other externalizing programs, the Migrant Protection Protocols and safe third country agreements the United States entered into with several Central American countries also required migrants to wait or even seek asylum in other transit countries before reaching U.S. territory. AM. IMMIGR. COUNCIL, THE “MIGRANT PROTECTION PROTOCOLS” (2022), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> [<https://perma.cc/X8QK-ZQ94>]; Press Release, American Immigration Council, Safe Third Country Agreements with Central American Countries Eviscerate America’s Asylum System (Nov. 20, 2019) <https://www.americanimmigrationcouncil.org/news/safe-third-country-agreements-central-american-countries-eviscerate-america%E2%80%99s-asylum-system> [<https://perma.cc/QE6W-NS9W>].
76. AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf [<https://perma.cc/BRJ7-RP9J>].
77. AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf [<https://perma.cc/ZY2Q-EYHH>].
78. *Haiti: The US Must Stop Deportations and Abuse Against Haitians*, AMNESTY INT’L (Dec. 15, 2021, 8:35 PM), <https://www.amnesty.org/en/latest/news/2021/12/haiti-us-must-stop-deportations-abuse-against-haitians> [<https://perma.cc/7RMT-N46Z>]; Jaya Ramji-Nogales, *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law*, JUST SEC. (Oct. 5, 2021), <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law> [<https://perma.cc/KS3Y-ZADW>].
79. Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol’s Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html> [<https://perma.cc/5J33-BVAM>].

since President Joe Biden was inaugurated in January 2021.⁸⁰ These deportations have occurred despite the U.S. Department of Homeland Security admitting that “Haiti is grappling with a deteriorating political crisis, violence, and a staggering increase in human rights abuses.”⁸¹ Former U.S. Special Envoy to Haiti Daniel Foote described the Biden Administration’s deportation policy as “inhumane” and, in his resignation letter, said he did not “want to be associated” with it.⁸² Similarly, outgoing State Department senior advisor Harold Koh described the Title 42 policy, and particularly its impact on Haitians at the U.S.-Mexico border, as “illegal,” “inhumane” and “not worthy of this Administration that I so strongly support.”⁸³

Yet, these Title 42 deportations are merely the latest example of the United States wielding discriminatory immigration laws and policies to keep Haitians and other racialized migrants out of the country, even with a history of United States imperialism in Haiti and the region.⁸⁴ Despite the obstacles they face in transit, and the risk of deportation to Haiti, there are still thousands of Haitians on the migration route who have no choice but to continue north.⁸⁵

In an article arising from the recent UCLA School of Law convenings,⁸⁶ James Thuo Gathii—one of TWAIL’s founders—argued that “[e]xpanding CRT’s gaze to embrace transnational histories—as well as the connections and webs of circulation between locations that have undergirded and reinforced White supremacy and anticolonial resistance—could yield new analytic

80. Adam Isacson, *A Tragic Milestone: 20,000th Migrant Deported to Haiti Since Biden Inauguration*, WOLA (Feb. 17, 2022), <https://www.wola.org/analysis/a-tragic-milestone-20000th-migrant-deported-to-haiti-since-biden-inauguration> [https://perma.cc/B9BA-4RUZ].

81. Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,863, 41,864 (Aug. 3, 2021).

82. Jaya Ramji-Nogales, *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law*, JUST SEC. (Oct. 5, 2021), <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law> [https://perma.cc/3YUT-VSFN].

83. Alex Thompson & Alexander Ward, *Top State Adviser Leaves Post, Rips Biden’s Use of Trump-era Title 42*, POLITICO (Oct. 4, 2021, 2:23 PM) <https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029> [https://perma.cc/8PEB-MJKY].

84. JOURNEY OF HOPE, *supra* note 40, at 57; *see also* Edwidge Danticat, *The U.S.’s Long History of Mistreating Haitian Migrants*, NEW YORKER (Sept. 24, 2021), <https://www.newyorker.com/news/news-desk/the-uss-long-history-of-mistreating-haitian-migrants> [https://perma.cc/QV7C-FN3N]. *See generally* Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. STATE U. L. REV. 1139, 1149 (2021) (“The goal of this Article is to examine how, at the intersection of anti-Black racism and immigration status, the immigration laws and enforcement policies operate to reinforce structural racism in America.”).

85. Caitlyn Yates, *Haitian Migration Through the Americas: A Decade in the Making*, MIGRATION POL’Y INST. (Sept. 30, 2021), <https://www.migrationpolicy.org/article/haitian-migration-through-americas> [https://perma.cc/JAJ7-5CCG].

86. *See supra* notes 6–7, and accompanying text.

insights into the nature of the United States as a colonial and imperial power.”⁸⁷ In this Essay, I offer my initial response to this call. By drawing from a TWAIL-CRT lens, we can see how recent Haitian migration through the Western Hemisphere, and the migration laws and policies that alternately facilitated and constrained their movement, is inextricably linked to Haiti’s colonial and imperial history and its persistent and racialized impacts today. Evoking Achiume and Bâli’s analysis of Libya, described above, the United States’s perception of Haiti’s sovereignty—as well as the sovereignty of transit countries pressured into enforcing United States borders on their territory—depends on whether it serves U.S. interests or not and is inherently linked to race.

Going further, this analysis also highlights how the refugee protections in international law are inadequate given the current circumstances of global migration, and the way these protections disproportionately harm racialized migrants.⁸⁸ The definitions of a refugee articulated in international law, including in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol and regional agreements like the 1984 Cartagena Declaration,⁸⁹ operate to exclude from their protection many vulnerable migrants who are forced to flee their countries of origin for other reasons. Although some Haitian migrants may obtain refuge on grounds provided under the existing laws, many others are excluded. They include so-called “climate migrants”⁹⁰ who are fleeing the environmental and human impacts of climate change, and “economic migrants,”⁹¹ who experience the impacts of rising global inequality and must

87. Gathii, *supra* note 7, at 1642.

88. U.N. High Commissioner for Refugees, *The Refugee Concept Under International Law* (Mar. 8, 2018), <https://www.unhcr.org/5aa290937.pdf> [<https://perma.cc/D4H5-XJ2>].

89. Caroline Foley, *Going Beyond U.S. Immigration Law to Accept Climate Migrants*, EARTH REFUGE (Apr. 13, 2021), <https://earthrefuge.org/going-beyond-u-s-immigration-law-to-accept-climate-migrants> [<https://perma.cc/BT7Y-976Y>].

90. Abraham Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html> [<https://perma.cc/8CA3-RH3S>]. While there is some debate over the term “climate migrant,” see CAMILLO BOANO, ROGER ZETTER & TIME MORRIS, FORCED MIGRATION POLICY BRIEFING 1: ENVIRONMENTALLY DISPLACED PEOPLE: UNDERSTANDING THE LINKAGES BETWEEN ENVIRONMENTAL CHANGE, LIVELIHOODS AND FORCED MIGRATION 4 (2008), <https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf> [<https://perma.cc/D4Q3-Y4GW>], one helpful definition is: “Persons or groups of persons who, for reasons of sudden or progressive climate-related change in the environment that adversely affects their lives or living conditions, are obliged to leave their homes either temporarily or permanently, and who move either within their country or abroad.” ENV’T JUST. FOUND., NO SHELTER FROM THE STORM: THE URGENT NEED TO RECOGNIZE AND PROTECT CLIMATE REFUGEES 2 (2021), https://ejfoundation.org/resources/downloads/EJF_Climate-Refugee-Report_2021_final.pdf [<https://perma.cc/CJR2-W7MA>].

91. See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1513 (2019). (“Unlike the refugee, whose international flight is by definition a last resort, the term

leave their countries of origin in search of economic opportunities and livelihoods. These two categories themselves overlap, as climate change is “a logical consequence of an economic system based on extraction, accumulation through dispossession, and white supremacy.”⁹² Neither of these categories is currently recognized as a ground for asylum under international law.⁹³ These phenomena, and the global migration crisis they are producing, however, disproportionately impact Global South nations and their racialized, often Black or Indigenous, citizens.

With these limits in mind, critical scholars informed by the TWAIL and CRT traditions have been developing new ways of thinking about migration, including by theorizing “migration as decolonization” or otherwise as a form of reparations for historical harms of slavery and colonialism as well as the harms associated with climate change.⁹⁴ By engaging with the limits of the current legal framework, and advancing ideas for how to reimagine it, they illuminate how law might be used to further social change and rethink our understanding of migration and borders.

CONCLUDING THOUGHTS

In this Essay, drawing on my own experience, I have attempted to illustrate what it can look like for human rights practitioners and scholars to draw from CRT and TWAIL in their work. The recent landmark TWAIL-CRT convenings at UCLA School of Law generated new ways of thinking about the analytical tools that CRT and TWAIL offer and, when combined, what they illuminate about the relationship between race and empire. It is my hope that, by joining forces, CRT, TWAIL, and human rights scholars can better withstand attacks, seize law’s emancipatory potential, and build a shared vision of a more equitable and racially just future.

‘economic migrant’ is typically reserved for groups or individuals whose movement is popularly and legally understood to be a matter of preference, defined by a fair degree of political agency, and motivated primarily by the desire for a better life.”)

92. Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J.L. & POL. ECON. 109, 109 (2020).

93. There are some steps towards increased protection for climate migrants under international human rights law. See, e.g., ENV’T JUST. FOUND., *supra* note 90, at 7.

94. See, e.g., *id.*; Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401 (2020).