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Black Guilt, White Guilt at the International Criminal Court

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Introduction

All but one defendant convicted at the International Criminal Court (ICC) has been a Black man. This is not a coincidence. This chapter elucidates how the jurisdictional and substantive law that governs the ICC systematically results in Black guilt [1] being heightened while White guilt is minimized. With these convictions, the ICC builds on a long history of criminalizing Blackness, but there is something particularly invidious about this in the context of international criminal law that this chapter seeks to expose. Since the ICC supposedly prosecutes only "the most serious crimes of international concern," these convictions express the not-so-subtle suggestion that the "worst of the worst" criminals on the planet are Black men. More troubling still, given the long-standing characterization of international crimes as evil, it perpetuates well-documented stereotypes of darker skin being associated with wickedness, thereby building on a pernicious narrative of the "evil Black body."

Proponents of the ICC have defended the racialized nature of these prosecutions as simply a consequence of the court following its own rules, but as this chapter illustrates, it is precisely these rules that embed systemic racism within the structural design of the court, making the near exclusive conviction of Black men inevitable. Moreover, often these rules are justified

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[1] Throughout this chapter, when I use the phrase "Black guilt" or "White guilt," I seek to express in the plainest of terms how culpability (or guilt) at the ICC is racialized because what is criminalized is often race dependent.

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as being in the service of peace and security, but a closer look reveals a contradiction. By shifting the focus away from the broader forces that set the stage for violence and toward the inherent wickedness of the defendant, the ICC promotes a shallow understanding of the root causes of atrocity, thereby undermining international criminal law's potential for contributing to collective peace and security. This chapter thus argues that in order to reach its full potential, the ICC should break from its nominally race-neutral stance and instead adopt an explicitly antiracist orientation to international criminal punishment.

Institutionalizing Black Guilt

Many have reflected on the African bias at the ICC, arguing that the selective prosecution of the court reflects a bias against the African continent.[2] The numbers support such accusations. All those charged as well as all those convicted by the ICC, have been from African countries. But the geographic focus of such analyses obfuscates a starker, uncomfortable truth: all those charged and convicted by the court have been Black or Brown and not one has been White.[3]

Proponents of the ICC have defended these prosecutorial choices by pointing to the fact that the ICC is just following its own rules, acting upon self-referrals from African nations or referrals from the United Nations Security Council.[4] Yet, building off the work of others, particularly Kamari

[2] Rebecca J. Hamilton, *Africa, the Court, and the Council*, *in* Elgar Companion to the International Criminal Court 261 (2019) ("One of the defining narratives of the Court's first 15 years of operation has been that it has an anti-Africa bias.").

[3] Randle C. DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 London Rev. Int'l L. 55, 59 (2019); Kamari Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, Just Sec. (July 24, 2020), https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/. For a list of all ICC defendants, *see Filter by Case*, Int'l Crim. Ct., https://www.icc-cpi.int/Pages/defendants-wip.aspx#Default=%7B%22k%22%3A%22%22%7D (last visited May 3, 2022).

[4] Hamilton, *supra* note 2, at 270 ("At every opportunity, Court officials drew on the vision of the Court, present since its inception, as an a-political institution, stressing that an anti-Africa bias could not follow from decisions based on the law."). *See, e.g.*, Max du Plessis, *Confronting Myths About the International Criminal Court and Its Work in Africa*, *in* Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay 437 (2010); W. Chadwick Austin & Michale Thieme, *Is the International Criminal Court Anti-African?*, 28 Peace Rev. 342, 345 (2016) ("It seems somewhat disingenuous to complain of racial targeting when it is African governments themselves asking for the court to intervene."); Sanji Mmasenono Monageng, *Africa and the International Criminal Court: Then and Now*, *in* Africa and the International Criminal Court 13, 19 ("Hundreds of African legal practitioners have made the [ICC] what it is. Frankly, it is absolutely ridiculous to accuse the Court of being racist."); Alex Whiting, *South Africa's ICC*

Clarke, Randle DeFalco, Rebecca Hamilton, Frédéric Mégret, John Reynolds, and Sujith Xavier, this section demonstrates why such justifications are inadequate to allay concerns about racial bias at the ICC. They do not explain, for instance, why none of the defendants have been White. Rather, this section outlines how the institutional design and jurisdictional rules of the court heighten Black guilt, while minimizing White guilt, often under the guise of promoting peace and security. While this invidious process has different instantiations throughout international criminal law, here I focus narrowly on how seemingly technical, "neutral" rules and procedures implicate the ICC in the reproduction of structural racism. In particular, I focus on (1) the outsized role of the United Nations Security Council in creating levers of power for non-member states to amplify Black guilt while immunizing White violence; (2) the limited temporal and definitional focus of the ICC on certain international crimes to the exclusion of harms that most concern the Global South—especially those involving White guilt; and (3) the general selectivity and the other forms of discretion built into the system which in practice manifest anti-Black bias.

As a starting point, the outsized role of the United Nations Security Council in the matters handled by the court is partly to blame. The Rome Statute, the treaty which established the court, empowers the Security Council both to refer and defer ICC investigations, with the Security Council being the sole entity with the power to confer jurisdiction onto the territory of non-ICC members.[5] These rules, and how they have been instrumentalized to date, are an example of how the work of the ICC helps cement the racial hierarchy and power imbalances already present within the international legal order into the ICC legal regime.[6] Notably, five permanent members, more than half of which are majority White nations, control most of the decision-making at the Council. Each has veto power over nonprocedural decisions, including

Withdrawal: Why? And What Now?, Just Sec. (Oct. 22, 2016), https://www.justsecurity.org/33765/south-africas-icc-withdrawal-why-now/ ("The claim of bias is misplaced and obscures the real issue. The notion that the ICC Prosecutor targets Africa out of some kind of bias against the continent is both ludicrous and pernicious. . . . In truth, the Prosecutor has decided to investigate where the Court has jurisdiction, serious crimes are being committed, and there exists a reasonable prospect that investigations will be fruitful.").

[5] Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002). The Rome Statute refers to these investigations as situations, but for ease of understanding, I will call them investigations through this chapter.

[6] John Reynolds & Sujith Xavier, *The Dark Corners of the World: TWAIL and International Criminal Justice*, 14 J. Int'l Crim. Just. 959, 964 (2016).

whether to refer cases to the ICC or delay them.[7] More troubling still, three of the permanent members are not even parties to the Rome Statute, meaning that international crimes committed in their territories are not subject to ICC jurisdiction. Thus, despite opting out of the ICC, those nations have the power to obstruct or push ICC investigations.[8] Specifically, acting through the Security Council, they have the power to grant ICC jurisdiction over other nations which, like them, have not joined the court, while, at the same time, blocking investigations into their own nationals or crimes committed in their territory.[9] Through these rules, the power and privilege of majority White nations have become embedded in the Court's structure and thereby, its decision-making.[10]

And the results are predictable. The Security Council has only asked the ICC to investigate crimes in two African nations, Sudan and Libya, but issued no referrals for documented torture and war crimes by the United States and United Kingdom in Iraq and Afghanistan.[11] While Article 16 of the Rome Statute was meant to allow the Security Council to step in and delay prosecutions if doing so is in the interest of maintaining peace and security, so far, it has only been used to immunize White guilt, shielding the citizens of majority White nations from the court's reach. In fact, the first evocation of the Security Council's deferral power was only made after the United States. threatened to veto a resolution renewing the United Nations peacekeeping mission in Bosnia (as well as all other future peacekeeping operations) unless a provision immunizing its troops from criminal liability was included.[12] Since then, the Security Council has invoked Article 16 two additional times, each time at the United States' behest to immunize soldiers from any criminal liability resulting from military operations authorized by the Security Council.[13]

While the Security Council has used Article 16 to minimize the guilt of White majority nations, it refused to use this power to defer investigations

[7] U.N. Charter art. 27(3).

[8] Rome Statute of the International Criminal Court arts. 13(b) & 16, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

[9] Hamilton, *supra* note 2, at 266.

[10] *Id.* at 265.

[11] *Id.* at 264, 277.

[12] *See* S.C. Res. 1422 (July 12, 2002); S.C. Res. 1487 (June 12, 2003); S.C. Res. 1497 (Aug. 1, 2003); Hamilton, *supra* note 2, at 266–67; Charles C. Jalloh, Dapo Akandeb & Max du Plessisc, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5, 17 (2011).

[13] *See* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 142–44 (4th ed. 2007).

in two African nations, Sudan and Kenya, despite repeated requests from the African Union to do so.[14] Functionally, this has meant that White leaders who authorized torture, like George W. Bush and Donald Rumsfeld, have evaded criminal liability before the ICC, while Black and Arab-African heads of state like Uhuru Muigai Kenyatta and Omar al-Bashir faced charges.[15]

In addition to these jurisdictional rules, the temporal and definitional limitations on what counts as a prosecutable crime before the ICC renders White violence less visible and consequential. Like other tribunals that have tried international crimes, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Extraordinary Chambers in the Courts of Cambodia, the ambit of the ICC's prosecutorial reach is time limited.[16] Specifically, the crimes committed before the Rome Statute entered into force on July 1, 2002, are off the table.[17] As will be discussed further in the third section of this chapter, this narrow temporal gaze often obfuscates the role of colonial powers in the violence under investigation by the ICC and shields them from prosecution for their past empire-building crimes, most notably slavery and genocide. In a broader sense, these rules have criminalized the processes by which the Global North became wealthy, at the same time as effectively granting them de facto amnesty for those same acts.

The impunity for colonial era crimes of the Global North is compounded by the fact that the type of violence currently perpetrated by these majority White nations also tends to be untouched by international criminal law, while those crimes which typify Western stereotypes of Black men have been vigorously pursued.[18] First, as Kamari Clarke illuminated in her groundbreaking book, *Fictions of Justice*, the choice of acts considered to be the "most serious crimes of international concern" under the Rome Statute and therefore prosecutable by the ICC exacerbates Black guilt, while mitigating White guilt. Omitted from actionable crimes are those most likely to be committed by majority White nations, such as colonial domination, economic aggression,

[14] Hamilton, *supra* note 2, at 273.

[15] *Id.* at 263.

[16] Clarke, *supra* note 3; *see also* Randle C. DeFalco, *Time and the Visibility of Slow Atrocity Violence*, 21 Int'l Crim. L. Rev. 905, 930 (2021).

[17] *See* Rome Statute of the International Criminal Court art. 11, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

[18] DeFalco & Mégret, *supra* note 3, at 81–82. Christine Schwöbel-Patel has also described how racialized and gendered tropes of victimization also play into international criminalization. *See generally* Christine Schwöbel-Patel, *Spectacle in International Criminal Law: The Fundraising Image of Victimhood*, 4 London Rev. Int'l L. 247 (2016).

the use of nuclear weapons, the recruitment, use, financing, and training of mercenaries, and environmental atrocities.[19] These crimes were all dropped during the negotiation of the Rome Statute because they were considered to "devalu[e] the concept of crimes against the peace and security of mankind."[20] Implicitly, they were not seen as unquestionably undermining peace and security. Instead, the ICC only has jurisdiction over four crimes: war crimes, crimes against humanity, genocide, and the crime of aggression.[21] Of these crimes, the crime of aggression is the only one that is most often perpetrated by majority White states, and it was left inoperable until 2018 largely due to pushback from the United States.[22] Even now, the crime of aggression is not prosecutable against the nationals of those countries most likely to engage in military action, like the United Kingdom, the United States, France, and Russia, because these states have not acceded to the ICC's jurisdiction, either generally or specifically when it comes to this crime.[23] This paradox came to a head recently, as due to this rule, the ICC has been unable to prosecute any Russian nationals for the crime of aggression after Russia's invasion of Ukraine despite widespread consensus that it constituted aggressive war.[24]

[19] Kamari Clarke, Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa 56–58 (2009); *see also Summaries of the Work of the International Law Commission: Draft Code of Crimes Against the Peace and Security of Mankind (Part II)*, Int'l L Comm'n, https://legal.un.org/ilc/summaries/7_4.shtml (last visited Dec. 4, 2017).

[20] Clarke, *supra* note 19, at 57 (quoting Report of the International Law Commission on the Work of the Its Forty-Seventh Session (1995), at 10 § 28.); *see also* Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese J. Int'l L. 77, 95 (2003) ("Thus the ICC Statute does not outlaw the use of nuclear weapons, in a situation where this issue is surely fundamental to the goal of the ICC, to prevent the acts harming innocent civilians.").

[21] Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

[22] Celestine Nchekwube Ezennia, *The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?*, 16 Int'l Crim. L. Rev. 448, 471–72 (2016). For further discussion on the negotiations regarding the definition of the crime of aggression, *see generally* Dire Tladi, *Kampala, the International Criminal Court and the Adoption of a Definition of the Crime of Aggression: A Dream Deferred*, 35 S. Afr. Y.B. Int'l L. 80 (2010).

[23] International Criminal Court Res. ICC-ASP/16/Res.5, Activation of the Jurisdiction of the Court over the Crime of Aggression (Dec. 14, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-eng.pdf (confirming "that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments . . ."); *see also Status of Treaties Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court*, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited May 3, 2022) (listing states that have accepted or ratified the amendments on the crime of aggression to the Rome Statute). While the Security Council could still refer such cases to the ICC, because these countries have veto power at the Security Council, the political reality of that is near impossible.

[24] Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine*, 26 ASIL Insights 1 (Apr. 19, 2022), https://www.asil.org/insights/volume/26/issue/2#_

While the ICC is pursuing charges of war crimes against Russian President Vladimir Putin and another Russian official for their involvement in the unlawful deportation of Ukrainian children to Russia, these same officials are essentially untouchable for their involvement in the crime of aggression.[25] Yet, as Dr. Gaiane Nuridzhanian, a Ukrainian law professor with expertise in international criminal law, has noted, Russia's aggression has done more damage to her country than all their war crimes taken together.[26]

In addition, when majority White nations have been involved in other crimes that fall within the four corners of the Rome Statute, they are often dismissed by the ICC, usually for being insufficiently grave, a threshold requirement at the court.[27] This has been the case with international crimes, such as war crimes and torture, committed by Israel, the United States, Australia, and the United Kingdom.[28] Most recently, the new ICC prosecutor justified his decision to "deprioritise" the investigation into atrocities committed by American forces in Afghanistan and instead focus on the Taliban and affiliates of the Islamic State, on the basis of the "gravity, scale and continuing nature of alleged crimes."[29] In addition, powerful nations frequently facilitate the international crimes of other less powerful nations from behind the scenes by providing weapons, technical support, or intelligence.[30] By

ednref16. However, in a notable departure from the usual immunity afforded to powerful states, the ICC has opened investigations into war crimes and crimes against humanity genocide committed in Ukraine, since Ukraine assented to its jurisdiction via a declaration in 2015, pursuant to Article 12(3) of the Rome Statute. *See* Statements of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine (Feb. 28, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

[25] Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[26] Gaiane Nuridzhanian, *Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective*, Just Sec. (Aug. 24, 2022), https://www.justsecurity.org/82780/justice-for-the-crime-of-aggression-a-ukrainian-perspective/.

[27] Margaret M. deGuzman, *Gravity Rhetoric: The Good, the Bad, and the "Political,"* 107 Proc. ASIL Ann. Meeting 421, 422–23 (2013). *Cf.* Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned from It*, 25 Fordham Int'l L.J. 95, 97 (describing the ICTY as being "far more concerned with legitimating NATO's war on Yugoslavia than with doing justice").

[28] Rachel López, *The Law of Gravity*, 58 Colum. J. Transnat'l L. 565, 589–90 (2020); *see, e.g.*, Kevin Jon Heller, *The OTP Lets Australia Off the Hook*, Opinio Juris (Feb. 2, 2021), http://opiniojuris.org/2020/02/17/the-otp-lets-australia-off-the-hook/.

[29] Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (Sept. 27, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan.

[30] Rachel López, *The Duty to Refrain: A Theory of State Accomplice Liability for Grave Crimes*, 97 Neb. L. Rev. 101, 120–21 (2018); *see also* Rebecca J. Hamilton, *State-Enabled Crimes*, 41 Yale J. Int'l

acting through proxies, these nations advance their national interest and entrench their power without getting their hands dirty. Their crimes of aiding and abetting others' grave crimes are likely to escape punishment because they are less visible and perhaps less likely to be considered serious enough to warrant investigation by the ICC.[31]

Prosecuting Evil

In response to allegations of anti-African bias, supporters of the ICC have claimed that the focus on Africa is not racially motivated, but rather is just the unfortunate result of following the rules.[32] For example, former ICC prosecutor, Luis Moreno Ocampo, repudiated the accusations of bias in his selection of cases, asserting that his job was "to apply the law without political considerations."[33] To this end, he has characterized allegations of African bias as "hypocrisy," saying, "[W]e are in Africa for two reasons: the most serious crimes under ICC jurisdiction are in Africa . . . and African leaders requested the court's intervention."[34] In essence, his argument, much like those of other proponents of the ICC, is that we should not be concerned with racism at the court, because the exclusive prosecution of African defendants resulted from a race-neutral application of the law.

Somewhat ironically, given Ocampo's insistence on rule-following, this persistent focus on deliberate racism breaks the ICC's own antidiscrimination rules. Namely, the Rome Statute itself requires the ICC to follow and apply the law "consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as [inter alia] race."[35] This

L. 102 (2016) (critiquing the way that international criminal law, in the post-Nuremberg period, has focused on individual accountability at the expense of considering the enabling role that states play in the commission of atrocities).

[31] *See generally* Randle DeFalco, Invisible Atrocities: The Aesthetic Biases of International Criminal Justice (2022). *Cf.* Zinaida Miller, *Effects of Invisibility: In Search of the "Economic" in Transitional Justice*, 2 J. Int'l Transitional Just. 266 (2008).

[32] *See* Austin & Thieme, *supra* note 4.

[33] Statement from L. Moreno-Ocampo, Prosecutor, ICC, at ISS Symposium on "The ICC that Africa Wants," Working with Africa: The View from the ICC Prosecutor's Office (Nov. 9. 2009); Symposium on "The ICC that Africa Wants": Key Outcomes and Recommendations 3 (2010), https://www.files.ethz.ch/isn/139879/10%20November%202009.pdf.

[34] *Arena: Is the ICC Biased Against African Countries?*, Al Jazeera (Mar. 12, 2016), https://www.youtube.com/watch?v=1XHyJYOYZDk.

[35] Rome Statute of the International Criminal Court art. 21(3), July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

nod to human rights law is noteworthy. Under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the primary international human rights treaty to address racism, a violation of its antidiscrimination principles does not require a showing of discriminatory intent. Instead, a policy or practice that appears racially neutral, but has a discriminatory effect is still considered to be discrimination under CERD.[36] CERD also requires the ICC to take measures to amend, rescind, or nullify any laws or regulations, such as those described in this chapter, that have the effect of *perpetuating* racial discrimination.[37]

Additionally, as Kamari Clarke, Randle DeFalco, and Frédéric Mégret have all pointed out, such repudiations reveal a rather thin understanding of racism.[38] By definition, structural racism can be entrenched in institutional design and embedded in rules, even when individual actors in a system harbor no racial animus.[39] Yet, as this section elaborates, the effects of such "unconscious racism" are no less harmful. Particularly in the context of international criminal law, the ICC's trained focus on Black men reinforces racialized stereotypes, thereby perpetuating White supremacist ideologies. Indeed, recent empirical evidence has shown that people often associate dark skin with immorality and wickedness.[40] Specifically, dubbed the "bad is black" effect, psychologists have found that when people learn about "evil acts," they are more likely to believe that they were committed by someone with dark skin.[41] More problematic still, the darker your complexion, the more likely society is to support extreme punishment of you.[42]

[36] Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 Am. J. Int'l L. 283, 289 (1985) ("Because the objective of the Convention is the attainment of equality, facially neutral policies or practices that have a disparate impact on some racial groups should be prohibited, despite the absence of discriminatory motive.").

[37] *See* Rome Statute of the International Criminal Court art. 2, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

[38] Clarke, *supra* note 3; DeFalco & Mégret, *supra* note 3, at 57, 64–65.

[39] DeFalco & Mégret, *supra* note 3, at 57.

[40] Adam A. Alter et al., *The "Bad Is Black" Effect: Why People Believe Evildoers Have Darker Skin Than Do-Gooders*, 42 Personality & Soc. Psych. Bull. 1653 (2016); Calvin John Smiley & David Fakunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. Hum. Behav. Soc. Env't 350 (2016); Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemp. Crim. Just. 276 (2007); Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 L. & Hum. Behav. 463 (2015). Granted, these studies focused on the United States, but the stereotypes of the African continent in other Western countries have been no less racialized, informed by the understanding of Africa as the "Heart of Darkness." Reynolds & Xavier, *supra* note 6, at 968.

[41] Daisy Grewal, *The "Bad Is Black" Effect*, Sci. Am. (Jan. 17, 2017), https://www.scientificamerican.com/article/the-bad-is-black-effect/.

[42] Nazgol Ghandnoosh, The Sentencing Project, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies 18–19 (2014), https://www.senten

The operationalizing of these stereotypes in the context of international criminal law is particularly noxious. Since international crimes are often portrayed as inherently evil, the ICC's narrow focus on the criminal acts of Black men reinforces these racial stereotypes.[43] Implicit in such characterization is a lack of reason.[44] These crimes are not committed for a specific purpose or under certain conditions, but rather attributed to the inherent wickedness or lust for power or violence.[45] Such stereotypes have not been absent from the courtrooms of international criminal law, with prosecutors at times evoking themes of darkness and hell in an effort to secure convictions.[46] Cast under such light, international criminal law could be portrayed as replicating the modalities of the civilizing mission of international law of the 19th century, which relied on stereotypes regarding the inherent violence and inferiority of "Blackness" to justify slavery and colonialization.[47] Subtly embedded in the race neutral defenses of the ICC is the notion that international criminal law is needed to civilize Africa or as Ocampo's preceding remarks imply, that the ICC has been forced to train its eye on Africa because that's where the most serious violence occurs.

Further to this point, when defendants are exclusively dark-skinned, as they are at the ICC, international criminal justice becomes a tool for confirmation bias—an expression of our racialized understanding of wrongdoing.

cingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/.

[43] Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 Harv. Hum. Rts. J. 39 (2002); Robert Meister, After Evil: A Politics of Human Rights (2011); Carlos Santiago Nino, Radical Evil on Trial (1996); Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2537 (1991) (beginning her article with the following quote from A. Solzhenitsyn, The Gulag Archipelago 178 (1974): "When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.").

[44] An empirical study by Sofia Stolk of opening statements in international criminal tribunals revealed a paradox: "[V]iolence is described as a rational plan that is devoid of reason at the same time." Sofia Stolk, *A Sophisticated Beast? On the Construction of an "Ideal" Perpetrator in the Opening Statements of International Criminal Trials*, 29 Eur. J. Int'l L. 677, 685 (2018).

[45] *Id.* at 684–87.

[46] *Id.* at 688–92; *see also* Reynolds & Xavier, *supra* note 6, at 966 (citing Transcript, Sesay, Kallon, and Gbao (SCSL-04–15-T), Trial Chamber, 5 July 2004, at 19) ("'This idealized rule of law stands in marked contrast to the state of nature depicted by Crane in his Prosecution statements during the trials of the Revolutionary United Front leaders, whereby Sierra Leone is the setting for 'a tale of horror, beyond the gothic into the realm of Dante's inferno', populated by 'dark shadows' and 'hounds from hell.'").

[47] DeFalco & Mégret, *supra* note 3, at 75–76; Anghie & Chimni, *supra* note 20, at 85. Ntina Tzouvala, Capitalism as Civilisation: A History of International Law 45 (2020).

Indeed, the construction of certain rules at the ICC create a feedback loop reaffirming preexisting implicit bias. For example, the ICC can dismiss or move ahead with cases based on how grave the crime is perceived to be. As I have explored in past work, research has shown that an individual's determination of what constitutes the worst acts is highly dependent on their own demographic characteristics, including their race, class, political orientation, and gender—to name a few.[48] Since approximately 69 percent of all professional staff at the ICC and 68 percent of those in higher ranks are European (as compared to only 16.5 percent and 19.8 percent, respectively, who are African), gravity determinations are more likely than not to reflect Eurocentric understandings of criminality.[49] And in the court's decisions, we can see such implicit biases at work. For instance, the ICC has deemed torture by U.S. forces in Iraq not grave enough to merit prosecution, while the recruitment of child soldiers in the Congo and destruction of cultural property in Mali are.[50]

Such racialized understandings of international crimes are particularly concerning given the current rationales leveled in support of international criminal law on the whole. As the deterrent effect of international criminal punishment remains unclear, the proponents of international criminal law are increasingly turning to expressive theories of punishment as justifications for the ICC's work.[51] For example, David Luban has argued that, through international criminal punishment, the international community engages in both norm affirmation and norm projection (i.e., the articulation of new codes of behavior).[52] In sum, international criminal punishment has value

[48] López, *supra* note 28, at 620–21.

[49] *See* Int'l Crim. Ct., Report of the Committee on Budget and Finance on the Work of Its Thirty-Sixth Session, annex V (2021), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-5-ENG-CBF36%20Report-10ago21.1300.pdf (Annex V: Geographical Representation). Figure 2 in Annex V references "Western Europeans and other states." Since the only continent not otherwise represented in the figure is North America, these other states are likely in that continent. For that reason, these statistics are just an approximation.

[50] Int'l Criminal Court Office of the Chief Prosecutor, OTP Response to Communications Received Concerning Iraq 8 (Feb. 9, 2006), https://www.icc-cpi.int/news/otp-response-communications-received-concerning-iraq [https://perma.cc/QMA4-M37V]; *see also* Int'l Crim. Ct., Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Int'l Criminal Court, ICC-01/04–01/06 (July 2021), https://www.icc-cpi.int/CaseInformationSheets/lubangaEng.pdf; *Al Mahdi Case: The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Int'l Crim. Ct., https://www.icc-cpi.int/mali/al-mahdi (last visited May 4, 2022).

[51] Padraig McAuliffe, *Suspended Disbelief: The Curious Endurance of the Deterrence Rationale in International Criminal Law*, 10 N.Z. J. Pub. & Int'l L. 227, 254–61 (2012) (critiquing the empirical research showing that a deterrence effect exists in international criminal law); Carsten Stahn, Justice as Message: Expressivist Foundations of International Criminal Justice 6 (2021).

[52] Stahn, *supra* note 51, at 58.

because it reflects our current beliefs and future aspirations. Understanding the purpose of international criminal law through this lens, it is imperative to ask whether the ICC's near exclusive focus on Black men is sending the right message. Or given the current structural racism embedded in the ICC's design, are we merely affirming the racial biases of the Global North and cementing the current global power structures under the guise of law?

Alternatively, if the international community seeks to express what it values most through international criminal punishment, it should adopt an *antiracist expressive orientation*, rather than the nominally race-neutral approach articulated by ICC officials and other proponents.[53] Antiracism is a framework developed by Ibram X. Kendi. According to Professor Kendi, striving to be antiracist means more than just being "not racist."[54] Being "not racist" is akin to being "color-blind" or in a state of denial—that is, failing to see or denying the effects of racism.[55] Rather, being antiracist requires playing an active role in identifying and dismantling the systemic racism embedded in the regular practices and rules of institutions.[56] To adopt an *antiracist expressive orientation*, the ICC would have to openly commit itself to antiracism in its administration of international criminal law. It must then take a hard look at itself, identifying and rescinding those policies that reproduce racism and instituting new antiracist policies that eliminate racial inequity.[57] This process will take time and be ongoing, but at a minimum, adopting an antiracist approach would necessitate nullifying rules like Article 16 that reproduce the structural racism embedded in the international legal order, allowing for evolving definitions of crimes that account for the harms of most concern to the Global South, including those involving environmental atrocities that are often perpetrated by majority White states, limiting the power of states that are not parties to the Rome Statute to influence proceedings at the ICC, and hiring staff in numbers that statistically reflect the racial and national diversity of its state parties. Through adopting such an expressly

[53] Gratitude is in order to Randle DeFalco for suggesting this framing in this chapter. A similar approach was also proposed by Rebecca Hamilton in her discussion of a communication alleging international crimes perpetrated by Australia against the asylum seekers held in Australia's offshore detention facilities on the islands of Nauru and Manus. Rebecca Hamilton, *Australia's Refugee Policy an Opportunity for the ICC to Combat Image of Bias*, JUST SEC. (Mar. 6, 2017), https://www.justsecurity.org/38326/australias-refugee-policy-opportunity-icc-combat-perception-bias/.

[54] For a general explanation of antiracist approaches, *see* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).

[55] *Id.* at 10, 226.

[56] *Id.* at 19.

[57] *Id.* at 232.

antiracist approach to international criminal punishment, the international community can express its outrage at both atrocity and racism by prioritizing the punishment of pernicious uses of power that harm marginalized people regardless of nationality and race.

Decontextualizing Harm

An antiracist approach to criminal punishment is also needed, because, as this section explains, the racialized nature of international prosecution undermines peace and security by shallowing our understanding of why violence occurs. Instead of trying to analyze and understand what causes violence, this racialized version of "justice" permits atrocity to be written off as "evil," lacking in reason or purpose.[58] Put another way, the othering effect that racism facilitates hides the causes and conditions that foment violence and thereby impedes the international community (or in some cases, regional authorities) from advancing measures that are more likely to arrest violence in the future.[59] In the course of demonstrating this point, this section also documents how the ICC rules related to promoting peace and security have been used by powerful majority White nations to racialize criminal punishment at the ICC in ways that have the potential to undercut collective security.

For example, the narrow gaze of the ICTR on the Black Rwandan perpetrators cast the genocide as part of an internal conflict between two tribes, the Hutu and Tutsi. This trained focus averted eyes from the role of the colonial powers like Belgium that created and propagated these racial categories, fomenting the animosity between these two imagined tribes

[58] *See, e.g.*, the statement of David Crane, the first prosecutor of the Special Court for Sierra Leone, in David Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts*, 37 Case W. Rsrv. J. Int'l L. 1, 3–4 (2005) ("Fertilized by greed and corruption, what grows out of these regions of the world are terror, war crimes, and crimes against humanity. Conflicts in these dark corners are evolving into uncivilized events. They appear to be less political and are more criminal in origin and scope.").

[59] Clarke, *supra* note 19, at 3 ("This reclassification of responsibility has had the effect of sublimating root causes of violence, reassigning accountability to those few high-ranking leaders in sub-Saharan Africa who are seen as responsible for mass violations."); *see also id*. at 2–3 (describing how the defense attorney for Thomas Lubanga pointed to the root causes of violence in Ituri, such as challenges of poverty and sovereign control of the wealth of the land, but the prosecution focused narrowly on the guilt of one Black man).

for their own gain.[60] This, too, minimized the appearance of White guilt as a contributor to violence, while also assuaging White guilt by making the superpowers in the Security Council feel like they had done something, even if they had done very little to stop the genocide in real time.[61] This dynamic is not unique to Rwanda. As Antony Anghie and B.S. Chimni explain, "[c]ontemporary ethnic conflict is not simply the latest expression of primordial forces. Its nature, its conduct, its shape are all inextricably linked both with colonialism and with the very modern forces of globalization that inevitably involve North-South economic relations."[62]

Additionally, the institutional design and jurisdictional rules described in the first section of this chapter have subjected decisions about peace and security to the racial politics of the world stage with destabilizing effects. One of the most enduring dilemmas for nations grappling with the aftermath of atrocity is whether to pursue punishment in the name of "justice" or to forgo prosecutions in the name of "peace."[63] At the ICC, Article 16 was designed to mediate this tension between the search for peace and demands for criminal justice.[64] This sensitive role was entrusted to the Security Council, which has the power to delay prosecutions if they might undermine peace and security.[65] In practice, however, the consequence has been that the judgment of Black African nations closest and most affected by violence in the region has been supplanted with that of the majority White superpowers on issues of peace and security. Inevitably, this has meant that there is little recourse when powerful majority White nations engage in acts that threaten peace and security, at the same time that prosecutions of African leaders are pursued even if they might derail ongoing peace processes.

The Security Council's involvement in the investigation into atrocities in Sudan is a prime example. Upon determining that "the situation in Sudan continues to constitute a threat to international peace and security," the Security Council asked the ICC to investigate the ongoing violations of

[60] Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

[61] A. CASSESE, INTERNATIONAL CRIMINAL LAW 339 (2003) ("[S]ensitive to the criticisms that the establishment of the ICTY represented yet another illustration of the disproportionate attention paid to the problems of Europe vis-à-vis the developing world, the international community was also anxious to establish a Tribunal for Rwanda so as to assuage its conscience and shield itself from accusations of double standards.").

[62] Anghie & Chimni, *supra* note 20, at 96.

[63] Rachel López, *Post-Conflict Pluralism*, 39 U. PA. J. INT'L L. 749, 757–67 (2018).

[64] Jalloh, Akandeb & Plessisc, *supra* note 12, at 11.

[65] U.N. Charter art. 24; Jalloh, Akandeb & Plessisc, *supra* note 12, at 11.

human rights and humanitarian law in Darfur.[66] In order to exercise its referral power under the Rome Statute, the Security Council must have thought that criminal trials of those responsible in Sudan would help to maintain or restore international peace and security in the region.[67] While the African Union (AU) initially supported the investigation, once the ICC charged the sitting Sudanese President Omar al-Bashir, it vehemently opposed it.[68] This decision pitted the United Nations Security Council, which has "primary responsibility for the maintenance of international peace and security" under the United Nations Charter, against the Peace and Security Council of the AU, which has "primary responsibility for promoting peace, security[,] and stability in Africa."[69] Instead of promoting peace and security, the AU feared that the pursuit of criminal punishment of the incumbent Sudanese president would derail ongoing efforts at a peaceful resolution to the Darfur crisis.[70] On this basis, the AU requested that the Security Council defer the investigation, a request that was supported by a super majority of the international community.[71] However, this request was met with silence from the Security Council, which never officially affirmed or denied it.[72]

If anything, in this context, the Security Council's use of Article 16 deferral power jeopardized peace and security. At the time, many commentators saw the Security Council's referral of the situation in Sudan as a sign of the ICC's growing credence on the world stage, as it signified an acceptance of the court by many of its detractors, especially the United States, which did not veto the referral to the ICC. A closer look reveals a much more complicated picture in which Black guilt is aggravated and White guilt is immunized in ways that ultimately undercut collective security. First, the U.S.' decision to abstain from the resolution, rather than veto it, must be understood in context. At the time, U.S. relations with its European allies were strained as support for the Iraq War waned due to emerging evidence of its own international crimes, namely, the torture of detainees at Guantanamo and Abu Ghraib.[73]

[66] S.C. Res. 1593 (Mar. 31, 2005).
[67] Jalloh, Akandeb & Plessisc, *supra* note 12, at 6, 15.
[68] Hamilton, *supra* note 2, at 270.
[69] U.N. Charter art. 24; U.N. Charter art. 16; Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted July 9, 2022, entered into force Dec. 26, 2003).
[70] Jalloh, Akandeb & Plessisc, *supra* note 12, at 8.
[71] *Id.* at 23; Hamilton, *supra* note 2, at 273.
[72] Hamilton, *supra* note 2, at 273.
[73] Rebecca Hamilton, Fighting for Darfur: Public Action and the Struggle to Stop Genocide 54–69 (2011) (detailing the central role of securing ongoing European support for the U.S. invasion of Iraq in the U.S. government's decision to abstain from vetoing the U.N. Security Council referral of Darfur to the ICC).

This political reality made it too costly to expressly oppose a referral of the situation in Darfur to the ICC.[74]

Second, embedded in the resolution referring the situation in Darfur to the ICC was an escape clause for the United States. Much like in the resolution authorizing peacekeeping in Bosnia described in the first section of this chapter, this resolution evoked Article 16 as authority for granting non-parties to the Rome Statute exclusive jurisdiction over any criminal acts by their nationals in Sudan.[75] This resolution went a step further than prior Article 16 clauses, offering even greater protection to U.S. troops and leaders. Instead of giving the Security Council the power to authorize criminal proceedings as was the case in prior resolutions, it left it to the states contributing military personnel to waive their exclusive right to jurisdiction. Because this Article 16 clause discriminated between the peacekeepers that are party to the Rome Statute and those that are not, U.S. peacekeeping forces were immunized, while other peacekeepers, mostly from Africa, the continent with the most membership in ICC, were not.[76] The fact that this provision was designed to protect the United States in exchange for waiving its veto power was no secret. The United States ambassador to the United Nations at the time commented, "[t]his resolution provides clear protections for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution."[77] In effect, the resolution made the wrongdoing of troops from participating African nations international crimes and that of mostly White U.S. troops matters of domestic affairs.[78] Given the very low chance of prosecution of U.S. troops in U.S. domestic courts, in effect, it became an exchange of Black criminalization for White impunity.

[74] *Id.*

[75] S.C. Res. 1593, ¶ 6 (Mar. 31, 2005) (providing "that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State").

[76] Thirty-three African countries are part to the Rome Statute, the most of any continent. *See* list, *The State Parties to the Rome Statute: African States*, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (last visited May 4, 2022).

[77] Jalloh, Akandeb & Plessisc, *supra* note 12, at 20.

[78] U.N. Security Council, 60th Sess., 5158th meeting, U.N. Doc. S/PV.5158 at 4 (Mar. 31, 2005); *Demographics of the U.S. Military*, Council on Foreign Rel. (July 13, 2020, 9:00 AM), https://www.cfr.org/backgrounder/demographics-us-military.

Many members of the United Nations as well as numerous commentators questioned how the use of Article 16 deferral power to immunize troops of non-parties to the ICC concerned matters of peace and security.[79] Judging from the drafting history, legal scholar Carsten Stahn has concluded that "Article 16 was certainly not meant to provide a basis for the immunity of a whole group of actors in advance and irrespective of any concrete risk of indictment or prosecution."[80] In fact, a provision of blanket immunity for peacekeepers was proposed but expressly excluded from the Rome Statute after "widespread doubts" surfaced about its content.[81] Rather, Article 16 was meant to be a case-by-case determination of when peace and security interests cautioned against speedy prosecutions, not an anticipatory blanket amnesty.[82] Indeed, it would seem difficult to know in advance whether prosecution would threaten peace and security without knowing the circumstances of the act. To the contrary, it is possible that not holding soldiers accountable for committing mass atrocities against a civilian population could undermine the legitimacy of the ICC and impede its ability to promote collective security.

Conclusion

In short, the racialized nature of prosecutions cannot be justified as the unfortunate consequence of following the rules. As this chapter and the work of other legal scholars have illuminated, the near exclusive focus on Black defendants is the result of rules that systemically heighten Black guilt while minimizing White guilt. The broader effect of such systemic bias at the ICC is particularly invidious because it reinforces well-documented racialized associations of dark skin with evil. A deeper reckoning with the rules that yield such consistently racially discriminatory results is imperative especially given the increased prominence of expressive theories of punishment in international criminal law, which justify criminal prosecutions for their role in communicating the international community's sense of right and wrong.[83] If not, international criminal law risks being not much more than

[79] Cryer et al., *supra* note 13, at 142–44; Carsten Stahn, *The Ambiguities of Security Council Resolution 1422*, 14 Eur. J. Int'l L. 85 (2003).
[80] Stahn, *supra* note 79, at 90.
[81] *Id*. at 95.
[82] *Id*. at 89.
[83] Stahn, *supra* note 51, at 29–30.

an expression of racialized perceptions of wrongdoing. Indeed, cast under such light, international criminal law could easily be portrayed as an extension of international law's civilizing mission, which relied on stereotypes regarding the inherent violence and inferiority of "Blackness" to justify slavery and colonialization.[84] Instead, the ICC should adopt an antiracist orientation to its work, identifying how structural racism is embedded in its institutional design and recognizing the role that race and racism might be playing in its decisions.

[84] DeFalco & Mégret, *supra* note 3, at 75–76; Anghie & Chimni, *supra* note 20, at 85.