

A Culture of Impunity:

Why the Remain in Mexico Policy is Insulated from International Criminal Accountability

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“The tiny child was bundled into blankets in the small tent where it was spending its first days of life. Her mother coughed when she spoke, visibly exhausted. She said that she’d fled an abusive spouse and was too afraid to return to him. Later, one of the few health responders who visits the camp regularly told me that she was fearful about whether the child would survive conditions at the camp, which she said reminded her of refugee camps she’d worked at in Bangladesh.”¹

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¹ Ashoka Mukpo, *I Went to Mexico to Meet Asylum-Seekers Trapped at the Border. This is What I saw.*, ACLU NEWS & COMMENTARY (Oct. 24, 2019), <https://www.aclu.org/news/immigrants-rights/i-went-to-mexico-to-meet-asylum-seekers-trapped-at-the-border-this-is-what-i-saw/> (describing the conditions of a camp in Matamoros housing individuals placed in the “Migrant Protection Protocols” program).

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INTRODUCTION

The atrocities being committed at the southern border of the United States are not so different in substance from atrocities that have been committed in the past. They distinguish themselves, rather, in their resistance to the international criminal law (“ICL”) framework. This paper does not seek to dissect U.S. exceptionalism, nor jurisdiction issues related to ICL. Rather, I argue that these atrocities, in particular the so-called Remain in Mexico policy, are theoretically resistant to this framing because ICL was intentionally developed in a way to neutralize crimes related to colonial domination. Since migration, particularly in the context of the U.S. southern border, is tightly intertwined with the U.S. neo-imperial relationship with the Northern Central American countries specifically, the violence committed under the cover of borders and nationality is insulated from ICL accountability. The urgency of this argument is that the skewed engineering of ICL not only has protected certain countries from their own past actions as colonial powers, but it also *continues* to protect certain countries from ongoing abuses when those abuses are closely related to colonial or imperial relationships.

In Part I, I set forth a framing based in Critical Race Theory, positing that law is not developed in neutral ways, but rather in ways that retrench racial power. In Part II, I trace the development of the crimes of colonial domination and apartheid – two crimes deeply linked to colonial/imperial relationships – to show that ICL emerged in a way that protected states engaged in colonial/imperial relationships. In Part III, I consider the racial foundations of borders and suggest that the close ties between borders and colonial domination render the former a shield against ICL liability for international crimes. I conclude that the “Migrant Protection Protocols” program, which forces individuals seeking asylum in the U.S. to await their hearings in Mexico, bears a strong resemblance to the forced deportation of the Rohingya from Myanmar to Bangladesh but that the neo-imperial relationship between the U.S. and Mesoamerica legally neutralizes the violence of the former.

I. THEORETICAL FRAMING

The adoption and application of remedies for racial discrimination in the United States, and the critical scholarship it has generated in

particular, offer a useful frame for understanding the process by which certain acts were criminalized in the development of international law broadly and ICL specifically. At their core, both antidiscrimination law in the U.S. and ICL characterize their targeted behaviors as aberrational, which starts to explain why violence that occurs as a result of structures—e.g. pushing individuals seeking asylum back into Mexico—are not easily contemplated in these areas of law.

In this vein, the development and application of ICL suffers from a perpetrator perspective, which exceptionalizes the conduct it condemns. Alan Freeman describes a perpetrator perspective as focused on the actions inflicted on a victim, whereas a victim perspective would take into account the victim's objective conditions of life, rather than the discrete actions perpetrated against her.² In practice, the perpetrator perspective creates a "class of innocents" that need not be bothered by the burden of addressing the totality of conditions,³ so long as they do not engage in affirmative acts of discrimination. In this way, antidiscrimination law in the U.S. serves merely to legitimize existing social structures, while providing just enough relief to make judicial operations credible.⁴ The Supreme Court in *Washington v. Davis*, for example, infamously stated that the Fifth and Fourteenth Amendments of the U.S. Constitution could not possibly be understood to render invalid all statutes that produce racially imbalanced results, in view of "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent white."⁵ In perhaps an unintended moment of unabashed honesty, the Supreme Court recognized that racial inequality was deep-seated and widespread in the U.S. In the same breath, however, it declined to deploy antidiscrimination law to address it.

To understand the urgency of identifying and remedying defects in race-conscious remedies, the process of racial formation itself should be clarified. Omi and Winant describe race as the "master category,"⁶ for example, in the context of the U.S. They cite the genocide of Native

² Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINNESOTA L. REV. 1049, 1052-53 (1978).

³ *Id.* at 1055-56.

⁴ *Id.* at 1051.

⁵ *Washington v. Davis*, 426 U.S. 229, 426 (1976).

⁶ MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATIONS IN THE UNITED STATES* 105 (3d ed. 2014).

communities and the enslavement of African peoples as establishing a template for the oppression of other subordinated groups.⁷ The legitimization of the resulting inequality, then, through the gutting of antidiscrimination law and discourses of post-racialism,⁸ can serve to erase past and *ongoing* processes of racial formation and retrenchment of inequality.

The U.S. context helps outline the relevance of racial formation in the development of international law more broadly. Anghie presents the paradoxical legal position many non-European nations found themselves in during the height of imperial expansion: on one hand, Europeans used law to legitimize their conquest of non-European land through a process of racialization that rendered non-Europeans inferior.⁹ On the other hand, non-Europeans had sufficient legal status to enter into treaties that transferred rights to Europeans.¹⁰ Decolonization served facially to incorporate states into the club of sovereignty, but served to legitimize economic inequality in fact by masking colonial relations with the draw of equal sovereignty.¹¹

Colonialism, racialization, and the obfuscation of these processes in international law are also deeply entangled with the development of asylum policies. “It is the exclusion of some, on the basis of old ideas of human hierarchy,” writes Mayblin, “which endures through time despite the creeping forward.”¹² Achiume, for example, argues that when economic migrants from the Third World respond to the structural inequality occasioned by colonialism by immigrating to former colonial powers, they are exercising a process of decolonization.¹³ This shows the continuing stake that former colonial powers have in continuing to exclude certain migrants in order to maintain their own colonial advantage.¹⁴ As I discuss below, migration is mostly shielded from the purview of ICL because it is inherently a result of colonial relations. I

⁷ OMI & WINANT, *supra* note 6, at 106-107.

⁸ Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

⁹ See Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD QUARTERLY 739, 745 (2006).

¹⁰ *Id.*

¹¹ *Id.* at 740, 749.

¹² LUCY MAYBLIN, *ASYLUM AFTER EMPIRE: COLONIAL LEGACIES IN THE POLITICS OF ASYLUM SEEKING* 110 (2017).

¹³ Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

¹⁴ See Astghik Hairapetian, *The Last Resort: Tourism Development on Garifuna Territories in Honduras through the Lens of Structural- Dynamic Intersectionality*, 67 UCLA L. REV. (forthcoming 2021).

suggest that lifting these processes from the shadows is essential to understanding the way ICL developed to shield colonial powers not only from their past actions, but also from their ongoing and future actions. The conditions underlying manifestations of violence are unreachable, certainly; however, and most urgently, the engineering of ICL by colonial powers renders even manifestations of violence themselves unreachable when, as in the case of migration, they are too deeply ensnared with normalized colonial relations to be understood as aberrational.

To unravel the process by which ICL was developed, I intentionally adopt a perpetrator perspective. This framing will assist in clarifying why ICL has developed to exclude certain crimes. Nonetheless, the gap that this framing will help expose should evoke a victim perspective. Thus, the various axes of oppression that are at play in the perpetuation of mass violence—colonialism and race in the present paper, but gender, sexual orientation, age, etc. more broadly—are not a corollary to my argument but rather a central premise approached laterally.¹⁵

II. DEVELOPMENT OF ICL FROM A CRS PERSPECTIVE

A. Narrative

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established via Security Council Resolutions in 1993 and 1994, respectively.¹⁶ The very selection of these two incidents of atrocity underscores the political processes at play.¹⁷ In that vein, the comments of the various Security Council Members at the time the Resolutions were adopted reveal the primary narrative in response to the mass atrocities in the Former Yugoslavia and Rwanda.¹⁸ The narrative is that these acts of

¹⁵ See Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 222-232 (2015).

¹⁶ S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹⁷ RES SCHUERCH, THE INTERNATIONAL CRIMINAL COURT AT THE MERCY OF POWERFUL STATES: AN ASSESSMENT OF THE NEO-COLONIALISM CLAIM MADE BY AFRICAN STAKEHOLDERS 163 (2017) (Reasoning that the selection of the Yugoslav and Rwandan atrocities for the establishment of ad hoc tribunals “cannot be adequately explained from a legal perspectives . . . the decision-making procedure . . . is susceptible to political abuse because the members of the SC [Security Council] are not required to rely on legal criteria in their deliberations [This] increases the likelihood that political considerations prevent the establishment of other tribunals with regard to situations where crimes of comparable scale are committed.”).

¹⁸ Security Council, Provisional Verbatim Record, S/PV.3175 (Feb. 22, 1993); Security

violence belong to the past, are a symptom of a culture of impunity, and are acts of barbarism.¹⁹ In this regard, it is the existence of the narrative itself that elucidates the attitudes that shaped ICL – not necessarily the individual actors that are the mouthpieces for these views.²⁰

Upon the adoption of the ICTY Resolution, the representative from Venezuela noted, quoting in part Judge Robert H. Jackson of the Nuremberg war-crimes tribunal, that

“[t]he crimes we intend to condemn and punish were so deliberate and so devastating that our civilization cannot allow them to be ignored, for mankind could not survive a repetition of such crimes” ... the world is horrified to see that organized barbarism — which, it was thought, was possible only in that age and could never be repeated — has come again.²¹

His comments point to the need to quarantine this kind of violence to the past. The comments of the representative from Morocco, also presiding as President of the Security Council at the time, further clarify this sentiment. He states

[n]ot content with carrying out a disgraceful genocide, the Serbs have systematically perpetrated a whole range of atrocities, torture and violence, all of them totally inadmissible, acts and practices that we had thought belonged to a bygone age.²²

Council, Provisional Verbatim Record, S/PV.3453 (Nov. 8, 1994).

¹⁹ It is worth noting also, that although the focus of this paper is on the confluence of race and colonialism in the development of ICL, the gender dimension of the narrative is also striking. Although comments at the adoption of the ICTY resolution abounded with references to gender-based violence, this same discourse, despite rampant gender-based violence during the Rwandan genocide, was markedly absent. KINGSELY MOGHALU, *RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 60 (2005) (noting the tens, perhaps hundreds, of thousands of rapes that occurred, and the general inability of the ICTR to reach the perpetrators); *see generally* Davis, *supra* note 14; *see generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); *compare* S/PV.3175, *supra* note 17, at 4, 9, 12, 16, 17, 21, with S/PV.3453, *supra* note 17, at 15.

²⁰ A host of reasons – the pre-existent framing of the issue by Western states, pressure to not “distract” from the issue at hand, assimilation into a global elite, etc. – could be at work. In relation to whether a discourse can be global when actors are local, *see* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society* in *GLOBAL LAW WITHOUT A STATE* 3-28 (1997); B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMM. L. REV. 3, n. 56 (2006) (“it is the phenomenological world construction within a discourse that determine the globality of the discourse, and not the fact that the source of use of force is local”).

²¹ S/PV.3175, *supra* note 17, at 17.

²² *Id.* at 25.

Here, he explicitly asserts that this violence belongs firmly in the past. What is most confusing about these comments is that a myriad of independence movements, many violently oppressed by colonial powers, had occurred since Nuremberg.²³ Nonetheless, the violence of the Former Yugoslavia was generally understood to belong to a “bygone age.”

If that belonged to the past, then what was the present supposed to look like? The representative of the United States, Madeleine Albright, citing then Secretary of State Warren Christopher, noted

[b]old tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or if we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answers must be a resounding ‘no’.²⁴

Albright delivered these comments less than a year after the four LAPD officers who beat Rodney King were acquitted. Despite rampant racialized violence in the U.S., which is deeply related to the same historical processes that resulted in the colonization of the Global South,²⁵ it seems Albright is characterizing the U.S. as a peaceful, multi-ethnic democracy. Colonialism and its repercussions are not a part of the present; only acts of violence that can be divorced from colonialism are recognizable as aberrational and worthy targets of the international community’s horror.

Comments made during the adoption of the resolution establishing the ICTR belied the same narrative. Albright, speaking on behalf of the United States and presiding as President of the Security Council at the time, expressed her

[g]overnment’s hope that the step we have taken here today can promote both justice and national reconciliation, lest the Rwandan people be unable to escape the memory of madness and barbarism they have just lived through.²⁶

²³ See, e.g., FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1961).

²⁴ S/PV.3175, *supra* note 17, at 13.

²⁵ See, e.g., Barbara J. Fields, *Ideology and Race in American History*, in *REGION, RACE AND RECONSTRUCTION* 168-69 (J. Morgan Kousser & James M. McPerson eds., 1982) (“Race . . . became the ideological medium through which Americans confronted questions of sovereignty and power because the enslavement of Africans and their descendants constituted a massive exception to the rules of sovereignty and power . . . [D]espite the changes it has undergone along the way, race has remained a predominant ideological medium because the manner of slavery’s unraveling had lasting consequences for the relations of whites to other whites, no less than for those of whites to blacks.”).

²⁶ S/PV.3453, *supra* note 17, at 18.

This “madness and barbarism,” according to a few other speakers, was a direct result of a culture of impunity. The representative for the Czech Republic, for example, noted that justice was

necessary for Rwanda, which for decades has lived in a culture of impunity, a culture where massacres which have gone unpunished constitute a part of its contemporary history. The colloquial expression “getting away with murder,” a vivid exaggeration of a daring exploit in the English idiom, carries a haunting literalness in Rwanda.²⁷

Of course, there is no denying that a culture of impunity can certainly lead to horrors such as those experienced in Rwanda. In fact, the representative of Rwanda himself noted the relationship between impunity and genocide.²⁸ But, to give an example, was Britain’s brutal repression of the Mau Mau uprising in the 1950’s, which “left tens of thousands, perhaps hundreds of thousands, dead,” not also an example of getting away with murder and a culture of impunity?²⁹ Or the genocide in Guatemala spurred by the U.S.-backed overthrow of the democratically-elected Arbenz;³⁰ and later, U.S. support for Rios’ administration as it committed crimes against humanity, particularly against indigenous Guatemalans?³¹ Since colonialism was intertwined with those particular outbreaks of barbarism (and, in the case of the Mau Mau uprising, the fact that the British explicitly hid evidence of their deeds), they were not a problem for ICL.³²

The barbarism of the Rwandan genocide and the culture of impunity it stemmed from were easy targets for ICL (although Rwanda voted against the Resolution establishing the ICTR, for different

²⁷ *Id.* at 7.

²⁸ *Id.* at 14.

²⁹ Marc Parry, *Uncovering the brutal truth about the British empire*, THE GUARDIAN (Aug. 18, 2016), <https://www.theguardian.com/news/2016/aug/18/uncovering-truth-british-empire-caroline-elkins-mau-mau>; see also *Mau Mau uprising: Bloody history of Kenya conflict*, BBC NEWS (April 7, 2011), <https://www.bbc.com/news/uk-12997138>.

³⁰ For a timeline of U.S. intervention, see NICHOLAS CULLATHER, *OPERATION PBSUCCESS: THE UNITED STATES AND GUATEMALA, 1952- 1954* 97-104 (1994).

³¹ See Nubia Batista Willman, *Reaping Whirlwind: How U.S. Interventionist Foreign Policies Created Our Immigration Crisis*, 23 PUB. INT. L. REP. 36, 40-41 (2017); Gregory L. Smith, *Immune to Truth - Latin American Truth Commissions and U.S Support for Abusive Regimes*, 33 COLUM. HUM. RTS. L. REV. 241, 263 (2001); see also Schuerch, *supra* note 16, at 160 (“If Yugoslavia, why not Somalia; if Rwanda, why not Guatemala?”).

³² Parry, *supra* note 28.

reasons).³³ If, to take the example of the Mau Mau uprising again, violence intertwined with colonialism were to be targeted, it would question the civilizing mission of the colonial project.³⁴ For if colonialism itself was barbarism, what would be left to justify it?

B. History

The narrative of barbarism and violence belonging to the past hints at the conditions in which ICL was reared. However, within this context, specific incidents of engineering occurred, which gave rise to the sterilized version of ICL that was ultimately adopted.

The 1991 Draft Code of Crimes against the Peace and Security of Mankind³⁵ included 12 Articles describing crimes over which a then-potential international criminal tribunal would have jurisdiction. Most interesting to the purposes of this paper are the crimes of colonial domination and apartheid.³⁶ The list of crimes shows the radical future its drafters had in mind. Unfortunately, following states' comments,³⁷ states in the Global North significantly reduced both the jurisdiction and crimes eligible for prosecution under the future international criminal tribunal. States — in this case, particularly Global North states³⁸ — had a lot to say about the inclusion of colonialism and apartheid. To some, the definitions were too vague; to others, yet again, these crimes belonged firmly in the past. A few, daringly, hinted at fears for their own future liability.

³³ See, e.g., S/PV.3453, *supra* note 17, at 13-16.

³⁴ Parry, *supra* note 28 (quoting CAROLINE ELKINS, *BRITAIN'S GULAG: THE BRUTAL END OF EMPIRE IN KENYA* (2005)) ("I've come to believe that during the Mau Mau war British forces wielded their authority with a savagery that betrayed a perverse colonial logic . . . Only by detaining nearly the entire Kikuyu population of 1.5 million people and physically and psychologically atomising its men, women, and children could colonial authority be restored and the civilising mission reinstated.").

³⁵ *Report of the Commission to the General Assembly on the work of its forty-third session*, [1991] 2 Y.B. Int'l L. Comm'n 1, at 94-97, U.N. Doc. A/CN.4/SER.A/1991/Add.1.

³⁶ A/CN.4/SER.A/1991/Add.1, *supra* note 34, at 95-97 (Including other crimes: aggression; threats of aggression; intervention; genocide; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and, wilful and severe damage to the environment).

³⁷ *Comments and observations received from Governments*, [1993] 2 Y.B. Int'l L. Comm'n 59, at 59-109, U.N. Doc. A/CN.4/448 and Add.1.

³⁸ *Id.* at 59 (noting that twenty-four countries submitted comments, of which only 8 [Brazil, Costa Rica, Ecuador, Paraguay, Senegal, Sudan, Turkey and Uruguay] are located in the Global South).

In relation to colonial domination, Australia notes that there is “considerable debate” around what the right to self-determination encompasses,³⁹ while Austria would like “colonial domination” specifically defined in an additional paragraph.⁴⁰ The United States claims that the language is “vague and too broad.”⁴¹ Confusingly, they assert that this failure to define colonial domination

is particularly grave in the present international climate, which is witnessing the emergence of smaller nations from the territory of larger ethnically diverse societies. Any attempt to criminalize conduct such as ‘alien domination’ would most likely serve only to increase international tensions and conflicts.⁴²

It seems the U.S. protest itself is “vague and too broad.” In any case, these moves could be understood as a diaphanous disguise for these states’ own fears of prosecution. In a way, these comments harken back to the Supreme Court’s statement in *Davis* that the Constitution could not be interpreted in such a way as to render invalid a myriad of programs with racially unequal results.⁴³ The U.K. vehemently opposed the inclusion of the crime of colonial domination. It noted that colonial domination has “no foundation in international criminal law”⁴⁴ and is “an outmoded concept redolent of the political attitudes of another era.”⁴⁵ The move of relegating an unsavoury development to the past resurfaces here in a slightly different iteration: both colonialism and massive violence belong in the past, but only the latter had manifested in recent years. The former belonged to a bygone era, and indeed, remained there.

Dissipating that discursive shroud was a standout comment from Switzerland. In response to commentary included in the 1989 draft of the code noting that certain members of the Commission felt neo-colonialism—particularly in relation to natural resources—should be understood as encompassed in the crime of colonial domination,⁴⁶ Switzerland states,

³⁹ *Id.* at 64, ¶ 24.

⁴⁰ *Id.* at 67, ¶ 22.

⁴¹ *Id.* at 103, ¶ 11.

⁴² *Id.* at 103, ¶ 11.

⁴³ *Washington v. Davis*, 426 U.S. 229, 249 (1976).

⁴⁴ A/CN.4/448, *supra* note 36, at 101, ¶ 23.

⁴⁵ *Id.*

⁴⁶ *Report of the Commission to the General Assembly on the work of its forty-first session*, [1989] 2 Y.B. Int’l L. Comm’n 1, at 70, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2).

[h]owever reprehensible it may be politically, “neo-colonialism” is not a legally established concept.⁴⁷ Moreover, it should be noted that “neocolonialism,” to the extent that it can be observed objectively, is not necessarily imposed by force as part of a plan or an understanding. It often results from economic disparities between countries and will be very difficult to prove in practice ... the Swiss Government wonders if it would not be better to delete all references to “neocolonialism” from the commentary.⁴⁸

This statement is particularly striking, not because this is a surprising position, but because it shows that Switzerland was thinking of the future. Other countries’ positions may hint at anxiety in relation to their present action, but Switzerland is direct: there was no political will to cease the neo-colonial activities happening in the 90’s, and it was imperative that they not be criminalized.

The comments surrounding apartheid reveal similar impulses. The International Law Commission in its commentary defines apartheid as “an institutionalized form of racial discrimination that aims to perpetuate domination of a racial group and oppress it.”⁴⁹ It further notes that

[i]rrespective of whether such practices might one day disappear altogether from that region of the world [referring to southern Africa], the Commission also took the view that a crime as universally condemned as apartheid should be defined so that the definition is applicable without any restriction as to time or place.⁵⁰

The intention of the Commission, then, was clearly forward-looking. Perhaps understanding this, the inclusion of apartheid was a sore spot for many countries. Austria raised doubts as to whether apartheid belonged in the document, as “[i]nstitutionalized racial discrimination” would be sufficient.⁵¹ The Netherlands wanted apartheid removed because it would be covered by systematic or mass violations of human rights.⁵² The UK expressed stronger disagreement when it stated that the “Commission needs fundamentally to reconsider this article in light of changed international circumstances.”⁵³ The U.S. proffers perhaps the strongest rebuke of the bunch, proclaiming in a state of unabashed honesty

⁴⁷ Shocking.

⁴⁸ A/CN.4/448, *supra* note 36, at 108, ¶ 13.

⁴⁹ A/CN.4/SER.A/1991/Add.1, *supra* note 34, at 102.

⁵⁰ *Id.* at 103.

⁵¹ A/CN.4/448, *supra* note 36, at 68, ¶ 24.

⁵² *Id.* at 87, ¶ 58.

⁵³ *Id.* at 101, ¶ 25.

not unlike that which possessed the Supreme Court in *Davis*, that the definition of apartheid “is so vague and broadly worded that it could be contrary to the Constitution of the United States and those of other countries.”⁵⁴

Somehow it is unlikely that the U.S. representatives meant that the prohibition against “legislative measures, designed to divide the population along racial lines,”⁵⁵ is contrary to the Constitution due to the Constitution’s zealous endorsement of affirmative action.⁵⁶ Rather, the comment seems to imply that the U.S. Constitution explicitly permits legislative measures that may divide the population by race, not unlike the gamut of programs the *Davis* court cites. Condemning apartheid was not, then, an easy consensus.⁵⁷

Although not directly related to colonial or neo-colonial activities, the U.S. response to Article 21, systematic or mass violations of human rights, was also telling and relevant to this paper’s analysis. Article 21 of the 1991 Draft criminalized “deportation or forcible transfer of

⁵⁴ *Id.* at 104, ¶ 13. Interestingly, the U.S. states that the definition of apartheid “contains many of the same defects that are present in the ‘crime of colonial domination.’” *Id.*

⁵⁵ A/CN.4/SER.A/1991/Add.1, *supra* note 34, at 96. I assume that the U.S. did not mean this in relation to the other subsections of the Article, namely: (a) denial to a member of a racial group the right to life and liberty of person; (b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; (c) legislative measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country; (e) exploitation of the labour of the members of a racial group; or (f) persecution of persons because they oppose apartheid. *Id.* But then again, maybe they did take issue with these prohibitions.

⁵⁶ *See, e.g.,* Regents of the University of California v. Bakke, 438 U.S. 265, 295 (1978) (“The clock of our liberties, however, cannot be turned back to 1868 It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others”); Shaw v. Reno, 509 U.S. 630, 656 (1993) (“Racial gerry-mandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire”). Also relevant, but decided a few years after the U.S. submitted its comments is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (“all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding ‘benign’ state and federal racial classifications to different standards does not square with them.”).

⁵⁷ *See also* Asad G. Kiyani, *International Crime and the Politics of Criminal Theory: Voices and conduct of exclusion*, 48 N.Y.U. J. INT’L L. & POL. 129, 138–54 (2015) (outlining the sanitation of apartheid within ICL).

population.”⁵⁸ The U.S. responded that “deportation may under many circumstances be lawful: this current formulation is thus too broad.”⁵⁹ The increase in the removal of noncitizens in the U.S. during that time period may have motivated this defensive comment.⁶⁰ I will discuss the interdependence of colonial domination and migration restrictions below, but for now I note the U.S. recognition that its ability to continue to deport “lawfully” was essential.

After the establishment of a working group, another version of the Code, and another set of government responses,⁶¹ the 1994 Draft Code set forth a gutted version of the 1991 Draft Code.⁶² The crimes within the jurisdiction of the court were to be: genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and crimes established under certain treaties.⁶³ The Commission stated that it

was guided in the choice of these in particular by the fact that three of the four crimes are singled out in the statute of the [ICTY] as crimes under general international law falling within the jurisdiction of the [ICTY].⁶⁴

These crimes were chosen because they represented a “common

⁵⁸ A/CN.4/SER.A/1991/Add.1, *supra* note 34, at 97.

⁵⁹ A/CN.4/448, *supra* note 36, at 104, ¶ 14.

⁶⁰ See Jacqueline Hagan & Scott Phillips, *Border Blunders: The Unanticipated Human and Economic Costs of the U.S. Approach to Immigration Control, 1986-2007*, 7 CRIMINOLOGY & PUB. POL’Y 83 (2008). In the 1990’s, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) increased the ability of the government to deport noncitizens. *Id.* at 83. Motivations closely tied to U.S. colonial advantage were at play in the development of immigration policy. During that period, and up to the present, enforcement was “‘hard’ on migrants but ‘soft’ on the employers who hire them.” *Id.* at 86. Humane approaches to migration would reduce the exploitability of migrant labor. See AMADA ARMENTA, PROTECT, SERVE, AND DEPORT 55 (2017).

⁶¹ For legislative history, see, U.N. Yearbook of the International Law Commission vol. II(2), Report of the International Law Commission on the work of its forty-sixth session, A/49/10 (Part 2) 19-20 ¶¶ 35-41 (1994).

⁶² *Id.* at 38.

⁶³ *Id.* The Commission had trouble with the crime of aggression, noting that there “is no treaty definition comparable to genocide . . . [but] [i]t would seem retrogressive to exclude individual criminal responsibility for aggression . . . 50 years after Nürnberg.” *Id.* at 38-39. Ultimately, the crime of aggression did not survive into the Rome Statute and was later inserted on 11 June 2010. See Rome Statute, A/CONF.183/9 (1998); amended, *inter alia*, by Resolution RC/Res.6, Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010.

⁶⁴ A/49/10, *supra* note 60, at 38.

core of agreement in the Commission.”⁶⁵ In further explaining these choices, the Commission noted that there was in fact some disagreement over listing crimes under general international law. For example, those defined as crimes against humanity would “raise questions as to why other international crimes, such as apartheid and terrorism, were not also included.”⁶⁶

In fact, some members of the Commission believed that if any crimes under general international law were to be included, apartheid must be among them. Nonetheless,

[o]n balance the Commission agreed that in the present international circumstances and given the advent of majority rule in South Africa, it was sufficient to include the International Convention on the Suppression and Punishment of the Crime of Apartheid under subparagraph (e) of article 20.⁶⁷

Again, the fact that apartheid belonged in the past meant it was not a primary subject for ICL. By 1996, even reference to the International Convention on the Suppression and Punishment of the Crime of Apartheid was removed.⁶⁸ Kiyani describes the process resulting in the removal of apartheid as a repudiation by Western states of the “politicization” of a process that is ostensibly meant to be neutral.⁶⁹ Clearly, however, Western states had their own political motives.

The logic of “neutrality” operates on two levels that are relevant to my argument. First, as has been described in this section, the process of developing ICL self-consciously adopted a baseline that itself was not neutral and created biased results. That is, states recognized their own complicity in actions that could possibly be criminalized, and thus (i) reduced the significance of these actions by inventing a narrative relegating them to the past; (ii) paraded a “neutral” baseline rooted in the existing state of international law, which is itself a result of historically

⁶⁵ *Id.*

⁶⁶ *Id.* at 40.

⁶⁷ *Id.* at 41.

⁶⁸ Kiyani, *supra* note 56, at n. 92. *See also* 2 M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 31 (2005) (reference to the Convention is removed from subsection (e)).

⁶⁹ Kiyani, *supra* note 56, at 150–54 (“This inaccurate narrative further rewrites the historical development of the law, and impugns the intellectual contributions of the non-West by implying the inferiority of a Third World that is committed to opportunistic politics, while developed states engage in the sophisticated intellectual task of ‘legal engineering.’”).

contingent processes; and, on that basis (iii) actively intervened in law-making to suit their interests.

This has allowed the second level of “neutrality” to emerge: since colonial domination is not legally a crime, our understanding of reality has shifted such that the legacy of colonialism is “neutral” and not a proper subject for ICL.⁷⁰ This is the level of “neutrality” that the next section will explore.

III. IMMIGRATION AS A SUBJECT FOR ICL

Part II argues that former colonial powers actively intervened in the development of ICL to protect their own colonial advantage from criminalization. Part III argues that migration-linked violence is mostly insulated from criminalization because of the complementary process of neutralizing structural inequality stemming from colonialism. Specifically, this section examines scholarship exposing the link between borders and colonial domination, both in terms of the establishment of borders and their present implications. Part III argues that this relationship generates the reality that when a border overlays violence, it serves as a theoretical shield against accountability. This reality, in turn, reveals the gravity of the skewed development of ICL: not only did the intervention of certain states result in a system that cannot reach past incidents of crimes against humanity (when intertwined with colonialism). It also means that *ongoing* crimes against humanity cannot be reached for the same reason.

A. Racial Borders for Colonial Domination

Colonialism required freedom of movement for Europeans, but not for those subjugated. As Lake and Reynolds stated, “In drawing the global colour line, immigration restriction became a version of racial segregation on an international scale.”⁷¹ Borders, then, were an essential technology of colonial domination, rooted in racist ideology. This is an idea that has been explored at length, and I will only offer a brief overview here.

⁷⁰ These two levels of neutrality are mutually constitutive processes and could also be understood as two symptoms of the same legal proclivity for retrenchment. That is, the law creates reality and reality creates the law in ways that maintain existing power structures. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii–xxxii (Kimberlé Crenshaw, et al. eds., 1995).

⁷¹ MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE QUESTION OF RACIAL EQUALITY 5 (2008).

The invention of race, and particularly of whiteness, was essential to the success of colonial domination. Concretely, in relation to human mobility, “[t]he struggle over free migration highlighted the contradictions inherent in political liberalism. Individual liberty and freedom of movement were heralded as universal rights, but only Europeans could exercise them.”⁷² This is because excluding nonwhites was essential to building the colonial world Europeans sought. As Lake and Reynolds explain, “[w]hite men’s countries rested on the premise that multiracial democracy was an impossibility: this was the key history lesson learnt from the great tragedy of Radical Reconstruction in the United States.”⁷³ Exclusion or subjugation, then, were essential to the colonial project, tying migration up inextricably with colonial domination.

Immigration schemes in large part served as the instrument for this end, acting to tether nonwhite peoples to certain geographical regions, defined by borders. These same restrictions acted to *facilitate* access for whites. Achiume notes that this reality is ongoing.

[B]ecause of the persisting racial demographics that distinguish the First World from the Third — demographics that are, in significant part, a product of passports, national borders, and other successful institutions that partially originated as technologies of racialized exclusion — most whites enjoy dramatically greater rights to freedom of international movement (by which I mean travel across borders) than most nonwhites. The reality is that the mortal cost of international mobility is largely a nonwhite problem.⁷⁴

Borders and the ability to cross them are not neutral. Rather, the same processes that neutralized colonial domination in the ambit of ICL

⁷² *Id.* at 26. See also Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 UC IRVINE L. REV. 359, 363 (2012) (“This tension between borders and equality is the core dilemma of liberal nationalism.”).

⁷³ LAKE & REYNOLDS, *supra* note 70, at 6. This comment adds nuance to Albright’s statement about “peaceful, multi-ethnic democracies” at the inception of the ICTY. It seems the status of the U.S. as a peaceful multi-ethnic democracy was simply spoken into existence through the erasure of the racial violence that continues to occur. At a certain point, it was no longer acceptable to outright dismiss the feasibility of such a democracy. It just had to be called something else (i.e. the opposite) without changing much of the underlying structure. Why could this be done with the U.S. and not racial or ethnic conflicts in other places? Partly, I propose as a corollary to my central argument, because violence intertwined with colonial domination is more easily neutralized.

⁷⁴ Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1530–31 (2019).

also neutralized the particular violence of restricting mobility. Borders have been excised from their initial racial purpose of the violence of a “bygone era,” (i.e. the kind that remained in the past), and mobility restrictions based on nationality have been normalized – even if these restrictions transparently impact nonwhites to an exponentially higher degree.

B. Imperial Relationships as Generator of Migration

In the context of the southern border of the U.S., although a classical colonial relationship has not existed in relation to Central America, the historical and ongoing neo-imperial relationship means that migration across that border has precisely the same stakes as outlined in the section above. Achiume asserts, for example, that “[n]eocolonial empire is not the only form of informal empire that binds nations across vast territories. U.S. informal imperial intervention in parts of the world it never formally colonized has created similar relationships to subordinated nation-states.”⁷⁵ This is especially true in the context of Central America, where U.S. policy towards the region has in large part shaped its current reality as well as produced the impetus for migration north.

The many ways that the U.S. has intervened in Northern Central America specifically have been amply documented. Politically, ostensibly to stop the spread of communism, the U.S. supported the coup of Guatemala’s democratically elected Jacobo Arbenz in 1954.⁷⁶ The U.S. supported Salvadoran forces committing human rights abuses against dissidents on the left in the 1980’s, and the Honduran military throughout the latter part of the 20th century, through the 2009 coup, and until today.⁷⁷ This neo-imperial relationship has produced a “colonial” advantage very similar to that produced via more traditional colonial relationships. Neoliberal economic policies both push people living in Northern Central

⁷⁵ E. Tendayi Achiume, *The Postcolonial Case for Rethinking Borders*, DISSENT MAGAZINE (July 27, 2019), <https://www.dissentmagazine.org/article/the-postcolonial-case-for-rethinking-borders> (last visited Nov. 12, 2019). Even in relation to states with who gained independence in the 20th century, formal decolonization merely “shifted colonial empire to neocolonial empire.” Achiume, *supra* note 73, at 1540.

⁷⁶ For a brief overview of U.S. intervention in the Northern Triangle, and particularly its relation to migration see Nubia Batista Willman, *Reaping Whirlwind: How U.S. Interventionist Foreign Policies Created Our Immigration Crisis*, 23 PUB. INT. L. REP. 36, 40–42 (2017).

⁷⁷ *Id.*

America to migrate,⁷⁸ and on the other end, “capture migrants as a vulnerable, cheap, super-exploitable labor pool.”⁷⁹ Humane avenues for migration would eviscerate this advantage.

Thus, U.S. policies excluding Central American asylum seekers is not a neutral accident, rather it is a means of preserving its own neo-imperial advantage. As Nevins points out, “the role played by the United States in shaping the causes of this migration raises ethical questions about its responsibility toward those now fleeing from the ravages its policies have helped to produce.”⁸⁰ However, if what Achiume writes is also true – and I am inclined to believe that it is – and migration can act as decolonization, then the U.S. has an ongoing stake in exclusion to preserve its own position.

C. U.S. – Mexico Border as a Site of Crimes Against Humanity

*“He said he was unaware of any incidents in which an asylum seeker was harmed under Remain in Mexico, but he said the U.S. didn’t track what happened to migrants once they were returned to Mexico. ‘That’s up to Mexico,’ he said.”*⁸¹

This foundation brings us closer to understanding why the violence currently being carried out at the U.S. southern border in the context of the Remain in Mexico policy is so theoretically resistant to the ICL framework. The existence of borders and nationality help neutralize this violence, although the process that accomplished this was in no way an accident of history.

For many observers, the atrocities being carried out are not so distinct from other crimes that have been prosecuted by international tribunals. For example, the Remain in Mexico policy has resulted in the separation of families, with adults sent to await hearings in Mexico and their minor children detained in the U.S.⁸² Ben Ferencz, the last surviving

⁷⁸ See, e.g., Hairapetian, *supra* note 13.

⁷⁹ Grace Chang, Precious Cargo, 52 U.C.D. L. REV. 81, 87 (2018).

⁸⁰ Joseph Nevins, *How US policy in Honduras set the stage for today’s migration*, THE CONVERSATION (Oct. 25, 2018, 7:19 AM), <https://theconversation.com/how-us-policy-in-honduras-set-the-stage-for-todays-migration-65935>.

⁸¹ Molly O’Toole, *Trump administration appears to violate law in forcing asylum seekers back to Mexico, official warn*, L.A. TIMES (Aug. 28, 2019), <https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases>.

⁸² Michael Garcia Bochenek, *US: Family Separation Harming Children, Families*, HUMAN RIGHTS WATCH (July 11, 2019, 3:00 AM),

member of the prosecuting team at Nuremberg has called the family separation policy a crime against humanity.⁸³ Jewish World Watch has likewise drawn this link:

[W]e feel there is evidence suggesting a governmental plan is in place to deter future migration specifically through child separation and also through prolonged child detention in deplorable, inhumane conditions. It is also clear that the “othering” or systematic dehumanization of detained migrants is a pervasive problem within border facilities. This, of course, is the kernel of most mass atrocity situations — separating “us” from “them.”⁸⁴

Others have pointed out how the policies are in contravention of other bodies of international law, for example refugee law and international humanitarian law.⁸⁵ Suggesting that these atrocities should fall within the ambit of ICL is not so radical.

Nonetheless, the crisis is still somehow theoretically impervious to this analysis. The recent decision of pre-trial chamber of the ICC regarding the situation in Myanmar offers an analytical guide. In that case, the prosecutor submitted that deportation, other inhumane acts, and persecution on grounds of ethnicity and/or religion are the primary violations which come within the competence of the ICC because at least one element occurred in Bangladesh, a party to the Rome Statute.⁸⁶ Ultimately, the reasoning underlying the ICC Decision, particularly in relation to deportation, could easily apply to the U.S.-Mexico border and in particular the Migration Protection Protocols (“MPP” or “Remain in

<https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families#>.

⁸³ Mythili Sampathkumar, *Last surviving prosecutor at Nuremberg trials says Trump’s family separation policy is ‘crime against humanity,’* THE INDEPENDENT (Aug. 9, 2018), <https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-ben-ferencz-family-separation-migrants-un-a8485606.html> (last visited Nov. 22, 2019).

⁸⁴ Ann Strimov Durbin, *Is the U.S. border crisis a mass atrocity?*, JEWISH WORLD WATCH: BLOG (Aug. 28, 2019, 12:12 PM), <https://www.jww.org/blog/is-us-border-crisis-a-mass-atrocity/>.

⁸⁵ Charli Carpetner, *Trump’s Asylum Policies – and the Troops Who Enforce Them – Are Breaking the Law*, FOREIGN POLICY (Aug. 7, 2019, 9:03 AM), <https://foreignpolicy.com/2019/08/07/trumps-asylum-policies-and-the-troops-who-enforce-them-are-breaking-the-law/>.

⁸⁶ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶¶ 94, 95 (Nov. 14, 2019), [hereinafter ICC Decision].

Mexico” policy). However, it is unlikely that the reasoning would be so translated. Concretely, the U.S.-Mexico border surgically bifurcates the crime of deportation to wash American hands of legal responsibility.

The ICC decision regarding Myanmar directly addresses deportation as a crime against humanity. The decision considers a variety of factors in reaching a conclusion to authorize an investigation into the situation in Myanmar and alleged crimes committed against the Rohingya therein. For example, the government of Myanmar allegedly committed a series of coercive acts that forced Rohingya to escape to Bangladesh, including killings, arbitrary arrests, sexual violence, and the destruction of homes.⁸⁷ As a result of this displacement, many families have been separated, speaking to the gravity of the situation.⁸⁸ Rohingya and Muslims were painted as a threat to racial and religious homogeneity.⁸⁹ Many Rohingya expressed a wish to return, but also concerns about safety and citizenship rights if they were to do so.⁹⁰ Ultimately, the Chamber found that the coercive acts towards the Rohingya forced them to flee, amounting to deportation as a crime against humanity.⁹¹

The “Remain in Mexico” policy, on the other hand, which began in January 2019, has been implemented in seven cities,⁹² and remains in place despite ongoing litigation.⁹³ It is meant to “restore a safe and orderly immigration process.”⁹⁴ It “allow[s] DHS [Department of Homeland Security] to more effectively assist legitimate asylum-seekers and individuals fleeing persecution, as migrants with non-meritorious or even fraudulent claims will no longer have an incentive for making the journey.”⁹⁵ Effective assistance seems to be a paradoxical term of art for the DHS; MPP in fact forces individuals from countries other than Mexico who are seeking asylum in the U.S. to remain in Mexico, often without

⁸⁷ *Id.* at ¶¶ 28-32.

⁸⁸ *Id.* at ¶ 36.

⁸⁹ *Id.* at ¶ 69.

⁹⁰ *Id.* at ¶ 107.

⁹¹ *Id.* at ¶ 108.

⁹² Victoria Macchi, *US Adds Sixth City to Controversial ‘Remain in Mexico’ Program*, VOICE OF AMERICA NEWS (Oct. 29, 2019, 7:39 PM), <https://www.voanews.com/usa/immigration/us-adds-sixth-city-controversial-remain-mexico-program>; *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUMAN RIGHTS WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>.

⁹³ *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432 (U.S. Mar. 11, 2020).

⁹⁴ *Migrant Protection Protocols*, Department of Homeland Security (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁹⁵ *Id.*

due process,⁹⁶ for the duration of their U.S. immigration proceedings. This makes it more difficult for them to find U.S. immigration lawyers,⁹⁷ to say nothing of increased risks to their personal safety.⁹⁸

The reality of this policy is that migrants are subjected to inhumane conditions in Mexico as they wait to file for asylum, recalling the “coercive acts” cited in the ICC Decision. In Matamoros, Mexico, for example, the “Remain in Mexico” policy has resulted in the largest refugee camp on the U.S. border.⁹⁹ The Los Angeles Times reported that kidnappers seeking to extort migrants and their families for money are waiting outside Mexico’s ports of entry for U.S. returns.¹⁰⁰ Because of squalid and dangerous conditions, many parents are sending their children across the border alone because unaccompanied children are not subject to MPP.¹⁰¹ Due to violence in border towns, many are engaging in “voluntary return,” whereby migrants receive a reduced-rate ride back to their home countries under a U.N. program.¹⁰² According to an asylum

⁹⁶ O’Toole, *supra* note 79. Officers are reportedly not even asking migrants whether they fear returning to Mexico, and only take this danger into consideration if migrants affirmatively express a fear of returning. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring) (“One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer.”).

⁹⁷ Monica Ortiz Uribe, *Trump Administration’s ‘Remain In Mexico’ Program Tangles Legal Process*, NPR (May 9, 2019, 2:59 AM), <https://www.npr.org/2019/05/09/721755716/trump-administrations-remain-in-mexico-program-tangles-legal-process> (“We’re literally having to go across the border to be able to provide intakes, consultations with people and see what we can do”).

⁹⁸ Human Rights First has identified 340 public reports of rape, kidnapping, torture, and other violent attacks against asylum seekers subjected to MPP. *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUMAN RIGHTS FIRST (Oct. 1, 2019), <https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy>; see also Patrick McDonnell, *Pastor’s kidnapping underscores threat to migrants returned to Mexican border towns*, LA TIMES (Sept. 2, 2019), <https://www.latimes.com/world-nation/story/2019-09-01/kidnapping-of-pastor-in-mexican-border-town-dramatizes-threats-to-migrants>.

⁹⁹ Kevin Sieff, *In squalid Mexico tent city, asylum seekers are growing so desperate they’re sending their children over the border alone*, THE WASHINGTON POST (Nov. 22, 2019), https://www.washingtonpost.com/world/the_americas/in-squalid-mexico-tent-city-asylum-seekers-are-growing-so-desperate-theyre-sending-their-children-over-the-border-alone/2019/11/22/9e5044ec-0c92-11ea-8054-289aef6e38a3_story.html. “Refugee” here is not used in its legal sense.

¹⁰⁰ O’Toole, *supra* note 79.

¹⁰¹ Sieff, *supra* note 96. See also Migrant Protection Protocols, *supra* note 91.

¹⁰² O’Toole, *supra* note 79. See also Mica Rosenberg, et al., *Thousands of Central*

officer's anonymous manifesto, "MPP is clearly designated to further this administration's racist agenda of keeping [Latinx] populations from entering the United States."¹⁰³ The officer cites the "half-hazard implementation" that seems to specifically target Central American countries.¹⁰⁴

In both the U.S.'s MPP and Myanmar's Rohingya deportation, state policies violently push racially marginalized populations outside its borders, resulting in family separations and other violations of human rights. But there is one crucial difference: the U.S. has been able to strategically deploy to the border to protect itself from responsibility. In the first step of the process, it uses immigration law¹⁰⁵ to push individuals back across the border. The second step is not an explicit part of American policy but nonetheless occurs naturally and as planned: coercive acts push individuals to "voluntarily return" on the other side of the border. Whereas the *Tatmadaw* and other Myanmar security forces committed horrific atrocities outright to secure the removal of the Rohingya, the U.S. was able to hide under the shroud of national sovereignty, using technologies of racial exclusion (i.e. borders), precisely for the purposes for which they were conceived. By dividing the deportation in two, the U.S. can fall back on nationality and borders, which have been neutralized of this racial purpose to justify MPP, while in practice achieving the same results as the deportation of the Rohingya.¹⁰⁶ It benefits from the culture of impunity which surrounds imperial relationships.

The skewed development of ICL, then, protects perpetrators who commit crimes closely tied to neo-colonial or imperial relationships. The

American migrants take free rides home courtesy of U.S. government, REUTERS (Aug. 21, 2019, 3:21 AM), <https://www.reuters.com/article/us-usa-immigration-returns-idUSKCN1VBOZJ>.

¹⁰³ *Read the email: Former asylum officer blasts Trump's 'Remain in Mexico' policy*, THE WASHINGTON POST (Nov. 13, 2019), <https://www.washingtonpost.com/context/read-the-email-former-asylum-officer-blasts-trump-s-remain-in-mexico-policy/bd0e07ea-2b91-4d5b-9bc1-4fb01500359a/>.

¹⁰⁴ *Id.*

¹⁰⁵ To be clear, although a stay of an injunction of MPP issued by a district court has been granted pending appeal, the legality of MPP is far from settled. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 513 (9th Cir. 2019) ("The Government's arguments in support of the MPP are not only unprecedented. They are based on an unnatural and forced—indeed, impossible—reading of the statutory text.")

¹⁰⁶ Note that the crime of deportation depends not on the lawful residence of the victims in the state from which they are deported, but simply lawful presence, which asylum seekers possess under international law. *See* ICC Decision, ¶ 99.

Pre-Trial Chamber of the ICC to a certain extent made this clear in its decision regarding an investigation into Afghanistan. It stated:

[T]he Court is not meant — or equipped — to address any and all scenarios where the most serious international crimes might have been committed; therefore, focusing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success.¹⁰⁷

The ICC has already shown that when certain states choose not to cooperate,¹⁰⁸ ICL may choose to simply look the other way.¹⁰⁹ However, the Remain in Mexico policy shows that outright non-cooperation is not the only way for states to shield themselves from responsibility. Rather, ICL seems to have an insidious built-in defence mechanism dating back to its inception, to shield states' colonial or imperial advantage.

CONCLUSION

On many peoples' minds is whether U.S. migrant detention centers¹¹⁰ should be compared to concentration camps.¹¹¹ As expected, no

¹⁰⁷ *Situation in the Islamic Republic of Afghanistan*, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), ¶ 90, [hereinafter "ICC Decision on Afghanistan"].

¹⁰⁸ ICC Decision on Afghanistan, ¶ 94.

¹⁰⁹ Ultimately the Appeals Chamber decided to authorize the investigation. *Situation in the Islamic Republic of Afghanistan*, Case No. ICC-02/17 OA4, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ¶79 (5 March 2020). Some commentators disputed that the initial Afghanistan decision was impacted by U.S. pressure. Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigation?* JUST SECURITY (Apr. 12, 2019), <https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/>.

Nonetheless, once the investigation was authorized, the U.S. imposed sanctions on individuals "directly engaged in the ICC's efforts." Congressional Research Service, *International Criminal Court: U.S. Sanctions in Response to Investigation of War Crimes in Afghanistan* (June 19, 2020), <https://fas.org/sgp/crs/row/IN11428.pdf>.

¹¹⁰ The focus was mostly on CBP "processing and detention centers." Both these and ICE "processing centers" are more accurately called prisons.

¹¹¹ See, e.g., Lauren Duca, *If calling migrant detention centres 'concentration camps' makes you that upset, ask yourself why*, THE INDEPENDENT (July 3, 2019), <https://www.independent.co.uk/voices/aoc-migrant-detention-centers-trump-administration-holocaust-concentration-camps-a8986806.html>; Alyssa Pry, *Holocaust Survivor: Yes, the Border Detention Centers Are Like Concentration Camps*, THE DAILY BEAST (July 8, 2019), <https://www.thedailybeast.com/holocaust-survivor-yes-the-border-detention-centers-are-like-concentration-camps>; Adam Serwer, *A Crime by Any Other Name*, THE ATLANTIC (July 3, 2019),

consensus was reached; however, it did open a window for understanding immigration-related violence in the context of international criminal law. Importantly, the comparison managed to transcend the basic problem outlined in this paper – that the invention of nationality and borders often hides international crimes.

The gap between law and justice is often vast: lawyers try to find the places where the disconnect between legal fiction and the lived reality of our clients is the most extreme,¹¹² as those can be ideal entrance points for advocacy.¹¹³ I argue that the similarities between the forced deportation of the Rohingya and the forced deportation of individuals seeking asylum at the southern border of the U.S. present one of these breaking points. It is worth unearthing the dual nature of retrenchment – how racial power shapes the law and how the law retrenches that power – to understand why certain acts of violence are immune to ICL accountability. Notwithstanding the significant practical obstacles to subjecting U.S. actors to international criminal law, there is immense value in this framing, both in terms of advocating for more just and humane immigration policies and identifying the gaps within ICL that must be addressed.

<https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239/> (last visited Nov. 27, 2019).

¹¹² E.g. “The declarations of class members also disclose that they are detained in what they call ‘hieleras,’ or ‘iceboxes,’ or in cages, under appalling, overcrowded, and unsanitary conditions which has caused a health crisis for class members and the deaths of several children,” the lawsuit alleges. “Class member children are held for weeks in deplorable conditions, without access to soap, clean water, showers, clean clothing, toilets, toothbrushes, adequate nutrition or adequate sleep.” Cindy Carcamo, *Lawsuit accuses U.S. government of holding migrant children in ‘deplorable’ conditions*, L.A. TIMES (June 26, 2019), <https://www.latimes.com/local/california/la-me-lawsuit-children-immigration-detention-20190626-story.html>.

¹¹³ I attribute both the substance and its expression to Ahilan Arulanantham, Senior Counsel at ACLU of Southern California, who explained the advocacy of the Immigrants’ Rights Project in this way.