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OTHERING ACROSS BORDERS

STEVEN ARRIGG KOH[†]

ABSTRACT

Our contemporary moment of reckoning presents an opportunity to evaluate racial subordination and structural inequality throughout our three-tiered domestic, transnational, and international criminal law system. In particular, this Essay exposes a pernicious racial dynamic in contemporary U.S. global criminal justice policy, which I call othering across borders. First, this othering may occur when race emboldens political and prosecutorial actors to prosecute foreign defendants. Second, racial animus may undermine U.S. engagement with international criminal legal institutions, specifically the International Criminal Court. This Essay concludes with measures to mitigate such othering.

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INTRODUCTION

Brutal police killings, anti-Asian violence, and a global pandemic have forced race, criminal justice, and global affairs into our collective national consciousness. While long familiar to communities of color, the inequities of racially motivated violence are now broadly salient in the wake of the killings of George Floyd, Breonna Taylor, and many others. Attacks on Asian Americans and Pacific Islanders have cast a necessary national

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spotlight on anti-Asian racism. Meanwhile, Covid-19 exposes global vulnerabilities: immunological, socioeconomic, political, and epistemic.

This moment thus presents an opportunity to rigorously evaluate racial subordination and structural inequality at the intersection of race, criminal justice, and global affairs. Specifically, this Essay exposes a phenomenon I call *othering across borders*, wherein U.S. political actors perniciously promote domestic solidarity by prosecuting foreign defendants and sanctioning legal actors of color in international criminal legal institutions. By “othering,” I mean actions that the majority takes to promote in-group solidarity by exploiting a perception of the minority as different and inferior. While the concept of the “other” has emerged in various strains of intellectual thought over the past century,¹ a broad synthesis consists of four Eurocentric propositions: (1) the other is a means of defining the self, (2) the other is an abstraction, (3) the other cannot define itself, and (4) the other is to be feared and controlled.² As Professor Kimberlé Crenshaw has noted, when non-stigmatized people create an “other,” it bonds their collective sense of identity, which they define in opposition to such other.³ In our domestic criminal conception, the majority may view the criminal defendant as a form of other, distinct from the polity and collective of “the People” in a prosecution.⁴ Othering is also evident in the disparate treatment of domestic and foreign terrorists in our criminal justice system.⁵

1. See generally, e.g., W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903) (discussing “double consciousness”); JACQUES DERRIDA, *DISSEMINATION* (Henry Louis Gates, Jr., ed., Barbara Johnson trans., 1981) (discussing hierarchically ordered oppositional categories); SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., 1952) (examining male subjugation of the female other); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markman trans., 1967) (analyzing the colonially constructed inferiority complex); EDWARD W. SAID, *ORIENTALISM* (1978) (considering Western perceptions of Asia, the Middle East, and North Africa). See also Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 690–99 (2002) (reviewing conceptions of “other” and applying them to juvenile justice).

2. Nunn, *supra* note 1, at 698–99; see also, e.g., JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S MIDDLE EASTERN MINORITY* 68–72 (2009) (describing the othering and selective racialization of Middle Easterners).

3. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988). Social psychology has supported this theory. See Gordon Hodson, Victoria M. Esses & John F. Dovidio, *Perceptions of Threat, National Representation, and Support for Procedures To Protect the National Group*, in *COLLATERAL DAMAGE: THE PSYCHOLOGICAL CONSEQUENCES OF AMERICA’S WAR ON TERRORISM* 109, 109–25 (Paul R. Kimmel & Chris E. Stout eds., 2006).

4. Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 270–71 (2019).

5. See generally Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333 (2019) (challenging the international-domestic terrorism divide and describing its deleterious consequences for Muslims); TEHRANIAN, *supra* note 2 (describing the assault on the civil rights of Middle Eastern Americans in the wake of 9/11).

This Essay completes the picture of othering in U.S. criminal justice by exploring its extraterritorial dimensions. First, othering across borders occurs when race emboldens political and prosecutorial actors to prosecute foreign defendants. Such othering of communities of color may be even greater in the transnational context than in the domestic one, given that certain defendants and international criminal legal actors are *both* of color *and* lacking American citizenship. Second, race complicates U.S. engagement with international criminal legal institutions. Specifically, U.S. antagonism toward the International Criminal Court (“ICC”) may intensify when certain international criminal legal actors are nonwhite. This antagonism then further undermines the project of international criminal law (“ICL”) and, even more broadly, fragments international law itself. Along both of these dimensions, U.S. political and prosecutorial actors exploit such othering across borders to promote national solidarity and build domestic political capital.

Up until now, scholars have primarily considered the role of race in three related criminal, foreign relations, and/or international legal contexts: (1) U.S. criminal justice, (2) U.S. national security policy, and (3) ICC prosecutorial discretion. First, numerous studies show how the modern American criminal justice system produces racially disparate outcomes in several areas, including policing and profiling, the drug war, the death penalty, prosecutorial discretion and plea bargaining, the school-to-prison pipeline, and incarceration.⁶ Second, twenty years after the 9/11 attacks, we have gained perspective on the function of race in national security,⁷ including how the U.S. government has marginalized its own citizens—those who are already members of alienated minority groups, such as Arab and

6. See generally, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (positing that the criminal justice system, through the War on Drugs, has created a contemporary system of discrimination and oppression); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (critiquing the Jim Crow analogy); Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [<https://perma.cc/KA4N-9LMM>] (cataloging studies about racial bias in the criminal justice system); Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOCIO. ASS’N (Sept. 2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> [<https://perma.cc/3TT4-BFRP>] (examining complex empirical evidence concerning the effects of race at individual stages of the criminal justice system, and discussing how certain studies find “direct or overt race discrimination in the criminal justice system,” while others indicate “race effects in specific situations, contexts, or jurisdictions—or find no race effects at all”).

7. See generally Matiangai Sirleaf, *Racing National Security: Introduction to the Just Security Symposium*, JUST SEC. (July 13, 2020), <https://www.justsecurity.org/71373/racing-national-security-introduction-to-the-just-security-symposium> [<https://perma.cc/D4XG-5MZX>] (rendering race more visible in national security discourse, while also emphasizing racial justice over racial discrimination as an analytical framework).

Muslim Americans—through race-based policing and policies that foster government distrust.⁸ Finally and separately, other scholars critique the unequal manner in which ICC investigations and prosecutions fall upon African defendants,⁹ part of a broader reevaluation rooted in critical race theory and third-world approaches to international law.¹⁰ A common refrain amongst all these scholars is that certain ethnic, racial, and/or national communities are disproportionately prosecuted or otherwise impacted due to racism, pathological politics, or geopolitical opportunism. And yet, missing from these discourses is how such structural issues shape the United States as an actor in the transnational and international criminal justice systems.

This Essay builds on this scholarship by exposing race at the heart of extraterritorial criminal law enforcement, where the U.S. executive branch operates with even more freedom than it does domestically. Part I describes the reckoning, in which othering across borders occurs in both U.S. transnational criminal prosecutions and international criminal legal policymaking. And Part II describes the reformation, calling for ICC engagement; realignment of institutional, bilateral, and multilateral incentives around bilateral relationships; and renewed efforts to address domestic criminal justice inequities. In so doing, this Essay will contribute to four scholarly conversations. First, it will add a cross-border dimension to ongoing scholarship regarding the nature and extent of the U.S. criminal

8. See e.g., Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 611–15 (2005) (discussing the targeting of Arab and Muslim citizens and post-9/11 policy impacts); Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 156–58 (2003) (arguing that race-based policing threatens national security by sowing distrust); *Towards the Closure of Guantanamo*, INTER-AM. COMM’N ON HUM. RTS., <http://www.oas.org/en/iachr/multimedia/guantanamo/guantanamo.html> [<https://perma.cc/8F25-735B>] (describing Guantanamo Bay as a “[d]iscriminatory regime . . . on the basis of [the prisoner’s] nationality, ethnicity, and religion”).

9. See generally, e.g., Fatou Bensouda, *Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, ICC F. (Mar. 2013), <https://iccforum.com/africa> [<https://perma.cc/XPZ8-SL6J>] (debating whether Africa is inappropriately targeted by the ICC); Mary Kimani, *Pursuit of Justice or Western Plot?*, UNITED NATIONS: AFRICA RENEWAL (Oct. 2009), <https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> [<https://perma.cc/KQR7-JCP6>] (discussing the controversy concerning the ICC’s role in Africa); Maxine Rubin, *Points of Tension Between African States and the International Criminal Court*, SOC. SCI. RES. COUNCIL (Aug. 27, 2019), <https://kujenga-amani.ssrc.org/2019/08/27/points-of-tension-between-african-states-and-the-international-criminal-court> [<https://perma.cc/L5XN-HVUP>] (same); Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*, WASH. POST (June 15, 2015, 2:11 PM), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court> [<https://perma.cc/9LDP-M2HS>] (same).

10. See, e.g., Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 845 (2000) (proposing that critical race theory be “deployed as part of the project for the reconstruction of international law”).

justice system's disproportionate impact on communities of color.¹¹ Second, it will contribute to ongoing foreign relations law discourse regarding race and citizenship in U.S. national security policy.¹² Third, it will add to the growing scholarship on foreign affairs prosecutions,¹³ including their impact on defendants' criminal procedural rights and U.S. foreign policy.¹⁴ And fourth, it will add a racial dimension to the scholarship on U.S. engagement with the ICC.¹⁵

I. THE RECKONING: NEW FRONTS IN RACE AND CRIMINAL JUSTICE

Today, criminal justice exists along three tiers. The domestic tier is the most familiar: our U.S. system of federal, state, and local prosecutions. In our era of mass incarceration, scholars and practitioners alike criticize this system for its disproportionate impact on communities of color due to, *inter alia*, disparities in policing and prosecutorial practice.

The international tier is the most macroscopic: a system of international criminal tribunals and investigative mechanisms that the international community has established. Today, the ICC—a permanent tribunal in The Hague with jurisdiction over war crimes, genocide, crimes against humanity, and aggression—best exemplifies this tier. In recent years, a persistent question has been how the United States negotiates its relationship with an international court that is an autonomous global actor, given that it—alongside other large countries such as China, Russia, and India—is not a

11. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470, 530–33 (2010) (describing measures taken by states to further study the ways in which collateral consequences of criminal conviction disproportionately burden communities of color).

12. See generally Sinnar, *supra* note 5 (challenging the international-domestic terrorism divide and describing its deleterious consequences for Muslims).

13. See generally Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019) [hereinafter Koh, *Foreign Affairs Prosecutions*] (exploring both the promise and risks of foreign affairs prosecutions).

14. See generally Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020) (arguing that the U.S. government treats some criminal procedural rights as “marginal and expendable” in the context of foreign affairs prosecutions); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. (forthcoming 2021) [hereinafter Koh, *Criminalization*] (on file with Author).

15. See, e.g., Jordan J. Paust, *The U.S. and the ICC: No More Excuses*, 12 WASH. U. GLOBAL STUD. L. REV. 563, 563–68 (2013) (scrutinizing excuses given for the United States's failure to become party to the ICC's founding treaty); David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529, 531–32 (1999) (discussing the U.S. delegation's objectives during negotiations of the Rome Treaty and its rationale for declining to support the final draft treaty); see also Mileno Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE W. RES. J. INT'L L. 201, 203–10 (2019) (criticizing the Trump administration's policy towards the ICC as “misguided and detrimental to United States' interests”).

party to the Rome Statute of the ICC.¹⁶ President Bill Clinton signed the Rome Statute but did not move for its ratification, the Bush administration passed the American Service-Members' Protection Act,¹⁷ and the Obama administration engaged in a *rapprochement* that included a reaffirmation of the U.S. signature to the Rome Statute.¹⁸ Throughout, a common critique of the ICC was that it solely investigated and prosecuted atrocities in African countries—a prosecutorial strategy that the United States has at some points supported.¹⁹ Most recently, an African-led ICC began investigating U.S. troops in Afghanistan.²⁰

Finally, the middle, transnational tier foregrounds the “long arm” of the U.S. criminal justice system, which reaches abroad now more than ever before, due to rising cross-border, cyber, and international crime.²¹ Previously, I have called such cases *foreign affairs prosecutions*, encompassing foreign apprehension, evidence gathering, and criminal conduct, as well as cases that implicate foreign nations' criminal justice interests. In such cases, the executive branch engages its foreign affairs and prosecutorial authority at the same time, operating within a pre-existing framework of bilateral and multilateral treaties, extraterritorial statutes, amended federal criminal procedure, case law characterized by judicial deference, and globalized institutional capacity. Recent headlines of foreign

16. *State Parties to the Rome Statute*, ASSEMBLY OF STATE PARTIES, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/9ACN-FDV9>]. This dynamic represents yet another chapter in the long history of U.S. engagement with international criminal tribunals, which oscillates between leadership and hostility. *See generally* Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525 (2013) [hereinafter Koh, *ICJ 5.0*] (reviewing the United States's role in the history of international criminal justice).

17. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (2002). The Act severely limits U.S. cooperation with the ICC. *See* David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 991 (2008).

18. *See* Koh, *ICJ 5.0*, *supra* note 16, at 534–37 (describing the Obama administration's efforts to increase engagement with the ICC).

19. *See* Nerida Chazal, *Beyond Borders?: The International Criminal Court and the Geopolitics of International Criminal Justice*, 22 GRIFFITH L. REV. 707, 721 (2013); Shai Dothan, *Deterring War Crimes*, 40 N.C. J. INT'L L. & COM. REG. 739, 744–45 (2015) (explaining that the ICC, as of 2015, had “investigated only eight situations, all of them in African countries”); Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 42 (2013); Mary Kimani, *supra* note 9; Alexandra Zavis & Robyn Dixon, *Q&A: Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. TIMES (Oct. 23, 2016, 2:18 PM), <https://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html> [<https://perma.cc/69XX-MTV9>].

20. Elian Peltier & Fatima Faizi, *I.C.C. Allows Afghanistan War Crimes Inquiry To Proceed, Angering U.S.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html> [<https://perma.cc/V89F-DYHY>].

21. *See* Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 352–58, 388.

affairs prosecutions²² include the indictment of Chinese nationals accused of stealing Covid-19 research;²³ the incarceration of Mexican drug cartel leaders;²⁴ and the extradition of Black Caribbean, Latin American, and European FIFA officials.²⁵

It is time to expand the academic discourse regarding race and U.S. criminal justice beyond our borders, focusing on the international and transnational tiers. A ripe contemporary question is: To what degree does race animate U.S. *global* criminal justice policy? We may answer this first by considering two case examples and then illuminating the structural factors that give rise to othering across borders.

A. Two Case Examples

Consider two simultaneous scenarios during the Trump administration. First, former President Donald Trump waged a multi-front confrontation with China, one tinged with racial animus. He and other conservative leaders referred to Covid-19 as the “Chinese Virus”²⁶ or “Wuhan virus”²⁷ or “kung flu,”²⁸ despite many reports that such widely circulated references increased racial attacks against Asian Americans in 2020. Such anti-Asian sentiment has culminated most recently in the March 2021 Atlanta spa shootings.²⁹

22. *See id.* at 346–52.

23. Julian E. Barnes, *U.S. Accuses Hackers of Trying To Steal Coronavirus Vaccine Data for China*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/china-hacking-coronavirus-vaccine.html> [<https://perma.cc/AL9W-2UYC>].

24. Alan Feuer, *El Chapo Found Guilty on All Counts; Faces Life in Prison*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/nyregion/el-chapo-verdict.html> [<https://perma.cc/DZB9-E7DF>].

25. Matt Apuzzo & Sam Borden, *FIFA Charges Instantly Earn Loretta Lynch Global Recognition*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2015/05/30/sports/soccer/loretta-lynch-with-assist-from-soccer-makes-strong-global-impression.html> [<https://perma.cc/UKY9-A847>]; Evan Perez & Shimon Prokupez, *U.S. Charges 16 FIFA Officials in Widening Probe*, CNN (Dec. 3, 2015, 6:02 PM), <https://www.cnn.com/2015/12/03/sport/fifa-corruption-charges-justice-department/index.html> [<https://perma.cc/J4CJ-9NLC>].

26. Allyson Chiu, *Trump Has No Qualms About Calling Coronavirus the ‘Chinese Virus.’ That’s a Dangerous Attitude, Experts Say*, WASH. POST (Mar. 20, 2020, 7:22 AM), <https://www.washingtonpost.com/nation/2020/03/20/coronavirus-trump-chinese-virus> [<https://perma.cc/UB5B-QG72>].

27. *Id.*

28. *Donald Trump Calls Covid-19 ‘Kung Flu’ at Tulsa Rally*, GUARDIAN (June 20, 2020, 9:06 PM), <https://www.theguardian.com/us-news/2020/jun/20/trump-covid-19-kung-flu-racist-language> [<https://perma.cc/29HT-G78D>].

29. *See, e.g.*, Chiu, *supra* note 26; Anna Purna Kambhampaty, *‘I Will Not Stand Silent.’ 10 Asian Americans Reflect on Racism During the Pandemic and the Need for Equality*, TIME (June 25, 2020, 6:32 AM), <https://time.com/5858649/racism-coronavirus> [<https://perma.cc/5PLJ-YPB8>]; Sabrina Tavernise & Richard A. Opiel, Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/9D23-LEQC>]; *8 Dead in Atlanta Spa Shootings, With Fears of Anti-Asian*

Trump also railed against TikTok, the viral video app owned by ByteDance, a Chinese internet technology company, and publicly mused about intervening in the extradition of Huawei CFO Meng Wanzhou.³⁰

Many commentators have linked Trump's anti-Asian racism—which included support for President Franklin D. Roosevelt's decision to intern Japanese Americans during World War II—with his Executive Orders 13769 and 13780 restricting travel from certain majority Muslim countries.³¹ Unaddressed, however, is the connection to the growing list of investigations and prosecutions against Chinese nationals, catalyzed by a “China Initiative” designed to “reflect[] the strategic priority of countering Chinese national security threats and reinforce[] the President's overall national security strategy.”³² While the status of the China Initiative in the Biden administration remains to be seen, at the time of this writing, the head of the Department of Justice (“DOJ”) National Security Division and various U.S. attorneys still lead it.³³ The multi-faceted initiative emphasizes trade secret theft cases, and involves proactive information sharing and threat identification with individual U.S. Attorneys' Offices (“USAOs”).³⁴ The Initiative's website currently reflects a staggering number of sixty-eight case examples.³⁵ Cases against the Chinese include the alleged stealing of Covid-19 vaccine research,³⁶ computer hacking and economic cyberespionage

Bias, N.Y. TIMES (last updated Mar. 26, 2021, 9:19 AM), <https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth> [<https://perma.cc/4DWK-BCJY>].

30. See David E. Sanger & Julian E. Barnes, *Is TikTok More of a Parenting Problem Than a Security Threat?*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/politics/tiktok-security-threat.html> [<https://perma.cc/6NUR-8N2E>]; Andy Blatchford & Leah Nylen, *Trump's Comments About Deal Huawei Exec's Arrest To Take Center Stage in Extradition Fight*, POLITICO (last updated June 15, 2020, 11:55 AM), <https://www.politico.com/news/2020/06/15/trump-china-trade-deal-huawei-executive-extradition-319642> [<https://perma.cc/MUE7-RZPB>].

31. Duncan Williams & Gideon Yaffe, *Trump's Administration Says the Travel Ban Isn't Like Japanese Internment. It Is.*, WASH. POST (May 16, 2017, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2017/05/16/trumps-administration-says-the-travel-ban-isnt-like-japanese-internment-it-is/> [<https://perma.cc/NRK3-T9LG>].

32. U.S. DEP'T OF JUSTICE, INFORMATION ABOUT THE DEPARTMENT OF JUSTICE'S CHINA INITIATIVE AND A COMPILATION OF CHINA-RELATED PROSECUTIONS SINCE 2018 (last updated Feb. 11, 2021), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [<https://perma.cc/G7P2-LC6Z>].

33. *Id.*

34. *Id.*

35. *Id.* As will be discussed *infra*, this Essay's claim is not that all sixty-eight of these cases are wholly motivated by race and thus illegitimate; indeed, U.S. criminal justice must be marshalled to some degree alongside other foreign policy modalities such as diplomacy and sanctions. See Koh, *Criminalization supra* note 14, at 23–24. However, othering across borders contributes to the decision to investigate and prosecute such cases; the critical and political economic lens described herein provides insight into this dynamic.

36. See Barnes, *supra* note 23.

offenses against American companies by Chinese nationals,³⁷ and numerous allegations of individuals charged with conspiring to act in the United States as illegal agents of the People's Republic of China.³⁸ Such cases are widely popular in America, in which 73% of the population views China unfavorably.³⁹

Second, the Trump administration marshaled unprecedented levels of punitive measures against an African-led ICC.⁴⁰ Since 2018—the year Nigerian Judge Chile Eboe-Osuji assumed the ICC Presidency⁴¹—the Trump administration authorized myriad anti-ICC measures on the stated public ground of safeguarding U.S. and Israeli nationals from ICC investigation or prosecution.⁴² These measures included barring ICC officials from entering the United States, enjoining their property within the United States, and prosecuting them in the U.S. criminal justice system.⁴³ Most recently, in

37. See Press Release, U.S. Dep't of Justice, U.S. Charges Three Chinese Hackers Who Work at Internet Security Firm for Hacking Three Corporations for Commercial Advantage (Nov. 27, 2017), <https://www.justice.gov/opa/pr/us-charges-three-chinese-hackers-who-work-internet-security-firm-hacking-three-corporations> [https://perma.cc/77TV-4SDZ].

38. See, e.g., Press Release, U.S. Dep't of Justice, Eight Individuals Charged With Conspiring To Act as Illegal Agents of the People's Republic of China (Oct. 28, 2020), <https://www.justice.gov/opa/pr/eight-individuals-charged-conspiring-act-illegal-agents-people-s-republic-china> [https://perma.cc/8EPR-JVRT]; Press Release, U.S. Dep't of Justice, Hayward Resident Sentenced to Four Years for Acting as an Agent of the People's Republic of China (Mar. 17, 2020), <https://www.justice.gov/opa/pr/hayward-resident-sentenced-four-years-acting-agent-people-s-republic-china> [https://perma.cc/Y4CZ-AFXT]; Press Release, U.S. Dep't of Justice, New York City Police Department Officer Charged with Acting as Illegal Agent of the People's Republic of China (Sept. 21, 2020), <https://www.justice.gov/opa/pr/new-york-city-police-department-officer-charged-acting-illegal-agent-people-s-republic-china> [https://perma.cc/GF5L-D3U9].

39. Laura Silver, Kat Devlin & Christine Huang, *Unfavorable Views of China Reach Historic Highs in Many Countries*, PEW RSCH. CTR. (Oct. 6, 2020), <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries> [perma.cc/23TF-DL75].

40. While the actions are nominally triggered by the prospect of the investigation and prosecution of U.S. servicemembers, this is not a new issue. The Bush administration, also motivated by this fear, concluded bilateral Article 98 agreements in order to procure immunity of U.S. troops from ICC jurisdiction. CLARE M. RIBANDO, CONG. RSCH. SERV., RL33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 2 (2006). In the Trump administration, this same threat triggered a new response: individual sanctions levied against people of color leading the ICC.

41. *Judge Chile Eboe-Osuji*, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Chile%20Eboe-Osuji> [https://perma.cc/78S3-RALL].

42. See Sterio, *supra* note 15, at 209; *The Trump Administration Revokes the ICC Prosecutor's U.S. Visa Shortly Before the ICC Pre-Trial Chamber Declines To Authorize an Investigation into War Crimes in Afghanistan*, 113 AM. J. INT'L L. 625, 625–30 (2019); Alex Ward, *Why the Trump Administration Is Sanctioning a Top International Court*, VOX (June 12, 2020), <https://www.vox.com/2020/6/12/21287798/trump-international-criminal-court-sanctions-explained> [https://perma.cc/HU65-VY2S] (discussing how the sanctioning of ICC members was in part motivated by a desire to protect U.S. servicemembers and Israel).

43. *Id.* In June 2020, in response to ICC investigations in Afghanistan, the Trump administration announced the imposition of sanctions and visa restrictions against ICC officials as part of an “important

September 2020, former Secretary of State Mike Pompeo announced the imposition of U.S. sanctions upon the ICC's Chief Prosecutor Fatou Bensouda (a Gambian national) and the Head of the Office of the Prosecutor's Jurisdiction, Complementarity, and Cooperation Division, Phakiso Mochochoko (a Lesothan national).⁴⁴ This sparked global outcry, with U.S. senators,⁴⁵ ex-U.S. government officials,⁴⁶ foreign ministers,⁴⁷ and international actors criticizing such action.⁴⁸ Notably, the United States

first step in holding the ICC accountable for exceeding its mandate and violating the sovereignty of the United States." Julian Borger, *Trump Targets ICC with Sanctions After Court Opens War Crimes Investigation*, GUARDIAN (June 11, 2020, 12:37 PM), <https://www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions> [https://perma.cc/X84U-CULS]. Then Attorney General William Barr also indicated that the DOJ had commenced domestic investigations into executives at the ICC's Office of the Prosecutor for "corruption and malfeasance." Uzay Yasar Aysev, *Can the International Criminal Court Hold the Trump Administration in Contempt?*, JUST SEC. (July 30, 2020), <https://www.justsecurity.org/71498/can-the-international-criminal-court-hold-the-trump-administration-in-contempt> [https://perma.cc/2WNX-NHJ4].

44. Julian Borger, *US Imposes Sanctions on Top International Criminal Court Officials*, GUARDIAN (Sept. 2, 2020, 12:08 PM), <https://www.theguardian.com/law/2020/sep/02/us-sanctions-international-criminal-court-fatou-bensouda> [https://perma.cc/RU3Y-DF2C].

45. Beth Van Schaack, *A Test for the US Posture on the Int'l Criminal Court: "Safe Harbor" Licenses?*, JUST SEC. (Sept. 4, 2020), <https://www.justsecurity.org/72305/a-test-for-the-us-posture-on-the-intl-criminal-court-safe-harbor-licenses> [https://perma.cc/P5AR-7JAT].

46. Daniel Fried, former State Department coordinator for sanctions policy during the Obama administration, criticized the U.S. sanctions for "creat[ing] the reality, not just the impression, of the United States as a unilateralist bully with contempt for international law and norms." Pranshu Verma, *Trump's Sanctions on International Court May Do Little Beyond Alienating Allies*, N.Y. TIMES (last updated Feb. 6, 2021), <https://www.nytimes.com/2020/10/18/world/europe/trump-sanctions-international-criminal-court.html> [https://perma.cc/HM45-YFQD]. Additionally, Eric Lorber, a former senior adviser to the undersecretary for terrorism and financial intelligence in the Trump administration, denounced the U.S. sanctions as yet another example of the administration's inability to strike a proper balance between "using sanctions in a way that protects national interests while ensuring buy-in from key partners." *Id.*

47. The top diplomat of the European Union condemned the actions of the United States as "unacceptable and unprecedented." *Id.* Germany's foreign minister also criticized the sanctions, referring to them as a "serious mistake." *Id.*

48. President O-Gon Kwon of the Assembly of State Parties, which is the legislative body that oversees the ICC's management, spoke out against the "unprecedented" measures taken by the United States against the international organization. *See UN Dismayed Over US Sanctions on Top International Criminal Court Officials*, UN NEWS (Sept. 2, 2020), <https://news.un.org/en/story/2020/09/1071572> [https://perma.cc/2MQQ-DES7] (reporting that Kwon released a statement that he "deeply regret[ted] measures targeting Court officials, staff and their families"). Additionally, Richard Dicker, who serves as the international justice director of the Human Rights Watch, claimed that the U.S. sanctions were obstructive and perverse, in that they "persecute[d] those tasked with prosecuting international crimes." Borger, *supra* note 44. Daniel Balson, advocacy director of the human-rights group Amnesty International USA, expressed concerns that "[t]he White House's actions may dissuade survivors of human rights abuses from demanding justice, and create a chilling effect on those who would support their efforts." Ian Talley & Courtney McBride, *U.S. Imposes Sanctions on International Criminal Court Officials*, WALL ST. J. (Sept. 2, 2020, 3:37 PM), <https://www.wsj.com/articles/u-s-imposes-sanctions-on-international-criminal-court-officials-11599073486> [https://perma.cc/BG96-YDU4].

spared from sanction Bensouda's *chef de cabinet* and deputy, both of whom are Canadian.⁴⁹

B. *Othering Across Borders*

These two examples highlight what I call *othering across borders*, in which political and prosecutorial actors target foreign defendants and international institutions in order to promote national solidarity and build domestic political capital. Othering across borders arises due to the structure of law enforcement and foreign affairs authority, which is accountable only to the domestic electorate. In other words, one way to view this transnational criminal dynamic is one of externalities. Just as a corporation has every incentive to externalize certain costs onto third parties,⁵⁰ U.S. political actors similarly have incentives to externalize costs onto foreign defendants and international institutions to which they are not electorally accountable. And just as the structural racism of a domestic political system may pursue policies that advance White and male voices to the detriment of women and minorities, so may the institutional forces of U.S. extraterritorial law enforcement trend toward cases prosecuting foreigners, particularly those from countries seen as “other.”

Othering across borders lies at the intersection of critical theory and political economy.⁵¹ Regarding the former, a country—and even more recently, a president—engaging in such “othering” domestically is even more likely to do so in U.S. criminal policy abroad.⁵² Regarding the latter, which in criminal law is often associated with the late Professor Bill Stuntz,

49. Van Schaack, *supra* note 45.

50. Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627, 627–28 (2011).

51. By “critical theory” I mean the analytical framework of law as politics, and in particular, the ways in which race is constructed by and in American law. Mark V. Tushnet, *Critical Legal Theory*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80, 88 (William A. Edmundson & Martin P. Golding eds., Blackwell Publishers, 2005). By “political economy” I mean the analytical framework focusing on how public officials and institutions only meet their legal obligations if it is in their (self-)interest to do so. Lewis A. Kornhauser, *Economic Rationality in the Analysis of Legal Rules and Institutions*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* at 67, 70.

52. As Professor Shirin Sinnar stated,

History and social psychology suggest that the legal divide persists, at least in part, because it tracks deep-seated tendencies to distinguish between insiders and outsiders on racial and xenophobic terms. Because foreign or nonwhite people—and their ideas—have long been perceived as threatening, the harsher treatment of international terrorism accords with implicit beliefs. Historical patterns of “othering” also make it natural for the international category to expand to cover ethnic and racial minorities who are experienced as a threat, whether or not they have true international ties.

Sinnar, *supra* note 5, at 1395.

the drive to prosecute and/or act “tough on crime”⁵³ may be externalized on foreign defendants, who are not part of the same polity and are less likely to mobilize to hold politicians politically accountable. Similarly, U.S. actors may criticize or sanction foreign nations and foreign defendants in order to show themselves to be “pro-America” or “America First.” While this has long been an aspect of foreign relations, today, our prosecutorial system is more globalized than ever, meaning that the added gravity of criminal sanction may fortify such statements.

Under President Trump, othering across borders reached its zenith. The former president has a long, pre-existing disdain for women and people of color, mixed with an open disregard for domestic criminal justice norms. He questioned President Barack Obama’s place of birth,⁵⁴ threatened to “lock up” Hillary Clinton,⁵⁵ designated citizens of another country as “rapists,”⁵⁶ derided Mexican-American judges,⁵⁷ referred to other nations as “shithole countries,”⁵⁸ suggested that congresswomen of color “go back” to other countries,⁵⁹ and called for the execution of the Central Park Five.⁶⁰ He also engaged in tremendous prosecutorial protectionism for his close associates,

53. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

54. Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978> [<https://perma.cc/7MGQ-QHL7>].

55. Dan Roberts, Ben Jacobs & Sabrina Siddiqui, *Donald Trump Threatens To Jail Hillary Clinton in Second Presidential Debate*, GUARDIAN (Oct. 10, 2016, 11:57 AM), <https://www.theguardian.com/us-news/2016/oct/10/debate-donald-trump-threatens-to-jail-hillary-clinton> [<https://perma.cc/7M7R-MBR4>].

56. Rupert Neate, *Donald Trump Doubles Down on Mexico “Rapists” Comments Despite Outrage*, GUARDIAN (July 2, 2015, 3:58 PM), <https://www.theguardian.com/us-news/2015/jul/02/donald-trump-racist-claims-mexico-rapes> [<https://perma.cc/B73K-UT5P>].

57. Z. Byron Wolf, *Trump’s Attacks on Judge Curiel Are Still Jarring To Read*, CNN (Feb. 27, 2018, 8:24 PM), <https://www.cnn.com/2018/02/27/politics/judge-curiel-trump-border-wall/index.html> [<https://perma.cc/C9HK-NM4Q>].

58. See Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/H83K-VLHM>]; Rupert Neate & Jo Tuckman, *Donald Trump: Mexican Migrants Bring “Tremendous Infectious Disease” to US*, GUARDIAN (July 6, 2015, 6:29 PM), <https://www.theguardian.com/us-news/2015/jul/06/donald-trump-mexican-immigrants-tremendous-infectious-disease> [<https://perma.cc/Z2S6-ND25>]; Roberts, Jacobs & Siddiqui, *supra* note 55.

59. Bianca Quilantan & David Cohen, *Trump Tells Dem Congresswomen: Go Back Where You Came From*, POLITICO (July 14, 2019, 9:15 AM), <https://www.politico.com/story/2019/07/14/trump-congress-go-back-where-they-came-from-1415692> [<https://perma.cc/8NV6-RHZY>].

60. Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html> [<https://perma.cc/L49P-ZD6B>].

all of the same gender and race: he intervened in Michael Flynn⁶¹ and Roger Stone's cases, not to mention those of Navy SEALs accused of war crimes.⁶² In each case, President Trump circumvented or short-circuited the typical criminal process. Given such conceptions, it is no surprise that the president and his administration mixed this racism, sexism, xenophobia, and disregard for criminal justice norms in its transnational and international criminal legal policies, applying all to foreign nationals and international institutions led by Africans. This then emboldened his administration to again signal solidarity and nostalgia under the banners of "America First" and "Make America Great Again."

But it would be too simplistic to isolate these racial dynamics within the Trump White House alone. The vast majority of transnational criminal cases play out apart from the president. As noted recently in President Obama's *Harvard Law Review* article, in practice, DOJ autonomy from direct White House control has long been the norm.⁶³ On the front end, there is a long-standing norm against the president ordering prosecutions, thus reducing the risk of politicized prosecutions.⁶⁴ On the back end, a norm prohibits the president from ordering the cessation of an investigation or

61. Adam Goldman & Katie Benner, *U.S. Drops Michael Flynn Case, in Move Backed by Trump*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case-dropped.html> [<https://perma.cc/Z8TS-UJNX>].

62. Helene Cooper, Maggie Haberman & Thomas Gibbons-Neff, *Trump Says He Intervened in War Crimes Cases To Protect "Warriors,"* N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/politics/mark-esper-seal-navy-secretary.html> [<https://perma.cc/9TSL-5PH6>]; Dave Philipps, *Trump Reverses Navy Decision To Oust Edward Gallagher from SEALs*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/us/trump-seals-eddie-gallagher.html> [<https://perma.cc/8XAQ-A49L>].

63. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017) ("[W]ithin the executive branch, the President's direct influence is subject to constraints designed to safeguard the fair enforcement of the law."). Attorney general nominees since Watergate have also endorsed this autonomy principle. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 22 (2018). White House priorities do enter the DOJ when the president installs political appointees to lead USAOs and the Main Justice Criminal Division, but many DOJ institutional priorities persist across administrations. And in any event, once such leadership is installed, the White House does not direct the DOJ on how to proceed in individual cases.

64. Former President Barack Obama remarked,

For good reason, particular criminal matters are not directed by the President personally but are handled by career prosecutors and law enforcement officials who are dedicated to serving the public and promoting public safety. The President does not and should not decide who or what to investigate or prosecute or when an investigation or prosecution should happen.

Obama, *supra* note 63, at 823; *see also* Green & Roiphe, *supra* note 63, at 16 ("But, presidents do not, as a general matter, tell the FBI when to initiate or terminate particular investigations. Nor do they direct federal prosecutors whether charges against an individual should be presented to the grand jury or how pending charges should be prosecuted.").

prosecution, for similar reasons.⁶⁵ DOJ is also tremendously decentralized, given that ninety-three USAOs around the country—separate from one another and from Main Justice in Washington, D.C.—decide how and whether to prosecute.⁶⁶ In the vast majority of cases, USAOs make independent decisions regarding which cases to investigate and prosecute, without Main Justice’s clearance.⁶⁷ Such localized discretion has been made possible, in part, by the steady growth of the federal caseload.⁶⁸ In such cases, targeting foreigners, including foreigners from less powerful states and/or of color, appears *more available* and even *more desirable* than pursuing cases domestically. Such critique is prominent with regard to Foreign Corrupt Practices Act (“FCPA”) cases, for example. Since 1997, all FCPA prosecutions have concerned extraterritorial conduct like foreign bribery and often targeted non-U.S. nationals.⁶⁹ Such global allegations have, for instance, sparked best-selling book sales in China of *The American Trap*, a sensationalized account of FCPA prosecutions written by a convicted French corporate executive.⁷⁰

65. For example, as noted above, Trump said he would intervene with Meng, then his administration walked it back. Demetri Sevastopulo & David da Silva, *Donald Trump Willing To Intervene in Huawei CFO Arrest Case*, FIN. TIMES (Dec. 11, 2018), <https://www.ft.com/content/f82176a2-fda8-11e8-aebf-99e208d3e521> [<https://perma.cc/J53C-LVCS>].

66. Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 385–86. Indeed, prosecution of Chinese hackers has been ongoing since the Obama administration, which tried to broker a détente in such actions with a diplomatic summit on intellectual property, albeit one that ultimately only slowed, not stopped, such theft. See Press Release, U.S. Dep’t of Justice, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantages (May 19, 2014), <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> [<https://perma.cc/JJT7-4YRA>]; Jack Goldsmith & Robert D. Williams, *The Chinese Hacking Indictments and the Frail “Norm” Against Commercial Espionage*, LAWFARE (Nov. 30, 2017, 1:00 PM), <https://www.lawfareblog.com/chinese-hacking-indictments-and-frail-norm-against-commercial-espionage> [<https://perma.cc/8VNB-9NJC>].

67. Main Justice in DOJ maintains the authority to exclusively prosecute, review, and/or coordinate with USAOs regarding certain offenses, such as capital cases and foreign corrupt practices. See U.S. DEP’T OF JUSTICE, U.S. ATT’YS’ MANUAL § 9-10.040 (2020) (“Prior to seeking an indictment for an offense potentially punishable by death, the United States Attorney or Assistant Attorney General shall consult with the Capital Case Section.”); *Id.* § 9-47.110 (“Unless otherwise agreed upon by the AAG, Criminal Division, investigations and prosecutions of alleged violations of the antibribery provisions of the FCPA will be conducted by Trial Attorneys of the Fraud Section.”).

68. Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 406 (2009).

69. Stanford L. Sch., *DOJ and SEC Enforcement Actions per Year*, FOREIGN CORRUPT PRACS. ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html?tab=1> [<https://perma.cc/EQ5N-8CQ6>] (select “Foreign and Domestic Entities Charged per Year”); Stanford L. Sch., *Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by Country)*, FOREIGN CORRUPT PRACS. ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html?tab=8> [<https://perma.cc/B9RT-XW3H>].

70. Adam Taylor & Liu Yang, *An Unlikely Winner in the China-U.S. Trade War? A French Businessman’s Book About His Battle with the DOJ*, WASH. POST (June 8, 2019, 4:23 PM),

Some of the most vivid examples of foreign targeting concern Mexico, a country that the United States has a long history of othering. Consider the infamous *United States v. Alvarez-Machain* case, in which the Drug Enforcement Administration (“DEA”) kidnapped from Mexico a Mexican national alleged to have participated in the torture and killing of a DEA agent.⁷¹ The case led to Supreme Court litigation on the question of whether such kidnapping contravened the U.S.–Mexico extradition treaty.⁷² In the end, such an egregious extraterritorial law enforcement tactic resulted in the acquittal of Alvarez-Machain himself.⁷³ Another example is U.S. law enforcement activity regarding consular relations and Mexico. As is well known, in several high-profile cases,⁷⁴ the United States conferred “respectful consideration” but, ultimately, disregarded the International Court of Justice’s (“ICJ”) decision regarding the proper interpretation of Article 36 of the Vienna Convention on Consular Relations (“VCCR”), which mandates that receiving states must notify foreign nationals upon arrest of their right to contact their national consul.⁷⁵ Such actions perpetuated Mexican nationals’ execution, undermined the legitimacy of the ICJ, and fragmented the interpretation and application of the VCCR.⁷⁶

<https://www.washingtonpost.com/world/2019/06/07/an-unlikely-winner-china-us-trade-war-french-businessmans-book-about-his-battle-with-doj> [<https://perma.cc/P5TT-PNRA>]. The book details how Frédéric Pierucci, the former senior executive of French multinational Alstom SA, was arrested, prosecuted, and incarcerated in the United States for FCPA violations. See generally FRÉDÉRIC PIERUCCI, *THE AMERICAN TRAP: MY BATTLE TO EXPOSE AMERICA’S SECRET ECONOMIC WAR AGAINST THE REST OF THE WORLD* (2019). In Pierucci’s conception, FCPA prosecutions are nothing other than an arm of American power, designed to incapacitate foreign companies competing with U.S. companies. *Id.*

71. *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

72. *Id.* at 658. The Court held that such action did not contravene the treaty, over a strenuous dissent from Justice John Paul Stevens and widespread global condemnation. See *id.* at 666, 668–70; *id.* at 670–71 (Stevens, J., dissenting); Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 341, 373–74, 388.

73. *Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996).

74. See *Medellin v. Texas*, 552 U.S. 491, 513 n.9 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 382–83 (2006) (Breyer, J., dissenting); *Breard v. Greene*, 523 U.S. 371, 375 (1998).

75. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. For more information on the ICJ’s interpretation of art. 36, see *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, 43, 71 (Mar. 31); see also *Vienna Convention on Consular Relations (Para. v. U.S.)*, Application of the Republic of Paraguay, ¶¶ 1, 3–4 (Apr. 3, 1998), <https://www.icj-cij.org/public/files/case-related/99/7183.pdf> [<https://perma.cc/N3DL-GHAQ>] (petitioning the ICJ to determine whether the United States had failed to comply with its obligations to Angel Breard, a Paraguayan national, and Paraguay under VCCR; however, Paraguay rescinded its case prior to the ICJ issuing a ruling on the matter); *LaGrand (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 472–73, ¶ 11 (June 27) (filing in the ICJ by Germany against the United States, alleging that the United States had failed to notify two German nationals of their right to have German consular officials contacted following their arrests).

76. See Steven Arrigg Koh, Note, “Respectful Consideration” After *Sanchez-Llamas v. Oregon*: Why the Supreme Court Owes More to the International Court of Justice, 93 CORNELL L. REV. 243, 250–73 (2007).

II. THE REFORMATION

How might we address the pernicious complexities of race and cross-border criminal justice? To move from reckoning to *reformation*, we must *reconcile* the promise of cross-border criminal justice—the overarching goal of criminal accountability—alongside its stakes—the risk to defendants, foreign policy, and the international legal system. This opens the door to necessary transnational and international criminal legal reforms.

A. *The Promise and the Stakes*

Let us first situate suggested reform in the proper context: extraterritorial law enforcement is undoubtedly inevitable and necessary. Cross-border, cyber, and international crime are growing twenty-first-century concerns,⁷⁷ and the United States has an obvious interest in ensuring that members of its armed forces are not wrongly prosecuted for crimes. For example, the aforementioned China Initiative is driven to some degree by othering across borders, but it is also responding to a legitimate national security threat, to which criminal justice must play some role alongside other foreign policy modalities such as diplomacy, state-to-state agreements, and sanctions.⁷⁸ Likewise, international criminal justice’s central aim is to promote accountability for such human conduct on a global dimension.⁷⁹

The specter in both tiers of criminal justice is that of “impunity gaps,” wherein individuals commit serious crimes but take advantage of national borders and/or ineffective criminal justice systems to avoid accountability for such crimes.⁸⁰ So any reforms addressing race in criminal justice—such as, for example, the malleable norm of DOJ autonomy,⁸¹ the breadth of American prosecutorial discretion,⁸² and the reluctance of many prosecutors to “go after their own”⁸³—may tug at deeply-embedded norms in our U.S. criminal justice system’s structure, risking other unintended consequences.

77. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 352–58.

78. See Koh, *Criminalization*, *supra* note 14, at 5–12 (describing the use of such modalities in the context of the China Initiative).

79. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 352.

80. See *id.* at 352–55, 359–61.

81. See Green & Roiphe, *supra* note 63, at 64.

82. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176–82 (2019); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1332–33 (1993).

83. See, e.g., JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* xvii, 31, 87 (2017) (asserting that the shifts in the political landscape, courts, the defense bar, and the DOJ have collectively undermined the power and persistence of U.S. prosecutors to go after corporations and their executives).

Similarly, justified ICC criticism need not necessitate throwing out the baby with the bathwater. While racial complexities pervade the entire ICL project, such dynamics do not warrant its wholesale abandonment. The best example of such subtlety regards Africa: Do we center our critique around neglect of African victims or disproportionate targeting of African defendants? Regarding the former, in the 1990s, many criticized the international community for turning a blind eye to atrocities in Africa while establishing an international tribunal to prosecute international crimes against White Europeans in Yugoslavia.⁸⁴ Such criticism led to the establishment of the U.N. International Criminal Tribunal for Rwanda in 1994.⁸⁵ Now, the standard critique is that the ICC is *too* focused on Africa, disproportionately prosecuting African defendants and neglecting other parts of the world. So which is it? The subtle answer is “both,” given that race may both foster African victims’ neglect but also perpetuate an over-emphasis on African prosecutions due to geopolitical opportunism. ICC prosecutorial actors are disincentivized from investigating and prosecuting powerful countries, given the authority such states enjoy globally. There will be more institutional and political costs to prosecuting the United Kingdom for war crimes than prosecuting Kenya. The racial makeup of these countries is of course intertwined with this geopolitical reality.

But this reality does not obscure that some individual Africans are truly perpetrating international crime against African victims, nor that international tribunals can promote accountability for such injustices. Dismissing such projects as neo-colonial is thus too facile. The conflict in Darfur, for example, has rightly been described as a genocide, and the ICC has indicted Omar al-Bashir on that charge.⁸⁶ This indictment is desirable: beginning in 2003, al-Bashir’s Arab Sudanese government perpetrated genocide against Black Sudanese, with some estimates of 300,000 deaths

84. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT’L & COMP. L.J. 167, 175–78 (1997).

85. *See id.* at 168 n.3, 176–78.

86. The ICC has since suspended activities on this case. Marlise Simons, *Sudan: Prosecutor Halts Darfur Inquiry*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/world/africa/sudan-prosecutor-halts-darfur-inquiry.html> [<https://perma.cc/R9QE-3RBA>]. However, on June 10, 2020, ICC prosecutor Fatou Bensouda implored the Security Council and the broader international community to urge Sudan to increase its efforts in bringing Darfur war crimes suspects to justice. Press Release, U.N. Sec. Counsel, *Securing Justice for Past Crimes in Darfur Must Remain Sudan’s Priority*, International Criminal Court Prosecutor Tells Security Council (June 10, 2020), <https://www.un.org/press/en/2020/sc14210.doc.htm> [<https://perma.cc/R7VU-PRNF>]. Bensouda’s statements followed the June 3 transfer of Ali Kushayb into ICC custody in the Central African Republic—a promising development in the ICC’s plans to achieve justice for Darfur victims. *Id.* (“Justice for Darfur has already been too elusive for too long . . . It is past time for that unsatisfactory state of affairs to change. A window of opportunity has been reopened. We must collectively seize it.”).

and 2.7 million Darfurians displaced.⁸⁷ This case thus highlights the ongoing challenge of promoting accountability, mindful of the pernicious effects of racism on all sides of such a criminal process.

And yet othering across borders disrupts and corrodes these transnational and international criminal legal systems on three fronts. The first is the impact on foreign defendants, who are often both of color *and* foreign nationals.⁸⁸ Such defendants litigate in an unfamiliar system and (almost always) a foreign language. For them, the U.S. criminal process is unintuitive, and they are forced to retain counsel in a foreign jurisdiction. Jurors are also more inclined to rule against them, given the defendants almost always do not hail from the jurors' community. Additionally, these defendants may find themselves defending against not one but multiple sovereigns, each of which has shared evidence or otherwise contributed to the criminal case.

Second, othering across borders regrettably reverberates in foreign relations. Foreign countries may avail themselves of several options. They may protest through diplomatic channels; this occurred, for example, between Presidents Obama and François Hollande in the BNP Paribas case.⁸⁹ They may also use other instrumentalities of foreign policy, including cooperation and association agreements, trade, economic sanctions, military force, and the use of foreign aid.⁹⁰ And they may weaponize their own criminal justice system, in a sort of *global arrest game*, in which retaliatory

87. *At Five-Year Mark, Darfur Crisis Is Only Worsening - UN Aid Chief*, UN NEWS (Apr. 22, 2008), <https://news.un.org/en/story/2008/04/256942-five-year-mark-darfur-crisis-only-worsening-un-aid-chief> [https://perma.cc/DSP3-L2PJ]. In June 2020, fugitive and former militia leader Ali Koshieb turned himself in to the ICC, thus becoming the first individual to likely be tried by the Court. Press Release, Int'l Crim. Ct., Situation in Darfur (Sudan): Ali Kushayb is in ICC Custody (June 9, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1525> [https://perma.cc/P8UW-2GR4]; ICC: *Sudanese Fugitive in Custody: Ali Koshieb First Suspect Held for Government-Backed Crimes in Darfur*, HUM. RTS. WATCH (June 9, 2020), <https://www.hrw.org/news/2020/06/09/icc-sudanese-fugitive-custody> [https://perma.cc/42J7-WJQ2]. It is a welcome development: by any measure, this is indeed a "crime of most serious concern to the international community" and thus a call to the promotion of criminal accountability. Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90.

88. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 362–85.

89. Karen Freifeld & Yann Le Guernigou, *Obama Deflects French Pressure To Intervene in BNP Dispute*, REUTERS (June 5, 2014, 6:10 AM), <https://www.reuters.com/article/us-bnpparibas-usa/obama-deflects-french-pressure-to-intervene-in-bnp-dispute-idUSKBN0EG15420140605> [https://perma.cc/MDA6-PU77]. At a dinner between Presidents Obama and Hollande, Obama rejected Hollande's request to intervene in the DOJ investigation of the French bank. *Id.* He is reported to have stated something to the effect of "[t]he tradition of the United States is that the president does not meddle in prosecutions." *Id.*

90. See Clair Apodaca, *Foreign Aid as Foreign Policy Tool*, in OXFORD RESEARCH ENCYCLOPEDIA OF FOREIGN POLICY ANALYSIS *2 (Apr. 26, 2017), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-332> [https://perma.cc/RG8D-J6SY].

arrests and prosecutions occur as part of a worldwide system of criminal prosecution.⁹¹ Just recently, for example, the Chinese government warned that it may detain U.S. citizens as retaliation for U.S. prosecution of Chinese scholars in U.S. territory; the U.S. State Department issued a related travel advisory recommending that Americans avoid visiting China, in part because the Chinese government detains foreign nationals “to gain bargaining leverage over foreign governments.”⁹²

Third, this racial valence corrodes the international legal system and further undermines American leadership in international law. International law may promote global cooperation, while othering may foster nationalism, racism, and xenophobia. With ICL specifically, such nationalism disrupts the broader goal of fostering international criminal accountability. From its earliest days in Nuremberg until today, ICL has promised to promote accountability for the most serious crimes of concern to the international community, namely, genocide, war crimes, and crimes against humanity. The gravity of such crimes should transcend national boundaries. And whatever criticisms of the ICC’s structure and jurisdiction (and many valid ones exist), it is a gross perversion of U.S. policy to weaponize U.S. sanctions to target ICC actors.

B. *The Way Forward*

Like many issues at the intersection of race and law, othering across borders defies any simple solution.⁹³ And yet, the following measures may help curb such forces in U.S. criminal justice policy at the international, transnational, and domestic levels.

First, regarding U.S. engagement internationally, it is far preferable for the United States to work constructively with the ICC than to antagonize it. One opportunity for the Biden administration is to reengage with the ICC as the Obama administration did, including ceasing hostile rhetoric towards the

91. See Koh, *Criminalization*, *supra* note 14, at 17; see also Steven Arrigg Koh, *Criminalizing Foreign Relations: How the Biden Administration Can Prevent a Global Arrest Game*, JUST SEC. (Dec. 18, 2020), <https://www.justsecurity.org/73853/criminalizing-foreign-relations-how-the-biden-administration-can-prevent-a-global-arrest-game> [<https://perma.cc/7Y8J-NHC4>]. In the case of FCPA prosecutions, for example, aggressive U.S. enforcement has led to a rise in such enforcement practices in France. See generally Frederick Davis, *Where Are We Today in The International Fight Against Overseas Corruption: An Historical Perspective, And Two Problems Going Forward*, 23 ILSA J. INT’L & COMPAR. L. 337 (2017) (discussing French legislative efforts to address overseas bribery).

92. Kate O’Keeffe & Aruna Viswanatha, *China Warns U.S. It May Detain Americans in Response to Prosecutions of Chinese Scholars*, WALL ST. J. (Oct. 17, 2020, 3:37 PM), <https://www.wsj.com/articles/china-warns-u-s-it-may-detain-americans-in-response-to-prosecutions-of-chinese-scholars-11602960959> [<https://perma.cc/E9X7-9JLX>].

93. See e.g., TEHRANIAN, *supra* note 2, at 165 (listing a wide variety of reforms in law, media, and culture to redress civil rights violations against Middle Easterners).

ICC, engaging with the Assembly of States Parties and the ICC, publicly supporting and advocating for cooperation with the ICC, urging foreign nations to refrain from assisting those individuals that are at large and currently under investigation by the ICC, and encouraging foreign states to contribute resources and logistical assistance to help the ICC detain current fugitives.⁹⁴ The greater the cooperation, the more the United States and the ICC will have similar goals around similar defendants.⁹⁵ In particular, concerning the Afghanistan investigation, the United States should be mindful that charges are unlikely, as emphasized recently by retired General Wesley Clark.⁹⁶ At the extreme, the United States could strip the ICC of the ability to hear any case by showing itself to be willing and able to investigate or prosecute.⁹⁷ One initial hopeful sign is the Biden administration's announcement in April 2021 that it is dropping sanctions against Bensouda and others.⁹⁸

Transnationally, keeping with the political economy lens, U.S. political, prosecutorial, and institutional actors should internalize some of the costs of prosecutions against foreign defendants, disincentivizing the exploitation of foreign affairs prosecutions to promote domestic solidarity. One way is to further integrate the DOJ and the Department of State under the National Security Council's umbrella of inter-agency coordination.⁹⁹ DOJ will better apprehend the geopolitical consequences of its actions without falling

94. Koh, *ICJ 5.0*, *supra* note 16, at 534–37.

95. While this addresses U.S. interference with ICC function, it also compounds the geopolitical dynamics surrounding the ICC: more powerful countries may evade prosecution when engaged in a positive interrelationship with the Court.

96. Beth Van Schaack, *The Int'l Criminal Court Executive Order: Global Reactions Compiled*, JUST SEC. (Sept. 1, 2020), <https://www.justsecurity.org/72256/the-intl-criminal-court-executive-order-global-reactions-compiled> [<https://perma.cc/P7WY-6J6N>].

97. This happened, analogously, in the ICC's inquiry into war crimes perpetrated by the British in Iraq between 2003 and 2008. See Owen Bowcott, *ICC Abandons Inquiry Into Alleged British War Crimes in Iraq*, GUARDIAN (Dec. 9, 2020, 12:44 PM) (quoting Office of the Prosecutor, *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Iraq/United Kingdom*, INT'L CRIM. CT. (Dec. 9, 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk> [<https://perma.cc/E2LS-K3U9>]), <https://www.theguardian.com/uk-news/2020/dec/09/icc-abandons-inquiry-into-alleged-british-war-crimes-in-iraq> [<https://perma.cc/6Y5S-M6FC>] (“[T]he office . . . could not substantiate allegations that the UK investigative and prosecutorial bodies had engaged in shielding . . . , based on a careful scrutiny of the information before it.”).

98. Nahal Toosi, *Biden Lifts Sanctions on International Criminal Court Officials*, POLITICO (Apr. 2, 2021, 4:10 PM), <https://www.politico.com/news/2021/04/02/icc-sanctions-reversed-biden-478731> [<https://perma.cc/EW68-2AV9>].

99. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 391–92; Steven Arrigg Koh, *Julian Assange and Omar al-Bashir: What Comes Next for Two Global Fugitives?*, JUST SEC. (Apr. 12, 2019) [hereinafter Koh, *What Comes Next*], <https://www.justsecurity.org/63620/julian-assange-and-omar-al-bashir-what-comes-next-for-two-global-fugitives> [<https://perma.cc/99CZ-NL7N>].

directly under White House direction on questions of criminal investigation and prosecution.¹⁰⁰ It may also give the United States greater incentive to pursue diplomatic and legal solutions to such problems. For example, as noted above, the United States initially pursued diplomatic negotiations with China regarding intellectual property theft; while in this specific case the strategy was unsuccessful, as a general rule this is a positive proposition. The United States may also marshal international law to broker bilateral and multilateral law enforcement agreements. This creates a *quid pro quo* relationship, wherein countries have a mutual incentive to engage judiciously in law enforcement activity to preserve their broader law enforcement dynamic.¹⁰¹ The recent history of bilateral treaties regarding the exchange of evidence exemplifies this trend.¹⁰² While such agreements have drawbacks—including perennial international legal questions of compliance and enforcement—such an approach has many benefits over the ICC model, wherein a national government has an incentive to “other” an international court prosecuting its own nationals.¹⁰³

When foreign defendants of color are prosecuted domestically, the necessary prescriptions resemble those already identified as sorely necessary

100. See, e.g., Koh, *What Comes Next*, *supra* note 99 (describing the geopolitical implications of the case for the extradition of Julian Assange).

101. For some countries, this is easier said than done, given that some countries lack sufficient rule of law to warrant conclusion of extradition or mutual legal assistance treaties. See generally Koh, *Criminalization*, *supra* note 14. But the United States may still broker smaller, more surgical, deals using executive agreements. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1307–12 (2002) (discussing structural obstacles to Article II treaty-making); Kathleen Claussen, *Trade Executive Agreements* (Mar. 24, 2021) (in progress manuscript) (on file with author); Guillermo J. Garcia Sanchez, *The Other Secret Deals with Mexico and the Expansion of the Executive Bureaucracies* (Feb. 17, 2021) (in progress manuscript) (on file with author).

102. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 358–59 (discussing mutual legal assistance treaties); Koh, *Core Criminal Procedure*, *supra* note 14, at 269–70 (reviewing recent developments in exchange of electronic evidence). Of course, challenges exist to negotiation and enforcement of such agreements: at times countries fail to reach consensus on terms, while violations of the agreements may not be adequately redressed. And yet the prospect of mutual benefit—for example, the promise of obtaining evidence from a foreign jurisdiction for use in a domestic prosecution—around criminal prosecution gives countries incentive for continued engagement in law enforcement relationships. This, to some degree, explains the rise of bilateral and multilateral law enforcement agreements in recent decades. Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 358–59 (reviewing the rise of transnational criminal legal treaty-making).

103. See Koh, *Foreign Affairs Prosecutions*, *supra* note 13, at 355–56 (comparing the efficacy of international tribunals against foreign affairs prosecutions); Mattia Cacciatori, *When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents*, 12 *IN'TL J. TRANSITIONAL JUST.* 386, 386–89 (2018) (reviewing the dynamics between the ICC, NGOs, and the governments of Sudan and Kenya).

in domestic criminal justice. The need for reform of indigent defense,¹⁰⁴ plea bargaining,¹⁰⁵ and juries adjudicating minority defendants¹⁰⁶ all apply equally to the global criminal justice space as well. In this sense, the problematic racial questions arising in global criminal justice inhere in the very nature of U.S. criminal justice itself—particularly the disproportionate impact of the system on defendants of color. Thus, all reforms must continue to be situated in a deeper understanding of the function of racial subordination at the intersection of U.S. law, policy, and culture.

CONCLUSION

Our moment of reckoning for criminal justice does not stop at our borders. We must account for the realities of racism as a matter of domestic criminal law enforcement and in our broader transnational and international criminal systems. Today, U.S. criminal justice may *other across borders*, leading to overzealous foreign affairs prosecutions and the sanctioning of ICC officials. This then harms foreign defendants, complicates U.S. foreign relations, and fragments international law. While the persistent questions of race and law are not easily resolved, we may begin the process of reformation through ICC engagement; realignment of institutional, bilateral, and

104. See, e.g., Roger A. Fairfax, Jr., *Searching for Solutions To the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2316 (2013) (arguing that indigent defense reform should be incorporated into “smart-on-crime” initiatives); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1200–01 (2013) (arguing that indigent defense reform should be based on the broader concept of access to justice and not just the right to counsel); Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL’Y REV. 161, 161–64 (2009) (arguing for the necessity of a cultural shift to help improve indigent defense).

105. See generally, e.g., Mirko Bagaric, Julie Clarke & William Ringer, *Plea Bargaining: From Patent Unfairness to Transparent Justice*, 84 MO. L. REV. 1 (2019) (noting plea bargains are unnecessarily harsh due to the built-in power disparities); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018) (arguing that a defendant’s race plays a factor in plea bargaining); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 66 (2012) (noting that overcharging in the plea-bargaining process “runs afoul of the ethical guidelines governing prosecutors, abuses its prosecutorial power, and compromises the justice system as a whole”); Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 615 (1987) (arguing that plea bargaining encourages crime and “extort[s] guilty pleas from the innocent”).

106. See, e.g., Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593, 1595–96 (2018) (arguing that “black and white jurors regularly c[o]me to starkly different conclusions about guilt and innocence”); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1611 (1985) (arguing that research “reveals a widespread tendency among whites to convict black defendants in instances in which white defendants would be acquitted”); Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 319–20 (2005) (finding that two of Texas’s largest counties—Dallas and Harris—were not populating representative juries for trials).

multilateral incentives around bilateral relationships; and renewed efforts to address domestic criminal justice inequities.