The Analogous Operation of the ICC and US Mass Incarceration

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1 Introduction

As US President George W. Bush "unsigned" the Rome Statute of the International Criminal Court (ICC), over 2 million Americans sat behind bars.[1] The United States has always been regarded as a leader of international criminal justice, having played an imperative role in the prosecution of Nazi leaders at the Nuremberg Tribunal and, through its role on the UN Security Council, greatly contributed to the formation of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). But now, even as it subjects unprecedented numbers of its own citizens to criminal accountability, the United States refuses to accept the jurisdiction of the world's first permanent ICC. This paper explores these two concurrent developments in criminal justice, analyzing the US-ICC relationship and the growth of mass incarceration across three presidential administrations– Bill Clinton, George W. Bush, and Barack Obama– whose terms span the creation and first 15 operative years of the ICC, as well as the peaking of US mass incarceration.

Through this analysis, the paper advances several related arguments. First, notwithstanding their apparently fraught relationship, the United States is still shaping the terms of international criminal justice through the ICC. The paper argues that the Bush and Obama Administrations, despite their partisan differences, similarly used the ICC architecture, whose construction was overseen by the Clinton Administration, to protect and advance US geopolitical interests. In this sense, the paper contends that the ICC has been complicit in entrenching the power of the United States in international relations. As a result, the ICC has, in many ways, been wielded as a tool of neocolonialism by the United States and its allies. Next, this paper argues that these three administrations' domestic criminal justice policies, in their contribution to mass incarceration, have entrenched in US criminal punishment a racialized logic of disposability "that attempts to deal with harm by locating the source of that harm in a single individual (or identity-based group) and then isolating, punishing or socially 'disposing' of that person (and/or that group)…[doing] little to change the conditions that lead to violence in the first place."[2] Finally, in an attempt to make sense of these concurrent (re)productions of power through criminal justice at the international and US domestic levels, the paper aims to show that there are deeper, underacknowledged connections– punishment parallels– between US mass incarceration and the ICC's enforcement of international criminal law. This paper identifies three of these punishment parallels: 1) reliance on retributive and deterrent punishment aims; 2) emphasis on individual criminal responsibility; and 3) racial disproportionately in

[1] Paige M. Harrison and Allen J. Beck, *Bureau of Justice Statistics: Prisoners in 2002* (US DOJ 2003) 2.
[2] Sarah Lamble, 'Sexual Peril and Dangerous Others: The Moral Economies of the Trans Prisoner Policy Debates in England and Wales' (2023) 0 *Sexualities* 1, 14.

criminalization. Through the interpretive context provided by these punishment parallels, this paper contends that the ICC and US mass incarceration operate analogously to both disregard and exacerbate structural conditions of violence, thereby reinforcing existing global power relations– "whether in the form of slavery or empire."[3]

2 Administrative Attitudes

This section analyzes two concurrent developments in international and US domestic criminal law: the creation and first 15 operative years of the ICC and the peaking of US mass incarceration. I argue that the Bush and Obama Administrations, despite their partisan differences, similarly used the ICC architecture, whose construction was overseen by the Clinton Administration, to protect and advance US interests. As a result, I contend that ICC is complicit in entrenching the power of the United States in international relations. I also explore concurrent US criminal justice policymaking and its contribution to mass incarceration, which is itself, I argue, an exercise of power reinforcing the subjugation of Black and Brown Americans.

2.1 The Clinton Administration and the ICC

The tale of the United States' vote against the Rome Statute is one frequently told. What is less appreciated is the extent to which this founding document of the ICC reflects and reproduces US interests, while shielding US foreign policy decisions from international judicial scrutiny. The Clinton Administration's strongest aversion to the Rome Statute was directed toward Article 12, which extended the Court's jurisdiction to Statute crimes[4] committed by nationals of nonmember states on member states' territory[5] or on the territory of a state that has accepted the jurisdiction of the Court on an ad hoc basis.[6] The American delegation at the Rome Conference, led by David Scheffer, Clinton's Ambassador at Large for War Crimes Issues and point man at Rome, had demanded that indictment be dependent on the consent of the accused's home state– a demand left unheeded by the final "take it or leave it" text.[7]

While Article 12 theoretically exposes Americans to prosecution, there are several Rome Statute provisions which, taken together, virtually insulate the United States from ICC jurisdiction. First, the Court's exercise of jurisdiction over nationals of a nonmember state through Article 13(a), a referral of a situation to the Prosecutor by a state party, or Article 13(c), the Prosecutor's exercise of their proprio motu power, does not grant rights nor impose

[3] Ratna Kapur, 'Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India' (2013) 14 Melb J of Intl L 317, 325.

[4] Statute crimes are those within the jurisdiction of the ICC: the crime of genocide; crimes against humanity; war crimes, and the crime of aggression. Rome Statute, Art 5.

[5] Rome Statute, Art 12(2)(a).

[6] Rome Statute, Art 12(3).

[7] David Scheffer, 'The United States and the International Criminal Court' (1999) 93 AJIL 12, 20; Tor Krever, 'Dispensing Global Justice' (2015) 85 New Left Rev 67, 76.

obligations on the state of the accused's nationality.[8] The United States would have no obligation to surrender an accused national to the ICC if the charged individual is in their custody. While the ICC is precluded from imposing obligations on the United States when exercising jurisdiction under Article 13(a) or (c), Article 98(2) allows the United States to limit the obligations of other states to the Court. Article 98(2), as Scheffer explains, allows even a nonmember state like the US to "negotiate agreements with other governments that would prevent any American being surrendered to the ICC from their respective jurisdictions without our consent."[9]

Furthermore, the Rome Statute maintained a central role for the UN Security Council, granting two avenues for its involvement with the Court.[10] First, Article 13(b) provides that the Council may refer situations to the ICC acting under Chapter VII of the UN Charter regardless of whether the situation involves the nationals or territories of States Parties to the Rome Statute.[11] Unlike Article 13(a) or (c), Article 13(b) imposes rights and obligations on states regardless of ICC membership status, but only those states identified in the given Security Council resolution.[12] Because of the United States' P5 status[13] and veto power in the UN Security Council, not only would situations involving the US fail to amount to an Article 13(b) referral, but any imposed rights and obligations within a Security Council resolution referring a situation to the ICC would almost certainly be crafted with US interests in mind. Second, Article 16 permits the UNSC to defer an ICC investigation or prosecution by resolution adopted under Chapter VII of the UN Charter for a twelve-month period renewable without limit. These two avenues for UNSC involvement in the ICC manifest a prophetic warning issued by the Indian delegation at the Rome Conference– namely, that P5 Security Council members will be "above the law and thus possess de jure impunity from prosecution, while individuals in all other States are presumed to be prone to committing such international crimes," resulting in an international court wielded as a tool of "European neo-colonialism" by powerful states.[14]

Finally, Article 17, regulating the principle of complementarity, provides that the ICC may only determine that a case is admissible where a state which has jurisdiction over it is "unwilling or unable genuinely to carry out the investigation or prosecution," and where the case

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[8] Monique Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (CUP 2020) 16.

[9] David Scheffer, 'A Negotiator's Perspective on the International Criminal Court' (2001) 167 Mil Law Rev 1, 18.

[10] Scheffer and the Americans were scandalized by the prospect of the ICC prosecutor possessing a proprio motu power and insisted that "the prosecutor should act only in cases referred either by a state party to the treaty or by the [Security] Council." See Scheffer (1999) 13.

[11] Cormier 118.

[12] Ibid 16.

[13] The five permanent members (P5) of the UN Security Council include the United States, the United Kingdom, France, Russia, and China.

[14] 'India Blasts Special Treatment for Security Council' *Terra Viva*, (Rome, 17 June 1998); David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP 2014) 47.

is "of sufficient gravity to justify further action by the Court."[15] Though Article 15(1) allows the Prosecutor to initiate investigations proprio motu, endowing them "with significant discretion in deciding whether and when to pursue prosecutions," ICC prosecutorial discretion has been overwhelmingly trained on "non-controversial" situations.[16] The Indian delegation at Rome further perceived that the exercise of prosecutorial discretion under the principle of complementarity would serve to legitimize the judiciaries of Western powers while other, especially Global South states, "must constantly prove the viability of their judicial structures or find these overridden by the ICC."[17]

Ultimately, on the last day open for signatures, President Bill Clinton allowed the US to sign the Rome Statute. Clinton stressed his desire to communicate the United States' "long history of commitment to the principles of accountability" by signing but added that until "significant flaws" were remedied, he would not recommend that his successor send the Statute to the US Senate for ratification.[18]

2.2 Clinton's Criminal Justice Policies

While the Clinton Administration negotiated the ICC architecture, it committed to the "tough on crime" tradition at home. This tradition is rooted in the 1964 presidential election during which Republican nominee Barry Goldwater, credited with coining the term "law and order," led the successful "frontlash" by conservatives, reframing civil rights unrest as warranting not social reform but criminal punishment.[19] After securing reelection, President Lyndon Johnson responded with the Law Enforcement Assistance Act (LEAA) of 1965, the first sustained national program on crime which served as a model for Clinton's own omnibus crime control bill.[20] Granting more funding to those localities able to demonstrate inflated crime rates, the LEAA was "the fodder which combined with escalating riot-related violence… to call for more, and more draconian, policies."[21] The stage for political currency in appearing "tough on crime," and the racialized mass incarceration epidemic which followed, was set.

Clinton's criminal justice policies were encapsulated by his 1994 Violent Crime Control and Law Enforcement Act.[22] The bill rendered sixty additional crimes punishable by death, mandated life imprisonment sentences for some three-time offenders, and authorized more than

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[15] Rome Statute, Art 17(1)(a) and (d).

[16] Krever (2015) 95.

[17] Statement by Mr Dilip Lahiri, Head of the Indian Delegation, *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (16 June 1998) para 8.

[18] Erna Paris, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice* (Seven Stories Press 2009) 52.

[19] Vesla Weaver, 'Frontlash: Race and the Development of Punitive Crime Policy' (2007) 21 Studies in Am Pol Dev 230, 251.

[20] Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197; Weaver 244.

[21] Weaver (2007) 247.

[22] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

$16 billion for state prison and expansion of state and local police forces.[23] The Community Oriented Policing Services (COPS) program was a key piece of the act, designed to reduce crime by promoting policing tactics whereby police officers would assimilate as community members rather than antagonizing outside enforcers.[24] Yet, COPS "also fostered more confrontational styles of policing by funding SWAT teams and encouraging the broader use of paramilitary tactics and equipment."[25] Such tactics were key to Clinton's approach to drug offenses as he "increased the transfer of military equipment, technology, and training to local law enforcement, contingent, of course, on the willingness of agencies to prioritize drug-law enforcement."[26]

Clinton matched his draconian crime bill with related welfare cutbacks. His 1996 Personal Responsibility and Work Opportunity Reconciliation Act replaced Aid to Families with Dependent Children (AFDC), a New Deal program that guaranteed a minimum level of public assistance to poor mothers and their children, with Temporary Assistance for Needy Families (TANF).[27] Notably, in the years before its repeal, 14% of Black households and 11.8% of Hispanic households relied on AFDC, compared to only 2.7% of white households.[28] Unlike ADFC, TANF imposed "a permanent, lifetime ban on eligibility for welfare and food stamps for anyone convicted of a felony drug offense– including simple possession of marijuana."[29] Furthermore, Clinton's Housing Opportunity Program Extension Act of 1996 ensured that public housing residents who engage in illegal drug use or other criminal activities on or off public housing property face swift and certain eviction.[30]

Though these welfare cutbacks were purported to cut government budget deficits in accordance with a neoliberal vision of public policy, the Clinton Administration merely shifted funds to manage the predominantly Black and Brown urban poor. Washington reduced funding for public housing by $17 billion (a reduction of 61%) while boosting corrections by $19 billion (an increase of 171%).[31] According to the Justice Policy Institute, the Clinton Administration contributed to the largest increases in federal and state prison inmates of any President in American history– an unprecedented entrenchment of US criminal punishment's racialized

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[23] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2012) 56; Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton UP 2016) 153.

[24] Gottschalk 33.

[25] Ibid.

[26] Alexander 77.

[27] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193; Gottschalk 88.

[28] Robert Moffitt and Peter Gottschalk, 'Ethnic and Racial Differences in Welfare Receipt in the United States' in Neil Smelser, William Julius Wilson, and Faith Mitchell (eds), *America Becoming: Racial Trends and Their Consequences* (National Academy Press 2001) 157.

[29] Alexander 57.

[30] Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120; US Dept of Housing and Urban Development, *Meeting the Challenge: Public Housing Authorities Respond to the "One Strike and You're Out" Initiative* (US DOJ 1997); Human Rights Watch, 'Federal 'One Strike' Legislation' (2004) <https://www.hrw.org/reports/2004/usa1104/5.htm> accessed 31 March 2024.

[31] Alexander 57.

disposability logic.[32] When Clinton left office in 2001, nearly 1.4 million Americans were trapped in this carceral net.[33]

2.3 The Bush Administration and the ICC

Though the Bush Administration set out with zealous hostility toward the ICC, this section will explore the ways in which the administration used the ICC architecture to protect and advance US interests. I argue that this was accomplished in two phases: first full marginalization, then strategic guidance. The first phase began when the Bush Administration "unsigned" the Rome Statute. Though the passage of the American Servicemembers' Protection Act (ASPA)[34] was certainly part of the Bush Administration's marginalization strategy, what is of more interest here is how the terms of this US law were reflected in Security Council Resolutions using Article 16 of the Rome Statute, particularly the ASPA's "curtail[ing] American participation in UN peacekeeping operations unless every US soldier and civilian was granted immunity from possible prosecution."[35]

When the US used its veto in the Security Council to deny an extension of the UN Bosnia peacekeeping mission unless its soldiers were granted immunity from ICC prosecution, the Security Council responded with its adoption of Resolution 1422, which:

> Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.[36]

Monique Cormier explains that the resolution "was a clear attempt to circumvent Article 12(2)(a) of the Rome Statute" considering US threats "to block future UN peacekeeping missions if its concerns were not addressed."[37] Indeed, Resolution 1422 intended to grant immunity to UN peacekeepers of nonmember states (i.e., US nationals) accused of committing Statute crimes on the territory of a state party to the Rome Statute. Echoing the ASPA, Resolution 1422 was designed to undercut the ICC's capacity "to second-guess US foreign policy decisions."[38]

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[32] 'Clinton Crime Agenda Ignores Proven Methods for Reducing Crime' (*Justice Policy Institute*, 14 April 2008) https://november.org/stayinfo/breaking08/ClintonCrime.html> accessed 29 March 2024.
[33] 'Growth in Mass Incarceration' (*The Sentencing Project*) <https://www.sentencingproject.org/research/> accessed 29 March 2024.
[34] The American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206.
[35] Paris 62.
[36] SC Res 1422, UN SCOR, 4572nd meeting, UN Doc. S/RES/1422 (12 July 2002).
[37] Cormier 121.
[38] Paris 62.

At the same time, the Bush Administration signed bilateral Article 98 agreements with 102 countries, many of whom were small, poor states. Of the 54 states that refused, nineteen lost US economic aid.[39] As with the UNSC's passage of Resolution 1422 in accordance with Article 16, the Bush Administration used the ICC architecture to establish immunity agreements that protect and advance US interests, despite being in a phase of full marginalization of the ICC. To the extent that these uses of Articles 16 and 98 were both evident to and agreed upon by the architects of the ICC in negotiations at the Rome Conference, the ICC has entrenched US influence over shaping the terms of international criminal justice.

Furthermore, this complicity of the ICC is evident in Court officials' discretionary deference to the United States. Mere weeks after the US-UK led "coalition of the willing" invaded Iraq, Luis Moreno Ocampo was appointed the ICC's first prosecutor and made clear that he "could not imagine launching a case against a US citizen."[40] Though Iraq was not an ICC member state, the Court had jurisdiction over Statute crimes committed by nationals of member states Britain and Australia. Yet, ICC registrar Bruno Cathala communicated to US embassy officials "his desire that the court remain narrowly focused on the most serious crimes and avoid 'silly things like Iraq,'" indicating the Court's inclination not to "launch controversial investigations."[41] A similar inclination appeared to motivate the Court's initial decision not to open a formal investigation in Afghanistan[42]– the immediate target of Bush's post-9/11 War on Terror– despite Afghanistan being an ICC member state.[43]

The prosecutorial discretion implicit in Articles 15(1) and 17 of the Rome Statute is key to the Court's decision to turn away from Iraq and Afghanistan, and toward situations like those in Joseph Kabila's Democratic Republic of the Congo (DRC) and Yoweri Museveni's Uganda,

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[39] Ibid 70-1.

[40] Bosco 88.

[41] Ibid 90.

[42] On 20 November 2017, the second ICC Prosecutor, Fatou Bensouda, requested authorization to investigate the crimes alleged to have been committed on the territory of Afghanistan since 1 May 2003, of which US armed forces are suspect. Pre-Trial Chamber II rejected the request on 12 April 2019, finding that the commencement of an investigation would not be in the interests of justice. The Prosecutor filed an appeal, and on 5 March 2020, the Appeals Chamber of the ICC authorized the investigation. Though Afghanistan initially requested a deferral of the investigation, the third and current ICC Prosecutor, Karim Khan, requested authorization to resume the investigation under Article 18(2), which Pre-Trial Chamber II authorized on 31 October 2022. Given Afghanistan's Article 98 Agreement with the US, and its ratification of the Rome Statute, Cormier concludes that it is Afghanistan's *political* choice whether to honor its obligation to the US in bestowing procedural immunity on US soldiers, or to honor its obligation to permit ICC jurisdiction over Statute crimes committed on Afghan territory. See Cormier 105-6. Despite the ICC's investigation into the situation in Afghanistan being a major challenge to US power over international justice, the Court's investigation, as the above timeline indicates, is slow moving. Notably, on 28 November 2025, Khan filed two applications for warrants of arrest for the crime against humanity of persecution on gender grounds, under article 7(1)(h) of the Rome Statute, against the Supreme Leader of the Taliban, Haibatullah Akhundzada, and the Chief Justice of the "Islamic Emirate of Afghanistan", Abdul Hakim Haqqani. While these charges are deeply important from a gender equality perspective, the Court's calling upon US armed forces to account for alleged crimes committed during the American War in Afghanistan remains elusive. <https://www.icc-cpi.int/>.

[43] Bosco 162.

in its early operative years. Indeed, what made an investigation into the situation in Iraq "controversial" was the involvement of the United States, as well as other major global powers. While undoubtedly sites of mass atrocity, what permitted Ocampo to uncontroversially deem the situations in the DRC and Uganda "of sufficient gravity," while finding their national judicial institutions "unable genuinely to carry out the investigation or prosecution," was that major powers had neither combat forces deployed nor strong interests in these regions.[44] Moreover, even the way the ICC pursued investigations into these African conflicts signaled deference to the United States– Ocampo relied on Article 14 referrals by Uganda and the DRC rather than use his proprio motu power.[45]

Though the United States likely would have preferred renewing the requests set out in Resolution 1422, the scandal of American abuses at the Abu Ghraib prison in Iraq altered the political landscape significantly. In turn, the second phase of the Bush Administration's relationship to the Court began– strategic guidance. As Abu Ghraib loomed large, violence in the Darfur region of Sudan became a leading international concern– the Khartoum government had launched a brutal counterinsurgency campaign against rebel groups resulting in mass death and displacement. The Bush Administration welcomed the distraction, again located on the African continent. In July 2004, the US Congress passed a resolution declaring the crisis a genocide, and soon after, Bush asked for a full UN investigation.[46] The report of the International Commission of Inquiry on Darfur recommended that the Security Council refer the violence in Darfur to the ICC, and on March 31, 2005, the Security Council obliged, adopting Resolution 1593– the first use of Article 13(b) of the Rome Statute.[47] In a stunning change of tone, the United States abstained, allowing the referral to pass. But it came with a price: The US insisted the resolution include: 1) an acknowledgement of its bilateral Article 98 agreements; 2) the exemption of nationals of non-States Parties (other than Sudan) from ICC jurisdiction and 3) the provision that any costs associated with the referral be placed solely on the Assembly of States Parties to the ICC.[48]

The terms of Resolution 1593 set a precedent for both US immunity in ICC investigations resulting from a Security Council referral and US influence over the court's docket. As David Bosco explains, "a court responding to Security Council referrals (particularly without any additional UN funding) would have limited resources to initiate investigations the Security Council did not favor, and that dynamic might help the Council indirectly manage the court's docket."[49] What is more, the fact that the Bush Administration had pursued a marginalization campaign of the ICC up until Resolution 1593 only made the moral value of their abstention,

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[44] Ibid 123.

[45] Notably, Ocampo could have pushed for Iraq to grant the ICC ad hoc jurisdiction in accordance with Article 12(3), but again, in the exercise of prosecutorial discretion, this path was not taken.

[46] Bosco 105.

[47] SC Res 1593, UN SCOR, 5158th meeting, UN Doc. S/RES/1593 (31 March 2005).

[48] Cormier 132.

[49] Bosco 113.

their commitment to global justice, that much more commendable. In these circumstances, other global powers, and the ICC itself, were willing to allow the United States to draw the limits of what global justice may look like.

2.4 Bush's Criminal Justice Policies

The Bush Administration's campaign against the ICC was not matched by overtly draconian criminal justice measures at home. In his 2004 State of the Union Address, Bush declared that "America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life."[50] Four years after his address, Bush signed the Second Chance Act, which awarded nearly $300 million in block grants to help states and localities develop ex-offender reentry programs.[51] While a welcome change from Clinton's harsh approach to criminal justice, the "reentry solution" is largely portrayed "as a matter of helping ex-offenders acquire the right individual skills to become employable," overlooking "the enormous structural obstacles that stand between ex-offenders and full economic, political, and social membership in the United States."[52] The narrow framing of reentry in such human capital terms is "fully compatible with a neoliberal vision of public policy that is persistently inattentive to or dismissive of the larger structural forces that have been remaking the life chances of historically disadvantaged groups in the United States," including the forces of deindustrialization and welfare retrenchment.[53]

While its reentry programs sidestepped structural questions of membership, the heightened suspicion of terrorist "outsiders" in the wake of 9/11 prompted the Bush Administration's entrenchment of a unique aspect of the racialized disposability logic, what Professor Juliet Stumpf has coined "crimmigration." Put simply, crimmigration is the convergence of immigration and criminal law, resulting in the harshest elements of each area of law expanding the population of the "excluded and alienated."[54] Examples of crimmigration abound following the Bush Administration's USA PATRIOT Act of 2001, which "authorized the Attorney General to detain noncitizens for seven days without criminal charges."[55] Indeed, expanded administrative rules permitting immigrant detention without charge for undefined "reasonable period[s] of time" becoming prevalent shortly thereafter.[56] As the burgeoning population of detainees overwhelmed the available cell space in federal and state jails and prisons, the Bureau of Prisons and the US military quietly built prison camps on five

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[50] George W. Bush, 'State of the Union Address' (20 January 2004) <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-24> accessed 31 March 2024.

[51] Second Chance Act of 2007, Pub. L. No. 110-199; Gottschalk 80.

[52] Gottschalk 80.

[53] Ibid 81.

[54] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 *AULR* 367, 378.

[55] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 350-51 § 412(a) (2001); Stumpf 391.

[56] Stumpf 391. See 8 CFR § 287.3(d). Disposition of cases of aliens arrested without warrant.

extraterritorial army bases to contain immigrants and US citizens convicted of serious crimes,[57] while the Defend America Act of 2007 exempted the extraterritorial confinement of convicts and immigrants from judicial review.[58]

Crimmigration's contribution to bloated incarceration rates was undoubtedly exacerbated by the Bush Administration's "fixation with case counting," which resulted in the scandalous midterm dismissal of US Attorneys who didn't deliver.[59] As Daniel Richman observes, "When districts pursued gun, low-level drug, and immigration prosecutions, they dipped into a virtually inexhaustible supply of relatively easily made cases. Other kinds of cases, like corruption and white-collar fraud, take far more effort and result in far fewer convictions."[60] Not only does this resemble the incentive structure set out by Johnson's LEAA and Clinton's 1994 crime act– more prosecutions mean more funding (in Bush's case, more prosecutions mean more job security)– but such prosecutions continue to proceed on a racialized disposability logic. While Black and Brown Americans are more likely to face arrest, conviction, and harsh sentencing for drug offenses, resulting in welfare ineligibility or eviction from public housing, Black and Brown immigrants disproportionately find themselves in the crimmigration nexus.[61] When Bush left office in 2009, the US prison population was at its peak: 1,553,570 persons were incarcerated in state and federal prisons; another 380,000 would be detained in immigration detention centers by Fiscal Year 2009's end.[62]

2.5 The Obama Administration and the ICC

Despite its promise of "a new chapter in relations" between the United States and the ICC, the Obama Administration, like that of Bush, used the ICC to shape the terms of international criminal justice.[63] Though never fully marginalizing the Court in the manner Bush's had, the Obama Administration picked up on the second phase of the Bush Administration's relationship to the Court: strategic guidance. Three key events of the Obama Administration comprise this strategic guidance: defining aggression, the UNSC Libya referral, and the aftermath of the Goldstone report.

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[57] Stumpf 373-4.

[58] 8 USCA § 1252; Stumpf 374.

[59] For example, Carol Lam, the U.S. Attorney in the Southern District of California was fired in 2006 "because of the Department's concerns about her office's gun and immigration prosecution statistics." See Office of the Inspector Gen. & Office of Prof'l Responsibility, *An Investigation into the Removal of Nine US Attorneys in 2006* (US DOJ 2008) 285; Daniel Richman, 'Political Control of Federal Prosecutions: Looking Back and Looking Forward' (2009) 58 Duke LJ 2087, 2100.

[60] Richman 2100.

[61] Teresa Miller, 'Blurring the Boundaries Between Immigration and Crime Control After September 11th' (2005) 25 BC Third World LJ 81, 101-2, notes that "immigration law enforcement relies heavily upon religious and ethnic 'profiles'" of potential terrorists that includes Muslim and Middle Eastern men and "a range of immigrant communities, particularly Mexican immigrants with brown skin and dark hair."

[62] Dora Schriro, *Immigration and Customs Enforcement (ICE): Immigration Detention Overview and Recommendations* (US Dept. of Homeland Security) 6; 'Growth in Mass Incarceration' (2024).

[63] Bosco 153.

Having left the crime of aggression undefined at the Rome Conference, the 2010 review conference in Kampala offered a chance to settle the debate. Aggression was still a hotly contested issue, especially in the wake of the unauthorized US-led invasion of Iraq. The United States sent a large observer delegation to Kampala– led by legal adviser to Obama's State Department, Harold Koh. As a result of the conference, the Rome Statute would be amended to define the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression[64] which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[65] The aggression amendments exclude nonmember states' nationals from prosecution entirely in cases of a state referral or if the Prosecutor chooses to proceed proprio motu, even if the alleged act of aggression occurs on the territory of an ICC member state.[66] If an investigation of aggression does proceed by state referral or proprio motu, the Prosecutor is required to wait six months for Security Council action before initiating the investigation.[67] Only in cases of a Security Council referral can the Court proceed with an investigation of aggression as with other crimes. Finally, in the case of state referrals and proprio motu investigations, the 2017 Activation Resolution "plainly requires that for the ICC to have jurisdiction over the crime of aggression, both the State of nationality and the territorial State (in other words, the aggressor and victim States) must have ratified the amendments"– that is, to have *opted-in* to the agreement.[68] This appears to set an even higher bar for the ICC to exercise jurisdiction over aggression than that set at Kampala, which indicated only that member states would have to lodge an *opt-out* declaration in accordance with Article 15*bis* (4).[69]

The Court's limited jurisdiction over the crime of aggression, with a central role granted to the Security Council in controlling its investigation, reflect the Clinton Administration's demands at Rome. Moreover, turning the Court's attention away from the unauthorized use of force and toward crimes involving the deliberate targeting of civilians works "decidedly to the major powers' benefit [as] [t]hose states in possession of trained, technologically advanced militaries [have] little need to terrorize civilians."[70] The United States, a nonmember state with the most "technologically advanced" military in the world, along with its P5 status, may pursue aggressive conflict with virtual impunity. The Obama Administration's success in negotiating aggression at Kampala thus built upon existing ICC architecture to further entrench its power

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[64] The Rome Statute was amended to define an *act* of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (Rome Statute, Art 8 *bis* (2)).

[65] Rome Statute, Art 8 *bis* (1).

[66] Bosco 166.

[67] Rome Statute, Art 15 *bis*.

[68] Resolution ICC-ASP/16/Res.5; Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2nd edn, CUP 2021) 326.

[69] Resolution RC/Res.6.

[70] Bosco 166.

over international criminal justice, once again guiding the Court toward situations involving other Statute crimes, those more likely to be committed in poorer, weaker states without technologically advanced militaries.

Nine months after the Kampala Conference, violence erupted in Libya, where the Muammar Gaddafi regime threatened a deadly counterinsurgent response to Arab Spring protests.[71] For the second time, the Security Council invoked its Article 13(b) power, adopting Resolution 1970 to refer the situation in Libya to the ICC with the United States voting in favor. Despite this active cooperation, Resolution 1970 contained two of the same caveats that the Bush Administration had shoehorned into Resolution 1593– the exemption of nationals of non-states parties other than Libya from ICC jurisdiction (like US troops involved in the NATO intervention) and the refusal to fund any ICC investigations or prosecutions that arise out of the referral.[72] Thus, picking up on the precedent set by Resolution 1593– i.e., that the US would be immune in ICC investigations resulting from a Security Council referral– the Obama Administration strategically guided the ICC's docket with Resolution 1970.

Importantly, the situation in Libya arose as Israel faced scrutiny following the publication of the Goldstone Report. The report on Palestine, commissioned by the UN Human Rights Council, "accused Israel of deliberately attacking civilian infrastructure in Gaza, abusing detainees, using Palestinians as human shields, and arbitrarily depriving wounded civilians of medical care."[73] Concluding that the violations "fall within the subject-matter jurisdiction of the International Criminal Court," the report urged the Prosecutor to act.[74] Though Israel is not an ICC member state, Palestine had submitted an Article 12(3) request to grant the Court ad hoc jurisdiction over its territory. While Prosecutor Ocampo considered whether Palestine constituted a "state" for the purposes of the Rome Statute, Obama's ambassador to the UN, Susan Rice, assured then-Israeli President Shimon Peres that the United States was committed "not to allow the issue to move from the Security Council to International Criminal Court."[75]

Situated in these circumstances, the image of Susan Rice, hand high, voting in favor of Resolution 1970 is not an obvious testament to the Obama Administration's commitment to global justice. Rather, the Libya referral closely mirrors the Bush Administration's focus on Darfur amidst the swirling Abu Ghraib criticism– a strategic utilization of the Security Council's relationship with the Court to guide scrutiny away from the United States and its allies. Once again, this dynamic was reinforced by ICC officials' discretionary deference to the United States. When Fatou Bensouda took office as the second ICC Prosecutor in 2012, the international community had definitively recognized Palestine as a state, seemingly resolving the uncertainty that had prevented Ocampo from accepting the Palestinian Authority's 2009 grant of

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[71] Ibid 167.

[72] SC Res 1970, UN SCOR, 6491st meeting, UN Doc S/RES/1970 (26 February 2011), operative paras 6 and 8; Cormier 135-6.

[73] Bosco 161.

[74] *Report of the United Nations Fact Finding Mission on the Gaza Conflict ("Goldstone Report")* A/HRC/12/48 (2009) 422.

[75] Bosco 151, 161.

jurisdiction.[76] Instead of reconsidering the previous jurisdictional grant, however, Bensouda asserted that Palestine would need to submit a new request.[77] While Palestinian negotiators used the prospect of additional action as leverage with the Israelis, the United States drew Bensouda's attention further away from Israel, facilitating the transfer of Congolese warlord Bosco Ntaganda to the Hague.[78] Yet another American administration, this time under the guise of cooperation, used its ICC-endorsed influence to shape the terms of international criminal justice.

2.6 Obama's Criminal Justice Policies

Like Bush, President Obama was ostensibly keen to reform US criminal punishment. With the goal of ameliorating racial disparities evident in drug sentencing, Obama signed into law the Fair Sentencing Act.[79] The act reduced the penalty disparity between crack and powder cocaine from 100:1 to 18:1, the first rollback in federal mandatory minimums in 35 years.[80] Gottschalk explains that "African Americans are more likely than whites to use crack, which pharmacologically is nearly identical to powder cocaine but much cheaper, while whites are proportionally more likely to use powder cocaine."[81] Though more likely to use crack than powder cocaine, Black Americans still constitute a minority of regular users of crack cocaine. However, throughout the 1990s and early 2000s, Black Americans made up more than 80% of crack defendants.[82] Though the new law reduced the sentencing disparity between crack and powder cocaine, it did not eliminate it. More importantly, it left unaddressed the insidious racial disparities in the enforcement of drug penalties generally.

The Obama Administration's efforts with the Fair Sentencing Act were overshadowed by its penchant for punishment, especially of drug crimes. Amid the Great Recession, the Obama

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[76] Ibid 174.

[77] On 22 May 2018, Palestine referred to the Prosecutor the Situation in its territory since 13 June 2014, with no end date. On 28 January 2020, Pre-Trial Chamber I issued an order setting the procedure and the schedule for the submission of observations, and on 3 March 2021, nearing the end of her tenure, Bensouda announced the opening of the investigation into the Situation in the State of Palestine. It was not until 21 November 2024 that Pretrial Chamber I issued a warrant of arrest for Mohammed Diab Ibrahim Al-Masri, commonly known as 'Deif', the highest commander of the military wing of Hamas, for the crimes against humanity of murder; extermination; torture; and rape and other form of sexual violence; as well as the war crimes of murder, cruel treatment, torture,; taking hostages; outrages upon personal dignity; and rape and other form of sexual violence, committed on the territory of the State of Israel and the State of Palestine from at least 7 October 2023. Pretrial Chamber I also issued warrants of arrest for Benjamin Netanyahu, Prime Minister of Israel at the time of the relevant conduct, and Yoav Gallant, Minister of Defense of Israel at the time of the alleged conduct, for crimes against humanity and war crimes committed from at least 8 October 2023 until at least 20 May 2024. As the above timeline indicates, the investigation, particularly into acts committed by Israeli nationals prior to 7 October 2023, has been slow going. <https://www.icc-cpi.int/palestine>.

[78] Bosco 175.

[79] Fair Sentencing Act of 2010, Pub. L. No. 111-220.

[80] Gottschalk 128. The 100:1 disparity was set by the 1986 Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207.

[81] Ibid 127.

[82] William Stuntz, *The Collapse of American Criminal Justice* (Harvard UP 2011) 184.

Administration passed the American Recovery and Reinvestment Act, resuscitating two law enforcement programs that the Bush Administration had started phasing out: Clinton's COPS program and the Byrne Justice Assistance Grants.[83] Reminiscent of the Bush Administration's "fixation with case counting," Byrne grants "have encouraged law enforcement officials to focus on low-level drug arrests rather than pursuing big dealers because the funds are typically awarded based on the number of arrests– not the significance of the arrests."[84] The 2009 Recovery Act provided for more than $2 billion in new Byrne funding and an additional $600 million to increase state and local law enforcement across the country.[85] The funding choice this time, Alexander explains, was "not in response to any sudden spike in crime rates or any new studies indicating the effectiveness of these programs, but instead because handing law enforcement billions of dollars in cash is an easy, efficient jobs program in the midst of an economic crisis."[86] The stimulus package pumped an additional $2 billion into the corrections budgets of 44 states, capitalizing on and further augmenting state capacity to build and run prisons.[87] Harking back to the Clinton era, the Obama Administration's penal spending was met with an enthusiastic embrace of deficit politics.[88] The contradictory logic of neoliberal penal policy appeared to be lost on Obama, with 1,439,880 persons incarcerated in federal and state prisons when he left office in 2017.[89]

3 Punishment Parallels

In the tradition of interpretive social science, this section attempts to make better sense of the power relations observed in the previous section– the United States' ability to influence the ICC to reflect and reproduce its interests and the racialized disposability logic of US mass incarceration. I contend that US mass incarceration and the ICC operate analogously to disregard and exacerbate structural conditions of violence, thereby reinforcing existing global power relations, through three punishment parallels: 1) reliance on retributive and deterrent punishment aims; 2) emphasis on individual criminal responsibility; and 3) racial disproportionality in criminalization.

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[83] The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.
[84] Gottschalk 34.
[85] Alexander 84.
[86] Ibid 253.
[87] Gottschalk 33.
[88] For a discussion of Obama's proposed cuts to welfare programs in securing a budget compromise with Republicans, see Gottschalk 21, 22 fn 99.
[89] 'Growth in Mass Incarceration' (2024).

3.1 Purposes of Punishment: An Overview

Retribution is rooted in the deontological notion that "the guilty receiving their just deserts is an intrinsic good."[90] According to Danilo Zolo's description of retribution: "Punishment and expiation serve to repristinate the ontological equilibrium upset by immoral or illegal behaviour."[91] Contrastively, the deterrent purpose of punishment reasons that "[t]he memory of the suffering endured is intended to dissuade the offender from repeating criminal behaviour, while the social spectacle of inflicting suffering on deviant subjects is designed to induce the majority of citizens to respect the collective rules."[92] While retribution is backward-looking, focused on obtaining justice through punishing the deserving, deterrence is forward-looking, focused on the consequences of punishment as the prevention of future criminality.

Rehabilitation and restoration take a more comprehensive approach to the purpose of punishment. According to Edgardo Rotman, rehabilitation "introduces broader social issues into the criminal justice system, creating an area of convergence with the social welfare, public health, and educational systems."[93] Restoration "focuses on the harm to the victim and the community," fostering a collective assessment of how to heal in the aftermath of crime.[94] Both rehabilitation and restoration emphasize the need to connect individual criminal acts to their underlying, structural conditions– while rehabilitation connects the individual offender to wider networks of assistance, restoration recognizes the central role played by communities in furnishing these networks. Restoration provides the "social capital" required for offenders to adequately make use of rehabilitative resources. Thus, while rehabilitation and restoration are concerned with addressing societal motivation for criminal conduct, both retribution and deterrence are centrally occupied with the specific criminal act or behavior– whether punishing to obtain "justice" or to deter recurrence.

3.1.1 Retribution and Deterrence in US Mass Incarceration

A reliance on retributive and deterrent purposes of punishment, and its contribution to mass incarceration, is exhibited in the criminal justice policies of the three US presidential administrations analyzed in the previous section. First, Clinton's 1994 Violent Crime Control and Law Enforcement Act expanded the crimes punishable by death and contained a "three-strikes" provision by which defendants convicted of a serious violent felony with two previous felony charges (which may include a non-violent drug offense) receive mandatory life imprisonment. Clinton expressed his reasoning for these policies:

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[90] Michael S. Moore, 'Justifying Retributivism,' (1993) 27 Israel LR 15, 19.
[91] Zolo 156.
[92] Ibid 157.
[93] Edgardo Rotman, "Beyond Punishment" in R. A. Duff and David Garland (eds), *A Reader on Punishment* (OUP 1994) 287.
[94] Lucy Clark Sanders, 'Restorative Justice: The Attempt to Rehabilitate Criminal Offenders and Victims,' (2008) 2 Charleston LR 923, 924.

> The Crime Bill…does add capital punishment for a certain number of crimes…[which] need a completely clear and unambiguous deterrent… We must also find a way to protect ourselves from repeat offenders, the… criminals with no conscience who prey on us again and again.[95]

Though explicitly referring to his deterrent purpose, Clinton's reasoning also relies on retributive aims– "criminals with no conscience" deserve to be disposed of, whether through life imprisonment or death, having violated the "objective order."[96] Carrying out this punishment, the act's COPS program boosted arrest rates to deter would-be offenders, while its expansion of the carceral state offered warehousing for the disposable, deserving "criminals with no conscience."

Clinton's retrenchment of welfare policies bolsters his criminal punishment policies of retribution and deterrence. TANF excludes welfare eligibility to those convicted of felony drug offenses and the 1996 Housing Opportunity Program Extension Act's "one strike" policy on illegal drug or criminal activity in public housing are geared toward deterring criminal behavior. Further, these policies communicate to low-income, predominantly Black communities that criminal records equate to a severance of public assistance and the effective revocation of membership in American society.

The Bush Administration's hand in the crimmigration crisis underscores a reliance on deterrent and retributive aims in circumscribing the conditions of membership and disposability in American society. Indeed, the deterrent and retributive purposes of crimmigration are well documented.[97] The Bush Administration heightened post-9/11 suspicion of immigrant "outsiders" with the USA PATRIOT Act, expanding legal grounds for the ambiguous detention of noncitizens and extending the extraterritorial confinement of immigrant detainees while exempting it from judicial review. Immigrants to the United States, and particularly immigrants of color, were thus implicitly told: 1) are *undeserving* of American citizenship, and therefore disposable; and 2) we want to *deter* others like you from breaking American laws or entering the country at all.

The Bush Administration's Second Chance Act arguably attempted to incorporate rehabilitative and restorative aims into its criminal justice policies. However, by narrowly focusing on augmenting offenders' human capital– their employability– to facilitate their reentry into society, the act invisibilizes "the deeper socioeconomic and other factors that prevent offenders and ex-offenders from securing gainful employment that lifts them out of poverty and keeps them out of prison," as well as the restoration needed to reintegrate ex-offenders into their

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[95] President William Jefferson Clinton, 'Crime Bill Forum' (Department of Justice, Washington, D.C., 11 April 1994) <https://clinton.presidentiallibraries.us/items/show/22601> accessed 2 April 2024.
[96] Zolo 156.
[97] See Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 Harv L Rev 1890, 1893-94; Nora V. Demleitner, 'Immigration Threats and Rewards: Effective Law Enforcement Tools in the 'War' on Terrorism?' (2002) 51 Emory LJ 1059, 1068-71; Stephen H. Legomsky, 'The Detention of Aliens: Theories, Rules, and Discretion,' (1999) 30 U Miami Inter-Am L Rev 531, 540.

communities.[98] Crucially, a reentry program packaged as a "second chance" disregards the lived experience of many ex-offenders who "never got a first chance, let alone a second one."[99] As Daniel Stageman puts it, "How can an individual reenter a society of which he has never truly been a member?"[100]

Turning to the criminal justice policies of the Obama Administration, the Fair Sentencing Act's retention of any sentencing disparity between crack and powder cocaine continues to convey the message that the use and sale of crack cocaine *deserves* harsher penalties, and should have more resources devoted to its *deterrence*, than that of powder cocaine. To the extent that, while pharmacologically identical, Black Americans are more likely to use crack cocaine while white Americans are more likely to use powder cocaine, the 18:1 sentencing disparity between crack and powder cocaine provided for by the Fair Sentencing Act reflects a discriminatory effort to control and penalize the drug activity of Black Americans more stringently than white Americans. Moreover, the 2009 Recovery Act added billions of dollars to policing and prison budgets, reminiscent of the Clinton era crackdown, which further bolstered the institutional architecture of a punishment regime reliant on a retributive and deterrent preoccupation with specific criminal acts, as opposed to a rehabilitative and restorative focus on their structural circumstances.

The criminal justice policies of the three presidential administrations should be regarded as descendants of the Goldwater-led "frontlash" brilliantly chronicled by Vesla Weaver in her article, "Frontlash: Race and the Development of Punitive Crime Policy." The conservative frontlash logic proceeded thus: "civil disobedience led to violent riots; riots were not a legitimate grievance but were criminal acts; the right of society to be free from criminals was above rights of protesters (who were criminal); therefore, we need more punishment."[101] An American punishment tradition thereby began in which retribution was secured without concern for its consequences, while deterrence was pursued without regard to context, the structural conditions of violence. Foreclosing rehabilitative and restorative approaches to racial unrest, American punishment aims implicitly justified mass incarceration and racialized disposal of people and communities of color.

3.1.2 Retribution and Deterrence at the ICC

As Mark Drumbl contends, "In the area of punishment and sentencing, international tribunals very closely borrow the rationalities of ordinary domestic criminal law– in particular, retribution and general deterrence."[102] This holds true with the ICC, as the preamble to the Rome Statute centralizes retributive and deterrent aims, respectively: "Affirming that the most serious

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[98] Gottschalk 81.
[99] Ibid.
[100] Daniel Stageman, 'Entry, Revisited' (2010) 34 *Dialectical Anthropology* 441, 441.
[101] Weaver (2007) 249.
[102] Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 11.

crimes of concern to the international community as a whole *must not go unpunished*; Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the *prevention of such crimes*."[103] The pursuit of both aims is implicit in the ICC's invocation of "no peace without justice," a position which, Richard Clements elaborates, has evolved into the view "that peace itself [will] not emerge unless the ICC intervene[s]."[104]

Regarding its retributive element, the idea that "there can be no peace without justice," reflects Zolo's description of retribution: "Punishment and expiation serve to repristinate the ontological equilibrium upset by immoral or illegal behaviour."[105] *Justice* is the punishment needed to "repristinate the ontological equilibrium," the *peace,* "upset by immoral or illegal behaviour."[106] The conception of justice as punishment has been termed by Sarah Nouwen as "ICC-style justice," its retributive nature particularly evident in juxtaposition with conceptions of justice in local systems where "atrocity is becoming internationally judicialized."[107] The Acholi tribe of northern Uganda, in the wake of President Museveni's request for an ICC investigation provides a powerful example of the clash between the ICC's "Western notions of justice" and "a deep African tradition of forgiveness."[108] According to a Ugandan bishop interviewed by Nouwen in 2008, "The court system is justice through punishment…We [the Acholi people] don't do it like that."[109] As Nouwen puts it, the bishop argues that "the character of retributive justice is to polarise, which leads to death."[110]

In a similar tone, the African Union responded to the ICC's indictment of Sudanese President Omar Al-Bashir with a resolution that criticized "the unfortunate consequences that the indictment has had on the delicate peace processes underway" in Sudan, and called on African Union member states not to cooperate with the Court's arrest warrant for Bashir.[111] Notably, the United States had successfully led a campaign to block an Article 16 deferral of the ICC's investigation into the situation in Darfur. Further demonstrative of its influence over international criminal justice, and its own reliance on retributive punishment aims, the United

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[103] Rome Statute, preambular paras 4-5 (emphasis added).

[104] Richard Clements, 'Governing International Criminal Justice: Managerial Practices and the International Criminal Court' (DPhil thesis, University of Cambridge 2019) 50.

[105] Zolo 156.

[106] Ibid.

[107] Drumbl 63; Sarah Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012).

[108] Marc Lacey, 'Atrocity Victims in Uganda Choose to Forgive" (*New York Times*, New York, 18 April 2005) <https://www.nytimes.com/2005/04/18/world/africa/atrocity-victims-in-uganda-choose-to-forgive.html> accessed 25 March 2024.

[109] Nouwen 332-3.

[110] Ibid 334.

[111] Decisions and Declarations reached by the Assembly of the African Union, Assembly/AU/Dec. 245 (XIII) Rev.1 (1-3 July 2009) <https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf> accessed 28 March 2024.

States encouraged the ICC's prioritization of "efforts to bring [Bashir] and others to justice," over the stability of peacebuilding in Darfur.[112]

To be sure, there are many victims of atrocity who seek punishment for those who harmed them. Without discounting the value of punishment for these victims' sense of justice, the threat of polarization observed in ICC-style justice by local stakeholders, from a solitary Ugandan bishop to the African Union, is perfectly consistent with the retributive purpose of punishment which must be secured "irrespective of its consequences and should never be sacrificed in negotiations." [113] Indeed, the Rome Statute does not qualify its retributive assertion that international crimes "must not go unpunished," suggesting that punishment is to be doled out regardless of its effects on delicate peacemaking processes. In turn, the retributive reading of "no peace without justice"– perhaps better phrased, "no peace without ICC intervention to punish"– relies on a specific, limited understanding of peace. It is neither the absence of violence (negative peace) nor addressing the root causes of violence (positive peace). Rather, peace in accordance with this retributive notion of justice is that which is delimited by the ICC's decision of what and who counts as "violations of an objective order."[114]

While retribution is said to "indulge in the emotionalism of the moment," deterrence theory offers an arguably more rational approach to punishment.[115] As the deterrent reasoning goes, "international criminal justice prevents crimes by combating impunity, and by preventing crime promotes peace."[116] In this sense, the deterrent reading of "no peace without justice," is better phrased: "no peace without ICC intervention to assign accountability." As Christopher Mullins and Dawn Rothe confirm, "many actors within the field of international criminal justice… have heralded the deterrent power of the court."[117] According to Ocampo, "by putting an end to impunity for the perpetrators of the most serious crimes, the Court can and will contribute to the prevention of such crimes, thus having a deterrent effect."[118] Former ICC President Philippe Kirsch holds, "The International Criminal Court was created to break this vicious cycle of crimes, impunity and conflict. It was set up to contribute to justice and the prevention of crimes, and thereby to peace and security."[119] Further linking the deterrent effect of accountability to securing peace, M. Cherif Bassiouni argues that international criminal

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[112] UN SCOR, 5947th meeting, UN Doc. S/PV.5947 (31 July 2008).
[113] Nouwen 338.
[114] Zolo 156.
[115] Heike Jung, 'New Perspectives or More of the Same? Criminal Law and Criminal Science in the 21st Century' (1993) 19 Keio LR 41, 61.
[116] Nouwen 331.
[117] Chrisopher Mullins and Dawn Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10 Intl Crim L Rev 771, 771–2.
[118] Luis Moreno-Ocampo, 'The International Criminal Court: Some Reflections' (2009) 12 Ybk Intl Hum L 3, 5.
[119] Philippe Kirsch, *Address to the United Nations General Assembly* (1 November 2007) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/754F8043-22DB-4D78-9F8C-67EFBFC4736A/278573/PK_20071101_ENG.pdf> accessed 25 March 2024.

"prosecutions and other accountability measures… serve as deterrence, and thus prevent future victimization."[120]

However, separate from skepticism toward the possibility to deter international crimes, the deterrent reading of "no peace without ICC intervention," as with its retributive sense, relies on a limited understanding of peace.[121] While the retributive sense of peace depends upon the Western notion of justice as punishment, the deterrent sense of peace depends upon the Western notion of accountability– one that, in accordance with the principle of legality, cautions against *retroactive* accountability for acts committed before punishment was prescribed for them. The ICC's deterrent purpose, in contrast with previous ad hoc tribunals, is thus accentuated by its strictly prospective, i.e. forward-looking, temporal jurisdiction, limited to crimes committed after the entry into force of the Rome Statute.[122] By restricting what and who may be held accountable to its prospective temporal jurisdiction, the ICC's deterrent sense of peace "contributes to unresolved issues for the continuing challenges of structural inequality in the current world order."[123] Thus, while the retributive reading of "no peace without ICC intervention," imposes punishment without regard to its consequences on existing conditions of violence, the deterrent reading of "no peace without ICC intervention" assigns accountability without addressing the structural conditions, the context, of violence. As a result, the ICC's reliance on retributive and deterrent punishment aims preserves, while threatening to exacerbate, existing relations of harm and domination.

3.2 Individual Criminal Responsibility

Individual criminal responsibility is inherently related to a criminal justice system's reliance on retributive and deterrent punishment purposes. Just as it may be said that retribution relies on the Western notion of justice, and deterrence relies on the Western notion of accountability, both punishment aims may be said to rely on individual criminal responsibility, itself "embedded in the 'free individualism' of the Western criminal-law tradition."[124] The ability to prevent future crime "rests on an assumption that such crimes are acts of individuals… and thus responsive to deterrence," while the retributive principle that crimes must not go unpunished rests on the "understanding that individuals can and should be held liable for infractions."[125] As such, an emphasis on individual criminal responsibility in punishment accords with a retributive

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[120] M Cherif Bassiouni, ''The Need for International Accountability' in M Cherif Bassiouni (ed), *International Criminal Law, Volume 3: International Enforcement* (3rd edn, Brill 2008) 20.

[121] For skepticism toward the potential to deter international crimes, see Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561, 584; Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 Int J of Tran Jus 434, 454.

[122] Rome Statute, Art 11(1).

[123] Kamari Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality' (*Just Security*, 24 July 2020) <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> accessed 12 March 2024.

[124] Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 LJIL 701, 711.

[125] Ibid (emphasis added).

neglect of consequence, and a deterrent neglect of context. This section explores how a parallel emphasis on individual criminal responsibility in punishment has thereby contributed to the reinforcement of existing global power relations by US mass incarceration and the ICC.

3.2.1 Individual Criminal Responsibility and US Mass incarceration

Individual criminal responsibility reinforces the neoliberal notion that "problems like crime, poverty, mass unemployment, and mass incarceration [do not have] fundamental structural causes," and are instead solely attributable to individual action.[126] Without minimizing the deeply harmful consequences of criminal behavior that often precede one's incarceration, there are structural, community-centered conditions of mass incarceration which an emphasis on individualized criminal responsibility threatens to overlook. Namely, the mass incarceration of a community feeds a cycle of racialized disposability that maintains the subordination of poor, urban, Black and Brown populations in the United States.

As Dorothy Roberts makes explicit, "African Americans experience a uniquely astronomical rate of imprisonment, and the social effects of imprisonment are concentrated in their communities."[127] Indeed, the social effects of mass incarceration, due to its spatial concentration in communities of color, are greater than the sum of the prison sentences issued to each individual found responsible for a crime. Mass incarceration "strains the extended networks of kin and friends that have traditionally sustained poor African American families in difficult times, weakening communities' ability to withstand economic and social hardship."[128] When the mass incarceration of a community's members strains those social networks beyond a certain threshold, it impedes the formation of social capital.[129]

Distinct from human capital– the "skill and resources individuals need to function effectively"– social capital is the "skills and resources needed to effect positive change in neighborhood life."[130] Though an individual's experience of incarceration in the United States tends to diminish their human capital– encouraging behaviors that are inconsistent with "the routine of steady work" outside prison– the diminishment of a community's social capital through mass incarceration poses unique structural challenges.[131] As Dina Rose and Todd Clear contend, "social capital is the essence of social control for it is the very force [that] enables groups to enforce norms."[132] As a result, communities with diminished social capital are disposed to, what Philosopher Tommie Shelby terms, "suboptimal cultural divergence," which

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[126] Gottschalk 18.

[127] Dorothy Roberts, 'The Social and Moral Cost of Mass Incarceration in African American Communities' (2004) 56 Stan L Rev 1271, 1273.

[128] Ibid 1282.

[129] Ibid 1283.

[130] Dina Rose and Todd Clear, 'Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory,' (1998) 36 *Criminology* 441, 454-5 (emphasis added).

[131] Bruce Western, *Punishment and Inequality in America* (Russell Sage Foundation 2006) 113.

[132] Rose and Clear 454.

holds that "a significant segment of the ghetto poor[133] diverge culturally from mainstream values and norms, and this divergence generally inhibits their upward mobility or escape from poverty."[134] This divergence comprises norms such as a lack of "conventional occupational ambition;" "pessimism, even fatalism, about the prospects for upward mobility through mainstream channels;" and a distrust of authority, "particularly officials of the criminal justice system."[135]

Suboptimal cultural divergence often begins as individuals' "consciously adopted strategic responses" to hardship.[136] Yet, when incarceration occurs on the mass, community level, "the cycling of people from ghetto to prison and back again spreads a criminal ethos, an outlaw subculture, throughout many poor urban areas."[137] Such a "criminal ethos" within a community can become a self-perpetuating a component of a community's social identity, persisting "even if educational and employment opportunities significantly improve."[138] In this context, the mass incarceration of Black and Brown communities becomes a sort of self-fulfilling prophecy.

An emphasis on individual criminal responsibility thus risks misinterpreting the problem of crime in communities most impacted by mass incarceration– a misinterpretation that informs policy decisions such as the Second Chance Act. Though the act may very well address the diminishment of human capital through incarceration, helping an ex-offender "acquire the right individual skills to become employable," its attempts at improving reentry will remain ineffective when the effects of an individual's prison sentence continue to be abstracted from the effects of mass incarceration on their community.[139] Despite access to opportunities for upward mobility through mainstream channels, the norms of such communities have been shaped such that "suboptimal" behaviors– crime, joblessness, contempt of law enforcement– become acceptable, even favorable alternatives.[140]

Fitting smoothly into the United States' retributive and deterrent punishment regime, individual criminal responsibility is singularly concerned with attributing fault to individuals without discerning the aggregate effect. In turn, mass incarceration uncritically justifies the cyclical disposal of disproportionately Black and Brown persons from their communities, reinforcing a suboptimal cultural divergence that perpetuates relations of domination along racial lines.

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[133] Shelby defines ghettos as "metropolitan neighborhoods visibly marked by racial segregation and multiple forms of disadvantage" (38). I take this to be synonymous with the predominantly Black and Brown "urban" communities I've been referring to.

[134] Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Harvard UP 2016) 82.

[135] Ibid 85-6.

[136] Ibid 86.

[137] Ibid 206.

[138] Ibid 84.

[139] Gottschalk 80 (emphasis added).

[140] For more on crime and joblessness as cultural adaptations in communities impacted by mass incarceration, see Alford A. Young Jr., *The Minds of Marginalized Black Men: Making Sense of Mobility, Opportunity, and Future Life Chances* (Princeton UP 2006).

3.2.2 Individual Criminal Responsibility and the ICC

In the context of international criminal law, individual criminal responsibility was a revolutionary development of the International Military Tribunal at Nuremberg. In sharp contradistinction to the traditional understanding of international law comprising impenetrable, sovereign states, the tribunal declared, "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."[141] Individual criminal responsibility is enshrined in Article 25 of the Rome Statute, upholding the Nuremberg legacy in asserting that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment."[142] Dissolving the cover once provided by state sovereignty, individual criminal responsibility exposes perpetrators of mass violence to their retributive just deserts, while making the deterrent promise that accountability awaits those considering similar courses of action.

Yet, much like its role in US mass incarceration, the emphasis on individual criminal responsibility by the ICC risks overlooking and aggravating structural causes of violence. As Immi Tallgren shrewdly warns, "The ideology of a disciplined, mathematical structure of international [individual] criminal responsibility serves as a soothing strategy to measure the immeasurable. The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation surrounding the violence."[143] Indeed, international individual criminal responsibility, "abstracts individuals from a concrete context in which they act, or are moved to act, and in which the specific crimes with which they are charged occur."[144] Yet, as Kamari Clarke asserts, "the violence of colonialism and neocolonialism continues to structure the nature of privilege, power, and violence in ICC situation countries today," with the "economic degradation of neocolonialism" playing a particularly pernicious role in seeding contemporary violence.[145]

Clarke's invocation of the "economic degradation of neocolonialism" may be rephrased as "the political-economic aspects of atrocity."[146] Notably, the political-economic forces which structure and enable atrocity are deeply influenced by neoliberal market agendas. As Christopher Cramer argues, "much of the violence in the world may represent the consequences of and reactions to the failures and choices of government policies, including those policies of wholesale liberalisation and deregulation encouraged by international financial institutions (IFIs)."[147] As Tor Krever notes more generally, "At the core of IFI programmes was and remains an emphasis on the opening of countries' political economies to the free movement of goods and

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[141] 'Judgment of the Nuremberg International Military Tribunal 1946' (1947) 41 AJIL 172, 221.
[142] Rome Statute, Art 25 (1) and (2).
[143] Tallgren 593-4.
[144] Krever (2013) 720.
[145] Clarke (2020).
[146] Krever (2013) 720
[147] Christopher Cramer, *Violence in Developing Countries: War, Memory, Progress* (Indiana UP 2007) 198

financial flows from the North and a transformation of states' domestic social relations."[148] Structural adjustment loans from the World Bank and International Monetary Fund (IMF) to developing countries were contingent on "commitments to neoliberal, market-stimulating reforms," from opening domestic economies to imports and freeing prices from controls, to privatizing state-owned enterprises and liberalizing financial and labor markets.[149]

Despite the promises of the neoliberal agenda, per capita GDP plummeted in many regions, while global inequality worsened.[150] Whereas in 1960, the richest twenty percent of the world was about thirty times wealthier than the poorest quintile, by 1989, the top quintile was sixty times richer than the bottom quintile.[151] Furthermore, as the opening of economies to the forces of transnational capital has magnified "asymmetries in the distribution of material and cultural resources" within states, Susan Marks explains that neoliberal reforms have precluded "the implementation of social and economic policies—agrarian reform, industrial planning, expanded programmes of education and training, etc.– which might [have] help[ed] to correct this."[152] The result, Krever concludes, is that IFI policies have tended to exacerbate "the very conditions – social, economic, legal, and political – associated with a breakdown of social order," and the growth "of socioeconomic inequality, insecurity, and human misery."[153] I am not arguing a simple causal relationship between interventions in a country's political economy and the outbreak of violence.[154] Nor do I want to minimize the agency of perpetrators of mass violence and the harm they've caused. The point, rather, is that these political-economic aspects of atrocity comprise– with their exacerbation of poverty, discrimination, marginalization, and social exclusion– fundamental, structural conditions of violence which the ICC, in its emphasis on individual criminal responsibility, has overlooked.[155]

As Antony Anghie and B.S. Chimni affirm, initiatives to assign individual criminal responsibility in international law "always suffer from the danger of becoming, simply, the reproduction of the civilizing mission and victor's justice."[156] Part of this "civilizing mission and victor's justice," as discussed when considering the retributive and deterrent aims underlying both the ICC and US mass incarceration, is the determination of what and who is to be criminalized. This, again, is informed by the ICC's limited understanding of peace (and violence) which, according to John Reyolds and Sujith Xavier, has resulted in a catalog of core crimes that

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[148] Krever (2013) 718.

[149] Tor Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52 Harv Intl LJ 287, 297.

[150] Angus Maddison, *The World Economy: A Millennial Perspective* (OECD 2001) 126. For example, Africa's average annual per capita GDP growth was 2.07% from 1950-1973 and 0.01% from 1973 to 1998.

[151] *Human Development Report 1992* (UNDP 1992) 34.

[152] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003) 58.

[153] Krever (2013) 718-9.

[154] Ibid 719.

[155] Ibid 719-20.

[156] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese JIL 77, 91.

"cannot address many of the collective interests of Global South peoples that are impacted by the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment."[157] The violence which the ICC criminalizes is circumscribed by "a narrow individual accountability mandate and a desire to go with the flow of global geopolitics"[158] leaving the Court "unable or unwilling to offer antidotes to the symptoms of imperial relations."[159] In placing the economic contexts of war, exploitation and scarcity beyond the "boundaries of criminalization," the ICC elides the contribution of IFI structural adjustment and austerity programs to "insecurity and precarity in Africa and elsewhere."[160]

Moreover, the ICC's preoccupation "with the abnormality of conjunctural violence," deemed the work of individually responsible perpetrators, "rather than with the normality of the forces– including economic and legal structures– that lurk beneath," naturalizes and legitimizes the latter such that structural violence is not considered "violence" at all.[161] The ICC thus "serves to narrate conflict and peace… tolerable structural violence and intolerable physical atrocity."[162] The ICC's emphasis on individual criminal responsibility, to the extent that it disregards, and in this sense condones, structural violence, thus mirrors US mass incarceration's cyclical reinforcement between the structural conditions and outcomes of punishment. Put differently, the ICC's emphasis on individual criminal responsibility reinforces existing relations of domination, manifesting "the cunning of colonialism, the ways in which the civilizing mission reproduces itself in bewilderingly different forms, all of them presented as benevolent."[163]

3.3 Racial Disproportionality in Criminalization

The third punishment parallel I identify between US mass incarceration and the ICC's enforcement of ICL is racial disproportionality. Highlighting the interconnectedness of the three punishment parallels, I argue that the selection of what and who is to be criminalized at both levels of criminal justice, while grounded in individual criminal responsibility and retributive and deterrent punishment aims, is shaped by and shap*ing* global white supremacy. Agreeing with Randle DeFalco and Frédéric Mégret's revealing comparison of the role of race in the ICC and US criminal justice, I frame racial disproportionality in criminalization as not primarily

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[157] John Reynolds and Sujith Xavier, ''The Dark Corners of the World: TWAIL and International Criminal Justice' (2016) 14 J Intl Crim Jus 959, 981 (emphasis added).

[158] Indeed, a primary aim of the previous chapter was to establish this "go with the flow" desire with respect to US influence.

[159] Ibid 975.

[160] Asad Kiyani, 'International Crime and the Politics of International Criminal Theory' (DPhil thesis, University of British Columbia 2016) 105; Clarke (2020).

[161] Krever (2013) 722.

[162] Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 Int J of Tran Jus 266, 266-7.

[163] Anghie and Chimni 86.

"grounded in deliberate racist acts," but rather "structural forms of racism."[164] As Alpa Parmar concurs, "The ways in which race operates is increasingly silent, implicit, diffuse and denied and therefore harder to locate in criminal justice practices despite having clearly racialized outcomes."[165] I contend that the root of racial disproportionality in criminalization, the "clearly racialized outcomes" in US mass incarceration and at the ICC, lies in the structural, facially race-neutral administration and substance of criminal law. As a result, and in connection with the other two punishment parallels, racial disproportionality in criminalization "operates as a contemporary project invested in maintaining the structure of a racial (colonial) state"– that is, in maintaining racial and colonial power relations while eliding and exacerbating structural conditions of violence.[166]

3.3.1 Racial Disproportionality and US Mass Incarceration

While certainly some of the racial disproportionality in mass incarceration can be attributed to intentional racial animus, its most nefarious feature is its discrete embeddedness in the structure– the facially race-neutral administration and substance– of the various US criminal justice policies explored above. Turning first to the element of administration, *who* is to be criminalized, Michelle Alexander explains that racially disproportionate mass incarceration in an ostensibly colorblind criminal justice system is the outcome of two steps: 1) Grant wide discretion to law enforcement regarding whom to arrest, investigate, and convict, "thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free rein," and 2) "Demand that anyone who wants to challenge racial bias in the system offer… clear proof that the racial disparities are the product of intentional racial discrimination."[167] In turn, two US Supreme Court decisions have effectively closed the courthouse doors to challenging US mass incarceration's racial disproportionality.

First, in *McCleskey v. Kemp*,[168] Warren McCleskey, a Black man facing the death penalty for killing a white police officer during an armed robbery in Georgia, challenged his sentence on the grounds that Georgia's death penalty scheme was infected with unconstitutional racial sentencing bias.[169] Though the Supreme Court accepted the statistical evidence of racial disproportionality in Georgia's death penalty scheme, it insisted that evidence of *conscious* racial bias informing prosecutorial discretion must be proven in McCleskey's individual case, without

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[164] Randle DeFalco and Frédéric Mégret, 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7 Lond Rev Intl L 55, 58.

[165] Alpa Parmar, 'Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalization' (2020) 24 Theo Crim 28, 30.

[166] Ibid. See also David Theo Goldberg, *The Racial State* (Blackwell 2002).

[167] Alexander 103.

[168] *McCleskey v. Kemp* 481 US 279 (1987).

[169] DeFalco and Mégret 67.

which patterns of structural discrimination did not violate the Fourteenth Amendment's equal protection clause.[170]

The Supreme Court further entrenched its *McCleskey* decision in *United States v. Armstrong*.[171] In April 1992, Christopher Lee Armstrong and four friends, all of whom were Black, were arrested on federal crack cocaine charges. Upon realizing that not a single defendant among the fifty-three crack cases handled by their office in the past three years was white,[172] Armstrong's lawyers filed a motion for discovery of the federal prosecutors' files in order to support their claim of selective prosecution.[173] Because the majority of crack offenders are white, they suspected that federal prosecutors were diverting white defendants to the state system, where penalties for crack offenses were much less severe.[174] The case reached the Supreme Court, who ruled that "in order to gain access to discovery concerning the exercise of prosecutorial discretion, a defendant alleging that he has been prosecuted because of racial bias must demonstrate that similarly situated White defendants could have been charged, but were not."[175] In effect, the Court demanded that Armstrong produce in advance the evidence he sought to gain through discovery. In both *McCleskey* and *Armstrong*, the Supreme Court reinforced a toleration of racial bias in prosecutorial discretion, so long as such bias remains implicit.

While the wide berth granted to prosecutorial discretion by these two decisions sustain a blindness to structural racism in the law's administration, the substance of various "facially neutral" US criminal laws– that is, *what* is to be criminalized– has "had a similarly drastic, disproportionate effect on African-American populations."[176] The most obvious example is the previously discussed crack versus powder cocaine sentencing disparity.[177] Moreover, many mandatory terms and sentence enhancements "are contextually linked to race."[178] Beyond being more likely to trigger the more punitive mandatory minimum sentences for crack versus powder

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[170] The statistical evidence introduced by McCleskey revealed that prosecutors sought the death penalty for 70% of cases involving Black defendants and white victims, but only 19% of cases involving white defendants and Black victims. Alexander 110. The implications of the *McCleskey* decision on racialized mass incarceration were seen in a 1995 challenge to a sentencing scheme in Georgia which imposed life imprisonment for a second drug offense. The penalty was invoked against only 1% of white defendants facing a second drug conviction, but against 16% of Black defendants, resulting in a whopping 98.4% of those serving life sentences under the provision being Black. The Georgia Supreme Court ultimately held that the results did not require a race-neutral explanation from prosecutors, relying almost exclusively on *McCleskey v. Kemp* in its reasoning. Alexander 114.

[171] *United States v. Armstrong* 517 US 456 (1996).

[172] Forty-eight were Black and five were Hispanic.

[173] Alexander 115.

[174] Ibid 116.

[175] DeFalco and Mégret 67.

[176] Ibid 69.

[177] Note that in 2021 the US House of Representatives passed the EQUAL Act, which would eliminate completely the federal sentencing disparity between drug offenses involving crack cocaine and powder cocaine. The bill, however, has failed to clear the Senate.

[178] Vesla Weaver, 'Unhappy Harmony: Accounting for Black Mass Incarceration in a 'Postracial' America," in Fredrick C. Harris and Robert C. Lieberman (eds), *Beyond Discrimination: Racial Inequality in a Post-Racist Era* (Russell Sage Foundation 2013) 232.

cocaine offenses, "Blacks are more likely to be in situations that trigger an enhancement."[179] For instance, Black individuals are more likely to live in urban areas where drug distribution will virtually always be in school zone proximity and are also more likely to live in public housing, in or near which drug-trafficking has enhanced penalties.[180] Furthermore, at least partially due to heightened police surveillance in their communities and the racial bias in prosecutorial discretion demonstrated above, Black individuals are more likely to have a prior record, triggering Clinton's "three-strikes" rule for mandatory life imprisonment, not to mention detrimental impacts on social assistance eligibility, further contributing to cycles of impoverishment, incarceration, and community erosion already described with respect to individual criminal responsibility.

Racial disproportionality in US mass incarceration thus "stems from a vast combination" of individual "slippages," creating "a powerful confirmatory bias… [as] racialised individuals imagined as the causes of crime all along are prosecuted at much higher rates."[181] This confirmatory bias both informs and follows a punishment regime that relies on retributive and deterrent aims and emphasizes individual criminal responsibility. Turning focus "away from structure and back towards individuals," US mass incarceration "provokes itself into a cycle of action and reaction further justifying modalities of aggressive outside intervention into racialised communities."[182] The determination of what and who are violations of the "objective order" in need of repristination, of what and who must be held accountable to prevent future offending, of what triggers whose individual responsibility for crime, while limiting acknowledgement of race (and racism) to that which is conscious and explicit, has structured a racial disproportionality and disposability logic in US mass incarceration that "has become part of a feedback loop of racial constructs of privilege and power in the US."[183]

3.3.2 Racial Disproportionality and the ICC

The vastly disproportionate representation of Black and Arab Africans in cases before the ICC is widely acknowledged.[184] Article 21 of the Rome Statute explicitly provides that the ICC shall apply and interpret the law "without any adverse distinction founded on grounds such as [inter alia] race."[185] Responding to accusations that the ICC targets "Africa following a neo-

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[179] Ibid.

[180] For example, sec. 90102 of Clinton's 1994 Violent Crime Control and Law Enforcement Act provides enhancements of penalties for drug-dealing in "drug free zones," i.e. within a certain distance of a school zone. Sec. 320104 of the same act provides for increased penalties for drug trafficking near public housing.

[181] DeFalco and Mégret 70, 73.

[182] Ibid 73-4.

[183] Zolo 156; DeFalco and Mégret 73.

[184] Though race invariably has different meanings in domestic and international contexts, when claiming that the ICC's enforcement of international law is racially disproportionate, I mean that the ICC has disproportionately criminalized, through the administration and substance of ICL, Black and Brown individuals of predominantly non-Western (i.e. states outside of western Europe and North America), postcolonial, Global South states.

[185] Rome Statute, Art 21(3).

colonialist agenda and…[ignores] other criminals," Ocampo bluntly asserted: "My duty is to follow the law."[186] As DeFalco and Mégret aptly note, "The idea evident in this statement… [is that] the exclusive selection of racialised African defendants is… a natural, race-neutral by-product of the law."[187] Much like the approach taken by the United States, the ICC has proceeded with a colorblindness to structural forms of racism in the administration and substance of international criminal law which, though facially race-neutral, have perpetuated racialized relations of domination by which who and what is deemed non-white and non-Western is associated with criminality.

Regarding the administration of international criminal law– determining *who* is to be criminalized– the exercise of prosecutorial discretion at the ICC, in parallel with US mass incarceration, has persistently shifted the international judicial gaze towards Black and Brown bodies.[188] While the prosecutor's Article 15(1) proprio motu power, may allow "racial beliefs and stereotypes [to] be given free rein," even more structurally embedded in the administration of ICL is the principle of complementarity as regulated by Article 17.[189] While the *McCleskey* and *Armstrong* decisions effectively closed the courthouse doors to challenging racial disproportionality in US criminal punishment and mass incarceration, Article 17 functions to literally close the courthouse doors of predominantly non-white, non-Western states to manage violence on their own terms. Indeed, the ICC's use of Article 17 in determining which states are "unwilling or unable genuinely to carry out [an] investigation or prosecution," though facially race-neutral, has disproportionately targeted African states even with robust judiciaries. As Krever points out, "The Ituri region's judicial system was fully functional when The Hague took custody of Lubanga" and the judiciary of Uganda was "one of the most proficient… in Africa" when Ocampo pursued Museveni's investigation request.[190]

I do not deny the fact that "states that have been devastated by conflict and violence may well be unable to competently investigate and prosecute those culpable for violence."[191] Rather, I note this feature of prosecutorial discretion to elaborate on two further points regarding structural forms of racism in the ICC's administration of ICL. First, the disproportionate selection of cases in Africa and other non-Western, typically Global South states, reinforces a racialized understanding of what a "capable" judiciary looks like– i.e. one which can impose the Western notions of retributive punishment and deterrent accountability on individually responsible criminals. This further vindicates "Westernized legal processes as the only legitimate means to

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[186] Luis Moreno-Ocampo, 'Working with Africa: The View from the Prosecutor's Office' (Statement to ISS Symposium on 'The ICC that Africa Wants,' 9 November 2009) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1229900D-B581-42AE-A078-918550C372FB/281385/south_africa_nov_09_3finalfordistribution.pdf> accessed 4 April 2024.

[187] DeFalco and Mégret 63.

[188] Ibid 56.

[189] Alexander 103.

[190] Krever (2015) 95. See Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo', in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) 40-3.

[191] Clarke (2020).

adjudicate violence" and "negates the ability of the state to find political solutions to age old violence… [while] eras[ing] Western states' complicity for their historic culpability in postcolonial state disfunction."[192] Once again, the invocation of "no peace without ICC intervention," under the guise of racial neutrality, overlooks the structural conditions of violence, doing much "to one-sidedly portray Black and/or Arab Africans, as the primary, even sole, authors of atrocity crimes," all the while implicitly "expung[ing] (primarily White) historical responsibilities."[193]

Second, the exercise of prosecutorial discretion at the ICC has entrenched a tradition of confirmatory bias by which the "good intentions" of powerful Western states is presumed, while less powerful states (typically non-Western and of the Global South) are, as the Indian delegation forewarned at the Rome conference, "presumed to be prone to committing such international crimes."[194] Just as the ICTY dropped its inquiry into NATO's bombardment of Yugoslavia, "satisfied that there was no deliberate targeting of civilians or of unlawful military targets by NATO" the ICC took the UN's lead in accepting "the good intentions of the coalition governments as regards the behavior of their forces in Iraq."[195] Tellingly, British foreign minister Robin Cook plainly stated: "If I may say so, [the ICC] is not a court set up to book Prime Ministers of the United Kingdom or Presidents of the United States."[196]

An important part of the reason why the ICC is not a court set up to book leaders of white/Western states, and by implication, is a court set up to book non-white individuals of non-Western states, is that the substance of Statute crimes, *what* is to be criminalized, is also embedded in structural racism. Indeed, it is no coincidence that the ICC's "boundaries of criminalization" emphasizing individual criminal responsibility stop short of collective, economic harms inflicted on predominantly postcolonial, Global South peoples. As DeFalco and Mégret put it, "the constructed distinction between 'core' crimes increasingly associated with the worst international stigma, and a range of other... forms of harm causation... that are implicitly designated as less grave… overlap with racialised categories."[197] Clarke contributes that "the crimes that came to occupy the moral and legal concerns of the [ICC] were those dealing with explicit forms of mass violence – akin to the forms of violence being perpetrated in sub-Saharan Africa…at the time."[198] By contrast, crimes which fell out of favor in negotiations surrounding the Rome Conference included "colonial domination and other forms of alien domination… and willful and severe damage to the environment."[199] In other words, the ICC's facially race-neutral

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[192] Ibid.

[193] DeFalco and Mégret 84.

[194] Bosco 47.

[195] UN SCOR, 4150th meeting, U.N. Doc. S/PV.4150 (2 June 2000); Warren Hoge, 'U.N. Says Abu Ghraib Abuse Could Constitute War Crime' *New York Times* (New York, 4 June 2004).

[196] Quoted in Bosco 66.

[197] DeFalco and Mégret 81.

[198] Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (CUP 2010) 59.

[199] Ibid 56-7.

Statute crimes, together with its emphasis on individual criminal responsibility, reinforce a racialized toleration of structural violence and intoleration of physical, emblematically "African" violence.[200] The structural racism embedded in what the ICC does and does not criminalize is connected to its strictly limited jurisdiction over the crime of aggression which, of all the core international crimes, is most likely to impact "major powers capable of and inclined to intervention abroad."[201] Recall that, precluded from meaningfully prosecuting aggression, the Court remains focused on the "more direct and intimate processes of killing and abuse, which may be the only means available to relatively less powerful and technologically-sophisticated actors… who tend to be members of racialized communities, especially within Africa."[202]

The racial disproportionality of who and what is criminalized by the ICC, itself a product of latent structural racism in the administration and substance of ICL, throws into stark relief "the persistent ignoring or euphemizing of, for example, acts of aggression by the United States in invading Iraq [and] the torture of detainees in Guantánamo Bay or Abu Ghraib prisons."[203] The Court's selection of whose judiciaries are legitimized and whose intentions are given the benefit of the doubt through the administrative exercise of prosecutorial discretion, as well as which acts are elevated as substantive international crimes, reproduce an image of international criminal justice that largely exonerates that which is white and Western, while deploring, criminalizing that which is non-White and non-Western.

4 Conclusion

US mass incarceration and the ICC are connected by three parallels which ground their approaches to criminal punishment: 1) reliance on retributive and deterrent punishment aims; 2) emphasis on individual criminal responsibility; and 3) racial disproportionality in criminalization. I have attempted to show that these three punishment parallels are intertwined, working together to disregard and exacerbate structural conditions of violence. In doing so, US mass incarceration and the ICC operate analogously to reinforce existing global power relations which, I have developed, are racial and colonial relations of domination. In short, through their three punishment parallels, US mass incarceration and the ICC analogously reinforce global white supremacy.

Several implications follow from this exercise in interpretive social science. First, in its three punishment parallels with US mass incarceration, the ICC tacitly endorses a US neoliberal agenda, overlooking the structural causes of violence while selectively prosecuting those "enemies of humanity," predominantly conceived as Black and Brown bodies of non-Western states, "who deny the universality of such values as liberty, democracy, human rights and, of

[200] DeFalco and Mégret 81.
[201] Bosco 102.
[202] DeFalco and Mégret 82.
[203] Clarke (2020).

course, the market economy," in an attempt to civilize or save such peoples from themselves.[204] In turn, the ICC reifies a white Western shaping of the "objective order," infractions against which are committed by the racialized, non-white, individually responsible "Other," whose being held accountable will prevent further (re)offending, and who, above all, deserves to be punished.[205] This interpretation of the ICC contextualizes the Court's entrenchment of US influence in shaping the terms of international criminal justice, as explored in the Administrative Attitudes section. Indeed, the United States is the emblem of white Western interests which the ICC, with its grounding in the three punishment parallels, reinforces.

Furthermore, the punishment parallels offer an opportunity to parse two features of the American neoliberal agenda: military intervention and the strengthened penal apparatus. To the extent that the ICC and US mass incarceration operate analogously to reinforce existing global power relations, it appears the same forces– that is, the same approaches to criminal punishment– which have permitted American military intervention to proceed virtually unimpeded by the international community have also enabled US mass incarceration's entrenchment of racialized disposability. In the same vein, the ICC's tacit endorsement of a US neoliberal agenda, with its attendant neglect of structural forces, appears to entrench an internationalized iteration of the racialized disposability logic– the source of international crime is overwhelmingly located in Black and Brown individuals (and particularly Black and Arab Africans), who are then isolated, punished, disposed from the international community, with little done "to change the conditions that lead to violence in the first place."[206]

Finally, the punishment parallels necessitate a critical reconsideration of the ICC's approach to international criminal justice insofar as it mirrors US mass incarceration– an infamous manifestation of white supremacy in criminal punishment. Though I contend that US mass incarceration and the ICC analogously reinforce global white supremacy, the strength and direction of causal influence between the US domestic and international criminal justice levels remain to be determined. Thus, perhaps the most significant implication of this project is better phrased as a question: to what extent does the ICC reflect and entrench an American punishment theory?

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[204] Zolo 97. See Makau wa Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harv Intl LJ 201, 210 for an elaboration of this "impulse to universalize Eurocentric norms and values by repudiating, demonizing, and 'othering' that which is different and non-European," which he encapsulates in his famous savages-victims-saviors metaphor of human rights.

[205] Zolo 156.

[206] Lamble 14.