

# U.C.L.A. Law Review

## Race and Empire: Legal Theory Within, Through, and Across National Borders

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### ABSTRACT

In January 2020, we convened the *UCLA Law Review* Symposium, entitled *Transnational Legal Discourse on Race and Empire*. In this Article, which also serves as an introduction to the Issue that resulted from the Symposium, we seek to do two things. Our first objective is to situate this Symposium Issue within its broader intellectual context: renewed momentum among Third World Approaches to International Law (TWAIL) scholars to engage Critical Race Theory (CRT) scholars in collaboration aimed at deeper understanding of issues of shared concern. Our second objective, is to offer a concrete example of the insights to be gained from 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. Mainstream and official analysis casts the international system and its hegemonic actors in the role of humanitarian responders to a Libyan crisis not of their making. Instead, we draw attention to the ways in which the racial framing of Libya—and its subordination to imperial prerogatives—proved critical to international governance regimes for managing the country—and the bodies and territory within it—from 2011 to the present.

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providing their stellar platform to amplify critical perspectives in international law that are often marginalized in flagship academic journals in the United States and elsewhere.

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## INTRODUCTION

In January 2020, we convened the *UCLA Law Review* Symposium, entitled *Transnational Legal Discourse on Race and Empire*. In this Article, which also serves as an introduction to the Issue that resulted from the Symposium, we seek to do two things.

Our first objective is to situate this Symposium Issue within its broader intellectual context: renewed momentum among Third World Approaches to International Law (TWAIL) scholars to engage Critical Race Theory (CRT) scholars in scholarly collaboration aimed at deeper understanding of issues of shared concern. We come to this project primarily as international legal scholars invested in the commitments broadly associated with TWAIL, best understood as an “expansive, heterogeneous and polycentric dispersed network and field of study.”<sup>1</sup> Within TWAIL, the Third World is a “counter-hegemonic discursive tool that allows us to interrogate and contest the various ways in which [geopolitical] power is used,”<sup>2</sup> and it is an “anti-imperial and anti-racist project.”<sup>3</sup> It is a category that enables fundamental diagnosis and critique of international law and its operation, and that opens up meaningful if imperfect opportunities for shoring up the emancipatory potential of international law.<sup>4</sup> TWAIL is less about a dogmatic insistence on the Third World as a stable or unchanging, well-defined geographic or even geopolitical formation, and more about flexible but focused attention to the Third World as tracking a common experience of political, economic, and social subordination in the global hierarchy of power relations. Finally, as powerfully articulated by one of TWAIL’s founders, James Gathii, the Third World is also a “subaltern epistemic location”; that is, a site of knowledge production about international law that aims to disrupt dominant approaches,

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1. James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE L. & DEV.* 26, 26 (2011).
  2. See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 *THIRD WORLD LEGAL STUD.* 1, 19 (1999).
  3. JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* 21 (2017) (“[TWAIL is] a social and political consciousness that bands together a diversity of actors through their common marginalisation by the particularities of global North hegemony.”).
  4. For analysis of the meaning, value, and limits of the concept of the “Third World,” see B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *INT’L CMTY. L. REV.* 3, 4–7 (2006); Makau Mutua, *What Is TWAIL?*, 94 *PROCEEDINGS ASIL ANN. MEETING* 31, 31–32 (2000); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 *WIS. INT’L L.J.* 353, 355–62 (1997); REYNOLDS, *supra* note 3, at 21–24.

which to this day explicitly and implicitly treat the West as the only legitimate and plausible source of international legal knowledge.<sup>5</sup>

The TWAIL umbrella unifies scholars with diverse interests and methodologies, but scholars who still typically share the foundational premise that international law cannot be understood or analyzed apart from its mutually constitutive relationship with empire, specifically European colonialism and its enduring contemporary legacies.<sup>6</sup> TWAIL's contributions to international legal scholarship range from illuminating how historical antecedents of modern international law embodied and advanced colonial logics of racialized exploitation, expropriation, and extermination, to deconstructing the contemporary legacies of these antecedents in different fields of international law. Other TWAIL scholars have focused on the reconceptualization of international law to disrupt its embedded hierarchies of power.<sup>7</sup> A common thread within TWAIL that is salient for our subsequent analysis, then, is its critical foregrounding of empire (past and present): Where we might think of empire as referring to social, political, and economic interconnection among sovereign

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5. James Thuo Gathii, Professor of Law, Loy. Univ. of Chi. Sch. of Law, The Promise of International Law: A Third World View, Grotius Lecture at the 2020 Virtual Annual Meeting of the American Society of International Law 16 (June 25, 2020) (transcript available at <https://ssrn.com/abstract=3635509>).
  6. Our description of Third World Approaches to International Law (TWAIL) here is a cursory articulation of the aspects of the approach most salient for our analyses in this Article. For background on TWAIL (its history and commitments), see, for example, Gathii, *supra* note 1; Mutua, *supra* note 4; Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L CMTY. L. REV. 371 (2008); Mickelson, *supra* note 4; and Luis Eslava, *TWAIL Coordinates*, CRITICAL LEGAL THINKING (Apr. 2, 2019), <https://criticallegalthinking.com/2019/04/02/twail-coordinates> [<https://perma.cc/PQ42-RKCD>]. A number of scholars have aggregated useful bibliographies of TWAIL scholarship. See, e.g., Gathii, *supra* note 1; Gathii, *supra* note 5, app. at 28–66. The inauguration in August 2019 of the Third World Approaches to International Law Review (TWAIR) marked the launch of “the first continuous publication dedicated to the TWAIL network,” and is a valuable repository of TWAIL scholarship and other commentary. Laura Betancur-Restrepo, Amar Bhatia, Usha Natarajan, John Reynolds, Ntina Tzouvala & Sujith Xavier, *Introducing the TWAIL Review: TWAIR*, TWAIR: EXTRA (Aug. 30, 2019), <https://twair.com/introducing-the-twail-review-twair> [<https://perma.cc/JX9G-VY8L>].
  7. See, e.g., Vasuki Nesiiah, *Theories of Transitional Justice: Cashing in the Blue Chips*, in OXFORD HANDBOOK OF INTERNATIONAL LEGAL THEORY 779 (Anne Orford & Florian Hoffman eds., 2016) (offering a critique and reconceptualization of the field of transitional justice); Kishan Khoday & Usha Natarajan, *Fairness and International Environmental Law From Below: Social Movements and Legal Transformations in India*, 25 LEIDEN J. INT'L L. 415 (2012) (proposing means for more equitable reconstruction of international environmental law); E. Tendayi Achiume, *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015) (reconceptualizing the doctrine of the responsibility to protect in the context of refugee protection). For examples in this Symposium Issue, see Matiangai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820 (2021), and Darryl Li, *Genres of Universalism: Reading Race Into International Law, With Help From Sylvia Wynter*, 67 UCLA L. REV. 1686 (2021).

nations but on fundamentally unequal terms that structurally benefit powerful nations, while structurally disadvantaging and exploiting subordinated nations.<sup>8</sup>

We also come to this project as scholars invested in the commitments broadly associated with CRT, which proceeds from the premise of race as a social construction, according to which physical features and lineage are imbued with social, political, economic and even legal meaning.<sup>9</sup> CRT has its origins in the study of U.S. law,<sup>10</sup> but it has traveled far outside the borders of the United States.<sup>11</sup> Of particular relevance to our analysis here is the emphasis CRT places on interrogation of law as implicated in racial subordination, rather than existing outside of the problem, merely as solution. 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.<sup>12</sup> We want to be clear that no singular description of TWAIL could do justice to the work and aims of all scholars who identify with the tradition, and the same is true with respect to CRT.

As we describe in more detail in Part I, this Symposium Issue and a number of convenings that preceded it reflect renewed momentum among TWAIL

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8. See, e.g., E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520 n.36, 1540–41 (2019) (defining empire along these lines and reviewing relevant literature on this definition).
  9. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 7 (10th ed. 2006). For a review of definitions of race and racism within CRT, see Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 838 n.45 (2000).
  10. For an overview of CRT, see generally Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011), and *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).
  11. See, e.g., Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 WASH. U. GLOBAL STUD. L. REV. 695 (2015); Adelle Blackett, *Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively*, at McGill, 62 MCGILL L.J. 1251 (2017); Laura Carlson, *Critical Race Theory in a Swedish Context* 21–49 (Juridisk Tidskrift, Working Paper No. 1, 2012), <https://ssrn.com/abstract=2402587>; Tanya Katerí Hernández, *The Value of Intersectional Comparative Analysis to the "Post-Racial" Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 CONN. L. REV. 1407 (2011); Joel Modiri, *The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa*, 28 S. AFR. J. ON HUM. RTS. 405 (2012); Esther Ojulari, *The Social Construction of Afro-Descendant Rights in Colombia*, in *CONTEMPORARY CHALLENGES IN SECURING HUMAN RIGHTS* 19 (Corinne Lennox ed., 2015).
  12. The July 2011 Issue of the University of Connecticut Law Review, *Critical Race Theory: A Commemoration*, offers a range of illustrative examples of CRT's interventions in legal scholarship and academia. See generally *Commentary: Critical Race Theory: A Commemoration*, 43 CONN. L. REV. 1253–701 (2011).

scholars to engage with CRT; to center race as analytically productive in analysis of empire; and even to consider what a TWAIL-CRT broad strokes research agenda might look like. Although our focus is on a series of engagements at the intersection of TWAIL and CRT, our account is neither exhaustive of all encounters between the two frames, nor is it exhaustive of the field of analytical possibilities (and even pitfalls) that ought to be associated with bringing TWAIL and CRT jointly to bear on legal engagement with race and empire. Rather, we highlight themes, concepts, and insights generated at the TWAIL-CRT convenings we have hosted, and also those that have emerged across the rich and varied contributions to this Issue.<sup>13</sup> Our aim is less a definitive account, and more a meaningful contribution that builds on prior related efforts canvassed below—one that fosters generative debate and even contestation in the service of developing deeper and more sophisticated legal understanding of topics of shared concern among TWAIL and CRT scholars.

Our second objective, which we pursue in Part II, is to offer an example of the materially different insights that are made possible through the transnational approach that brings CRT to bear on TWAIL. We offer 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. By marking CRT as a lens we understand ourselves to be pursuing in tandem with TWAIL, we mean simply to highlight our efforts to center race as the critical analytical category for understanding the operation of contemporary global governance regimes. TWAIL scholars already do this work in various and compelling ways, without explicit invocation of a merged TWAIL-CRT lens.<sup>14</sup> We take an explicit approach in this Article, in large part as a way of

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13. See *infra* Part I. The keynote speech delivered by Aziz Rana and the comment responding to it by Vasuki Nesiiah wonderfully capture our goals in bringing the traditions of CRT and TWAIL to bear on questions of race and empire across these gatherings and especially in the contributions to this Issue. Rana's address surfaces interlinkages—between CRT's contestation of traditional approaches to constitutional law and TWAIL's contestation of conventional international law scholarship—that make visible the braided logics of settler empire and American global primacy, which together co-constitute the intrinsically racial project (and transnational projections) of the American century. In her contribution, Nesiiah reflects on alternate futures for CRT and TWAIL—new transnational solidarities to which Rana alludes—noting how thinking through these two traditions together “can be generative in developing our analysis of the race politics of Empire,” even as imperial unraveling generates its own new possibilities. Aziz Rana, *Keynote, UCLA Law Review Symposium 2020: Law and Empire in the American Century*, 67 UCLA L. REV. 1432, 1446–48 (2021); Vasuki Nesiiah, *An Un-American Story of the American Empire: Small Places From the Mississippi to the Indian Ocean*, 67 UCLA L. REV. 1450 (2021).

14. See, e.g., AZIZ RANA, *TWO FACES OF AMERICAN FREEDOM* 3 (2010) (offering the incisive lens of “settler empire”—which centers race and historical and contemporary imperial

forging links among scholars who pursue questions of shared interest, but using frames, approaches, and literatures that remain largely siloed.

We conclude with a brief discussion of the value of building intellectual community around a research agenda that is at times marginalized in mainstream international law scholarship.

## I. RACE AND EMPIRE IN INTERNATIONAL LAW AT THE INTERSECTION OF TWAIL AND CRT

### A. A Brief Intellectual History

Race and racial subordination have long been a focus of work in TWAIL, implicit in some projects and explicit in others. Foundational work in the TWAIL canon can be understood as unpacking the racial character of colonialism and the foundational role of empire in making international law. Mohammed Bedjaoui, a pioneer Third World international lawyer and legal scholar, for example, approached international law through a lens that highlighted its historical intimacy with racial discrimination.<sup>15</sup> And among American race theorists, there is a tradition that has sought to situate domestic race struggle and analysis in its international context, perhaps epitomized in the work of W.E.B. Du Bois,<sup>16</sup> and among lawyers, in the work of Henry J. Richardson.<sup>17</sup> Citing the words of Kimberlé Crenshaw, one of CRT's founding scholars, Antony Anghie, one of TWAIL's founders, has noted that a principal concern among TWAIL scholars has been "their attempt, in fields as diverse as international economic law and immigration law, to uncover 'the ongoing dynamics of racialized power and its

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projects—as essential for making sense of American Democracy). In this Symposium Issue, Adelle Blackett's contribution with Alice Duquesnoy offers another example of blended CRT and TWAIL scholarship in its analysis of the United States's dialogue with the International Labor Organization on slavery and race in prison labor. Adelle Blackett & Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labour and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labour Convention*, 67 UCLA L. REV. 1504 (2021).

15. See MOHAMMED BEDJAOU, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER 63 (1979).
16. Du Bois's address to the Pan African Congress of 1919 might be seen as such an intellectual origin point. See, e.g., Walter Rucker, "A Negro Nation Within the Nation": W.E.B. Du Bois and the Creation of a Revolutionary Pan-Africanist Tradition, 1903–1947, 32 BLACK SCHOLAR 37 (2002); see also Sean Elias, W.E.B. Du Bois, Race, and Human Rights, 4 SOC'YS WITHOUT BORDERS 273 (2009).
17. See, e.g., Henry J. RICHARDSON III, THE ORIGIN OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008); Henry J. Richardson III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMPAR. L.J. 27 (2003); Henry J. Richardson III, *Excluding Race Strategies From International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091 (2000).

embeddedness in practices and values which have been shorn of any explicit, formal manifestations of racism.”<sup>18</sup>

In various ways, then, TWAIL scholars have engaged racial subordination, even though, of course, they have not done so exhaustively.<sup>19</sup> In 2000, however, Ruth Gordon convened a landmark symposium at Villanova with a specific focus on CRT and international law,<sup>20</sup> and the issue that resulted from this convening is essential reading for anyone seeking to understand the history, trajectory, and substance of scholarly encounters on race and international law from CRT and TWAIL perspectives. Contributors to that volume, among other things, explored what both TWAIL and CRT stand to gain from engagement with each other.<sup>21</sup> They highlighted the work that critical race scholars have done to address racial discrimination in the structure and operation of the international human rights system,<sup>22</sup> including through intersectional analyses that bring structures such as gender to bear.<sup>23</sup>

## B. Bringing CRT and TWAIL (Back) Into Conversation at UCLA

In March 2019, we hosted a conference and workshop at UCLA School of Law with the explicit aims of bringing TWAIL and CRT scholars into conversation around two themes. In doing so, we were inspired by a number of prior events. In July 2018, Antony Anghie convened a monumental TWAIL symposium at the

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18. Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 890–91 (2000) (quoting KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARRY PELLER & KENDALL THOMAS, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xxix (1995); see also REYNOLDS, *supra* note 3, at 24 (“The primary thrust of TWAIL is to understand and deconstruct the role of international law in creating and perpetrating racialized hierarchies and structural material inequalities.”). For a discussion of race in international law, and a review of scholarship on race and global political economy, including by TWAIL scholars, see Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021).
  19. See, e.g., Christopher Gevers, “Unwhitening the World”: *Re-Thinking Race and International Law*, 67 UCLA L. REV. 1652 (2021) (arguing that even TWAIL scholars have insufficiently grappled with race and international law, including by sometimes conflating race with culture); Li, *supra* note 7, at 1708 (using the work of Sylvia Wynter to delineate “race and empire as distinct yet overlapping categories,” by re-centering the transatlantic slave trade in the foundational period of international law, where TWAIL and other scholars have failed to do so).
  20. Gordon, *supra* note 9, at 827 (marking that symposium as “the first symposium to address comprehensively how [CRT] might inform, and be informed by, an international perspective”).
  21. See, e.g., Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000).
  22. See Hope Lewis, *Reflections on Blackcrit Theory: Human Rights*, 45 VILL. L. REV. 1075, 1077–84 (2000).
  23. See *id.* at 1081 & nn.13–14.

National University of Singapore School of Law, with the aim of examining TWAIL's past, present, and future.<sup>24</sup> The program included 165 delegates and over one hundred abstracts from a breathtakingly diverse group of TWAIL scholars.<sup>25</sup> In August 2018, Justin Desautels-Stein, with Jim Anaya and Tendayi Achiume, led a workshop on International Law and Racial Justice at the University of Colorado, Boulder, School of Law. That workshop challenged participants to consider the place of race-centric analysis in contemporary international legal scholarship.<sup>26</sup>

The first of our March 2019 events, a Symposium entitled *Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations*, (*Critical Perspectives on Race and Human Rights*), centered specifically on critical consideration of the human rights frame's role in the pursuit of racial justice and equality.<sup>27</sup> Inspired in part by the momentum of the TWAIL Singapore convening, we were motivated to create a space for critical reflection regarding the possibilities and limitations of pursuing racial justice and equality using the language and frame of human rights. In broad terms, the international human rights movement anchored in the Global North and even international human rights scholars have failed to name and confront racial injustice, notwithstanding the twentieth and twenty-first century ascendance of the human rights frame.<sup>28</sup>

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24. *Third World Approaches to International Law Conference (TWAIL Singapore)*, NAT'L UNIV. SING. L. (Feb. 2, 2018), <https://law.nus.edu.sg/twail/index.html> [<https://perma.cc/YW5N-TK7W>].

25. *Abstracts: Third World Approaches to International Law Conference (TWAIL Singapore)*, NAT'L UNIV. SING. L., <https://law.nus.edu.sg/twail/pdfs/Speakers.pdf> [<https://perma.cc/TB6R-GPTW>].

26. See JIM ANAYA, TENDAYI ACHIUME & JUSTIN DESAUTELS-STEIN, INTERNATIONAL LAW AND RACIAL JUSTICE: UNIVERSITY OF COLORADO, AUGUST 3-4, 2018 (2018), [https://www.colorado.edu/law/sites/default/files/attached-files/ilrj\\_workshop\\_themes.pdf](https://www.colorado.edu/law/sites/default/files/attached-files/ilrj_workshop_themes.pdf) [<https://perma.cc/6VFC-UGAY>].

27. This gathering was the inaugural symposium of the Promise Institute for Human Rights at the UCLA School of Law, and was co-sponsored by the UCLA School of Law Critical Race Studies Program. For the symposium program and video recordings of the panels, see *Promise Institute Annual Symposium*, UCLA LAW, <https://law.ucla.edu/academics/centers/promise-institute-human-rights/promise-institute-annual-symposium> [<https://perma.cc/56YV-8ZWR>].

28. See, e.g., E. Tendayi Achiume, *Putting Racial Equality Onto the Global Human Rights Agenda*, 28 SUR INT'L J. ON HUM. RTS. 141 (2018) (discussing the marginality of race on the global human rights agenda). We both teach a doctrinal course on international human rights law and have repeatedly been struck by the short shrift given to racial justice and inequality in the leading international human rights law textbooks. They regularly (and rightly) engage significantly with gender justice and equality, including through analysis of the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), but engage with the racial justice and equality framework in a fairly cursory fashion, and with insufficient treatment of the International Convention on the Elimination of All Forms of Racial (ICERD). A notable exception is Jeanne M. Woods and Hope Lewis's textbook, which

We brought together leading TWAIL and CRT scholars,<sup>29</sup> early career scholars, and even the former United Nations High Commissioner for Human Rights for a perspective from within the global human rights machinery.<sup>30</sup> Our goal was to foster a transnational conversation among domestic and international legal scholars, and incubate a network of multidisciplinary academics interested in advancing critical, reconstructive, and even radical engagements with the human rights frame broadly construed, but with a focus on racial justice. A number of papers presented at the *Critical Perspectives on Race and Human Rights* symposium were subsequently published in the *UCLA Journal of International Law and Foreign Affairs*, and showcase scholarship on diverse racial justice issues in the spirit of TWAIL and CRT.<sup>31</sup>

The second of our March 2019 event had two parts: (1) a paper workshop pairing senior and early career scholars and at which the former provided feedback and mentorship to the latter;<sup>32</sup> and (2) a smaller workshop entitled *Race, Empire*

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substantively engages gender and racial discrimination intersectionally using the human rights frame. See JEANNE M. WOODS & HOPE LEWIS, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS (2004). Christopher Gevers' contribution to this Symposium Issue, "Unwhitening the World": Re-Thinking Race and International Law, discusses neglect and inadequate engagement with race of mainstream and critical public international lawyers. See Gevers, *supra* note 19. Darryl Li's contribution interrogates the ways in which ICERD reproduces barriers to theorizing race as a transnational structure of exploitation and subordination and explores how TWAIL scholarship might better theorize processes of racialization. Li, *supra* note 7. Finally, John Reynolds contribution traces the deployment of nationality as a proxy for race, functioning as a heavily racialized marker of hierarchy and mobility that regulates migration, relying in part on international law framings of emergency, to preserve the hegemony of Whiteness. John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. REV. 1768 (2021).

29. Video recordings of the plenary panels that combined TWAIL-CRT scholars in conversation on three themes: Race, Political Equality and Human Rights; Race, Migration, and Human Rights; and Race, Socio-Economic Inequality, and Human Rights. See *Promise Institute Annual Symposium*, *supra* note 27.
30. For an interview with the March 2019 symposium keynote lecturer and former UN High Commissioner on Human Rights, Prince Zeid bin Ra'ad Zeid al Hussein, on the themes of critical perspectives on race and human rights as they relate to the United Nations, see *Q&A With Prince Zeid bin Ra'ad Zeid al-Hussein*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 1 (2020).
31. See Dominic Npoanlari Dagbanja, *The Invisible Border Wall in Australia*, 23 UCLA J. INT'L L. & FOREIGN AFFS. 221 (2019); Kristen Carpenter & Alexey Tsykarev, *(Indigenous) Language as a Human Right*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 49 (2020); Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 133 (2020); Janine Silga, *The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 163 (2020); Mia Lattanzi, *Settler Colonialism Through the Court: Domestic Interpretations of International Law*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 201 (2020).
32. Race and empire are rarely engaged with any significance in legal education and our goal was to foster access for early career scholars to more established CRT-TWAIL scholars who were well-suited to provide them with useful feedback. We began teaching a TWAIL seminar at

*and International Law*, that moved beyond human rights, and invited TWAIL and CRT scholars to bring their respective frames to bear on race, empire, and international law more broadly. That smaller workshop delved more deeply into convergences and divergences among TWAIL and CRT, and interrogated the history of transnational legal analysis and political mobilization challenging racial domination. In a sort of reprisal and expansion of the conversation begun at the Villanova symposium workshop, participants discussed the difficulties and the possibilities of subaltern knowledge production across different fields (such as law, sociology, history) and at different scales (domestic and international), and interrogated some of the very premises that had motivated the convening. For example, can we meaningfully talk about race globally or transnationally or must race always be engaged locally? Can we meaningfully talk about empire, even European colonial empire, in global terms when important distinctions inhere, for example, between settler and nonsettler colonial projects? Discussion was also anchored concretely in a number of legal, historical, theoretical debates or analyses, and this 2020 *UCLA Law Review* Symposium Issue comprises a sample of the richness of those discussions. The January 2020 convening at UCLA of the annual *UCLA Law Review* Symposium was the most recent occasion for gathering the scholars participating in these conversations to develop and present research and arguments that grew out of the sustained engagements described herein. Some of the contributions published in this Issue were workshopped as solicited contributions at our *Race, Empire and International Law* workshop, and others were developed subsequently by participants of that workshop to address themes and questions that arose over the course of our intellectual exploration at that event. We believe the articles in this Issue showcase the significant contributions that a TWAIL-CRT union stand to make to our legal understanding of racial injustice and inequality as transnationally constituted and sustained.

## II. LIBYA AND INTERNATIONAL LAW: A RACE AND EMPIRE ANALYSIS

In this Part we offer our own example of the analytical value of bringing a combined TWAIL-CRT lens to bear on the traditional preoccupations of international law. TWAIL calls attention to empire, a transnational project of sovereign interconnection structured by geopolitical hierarchy. CRT calls specific attention to race as an analytic of subordination, including through law. We consider the case of Libya, and challenge conventional international legal analyses

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UCLA School of Law for this very reason. Furthermore, as we explain below, the vitality of any intellectual tradition requires investment in early career scholars, who can push its boundaries, refine its insights and address its deficiencies.

of the situation in that country, particularly from the perspectives of humanitarianism and counterterrorism on the one hand, and the laws and policies governing migration on the other. Mainstream and official analysis casts the international system and its hegemonic actors in the role of humanitarian responders to a crisis not of their making. Our analysis centrally implicates the international system and its hegemonic actors in the creation of conditions of possibility for the implosion in that country, sustaining the contemporary dysfunction and profiting from it. We argue that the dual and contingent nature of Third World sovereignty—a mainstay in the modern international system<sup>33</sup>—is at work here, and race is a part of this story, too. Our conception of race in this analysis is grounded in the CRT approach we highlighted earlier, one that treats race as a social construction that imbues morphology and ancestry with meaning—including through law and legal processes.<sup>34</sup> But it is also informed by the theorization of race by decolonial scholar Aníbal Quijano, who has detailed the emergence and function of race within European colonialism as a structure according to which rights and privileges were allocated.<sup>35</sup>

We argue that a TWAIL-CRT lens surfaces 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.<sup>36</sup> We also explore how different bodies of international law function and thrive as systems of racial governance, in which racial governance refers to the different ways that race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur.<sup>37</sup> Race, here, functions as a technology of empire, much along the lines elaborated by Chantal Thomas in her article in this Symposium Issue.<sup>38</sup> In our argument below, we draw attention to the ways in which the racial framing of Libya proved critical to the

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33. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (identifying colonialism as constitutive of the doctrine of sovereignty in international law, and mapping the quasi-sovereign status of Third World nation states even after decolonization); see also SIBA N'ZATIOULA GROVOGUI, *SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 2* (1996).

34. See HANEY LÓPEZ, *supra* note 9.

35. Quijano, *infra* note 37.

36. An earlier essay by Aslı Bâli and Aziz Rana implicitly adopts a TWAIL-CRT approach which offers a more detailed account of the contingent and provisional nature of Third World sovereignty, and informs our analysis here. Aslı Bâli & Aziz Rana, *Pax Arabica?: Provisional Sovereignty and Intervention in the Arab Uprisings*, 42 CAL. W. INT'L L.J. 321 (2012).

37. On race as a structure of colonial exploitation and benefit allocation, see Aníbal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA 533 (2000).

38. Thomas, *supra* note 18.

international governance regimes for managing the country—and the bodies and territory within it—from 2011 to the present. By framing Libya as an Arab—not African—state, First World countries sidelined the African Union’s efforts at mediation to defuse the conflict and presented military intervention backed by the United Nations (UN) as enjoying regional legitimacy by virtue of the Arab League’s endorsement. Later, the framing of Libya as an Arab state awash in jihadis situated the country in a familiar racialized script of Arab and Muslim violence,<sup>39</sup> enabling ad hoc, unilateral applications of force in the territory at the discretion of First World militaries wielding counterterrorism doctrine. Ironically, as Libya became the privileged theater of operation for experimentation with new counterterrorism techniques, it became the territorial locus for consolidating a new operational command structure for the U.S. military to “secure” Africa. Finally, treating Libya as an Arab “transit” state for Sub-Saharan Black Africans—racialized as definitionally non-Libyan—enabled vast interdiction operations using race as a proxy for unauthorized migration and establishing a European “racial border” on Libyan soil. We argue that the paradigms of humanitarianism, counterterrorism, and migration regulation as deployed in Libya showcase how international law structures regimes of racial governance in line with John Reynolds’s pithy formulation: “racist, reactionary, legal.”<sup>40</sup>

### A. Intervention, Race, and State Unmaking

The UN-authorized intervention in Libya was both remarkable and unexceptional. On the one hand, Libya was the first time that the “responsibility to protect” (R2P) was invoked as the basis for coercive action under Chapter VII of the UN Charter.<sup>41</sup> The United Nations Security Council (Security Council) licensed an armed intervention against a state not because of an act of aggression or a threat to its neighbors but ostensibly to protect its own civilian population.<sup>42</sup>

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39. On the racialization of Muslims as terrorists, see Carolina Mala Corbin, *Terrorists are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455 (2017), and also see Neil Gotanda, *The Racialization of Islam in American Law*, 637 *ANNALS AM. ACAD. POL. & SOC. SCI.* 184 (2011), and Sudha Setty, *Targeted Killings and the Interest Convergence Dilemma*, 36 *W. NEW ENG. L. REV.* 169, 178 (2014) (noting that “Muslims and Arabs . . . are the only groups whose members are known to have been included on the [U.S.] government’s targeted killings list”).

40. Reynolds, *supra* note 28, at 1798.

41. Andrea Carati, *Responsibility to Protect, NATO and the Problem of Who Should Intervene: Reassessing the Intervention in Libya*, 29 *GLOB. CHANGE PEACE & SEC.* 293 (2017).

42. *Security Council Authorizes ‘All Necessary Measures’ to Protect Civilians in Libya*, U.N. NEWS (Mar. 17, 2011), <https://news.un.org/en/story/2011/03/369382-security-council-authorizes-all-necessary-measures-protect-civilians-libya> [<https://perma.cc/8W7D-G8YD>].

On the other hand, this unprecedented authorization is better understood as continuous with a longer tradition of colonial and postcolonial military interventions in the Third World justified by appeals to humanitarianism. The critical question missed in almost all of the international law analysis of the Libya intervention is how the country could in a matter of weeks become the object of an international consensus that set aside all considerations of sovereignty in favor of a massive bombing campaign purportedly to protect civilians. To answer this question, it is essential to center race and empire in the analysis.

Sovereignty doctrine reflects the colonial origins of international law. As Antony Anghie's work has shown, sovereignty is a concept that was developed as a means of managing and justifying unequal relations between European states and the non-European world.<sup>43</sup> Decolonization and the emergence of formerly colonized societies as independent, sovereign states were often presented as the end of formal empire in the international system and the beginning of a postcolonial era of sovereign equality.<sup>44</sup> Yet, as the R2P doctrine makes particularly explicit, Third World sovereignty remains highly contingent. The possibility that the Libyan regime might put down a popular uprising by force was, at a propitious international moment, sufficient grounds to set aside Libyan sovereignty in the name of an asserted universal interest in humanitarianism.<sup>45</sup> The racial and imperial character of the governance arrangements that facilitate intervention in some contexts and exempt others reflects the dual nature of postcolonial sovereignty. Third World sovereignties that serve First World interests—either because of patronage relations or the need to solidify borders to manage migration flows—are impermeable. Protesters in countries like Saudi Arabia and even Syria would have been mistaken to expect humanitarian considerations to result in international intervention in their favor. But—as Libya shows—where First World geopolitical interests dictate setting sovereignty aside, it is readily cast off whether in the name of humanitarianism or the pursuit of other interests.

The events that precipitated the Security Council's decision to authorize armed intervention in Libya involved a crackdown against protesters who were, in

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43. ANGHIE, *supra* note 33, at 3.

44. See, e.g., ROBERT JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* 16–18 (1990).

45. Anghie notes the longstanding pedigree of such universalism:

[T]he principle of universality creates, even as it encompasses, the difference that must be sanctioned; universality is created to disempower the party to which it applies. Indeed, the construction of the universal and the international is not be any means an innocent act for here, it would seem, the “international” is formulated precisely in order to subordinate the Third World.

ANGHIE, *supra* note 33, at 238.

turn, part of a broader wave of protests across the Arab world that began in Tunisia in December 2010 and spread to Egypt, Bahrain, Syria, Yemen, and Libya, among others in 2011.<sup>46</sup> Latter day imperial politics were shot through international responses to these events. In countries whose governing regimes had powerful external patrons on the Security Council, a coordinated UN response was impossible no matter how brutal the government's actions against nonviolent protesters.<sup>47</sup> By contrast in Libya, intervention preceded largescale casualties among protesters and was so swift as to be all but automatic.<sup>48</sup>

Libya was distinctive in several respects—the country had long been a member of both the League of Arab States and the African Union.<sup>49</sup> But unlike the majority of Arab authoritarians facing uprisings—from Egypt's Hosni Mubarak to Ali Abdallah Saleh in Yemen—Qaddafi did not have longstanding partnerships with powerful states outside of the region or counterparts in the Arab world.<sup>50</sup> Indeed, Qaddafi's strongest relationships were with counterparts in the African Union, not the Arab world.<sup>51</sup> Qaddafi honed his pan-Africanism as part of a

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46. See generally JAMES L. GELVIN, *THE ARAB UPRISINGS: WHAT EVERYONE NEEDS TO KNOW* (2012).
47. Such brutality ranged from the massacre of nearly one thousand nonviolent protesters in Egypt to the deaths of hundreds of thousands in Syria. HUM. RTS. WATCH, *ALL ACCORDING TO PLAN: THE RAB'A MASSACRE AND MASS KILLINGS OF PROTESTERS IN EGYPT* (2014), <https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt> [https://perma.cc/TV2E-GVWV]; Michael Aaronson, *Syria and the Crisis of Humanitarian Intervention*, in *INTO THE ELEVENTH HOUR: R2P, SYRIA AND HUMANITARIANISM IN CRISIS* 56 (Robert W. Murray & Alasdair McKay eds., 2014), <https://www.e-ir.info/2014/02/11/syria-and-the-crisis-of-humanitarian-intervention> [https://perma.cc/8U72-WETJ].
48. For an excellent discussion of the course of the United Nations Security Council (Security Council) action in Libya, see Katherine Fallah & Ntina Tzouvala, *Deploying Race, Employing Force: 'African Mercenaries' and the 2011 NATO Intervention in Libya*, 67 UCLA L. REV. 1580 (2021).
49. Libya was a founding member of the Organization of African Unity in 1963. Charter of the Organization of African Unity, Sept. 13, 1963, 479 U.N.T.S. 39, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801314cf> [https://perma.cc/YG7T-RVUP]. The country joined the League of Arab States in 1953, two years after gaining independence. See *Profile: Arab League—Timeline*, BBC (Nov. 5, 2013), <https://www.bbc.com/news/world-middle-east-15747947> [https://perma.cc/CHD4-EBEB].
50. See Michael Slackman, *Dislike for Qaddafi Gives Arabs a Point of Unity*, N.Y. TIMES (Mar. 21, 2011), <https://www.nytimes.com/2011/03/22/world/africa/22arab.html> [https://perma.cc/YVF3-NGPV]; Gavin Cordon, *Muammar Gaddafi: A 40-Year Thorn in the West's Side*, INDEPENDENT (Oct. 20, 2011), <https://www.independent.co.uk/news/world/africa/muammar-gaddafi-a-40-year-thorn-in-the-west-side-2373395.html> [https://perma.cc/NMG7-4CKC].
51. James Kirchik, *South Africa Stands With Qaddafi*, ATLANTIC (Sept. 6, 2011), <https://www.theatlantic.com/international/archive/2011/09/south-africa-stands-with-qaddafi/244584> [https://perma.cc/AGF9-Y6PE] (noting that “South Africa has resisted the multilateral efforts against Qaddafi” and “is not much different from many other sub-Saharan African states” in this regard).

strategy of self-promotion and geopolitical posturing in his own rite.<sup>52</sup> Whatever the reasons, however, Libya's regional role prior to 2011 was firmly in Africa and not its strained relations with the Arab world. But for the purposes of isolating the regime and laying the groundwork for intervention, Libya's Arab rather than African identity proved salient in 2011.<sup>53</sup> As Arab authoritarians and their Western sponsors sought ways to stabilize a region experiencing waves of uprisings while still appearing to be on the "right side of history,"<sup>54</sup> Libya was low-hanging fruit. The country presented an easy opportunity to support protesters against a widely reviled regime with no allies in the Arab world, while discretely shoring up Arab regimes facing uprisings elsewhere.

For those who favored intervention in Libya, support from the relevant regional organization was seen as greatly enhancing the legitimacy of UN-authorized action. Intervention could be presented as a choice supported not only by American and European interveners seated on the Security Council but also by Libya's regional counterparts. This raised the vexed question of defining Libya's region. Qaddafi had long invested in a pan-African orientation for Libya—having been rebuffed by Arab leaders for decades and seeing an opportunity to use Libyan oil wealth to gain strategic leverage on the African continent.<sup>55</sup> Nor was Libya's relationship to sub-Saharan Africa exclusively a function of Qaddafi's whims. The nomadic tribes of Libya's Fezzan region range into neighboring countries to Libya's south and a significant minority of the Libyan population—including longstanding settled sub-Saharan immigrant communities—identify primarily as African.<sup>56</sup> For better or worse, Libyan

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52. See Adekeye Adebajo, *Gaddafi: The Man Who Would Be King of Africa*, GUARDIAN (Aug. 26, 2011), <https://www.theguardian.com/commentisfree/2011/aug/26/gaddafi-legacy-meddling-africa> [<https://perma.cc/887W-NY3D>] (describing Qaddafi's self-serving pivot to pan-Africanism).

53. For a discussion of the sidelining of Libya's African regional identity in the United Nations Security Council (Security Council) discussions leading to the 2011 intervention in Libya, see Phillip Apuuli Kasaija, *The African Union (AU), the Libya Crisis and the Notion of 'African Solutions to African Problems'*, 31 J. CONTEMP. AFR. STUDS. 117, 127–28 (2013) (noting that the Security Council in its resolutions on the Libya crisis "recognized the primacy of the Arab League over the AU").

54. For a discussion of the Arab Spring cliché of "getting on the 'right side of history'" through the lens of U.S. foreign policy, see Shadi Hamid, *5 Lessons From the Arab Spring So Far*, ATLANTIC (Dec. 23, 2011), <https://www.theatlantic.com/international/archive/2011/12/5-lessons-from-the-arab-spring-so-far/250454> [<https://perma.cc/4XPG-9URK>].

55. Adebajo, *supra* note 52.

56. *Official Figures: 11 Percent of Libya's Population Is Mostly African Immigrants*, AL-ARABIYA (Aug. 5, 2018), <https://english.alarabiya.net/en/features/2018/08/06/Official-figures-11-percent-of-Libya-s-population-is-mostly-African-immigrants> [<https://perma.cc/5ZEN-GCSB>] (noting that over two-thirds of immigrants in Libya are sub-Saharan Africans). For a discussion of the tribes that comprise the population of the Fezzan region, see FREDERIC WEHREY, *INSECURITY AND GOVERNANCE CHALLENGES IN SOUTHERN LIBYA* 4–6 (2017).

foreign policy was deeply invested in African affairs,<sup>57</sup> with the Qaddafi regime supporting actors ranging from the African National Congress party in South Africa<sup>58</sup> to insurgents and later dictators in countries such as Sierra Leone and Liberia.<sup>59</sup> Libya was also one of the largest contributors to the African Union itself.<sup>60</sup> The African Union, in turn, supported mediation to find a negotiated solution to the Libyan uprising.<sup>61</sup> None of this suited the purposes of intervention—instead the Arab League was presented as the appropriate regional organization and Libyans themselves were racialized as exclusively Arab at the UN by those in favor of intervention.<sup>62</sup> This racial framing would later facilitate descriptions of Black Libyans fighting in Qaddafi’s forces as paid mercenaries, further weaponizing racial stereotypes to demonize regime supporters and legitimize intervention.<sup>63</sup>

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(discussing Tabu and Tuareg tribes based in the Fezzan region who identify as non-Arab Africans). See also Judith Scheele, *The Libyan Connection: Settlement, War and Other Entanglements in Northern Chad*, 57 J. AFR. HIST. 115, 115–17 (2016) (discussing the long history of cross-border ties between Chad and the Fezzan region).

57. See, e.g., *Libyan Aid and Investment Projects in Africa*, REUTERS (Nov. 24, 2010, 6:35 AM), <https://www.reuters.com/article/us-libya-africa-influence-factbox/factbox-libyan-aid-and-investment-projects-in-africa-idUSTRE6AN39Z20101124> [<https://perma.cc/B545-7VRG>].
58. For an example of the ways in which Qaddafi’s longstanding support for the African National Congress enabled African leaders to play a diplomatic role in mediating Libya’s challenging relations with Europe at an earlier time, see Lyn Boyd-Judson, *Strategic Moral Diplomacy: Mandela, Qaddafi, and the Lockerbie Negotiations*, 1 FOREIGN POL’Y ANALYSIS 73 (2005).
59. On Qaddafi’s support for rebel leaders and later dictators like Charles Taylor in Liberia and Foday Sankoh in Sierra Leone, see, for example, Douglas Farah, *An ‘Axis’ Connected to Gaddafi*, WASH. POST (Nov. 2, 2001), <https://www.washingtonpost.com/archive/politics/2001/11/02/an-axis-connected-to-gaddafi/a7580f63-b23e-4a66-869b-0ea7a5973282> [<https://perma.cc/79DZ-2BVC>].
60. Libya contributed as much as fifteen percent of the African Union’s budget, paying not only its own dues but those of some other African nations in arrears in their own payments. Robert Nolan, *The African Union After Gaddafi*, J. DIPL. (Dec. 5, 2011), <http://blogs.shu.edu/journalofdiplomacy/2011/12/the-african-union-after-gaddafi> [<https://perma.cc/73UW-D3F7>].
61. For a discussion of the African Union’s mediation effort, see Alex DeWaal, *The African Union and the Libya Conflict of 2011*, REINVENTING PEACE (Dec. 19, 2012), <https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011> [<https://perma.cc/9F52-ANT6>]. See also *African Union Mediators Call for an ‘End to Hostilities’ in Libya*, DEUTSCHE WELLE (Apr. 10, 2011), <https://www.dw.com/en/african-union-mediators-call-for-an-end-to-hostilities-in-libya/a-14979294> [<https://perma.cc/N4D8-YSH7>].
62. On this point, see Siba N. Grovogui, *Looking Beyond Spring for the Season: An African Perspective on the World Order After the Arab Revolt*, 8 GLOBALIZATIONS 567, 569 (2011) (“[T]he Western alliance, all former colonial powers, decided unilaterally and as a matter of sovereign right that Libya was an Arab state and not African and that, for the purpose of their own intervention, the African Union had no authority over North Africa.”).
63. On the racist demonization of sub-Saharan Africans as mercenaries and the deployment of that framing to call for military intervention, see Maximillian Forte, *The War in Libya: Race, ‘Humanitarianism,’ and the Media*, MONTHLY REV. ONLINE (Apr. 20, 2011),

The Arab League—wracked with uprisings across its member states—closed ranks against Qaddafi while continuing to support authoritarian crackdowns against protesters elsewhere among its members. Libya was suspended from the League on February 22, 2011,<sup>64</sup> and within three weeks the League issued an endorsement of a UN no-fly zone over Libya.<sup>65</sup> The Arab uprisings underscored that the League was little more than a club for dictators—many busy suppressing uprisings in their own capitals—but one suddenly empowered by the First World to offer legitimacy and regional support for an international strategy of intervention, something the African Union declined to do. At the UN, Arab League action in support of Qaddafi's ouster was treated as evidence of regional support for intervention.<sup>66</sup> Meanwhile, efforts by the African Union to pursue a negotiated settlement between the regime and protesters in Libya were studiously ignored.<sup>67</sup>

Within less than a month of the start of protests,<sup>68</sup> the Security Council issued Resolution 1973, citing ongoing human rights violations as a basis to authorize member states to take “all necessary measures” to “protect civilians” under threat of attack.<sup>69</sup> The rhetoric employed to justify the urgent imperative to intervene

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<https://mronline.org/2011/04/20/the-war-in-libya-race-humanitarianism-and-the-media> [<https://perma.cc/L34L-5GC4>].

64. *Arab League Suspends Libyan Delegation*, REUTERS (Feb. 22, 2011, 10:53 AM), <https://www.reuters.com/article/libya-protests-league/arab-%C2%ADleague-suspends-libya-delegation-tv-idUSLDE71L2GK20110222> [<https://perma.cc/F9BC-HRE8>].
65. See Richard Leiby & Muhammad Mansour, *Arab League Asks U.N. for No-Fly Zone Over Libya*, WASH. POST (Mar. 12, 2011), [https://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R\\_story.html](https://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R_story.html) [<https://perma.cc/Q5TR-L76J>].
66. The UN press release on Security Council approval of a no-fly zone over Libya cited the importance of the Arab League in coming to its determination: “Recognizing the important role of the League of Arab States in the maintenance of international peace and security in the region.” Press Release, Sec. Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour With 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), <https://www.un.org/press/en/2011/sc10200.doc.htm> [<https://perma.cc/Y7NC-4LBC>]. The press release also cited statements by the representative of China indicating that “China had not blocked the action with a negative vote in consideration of the wishes of the Arab League.” *Id.*
67. See DeWaal, *supra* note 61.
68. The protests began with a “day of rage” on February 17, 2011, marking the anniversary of clashes five years earlier in Benghazi between security forces and protesters. ‘Day of Rage’ Kicks Off in Libya, AL JAZEERA (Feb. 17, 2011), <https://www.aljazeera.com/news/africa/2011/02/201121755057219793.html> [<https://perma.cc/3KW4-PBAM>]. For a timeline of the Libyan uprising, see *Timeline: Libya’s Uprising Against Muammar Gaddafi*, REUTERS (Aug. 22, 2011, 2:58 AM), <https://www.reuters.com/article/us-libya-events/timeline-libyas-uprising-against-muammar-gaddafi-idUSTRE77K2QH20110822> [<https://perma.cc/ER5D-9PTM>].
69. Press Release, *supra* note 66.

echoed calls from earlier centuries demanding Western action against barbarism.<sup>70</sup> Trading in both imperial and racial logics, the prerogative to take military action against savagery was reinforced by Western officials and commentators speaking of a moral imperative to act.<sup>71</sup> Two days after Resolution 1973 was passed, the United States, United Kingdom, and France formed a coalition to carry out airstrikes against military targets in Libya, initiating an operation that would be taken over by forces under the command of the North Atlantic Treaty Organization (NATO).<sup>72</sup> By October 2011, with NATO support, Libyan militias fighting against the Qaddafi regime gained control of the capital, captured and killed Qaddafi, and were recognized as part of a “transitional” authority deemed by the United Nations as the legitimate government of Libya.<sup>73</sup>

The Libya intervention has been given considerable attention in the international law literature, at first interpreted as a hopeful example of consensus

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70. See, e.g., Tom Malinowski, *Too Little, Not Yet Too Late*, FOREIGN POL’Y (Feb. 22, 2011, 11:37 PM), <https://foreignpolicy.com/2011/02/22/too-little-not-yet-too-late-2> [<https://perma.cc/4W8U-LZP2>] (calling on “Western governments” to “stop Qaddafi’s barbarous war on his own people”).

71. The invocations of Qaddafi’s alleged barbarism were against a backdrop of few civilian deaths by March 2011. As a consequence, these calls invoked the specter of the likely atrocities he would commit but for Western intervention, in some cases even days before Security Council authorization to use force. See, e.g., John Kerry, *The Moral Imperative of a No-Fly Zone*, GUARDIAN (Mar. 14, 2011), <https://www.theguardian.com/commentisfree/cifamerica/2011/mar/14/libya-nofly-zone-john-kerry> [<https://perma.cc/QD98-Q7SG>]. John Kerry argued three days before Security Council authorization to use force:

So far, Gaddafi’s forces have relied on airpower selectively. But Gaddafi is shrewd. My fear is that he is either choosing to bleed the opposition to death, rather than invite global action with a broad massacre, or waiting for the world to prove itself unwilling to act—at which point he might well begin killing civilians in large numbers.

*Id.* James Traub argues that Libya meets none of the criteria for humanitarian intervention but intervening remains

the right thing because U.S. and NATO force could stop a ruthless tyrant from killing his own people and bring his monstrous rule to an end . . . . And it would redound to America’s benefit because the United States would be placing its military power at the disposal of the Arab world in order to liberate Arab peoples.

James Traub, *Stepping In*, FOREIGN POL’Y (Mar. 11, 2011, 3:36 PM), <https://foreignpolicy.com/2011/03/11/stepping-in> [<https://perma.cc/XS7Z-GADX>].

72. UN Security Council Resolution 1973 passed on March 17, 2011 and the NATO-led air campaign against Libya began two days later on March 19th. S.C. Res. 1973 (Mar. 17, 2011); see also David Kirkpatrick, Steven Erlanger & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi’s Forces in Libya*, N.Y. TIMES (Mar. 19, 2011), <https://www.nytimes.com/2011/03/20/world/africa/20libya.html> [<https://perma.cc/23JE-T3MA>].

73. For an overview of the course of the intervention in Libya, see Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 378–80 (2012).

on the Security Council in support of humanitarianism,<sup>74</sup> and later in a less celebratory tone as the scholarship began to reflect worries concerning its aftermath.<sup>75</sup> Retrospective criticism of Security Council action in Libya focused largely on its implications for future great power cooperation and the association of R2P with regime change.<sup>76</sup> What is missing from such analysis is a forthright account, let alone criticism, of how and why Libya could so easily become the object of an international consensus setting aside sovereignty considerations and deploying massive aerial bombardment in the name of civilian welfare.

The humanitarian argument in favor of regime change intervention in Libya reprised the logic of an earlier century's civilizing mission.<sup>77</sup> The country's civilians were portrayed as victims almost from the start of demonstrations and the Qaddafi regime as savages—drawing on narratives that equated savagery with Blackness, as Katherine Fallah and Ntina Tzouvala show in their article—with NATO ultimately styled a humanitarian savior.<sup>78</sup> But not all civilians' humanitarian welfare was treated alike. For civilians supportive of the Qaddafi government, a combination of NATO airstrikes and rebel attacks resulted in untold damage and a significant proportion of the Libyan civilian death toll in 2011.<sup>79</sup> The overreliance on aerial bombardment—ensuring close to zero

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74. See, e.g., Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT'L L. 298, 314 (2012) (arguing that the Libyan intervention marked a multilateral institutional transformation that, through the Security Council “incentivized states to engage with a question of broad public interest, in lieu of a narrower focus on immediate national interests”).
75. See, e.g., Alan Kuperman, *A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign*, 38 Int'l. Sec. 105 (2013).
76. See, e.g., Justin Morris, *Libya and Syria: R2P and the Spectre of the Swinging Pendulum*, 89 INT'L AFFS. 1265, 1274–79 (2013) (arguing that prospects for future invocations of the responsibility to protect (R2P) doctrine are significantly diminished after Libya due to Russian and Chinese opposition and the trajectory of great power politics).
77. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 204–05, 209–19 (2001) (discussing the “civilizing mission”).
78. As Fallah and Tzouvala detail, the savagery of the Qaddafi regime was conveyed through a series of overtly racial tropes including the alleged deployment of “African” mercenaries to commit acts of “mass rape.” Fallah & Tzouvala, *supra* note 48, at 1584 n.9.
79. Libyan civilians who did not benefit from the protection promised by the Security Council include the residents of the village of Tawergha, nearly 50,000 of whom were ethnically cleansed by a Misratan militia on the grounds that they had been Qaddafi loyalists. *Libya: Displaced Population Can't Go Home*, HUM. RTS. WATCH (Jan. 24, 2019), <https://reliefweb.int/report/libya/libya-displaced-population-can-t-go-home> [<https://perma.cc/ABP6-D6S8>]; see also Tarik Kafala, “Cleansed” Libyan Town Spills Its Terrible Secrets, BBC (Dec. 12, 2011), <https://www.bbc.com/news/magazine-16051349> [<https://perma.cc/85WB-EUYJ>]. On the toll of airstrikes by North Atlantic Treaty Organization (NATO) forces on Qaddafi-held regions, see *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya*, HUM. RTS. WATCH (May 13, 2012), <https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya> [<https://perma.cc/T8B4-XEYT>] (documenting 9700 strikes resulting in civilian property damage, injury, and deaths). See also Michael Birnbaum, *NATO Launches Largest Airstrike Against Gaddafi*

casualties among interveners but heightening risk to civilians on the ground—as the privileged means of humanitarian intervention left the civilian infrastructure across the country devastated in the wake of its purported liberation.<sup>80</sup>

NATO evinced little sense of humanitarian obligation in the aftermath of its aerial campaign, particularly as related to rebuilding.<sup>81</sup> Far from assisting with repairing the country’s damaged infrastructure, the countries most involved in the NATO airstrikes against Libya—the United States, France, the United Kingdom and Italy—maintained a freeze on the assets of the Libyan state held in international bank accounts.<sup>82</sup> Those assets—frozen by the Security Council in February 2011—remain in a sort of virtual trust held by Western banks<sup>83</sup> to be made available to Libya only upon satisfaction among the great powers on the Security Council that a legitimate successor government has been established in Libya.<sup>84</sup> Neither the notion that Libyans are entitled access to their country’s

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*Regime*, WASH. POST (May 23, 2011), [https://www.washingtonpost.com/world/french-officials-france-and-britain-to-use-attack-helicopters-in-libya/2011/05/23/AFTF909G\\_story.html](https://www.washingtonpost.com/world/french-officials-france-and-britain-to-use-attack-helicopters-in-libya/2011/05/23/AFTF909G_story.html) [<https://perma.cc/V84B-FCM2>] (providing contemporaneous reporting on heavy NATO strikes on Qaddafi-held cities).

80. As just one example, Libya was once a leader in electrification in Africa. On Libya’s electricity access prior to 2011, see *Libya Energy Situation*, ENERGOPEDIA, [https://energypedia.info/wiki/Libya\\_Energy\\_Situation#cite\\_note-U.S.\\_Energy\\_Information Administration.2C\\_Libya\\_Country\\_Information.2C\\_Accessed\\_Dec.2C\\_15\\_2013.2C\\_http.2F2Fwww.eia.gov.2Fcountries.2Fanalysis/briefs.2FLibya.2FLibya.pdf-9](https://energypedia.info/wiki/Libya_Energy_Situation#cite_note-U.S._Energy_Information Administration.2C_Libya_Country_Information.2C_Accessed_Dec.2C_15_2013.2C_http.2F2Fwww.eia.gov.2Fcountries.2Fanalysis/briefs.2FLibya.2FLibya.pdf-9) [<https://perma.cc/MR2X-CL9L>] (noting that as of 2010, “99.8% of the Libyan people have access to electricity, which is the highest rate among African countries”). After the intervention, due to damage to transmission lines, Libyans faced widespread electricity shortages that persist to the present. See, e.g., Labib Daloub, *Conflict Damage and Reconstruction*, T&D WORLD (May 1, 2017), <https://www.tdworld.com/overhead-transmission/article/20969595/conflict-damage-and-reconstruction> [<https://perma.cc/8JJ5-4AHA>]. By 2018, the projects to reform Libya’s electricity sector produced lucrative opportunities, a macabre cycle where the countries whose intervention damaged the grid might now profit from its reconstruction. See, e.g., Sami Zaptia, *U.S. to Help Libya Reform Its Electricity Sector*, LIBYA HERALD (May 9, 2018), <https://www.libyaherald.com/2018/05/09/u-s-to-help-libya-reform-its-electricity-sector> [<https://perma.cc/3BVE-34F5>].
81. See, e.g., Ethan Chorin, *NATO’s Libya Intervention and the Continued Case for a “Responsibility to Rebuild,”* 31 B.U. INT’L L.J. 365 (2013) (arguing that NATO interveners should have prioritized rebuilding the country’s infrastructure as an extension of the requirements of the R2P doctrine).
82. *Libyan Assets Held By Leading Global Banks*, BBC (May 26, 2011), <https://www.bbc.com/news/business-13553259> [<https://perma.cc/U5M9-ZZJ2>].
83. See Sophie Quinton, *The Quest for Libya’s Frozen Assets*, ATLANTIC (Aug. 26, 2011), <https://www.theatlantic.com/international/archive/2011/08/the-quest-for-libyas-frozen-assets/244171> [<https://perma.cc/AA8E-3GUF>] (describing complexities of asset freezes applicable to Libyan sovereign assets).
84. On Libya’s ongoing efforts to unfreeze sovereign assets, see Karin Strohecker & Tom Finn, *Exclusive: Libyan Wealth Fund to Hire Auditors in Push to Unfreeze Assets*, REUTERS (Nov. 22, 2018, 8:15 AM), <https://www.reuters.com/article/us-libya-swf-exclusive/exclusive-libyan-wealth-fund-to-hire-auditors-in-push-to-unfreeze-assets-idUSKCN1NR1I3> [<https://perma.cc/3HCJ-LYLL>].

sovereign assets nor that these resources are necessary to establish a stable successor can prevail against the logic of tutelage and control of assets by trustees confident in their benevolence.<sup>85</sup>

The aftermath of the Libyan intervention brings to mind Partha Chatterjee's reflections on the persistence of "imperial privilege in a world without colonies."<sup>86</sup> In the Libyan case, intervention, destruction, and asset seizure raise obvious parallels with histories of colonial intervention and plunder. The familiar logic of First World intervention in the name of universal humanitarianism against Third World savagery, accompanied by overtly racialized tropes of brutal Black mercenaries, make plain the workings of race and empire duly authorized under international law. Billions of Libyan dollars remain available for the use of First World banks while the country's infrastructure remains in tatters. Unsurprisingly, the intervener's interests came to trump the humanitarian welfare of Libyan civilians in need of rescue soon after the intervention. After 2011, the original logic of intervention gave way to new imperatives of counterterrorism and migrant management. Nearly a decade after UN-backed regime change, the infrastructure and institutions of the Libyan state remain dismantled and the country is gripped by a civil war fueled by continuous external intervention.<sup>87</sup> One scholar of Libya has described the country's experience over the last nine years as a "globalized process of state unmaking."<sup>88</sup> To understand this globalized process requires an analysis that centers the racial and imperial logics that once underwrote intervention and now require ongoing policing of Libya's borders and its interior.

## B. Libya as a Counterterrorism Laboratory

When the intervention's military operations concluded, the eastern portion of Libya—where the anti-Qaddafi rebels had been based—was left in the hands of

85. The most recent restatement of the Security Council's determination to maintain the asset freeze came eight years after it was first imposed. Abdulkader Assad, *UN Security Council Says Libyan Assets and Their Interests Must Remain Frozen*, LIBYA OBSERVER (Jan. 2, 2019), <https://www.libyaobserver.ly/news/un-security-council-says-libyan-assets-and-their-interests-must-remain-frozen> [<https://perma.cc/E9EL-MBLT>].

86. Partha Chatterjee, *The Legacy of Bandung*, in BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW 657, 674 (Luis Eslva et al. eds., 2017).

87. See, e.g., Emadeddin Badi, *Russia Isn't the Only One Getting Its Hands Dirty in Libya*, FOREIGN POL'Y (Apr. 21, 2020, 12:18 PM), <https://foreignpolicy.com/2020/04/21/libyan-civil-war-france-uae-khalifa-haftar> [<https://perma.cc/L9H6-6YBH>]; Ramy Allahoum, *Libya's War: Who Is Supporting Whom*, AL JAZEERA (Jan. 9, 2020), <https://www.aljazeera.com/news/2020/01/libya-war-supporting-200104110325735.html> [<https://perma.cc/M9T2-SBFW>].

88. Jacob Mundy, *The Globalized Unmaking of the Libyan State*, MIDDLE E. REPORT, Spring 2019, at 3, 4, <https://merip.org/2019/07/the-globalized-unmaking-of-the-libyan-state> [<https://perma.cc/GFG7-CMPU>].

the militias armed and supported by NATO.<sup>89</sup> During the intervention, these militias were portrayed by Western powers as heroic freedom fighters in a struggle against an autocratic tyrant.<sup>90</sup> But in the predictable aftermath, arms trafficking, intermilitia conflict, and the failure to cohere into a unitary government produced a new narrative.<sup>91</sup> Particularly following the September 2012 attack on a U.S. compound in Benghazi,<sup>92</sup> the militias governing the east of the country were reframed as extremist-jihadis—consistent with racialized portrayals of the Arab world.<sup>93</sup> Together with this geopolitical shift in understanding, the international law literature moved from a reckoning with Libya’s consequences for the doctrine of R2P to renewed interest in the country as a site for developing

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89. Mahmoud Habboush & Ali Shuaib, *Militias May Drag Libya Into Civil War: NTC Chief*, REUTERS (Jan. 3, 2012, 4:32 PM), <https://www.reuters.com/article/us-libya/militias-may-drag-libya-into-civil-war-ntc-chief-idUSTRE80301120120104> [<https://perma.cc/99N6-JS2V>]. For a description of the military leadership of the anti-Qaddafi rebels during the NATO intervention, comprised of “senior military leaders from the eastern region of Torbuk,” see Barak Barfi, *Who Are the Libyan Rebels?*, NEW REPUBLIC (Apr. 29, 2011), <https://newrepublic.com/article/87710/libya-rebels-gaddafi-ntc-saif> [<https://perma.cc/JQ6G-AB5X>].
90. For an example of NATO Secretary-General Anders Fogh Rasmussen referring to Libyan armed groups during the intervention as “freedom fighters,” see David Brunnstrom, *NATO Worried by Libya Armed Groups, Offers Security Help*, REUTERS (Sept. 27, 2012, 4:23 PM), <https://www.reuters.com/article/us-un-assembly-nato-libya/nato-worried-by-libya-armed-groups-offers-security-help-idUSBRE88Q1YO20120927> [<https://perma.cc/8D32-EQZW>].
91. Thomas Gibbons-Neff, *Libya Has Become a Hub for Online Arms Trading, Report Says*, WASH. POST (May 2, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/05/02/libya-has-become-a-hub-for-online-arms-trading-report-says> [<https://perma.cc/8YWR-MGTQ>] (describing Libya as a hub for “militant groups and terrorists” to traffic weapons from small arms to antiaircraft missiles in Libya); Kevin Sullivan, *Two Years After Libya’s Revolution, Government Struggles to Control Hundreds of Armed Militias*, WASH. POST (Sept. 6, 2013), [https://www.washingtonpost.com/world/middle\\_east/two-years-after-libyas-revolution-government-struggles-to-control-hundreds-of-armed-militias/2013/09/06/6f32c4c0-13ae-11e3-880b-7503237cc69d\\_story.html](https://www.washingtonpost.com/world/middle_east/two-years-after-libyas-revolution-government-struggles-to-control-hundreds-of-armed-militias/2013/09/06/6f32c4c0-13ae-11e3-880b-7503237cc69d_story.html) [<https://perma.cc/9SRQ-49UC>] (describing fighters who refused to disarm after Qaddafi was overthrown as a mix of “criminal gangs . . . religious extremists” and “a mix of everything—cops, robbers, patriots and jihadis”).
92. On the Benghazi attack, see Erica Ryan, *Chronology: The Benghazi Attack and the Fallout*, NPR (Dec. 19, 2012), <https://www.npr.org/2012/11/30/166243318/chronology-the-benghazi-attack-and-the-fallout> [<https://perma.cc/7REX-WZFT>]. On the characterization of Libyan militias as jihadis after the attack, see, for example, James Risen, Mark Mazzetti & Michael S. Schmidt, *U.S.-Approved Arms for Libya Rebels Fell Into Jihadis’ Hands*, N.Y. TIMES (Dec. 5, 2012), <https://www.nytimes.com/2012/12/06/world/africa/weapons-sent-to-libyan-rebels-with-us-approval-fell-into-islamist-hands.html> [<https://perma.cc/P8HL-QPAC>].
93. See, e.g., Andrew McGregor, *Europe’s True Southern Frontier: The General, the Jihadis and the High-Stakes Contest for Libya’s Fezzan Region*, 10 CTC SENTINEL 19, 19 (2017) (publication of the Combating Terrorism Center describing rival militias in Libya as “an aggressive assortment of well-armed jihadis, tribal militias, African mercenaries and neo-Qaddafiists”); Risen, *supra* note 92.

innovative counterterrorism<sup>94</sup> doctrines of drone airstrikes, targeted abduction, and killing.

From 2011 to the beginning of 2020 three foreign-backed attempts to wrest control of the country failed. The initial NATO intervention toppled the existing government but could not replace it as the militias empowered by NATO refused to disarm and the violence deepened state collapse.<sup>95</sup> In 2014, with Libya in the throes of civil war, an externally-supported coalition of militias (Libyan Dawn) attempted to establish control over Tripoli, leading to a UN-sponsored political process that created a transitional authority known as the Government of the National Accord (GNA).<sup>96</sup> Even this attempt was largely a rushed affair to produce a transitional political body that could serve as a partner for Western counterterrorism strategies.<sup>97</sup> The GNA was never able to consolidate control over the country, with eastern Libya refusing to recognize the Tripoli-based government.<sup>98</sup> In 2019, an eastern militia, again with external support, made a third attempt to seize the capital and consolidate control.<sup>99</sup> That militia, the self-proclaimed Libyan National Army (LNA), led by Khalifa Haftar—a former Libyan general and naturalized American citizen—laid siege to Tripoli in the spring of 2019 and continued its assault on the capital for over a year until UN-backed forces finally broke the siege.<sup>100</sup> The war between the sides continues as of this writing.<sup>101</sup>

94. Wadie Said's contribution to this Issue provides a detailed history and analysis of the racialized character of the international counterterrorism regime. Wadie Said, *The Destabilizing Effect of Terrorism in the International Human Rights Regime*, 67 UCLA L. REV. 1800 (2021).

95. On the failure of efforts to disarm and demobilize militias, see CHRISTOPHER S. CHIVVIS & JEFFREY MARTINI, RAND, LIBYA AFTER QADDAFI: LESSONS AND IMPLICATIONS FOR THE FUTURE 7–34 (2014).

96. *Libya's Faltering New Government*, IISS: STRATEGIC COMMENTS (Sept. 21, 2016), <https://www.iiss.org/publications/strategic-comments/2016/libyas-new-government> [<https://perma.cc/6KN2-LZKA>].

97. One set of analysts note that the impetus for forming an internationally recognized government in Tripoli was itself driven by counterterrorism priorities: “[T]he U.S. needed a legitimate sovereign that could ‘consent’ to a sustained U.S. military intervention.” Elham Saudi, Thomas Ebbs & Riad Alakar, *The US Is Focusing on Counterterrorism in Libya, at Human Rights' Expense*, JUST SEC. (Mar. 21, 2018), <https://www.justsecurity.org/54152/counter-terrorism-expense-human-rights-libya> [<https://perma.cc/P2HD-XJ9U>].

98. Ayman al-Warfalli, *Libya's Eastern Parliament Votes Against U.N.-Backed Government in Tripoli*, REUTERS (Aug. 22, 2016), <https://www.reuters.com/article/us-libya-security-un-idUSKCN10X1DY> [<https://perma.cc/8E2V-9QQ7>].

99. *Timeline: Haftar's Months-Long Offensive to Seize Tripoli*, AL JAZEERA (Feb. 19, 2020), <https://www.aljazeera.com/news/2020/01/timeline-haftar-months-long-offensive-seize-tripoli-200119061244724.html> [<https://perma.cc/D8R3-ZS89>].

100. Patrick Wintour, *UN-Backed Libyan Forces Oust Renegade General From Tripoli*, GUARDIAN (June 5, 2020), <https://www.theguardian.com/world/2020/jun/04/un-backed-libyan-forces-oust-renegade-general-from-tripoli> [<https://perma.cc/TJ9Q-PFSU>].

101. Amy Mackinnon, *The Conflict in Libya Is Getting Even Messier*, FOR. POL'Y (Feb 4, 2021), <https://foreignpolicy.com/2021/02/04/libya-conflict-un-report-uae-haftar/>.

During this period, overt and covert external assistance—military, financial, and ideological—to various factions in Libya dismantled what was left of the state. While the international community, through the United Nations, remains nominally committed to supporting the country’s political transition,<sup>102</sup> the actions of the states that undertook the 2011 intervention speak to a different set of priorities. Their emphasis has shifted from concern for civilians and human rights to “stabilizing” the country and containing the threat of terrorism at what is sometimes described as “Europe’s Southern frontier.”<sup>103</sup> As one set of analysts noted:

Local [Libyan] partners are chosen based on their ability to maintain security without consideration for the impact their empowerment has on wider politics and relations in the country. . . . The need for stability has resulted in the U.S. and the international community veering dangerously close to endorsing a new Libyan dictatorship: through the support of militia groups that are accused of human rights abuses and war crimes.<sup>104</sup>

The need for stability in Libya is crucially tied by European analysts and policymakers to the imperative of securing Europe against terrorism and migration.<sup>105</sup> Thus the NATO intervention—that destabilized Libya and left it governed by the same militias now deemed terroristic by the North Atlantic powers—set the stage for new counterterrorism and migration regimes to manage Libya. The country went from an object of humanitarian rescue to being framed as a lawless incubator of threat within a very short timeframe. First World interests once presented as aligned with Libya’s liberation now require, instead, that threats from migrants and militias be contained within that country’s borders. The paramount international objective of intervention is to prevent spillover from Libya’s unraveling reaching First World shores. The now ascendant logics of counterterrorism and migrant interdiction, in turn, produce further support to

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102. On UN support for political transition in Libya and its setbacks, see FRANCESCO MANCINI & JOSE VERICAT, INT’L PEACE INST., *LOST IN TRANSITION: UN MEDIATION IN LIBYA, SYRIA AND YEMEN* (2016), [https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/IPI\\_1611\\_Lost-in-Transition.pdf](https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/IPI_1611_Lost-in-Transition.pdf) [<https://perma.cc/9ET5-KBNA>].

103. See, e.g., McGregor, *supra* note 93.

104. Saudi et al., *supra* note 97.

105. Some analysts go further, insisting that not only European but also American national security is imperiled by Libya’s “migration crisis.” See Thomas M. Hill & Emily Estelle, *Libya’s Migrant Crisis Isn’t Just a European Problem*, U.S. INST. PEACE (Nov. 9, 2018), <https://www.usip.org/publications/2018/11/libyas-migrant-crisis-isnt-just-european-problem> [<https://perma.cc/4VBR-HNB8>] (arguing that lawlessness in Libya is driving “irregular” migration and creating a foothold for terrorists and thus the Libyan crisis “is not only a humanitarian imperative; it’s a national security imperative”).

avored militias deemed capable of imposing stability at the borders by force.<sup>106</sup> Qaddafi was toppled because his dictatorship did not have external patrons on the Security Council. In his wake, the stabilization of Libya—to prevent “jihadis” and migrants from transiting to Europe—may require his replacement by a successor dictatorship able to secure the objectives of key Security Council members.

The imperial logic of ongoing intervention and management of the Libyan territory and population in the service of European and American interests, be they securing borders (as discussed in the next Subpart) or counterterrorism, paradoxically both undermines and purports to formally shore up Libyan sovereignty. The international legal analysis of counterterrorism operations in Libya center on whether and to what extent Libyan authorities “consent” to operations on their territory.<sup>107</sup> That international actors presided over the processes that determined which entities were entitled to speak qua “Libyan authority” and that international backing for the Government of National Accord (GNA) may have been designed to produce a partner<sup>108</sup> capable of providing such consent speaks to the contingent nature of Libyan sovereignty and the ways in which Third World “consent” may itself be weaponized in cases of ongoing intervention. Moreover, where consent cannot be manufactured, even this

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106. See, e.g., *Libya Militias Rake in Millions in European Migration Funds: AP*, AL JAZEERA (Dec. 31, 2019), <https://www.aljazeera.com/news/2019/12/libya-militias-rake-millions-european-migration-funds-ap-191231134806918.html> [<https://perma.cc/RB4S-XX8J>] (describing how European Union (EU) funds are provided to Libyan militias to use them as armed forces to prevent migrants seeking to travel to Europe). As Peter Bergen and Alyssa Sims note:

Many militias, led by ex-jihadists themselves, have at times successfully beaten back ISIS and other jihadist groups, generating a demand for rival states to continue to supply and support them—as Egypt, Qatar and the United Arab Emirates have done. Countries like France and the United States are pursuing their own counterterrorism agendas unilaterally.

PETER BERGEN & ALYSSA SIMS, *NEW AM., AIRSTRIKES AND CIVILIAN CASUALTIES IN LIBYA* 33 (2018), <https://www.newamerica.org/international-security/reports/airstrikes-and-civilian-casualties-libya> [<https://perma.cc/JK3U-7RCY>].

107. See, e.g., Robert Chesney, *Do We Care Less About Air Strikes When Pilots Are in the Cockpit? The Droneless Air War in Libya*, *LAWFARE* (Sept. 1, 2016), <https://www.lawfareblog.com/do-we-care-less-about-air-strikes-when-pilots-are-cockpit-droneless-air-war-libya> [<https://perma.cc/8MCH-SFFB>] (noting that the air operation in Libya is “straightforward” under international law due to GNA consent); Kristina Daugirdas & Julian Mortenson, *United States Justifies Its Use of Force in Libya Under International and National Law*, 110 *AM. J. INT’L L.* 804, 808 (2016) (citing GNA consent as the international law basis for authorized use of force in the 2016 American aerial campaign in Libya).

108. Saudi et al., *supra* note 97 (arguing that “faced with the possibility of a terrorist threat in Libya, it was apparent that the U.S. needed a legitimate sovereign that could ‘consent’ to a sustained U.S. military intervention” and that support for the “rushed Libyan agreement” was for this purpose).

formality may be waived<sup>109</sup> in favor of novel concepts positing forms of “confidential”<sup>110</sup> or “secret”<sup>111</sup> consent despite protestation from Libyan officials to the contrary.<sup>112</sup>

A review of U.S. and European Union policies towards Libya from the end of 2011 to the present reveals the extent to which Libya has become a laboratory for counterterrorism innovation—in terms of actual operations and their doctrinal justifications—with little regard for the country’s sovereignty. The 2012 attack on the U.S. diplomatic compound in Benghazi<sup>113</sup> resulted in a series of special forces operations to detain and render those suspected of being responsible for the attack.<sup>114</sup> To American audiences, the Benghazi attack is remembered primarily as the trigger for a partisan campaign against the Obama administration and more

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109. Ntina Tzouvala offers a parallel analysis of the “unable or unwilling” doctrine whereby state consent may be set aside in counterterrorism operations with respect to certain, inevitably Third World, states. She notes that such doctrines are not even nominally neutral but rather are utilized by powerful, typically First World states to subject weaker states, typically in the Global South, to nonconsensual uses of force. She also draws attention to the role of “Western legal scholars in developing, defending and popularizing the doctrine.” Ntina Tzouvala, *TWAIL and the ‘Unwilling or Unable’ Doctrine: Continuities and Ruptures*, 109 *AJIL UNBOUND* 266, 266–68 (2016).
110. See Tom Ruys, *The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal’ Uses of Force Excluded From UN Charter Article 2(4)?*, 108 *AM. J. INT’L L.* 159, 169 (2014) (discussing the idea of confidential prior consent by states to clandestine kidnappings from their territory in the counterterrorism context).
111. See Ashley Deeks, *A (Qualified) Defense of Secret Agreements*, 49 *ARIZ. ST. L.J.* 713, 763 (2016) (suggesting Libyan officials may have provided “secret” consent to the U.S. abduction of a terrorist suspect in Tripoli).
112. For example, Libyan officials publicly protested the abduction from Tripoli of Abu Anas Al-Libi by U.S. Special Forces in 2013, despite reports in Western media—and speculation by international law scholars—that the country had given secret consent. Jomana Karadsheh, Paul Cruickshank & Catherine E. Schoichet, *Wife: Captured ‘Most Wanted Terrorist’ al Libi Had Left al Qaeda*, CNN (Oct. 7, 2013), <https://www.cnn.com/2013/10/05/world/africa/libya-al-qaeda-leader-captured> [<https://perma.cc/S3SE-PU6S>] (noting that “Libya’s interim government distanced itself from the operation and called the U.S. capture a kidnapping”). Al Libi later died in U.S. custody in 2015. Jomana Karadsheh, *Alleged al Qaeda Operative Abu Anas al Libi Dies in U.S. Hospital, Family Says*, CNN (Jan. 3, 2015), <https://www.cnn.com/2015/01/03/us/us-libya-al-libi/index.html> [<https://perma.cc/6CT2-68A2>].
113. John Bacon, *Five Things to Know About the 2012 Benghazi Attack*, USA TODAY (June 17, 2014), <https://www.usatoday.com/story/news/world/2014/06/17/benghazi-attack-five-things/10676869> [<https://perma.cc/H39Z-WBR4>].
114. See, e.g., Karen DeYoung, Adam Goldman & Julie Tate, *U.S. Captured Benghazi Suspect in Secret Raid*, WASH. POST (June 17, 2014), [https://www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52\\_story.html](https://www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52_story.html) [<https://perma.cc/354T-ZCWF>]; Adam Goldman & Eric Schmitt, *Benghazi Attacks Suspect Is Captured in Libya By U.S. Commandos*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html> [<https://perma.cc/2UK5-DHKB>].

specifically then Secretary of State Hillary Clinton.<sup>115</sup> For Libyans, the Benghazi attack became a pretext to transform the country into a freefire zone of counterterrorism experimentation pockmarking the territory with airstrikes and special forces raids that continue to the present.<sup>116</sup> Libya became a central testing ground for both military and law enforcement operations that trump considerations grounded in sovereignty.<sup>117</sup> American intelligence operations to seize, capture, detain, and render suspected terrorists, together with drone strikes and targeted killings, are justified by arguments invoking self-defense and counterterrorism.<sup>118</sup> Libya retains a kind of “ephemeral sovereignty” from the perspective of interveners,<sup>119</sup> which does not entail authority to secure its territory nor defend its nationals against international imperatives that require their abduction or assassination.<sup>120</sup> The privileging of the security interests of the First

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115. See, e.g., Lauren Gambino, *Benghazi Report Finds No Smoking Gun, and Hillary Clinton Is Happy to ‘Move On,’* GUARDIAN (June 29, 2016), <https://www.theguardian.com/us-news/2016/jun/29/benghazi-report-finds-no-smoking-gun-and-hillary-clinton-happy-to-move-on> [<https://perma.cc/77CV-MF85>].
116. See, e.g., Billy Perrigo, *17 Killed in U.S. Airstrike on Suspected ISIS Targets in Libya, Military Says*, TIME (Sept. 27, 2019, 1:29 PM), <https://time.com/5688115/libya-us-airstrike> [<https://perma.cc/BYN8-Y6QC>]; Eric Schmitt, *U.S. Drone Strikes Stymie ISIS in Southern Libya*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/world/africa/drone-strikes-isis-libya.html> [<https://perma.cc/8FD9-KLPL>]; see also Nick Turse, Henrik Moltke & Alice Spier, *Secret War*, INTERCEPT (June 20, 2018, 4:32 PM), <https://theintercept.com/2018/06/20/libya-us-drone-strikes/?comments=1> [<https://perma.cc/7ZZV-ZY6X>] (noting that the United States conducted approximately 550 drone strikes in Libya from 2011 to 2018, making it among “the most heavily targeted nations in terms of American remotely piloted aircraft”).
117. See Wolfram Lacher, Commentary, *Drones, Deniability and Disinformation: Warfare in Libya and the New International Disorder*, WAR ON ROCKS (Mar. 3, 2020), <https://warontherocks.com/2020/03/drones-deniability-and-disinformation-warfare-in-libya-and-the-new-international-disorder> [<https://perma.cc/A4S2-QXRH>] (noting that drone strikes in Libya are now attributable to any of at least five foreign states, all able to use plausible deniability and disinformation to disavow responsibility let alone requirements of consent from Libyan authorities).
118. See, e.g., Marty Lederman, *The Legal Basis for the Abu Khattalah Capture*, JUST SEC. (June 19, 2014), <https://www.justsecurity.org/11856/legal-basis-abu-khattalah-capture> [<https://perma.cc/BJ94-GYTL>]; Deborah Pearlstein, *The Raids in Somalia and Libya—Theories of Self Defense?*, OPINIO JURIS (June 10, 2013), <http://opiniojuris.org/2013/10/06/raids-somalia-libya-theories-self-defense> [<https://perma.cc/B8Q5-ENWK>].
119. The concept of “ephemeral sovereignty” was advanced approvingly by one scholar to describe a “reconfiguration” of the meanings of territory and sovereignty in U.S. legal frameworks for drone-targeting operations. Katharine Hall Kindervater, *Drone Strikes, Ephemeral Sovereignty, and Changing Conceptions of Territory*, 5 TERRITORY POL. GOVERNANCE 207, 207 (2017).
120. See Shawn Snow, *Jamming, Precision Artillery and Long Range Drone Strikes on Libyan Battlefield Offer Lessons Learned for US Military*, MIL. TIMES (Feb. 24, 2020), <https://www.militarytimes.com/flashpoints/2020/02/24/jamming-precision-artillery-and-long-range-drone-strikes-on-libyan-battlefield-offer-lessons-learned-for-us-military> [<https://perma.cc/83E7-V5VK>] (noting that the “rapidly-morphing war in Libya may provide

World intervener over the consent and sovereignty of the Third World state against which force is deployed exemplifies the role of international law in sustaining logics of imperial governance.<sup>121</sup>

Even when Third World consent is sought, as with the U.S. operation to which the internationally-backed Libyan GNA gave its support, the scale and scope of destruction visited on the territory in the name of counterterrorism know few limits and would be unthinkable outside of the Third World. In 2016, U.S. special operation forces provided “direct, on-the-ground support” to Libyan fighters in a massive attack intended to eliminate the Islamic State (ISIS) from the coastal city of Sirte.<sup>122</sup> The intense military air campaign to dislodge ISIS from Sirte took place in a densely populated city and involved nearly 500 airstrikes.<sup>123</sup> Deemed a counterterrorism success, the air assault left the city of Sirte “deeply scarred physically and psychologically” with “whole neighborhoods . . . flattened.”<sup>124</sup> Residents reported that “[t]here has been little

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U.S. forces and American commandos an experimental battlefield to gauge how U.S. troops can compete with near-peers”); Carlotta Gall & David D. Kirkpatrick, *Libya Condemns U.S. for Seizing Terror Suspect*, N.Y. TIMES (Oct. 6, 2013), <https://www.nytimes.com/2013/10/07/world/africa/american-raids-in-africa.html> [<https://perma.cc/3U2V-53MU>] (noting that the abduction of a Libyan national by U.S. forces “underscored the stakes for the United States as it gave up on waiting for the Libyan government to grow strong enough to challenge the militias that wield power”).

121. See, e.g., Kevin Jon Heller, *Analysing the US Invocation of Self-Defence Re: Abu Khattallah*, OPINIO JURIS (June 20, 2014), <http://opiniojuris.org/2014/06/20/analysing-us-invocation-self-defense-re-abu-kattalah> [<https://perma.cc/8T2G-FV5X>] (noting that most scholars limited their discussion of the legality of the U.S. operation to capture Abu Khattalah in Libya to its basis in domestic U.S. law and that to the extent an international law basis were available it would have to be related to U.S. security interests since Libyan consent had clearly not been sought). Heller notes that the absence of evidence that Abu Khattalah was planning further attacks, let alone that such attacks were imminent, casts doubt on whether the U.S. invocation of self-defense should be treated as valid. *Id.*; see also Colum Lynch, *The U.S. Makes Case for Libya Abduction at the U.N.*, FOREIGN POL’Y (June 18, 2014, 3:51 PM), <https://foreignpolicy.com/2014/06/18/the-u-s-makes-case-for-libya-abduction-at-the-u-n> [<https://perma.cc/H7RW-WL6Q>]. Several months later, the Libyan government registered its objection to the operation. *Libyan Condemns US ‘Violation’ of Its Sovereignty*, MIDDLE E. EYE (Feb. 12, 2015), <https://www.middleeasteye.net/news/libyan-condemns-us-violation-its-sovereignty> [<https://perma.cc/66AK-WBL9>].
122. Missy Ryan & Sudarsan Raghavan, *U.S. Special Operations Troops Aiding Libyan Forces in Major Battle Against Islamic State*, WASH. POST (Aug. 9, 2016, 1:51 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2016/08/09/u-s-special-operations-forces-are-providing-direct-on-the-ground-support-for-the-first-time-in-libya> [<https://perma.cc/WSJ2-T2H3>].
123. Jim Michaels, *How U.S. Drones Helped Win a Battle Against ISIS for First Time in Libya*, USA TODAY (Apr. 17, 2017, 11:59 AM), <https://www.usatoday.com/story/news/world/2017/04/17/united-states-drones-battle-against-isis-libya/100515934> [<https://perma.cc/2X9N-WN4A>].
124. Sudarsan Raghavan, *A Year After ISIS Left, a Battered Libyan City Struggles to Resurrect Itself*, WASH. POST (Jan. 8, 2018), <https://www.washingtonpost.com/news/world/wp/2018/01/>

assistance from the United Nations and international charities” to rebuild following a massive campaign of aerial bombardment.<sup>125</sup> From a counterterrorism perspective, the operation was a success with American officials citing the battle of Sirte as a model to be replicated in Iraq against ISIS.<sup>126</sup> But the consequences for the affected civilian population let alone the country’s ability to reconstruct were excluded from this calculation of success. Moreover, the fact that neither al-Qaeda nor the Islamic State had any record of operating in Libya prior to the 2011 intervention was rarely acknowledged.<sup>127</sup> This silence exemplifies how conventional analysis obscures the role of international actors, and the international legal doctrines on which they rely, in producing the very forms of violence and instability that then serve to justify their posture of perpetual intervention. The presentation of Libya as an Arab state beset by terrorist actors uses a racial shorthand to naturalize the crisis in the country—another Arab country hosting al Qaeda and ISIS fighters—without the slightest recognition that international actions produced the conditions of possibility under which these fighters are now present on the territory, never mind the degree to which ongoing international intervention makes credible and even appealing forms of anti-imperial insurgency.

Following the fall of Sirte, U.S. counterterrorism analysts noted that “Sub-Saharan Africans have had a progressively stronger presence in the Islamic State in Libya with the group taking advantage of its links to human trafficking networks to recruit from among migrants attempting to reach Europe.”<sup>128</sup> The convergence of the counterterrorism and migration agendas in Libya features a racialized account both of the identity of migrants as non-Libyan and of sub-Saharan Africans as ready recruits to the ranks of the Islamic State. The predominantly African framing of threat is reflected in the command structure for American

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08/feature/a-year-after-isis-left-a-battered-libyan-city-struggles-to-resurrect-itself [https://perma.cc/KDH7-BGPT].

125. *Id.*

126. Michaels, *supra* note 123 (“The Sirte operation will ‘serve as a model for future U.S. operations in the region’ . . .” (quoting U.S. Marine General Thomas Waldhauser)).

127. The war on terror is replete with such paradox and incoherence, as CRT and TWAIL scholars have long argued. “The paradoxes emerge: while proclaiming to further human rights, the USA has persistently violated them, while seeking to prevent terrorism, it has generated further violence.” Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 751 (2006); see also Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 *GEO. J.L. & MOD. CRITICAL RACE PERSP.* 67 (2009) (arguing that the United States’s “war on terror” involves self-exemption from constraints of international law in the name of reshaping legal doctrines to better protect against illicit violence—that is, paradoxical lawless violence by the United States in the name of imposing legal constraint on violence).

128. Lachlan Wilson & Jason Pack, *The Islamic State’s Revitalization in Libya and Its Post-2016 War of Attrition*, 12 *CTC SENTINEL* 22, 22, 28 (2019).

operations in Libya as well. U.S. strategy for Libya is shaped by the relatively newly formed Africa Command (AFRICOM), a combatant command structure created in 2007 for the American military with the objective of “promoting greater security in Africa.”<sup>129</sup> The intervention in Libya and its aftermath was the “watershed event for interagency integration at AFRICOM.”<sup>130</sup> A U.S. Army War College assessment of AFRICOM concluded that the Libyan operation provided a theater for the nascent combatant command to develop “lessons learned,” improve its military operations, and complete the bureaucratic process of becoming integrated in the broader American military command structure.<sup>131</sup> In short, Libya served as the testing ground for the United States to consolidate its new operational command structure for securing Africa.

In less than a decade, Libya has gone from locus of humanitarian concern to an incubator of racialized threat that provides a central site for new operational and organizational structures to oversee the securing of African territories. The cyclical quality of intervention—and the imbricated logics of race and empire that sustain it—is scarcely masked by these shifting justifications. Humanitarian intervention dismantled the Libyan state and armed the very militias that must now be targeted for counterterrorism ends. Counterterrorism imperatives to secure Europe from threats emanating from Libya, in turn, justify further intervention. The logic of a racialized use of force regime is available both to legitimate aerial bombardment to liberate Libyans and to justify further airstrikes to pacify the threat these same Libyans pose to international security. Invocations of Libyan sovereignty or consent come and go as the alchemy of First World interests dictate. The civilizing mission of an earlier colonial era survives nearly intact in these legal logics.<sup>132</sup> In each case, international law furnishes a legitimating framework while working assiduously to obscure the international sources of destabilization and violence that generate the imperative of intervention. Mainstream international law—and the predominantly Western legal scholars preoccupied with doctrinal justifications of humanitarian intervention and legitimating frames for the prerogatives of counterterrorism—has more often been a handmaiden than a critic of the imperial and racial logics of “securing” Libya.

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129. DAVID E. BROWN, AFRICOM AT 5 YEARS: THE MATURATION OF A NEW U.S. COMBATANT COMMAND 1 (2013), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a583521.pdf> [<https://perma.cc/A9F3-QYLS>]. Prior to the creation of AFRICOM, the U.S. military command structure located responsibility for Africa with its European Command. *Id.* at 5.

130. *Id.* at 49.

131. *Id.* at 50.

132. See Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 45 (2005) (describing the American doctrine of preemptive self-defense as replicating earlier colonial history).

### C. Race and Libya's "Sovereign" Borders

If one half of our legal analysis focuses on racialized intervention, including through the counterterrorism prism, the other half relates to border or migration governance. Here, too, legal reckoning cannot be complete without analysis that accounts for race and empire, yet official analysis tends to obscure both. We critique conventional accounts of legal liability for human rights violations within Libya and on its shores as partial—both incomplete and biased. They obscure the complicity of powerful external states and regional bodies with imperial interests in Libya. These accounts also neglect analysis of migration or border control as a form of racial governance that is similarly only comprehensible through an imperial lens, which reveals the crucial role of international legal doctrine in sustaining this state of affairs. In other words, conventional accounts do not fully articulate the role of international migration law and policy in the operation of race as a means of ordering imperial exploitation, and the complicity of First World nation states in the human rights violations that result.<sup>133</sup>

Take the following example. In the post-NATO intervention context described above, an airstrike hit a building in Libya that included the Tajoura Detention Centre (Tajoura). This July 2019 airstrike resulted in two explosions at Tajoura, where at least 380 migrants and refugees were being held in detention with 126 of them in the section directly hit by the airstrike.<sup>134</sup> After the first explosion, eyewitnesses reported that migrants and refugees in the center attempted to open the doors and flee, but the detention guards—officials falling under the Libyan Ministry of Interior—prevented them from doing so.<sup>135</sup> Some eye witnesses further reported that a Libyan official shot and killed three migrants who attempted to escape the center after the first bombing, although officials ultimately denied these shootings.<sup>136</sup> In total, according to the United Nations, fifty-seven migrants and refugees were killed during the strike, six of whom were

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133. Whereas our analysis in this Part does not directly implicate settler colonial imperial practices of racial subordination through borders and migration governance, Sherally Munshi's contribution to this Issue is essential reading for its powerful illustration of the urgency of situating the study of borders and migration in their proper context of race in empire including for settler colonial nations. Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720 (2021).

134. U.N. Support Mission in Libya & Office of the High Comm'r for Hum. Rts., *The Airstrikes on the Daman Building Complex, Including the Tajoura Detention Centre*, 2 July 2019, ¶¶ 7, 13 (Jan. 27, 2020) [hereinafter *Airstrikes on the Daman*], [https://reliefweb.int/sites/reliefweb.int/files/resources/UNSMILOHCHRReport\\_AirstrikesTajoura%203.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/UNSMILOHCHRReport_AirstrikesTajoura%203.pdf) [https://perma.cc/J9JU-CTZF].

135. *Id.* ¶¶ 2, 13.

136. *Id.* ¶¶ 21–22.

children.<sup>137</sup> Eighty-seven were injured, of whom fifteen were returned to the Tajoura after treatment. Other reports cited larger numbers of detained and injured—600 and 130 respectively—comprising “at least 17 nationalities, *mainly African*.”<sup>138</sup> In interviews following the attack, migrants and refugees (many of whom were registered with the UN Refugee Agency) reported their routine torture and ill treatment by Tajoura personnel, as well as forced labor.<sup>139</sup>

In 2020, the UN published a report confirming the airstrikes, attributing them to the LNA.<sup>140</sup> This report also includes an analysis of legal liability for the strike, and the migrant deaths and casualties.<sup>141</sup> This analysis attributes liability to Libya as the sovereign nation bearing the sole responsibility for the loss of life, conditions of detention, and the attendant violations of international law.<sup>142</sup> It includes no analysis or acknowledgement of the racialized nature of the violations, and no analysis of First World and international contributors to the violations. The Security Council’s statement on the Tajoura attack similarly attributed sole responsibility for the detention centers to the Libyan government.<sup>143</sup> The result is an incomplete and slanted accounting of the harm and of the liability for the harm. Formal sovereignty, in the conventional legal analysis, treats Libya’s political and territorial borders as fully within the control of the Libyan nation state. But this formal account belies the contingent and greatly vitiated nature of Libyan nation state sovereignty discussed above. With respect to political control of Libya’s territorial borders in particular, this control, historically and in the present, remains at best shared with and at worst largely in the hands of external sovereign interests. More pointedly, these borders play a crucial role in a longer-term project to keep Third World refugees and migrants out of Europe—a project to which racial governance, among other things, is central.<sup>144</sup> European investment in and

137. *Id.* at ¶ 6.

138. Lisa Schlein, *UN: Release All Refugees, Migrants from Libyan Detention Centers*, VOA (July 5, 2019, 2:52 PM) (emphasis added), <https://www.voanews.com/africa/un-release-all-refugees-migrants-libyan-detention-centers> [<https://perma.cc/J8KF-2U2V>].

139. Airstrikes on the Daman, *supra* note 134, ¶¶ 23–26.

140. *Id.* ¶¶ 29–31.

141. *Id.* ¶¶ 34–50.

142. *Id.* ¶ 32. The legal analysis and findings focus squarely on Libya’s international law obligations, and violations by Libyan authorities and armed groups. *Id.* ¶¶ 34–35.

143. Press Release, Sec. Council, Security Council Press Statement on Libya, U.N. Press Release SC/13873 (July 5, 2019), <https://www.un.org/press/en/2019/sc13873.doc.htm> [<https://perma.cc/4CXW-QX9X>].

144. Recall the definition of racial governance above as the different ways that race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur. For analysis of European border regimes tailored at racialized exclusion of Third World migrants and refugees, see, for example Nicholas De Genova, *Europe’s Racial Borders*, MONITOR RACISM (Jan. 2018), <http://monitoracism.eu/europes-racial-borders> [<https://perma.cc/F59S-HXJY>]; Ian Law, *The Mediterranean Expulsion Machine*, in

commitment to ensuring the immobility and regional containment of Third World refugees and migrants cannot be divorced from the politics and economics and international law of European empire, past and present, as the analysis below will outline.

Libya has a long track record of partnership with Europe to keep Africans out of Europe, specifically Black or sub-Saharan Africans.<sup>145</sup> It is, however, a mistake to characterize sub-Saharan migration to Libya as predominantly aimed at Europe. To view Libya as primarily a territory of transit belies a much longer history of trans-Saharan mobility dating back to the precolonial period,<sup>146</sup> and a more recent history of significant sub-Saharan labor migration to Libya.<sup>147</sup> To use common though not uncontested terminology in migration studies, Libya is squarely both a “destination” and a “transit” country for Black migrants, and indeed the predominant trend has been that the majority of Black migrants have journeyed to Libya to work there, rather than to use it as a launch pad to Europe.<sup>148</sup> The perception of Libya as primarily a sub-Saharan migrant gateway to Europe is

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MEDITERRANEAN RACISMS 123 (2014); Martin Baldwin-Edwards & Derek Lutterbeck, *Coping With The Libyan Migration Crisis*, 45 J. ETHNIC & MIGRATION STUD. 2241, 2441–43, 2251–53 (2019).

145. The term sub-Saharan African is an implicitly racial category used to refer to what was explicitly referred to in prior eras as Black Africa, to distinguish it from the predominantly Arab countries of the North. Ziad Bentahar, *Continental Drift: The Disjunction of North and Sub-Saharan Africa*, 42 RES. AFRN. LITERATURES 1, 3–4 (2011). For a brief commentary on sub-Saharan or Black racialization and Libya during the NATO intervention, see Jemima Pierre, *Race in Africa Today: A Commentary*, 28 CULTURAL ANTHROPOLOGY 547 (2013).
146. See Hein de Haas, *The Myth of Invasion: The Inconvenient Realities of African Migration to Europe*, in GLOBALISATION AND MIGRATION: NEW ISSUES, NEW POLITICS 77, 79 (Ronaldo Munck ed., 2009) (“While having ancient historical roots in the trans-Saharan trade, the foundations of contemporary trans-Saharan migration were laid in the 1970s and 1980s when (former) nomads and traders started migrating to work at construction sites and the oil fields of southern Algeria and Libya.”).
147. See, e.g., Antonio M. Morone, *Policies, Practices, and Representations Regarding Sub-Saharan Migrants in Libya: From the Partnership With Italy to the Post-Qadhafi Era*, in EURAFRICAN BORDERS AND MIGRATION MANAGEMENT 129, 134–38 (Paolo Gaibazzi et al. eds., 2017) (describing the pre-2011 history of Libya as a major labor migration destination for sub-Saharan Africans).
148. In 2008, for example, an estimated 1 to 1.5 million sub-Saharan migrants lived in Libya. Hein de Haas, *The Myth of Invasion: Inconvenient Realities of African Migration to Europe*, 29 THIRD WORLD Q. 1305, 1308 (2008). Although the analysis here focuses on sub-Saharan Africans, for much of the period since the 1960s, “the overwhelming majority of African migrants moving to Europe has originated from Morocco, Algeria and Tunisia. . . . [S]ub-Saharan Africans have increasingly joined [migrants from the Maghreb] in their attempts to cross the Mediterranean since 2000.” *Id.* at 1307; see also Martin Baldwin-Edwards, ‘Between a Rock & a Hard Place’: *North Africa as a Region of Emigration, Immigration & Transit Migration*, 33 REV. AFR. POL. ECON. 311 (2006).

false, and furthermore, this false perception has played a central role in the erection of de facto European borders in Libya, borders that are by design, racial borders.<sup>149</sup>

After its independence from Italy, Libya relied a fair amount on migration to fill labor needs created in part by expulsion of Italians from the public and private sector positions they had exclusively held during their colonial occupation.<sup>150</sup> The need for so-called highly skilled labor remained especially acute as a result of colonial education policies and their legacies, according to which Italian colonial authorities had restricted the education of many Libyans to the primary level.<sup>151</sup> Initially, much of the labor migration to Libya was from the Maghreb. Libya's postcolonial immigration trends, however, were greatly affected by the shifts in Qaddafi's geopolitical ambitions and positioning. According to one scholar, "[t]he air and arms embargo imposed on Libya by the UN Security Council between 1992 and 2000 played an unintended, but probably decisive role in an unprecedented increase in trans-Saharan migration" to Libya.<sup>152</sup> In the 1990s, Qaddafi pivoted from his pan-Arabism ambitions and oriented his momentum towards a strategic pan-Africanism. He went on, for example, to support the establishment of the Community of Sahel-Saharan States "with the objective of achieving the free movement of people, capital, and goods between its member states and the rights of establishment for their citizens."<sup>153</sup> As a consequence of this pivot, he expelled large numbers of Palestinian refugees, and Egyptian and Sudanese workers.<sup>154</sup> And, as he actively courted Black Africa, Libya's oil rich economy and its loosening of immigration restrictions for sub-Saharanans meant that Libya became a "major destination" for Black migrants from West Africa and the Horn of the continent.<sup>155</sup>

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149. The term racial borders refers "to territorial and political border regimes that disparately curtail movement (mobility) and political incorporation (membership) on a racial basis, and sustain international migration and mobility as racial privileges," in the service of empire. E. Tendayi Achiume, *Racial Borders*, 110 GEO L.J. (forthcoming 2022) (manuscript at 3) (on file with author). For a legal analysis of international refugee law as one regime that effects racial borders so defined, see E. Tendayi Achiume, *Race, Refugees and International Law*, in OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Cathryn Costello et al. eds., forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3636518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3636518) [<https://perma.cc/U4DG-GEZF>]. For an insightful analysis of Europe's borders as racial borders see Nicholas De Genova, *supra* note 144. In this Symposium Issue, John Reynolds's contribution maps the manner in which emergency law and crisis responses further consolidate Europe's racial borders, calling special attention to the "racialized regional nationality" that the EU has produced. Reynolds, *supra* note 28, at 1772.

150. Morone, *supra* note 147, at 131.

151. *Id.*

152. De Haas, *supra* note 148, at 1307.

153. Morone, *supra* note 147, at 132 (listing countries in COMESSA).

154. *Id.*

155. De Haas, *supra* note 148, at 1307; *see also* Morone, *supra* note 147, at 132.

By 2002, Qaddafi launched what was termed the “Libyan Development Plan [U]sing African Manpower.”<sup>156</sup> At the same time, however, he had already begun to use Black migrants to his political advantage on two fronts (domestic and international). And he did so in a manner that illuminates the powerful and efficient function of race as a means of simultaneous intra- and international imperial subordination and exploitation.<sup>157</sup> Notwithstanding Qaddafi’s Africanist rhetoric and continental economic investments, Black African migration to Libya under Qaddafi in this decade “was generally characterized by illegality, social discrimination, and labor exploitation.”<sup>158</sup>

On the international front, Black African migrants would become crucial to Qaddafi’s strategy for his geopolitical repositioning—they would serve as leverage as he worked to secure an end to the international embargoes, attract foreign direct investment, and generally to rehabilitate his international reputation.<sup>159</sup> Among EU member states, Italy forged the strongest migration governance partnerships with Libya, in part on account of the historical colonial entanglement of the two nations.<sup>160</sup> Beginning in the late 1990s Italy sought to strengthen its capacity to prevent migration to its shores via the Mediterranean and the externalization of its borders to African territory (especially Libya) was an essential feature of its strategy.<sup>161</sup> In December 2000, Italy and Libya signed a cooperation treaty, that included a commitment to combatting undocumented migration.<sup>162</sup> In 2004, then Italian Prime Minister Silvio Berlusconi reached another agreement with Qaddafi to stop irregular migration to Italy, according to which Libya allegedly committed to the deportation of unauthorized sub-Saharan migrants and to closing its southern borders.<sup>163</sup> Libya also agreed for the first time to readmit “illegal” migrants from Italy,<sup>164</sup> a category that is undeniably racialized. Two months later, the EU finally agreed to lift its eighteen-year Libyan arms embargo, which then allowed Libya “to import (semi-)military equipment officially destined for improving border controls.”<sup>165</sup> Italy also funded law enforcement training and funded the construction of immigration detention camps in Libya, as it worked

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156. Morone, *supra* note 147, at 132.

157. Morone identifies three ways in which sub-Saharan migrants proved useful to Qaddafi: as cheap domestic labor, as a convenient domestic distraction from dissatisfaction with his regime, and as pawns in his negotiations with Europe. *Id.* at 138.

158. *Id.* at 136.

159. De Haas, *supra* note 148, at 1310.

160. Morone, *supra* note 147, at 130.

161. *Id.* at 138.

162. De Haas, *supra* note 148, at 1310.

163. *Id.*

164. *Id.*

165. *Id.*

closely with that country “in concerted expulsions of thousands of undocumented migrants from Italy via Libya to their alleged origin countries.”<sup>166</sup>

In 2008, Libya and Italy signed a Partnership Treaty in which funding to Libya (including to prevent African migration to Europe) was framed as a quasi-reparations gesture.<sup>167</sup> On his very first visit to Italy in 2009, Qaddafi took the opportunity to reinforce the nature of the racial threat that ostensibly made him an essential Italian ally:

Africans are people who look for food and shelter . . . . They are poor and starved people, but they do not engage in politics, political parties or elections. None of these things are known in Africa . . . . If a million Africans came here [Italy] saying they were all political refugees, would you [Italians] welcome everybody? And then if another ten million came, and then ten million more, you would certainly welcome them all. If you really were to welcome everybody, it would definitely be a great idea.<sup>168</sup>

A closer look at Qaddafi’s engagement with Europe on migration governance shows how notwithstanding the actual patterns of migration on the ground, Qaddafi exploited European anti-Black racial anxiety, and used an inflated specter of unauthorized migration across the Mediterranean via Libya to leverage his bargaining power with Europe.<sup>169</sup> His regime went so far as have Black Africans put on boats and sent to Italy “to unleash an unprecedented wave of illegal migration into Europe,” and as a threat to the European Union.<sup>170</sup> Europe, on the other hand, poured financial and human resources into building capacity for racial migration governance in Libya, which included barely mitigated racial borders—border regimes undergirded by international doctrine, regional and bilateral legal, and policy agreements with intended racially disparate effects. This history speaks to a long relationship between the former Libyan dictator and Europe, a relationship that is essential to explaining the existence of facilities such as the Tajoura detention center, and the predominantly sub-Saharan African population detained there.

Despite the dramatic rupture in conditions on the ground wrought by the NATO intervention, migration governance in its aftermath has been

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166. *Id.*

167. Gregor Noll & Mariagiulia Giuffré, *EU Migration Control: Made By Gaddafi?*, OPENDEMOCRACY (Feb. 25, 2011), <https://www.opendemocracy.net/en/eu-migration-control-made-by-gaddafi> [https://perma.cc/6GD7-9HUQ].

168. Morone, *supra* note 147, at 137.

169. Framing Libya as a transit country and not a destination country for Black migration was instrumental to Qaddafi’s strategy and its ultimate success. *Id.* at 129.

170. *Id.* at 143.

characterized by significant continuity rather than discontinuity with the period prior.<sup>171</sup> Within one year of the NATO intervention, Italy signed an agreement with the Libyan authorities in order to resume migration cooperation, including the training of Libyan police and coastguards, and the construction of detention centers and migrant interdiction infrastructure.<sup>172</sup>

In 2012, the European Court of Human Rights found that Italy had violated its non-refoulement obligations by intercepting a group of African migrants and refugees headed for its shores in the Mediterranean, and returning them to Libya where they faced risk of torture and cruel, inhuman, and degrading treatment.<sup>173</sup> *Hirsi Jamaa and Others v. Italy*<sup>174</sup> affirmed the extraterritorial application of the European Convention on Human Rights in contexts such as this, on the basis that Italian authorities had exercised effective control over the migrants and refugees. But this judgment did not name or critique the EU's racialized regional containment project. Italy and Europe's response was to invest more resources and effort into embedding its borders within the front of Libyan sovereignty; pushing its externalization efforts further south and east on the African continent; and funding migrant interdiction operations conducted by the International Organization on Migration.<sup>175</sup> If *Hirsi* represents an international human rights law attempt to disrupt Europe's violent externalization of its borders, it proved no match for Europe's evasion through the more robust public international law doctrine of formal sovereignty, according to which Libya now bears liability for this externalization as manifest in the UN analysis of Tajoura.

With respect to migrant interdiction, rebuilding Libyan capacity to carry out this task has been an essential and successful means of both keeping Africans out of Europe, and evading liability under the bodies of international law that might otherwise prohibit or redress the human rights abuses produced by migrant interdiction, as *Hirsi* had attempted. Rebuilding this capacity meant first and foremost establishing an effective "Libyan Coast Guard" to take responsibility for interdiction efforts at sea, invoking Libyan sovereign rights in its territorial sea.<sup>176</sup> Should European forces themselves carry out such interdiction efforts, they might generate obligations to render humanitarian assistance or adjudicate asylum claims, as had been the case when the EU ran a rescue mission known as Mare

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171. *Id.* at 130.

172. *Id.* at 144–45.

173. *Hirsi Jamaa and Others v. Italy*, 2012-II Eur. Ct. H.R. 97, 131–32.

174. *Id.*

175. Morone, *supra* note 147.

176. Benjamin Bathke, *When Helping Hurts—Libya's Controversial Coast Guard, Europe's Go-To Partner to Stem Migration*, INFOMIGRANTS (July 24, 2019), <https://www.infomigrants.net/en/post/18196/when-helping-hurts-libya-s-controversial-coast-guard-europe-s-go-to-partner-to-stem-migration> [<https://perma.cc/NS4J-RUXL>].

Nostrum.<sup>177</sup> As a consequence, shoring up Libyan sovereignty as the basis for a Libyan-led interdiction effort served the European purpose of insulating their own territory and forces from contact with migrants. Ironically, even as Libya's sovereignty was being perforated for counterterrorism purposes, the legal fiction of its sovereignty had to be reinforced to enable the territory to host an externalized version of Europe's borders.

The Libyan Coast Guard (LCG) that was put in place is an EU-funded and EU-trained force that has become one of the most efficient means of blocking migrants from reaching European soil.<sup>178</sup> In the year 2017, the LCG reportedly intercepted 20,000 migrants at sea and likely facilitated the drowning deaths of hundreds if not thousands more.<sup>179</sup> When migrants stranded at sea make contact with European officials, those officials contact the Libyan Coast Guard to "rescue" them. The operations of the Libyan force have been repeatedly documented to endanger the migrants they are ostensibly sent to rescue, approaching their vessels at high speed and withholding assistance from those fallen overboard.<sup>180</sup> As Europe abandoned its earlier rescue efforts at sea in favor of reliance on the Libyan Coast Guard, deaths in the Mediterranean soared while arrivals to Europe declined precipitously.<sup>181</sup>

The LCG is staffed by militias that had previously been engaged in smuggling migrants; the creation of the Coast Guard allowed the EU to remove one network of smugglers while employing their skills to disrupt and intercept other networks that facilitate seaborne migration. For those migrants not drowned but "rescued" by the Libyan Coast Guard, return to Libyan territory involves being detained in facilities that are themselves located in the crossfire between militias.<sup>182</sup> Tajoura is one among them, and it is the broader context of foreign and international complicity and racialized harm that must be brought to bear on our political and legal understanding of liability for the human rights violations that occurred during the airstrike. There is abundant documentation that shows migrants in Libyan detention centers are also subjected to torture, rape, killings, and

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177. Kate Ferguson, *EU Leaders 'Killing Migrants By Neglect' After Cutting Mediterranean Rescue Missions*, INDEPENDENT (Apr. 18, 2016), <https://www.independent.co.uk/news/world/europe/eu-leaders-killing-migrants-by-neglect-after-cutting-mediterranean-rescue-missions-a6988326.html> [<https://perma.cc/G9MA-7MK9>].

178. Bathke, *supra* note 176.

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., Vanessa Romo & Bill Chappell, *Airstrike on Migrant Detention Center in Libya Kills at Least 44 People*, NPR (July 3, 2019, 8:13 AM), <https://www.npr.org/2019/07/03/738392690/libya-airstrike-on-migrant-detention-center-kills-at-least-44-people> [<https://perma.cc/J8JH-LY5H>].

enslavement.<sup>183</sup> Even in instances where the EU explicitly recognizes severe deterioration in the conditions at Libyan detention centers, such awareness is coupled with praise for the effectiveness of the LCG in migration management.<sup>184</sup> Whereas the United States has collaborated with Libyan militias in pursuit of counterterrorism objectives, the EU has worked with another set of militias to pursue goals in a related domain—that of migration “management.” Just as American counterterrorism partnerships distinguish good militias from bad, arming some while targeting others as terrorists, the EU, too, has laundered the reputation and networks of its favored militias. With respect to migration management, the militias are subcontracted to interdict and detain migrants seeking to transit through the Libyan land mass and territorial sea en route to Europe.<sup>185</sup> According to some reports, some of the militias deputized to perform migrant interdiction are the very same that have been involved in Black African enslavement in Libya<sup>186</sup>—Black enslavement being a practice we might think of as a notably explicit instantiation of racial governance, whereas Black migrant interdiction is a more implicit but no less valid example of such governance.

Conditions in Libya and Europe illustrate the race-specific production of migrant illegality and geopolitical threat. Notwithstanding decades of sub-

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183. See, e.g., Sally Hayden, *The U.N. Is Leaving Migrants to Die in Libya*, FOREIGN POL’Y (Oct. 10, 2019), <https://foreignpolicy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war> [<https://perma.cc/4ADV-TK4Y>]; *Out of Sight, Out of Mind: Refugees in Libya’s Detention Centres*, MEDECINS SANS FRONTIERES (July 12, 2019), <https://www.msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya> [<https://perma.cc/V3R8-W93Q>]; Fatma Naib, *Slavery in Libya: Life Inside a Container*, AL JAZEERA (Jan. 26, 2018), <https://www.aljazeera.com/news/2018/01/slavery-libya-life-container-180121084314393.html> [<https://perma.cc/46GJ-2MQG>]; *Migrant Slavery in Libya: Nigerians Tell of Being Used as Slaves*, BBC (Jan. 2, 2018), <https://www.bbc.com/news/world-africa-42492687> [<https://perma.cc/G4F6-A3C2>].
184. See, e.g., *Libya and the Surrounding Area: Current Situation and Need for Immediate Action*, at 3, 5 (Sept. 4, 2019), <http://www.statewatch.org/news/2019/sep/eu-council-libya-11538-19.pdf> [<https://perma.cc/DE9S-CCG9>] (acknowledging “overflowing detention facilities” and deaths of migrants due to airstrikes on detention centers, yet going on to note that “despite the deterioration of the security situation in Libya over the past two months, the number of departures along the coast has remained low and the Libyan Navy Coast Guards have continued operating effectively, thus confirming the progress achieved over the past three years”).
185. European countries have gone so far as to criminalize civil society and humanitarian rescue efforts aimed at saving the lives of migrants imperiled at a sea. See, e.g., Paul Hockenos, *Europe Has Criminalized Humanitarianism*, FOREIGN POL’Y (Aug. 1, 2018), <https://foreignpolicy.com/2018/08/01/europe-has-criminalized-humanitarianism> [<https://perma.cc/6X3E-BYNB>].
186. See Maggie Michael, *Backed By Italy, Libya Enlists Militias to Stop Migrants*, AP NEWS (Aug. 29, 2017), <https://apnews.com/9e808574a4d04eb38fa8c688d110a23d/Backed-by-Italy-Libya-enlists-militias-to-stop-migrants> [<https://perma.cc/QZ5H-ZLA9>]; Maggie Michael, Lori Hinnant & Renata Brito, *Making Misery Pay: Libya Militias Take EU Funds for Migrants*, AP NEWS (Dec. 30, 2019), <https://apnews.com/9d9e8d668ae4b73a336a636a86bd27f> [<https://perma.cc/2QXZ-G7SK>].

Saharan residence in Libya and participation in its economy, Qaddafi instituted a series of immigration policies that exempted citizens of the Maghreb but rendered sub-Saharan Africans illegal. Such policies strengthened his leverage with Europe, which centrally included the threat of unleashing illegal Black African migrants into Europe.<sup>187</sup> Prior to the NATO intervention, and in light of Libya's dependence on Black African labor, Qaddafi adopted a strategy of sporadic expulsion of Black African migrants—including many who were lawfully present in the country—to maintain an image of compliance with European demands to “combat illegal migration.”<sup>188</sup> Qaddafi also fostered Libyans' growing antipathy towards Black migrants, but Morone notes that “[d]iscrimination and racism towards [Black] migrants is closely linked to their [B]lackness, despite the African origin of many Libyans. The general perception that many ordinary Libyans had of sub-Saharan migrants was . . . characterized by an increasing fear of the supposed Africanization of the Libyan Arab society.”<sup>189</sup> He notes also that these racial anxieties had historical overlays: “Libyan attitudes were still affected by memories of the past, when [B]lackness of skin/African origin was virtually synonymous in the Arab world with both the notion and the word slave.”<sup>190</sup> Although our focus is racial governance within European empire, this example illustrates a similar form of racial governance and function of Blackness in the context of a different imperial tradition related to the Indian Ocean slave trade. Even after the NATO intervention, Black Africans found themselves harassed and detained even when in possession of formal documentation,<sup>191</sup> because their Blackness was the sort of border insurmountable even by this formal documentation.<sup>192</sup>

Libya's racial borders were not only politically productive in Europe, but have been economically productive in the past and remain so today. As others have pointed out, strict migration controls and undocumented migrant status subject undocumented migrants to severe labor market exploitation in Europe and in Libya.<sup>193</sup> Hein De Haas notes that little is often made of the reality that

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187. Morone, *supra* note 147, at 138–39.

188. De Haas, *supra* note 148, at 1313 (internal quotation marks removed).

189. Morone, *supra* note 147, at 134.

190. *Id.* at 136 (internal citations omitted).

191. *Id.* at 149.

192. Here we reference the concept of race itself as a border, a site or means of enforcement of exclusion, in the sense that one function of race as it is socially constructed in empire is to connote and enforce insider or outsider status. See Achiume, *supra* note 149. Blackness in neocolonial empire connotes and enforces presumptive outsider status where Europe and its borders are concerned.

193. See, e.g., De Haas, *supra* note 148, at 1308; THE EUR. FUNDAMENTAL RTS. AGENCY, PROTECTING MIGRANT WORKERS FROM EXPLOITATION IN THE EU: WORKERS' PERSPECTIVES (2019), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-severe-labour-exploitation-](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-severe-labour-exploitation-)

notwithstanding the pervasive European (and African) state rhetoric on the need to put an end to irregular migration, there are powerful interest groups within both regions that decidedly benefit from it and thus have little genuine interest in ending it.<sup>194</sup> He explains that “[t]he large informal and formal labour markets for agricultural labour, construction, and other service jobs in (southern) Europe and Libya have become increasingly dependent on irregular migration labour.”<sup>195</sup> This has affected women, too. In southern Italy, undocumented migrant women from sub-Saharan Africa steadily replaced low-income or unpaid native women in the provision of domestic or care work, for example.<sup>196</sup> Illegality or undocumented status are a function of a border regime, and as such, play a significant role in creating and sustaining a highly exploitable labor pools. Where the border regimes are racialized, so too is the highly exploitable labor generated by those regimes.

Racially targeted migrant exclusion and subordination also benefited Qaddafi domestically (when he was alive)<sup>197</sup> and continues to benefit certain groups in Libya, too. Regarding the experiences of Black African migrants in Libya, studies paint an appropriately complex picture that includes periods of seeming racial integration of at least some Black Africans that were replaced in the 2000s by increased structural and institutionalized forms of anti-Black racism in Libya,<sup>198</sup> partially informed by the legacies of Black enslavement in the region and

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workers-perspectives\_en.pdf [https://perma.cc/6R28-F46D] (documenting the severe labor exploitation of migrants in the EU). Chantal Thomas’s contribution to this Symposium Issue notes that “[t]he wealth of rich country economies is policed and enforced through borders and exclusion,” and that the single most significant determinant of “modern-day slavery” is immigration controls. Thomas, *supra* note 18, at 1884.

194. De Haas, *supra* note 148, at 1315.

195. *Id.*

196. Emilio Reyneri, *Migrants’ Involvement in Irregular Employment in the Mediterranean Countries of the European Union* 9 (Univ. of Milan Bicocca, Int’l Migration Papers No. 41, 2001); see also Enrico Allasino, Emilio Reyneri, Alessandra Venturini & Giovanna Zincone, *Labour Market Discrimination Against Migrant Workers in Italy* 17 (Soc. Prot. Sector Int’l Migration Programme, Int’l Migration Papers No. 67, 2004).

197. “In this context immigration became an important instrument to support economic expansion and internal consensus, and a useful scapegoat to address social protest: Qadhafi’s regime had pragmatically exploited ‘an anti-migration rhetoric which attached to sub-Saharan foreigners the guilt for all contemporary Libya’s problems.’” Morone, *supra* note 147, at 132 (internal citation omitted).

198. De Haas notes this in relation to the Maghreb states generally, and in relation to Libya:

Attitudes towards immigrants hardened after Libya experienced a major anti-immigrant backlash after clashes between Libyans and African workers in 2000 led to the deaths of dozens or perhaps hundreds of sub-Saharan migrants. Consequently, the Libyan authorities, responding to strong popular resentment against sub-Saharan immigrants, introduced more restrictive immigration regulations. This went along with lengthy and arbitrary detention of immigrants in poor conditions in prisons and camps, with physical abuse, and the forced repatriation of tens of thousands of sub-Saharan immigrants.

by the intensified regimes of racial governance directly caused/triggered by European migration-oriented interventions. De Haas remarked in 2008 that “[i]n Libya in particular, xenophobia [was] expressed in blanket accusations of criminality, verbal and physical attacks, harassment, extortion, arbitrary detention, forced return and possibly torture.”<sup>199</sup>

In the relevant literatures, little is made of the fact that it is the race of these Africans—the social meaning of their morphology and ancestry, to borrow from Ian Haney López<sup>200</sup>—that facilitates their exclusion from Europe, their containment in Libya, and the extraction of value from their bodies.

In sum, the EU and its member states (albeit to varying degrees) bear significant responsibility for the refugees and migrants who were injured and killed in the Tajoura Detention Centre, and for the detention of these groups in the first place. None of this analysis appears in the UN reports accounting of responsibility—the legal analysis identifies Libya as solely liable, the sovereign that is not a sovereign—and speaks of an international community that ought to encourage Libya to close these detention facilities. A TWAIL and CRT encounter is important for the role it plays in exposing the farce of the conventional analysis.

In some ways, Libya may be among the most acute expressions of the globalized racial containment policies that converge at the intersection of the contemporary global migration governance and counterterrorism regimes. The border controls, deportations, and deaths in the desert and at sea, together with drone strikes, aerial bombardment, and renditions, reveal how the states of the Global North use law, targeted intervention, territorial boundaries, and militarized security structures to promote and ensure a particular hegemonic racial order. A race-centered TWAIL analysis enables identification of the imperial and specifically racial logics embedded in global counterterrorism and migration governance, but is largely ignored in mainstream and conventional international legal scholarship. Such an analysis and identification are prerequisites for developing global and regional governance mechanisms that operate on more equitable terms.

It is insufficient to say that the EU and Italy merely helped create a migration governance regime that resulted in racialized exclusion of Black African migrants and others. It is more accurate to say that the EU and Italy designed a regime tailored to this function, and went to great lengths to provide the capacity for its creation and continued operation. Libya’s borders, as

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De Haas, *supra* note 148, at 1307–08.

199. *Id.* at 1311.

200. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994).

experienced by Black African migrants, are largely the expression of European sovereign interests, and to the extent that these borders reflect Libyan interests, these, too, involve the racialized exploitation of Black Africans. Libya's borders illustrate the means through which racial governance can be so effectively and brutally executed through migration governance regimes underwritten by formal policies that are on their face race-neutral.<sup>201</sup> These include formal sovereignty doctrine and the international agreements between Libya and Europe that use the sanitized language of migration control.

Our aim has been to highlight the ways in which international law governing intervention, counterterrorism, and migration operate as part of a global system of racial governance, that typically benefit the First World at the expense of the Third. The ends of these regimes are bound to the replication of classic forms of imperial logic that racialize subjects as threats and then mobilize law as a technology to counter and contain those threats. A race-centered TWAIL project can contest the framing of threat itself while highlighting the interconnection between law and empire by showing that the definition of threat is a subjective fact tied to powerful states' efforts to manage and contain populations at home and abroad.

### CONCLUSION

In a 2003 article, B.S. Chimni and Antony Anghie referred to scholarship produced by the first generation of postcolonial international lawyers as TWAIL I, and to the scholarship that followed that generation of scholars as TWAIL II.<sup>202</sup> Even as it built on TWAIL I, TWAIL II critiqued important tenets in this earlier work, and we might think of the 2018 Singapore conference as heralding TWAIL III—the third generation of TWAIL scholars, variously building on the insights of TWAIL II, even as they contest, and maybe even reject its parameters and preoccupations. This Symposium Issue, and its predecessor convenings discussed in Part I suggest that at least one defining feature of TWAIL III might include deeper theoretical and doctrinal engagement with race, including through closer encounters with CRT, alongside similar engagement with other structures such as

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201. This requires a double move: first reinforcing Libyan sovereignty over territorial waters to maximize the ability of the Libyan Coast Guard to intercept seaborne migration. At the same time, it means requiring Libya—like other North African states—to warehouse on its own territory.

202. Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79–86 (2003) (describing the innovations of the first generation of TWAIL scholars, and the subsequent deepening and expansion of critique of the second generation to account for the realities of the changing “post-” colonial international order).

gender and class among others, and the critical traditions that examine those forms of structural subordination.

At the time of the writing of this Article, the United States and many other nations have been in the midst of a transnational uprising against systemic racism triggered by the brutal murder of George Floyd in Minneapolis on May 25, 2020, after a white police officer knelt on his neck for almost a full nine minutes.<sup>203</sup> Antiracism movement demands for racial justice have even found their way to the halls of the UN Human Rights Council, which held an urgent debate<sup>204</sup> on systemic racism in law enforcement in the United States and elsewhere in the world on June 17, 2020. In light of this state of affairs, which signals the persistence of global structures of racial injustice and inequality, transnational legal analysis that engages race and empire—such as that embodied in this Issue—is timely and pressing.

At our various TWAIL-CRT convenings at UCLA, participants highlighted the importance of deliberately fostering intellectual community through workshops, conferences, publications, and platforms that provide occasions for knowledge exchange and coproduction, including among more senior and early career academics. Creating spaces for such exchange is especially vital for critical scholars whose methods and approaches are regularly neglected and in some cases, actively undermined in mainstream academic fora and even in legal education itself. At the time of writing, attacks on Critical Race Theory in particular had even escalated to the highest levels of political office—the sitting president of the United States, whose ethnonationalist commitments are internationally condemned,<sup>205</sup> denounced CRT in an executive memorandum.<sup>206</sup>

For us, convening and participating in this Issue and the Symposium related to it manifests our commitment to furthering TWAIL's research agenda and

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203. Press Release, U.N. Hum. Rts. Council, Statement on the Protests Against Systemic Racism in the United States (June 5, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927&LangID=E> [<https://perma.cc/9VUE-L9WV>].

204. *Human Rights Council Holds an Urgent Debate on Current Racially Inspired Human Rights Violations, Systemic Racism, Police Brutality and Violence Against Peaceful Protests*, UN GENEVA (June 17, 2020), <https://www.ungeneva.org/en/news-media/press/taxonomy/term/175/60215/human-rights-council-holds-urgent-debate-current-racially> [<https://perma.cc/T48J-EFK4>].

205. See, e.g., Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *The Threat of Nationalist Populism to Racial Equality*, ¶ 15, U.N. Doc. A/73/305 (Aug. 6, 2018), <https://undocs.org/en/A/73/305> [<https://perma.cc/EP33-VXZQ>].

206. See Cheryl Harris, *What Is Critical Race Theory and Why Is Trump Afraid of It?*, NATION (Sept. 17, 2020), <https://www.thenation.com/article/politics/trump-critical-race-theory> [<https://perma.cc/E8GF-2FU4>].

intellectual community, as many other scholars have done elsewhere, as well as a contribution to the scholarship on race, empire, and international law.

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