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OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

The Ratification of the Rome Statute: The Next Step in Establishing an American Equalitarian Legal Order?

by Ian L. Courts[*]

ABSTRACT: For much of the 19th and 20th centuries, America has grappled with making progress in race relations. Apartheid is generally defined as systemic laws and practices that target one race against another and discriminate between races. It is my theory that the ratification of the Rome Statute, specifically art. 7(j), may be the next step in establishing what former civil rights pioneer and American jurist William Henry Hastie Jr. penned "an equalitarian legal order". In this piece, I will discuss what Hastie's "equalitarian legal order" is, and why the American legal system needs an equalitarian legal order, and how art. 7(j) of the Rome Statute's crimes against humanity's anti-apartheid provisions may be the next step in continuing Hastie's aforestated legal order. In addition, I will highlight the American legal and political hurdles that inhibit the ratification of the Rome Statute in the United States. Lastly, I will discuss how international customary law compels the United States judiciary to adopt the Rome Statute's antiapartheid provisions into American jurisprudence.

KEYWORDS: Apartheid; Equalitarian Legal Order; International Law; Rome Statute; U.S. Jurisprudence.

I. Introduction

For much of the 19th and 20th centuries, America has grappled with making progress in race relations. America's racial struggle has manifested itself in the Atlantic Slave Trade, Antebellum Slavery, Jim Crow, and the 20th Century's civil rights era. America has tried several times, with varying measures of success, to remedy its racial past. The Executive Branch, notably through President Abraham Lincoln's Emancipation Proclamation[1] that freed Black Americans in the rebellious Confederate States, and President Lyndon Banes Johnson's War on American poverty,[2] has tried to push America toward greater racial equality. Additionally, Congress, through the passage of the 19th Century's Civil rights Amendment, notably the 13th Amendment,[3] which outlawed slavery except as a sanction for a crime, and the 14th Amendment,[4] which granted Black Americans citizenship and prohibited states from being able to pass discriminatory laws based on race, and the 15th Amendment[5] which granted Black

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[1] US, 1791-1991 Record Group 11, Emancipation Proclamation (Jan. 1, 1863).

[2] *See* PRESIDENTIAL RECORDINGS OF LYNDON B. JOHNSON DIGITAL EDITION (David G. Coleman, Kent B. Germany, Guian A. McKee, Marc J. Selverstone eds., 2010); *See also* Robert Rector, Rachel Sheffield, *The War on Poverty After 50 Years*, THE HERITAGE FOUNDATION (Sept. 15, 2014), https://www.heritage.org/poverty-and-inequality/report/the-war-poverty-after-50-years.

[3] US, Constitution (Mar. 4, 1789), amend. XIII.

[4] *Id.*

[5] *Id.*

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Americans the right to vote, to the Voting Rights Act of 1965[6] that repealed many states' restrictive voting laws, and the Civil Rights Act of 1964 that authorized Congress to combat racial discrimination in privately owned public spaces through its Interstate Commerce Clause powers;[7] all these legislative measures has tried to move the country toward greater racial equality. Similarly, the Supreme Court, through *Brown v. Topeka Co Board of Education* (1954),[8] which banned racial discrimination in public education, and *Heart of Atlanta Motel, Inc v. U.S.* (1964),[9] which allowed Congress to enforce the Civil Rights Act of 1964, thus making it illegal for private companies to discriminate in its public spaces and businesses, and *Loving v. Virginia,* (1967)[10] which overturned anti-miscegenation laws in the country thus allowing citizens to marry whom they pleased regardless of racial identity; has tried to push the nation forward regarding race relations.

However, despite the substantial progress, these remedies have made in interpersonal racial relationships, they have struggled to achieve racial equity. The American racial equity gap is prominent, especially in the criminal justice system. Black Americans are disproportionately represented in American prisons. Moreover, young Black American men are more likely to have a negative experience with law enforcement than White American men.[11] As was demonstrated on a massive scale in 2020 with the murder of George Floyd, Americans in the 21st century have reckoned that the American criminal justice system is broken, and the preceding racial remedies have not dealt effectively with the issue of racial inequality.

All may not be lost; America's answer to its racial equity gap within its legal system may come through international statutory law, specifically art. 7(j) of the Rome Statute of the International Criminal Court. In detail within this piece, I will discuss how the Rome Statute was drafted and ratified to combat international war crimes, genocide, and crimes against humanity.[12] One of the statute's enumerated crimes against humanity is apartheid.[13] Apartheid is generally defined as systemic laws and practices that target one race against another and discriminate between races. It is my theory that the ratification of the Rome Statute, specifically art. 7(j), may be the next step in establishing what former civil rights pioneer and American jurist William Henry Hastie Jr. penned "an equalitarian legal order".

In this piece, I will discuss what Hastie's "equalitarian legal order" is, and why the American legal system needs an equalitarian legal order, and how art. 7(j) of the Rome Statute's crimes against humanity's anti-apartheid provisions may be the next step in continuing Hastie's aforestated legal order. In addition, I will highlight the American legal and political hurdles that inhibit the ratification of the Rome Statute in the United States. Lastly, I will discuss how international customary law compels the United States judiciary to adopt the Rome Statute's antiapartheid provisions into American jurisprudence.

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[6] US, Pub. L. 89-110, 79 Stat. 437, Voting Rights Act of 1965 (Aug. 6, 1965).
[7] US, Pub. L. 88-352, 78 Stat. 241, Civil Rights Act of 1964 (Jul. 2, 1964). *See also generally*, U.S. Constitution (Mar. 4, 1789), art. 1, sec. 8, cl. 3.a.
[8] U.S. Supreme Court, Brown v. Topeka Co Board of Education, 347 U.S. 483, Appeal Chamber, Judgment (May 17, 1954).
[9] U.S. Supreme Court, Heart of Atlanta Motel Inc. v. U.S., 379 U.S. 241, Appeal Chamber, Judgment (Dec. 14, 1964).
[10] U.S. Supreme Court, Loving v. Virginia, 388 U.S. 1, Appeal Chamber, Judgment (June 12, 1967).
[11] LeShae Henderson, Elizabeth Hinton, Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF 1 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.
[12] ICC, Rome Statute of the International Criminal Court (July 1, 2002).
[13] *Id*.

II. What Is an "Equalitarian Legal Order", and Why Do We Need It?

Judge William Hastie, a Black American civil rights pioneer, and the first Black federal jurist penned the phrase "equalitarian legal order" in his 1973 article.[14] In the article, he describes the advocacy of Thurgood Marshall, Charles Hamilton Houston, Constance Baker Motley, and many other early attorneys in fighting the American Jim Crow System. Hastie highlights their triumphs and obstacles in obtaining an "equalitarian legal order". Hastie stops short of providing an explicit definition of what an equalitarian legal order is, but from his writing, Thurgood Marshall's judicial philosophy, and Charles Hamilton Houston's teaching I have compiled a workable definition that I will describe later in this section.

Justice Thurgood Marshall's one of the leading Black American jurists known for his lifework in advocating for equality under the law developed an important philosophy concerning "equalitarianism". Justice Marshall's legal philosophy was firmly rooted in legal positivism.[15] Legal Positivism is defined as a philosophy that recognizes law as a social construct, meaning that society defines and determines what "the law" is.[16] Marshall's form of legal positivism relies on the belief that law can be changed to be more equitable by a society that believes in moral and social equality of all persons, regardless of race. Marshall also believed that not only does society change the law, but law itself changes over time the moral attitudes of its adherents.[17] Marshall's positivist attitude is clearly depicted in his crowning achievements *Brown v. Board of Topeka Education*; and *Furman v. Georgia*.[18]

Mr. Charles Hamilton Houston was a prominent legal educator, and the father of American civil rights advocacy in the 20th century.[19] Mr. Houston taught Thurgood Marshall and worked closely with Judge Hastie.[20] Houston legal philosophy was rooted in a hybrid of natural law and legal positivism. Houston believed that all persons are endowed with inalienable rights given by God, but also in the ability of Black lawyers to socially engineer a more equitable society for Black Americans.[21]

Based on these founding fathers of Black Equalitarian Thought, I have framed a definition of an "equalitarian legal order" as a system of laws that recognizes the inalienable right of the equality for all persons, and the legitimacy of all laws that further and produce equitable societal outcomes, regardless of race. Furthermore, a legal system is anti-equalitarian when it does not recognize the natural right of equality for all men, and/ or creates legal outcomes that discriminate between persons based on race. I argue that in a global setting, "equalitarianism" is rooted in the natural law idea that all persons are endowed by God with inalienable rights.[22] Additionally, under a positivist view the law should reflect common practices *unless* those practices have a racially discriminatory impact. Rights are embedded in every individual

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[14] William H. Hastie, *Toward an Equalitarian Legal Order*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 407 BLACKS AND THE LAW 18 (1973), at 18-31.
[15] D.A. Jeremy Telman, *The African-American Interest in Higher Law in the Supreme Court: Justices Marshall and Thomas*, 31(1) TEMP. INT'L & COMP. L.J. 289 (2017) at 290.
[16] Reginald Parker, *Legal Positivism*, 32(1) NOTRE DAME LAW 31 (1956).
[17] Telman, *supra* note 15.
[18] U.S. Supreme Court, Furman v. Georgia, 408 U.S. 238, Appeal Chamber, Judgment (June 29, 1972).
[19] GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).
[20] Ian L. Courts , *Justice in Black: William Hastie and Thurgood Marshall's Fight for an Equalitarian Legal Order*, 43(1) NC CENT. L. REV. 77 (2020), at 77.
[21] Hamilton Houston, *Charles Hamilton Houston*, 27(3) NEW ENGLAND LAW REVIEW 595 (1993), at 595.
[22] James A.C. Grant, *The Natural Law Background of Due Process*, 31(1) COLUM. L. REV 56 (1931).

regardless of race; and the law should protect those embedded rights; and when a law or legal system's effects either contradicts or restricts the inalienable rights *and* causes unjustifiable distinctions the law is immoral and illegitimate.

A. Why Do We Need an Equalitarian Legal Order?

America has made much progress in terms of the legal recognition of Black Americans since William Hastie's early civil rights advocacy. Notedly, Black Americans largely exercise their right to vote, are considered an important voting block, and the rate of Black American representation in political offices has increased.[23] However, despite this progress in the legal and political treatment of Black Americans within the latter 20th and 21st centuries−there are still significant disparities in the American system concerning Black American rights and wellbeing. These areas of disparities are salient throughout the Black American experience, but I will be focusing on three areas, the disproportionate impact of the American arrest and incarceration rates on Black Americans, the disparity in economic standing between Black Americans and White Americans, and the lack of resources in public education especially within urban school districts with majority Black American students. Each of these modern disparities are vestiges of American Apartheid, and cannot easily be remedied solely by American institutions especially during a time where Critical Race theory is a political byword, our governmental institutions polarized, and racial consciousness is derisively described as "woke". America's Apartheid vestiges especially concerning their impact on Black Americans may be remedied by international law, specifically the ratification of the Rome Statute's antiapartheid provisions.

According to a study published by the University of California Davis Law Review, "Blacks are arrested for marijuana at a higher rate […] while making up around 13% of the U.S. population, they account for 24% of marijuana arrests".[24] The study concludes that "people of color disproportionately arrested for drugs; Such disparities are likely due to the types of drugs targeted by law enforcement and not due to any racial group's greater involvement in the drug trade".[25] Moreover, through the lens of race, many people's assumptions about the American justice system are formed, shaped, and cemented. Because of the American justice system's disproportionate impact on Black Americans, as reflected in the countries racial incarceration and arrest rates, it is a vestige of American apartheid in need of a global remedy. Similarly, America's Apartheid vestiges impact the economic state of Black Americans. Black Americans are more likely than White Americans to live at or below the poverty rate.[26] Furthermore, Black American wealth is declining at a fast pace compared to previous generations.[27] Black American home ownership has significantly declined, which is largely due

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[23] Sara Atske, Anna Brown, *Black Americans Have Made Gains in U.S. Political Leadership, But Gaps Remain*, PEW RESEARCH CENTRE, RACE AND ETHNICITY TOPICS (Jan. 22, 2021), https://www.pewresearch.org/fact-tank/2021/01/22/black-americans-have-made-gains-in-u-s-political-leadership-but-gaps-remain/.

[24] Joseph Kennedy, Issac Unah, Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race, and Drug Type in Drug Arrests*, 52(1) U.C. DAVIS L. REV. 729 (2018), at 730.

[25] *Id*.

[26] US, Poverty Statistics, Federal Safety Net (2018): "While the poverty rate for the population as a whole is 11.4% the rate varies greatly by race. Blacks have the highest poverty rate at 19.5% and non-Hispanic whites the lowest at 8.2%. The Poverty rate for Blacks and Hispanics is more than double that of non-Hispanic Whites".

[27] Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie, Emanuel Nieves, *The Road to Zero Wealth: How The Racial Wealth Divide Is Hollowing Out America's Middle Class*, PROSPERITYNOW.ORG (Sept. 2017),

to shrinking wages and decreasing wealth.[28] As a Black American one is more likely to be denied access to public grants, and loans to purchase a home or fund a business-both being avenues to build generational wealth.[29] Addressing economic inequity between Black Americans and White Americans, and the lack of American political appetite to address the disparity issue, requires us to examine the potential that international law provides in remedying America's apartheid remnants.

Accordingly, the same disparities exist within America's public school systems within its urban, predominantly Black American student areas. Schools with predominantly Black American students struggle for funding and access to quality education materials.[30] Additionally, standardized test scores among Black American students remain low compared to White American students. Further, these racial disparities are demonstrated in high school graduation rates being significantly lower for Black American men compared to White American male students.[31] Educational access and quality are major contributions to economic success, and avoidance of criminal justice system entanglement, however in both access and quality Black American students suffer. America's educational system's racial disparities are another vestige of American apartheid in need of a potential international law remedy.

As highlighted above America in many instances has moved to a largely post-racial society; yet it is still impacted by the vestiges of its apartheid past, and Black Americans feel the brunt force of America's apartheid remnants. For Hastie, Marshall, and Houston's "equalitarian" legal society to become an objective reality within America, we need to examine the potential opportunity international law, namely, the Rome Statute's art. 7 Antiapartheid provisions, may have on remedying the vestiges of American apartheid.

III. The Rome Statute's & International Law's "Equalitarian" Provisions

In this part of the discussion, I will examine what I coined the Rome Statute of the International Criminal Court's "equalitarian" provisions, specifically art. 7. Additionally, I will discuss the broader global scope of apartheid as interpreted under international law. The Rome Statute defines the crime of apartheid as

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https://prosperitynow.org/resources/road-zero-wealth. The report found that the median wealth of black Americans will fall to zero by 2053 if current trends continue.

[28] Troy Green, *U.S. Homeownership Rates Experiences Largest Annual Increase on Record, Though Black Homeownership Remains Lower than a Decade Ago*, NATIONAL ASSOCIATION OF RELATORS (Feb. 23, 2022), https://www.nar.realtor/newsroom/u-s-homeownership-rate-experiences-largest-annual-increase-on-record-though-black-homeownership-remains-lower-than-decade-ago: "Though, the homeownership rate for Black Americans (43.4%) is lower than in 2010 (44.2%) and nearly 30 percentage points less than White Americans (72.1%)".

[29] Jefferey Mckinney, *New Report: Black Americans 84% More Likely to Be Denied a Mortgage than Their White Counterparts, Black Enterprise*, BLACK ENTERPRISE (Jan. 16, 2022), https://www.blackenterprise.com/new-report-black-americans-84-more-likely-to-be-denied-a-mortgage-than-their-white-counterparts/.

[30] JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2006).

[31] Schott Foundation for Public Education, http://blackboysreport.org/: "Only 52 percent of Black males and 58 percent of Latino males who graduated in 2010 received high school diplomas compared to 78 percent of their White male counterparts".

> inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.[32]

The crime of apartheid is classified as a crime against humanity, a collection of actions that the drafters of the statute deem serious violations of international order. I find it important to note, that I am not arguing that the United States is presently committing apartheid "attacks" or actions as defined under the Rome Statute but that its prior commission under Antebellum and later Jim Crow, have created systemic disparities between Black Americans and White Americans, effecting Black American criminal justice, economic wealth, and educational access thus resulting in vestiges or remnants of apartheid.

The Rome Statute's inclusion of the crime of apartheid is *in part* based on the global community's response to South African apartheid, and the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). Both the South African model, and ICSPCA's definition of apartheid are important to understanding why apartheid was included as an explicit crime against humanity, and why it is salient to my argument that the Rome Statue's antiapartheid provisions could be the next step in remedying American apartheid vestiges.

When the term "apartheid" is mentioned, many today think of 20th century South Africa under the National Party's regime. South Africa's apartheid system is the most well-known and studied case on the administration of the crime of apartheid. Moreover, the legacy of South Africa's apartheid regime served as the catalyst of the United Nation's International Convention on the Suppression and Punishment of Apartheid in 1973.[33] This discussion will not extensively discuss South African apartheid because of the voluminous research and study on South Africa's apartheid regime.

In the 20th Century, South Africa was a nation divided by class and race eerily similar to the United States under Antebellum and Jim Crow. South Africa's apartheid system divided persons on race to specific geographic zones, prohibited cross-racial marriages, and banned cross-racial public gatherings.[34] South Africa's apartheid regime culminated thousands of South African civilian deaths. Additionally, South African apartheid created a generation of societal and economic disparities among its Black and White civilians.[35] The global community, including the United States, largely condemned South African apartheid and worked to remove the South African apartheid regime.[36] The legacy of South African apartheid has fueled Black American critical race theory, and the Rome Statute's inclusion of the crime of apartheid as a crime against humanity. Moreover, South Africa's apartheid and subsequent reconstruction serves as an example of the potential the Rome Statute's antiapartheid provisions can play in mitigating and remedying American apartheid vestiges specifically concerning the modern social and economic state of Black Americans.

Accordingly, The ICSPCA's existence was a global response to South African apartheid, moreover, the drafting of the Apartheid Convention by the United Nations General Assembly caused much debate specifically concerning its scope. Some in the General Assembly viewed

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[32] ICC, Rome Statute of the International Criminal Court (Jul. 1, 2002), art. 7(1)(j)(h).
[33] Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8(1) TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 1 (1994), at 11.
[34] Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71(1) THE YALE LAW JOURNAL 1 (1961).
[35] PUMLA GOBODO-MADIKIZELA. A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN WOMAN CONFRONTS THE LEGACY OF APARTHEID (2004).
[36] Gernot Köhler, *Global apartheid*, 4(2) ALTERNATIVES 263 (1978).

the ICSPCA as specifically limited to responding to South African apartheid, while others viewed the ICSPCA as a global condemnation of apartheid activity, including racial discrimination among any state.[37] The ICSPCA defined apartheid as "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination".[38] Additionally, the ICSPCA further defines "inhuman acts" as those that "[are] committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons systemically oppressing them".[39] Further, the ICSPCA listed acts that would fall under the Convention's apartheid definition such as:

Inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.[40]

The ICSPCA's apartheid definition could be reasonably expanded to include vestiges of American Apartheid including this discussion's focal areas of the overincarceration and arrest of Black Americans, dwindling Black American wealth, and lack of quality in Black American education, and educational access.

However, the Rome Statute's antiapartheid provisions do not explicitly address disparate impacts, or vestiges of apartheid systems but the ICSPCA, which the Rome Statute's apartheid provision were based upon, provide a salient international legal greenlight to the potential of bringing apartheid-vestige litigation under the framework that a state's prior apartheid actions, have lasting systemic effects or "attacks" on the targeted civilian groups and their descendants who endured the systemic oppression. The modern state of Black Americans is a direct result of the impact and a vestige of America's Antebellum and Jim Crow−Apartheid system. Moreover, Black Americans aside from the Civil Rights Amendments and Voting Rights acts of the late 19th and mid-20th centuries have largely not been compensated or remedied for the impact of America's *de jure* and *de facto* apartheid. The International Criminal Court has not produced any significant case law concerning a modern application of the Rome Statute's apartheid provisions.[41] This lack of international jurisprudence serves as an opportunity for Black Americans to develop international jurisprudence to expand the Rome Statute's apartheid provisions to include systemic impact of a state's prior apartheid actions. Furthermore, because the United States, nor any of its domestic states, has not answered in a court of law for its Antebellum slavery, or Jim Crow-apartheid, the ratification of the Rome Statute could open up both domestic and international forums for cases concerning the vestiges of American apartheid. Accordingly, Black Americans' standing to bring apartheid-vestige suits rests on customary international law evidenced by the global community's response to South African apartheid, and subsequent creation of the International Convention on the Suppression and Prevention of the Crime of Apartheid, condemns apartheid actions and its vestiges. Moreover,

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[37] John Dugard, *Convention on the Suppression and Punishment of the Crime of Apartheid*, 1 UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Clive Baldwin, *Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (July 9, 2021), https://www.hrw.org/news/2021/07/09/human-rights-watch-responds-reflections-apartheid-and-persecution-international-law.

apartheid's explicit codification in the Rome Statute provides statutory-treaty authority to bring lawsuits against states where apartheid actions are actively taking place, or where apartheid conditions including discriminatory vestiges occur, despite whether the state has ratified the Rome Statute or not. America's apartheid vestiges can arguably be classified as violations of international customary, and treaty law under the Rome Statute or international human rights law.[42]

IV. Legal Hurdles to the Ratification of the Rome Statute within the United States

Despite Black Americans', *arguable* international standing for bringing a claim against the United States for its vestiges of American apartheid within the International Criminal Court, there are domestic legal hurdles that make a reality of legal accountability within domestic U.S. courts unlikely. The legal hurdles to the ratification of the Rome Statute by the United States come from each of the three branches of the American government, the Executive, Legislative, and Judiciary. Moreover, each of the American federal governmental branches have a history of opposition to international law, and including specifically the International Criminal Court. This part of the discussion will focus on the varying degrees of opposition each of the branches of the American government have participated in concerning international law, and the Rome Statute.

First, the Rome Statute of the International Criminal Court is a multilateral treaty meaning that several states consented and participated in its drafting, and ratification and based on its terms it is binding "between a large number of states, usually (though not always) denoting participation by a majority of the world's states".[43] The United States signed the Rome Statute but never ratified the statute, thus essentially the Rome Statute has no legal authority within the United States.[44]

A. Executive Branch and the Rome Statute

In 2000, President Bill Clinton signed the Rome Statute despite hesitation within his administration concerning the court's potential impact on U.S. diplomatic and military interests. Furthermore, the Clinton administration actively lobbied against the adoption of the statute, despite participating in the discussion concerning the crimes and scope of the Statute, and voted against adoption in 1998 at the Rome Statute Convention.[45] However, with President Clinton's signing of the Rome Statute, it sent a message to the global community that the United States would not be an adversary to the court nor its functions, but not quite an ally either.

Contrastingly, the Bush Administration took a more active and direct approach in opposing the court, including pushing for the passing of the American Service-Members' Protection Act, which provided immunity for military personnel from international courts and

[42] Christina Majaski, *Statute of Limitations*: *Definition, Types, and Example*, INVESTOPEDIA (Nov. 22, 2022). *See* OHCHR, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Nov. 11, 1970).
[43] Legal information institute, *Multilateral Treaties*, https://www.law.cornell.edu/wex/multilateral_treaties.
[44] William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court*, 1 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 37 (Dec. 31, 2000), at 4, https://www.govinfo.gov/.
[45] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court Archived*, 3(10) THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1998), insights.

tribunals.[46] However, the Bush Administration's tone toward the International Criminal Court slightly shifted with its support of the International Criminal Court's investigation of the Darfur, Sudan atrocities.[47]

While the Obama Administration was largely cooperative with the International Criminal Court, there was still not a push for ratification of the Rome Statute. The Obama Administration asserted that it was a cooperative observer of the Court, and even pledged to assist the court in its Rome Statute-mandated activities.[48]

The most tenuous relationship between an American presidential administration and the International Criminal Court was that of the Trump Administration. The Trump Administration continuing in part the hostilities of the Bush Administration went one step further by sanctioning and revoking the visas of the International Criminal Court including Fatou Bensouda, the International Prosecutor for authorizing an investigation into the U.S. for potential war crimes relating to its handling of the Afghanistan crisis.[49]

Currently, the Biden Administration's relationship with the International Criminal Court remains nascent, and is yet developing what tone his administration will take in its relations with the Court. However, it is reasonable to deduce that Biden will take a route similar to the Obama administration, though this is not a guarantee.

The discussion above demonstrates that the United States' Executive Branch has largely remained a significant hurdle to ratification of the Rome Statute. However, its hesitation remains largely linked to the United States' military and intelligence actions, while ignoring or overlooking potential civil or criminal liability for apartheid conditions existing within the country via the vestiges of American apartheid. Whether prior administrations, or future administrations will seriously examine the possibility of Rome Statute ratification, Executive support for ratification is likely null, thus posing a significant hurdle to Rome Statute ratification but not as unsurmountable as actual ratification by the U.S. Senate.

B. Congressional Hurdles

In the United States, the Senate is the body entrusted with the power to provide "advise and consent" to the President on treaties by a two-thirds vote in favor of ratification.[50] The U.S. Congress, which encompasses both the U.S. Senate and U.S. House of Representatives, has largely been in opposition to the Rome Statute since its adoption by the global community. The congressional resistance to the Rome Statute is both bipartisan and deeply entrenched in the body − which in a time of increasing partisanship; bipartisan resistance shows the significant hurdle ratification of the Rome Statute has in the halls of Congress. In response to the Rome Statute Congress has passed numerous pieces of legislation to nullify any potential affect the treaty would have. The most significant act by Congress against the International Criminal Court is the American Service-Members' Protection Act (ASMPA).

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[46] *See* US, Pub. L. 107-206, 116 Stat. 820, American Service-Members' Protection Act (Aug. 2, 2002).
[47] UNSC, S/RES/1593, on Referring the Situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (Mar. 31, 2005).
[48] Harold Hongju Koh, Stephen J. Rapp, *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Conference*, U.S. DEPARTMENT OF STATE-DIPLOMACY IN ACTION (June 15, 2010) https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.
[49] Marlise Simons, Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, THE NEW YORK TIMES (Apr. 5, 2019).
[50] US, Constitution (Mar. 4, 1789), art. II, sec. 2.

The American Service-Members' Protection Act also known as the Hague Invasion Act, was passed in response to the 2002 establishment of the International Criminal Court. The purpose of the act was to

> protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an international criminal court to which the United States is not party.[51]

The Bush Administration, and Congressional leaders feared that the International Criminal Court's capacity to try American military leaders and soldiers for perceived criminal activities. U.S. Senator, Jesse Helms of North Carolina, and U.S. Representative Tom DeLay of Texas, introduced the Act, both were encouraged by the Bush administration to propose the Act, while also having their own reservations concerning the Court's potential to try U.S. citizens.[52] The Act authorized the President of the United States to "use all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court".[53] The Act further prohibited state and federal cooperation with the International Criminal Court, the extradition of any person from the U.S. to the Court, and military aid to countries who ratified the Rome Statute.[54] The ASMPA remains the law of the land, as it was passed by both the U.S. House and U.S. Senate and signed into law by President George W. Bush in 2002. The Acts provisions serves as the clearest example of domestic hurdles to the Rome Statute's ratification.

C. Passive Judicial Refrain

The judicial branch of the United States has largely deferred questions of international law, and foreign policy to Congress and the Presidency. However, the judiciary has had to adjudicate international issues before it. Most notably, extradition law routinely finds it way before the Supreme Court of the United States, and in some cases positions the U.S. judiciary in contrast with other international tribunals.

The United States Supreme Court in *Medellin v. Texas* considered whether the state of Texas had violated the Vienna Convention on Consular Relations (1963) rights of Jose Medellin, a Mexican national who participated in the brutal rape and killing of two American nationals within Texas. The Vienna Convention required that foreign nationals arrested in a foreign country be informed of their rights to have their home embassy or consulate notified of their arrest and that any disputes arising under the convention be resolved by the International Court of Justice.[55] The Supreme Court held that the Vienna Convention was not self-executing, and therefore required Congress to take additional measures to give it the force of law.[56]

The Supreme Court's decision stood in direct contrast to the decision of the International Court of Justice in *United States v. Avena*. In *Avena*, the International Court of Justice held that the United States violated its obligations under the Vienna Convention by not informing the

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[51] *See* US, American Service-Members' Protection Act, *supra* note 46.
[52] Coalition for the ICC, *US Congress Passes Anti-ICC "Hague Invasion Act": American Servicemembers' Protection Act to be Signed by President Bush*, COALITION FOR THE ICC (2002).
[53] *See* US, American Service-Members' Protection Act, *supra* note 46.
[54] *Id.*
[55] UNTS, 21 U.S.T. 77, T.I.A.S. 6820, Vienna Convention on Consular Relations, (Apr. 24, 1963).
[56] U.S. Supreme Court, Medellin v. Texas, 552 U.S. 491, 507, 128 S. Ct. 1346, 1357, 170 L. Ed. 2d 190, Appeal Chamber, Judgment (Mar. 25, 2008).

nationals "without delay" of their right to notify the Mexican embassy of their arrest.[57] The ICJ asserted its jurisdiction under the provisions of the Vienna Convention and demanded that the United States provide the nationals with review and reconsideration of the Mexican nationals' convictions and sentences. Jose Medellin, one of the 51 nationals prosecuted without being notified of his rights under the Vienna Convention, filed a writ for *habeas corpus* in United States federal courts.

The Supreme Court's *Medellin* decision also contrasted President Bush's legal view that the Vienna Convention required that the International Court of Justice determine conflicts under the Convention. Moreover, the Supreme Court relied on U.S. precedent, which arguably has been historically prejudicial against foreign intervention; clearly, the Supreme Court in Medellin did not want to cede its power. Thus, in relying on Chief justice Marshall's precedent in *Foster* v. *Neilson*, 2 Pet. 253, 315 (1829), the Court distinguished between self-executing and non-self-executing treaties to preserve its jurisdiction as the final arbiter of U.S. law and shake oversight from international tribunals.[58] The Supreme Court's rationale did not necessarily have to do with the Convention's obligations because those were clear but mainly had to do with preserving the Supreme Court's jurisdictional role and limiting the power of the ICJ.[59]

The Court is largely passively resistant to reliance on international law or its adoption and application to federal jurisprudence. The Court has recognized that ratified treaties are incorporated into federal law but hesitated to include other bodies of international law. The Court recognized its role as both a domestic court, and uniquely international court but limits its international jurisprudential power to cases presented before under light of U.S. Constitutional scrutiny.[60] Under the Court's judicial passivism concerning international law, and the absence of ratification of the Rome Statute by the U.S. Senate, the Court as a hurdle to the Rome Statute, and this discussion's assertion that it is the next step in the remedying of American apartheid vestiges, is fairly nascent and theoretically ripe. The Court *may* have a hurdling effect on the Rome Statute and the advancement of litigation to dismantle the vestiges of American apartheid, if the Rome Statute was ever ratified but at this point the Court is largely a nonplayer in the analytical framework and potential opposition to the statute's ratification.

Despite the significant hurdles existing within the United States' political institutions concerning the ratification of the Rome Statute specifically art. 7's antiapartheid provisions, there are positive impacts potential ratification of the Rome Statute would have on the progress toward an Equalitarian legal order.

V. The Judiciary's Mandate Under the Constitution and International Customary Law to Adopt the Rome Statute's Antiapartheid Provisions in U.S. Jurisprudence

The judiciary of the United States has largely propelled the movement of the country toward William Hastie's "equalitarian legal order". Namely, through decisions such as *Brown v. Topeka Board of Education* 347 U.S. 483 (1954), and *Furman v. Georgia* 408 U.S. 238 (1972),

[57] ICJ, Mexico v. United States of America, 2004 I.C.J. 12-128, Judgment (Mar. 31, 2004).
[58] U.S. Supreme Court, Medellin v. Texas, *supra* note 56.
[59] *Id.*
[60] James J. Lenoir, *International Law in the Supreme Court of the United States*, 7(4) MISS. L.J. 327 (1935), at 328. "Sitting as it were, as an international, as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand". See U.S. Supreme Court, Kansas v. Colorado, 185 U.S. 125, 147, L.ed 838, 22 S. Ct. 552, Judgment (Apr. 7, 1902).

and *Reynold v. Sims* 377 U.S. 533 (1964), the judiciary has taken significant steps toward addressing America's then de jure and de facto apartheid system. Moreover, William Hastie and his civil rights attorney contemporaries viewed the judiciary of the United States as the medium to "change the racist character of our legal order".[61] According to Judge Hastie, the National Association for the Advancement of Colored People's campaign to end racial segregation within the United States focused on public education, Black American access to the ballot box, residential segregation, and financial discrimination.[62] For there to be an advancement of Hastie's equalitarian legal order American must address the disparities in Black American wealth, the overincarceration and arrest of Black Americans, and the disparity in access to quality public education for Black Americans. The disparities in the aforementioned areas are vestiges of American apartheid, and as discussed above were focal areas Judge Hastie and other early civil rights advocates fought to mitigate and improve. However, despite almost a century of lawsuits within American courts relying on U.S. law, Black Americans find themselves largely within a similar predicament. Yes, *de jure* discrimination has largely ended but the systemic oppression continues, as a vestige of America's apartheid past. The next step in advancing Judge Hastie's Equalitarian legal order is the ratification of the Rome Statute's antiapartheid provisions, or a judicial incorporation of the Rome Statute's apartheid provisions within federal jurisprudence.

The federal courts may incorporate into American common law, the "law of nations" specifically the customary law and statutory law prohibiting apartheid. As Professor Thomas Lee states "[t]he Constitution's allocation of powers−understood in historical context and as applied by the Supreme Court in practice−requires U.S. courts to apply some rules of customary international law".[63] Arguably, because of the dire situation concerning Black American life & liberty within the country due to the vestiges of American Apartheid, the Supreme Court is compelled to adopt within its jurisprudence customary law concerning apartheid and its vestiges.

Many may find my previous statement outrageous, dangerous or without basis within American jurisprudence, however, I argue that the precepts of international legal positivism evidenced through customary law compel our courts to uphold the law of nations, and adopt the Rome Statute's antiapartheid provisions. Under American judicial precedent the "law of nations" included customs, and conventions also known as treaties, of which each consisted of the conventional law of nations, and is included in the Framer's understanding of international law.[64] Furthermore, the U.S. Constitution explicitly codifies the "conventional law of nations" within the U.S. government's enforcement authority under Congress's power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations".[65]

Accordingly, the modern principle of *jus cogens*, which is a legal doctrine that recognizes international norms as evidence of international law, and therefore are binding even on contrasting domestic law.[66] Furthermore, the doctrine of *jus cogens* compels that the U.S.

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[61] Hastie, *supra* note 14.
[62] *Id.*
[63] Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106(1) THE GEORGETOWN LAW JOURNAL 1707 (2018).
[64] *See generally* Sarah H. Cleveland, William S. Doge, *Defining and Punishing Offenses Under Treaties*, 124(7) YALE L. J. 2202 (2015).
[65] US, Constitution (Mar. 4, 1789), art. I, sec. 8, cl. 10.
[66] Legal information institute, *Jus Cogens definition*, https://www.law.cornell.edu/wex/jus_cogens#:~:text=Definition,overriding%20principles%20of%20international%20law.

Supreme Court adopt and incorporate into its jurisprudence the international criminal law norms, including the Rome Statute's antiapartheid provisions within federal law. *Jus cogens* is derived in part from the Vienna Convention on the Law of Treaties which provides:

A treaty is void if, at the time for its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[67]

Similarly, the United States Constitution incorporates the "law of treaties" into the jurisprudence of the United States

> this Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land […].[68]

The Framers largely understood that the conventional law of nations, including treaties, formed the basis of federal law and was supreme and preemptory to diverging state law.[69]
Furthermore, the Framers incorporated into art. III "Treaties" into the law the judicial branch is implored to interpret.[70] The Founders inclusion of treaty law, which they understood as encompassing the law of nations into art. III's judicial interpretation manifests their intent for international customary law to be apart of American federal law.

Additionally, the Judiciary Act of 1789 explicitly references the "law of nations" when defining the jurisdiction of federal district courts.[71] The Framers considered the law of the nations, and treaty law as jurisdictional issues that the federal courts should routinely apply and interpret.

As discussed above, the customary conventional law of nations is as much a part of the United States' jurisprudence, thus the judiciary can and should incorporate the Rome Statute's antiapartheid provisions specifically to address the vestiges of American apartheid affecting Black Americans.

The customary law of the international community, especially international courts and tribunals has routinely used reparations as remedy to systemic harm. The International Criminal Court defines reparations as

> relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also attempting to redress the consequences of genocide, crimes against humanity, and war crimes.[72]

The International Criminal Court, along with other tribunals view the grant of reparations as

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[67] UN, 1155 U.N.T.S. 331-334, Vienna Convention on the Law of Treaties (Jan. 27, 1980), art. 53.
[68] US, Constitution (Mar. 4, 1789), art. VI, cl. 2.
[69] *See generally* Thomas H. Lee, *supra* note 63.
[70] US, Constitution (Mar. 4, 1789), art. III, sec. 2, cl. 1.
[71] US, 1 Stat 73, Judiciary Act of 1789, codified as amended at 28 U.S.C. Section 1350 (2012): "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States".
[72] Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29(2) T. JEFFERSON L. REV. 189 (2007).

> essential criterion for the restoration of social harmony between communities which have been [in conflict] with each other and a sine qua non for the establishment of deep-rooted and lasting peace.[73]

Additionally, the International Criminal's Rules of Procedure & Evidence, expands access to reparations to direct victims, and indirect victims "including family members, . . .other persons who suffered personal harm as a result of these offences".[74] Moreover, the International Criminal Court has articulated that reparations should be given without "adverse distinction on the grounds of race, colour, national, ethnic or social origin".[75] Furthermore, the Court has articulated that compensation is applicable when:

> i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) in view of the availability of funds, this result is feasible.[76]

Reparations are a pivotal tool to address harm created by American's overincarceration and criminalization of Black Americans, the Black American wealth gap, and the lack of access to consistently sufficient quality education in Black American households across the country. The vestiges of American apartheid can be remedied by the judicial authorization for reparations to foundational Black Americans in this country. Furthermore, the International Criminal Court has articulated that compensation should be afforded when the harm faced by victims includes the following:

> […] b. Moral and non-material damage resulting in physical, mental and emotional suffering;
> c. Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings;
> d. Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights.[77]

Black Americans have suffered under the vestiges of American apartheid economically, socially, and within the criminal justice system. However, the International Criminal Court's reparations provisions provides a potential tools and legal framework to mitigate the harm suffered.

The U.S. judiciary's adoption of the Rome Statute's antiapartheid provisions as a component of the law of nations, which the Framers considered incorporated into American law, is the next step in the advancement of an Equalitarian legal order.

VI. Conclusion

[73] *Id.*
[74] ICC Rules of Procedure & Evidence, Rule 85(a)(b).
[75] ICC Order for Reparations, 4. Dignity, non-discrimination and non-stigmatization, at 4-20, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2015_02633.PDF.
[76] *Id*., at 8-20, "compensation numerical 37".
[77] *Id*., at 9-20, "compensation numerical 40 (b-d)".

The fight for racial equity, and remedying systemic injustice did not end with Judge Hastie's generation. The fight for the advancement of an equalitarian legal order continues in the 21st Century. The Rome Statute's antiapartheid provisions provide the legal framework and authorization for advancing Black American civil, economic, political, and social progress in this country. Accordingly, despite the political obstacles that make ratification difficult, the American judiciary is implored by the Framers and international law to incorporate the Rome Statute's antiapartheid provisions to mitigate the vestiges of American apartheid. As the Reverend Dr. Martin Luther King stated "the arc of moral universe bends toward justice".[78] However, justice that is real and attainable comes when "higher law informs positive law grounded in social realities".[79] As William Hastie penned "in 1930 a few persons had planned and initiated the campaign to change the racist character of our legal order".[80] In 2022, almost a century later the call for the next step in the advancement of William Hastie's equalitarian legal order needs similar courageous leaders to challenge our political and legal system to ratify, and adopt the Rome Statute, and international customary law's antiapartheid provisions to combat apartheid's American vestiges.

[78] Martin Luther King Jr., *Sermon at Temple Israel of Hollywood*, AMERICAN RHETORIC (Feb. 26, 1965), https://www.americanrhetoric.com/speeches/mlktempleisraelhollywood.htm.
[79] Telman, *supra* note 15.
[80] Hastie, *supra* note 14.