

## SYMPOSIUM ON INTERNATIONAL CRIMINAL LAW'S CRITICAL AFTERMATHS

### ABOLITION OF INTERNATIONAL CRIMINAL LAW: A MARXIST CRITIQUE

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#### *Introduction*

Black feminists in the United States have made sophisticated arguments for the abolition of the prison industrial complex, of which criminal law is a crucial component. This literature offers a materialist critique of the carceral system, demonstrating the centrality of prisons for processes of both dispossession of Black communities, and accumulation of capital through the extraction of Black labor inside prisons. In this essay, I explore the potential and limits of an abolitionist critique of international criminal law (ICL), and I argue that there is a danger of losing the radical edge of Black feminist scholarship if its insights are transplanted without its explicitly anti-capitalist politics.

#### *Abolition as Radical*

Driven through the intellectual and activist work of Angela Davis, Ruth Wilson Gilmore, Gina Dent, and others, the abolitionist argument can (roughly) be sketched in the following terms: Black men are disproportionately criminalized in the United States; this is a central facet of racial capitalism which maintains a system of white supremacy built on the continued dispossession of African Americans.<sup>1</sup> In this account, prisons are generators of surplus value through extraction of Black labor, with scholars pointing out historical continuities between slavery and the prison-industrial complex.<sup>2</sup> Surplus value refers here to the Marxian value theory according to which it is critical to identify the difference between value created through workers in production and the value paid by the capitalist to the worker (often, but not always) expressed as profit. Prisons are then not only “bad” because people in them are innocent (as many are), but because such institutions are central to reproduction of both capitalism and white supremacy, in a materially specific way.<sup>3</sup>

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<sup>1</sup> See in particular ANGELA Y. DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* (2022); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998); RUTH WILSON GILMORE, *ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION* (2022).

<sup>2</sup> See in particular DAVIS, *supra* note 1, Ch. 2.

<sup>3</sup> See GILMORE, *supra* note 1, Ch. 1.

Further, because the problem of abolition is articulated in these terms the proposed solutions are also framed in material terms, whether as reparations,<sup>4</sup> transformative justice,<sup>5</sup> or abolition of racial capitalism more broadly.<sup>6</sup> The most radical proposals then do not only focus on the prison-industrial complex, but on addressing the conditions of structural violence that give rise to crime, including lack of housing, education, employment, social, and medical care. Abolition of prisons is then only a first step toward a just society, rather than its end point.

There are two potential ways of anchoring the abolitionist critique in ICL. One is to analyze ICL as a carceral system, and another is to engage in a materialist analysis of ICL as a mode of accumulation. Below I sketch what each of these critiques might look like.

### *A Carceral Critique of International Criminal Law*

A carceral critique of ICL would focus on the punitive aspects of the system, including examining procedural shortcomings that make fair trials for defendants an impossibility, forms of punishment (and who is subjected to them), as well as prison conditions and the violence inherent in stripping humans of their freedom. A carceral critique of ICL then might highlight the huge imbalances in the resources available to the prosecution and to the defense in international criminal trials, making it nearly impossible for defendants to have a fair trial.<sup>7</sup> Punishment is, under these conditions, fundamentally unfair. Another avenue of critique might be the argument that ICL struggles to take into account structural conditions and coercive circumstances within which defendants act, therefore failing to recognize that some defendants have little choice as to their involvement in conflict.<sup>8</sup> Further, prison conditions might be identified as inadequate, making imprisonment a particularly cruel form of punishment.<sup>9</sup> Finally, it could be pointed out that these punitive harms are not experienced equally by all: the International Criminal Court (ICC) has a long-standing African bias reflected in the fact that the majority of defendants punished for international crimes have been Black men from the African continent.<sup>10</sup>

The key limitation of this line of argumentation is its focus is on the individual defendants and their circumstances. It asks readers to empathize with individuals who have often harmed and dispossessed whole communities, and it foregrounds the rights of those individuals, while de-centering their victims.

Two solutions stem from this strand of critique: reform or abolition of international criminal institutions. Whereas reform-focused critiques imply that the injustices of ICL can be remedied through careful and thoughtful interventions, abolition critiques argue that unjust violence is central to ICL, and that the path toward justice therefore cannot start or end in The Hague. Much has been written about the limits of reform-focused critiques of ICL,<sup>11</sup> whereas calls for abolition have been few and far between, and so they have been less carefully examined.

Implied in the calls for abolition of ICL is the idea that violence inherent in the carceral system can be transformed if the system is dismantled. However, while abolition of ICL might address a very specific set of issues

<sup>4</sup> See, e.g., OLÚFÉMI O. TÁÍWÒ, [RECONSIDERING REPARATIONS](#) (2022); Patrisse Cullors, [Abolition and Reparations: Histories of Resistance, Transformative Justice and Accountability](#), 132 HARV. L. REV. 1684 (2019).

<sup>5</sup> See DAVIS ET AL., *supra* note 1; RUTH MORRIS, [STORIES OF TRANSFORMATIVE JUSTICE](#) (2000); Mimi E. Kim, [Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States](#), 27 INT'L REV. VICTIMOLOGY 162 (2021).

<sup>6</sup> See GILMORE, *supra* note 1.

<sup>7</sup> SOPHIE RIGNEY, [FAIRNESS AND RIGHTS IN INTERNATIONAL CRIMINAL PROCEDURE](#) (2022).

<sup>8</sup> Sophie Rigney, [Building an Abolition Movement for International Criminal Law](#), 22 J. INT'L CRIM. JUST. 211 (2024).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> For an overview see: Michelle Burgis-Kasthala & Barrie Sander, [Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist \(Dis-\)Engagement in an Era of Anti-Impunity](#), 22 J. INT'L CRIM. JUST. 127 (2024).

within a particular legal ecosystem (such as the injustice of the international criminal trials, the violence of imprisonment, and the racism of international criminal courts and tribunals), it would achieve nothing in tackling the issues of injustice, unfreedom, and racism more broadly. The key reason for this is the difference between the centrality of the carceral system to capital accumulation in the domestic-U.S. context, and its relative irrelevance when it comes to the reproduction and expansion of capitalism more broadly. The issue with merely applying a carceral critique to ICL is the fact that it *assumes* the materialist insights upon which this critique is built are equally true internationally as they are in a particular domestic context. It assumes that capital accumulation at the core and at the periphery operate similarly; such that extraction, accumulation, and circulation of value take the same form regardless of context. The critique, quite simply, treats the United States as the universal, in terms of how both racism and capitalism operate, while claiming to center the Global South experience(s) of violence.

### *International Criminal Law as a Mode of Capital Accumulation*

To understand, alternatively, how ICL functions as a mode of accumulation, it is necessary to first sketch the different modes of international law through which contemporary imperialism operates. In synthesizing an extensive body of Marxist scholarship,<sup>12</sup> Robert Knox proposes that there are “three key axes through which international law has continued to mediate the expansion of capitalist accumulation in the face of colonial independence.”<sup>13</sup> The first is international economic law. Knox argues that international economic institutions, including the International Monetary Fund, the World Bank, and the World Trade Organization enable the accumulation and circulation of capital by breaking down barriers to trade, imposing conditionalities on developing states which require them to adopt neoliberal policies, and by obscuring the ideological dimensions of these measures through the language of democratization and good governance.<sup>14</sup> The second axis identified by Knox is humanitarian intervention.<sup>15</sup> One well known example is the invasion of Iraq, where the intervention was used to impose wide-ranging neoliberal policies without any democratic oversight.<sup>16</sup> The final axis, under which one can find ICL (together with human rights, democratization, and development initiatives more broadly) is “humanitarianism” which discursively enables and legitimates “non-military interventions within peripheral societies to transform them in ways more amenable to capitalist accumulation.”<sup>17</sup>

International criminal law’s centrality to capitalism then does not stem primarily from its capacity to extract surplus value through labor,<sup>18</sup> but from its role in enabling circulation and accumulation of surplus value from the periphery to the core. ICL does this discursively by framing justice in a way that foregrounds individual/

<sup>12</sup> See, e.g., CHINA MIÉVILLE, [BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW](#) (2005); B.S. CHIMNI, [INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES](#) (2d ed. 2017); SUSAN MARKS, [THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY](#) (2003).

<sup>13</sup> Robert Knox, [Valuing Race? Stretched Marxism and the Logic of Imperialism](#), 4 LONDON REV. INT’L L. 81, 96 (2016).

<sup>14</sup> *Id.* at 97; see also Tor Krever, [Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense](#), 34 THIRD WORLD Q. 131 (2013).

<sup>15</sup> Knox, *supra* note 13, at 97.

<sup>16</sup> Maj Grasten & Ntina Tzouvala, [The Political Economy of International Transitional Administration: Regulating Food and Farming in Kosovo and Iraq](#), 24 CONTEMP. POL. 588 (2018); Eric Herring & Glen Rangwala, [Iraq, Imperialism and Global Governance](#), 26 THIRD WORLD Q. 667 (2005).

<sup>17</sup> Knox, *supra* note 13, at 97.

<sup>18</sup> My argument here is not that ICL does not extract labor, but rather that this is not its dominant mode of accumulation. For an account of how ICL *does* extract value from labor, see LEILA ULLRICH, [VICTIMS AND THE LABOUR OF JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: THE BLAME CASCADE](#) (2024).

physical violence and legitimates slow/structural violence, which in turn has profound distributive effects.<sup>19</sup> As various critics have argued, ICL is central to capital accumulation ideologically<sup>20</sup> as it obscures and mystifies (and therefore enables the reproduction of) relations of power and domination inherent in capitalism.<sup>21</sup> When processes of extraction and material dispossession of whole communities do not take the form of law, they are portrayed as *criminal*, but when they do take the form of law (investment agreements, contracts, privatization legislation) they are portrayed as peaceful and progressive. ICL is then parasitic in a sense: it legitimates accumulation (and disposition) through *other forms* of law—domestic and international, regulatory, as well as soft and hard—in post-conflict and post-atrocity settings. This also explains the persistent nexus between invocations of ICL and neoliberal interventions in post-atrocity settings: ICL plays a key discursive and distributive role in legitimating the structural violence of neoliberalism, while designating only a handful of acts of violence as worthy of condemnation and punishment.<sup>22</sup>

Further, like international law more generally, ICL “mediates and articulates the expansion of capital through racialising certain territories and societies.”<sup>23</sup> Drawing on Robert Knox’s work, the relationship between race, capitalism, and international law can then be understood in the following terms. Racism is a product of capitalist social relations, and as such is structural.<sup>24</sup> Racialization is both essential for and produced by capitalist expansion. Both racism and racialization change as the mode of capital accumulation changes: neither is fixed or static.<sup>25</sup> Social relations under capitalism take the form of law, and for this to be possible a process of abstraction must take place.<sup>26</sup> Material differences between subjects are concealed as abstract legal subjects emerge as formally equal.<sup>27</sup> Racism as a social relation is then both embedded in law and concealed by it. International law in conjunction with imperial expansion, which Third World Approaches to International Law (TWAAIL) scholars have demonstrated was highly juridified, produced particular forms of racialization.<sup>28</sup> While some of these forms have changed through different stages of capitalism, one form of racialization that persists is the idea that for developing states to become civilized, they must transition to capitalism (or more recently neoliberalism).<sup>29</sup>

<sup>19</sup> For the difference between direct and structural violence, see Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167 (1969); Johan Galtung & Tord Høivik, *Structural and Direct Violence: A Note on Operationalization*, 8 J. PEACE RES. 73 (1971). For contemporary, especially Marxist and Feminist critiques of Galtung’s work which helped shaped my approach, see Thomas Biebricher & Eric Vance Johnson, *What’s Wrong with Neoliberalism?*, 34 NEW POL. SCI. 202 (2012); Catia C. Confrontini, *Galtung, Violence, and Gender: The Case for a Peace Studies/Feminism Alliance*, 31 PEACE & CHANGE 333 (2006).

<sup>20</sup> Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT’L L. 701 (2013).

<sup>21</sup> I draw on John Thompson’s conception of ideology as discourse that sustains relations of domination, see JOHN B. THOMPSON, *STUDIES IN THE THEORY OF IDEOLOGY* (1984). See also TERRY EAGLETON, *IDEOLOGY: AN INTRODUCTION* (1991); MARKS, *supra* note 12.

<sup>22</sup> Krever, *supra* note 20; see also Tor Krever, *Ending Impunity? Eliding Political Economy in International Criminal Law*, in *RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW* 298 (Ugo Mattei & John D. Haskell eds., 2015); Tor Krever, *Dispensing Global Justice*, 85 NEW LEFT REV. 67 (2014); Marina Veličković, *Global Governance in The Age of Neoliberalism: A Marxist Critique*, in *RESEARCH HANDBOOK ON GLOBAL GOVERNANCE* (Aoife O’Donoghue & Routh Houghton eds., forthcoming).

<sup>23</sup> Knox, *supra* note 13, at 112.

<sup>24</sup> Robert Knox, *International Law, Race, and Capitalism: A Marxist Perspective*, 117 AJIL UNBOUND 55, 58 (2023).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also Knox, *supra* note 13.

<sup>27</sup> Knox draws on Pashukanis. Evgeny Bronislavovich Pashukanis, *The General Theory of Law and Marxism*, in *PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW* 37 (Piers Beirne & Robert Sharlet eds., Peter B. Maggs trans., 1980).

<sup>28</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005); NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (2020).

<sup>29</sup> TZOUVALA, *supra* note 28.

Racialization is then central to all three axes of imperialism outlined above, as it both justifies interventions and conceals the violence inherent in them. In relation to ICL (and human rights), it also operates to constitute racialized individuals as victims and savages, and white humanitarians (prosecutors, advocates, human rights workers) as saviors.<sup>30</sup>

Therefore, although accumulation of value globally operates so that those who are racialized are exploited, and those who are exploited are racialized, the mode through which this accumulation happens globally is different than in the American-domestic context. Racialized labor *is* used to extract value, but this is not primarily done through the carceral system. For example, even with the ICC's Africa-bias the number of overall prosecutions is so low (and their geographic scope so immense) that it would be difficult to argue that victims' labor which is extracted prior to and throughout the trial process, or any extraction of the defendants' labor once and if they are imprisoned, are significant when it comes to the reproduction of global capitalism. Or to put it differently: even if the carceral system of ICL was completely abolished, capital accumulation and circulation would continue, and it would continue along the same racialized dynamic along which it currently operates. Globally, racialized labor is made accessible through land enclosures that proletarianize local populations, and push them into low-paid and informal work. In other words, racialized labor is exploited through market deregulation, which destroys safety nets and removes worker protections.<sup>31</sup> Globally, the factory, the mine, and the field *are* the prison: workers have no choice as to their being there, and the conditions in which they labor are often worse than those in prisons to which the very few who make it to The Hague are confined.

#### *Abolition of . . . ?*

In the American-domestic context to advocate for (and more importantly, organize around) the abolition of the prison-industrial complex is to argue for abolition of racial capitalism. Yet, as I have demonstrated above, the same is not true in relation to ICL. However, this does not necessarily mean that there are not strong reasons (both anti-capitalist and ethical) to advocate abolition of ICL. After all, ICL plays a significant role in *legitimizing* capitalist violence and reproducing racial hierarchies inherent in it.

As an ethical stance, advocating for abolition of ICL points to one's belief that the violence inherent in this system is not something that can be remedied through reform, and moreover, that no matter what kinds of crimes or atrocities an individual may have committed, they should not be punished by imprisonment. It is an argument I have wrestled with extensively, in part because I am a committed Marxist who has always felt that we abandon the truly radical edge of Black feminist scholarship on abolition if our focus shifts from the collective and anti-capitalist to the individual level. I have also struggled with this argument in part because I am *also* Bosnian, and having grown-up in a post-war newly neoliberal periphery that was also an ICL experiment, I find the arguments for the ethical urgency of anti-capitalist struggle far more convincing than the arguments for the ethical impetus of anti-carceral abolition work. In the context of ICL these are two different strands of labor.

In other words, advocating for abolition of ICL as an anti-capitalist tactic seems to be missing the forest for the trees. While I find the argument that ICL obscures and reproduces capitalist social relations convincing, and have made it myself elsewhere, I am yet to be persuaded that this means that ICL could be a meaningful site of anti-capitalist struggle. The insistence on centering ICL, even in our supposedly radical struggles, reveals a lot more about our political horizons as scholars than it does about the broader significance of this project that we are clearly still so deeply invested in.

<sup>30</sup> Makau Wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

<sup>31</sup> Veličković, *supra* note 22.