



## Racism in the U.S. Criminal Justice System: Institutionalized Genocide?

Nkechi Taifa\*

David Simon, creator of the popular HBO series *The Wire* and commentator in director Eugene Jarecki's documentary *The House I Live In*, once characterized the drug war as a "holocaust in slow motion."<sup>1</sup> Filmmaker Michael Moore tweeted that the water crisis in Flint, Michigan was "a version of genocide."<sup>2</sup> Brazen police killings are far from new but increasingly terrifying as the result of smart phones, with even barber shop chatter describing the situation as genocidal. And a Shadow Report compilation of police violence and torture submitted to the United Nations (UN) in 2014 used genocide as its backdrop.<sup>3</sup>

On the launch of his 1903 treatise, *The Souls of Black Folk*, historian W.E.B. DuBois prophesized that "the problem of the twentieth century is the problem of the color-line," referring to the pernicious role of race in society. And now, more than 100 years later, his prognosis is even more ominous as my scrutiny of international law dictates that conditions facing twenty-first century Black America could have parallels to genocide.

### I. Introduction

I coined the arguably contentious phrase "institutional genocide" as a framework through which to analyze the evolving jurisprudence of international human rights doctrine to selected conditions impacting Black people in the United States.<sup>4</sup> The terminology is neither radical ranting nor rank rhetoric. It uses the international definition of genocide as a lens to scrutinize today's criminal punishment system and its impact on the Black community,

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\* The views expressed in this Issue Brief are solely those of the author.

<sup>1</sup> *Inside the "War on Drugs,"* HARV. MAG. (Mar. 28, 2013), <http://harvardmagazine.com/2013/03/inside-the-war-on-drugs>.

<sup>2</sup> Michael Moore (@MMFlint), TWITTER (Dec. 19, 2015, 7:13 PM), <https://twitter.com/mmflint/status/678367616650444800>.

<sup>3</sup> WE CHARGE GENOCIDE, POLICE VIOLENCE AGAINST CHICAGO'S YOUTH OF COLOR (2014), <http://report.wechargegenocide.org/downloads/un-report-we-charge-genocide.pdf>.

<sup>4</sup> See, e.g., Freddie Allen, *The IBW "Black Paper" Seeks To Energize Activists*, L.A. SENTINEL (Sept. 6, 2013), <https://lasentinel.net/the-ibw-black-paper-seeks-to-energize-activists.html>.

although the impact of racism in other systems, such as education<sup>5</sup> or health care,<sup>6</sup> could likewise be so examined.

The backdrop for my analysis is the scholarship of Critical Race Theory,<sup>7</sup> which provides an expanded framework of thinking on issues of race and social reality. For example, the term “genocide” appears to singularly conjure in most minds images of fiery ovens and atrocious massacres. As such, there is often a blanket denunciation of the applicability of the term to the United States. This censure is understandable, albeit myopic. Seldom do critics dispassionately examine the internationally accepted parameters of the term “genocide,” and then methodically apply that definition to the impact of the United States’ criminal justice system on a particular racial group.<sup>8</sup> For if one were to do so, I suggest that manifestations of genocide against a substantial segment of the Black populace in the United States could be plausible.

The purpose of this Issue Brief is to advance the scholarly dialogue with respect to the applicability of international human rights doctrine to domestic United States conditions; in this case, the application of the international definition of genocide to the Black community as it is impacted by the U.S. criminal justice system. My premise is that the United States has moved beyond institutional racism<sup>9</sup> in the administration of its punishment system, to manifestations of genocide.

Nothing in this argument is intended to compare or equate genocides throughout history. Each is abhorrent with its own mass atrocity. All must be remembered with their victims respected and sufferings honored.

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<sup>5</sup> See, e.g., Joy Resmovits, *American Schools Are Still Racist, Government Report Finds*, HUFF. POST (Mar. 21, 2014), [http://www.huffingtonpost.com/2014/03/21/schools-discrimination\\_n\\_5002954.html](http://www.huffingtonpost.com/2014/03/21/schools-discrimination_n_5002954.html).

<sup>6</sup> See, e.g., megalopolisuk, *Medical Apartheid Part 1*, YOUTUBE (Feb. 27, 2007), <https://www.youtube.com/watch?v=H6oHn72QUnc>.

<sup>7</sup> Critical Race Theory is the legal scholarship movement developed in the mid-1970s as a result of discontent with the failure of Critical Legal Studies to adequately address race in its analysis and criticism of the American legal system. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al., eds., 1996). Critical Race Theorists often advance innovative thoughts, tactics and strategies with which to analyze legal doctrine related to race.

<sup>8</sup> For example, Professor Randall Kennedy has criticized the paradigm of genocide in the United States, noting that “no one . . . has come forward with credible evidence to suggest that American drug policy is truly genocidal—that is, deliberately designed to eradicate a people.” Randall Kennedy, Symposium, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261 (1994). Professor Kennedy’s definitional reference to genocide however, is underinclusive. In selectively paraphrasing the Genocide Convention, he omits provisions that are addressed in this Paper and leaves the reader to off-handedly dismiss any correlation applied to conditions within the United States.

<sup>9</sup> “Institutional racism . . . is a theory of racism wherein unwarranted racially disparate treatment is codified within the structural fabric of social institutions and manifests routinely without the need for a discrete actor to overtly perpetrate a discriminatory act.” Nkechi Taifa, *The “Crack/Powder” Disparity: Can the International Race Convention Provide a Basis for Relief?*, AM. CONST. SOC’Y (May 2006), <https://www.acslaw.org/sites/default/files/Taifa - Crack Powder Disparity.pdf> [hereinafter *The Crack/Powder Disparity*].

I first present the definition of genocide embraced by the international community and analyze its adoption as ratified by the United States. Next, I tackle a presumptively fundamental barrier to my thesis—the issue of intent—and theorize how that hurdle might be overcome. In the classic story-telling tradition of many critical race theorists,<sup>10</sup> I then briefly introduce the inter-generational characters in Aunt Nettie’s neighborhood—a stylized composite of a community impacted by the devastating realities of the criminal justice system over the past forty years. Finally, I discuss, in a cursory fashion, policies and practices highlighted by the composite, demonstrating their far-reaching and grave implications, which I proffer, in many respects, parallel the definition of genocide against a substantial segment of the U.S. Black population within the framework of both international and domestic law.

## II. Application of the Term “Genocide”

### A. The International Definition of Genocide

In 1948 the UN General Assembly adopted the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>11</sup> This Convention confirmed that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish.”<sup>12</sup> Genocide, the Convention declares, is the committing of certain acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>13</sup> According to the international convention, the following acts constitute genocide:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; [or]
- (e) Forcibly transferring children of the group to another group.<sup>14</sup>

Pursuant to the Genocide Convention, however, genocide is not the only punishable act. Related acts, such as conspiracy, incitement or attempts to commit genocide, and complicity in genocide, are equally punishable.<sup>15</sup> Furthermore, the international definition concludes by reminding the Parties that those who commit genocide or any other of the related acts “shall

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<sup>10</sup> A predominate theme within critical race jurisprudence is the active use of storytelling—which includes narrative, parable, chronicles and anecdotes—with which to analyze and challenge the “majoritarian mindset—the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race.” Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462 (1993).

<sup>11</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>12</sup> *Id.* at art. I.

<sup>13</sup> *Id.* at art. II.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at art. III.

be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>16</sup>

## B. The Lengthy Process of U.S. Ratification

The UN General Assembly adopted the Genocide Convention in 1948 without dissent, with the United States being the first nation to sign. Indeed, the United States’ delegation played a pivotal role in drafting the international Convention; however, it took the United States thirty-eight years to give its advice and consent to ratification. One of the articulated reasons for this unconscionable delay was the fear that Blacks in America would use the treaty to their advantage.<sup>17</sup>

According to Stephen Klitzman, chairman of an American Bar Association committee that chronicled the history of the Genocide Convention’s ratification process, the Genocide Convention had set a record “as the most scrutinized and analyzed non-military treaty ever to be considered by the Senate.”<sup>18</sup> The Senate Foreign Relations Committee held hearings for thirteen days. More than 200 witnesses, representing divergent views, testified. The hearing’s transcript was more than 2,000 pages long.<sup>19</sup>

Nearly forty years after its adoption by the United Nations, and after scores of other nations had already ratified it, the U.S. Senate finally gave its advice and consent to ratification, subject to the enactment of implementing legislation under federal law. By this point, political leaders in the United States felt comfortable that enactment of anti-segregation laws mooted concern over attacks against American racial practices of the 1950s and 1960s.<sup>20</sup> The Senate also took the extra step of inserting language to limit the scope of the Genocide Convention within U.S. law.

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<sup>16</sup> *Id.* at art. IV.

<sup>17</sup> That fear was not without substance. In 1951, three years after the passage of the Genocide Convention by the United Nations, W.E.B. DuBois and over ninety others presented the United Nations with a petition chronicling the genocidal sufferings, murder, mental assault and crimes against humanity inflicted against Black people. Twenty years later this petition was published in the book, CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson ed., 1970). The documented reasons for delay included the anxieties of segregationists that ratification would subject the United States to punishment under the Convention, based on the country’s treatment of Native American and Black people. This fear was illustrated by the concerns of Ohio Senator John Bricker, who was alarmed at the thought that literally thousands of discriminatory federal and state laws could automatically be invalidated by application of international human rights law in domestic courts. *See* Stephen H. Klitzman, Craig H. Baab & Brian C. Murphy, *Ratification of the Genocide Convention: From the Ashes of “Sboab” Past the Shoals of the Senate*, 33 FED. BAR NEWS & J. no. 6, July-Aug. 1986, at 257, *reprinted in The Genocide Convention Implementation Act: Hearing on H.R. 807 Before the Subcomm. on Immigration, Refugees, & International Law of the H. Comm. on the Judiciary*, 100th Cong. (1988) (statement of Stephen Klitzman) [hereinafter *Ratification of the Genocide Convention*].

<sup>18</sup> *See Ratification of the Genocide Convention*, *supra* note 17.

<sup>19</sup> Yet, despite this voluminous record and the fact that the Foreign Relations Committee favorably reported the pact five times prior to 1985 (1970, 1971, 1973, 1976, and 1984), the treaty never came to vote in the full Senate until February 1986. *See id.*

<sup>20</sup> *See* Nkechi Taifa, Symposium, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641, 652 (1997). *See also* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 281–82 (1995).

Implementing legislation was now critical because the Genocide Convention, distinct from later international human rights treaties such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, incorporated a provision that the Contracting Parties agree to enact the necessary legislation in their respective jurisdictions prior to depositing the ratification documents with the United Nations.<sup>21</sup> This provision was significant, in that it ensured that ratification of the Genocide Convention would not be a symbolic gesture, but would have the full force of laws and the authority to enact penalties.

### C. The United States Codification

On April 4, 1988, President Ronald Reagan signed the Genocide Convention Implementation Act.<sup>22</sup> This Act codified the international Genocide Convention in U.S. law, making various changes to limit its applicability, perhaps because the Senate feared the language as originally composed. These changes included: (1) adding the terms “specific” before “intent,” and “substantial” in front of “part;” and (2) defining “mental harm” as the permanent impairment of mental faculties, particularly referring to the application of narcotic drugs. Thus, the Genocide Convention, as codified in U.S. law reads (with the significant additions highlighted in bold, and omissions designated by brackets) as follows:

“Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the **specific** intent to destroy, in whole or in **substantial** part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
- (2) causes serious bodily injury [or mental harm] to members of that group;
- (3) causes the **permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;**
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent births within the group; or
- (6) transfers by force children of the group to another group;

shall be punished as provided in subsection (b).”<sup>23</sup>

### III. The Problem with Intent

Many of the disparities in the criminal justice system arise from institutional and structural racism, in which “public policies, institutional practices, cultural representations, and other

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<sup>21</sup> Genocide Convention, *supra* note 11, at art. V.

<sup>22</sup> Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988), *as amended by* The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VI, § 60003(a)(13), 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 1091 (2009)).

<sup>23</sup> 18 U.S.C. § 1091(a).

norms work in various, often reinforcing ways to perpetuate racial group inequity.”<sup>24</sup> As such, the “specific intent” prong, as inserted by the United States, is a fundamental hurdle to use of this treaty in U.S. law. It is a difficult hurdle, given the restrictive manner in which U.S. courts have historically construed the intent requirement within a general equal protection analysis involving criminal justice issues.<sup>25</sup> It seems obvious that few public officials, private individuals, or constitutionally responsible officials will explicitly state, “I have the specific intent to destroy, in whole or in substantial part, your racial, ethnic or religious group.” More recently, however, in the seminal stop-and-frisk case *Floyd v. City of New York*, a federal judge in the Southern District of New York found discriminatory intent based on circumstantial evidence.<sup>26</sup> Still, the Supreme Court has yet to abandon its long-standing tradition requiring direct evidence of intent.<sup>27</sup>

Despite the lower court finding in *Floyd* that intentional discrimination could be found based on both statistical and anecdotal evidence,<sup>28</sup> as I stated in *The “Crack/Powder” Disparity: Can the International Race Convention Provide a Basis for Relief?*:

Scholars have argued . . . that the current intent standard “ignores the way racism works” and because racial inequality can manifest “irrespective of the decisionmakers’ motive,” the remedy to that inequality must likewise not be dependent upon provable intentional conduct. “Sophisticated racists have learned to code their language and not leave behind a trail of racism.” Although cognizable reasons may exist for courts declining to extend an equal protection remedy beyond cases of provable intentional discrimination, such arguments, no matter how colossal they may appear, should not continue to be allowed as justification to circumscribe justice. . . . Current equal protection analysis must not be allowed to block consideration of creative solutions.<sup>29</sup>

Unless the Supreme Court adopts the analysis in *Floyd* or sanctions similar use of ancillary evidence to prove discriminatory intent, we should look to international jurisprudence, which understands that racism manifests in various forms, allowing intent to be gleaned through actions and impact. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has ratified but not made self-executing, allows laws and practices that have an invidious discriminatory impact

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<sup>24</sup> ASPEN INST. ROUNDTABLE ON CMTY. CHANGE, STRUCTURAL RACISM AND COMMUNITY BUILDING 11 (2004),

[https://assets.aspeninstitute.org/content/uploads/files/content/docs/rcc/aspen\\_structural\\_racism2.pdf](https://assets.aspeninstitute.org/content/uploads/files/content/docs/rcc/aspen_structural_racism2.pdf).

<sup>25</sup> Jeffrey A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791 (1993).

<sup>26</sup> *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

<sup>27</sup> *United States v. Armstrong*, 517 U.S. 456 (1996). The Supreme Court ruled in *Armstrong* that, in order for a defendant to be entitled to discovery based on a claim of selective prosecution because of race, the defendant must prove the prosecution was motivated by discriminatory intent.

<sup>28</sup> *Floyd*, 959 F. Supp. 2d at 562.

<sup>29</sup> *The “Crack/Powder” Disparity*, *supra* note 9, at 5 (citations omitted).

to be condemned, regardless of specific intent, reaching both conscious and unconscious forms of racism.<sup>30</sup> Thus, if the intent standard of the Genocide Convention, as ratified by the United States, were to be interpreted in accordance with the intent standard in CERD, then the paradigm of genocide against a substantial portion of the Black populace in the United States resulting from institutionalized or structural racism in the criminal justice system could, in fact, be plausible and actionable.

Leaving the intent prong aside, let us go back to the definition of genocide and analyze how the impact of racism in the criminal punishment system could fit that mold. In this vein, the term “institutional genocide” is a formulation illuminating the severity inherent in the international nomenclature, while acknowledging that there may be complications with the U.S. interpretation of intent. In the criminal punishment context, institutionalized genocide is the aggregate impact of discriminatory treatment of a community—embedded in laws, policies, and practices of institutions involved in policing, prosecution, and sanctions—which has the effect of destroying, in whole or substantial part, a racial, ethnic or religious group. Such destruction manifests through killings, bodily or mental harm, and destructive conditions of life, to name a few factors. This destruction may not be the result of conscious choice or intentional, deliberate decision-making. Indeed, in addition to being perpetrated through individual acts, discriminatory treatment is embedded within the structure, policies, and practices of whole institutions.

There is a broader social context that underlies the criminal justice system in the United States, which disproportionately impacts African Americans. It is a social context permeated by the poverty, rampant unemployment, poor housing and homelessness, inadequate education, harmful health outcomes, and diminished life opportunities of “disordered neighborhoods.”<sup>31</sup> With such an array of interrelated risk factors, the conditions of life in neighborhoods of concentrated poverty often result in the destruction of not only individuals, but also entire families and generations. The cumulative effect of these conditions almost guarantees the involvement of many young inner city Blacks in the criminal justice system. Ultimately, unmet social needs provide fuel for the cycle of incarceration.<sup>32</sup> Even the vast majority of African Americans who do not come from poverty nevertheless share a heritage on this land of enslavement, segregation, and unequal treatment based on race, often embedded in institutions and generally implicit in policies and practices. These structural arrangements result in killings and bodily and mental harm, on top of appalling conditions of life.

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<sup>30</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>31</sup> “Disordered neighborhoods” also refers to “policing styles and outcomes, crime, social control, social disorganization, neighborhood decay, foreclosure, and fear of crime.” Danielle Wallace & Christopher Scott, *Neighborhood Disclosure*, OXFORD BIBLIOGRAPHIES (July 24, 2013), <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0154.xml>.

<sup>32</sup> See Nkechi Taifa & Catherine Beane, Symposium, *Integrative Solutions to Interrelated Issues: A Multi-Disciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283 (2009).

Are these conscious acts intended to cause such destruction? Are they the unconscious effects of structural racism in the criminal justice system? Or do they constitute institutionalized genocide? The following section will attempt to answer these questions by analyzing the life of the fictional “Aunt Nettie” through the framework of the U.S. interpretation of the international definition of “genocide.”

#### IV. Aunt Nettie’s Neighborhood and Breaking Down the Saga

Aunt Nettie, the elderly lady who lives up the street, has seen and heard it all. Whether viewed first hand from her porch or heard from news reports flashed across her T.V. screen, her community’s narratives are representative of countless chronicles in neighborhoods across the country depicting aspects of the definitional prongs of genocide. Aunt Nettie’s life is saturated with accounts of seemingly senseless police killings of Black men, women and children. When she was a little girl, Nettie’s grandfather was executed for the murder of a White woman in Georgia, despite the fact that he was fifty miles away at a family reunion at the time. He proclaimed his innocence to the end. Now in her later years, Nettie knows the dilapidated conditions around her are commonplace in her neighborhood. For decades she knew the children in her neighborhood ate paint chips from crumbling ceilings and walls, never realizing they contained deadly lead. So when the reports came out about poisoned water from lead pipes in Flint, Michigan, she could only shake her head in agony.

Aunt Nettie was scared to sit on her front porch that day. The previous night another Black youth was gunned down by law enforcement, this time right on her block, so she contented herself to pulling back her curtains and peering out the window. She watched the aging African American men gather at their daily abode—the street corner in front of the liquor store. She watched as her nephew Larry walked past them. Larry was recently released from serving a twenty-year mandatory minimum drug sentence and Nettie knew he was anxious to get back on his feet. She watched the teens hanging out by the alley with no employment prospects in sight and noticed the middle school students who frequented the fast-food restaurant on their way home from class, many of whom had never been to a “sit-down” restaurant in their lives. She watched her pregnant, drug-addicted niece Tanisha slowly ambling up the stairs to the apartment she let her boyfriend use as a drug-selling haven. Little did Aunt Nettie know that circumstances would dictate that Tanisha would never get to raise the child she would deliver. Just yesterday, Aunt Nettie witnessed Tanisha’s little brother, Terrence, get arrested for carjacking. But despite the desolate and painful conditions of life surrounding her neighborhood, Aunt Nettie beamed when she saw her grandnephew Little Ray bounce down the street toward her door.

##### A. “Killing Members of the Group”

Racially biased executions and extrajudicial killings against Black people—whether by lynch mobs or officers of the law, fall within the first definitional prong of the Genocide Convention. Aunt Nettie’s grandfather, executed in a White victim case, is representative of hundreds of Black men who have been convicted of killing Whites and sentenced to die and

countless others murdered before even getting to the courthouse. While the facts may differ in individual cases, the constant factor—death sentences or extrajudicial killings where the race of the victim is White—remains. This is further demonstrated by a U.S. General Accounting Office study, which found evidence indicating a pattern of racial disparities in the charging, sentencing, and imposition of the death penalty, and concluded that those who murdered Whites were more likely to be sentenced to death than those who murdered Blacks.<sup>33</sup>

Furthermore, there are disproportionately high rates of the use of excessive and deadly force by police officers against people of color, with more and more occurrences coming to light as the result of video technology. Despite the lack of an adequate federal database of fatal police shootings, even a cursory scrutiny of academic studies, legal rulings and media investigations reveals evidence of intentional and implicit bias by police against Blacks, from traffic stops to unjustified police killings.<sup>34</sup> The young Black man shot dead by police in Aunt Nettie’s neighborhood is reminiscent of increasing numbers of African Americans murdered by the very police officers sworn to protect them. The Genocide Convention does not provide guidance as to what numbers constitute “a group” and there has yet to be any United States-based litigation delineating such. However, even discounting the legacy of lynchings<sup>35</sup> in this country by private individuals and racially biased capital punishment<sup>36</sup> by the state, I submit that racially biased police killings of unarmed Blacks<sup>37</sup> alone is probative of “killing of members of the group.”

## **B. Causing Serious Bodily Injury, Mental Harm or Permanent Impairment of Mental Faculties**

Under the international definition of genocide, it is possible to destroy a group of people without actual killing, that is why the definition includes, “causing serious bodily or mental harm to members of the group” or, as interpreted and codified by the United States, “caus[ing] serious bodily injury to members of the group,” and “caus[ing] the permanent impairment of the mental faculties of members of the group through drugs, torture or similar techniques.” Although the United States sought to confine the reach of the international definition through its restrictive interpretation of “mental harm,” substantial numbers of African Americans have nevertheless been bodily harmed and mentally

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<sup>33</sup> U.S. GEN. ACCOUNTING OFF., GGD-90-57, DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990), <http://www.gao.gov/assets/220/212180.pdf>.

<sup>34</sup> See Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias>; Justin Feldman, *Roland Fryer Is Wrong: There Is Racial Bias in Shootings by Police*, OPENSCHOLAR@HARVARD: JUSTIN FELDMAN (July 12, 2016), <http://scholar.harvard.edu/jfeldman/blog/roland-fryer-wrong-there-racial-bias-shootings-police>.

<sup>35</sup> See EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (2d ed. 2015), [http://www.eji.org/files/Lynching\\_in\\_America\\_2d\\_Ed\\_Summary.pdf](http://www.eji.org/files/Lynching_in_America_2d_Ed_Summary.pdf).

<sup>36</sup> See Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides>.

<sup>37</sup> See Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police 1999-2014*, GAWKER (Dec. 8, 2014), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>.

impaired. Whether such injuries are caused by drugs, disproportionate racial imprisonment, solitary confinement, or torture, they are all exacerbated as the result of centuries of untreated, multi-generational trauma, analytically described as “Post Traumatic Slave Syndrome.”<sup>38</sup>

While in prison, Aunt Nettie’s son Larry was incarcerated in a special housing unit within a super maximum prison. Confined for twenty-three hours a day in a sealed, windowless cell, with no work, training, or other programs, Larry was subjected to regimes of extreme social and sensory deprivation. Many in his unit also suffered from severe mental illness due to the lack of environmental stimulation, leading to traumatic and serious psychiatric consequences. Prison authorities have defended such units as being necessary to contain violent, disruptive prisoners; however, Amnesty International asserts that conditions in some units violate international standards for the humane treatment of prisoners and exceed what is necessary for security purposes.<sup>39</sup> The total U.S. prison and jail population has exceeded the two million mark. Nearly half of that population is African American, with Black men in the United States incarcerated at a rate five times higher than Blacks were under apartheid South Africa. The increase in the prison population is neither evidence of rising crime and nor an indication of more criminal activity by African Americans. Rather, it is a reflection of destructively lengthy sentencing policies that have had a disproportionate impact on African Americans.

Still, the health consequences of mass incarceration are often overlooked. As a result of prison overcrowding and the lack of appropriate correctional health care, tuberculosis spreads rapidly. In New York City, where a particularly virulent, multi-drug resistant form of the disease broke out, eighty percent of known cases were traced to prisons. Moreover, the rate of HIV infection in the prison population is proliferating. Given the disproportionate numbers of African Americans who are incarcerated, and the cycling of people in and out of prison, a public health crisis has been created with disastrous consequences for not only Black prisoners but their families and communities as well.

Another stark example illustrating the genocidal definition of bodily or mental harm was the systematic torture that was inflicted on at least 125 African American suspects in police custody on Chicago’s Southside to extract confessions between 1972 and 1991. The torture techniques included electric shocks to genitals, suffocation with plastic bags, hot radiator burnings, and mock executions, all under the command of Lt. Jon Burge of the Chicago Police Department.

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<sup>38</sup> “Post Traumatic Slave Syndrome” posits that centuries of chattel slavery in the United States, followed by the residual impacts of multi-generational oppression and institutionalized racism without the opportunity to heal or access societal benefits, result in predictable destructive patterns of behavior. *Post Traumatic Slave Syndrome*, DR. JOY DEGRUY, <http://joydegruy.com/resources-2/post-traumatic-slave-syndrome/> (last visited Oct. 21, 2016).

<sup>39</sup> AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN RIGHTS VIOLATIONS: A SUMMARY OF AMNESTY INTERNATIONAL’S CONCERNS 22 (Mar. 1, 1995), <https://www.amnesty.org/en/documents/amr51/025/1995/en/>.

Burge's legacy of torture left festering wounds that remain open to this day. Many survivors continue to suffer from nightmares and flashbacks, grappling with post-traumatic stress disorder that has gone untreated for decades. They live under a shroud of shame, guilt, and anguish that undermines their ability to form relationships and share community with others. Survivors' family members were also left to contend with their secondary trauma in isolation, after their fathers, sons and partners were ripped from them. As whispers of the torture spread, entire communities lived in fear that they or their loved ones would be disappeared from street corners or homes into the bowels of police stations to be tortured and terrorized. The torture, like lynchings, served to terrorize entire African American communities.<sup>40</sup>

The UN Committee Against Torture was dismayed by Lt. Burge's systematic use of torture. The committee reviewed the issue of police violence in Chicago and it expressed "deep concern at the frequent and recurrent police shootings or fatal pursuits of unarmed black individuals."<sup>41</sup> As the result of a multi-faceted mobilization incorporating community activism and advocacy, Chicago became the first U.S. municipality to provide a reparations settlement to victims of racially motivated police violence.<sup>42</sup>

### C. Inflicting Conditions Calculated to Bring About Physical Destruction

The people in Aunt Nettie's neighborhood have lived all their lives in an under-resourced environment with substandard schools and a lack of meaningful jobs. Many of the children grew up with health deficits from lead poisoning and the lack of fresh food sources in their community. Who knows what impact these educational, health and economic disadvantages may have on people subjected to them? Such conditions of life—exacerbated by the extra scrutiny of police officers deployed to the area—do not make Aunt Nettie's neighborhood safer, but instead result in more people from her community being arrested, prosecuted, convicted, and imprisoned.

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<sup>40</sup> Joey Mogul, *Reparations: A Blueprint To Address Systemic Police Violence*, PEOPLE'S LAW OFF., <http://peopleslawoffice.com/reparations-a-blueprint-to-address-systemic-police-violence/> (last visited Oct. 21, 2016).

<sup>41</sup> See Press Release, We Charge Genocide, Chicago Police Violence Against Black and Latino Youth Called Out by United Nations Committee (Nov. 31, 2014), <http://wechargegenocide.org/press-release-chicago-police-violence-against-black-and-latino-youth-called-out-by-united-nations-committee-against-torture/>; see also WE CHARGE GENOCIDE, *supra* note 3, at 2.

<sup>42</sup> Chicago, Ill., Reparations for Burge Torture Victims Ordinance (May 6, 2015), [https://www.cityofchicago.org/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/ORDINANCE.pdf](https://www.cityofchicago.org/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/ORDINANCE.pdf). The ordinance provides a formal apology from the city; free tuition at Chicago city colleges; psychological counseling and prioritized access to select city services; a requirement that the Burge torture cases and police brutality be taught as part of the curriculum in Chicago city schools; and the creation of a public memorial in remembrance of the torture and its survivors. The ordinance also provides compensation to living survivors from a \$5.5 million dollar city fund. See *City of Chicago Reparations for Burge Torture Victims—Frequently Asked Questions*, CITY OF CHI., [http://www.cityofchicago.org/city/en/depts/dol/supp\\_info/burge-reparations-information/burge-reparations--frequently-asked-questions.html](http://www.cityofchicago.org/city/en/depts/dol/supp_info/burge-reparations-information/burge-reparations--frequently-asked-questions.html) (last visited Oct. 21, 2016).

For instance, Young Terrence's arrest and adjudication as a juvenile for car theft increased the likelihood that he later would be arrested and incarcerated as an adult. Studies have revealed that if youth like Terrence are sent to an adult prison, they are "500% more likely to be sexually assaulted, 200% more likely to be beaten by staff, and 50% more likely to be attacked with a weapon" than if they had been confined in a juvenile facility.<sup>43</sup>

After his release from prison, the conditions of life confronting Aunt Nettie's son, Larry, appeared calculated to ensure he would not succeed. In fact, he told Aunt Nettie that every time he disclosed his felony conviction on a job application or during an interview, he was not hired or, if he lied to get a job, he was fired when his record was discovered. "Aunt Nettie, I even received my GED in prison, and wanted to enroll in some college courses once I was released, but they said I couldn't receive financial aid because of my drug conviction. When I got out of prison, I didn't have medical insurance, and no place to live. And to make matters worse, when I go out to look for a job, I'm often stopped on the streets by the police and harassed for no reason."

More than 600,000 people return home each year from state and federal prisons. Despite the passage of the 2008 Second Chance Act<sup>44</sup> and Obama Administration reentry initiatives,<sup>45</sup> outdated laws and policies have made the transition process from prison life to society increasingly difficult, creating challenges that not only negatively impact formerly incarcerated people, but also have a rippling effect on their families and communities. Many of these barriers to reentry into society arise in the areas of housing, employment, public benefits, education, family reunification, and participation in the political process.

Although Aunt Nettie smiled when she saw Little Ray approach her door, she did not realize that based on his third grade test scores, a prison bed was already being reserved for him. The long-term impact of being denied healthy conditions of life, coupled with the disruption and disintegration of families and diminished life prospects wrought by mass incarceration, result in incalculable damages to substantial numbers of African Americans.

#### **D. Imposing Measures to Prevent Births or Transferring Children by Force to Another Group**

Not only was Aunt Nettie disappointed that Tanisha allowed her boyfriend to sell drugs from her apartment, she was shocked when Tanisha was arrested and sent to prison. She did not realize that drug conspiracy laws sweep within their ambit those who answer telephones and take messages, as well as those who actually sell drugs. Tanisha was shackled

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<sup>43</sup> *Fact Sheet: Juvenile Justice System*, ACLU, <https://www.aclu.org/fact-sheet-juvenile-justice-system> (last visited Oct. 21, 2016).

<sup>44</sup> *See Second Chance Act*, COUNCIL OF STATE GOV'TS JUSTICE CTR., <https://csgjusticecenter.org/nrc/projects/second-chance-act/> (last visited Oct. 21, 2016).

<sup>45</sup> *See* Press Release, White House Off. of the Press Sec'y, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

intermittently throughout her pregnancy and when her baby was born, she was immediately shackled to the bed.<sup>46</sup> Her son was later placed in a foster home with influential, White parents who were intent on adopting him.<sup>47</sup> Equally egregious, the fifteen-year mandatory minimum sentence she received took her out of her childbearing age, meaning she would never have the chance to reproduce again.

The Sentencing Project reports that from 1989 to 1994, the criminal justice control rates for African American women increased seventy-eight percent (a rate greater than that of any other demographic group studied).<sup>48</sup> This was more than double the increase for African American men and for White women and more than nine times the increase for White men. Although the numbers of incarcerated Black women have significantly decreased since 2000,<sup>49</sup> the astronomical incarceration of substantial numbers during their key reproductive years has negatively impacted the entire group's ability to give birth. Likewise, as the result of their lengthy sentences many, like Tanisha, have had their parental rights terminated, a trend that is arguably illustrative of “transferring children from one group to another.”

## V. Conclusion

In response to the ideas this Issue Brief posits, one may ask, “But is it deliberate? Why is it important that the conditions confronting Black people in the criminal justice system be viewed as genocidal? What is wrong with just saying that the system is racist?” In response, I would argue that the horror of overt and institutional racism has not been repugnant enough to prompt a critical mass of the American population to demand that their elected leaders

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<sup>46</sup> Shackling pregnant women violates the International Convention on Civil and Political Rights and the U.N. Convention Against Torture—treaties that have been ratified by the United States—and is violative of other international law standards as well. INT'L HUMAN RIGHTS CLINIC, UNIV. OF CHI. LAW SCH., CHI. LEGAL ADVOCACY FOR INCARCERATED MOTHERS & ACLU, THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES (Aug. 2013), <https://ihrcclinic.uchicago.edu/sites/ihrcclinic.uchicago.edu/files/uploads/Report%20-%20Shackling%20of%20Pregnant%20Prisoners%20in%20the%20US.pdf>.

<sup>47</sup> The Adoption and Safe Families Act of 1997 requires a state to file a petition for termination of parental rights when a child has been in foster care for 15 of the most recent 22 months. *See* Adoption and Safe Families Act of 1997, Pub. Law 105-89, tit. I, § 103(a), 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 675(5)(E) (2016)). This almost assures that children of parents serving mandatory minimum sentences will be adopted, if there is no acceptable relative to intervene. There is concern that as the result of incarceration, disproportionate numbers of Black children are being removed from birth families and transracially adopted, without serious focus on home-based services, reunification, or kinship care. *E.g.*, J. Toni Oliver, *Adoptions Should Consider Black Children and Black Families*, N.Y. TIMES (Feb. 3, 2014), <http://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/adoptions-should-consider-black-children-and-black-families>. Indeed, it can be argued that involuntarily severing parental rights from incarcerated people who are disproportionately African American triggers the genocidal element, “transfers by force children of the group to another group.” This is not meant to suggest that all, or even most, transracial adoptions contribute to genocide.

<sup>48</sup> MARC MAUER & TRACY HULING, SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (Oct. 1995), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Young-Black-Americans-and-the-Criminal-Justice-System-Five-Years-Later.pdf>.

<sup>49</sup> Marc Mauer, *The Changing Racial Dynamics of Women's Incarceration*, SENTENCING PROJECT (Feb. 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf>.

fashion structural solutions. Therefore, scholars, advocates, and activists—particularly those whose communities are most affected by racism—must raise the ante and advance creative, audacious, and untested theories. Perhaps applying the intensified nomenclature of genocide will shock the conscience of the public to intensify actions to remedy the problem. Perhaps the stark juxtaposition of the internationally accepted definition of genocide and the impact of racism in the U.S. criminal justice system will spark needed change in laws, policies, and practices.

Is the impact of racism in the criminal justice system genocidal against a substantial portion of the Black populace? I submit yes. As long as the lives of the people in Aunt Nettie’s neighborhood and African American communities as a whole are being destroyed; as long as discriminatory treatment is embedded in police departments, prosecutor’s offices, and courtrooms, and the perception of unequal justice is perpetuated throughout the system; and as long as legislatures continue laws and policies that have a damaging effect, there will be dire consequences for Black people. This Issue Brief has presented the case that the cumulative impact of destructive treatment against Blacks in the criminal justice system, combined with challenging conditions of life negatively impacting generations, constitutes institutionalized genocide—the human rights crisis facing twenty-first century Black America.

### About the Author

Nkechi Taifa is Advocacy Director for Criminal Justice at the Open Society Foundations, working to influence policy in support of comprehensive justice reform. Taifa focuses on issues involving sentencing reform, law enforcement accountability, re-entry of previously incarcerated persons, prison reform and clemency. Taifa also convenes the Justice Roundtable, a Washington-based advocacy network advancing federal criminal justice reform. Prior to joining the Open Society, Taifa was the founding director of Howard University School of Law’s Equal Justice Program, and was adjunct professor at both Howard Law and American University Washington College of Law. Taifa has served as legislative counsel for the American Civil Liberties Union, public policy counsel for the Women’s Legal Defense Fund, and as a staff attorney for the National Prison Project. She has also been in private practice, specializing in representing indigent adults and juveniles. Taifa has served on many different public interest boards, and as an appointed commissioner and chair of the District of Columbia Commission on Human Rights. Taifa received her JD from George Washington Law School, and BA from Howard University.

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