

Improving Global Accountability: the ICC, the Resource Curse, and a Theory of International Crime

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Abstract

I argue that a close reading of the Rome Statute, the foundational document of the International Criminal Court (ICC), significantly broadens the common understanding of “crimes against humanity” to include forms of bad governance. Whether in state governments or not, agents who practice poor governance, specifically, crimes of major corruption and general negligence that result in widespread, foreseeable, and avoidable human rights violations of certain types can and should be held internationally criminally liable for both their acts and omissions. By examining the likely repercussions for the resource curse, I note possible benefits, as well as possible negative unintended consequences, that the resource curse could have for some of the most serious and persistent problems involving gaps in global accountability and criminally bad domestic governance. Finally, I suggest that although many commentators have perhaps rightly demurred from the theory of general deterrence for most crimes under the ICC’s jurisdiction, general deterrence may be more likely to occur with crimes I argue in favor of, contingent on the court actively prosecuting such criminals.

Introduction

Global accountability gaps are widespread, serious, and life threatening to many people. Spheres of accountability gaps include global democracy (Dahl 1999. Goodhart 2008. Goodin 2007. Gould 2004: Chapter 7), global governance (Grant and Keohane 2005), foreign aid (Wenar 2006), the UN and international sanctions (Gordon 2006), and international law (Altman and Wellman 2004. Drumbl 2007. Rubenstein 2007), to mention but a few of the most meaningful. Lacking accountability is not always cause for concern – for example, an independent domestic judiciary is widely viewed as beneficial for the rule of law (Hamilton 1778 [2003]: Federalist # 78-79). Not only do pernicious gaps in global accountability persist, but often the accountability mechanisms that do exist place the power of accountability in the hands of people who are not, primarily, the agents affected. This can create perverse incentives (Goodin 2007; Grant and Keohane 2005. Rubenstein 2007). For example, while many protesters claim that the World Trade Organization (WTO), World Bank, or International Monetary Fund (IMF) are not accountable, Grant and Keohane note that, in fact, those institutions are highly accountable, but not to the people who are affected by their policies. They are primarily accountable to the states that finance them, especially the United States.

Analogously, today many leaders of nondemocratic states are either not accountable at all or more accountable to foreign interests, such as international financial institutions, corporations, or states, than they are to their own citizens. On a strong interpretation of Westphalia sovereignty, a state's leader, if s/he acts primarily toward her/his own citizens, is unaccountable for domestic affairs and can act with impunity. Over the last century, impunity for actions both within and outside of a state has been eroded by norms and institutions, particularly domestic democracy and universal human rights. It has also been eroded by international law and international criminal tribunals, such as the tribunals used for World War II war crimes; the Cambodian, Rwandan, and Balkan genocides; the Sierra Leone civil war; and, most recently, the ICC (Mennecke 2007: 321).

This paper argues for an improved global accountability through an extant legal institution, the ICC. The ICC is primarily aimed at (though not limited to), state leaders who commit atrocious human-rights violations. It presents a moral as well as legal argument for why and how this can and should be accomplished. Morally, I argue although the powerful are now sometimes held accountable for certain abuses of human rights—primarily violations of security rights—they should be held accountable for additional abuses as well (see Starr 2007. Altman and Wellman 2004. Skogly 2001). I argue that although the ICC does not have the power to hold all such actors to account, it already possesses broader legal powers to try those who cause more types of human rights violations than is it is widely considered to have, or that it has exercised to date (August 2009).

I proceed as follows. First, I briefly define accountability, and sketch the reason global legal surrogate accountability is a favored method of constraining the powerful. Second, I present a reading of the foundational document of the ICC, the Rome Statute, and argue that the ICC can already bring leaders to trial for certain types of nonviolent yet nevertheless atrocious human rights violations. Third, I use this reasoning to show how accountability may help ameliorate an intractable problem, the resource curse. Finally, I consider how general deterrence may be more effective for nonviolent human rights violations than other types of crimes under the ICC's jurisdiction. I consider possible perverse incentives and objections before concluding.

I. Global Accountability

Constraining power: why accountability?

There are multiple ways to constrain power besides using accountability mechanisms, such as using balancing power or checks and balances (Borowiak 2007. Grant and Keohane 2005. Hamilton, Madison, and Jay 1787-8 [2003]. Gordon 2006: 80-81). A useful distinction Grant and Keohane make regarding ways to restrain power is between *ex ante*, or preventive constraints, which include the balance of power as well as checks and balances, and *ex post* constraints, which is the terrain covered by accountability (Grant and Keohane 2005: 30). Although it is blurred somewhat by accountability's potentially powerful incentive structures, *ex post*, like *ex ante* (*ibid.*), can also have a powerful deterrent component. Accountability, as the preferred mechanism of constraining power, should only be employed if its use can be justified, although justification may be required if no other power constraint is available. The form of accountability that I use here - although a second best schema will also become clear throughout the paper - will be demonstrated to be morally and legally justifiable,.

International political accountability necessarily comes in a different form than domestic democratic accountability because the globe lacks both a government and other methods of democratic accountability (Borowiak 2007. Rubenstein 2007. Grant and Keohane 2005. Buchanan and Keohane 2006). Globally, many imperfect forms of accountability already exist, including humanitarian intervention, economic sanctions, travel bans on a country's leaders, normative shunning, and international criminal prosecutions. A serious gap remains, however, between widely accepted norms, especially those concerning human rights and terrible governance, which allows leaders to act with widespread, though not perfect, impunity in most governance realms.

However defective and limited, the ICC acts as another tool that can generate greater global accountability in ways not before realized, thereby closing this accountability gap. although it should not be seen or used as the only method (see Drumbl 2007: 10). For example, humanitarian intervention in some circumstances may be morally permitted or indeed obligatory, and the ICC could be used in concert with military action to bring the accused to trial.

The ICC can and should close the global accountability gap for several reasons. Pragmatically, the ICC is in the unique position of already possessing the legal powers to bring such perpetrators to trial. Morally, trying leaders for extensive nonviolent harms that they could have prevented would be a significant step in the centuries-long international justice struggle. Additionally, it would expand what Sonja Starr has called the "crisis mentality" and international criminal law to nonviolent crisis situations (2007: 1258-80 and *passim*). Starr criticizes international criminal law as well as the ICC for focusing on violent, and hence, crisis situations. Nonviolent crimes are often just as much of a crisis for the victims and should be viewed as such.

What is accountability?

Standard definitions of accountability include at least two actors: one as the accountability holder and the other as the power wielder. Three aspects of accountability include:

1. *Standards* according to which the power wielder will be judged, and to which the power wielders and accountability holders agree, even if the agreement is flawed.

2. *Information* must be available to the accountability holders so they may adequately judge if the power wielder met their agreed upon standards.
3. *A right and power to sanction* the power wielder by the accountability holder (Grant and Keohane 2005: 29. Rubenstein 2007. Gordon 2006: 80. Wenar 2006: 5-7).

This is a standard version, exemplified by representative democracy. Accountability holders are the voters and the power wielders are the elected representatives who are sanctioned, either by not being reelected or by legal action if they break the law, as well as through normative and legal standards that are widely understood and at least implicitly agreed upon. Information on the power wielders' performance is divulged through the media, voting records, and so on.

So far accountability has been referred to monolithically, yet it is anything but uniform. Rather, it assumes different forms along various dimensions. One way of differentiating accountability is between a "participation" and "delegation" model. The former allocates power to those affected by a power wielder's action, and the latter entrusts agents with power to carry out the accountability holders' demands, though the accountability holders need not be the ones primarily affected by the agent's decisions (Grant and Keohane 2005: 31). An example of participatory accountability is representative democracy, and an example of delegation accountability is an NGO that remains accountable to its donors. Differences also occur in application, and to a lesser extent structure, including but not limited to fiscal, legal, market, peer, reputational, supervisory, and hierarchical accountability (Grant and Keohane 2005: 35-37. see also Walzer 1983).

Globally, an alternative to the standard domestic models of accountability is needed because many countries are not democratic, and even those that are now democratic have no guarantee that they will remain so, nor that their leaders will not commit international crimes. Rubenstein (2007) presents a second-best model, called "surrogate accountability." It can be used when customary accountability holders lack the power to sanction power wielders, allowing other actors to do so. Ideally these surrogate accountability holders would act in the interests of the original accountability holders. An NGO, for instance, may advocate for compensation for a farmer displaced by a dam project in China, because the farmer would not have the power to do so alone or collectively with other farmers.

Surrogate legal accountability is the variety exercised by the ICC because the "complementarity principle" holds that only if a state is "unwilling or unable" to prosecute the crimes enumerated in the Rome Statute may the ICC try individuals (Article 17, 1. (a); see Schabas 2007: 174-186).¹ Under Rubenstein's model, those represented are the harmed, murdered, or both. The surrogate accountability holder is the ICC broadly, and the prosecutors more specifically. The standards—even if some leaders do not agree to them and even if they are imperfectly applied—are those enumerated in the Rome Statute (Rubenstein 2007).

II. The ICC and Criminally Bad Governance as a Crime Against Humanity

The ICC was established to bring to justice those international criminals who commit "the most serious crimes of concern to the international community as a whole" (ICC 1998: Preamble, see Article 1). Those crimes include four broad categories, namely genocide, crimes

¹ For an argument that the ICC's first case, that of the Lord's Resistance Army (LRA) in Uganda, may not meet this condition see Branch (2006).

against humanity, war crimes, and crimes of aggression. As of July 2009, crimes of aggression remain undefined (Article 5). My argument draws on only parts of one of these four broad crimes: crimes against humanity (ICC 1998: Article 7. see May 2004, 2006, 2006a. Altman 2006. Luban 2004, 2006. Mayerfeld 2006. Schabas 2007: 98-112).

Although the term crimes against humanity has been in existence for several hundred years, and it has been used twice before in international criminal prosecutions in the 20th century, the ICC remains the first international treaty to include and define it (May 2005: 119. Schabas 2007: 98-99. Schiff 2008: 75). The epistemological, moral, and philosophical grounds for crimes against humanity continue to be deeply controversial, and I will not take a position on the term here (Altman and Wellman 2004. Altman 2006. Luban 2004. May 2005. Vernon 2002). Rather, I use the term in my discussion through a close reading of the Rome Statute to argue for a certain legal aspect of it. Further below, although I object to philosophical roots of the term crimes against humanity, I use the phrase in my paper as the Rome Statute defines it unless otherwise noted, and I make a moral argument for the reason the crimes enumerated here should qualify as international ones.

To preview my central claim, I argue that the ICC already has language in its foundational document, the Rome Statute, under Article 7 defining crimes against humanity and Article 30 defining the “mental element,” that permits it, on an orthodox reading, to try leaders² for actions and policies that will have foreseeable and avoidable widespread or systematic violations of certain types of civilian human rights, including major corruption, *even if they are not intended*. This is due to the *unorthodox* definitions of “attack” and “intent” that the Rome Statute contains, significantly widening the purview of the ICC compared with the types of crimes it has been widely thought able to try, and what it has, in its brief existence, actually brought people to trial for. Although others, most notably Starr (2007), have suggested that “grand corruption” can and should be prosecuted under the Rome Statute, I argue that the Rome Statute has an even wider purview. Other crimes—such as allowing or causing foreseeable and preventable starvation (e.g. in Ukraine in the early 1930s, in Ethiopia in the mid 1980s), or massive political corruption (e.g. in the DRC/Zaire under Mobutu), or terrible governance (e.g. under Mugabe in Zimbabwe)—can be moral wrongs of comparable gravity to war crimes. The actors that perpetrate these crimes should be held to account as well (Conquest 1986. Davis 2001. Meredith 2005: Chapter 19. Sen 1981, 1999. de Waal 1997, 2005. Wrong 2001. Human Rights Watch 2009).

Robust empirical findings link poor governance to widespread harms. For instance, Amartya Sen found that famines only occur in nondemocratic states, and have never occurred in democracies, even poor ones such as India (1999: 152-3 and Chapter 7. D’Souza 1994).³ In recent years development agencies have adopted some of these findings into their work. Examples include the U.S.’s Millennium Challenge Corporation, which makes aid contingent on

² I assume for the remainder of this paper that all states, and hence leaders, are possibly under the ICC’s jurisdiction, since the treaty came into effect on July 1, 2002, including even those states that have not yet signed or ratified the treaty because, under section 13 (b), the United Nations Security Council can refer cases to the ICC. The other two methods of referring cases are by a state actor that has ratified the treaty (13 [a]) or by prerogative of the ICC’s prosecutor (13[c]) although his power is limited to indicting individuals from any of the states that have ratified the treaty (Cf. Schabas 2006: Chapter 4).

³ There have been anomalies and some have questioned whether Sen’s theory is applicable in all cases, or just in most. For examples, see Rubin (2008), Shiva (2002), and Devereux et. al. (2007).

good or improving governance and explicitly focuses research on governance through the World Bank's Governance Matters Project (Millennium Challenge Corporation. World Bank 2009). In short, although human rights sometimes are wrongly circumscribed to security rights, neither the 1948 UN Universal Declaration of Human Rights (UDHR), the most widely accepted list of human rights, nor the Rome Statute limits human rights to security rights. Because this argument is controversial, I will deliberately walk the reader through the pertinent sections of the Rome Statute to make my case.⁴

Crimes against humanity and attacks in the ICC's Rome Statute (Article 7)

The Rome Statute defines crimes against humanity in Article 7, paragraph 1, as:⁵

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Instead of reproducing all of Article 7.1, which includes 11 main and many additional lesser definitions of what may constitute a crime against humanity, I only focus on Article 7.1(e) and (k) here. I do this because, in conjunction with the stipulations noted above, to qualify as a crime against humanity only one of the 11 transgressions included must be met. Article 7.1.(e) and (k) read as follows:

- (e) Imprisonment *or other severe deprivation of physical liberty* in violation of fundamental rules of international law;
- (k) Other inhumane acts of a similar character intentionally *causing great suffering, or serious injury to body or to mental or physical health.*

Paragraph 2 of Article 7 clarifies possibly controversial terms in paragraph 1, but the Rome Statute does not further elaborate on (e) or (k). Either severe deprivations of physical liberty or other inhumane acts that cause great suffering or serious injury to one's body, physical, or mental health that are widespread or systematic would constitute a crime against humanity. I am not eliding "attacks," "intent," or "knowledge," each of which I address in turn.

"Attack," in the Rome Statute, does not mean what the Oxford English Dictionary (OED) says it means, and what it is normally taken to mean, "the act of falling upon with force or arms, of commencing battle."⁶ Rather, for the ICC's purposes, attack, as defined in Article 7, 2. (a) means:

a course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7] against any civilian population, pursuant to or in furtherance of a State *or* organizational policy to commit such attack.

This does not require military or armed involvement, but only conduct involving the multiple commission of acts, which includes almost any state policy and many nonstate actors' deeds (see Schabas 2007: 101-102). Proving intent and knowledge in a court of law may seem especially damaging to my argument, but below I show this is not the case because of the way the Rome Statute defines the two.

Intent and knowledge in the ICC's Rome Statute (Article 30).

⁴ I take the liberty to italicize what are for my argument the vital words or sections of the Rome Statute and all the following italics are mine except where otherwise noted.

⁵ All emphasis added by author

⁶ Accessed online, June 24, 2009, at <http://www.oed.com> and the definition quoted is from section 1.a.

Article 30 deals with whether an individual understands his or her actions:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of events.*
3. For the purposes of this article, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

To be legally responsible, a person must have *both* intent and knowledge, which seems, at first to significantly raise the bar for liability (see May 2005: 124-132). Note however, that intent, like attack, is defined unusually. A person must mean to engage in some conduct, but the second half of Article 30, 2. (b), reads that someone must simply be “aware that it [a consequence] will occur in the ordinary course of events.” Intent, here, just means being aware that an action will cause some effect “in the ordinary course of events”—one need not want to or hope to cause the consequences. This radically broadens, from our commonsense understanding, what intent means. Knowledge, as defined by the Rome Statute, is similarly broad, requiring only “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” One further point is important for my argument. Both intent and knowledge, as defined by the Rome Statute, have a prospective element. Actors are liable for the future effects of their actions.

In sum, to qualify as a crime against humanity all that is required are that multiple acts (7, 2. [a]) that result in widespread or systematic (7, 1.) severe deprivations of physical liberty (7. 2. [e]) or great suffering or serious injury to bodily or mental health (7, 1. [k]) be committed with the knowledge that these wrongs will occur in the normal course of events (30). Widespread is left open to interpretation, and I will use a conservative definition of this term to protect the argument from this line of criticism.

In fact, the court has already used similar reasoning, though to different ends. In June 2009 a three-judge panel used my reasoning for ‘attack’ and ‘knowledge’ in an indictment of an alleged warlord, Jean-Pierre Bemba Gombo of the Democratic Republic of the Congo (DRC) (ICC 2009: 26-30).⁷ However, my thesis, in part, is that the ICC need not restrict its jurisdiction to crimes associated with war or conflict.

I will now show that some acts, as well as some omissions, meet the conditions discussed above, before providing a brief discussion of the definitions of ‘systematic’ and ‘widespread.’ Then I show that corruption and bad governance often result in widespread or systematic harms, and provide some evidence that leaders have at least minimal knowledge that their actions may result in these harms to civilians. What I don’t have to show for my argument to be cogent is equally important. A key point of the above exegesis is to show that neither ‘attack’ nor ‘intent,’ as we normally understand them, needs to be present because of the unusual way the Rome Statute defines those two terms.

First, most non-utilitarians, and legal systems, hold people more morally and legally liable for acts they commit than for omissions. In other words, legally people would receive

⁷ Thanks to Yvonne Dutton for this citation.

harsher punishments if they acted and affected harms, than if the same harms resulted from their inaction. Further, most cases relevant for my argument fall somewhere between acts and omission because all the cases of interest here involve acts, and thus are not strictly omissions, but neither are the consequences necessarily intended by their authors.

That said, the Rome statute nevertheless assigns international legal responsibility, even if inadvertently, by defining the crimes individuals can be held liable for. For my argument, it is sufficient to show that leaders are legally and morally responsible for their actions and omissions that result in the harms codified in the Rome Statute. By assigning responsibility, the debate between act and omission collapses because a leader can be held liable for both, even if the severity of punishment can be determined in part by this distinction. (I further discuss this below in the deterrent and punishment section, IV.)

Second, ‘widespread,’ according to the OED, means “distributed over a wide region; occurring in many places or among many persons.”⁸ “Systematic” refers, again according to the OED, to “arranged or conducted according to a system, plan, or organized method; involving or observing a system; (of a person) acting according to system, regular and methodical.”⁹ The Rome Statute treats these as alternatives: Only one need be met to qualify as a crime against humanity, contingent on the other qualifications (Altman and Wellman 2004: 48-49. May 2005: 122-4).

Next, I must show two things. First, that corruption and other types of bad governance can and often do result in widespread or systematic harms to civilians. Second, that leaders have at least minimal knowledge that significantly bad actions, such as major corruption, theft, or permitting famine or other widespread harms, will “occur in the normal course of events” (Article 30 [b]). One caveat is that none of the following discussion applies to leaders who lack the capacity, such as money, material goods, or international support to prevent widespread harms or wrongs from occurring.

Empirical data show that corruption negatively affects both poverty levels and inequality (Gupta, Davoodi, and Alonso-Terme 2002). Azfar and Gurgur found, through a study of corruption in the Philippines, that corruption negatively affects multiple health indicators and that the poor are more affected than the rich (2008). This suggests that preliminary empirical evidence supports the contention that corruption leads to widespread or systematic harms.¹⁰

Utilitarians would follow a stringent interpretation that would claim that leaders have to minimize the harms stipulated in Article 7, or at least not allow any harms to be widespread or systematic. For example, if Oxfam is more efficient at preventing these harms at a given dollar

⁸ Accessed online, June 24, 2009, at <http://www.oed.com> and the definition quoted is from section 2. Section 1. reads “extended over or occupying a wide space; broad in spatial extent.”

⁹ Accessed online, June 25, 2009, at <http://www.oed.com> and the definition quoted is from section 3.a., the first definition; the first two have no substance and refer to 3.

¹⁰ The evidence need not be conclusive for my argument to be sustained because a significant part of the ICC’s duties are to do the very investigations that would prove or disprove the connection between corruption, say, and widespread civilian harms. Someone might object that in corrupt countries, even if a high-ranking official does not steal, lower-ranking officials could, which results in the same or similar negative outcomes. Theoretically, though, if the higher ups cannot steal for fear of punishment, they may likely exert anti-corruption pressure on their subordinates as well. Nevertheless, if the high-ranking official did not steal, she would not be liable under the Rome Statute, though depending on the number of people harmed, the corrupt lower-ranking officials might be internationally criminally liable.

amount, then a state would be required to give its national health funds to Oxfam so it could do its harm-minimizing work. This, I think, is going too far both morally and legally.

Morally, this could undermine national self-determination and the development of domestic state and nonstate functions in many, if not most, developing countries, drastically redefining our commonly held beliefs about the limits of responsibility. Legally, it makes almost every leader liable under international law, which undercuts the very purpose of the ICC: holding to account those who perpetrate the most egregious international crimes. Instead, a more modest account should be adopted where only those who perpetrate major mismanagement resulting in widespread or systematic harms should be brought to trial before the ICC. But still, might leaders claim ignorance of their acts and in this way avoid prosecution?

There are two ways to approach how much information leaders might possess. One requires documentary evidence proving that leaders knew that their acts would have criminal consequences. This is nearly impossible to show in a court of law, except if recorded documentation explicitly demonstrates a leader's thoughts. Many leaders take steps to not leave any sort of evidence, further complicating proof. This view is overly demanding and the high level of proof is not required for reasons of special responsibility. Responsibility plays a significant role here because it is widely accepted that leaders, and indeed anyone with great power, possess certain special responsibilities. These responsibilities include seeking out and gaining knowledge of what the likely effects of one's major political decisions would be.

Thus another approach, one that I countenance here, uses a standard that would apply to anyone who possesses some minimal capacity to reason, knowledge of how the world functions, and responsibility for learning the likely outcomes of one's actions (see Vanderheiden 2008: Chapter 6). As noted above, the ICC already assigns this level of responsibility to the powerful. The ICC can reasonably assume that every leader should possess for certain crimes such as major mismanagement, the requisite knowledge of first-order effects of one's policies because it is his or her responsibility to acquire this information. Even Mao's famously fawning communist party comrades did not keep him totally unaware of the up to 30 million people who starved to death as a result of his agricultural collectivism (de Waal 1997: 18-9). Peng Duhai confronted the dictator with evidence of the famine: instead of changing policy, he purged Peng (Ibid.). In other words, minimal knowledge of one's actions and inactions, is the responsibility of every leader. The Rome Statute permits exceptions, paralleling domestic law in some ways, through Article 31, "grounds for excluding criminal responsibility."

What qualifies as sufficient harm in the Rome Statute?

Two further sets of questions now surface. First, what sorts of harms should qualify as "severe deprivation of physical liberty" (Article 7, 1. [e]), or "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" (Article 7, 1. [k])? Second, what types of actions that leaders take—or fail to take—meet the criteria of widespread or systematic? More difficult questions follow, such as when should leaders be excused because of lack of resources? How far down the chain of command should liability travel? Do the differences between crimes like major corruption or terrible governmental mismanagement and crimes like ethnic cleansing or genocide call for modifications in orthodox theories or arguments, and if so, how and why?

Further afield, questions could be raised as well, such as who should be responsible (e.g. the international community, foreign heads of government, domestic heads of government,

corporations, NGOs, IOs, etc.) if one possesses the power to prevent widespread or systematic harms? One final question is at what level of specificity should such a process use? I am unable to address most of these questions at this time, but I will address the most relevant ones.

The level of theoretical specificity needs to be considered. Being too specific will not permit inclusion of necessarily unique new cases that, otherwise, should qualify, but being too broad will either contribute little to our knowledge or will be too vague to be helpful. I attempt to forge a middle ground, erring on generality and then illuminating my argument with concrete, real-world examples so that its applicability may remain broad. My argument shadows the Rome Statute's language, which appropriately remains broad to include a variety of potential international crimes. Finally, in attempt to convince the widest possible audience, I take a conservative stance on the first question of this section: What qualifies as sufficient harms under the Rome Statute?

During the Rome Statute's formative debates, some pressed for crimes such as mass starvation to be included as part of crimes against humanity, but that language was ultimately rejected (Schabas 2007: 105). There are probably a number of political, historical, and psychological reasons for this. Our consciences are more easily shocked by violent crimes, whereas property crimes—though often they are not only property crimes in their effects—or mismanagement crimes allow many, as Coleridge, put it, to “die so slowly that none call it murder” (as quoted in Shue 1996: 58).

There may have been other reasons as well. Advocacy often relies on widespread consent from otherwise diverse actors. As Keck and Sikkink note, “issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility,” are one of the easiest areas to gain a consensus (1998: 27). As numerous authors have documented, the formation of the ICC was nothing if not a political consensus among disparate actors, and by and large, the Rome Statute contains language outlawing multiple types of violent acts (Paris 2009. Struett 2008. Schiff 2008). Death and harm because of poverty are often viewed as mere bad luck: Some are fortunate to be born in rich countries while others starve. As Joy Gordon writes, “Terrible poverty often seems attributable to no one in particular; it rather appears to be a matter of random misfortune, however extreme it may be” (2006: 79).

Those who aimed to have famine included in the Rome Statute did not ultimately fail, however. The first question above was: What harms should qualify as severe deprivation of physical liberty? Roughly, I answer that violations of the human rights enumerated in the UDHR should qualify, although I concentrate only on the least controversial examples. Death, surely, is a severe deprivation of physical liberty. Malnutrition is one common example of serious, even if possibly temporary, injury to physical and mental health. Because some might object to the mental injury component, I limit my argument to physical harm. Of course not all death or malnutrition is or should be criminal. I assume in those cases, the claims are uncontroversial and need no further argument. Note that death and criminally liable malnutrition can be caused in numerous ways, including active diversion of food and aid, as was the case in parts of Ethiopia in the mid 1980s, or in Sudan after president Bashir was indicted by the ICC in 2009 and threw out leading aid groups, or by stealing money that would otherwise go to life- or nutrition-sustaining programs, or by implementing policies that cause foreseeable and avoidable widespread or systematic harms.

Some examples may be helpful. The DRC's (previously Zaire) former dictator, Mobutu, pilfered billions of dollars from state coffers as his citizenry, it is estimated, survived on average of less than \$120 per year in 2000 (Meredith 2005: Chapter 17. Wrong 2001, income estimate from Chapter 11). As Wrong writes, "Whatever bloody deeds were carried out on his orders, this will always constitute Mobutu's worst human rights violation: the destruction of an economy that quashed a generation's aspirations" (Wrong 2001: 315). But the ICC's jurisdiction only starts from July 1, 2002, so it is useful to examine more recent cases, which I will now do for Chad and Zimbabwe.

Chad is a destitute, landlocked, oil-rich nation, which persistently ranks as one of the most corrupt countries on earth by Transparency International (Transparency International 2008. see also BBC 2008. New York Times 2006, 2008). In the early 2000s, Chad negotiated a loan from the World Bank to build an oil pipeline so it could export oil, and in exchange for the loan the World Bank demanded that Chad spend some of its oil revenue on development projects. Instead, Chad's president, Idriss Deby, reneged on his promise and has been pocketing the estimated \$1.4 billion per year of oil revenues (BBC 2008, New York Times 2008). One in four adults in Chad is literate, child mortality increased between 1990 and 2006, and more than one in three children are underweight (New York Times 2008). Perhaps we should individually condemn Deby, but we cannot pass legal judgment; that is for ICC to decide and should only be done after a meticulous investigation. According to the ICC's statute, there is at least enough preliminary evidence to indict Idriss Deby on crimes against humanity because he had the intent and knowledge (as defined in the Rome Statute) that his actions—at the minimum—would result in widespread and serious injury to bodily health, and probably much more.

Another example of a crime that the ICC has jurisdiction over, at least for those actions and omissions since July 1, 2002, is Mugabe's horrific mismanagement of Zimbabwe (Physicians for Human Rights 2009: 41-2). Ignoring for the moment the violence perpetrated by Mugabe's henchmen, Human Rights Watch correctly identifies Zimbabwe as "a humanitarian crisis that is the result of a political crisis" (Human Rights Watch 2009: 3). Because of horrific governmental mismanagement, the health system has collapsed: Infant mortality is increasing at its highest rate in Zimbabwe's history, cholera has killed at least 2,000 people and sickened at least 39,000 more, and maternal mortality has tripled since the mid 1990s (Human Rights Watch 2009: 3, 9-23). What was formerly a breadbasket (Power 2003) now has 5 million people who are food insecure (Human Rights Watch 2009: 3). These facts are the result of horrific political decisions, and, under the Rome Statute, this is sufficient evidence to investigate and likely indict Mugabe and perhaps some other high-ranking officials on charges of crimes against humanity.

These examples of corruption and bad governance are two broad categories of crimes that I focus on, but my argument is not limited to these two. Rather, anything that power wielders do with consequences that are foreseeable, knowable, avoidable, an effect of their actions, and produce either harms that are widespread, systematic or both, would qualify as a crime by the ICC. This is a rough answer to the second question posed above. Which actions or omissions meet the criteria of widespread or systematic? They will be the focus of my discussion of the resource curse.

III. The Resource Curse and Its Causes

Nearly half of the world's poor countries depend on natural resources, requiring any policy that aims to lower the levels of conflict and destitution around the world to carefully consider if there is any viable solution to the resource curse (Slack 2004: 47). The resource curse is a paradox birthed of perverse incentives generated by the confluence of the economic and governance rules and institutions that prevail internationally and domestically. It would seem, at first blush, that resource-rich developing countries would tend to do better because of their resources, and the economic theory of comparative advantage suggests that countries should exploit and export what they possess in relative abundance (Slack 2004: 48). Actually, resource-rich exporting countries tend to have lower economic growth rates (Humphreys, Sachs, and Stiglitz 2007: 1), are less likely to be democratic or sustain democracy (Ross 2001), are more likely to be corrupt (Sala-i-Martin and Subramanian 2003), are more prone to civil war (Humphreys 2005), and may be more prone to coup attempts (for an argument for why they would, see Pogge 2008: Chapter 6. cf. Collier 2007: 36 for empirical evidence that does not support this theory). Additionally, some countries suffer from a variety of the resource curse known as the "Dutch disease," which I will not address because it is not relevant for this paper.¹¹

The main reasons for the resource curse are twofold. First, state leaders are unaccountable for many types of abuses of power that the resource curse generates, including corruption and kleptocracy. Second, the resource curse persists because of a flaw in international property rights that permits any leader who seizes power of a state to possess a property right to that country's natural resources. The leader can sell the resources on the international market, which increases the incentives for leaders to grab power by coups or civil wars, and to hang onto power through autocratic means (Humphreys, Sachs, and Stiglitz 2007. Pogge 2008: Chapter 6. Wenar 2008).

Any solution to this problem will have to take these two broad and problematic incentives into account, and the following areas are roughly the ones available for reform:

1. *International Demand* for primary resources
2. *International and Domestic Property Rights* that permit rulers to sell natural resources freely on the international market
3. *Domestic Factors*, such as democratization, economic diversification, reforming domestic property rights, privatization, natural resource funds, and so on
4. *Global Accountability*

Reforms 1, 2, and 3 are not politically feasible now or in the near future, leaving 4 as the most promising option, though this does not necessarily mean it is feasible either. It will be difficult, but possible, for the type of global accountability through the ICC for which I argued above to ameliorate the problems associated with the resource curse. I address each area of possible reform in turn.

¹¹ The Dutch disease occurs when one export or one exporting sector, because of increasing demand for that country's currency, raises the real exchange rate, which makes other sectors less internationally competitive, thus decreasing those exports. Additionally, because of the increases in profits in the exporting sector, it can pull investment and workers away from the non-exporting sector, further depressing those industries. Further complicating these adverse effects, often the goods exported are primary materials with highly volatile prices, creating planning problems for investors, workers, industries, and governments (Humphreys, Sachs, and Stiglitz 2007: 5-8).

1. International Demand

International demand for such products as oil, natural gas, minerals used in jewelry, cell phones, and laptop computers, among other goods, is a necessary but insufficient factor in explaining the resource curse. It is, Pogge notes, “very much in the interest of rich consumer societies” to keep a consistent and cheap flow of these goods into their countries (2008: 171). Most of us, probably every day, use devices made in, or consume materials from, resource cursed countries. Our involvement in procuring resources from resourced-cursed countries, Pogge argues, causally implicates us in an unjust global scheme of global institutions upholding the current economic and political order (Pogge 2008: 29-30), thereby generating obligations for us to work toward reforming the unjust institutions that we tacitly support (Young 2004, 2006). This may be the case, but I need not take a position on it here for my argument to be viable.

First, because oil, timber, and key minerals have become necessary for most developed– and developing–countries, curbing international demand is not realistic over the short term for such commodities as oil, gas, or minerals.¹² Any significant reform of institutions, especially property rights, that Pogge and Wenar (2008) question, is not likely in the near term, whereas my proposal is implementable in the coming years, even if its effects may take longer to be realized. Notice that my proposal is compatible with Pogge’s analysis; they are not mutually exclusive.

Second, too many powerful interests are satisfied with the current schema for any significant proposed reforms to be effective in the near future. Perhaps through energy reform, recycling programs, and consumer education over the medium and long run, international demand can be diminished, but we, and especially the victims of international wrongs, urgently need a quicker alternative. To understand how goods are bought, sold, and transported from resourced-cursed countries to wealthy democracies and other countries, international and domestic property rights must be understood.

2. International Factors: international and domestic property rights

Currently international property rights differ significantly, from Western legal conceptions of property rights both in *how* someone or some group can acquire property rights, and in *how robust* property rights are. First, international property rights differ from domestic ones because, internationally, Might generates a Right (Pogge 2008: 147-149, 158, 168. Wenar 2008: 12-15). If crooks domestically overran a large corporation and instated themselves as the CEO and board members, the police would step in, reinstate the rightful owners, and bring the criminals to trial (Pogge 2008: 158). Internationally, however, if powerful domestic actors manage to overthrow a government, they gain the rights necessary to sell that country’s resources, which is a significant flaw. Second, domestic property rights are less robust than international ones. Although all Western countries have strong property rights regimes, laws, and norms, nearly everyone has to pay taxes, which can be viewed as a mild and justifiable compromise of property rights (Murphy and Nagel 2002: 43-5). However, internationally there is no parallel system of compromising a libertarian property right through taxation (see Pogge 2008: Chapter 8 for such a proposal). Finally, domestic property crimes are mostly one-off

¹² This may not be the case for luxury items such as gold or diamonds, as the “Kimberley Process,” has shown (<http://www.kimberleyprocess.com/>), though recent reports have called its effectiveness into question (BBC 2009a). If there is a continuum between necessity and luxury, it is far less likely to have meaningful reform the more goods are considered necessities because consumers and governments are less likely to stand for possible supply disruptions.

crimes. That is not the case with international property crimes. They are associated with governmental power and many nonstate actors, and are iterated crimes of some duration. This allows the perpetrators to amass more wealth and, hence, more power than is common domestically. These three differences between domestic and international property rights create powerful incentives for international actors to attempt to overtake a country's government for financial reasons, and to act more like businessmen aimed at maximizing individual profit – whatever the humanitarian costs – than to act as responsible heads of state.

Although property rights reform may be a promising path in some areas of global problems (e.g., Pogge 2008: ch 8-9), it is not feasible in relation to the resource curse. Powerful countries' governments and citizens have too many incentives to continue purchasing cheap goods from illegitimate rulers and allowing them to sell their country's natural resources on the international market as if they had legitimate and robust property rights (Pogge 2008: 171).

One recent example of property-rights reform that demonstrates the problem with such suggestions is Wenar's (2008). Part of his proposed solution to the resource curse is to enforce property rights, drawing on some human rights treaties to argue that citizens, collectively, have ownership rights of their country's natural resources. There are two problems with this idea. First, if it could be implemented, this might significantly ameliorate the resource curse (it has in a way been implemented in Alaska where everyone older than 18 receives about \$1,500/year from oil revenue (Slack 2004: 55)), but it will fail in developing countries because of the distinct and harmful incentives discussed above. Why would a powerful dictator or even a democratic government voluntarily give up its revenue from natural resources? It is unrealistic.

Second, it is not at all clear that a state's citizens should collectively have a libertarian property right to their natural resources (Pogge 2008: 202).¹³ Pogge's proposal for a "global resource dividend," a tax of sorts on natural resources, would violate a libertarian property right, but this might be justifiable for Norway or other wealthy democratic countries that also happen to be resource rich (2008: Chapter 8). Similarly, because of the global importance of certain natural resources, such as Brazil's Amazon rain forest, which is rapidly disappearing, perhaps a country should not be permitted to freely use all of its resources. As Grant and Keohane note, "domestic democracy can improve accountability to citizens and, at the same time, work against the interests of people affected by government policies beyond state borders," (2005: 34). Unless incentives are significantly realigned, and this is unlikely because of the powerful actors in rich countries who wield significant influence over the international financial institutions that govern world trade, international property rights reform will remain an unrealistic way to improve the resource curse.

3. Domestic Factors

A great deal has been written about domestic accountability; democracy, its most common means of accountability; and what causes or allows countries to democratize. The resource curse, however, presents two challenges to both democracy and democratization (cf. Dunning 2008). First, the great wealth that autocratic leaders amass while in power allows them to use the wealth to repress domestic groups agitating for democratic reform, and the continual income from natural resources encourages autocratic rulers to hang onto power for as long as possible. Second, even if a resource-rich country manages to transition to democracy, the same

¹³ Thanks to Scott Wisor for brining this to my attention.

perverse incentives remain for coup plotters and warlords to overrun a government for vast financial rewards. Although domestic factors could improve the problems of the resource curse, it is exactly the bad incentives that the resource curse generates that make domestic reform difficult. If full democratization is not possible, might partial democratization, especially electoral competition, make a difference?

Electoral competition, one key aspect but not exhaustive of most definitions of democracy, may actually harm resource-rich countries more than it helps (Collier 2007: 43-46). Whereas democracies without resource wealth grow more quickly than autocracies, natural resource-wealthy countries with electoral competition grow more slowly than autocracies do (Collier 2007: 43). Collier notes, “our key point is that this same undermining of accountability operates within polities that, at least on the criterion of electoral competition, are democratic. What gets undermined is not electoral competition but the political restraints on power,” (2007: 46). While this is not to argue against democratization, it seems that even minimal democratic accountability, a necessary step in democratization, may not be sufficient to break the resource curse. Something else is needed (Collier 2007: 51).

4. Global Accountability: the ICC and changing incentives.

To recap, numerous others have proffered diverse solutions to the resource curse (Collier 2007: 140-146. Karl 2007: 269-74. Pogge 2008: Chapter 6. Sandbu and Shaxson 2009. Wenar 2008). The central problem to these suggestions, despite some astute political analysis, is failure to adequately account for incentives. To oversimplify, the resource curse is a problem because powerful people benefit from extant structures while remaining unaccountable for consequences. All proposed reforms will necessarily deviate somewhat from the status quo. There is no guarantee that any proposal will be sufficiently close to, or will sufficiently alter actors’ incentives to be realistically implementable.

It should now be clear how my arguments fit together. The resource curse can be ameliorated by the global accountability mechanisms of the ICC, through my reinterpretation of crimes against humanity. It takes incentives into account, and does not focus on politically improbable and dubious reforms, concentrating instead on state leaders and potential coup and civil war plotters. I now turn to a key part of my argument: deterrence.

IV. Deterrence and Punishment

A goal of accountability: deterrence theory and property crime.

Deterring others from committing international crimes is one reason international law is important (Drumbl 2007. Luban 2006: 354. Mayerfield 2006: 361. Snyder and Vinjamuri 2003/4). Additional but not necessarily competing principles used to justify punishment are retribution and what Drumbl calls “expressivism,” punishment for the sake of bolstering respect for the rule of law (Drumbl 2007: 11-12, 16-17, 60-63, Chapter 6), or the similar concept of “norm projection,” advocated for by Luban (2006: 354-355). Sometimes proffered additional reasons for punishment include reconciliation, reintegration, and rehabilitation, though some thinkers offer these as reasons why punishment may prevent these exact outcomes (Branch 2007. Drumbl 2007: 12. Rodman 2006).

Deterrence is arguably the most important aspect of punishment in international law. Drumbl differentiates *specific* deterrence, which posits that punishment can dissuade individuals from recommitting crimes, from *general* deterrence, which aims to discourage others from committing similar crimes (Drumbl 2007: 61-2). I focus here on general deterrence, and use deterrence without its antecedent modifier because the crimes argued for here, at least at the upper command levels, deserve long-term jail sentences leaving the perpetrators with little chance of regaining sufficient power to recommit crimes. Theoretically, the importance of deterring similar criminals cannot be overstated. Specific and general deterrence may have some overlap in cases where a potential criminal decides that more severe crimes, in degree or kind, are not worth the punishment.

A significant weakness of any deterrent argument, however, is that there is no conclusive empirical evidence that either type of deterrence works for international crimes (Drumbl 2007: 169. Mennecke 2007: 323. Snyder and Vinjamuri 2003/4). Obtaining such evidence is nearly impossible. Testing to see if the ICC, or other international criminal tribunals, deter individuals from committing international crimes depends primarily on measuring counterfactuals in at least two areas. First, measuring which international crimes were *not* committed because potential criminals were deterred from committing them is difficult because most leaders will never openly state that they would like to commit international crimes, but they were deterred from doing so by the ICC. Reasons for non-actions must be imputed and must remain guesses (Mennecke 2007: 324). Second, because the crimes punishable under the ICC's jurisdiction are different in kind from normal domestic crime, due to their temporal duration and vast effects, deterrence might mitigate the degree of the crime even if one is still committed (Drumbl 2007: 169).

One imperfect way to test deterrence would be through a natural experiment: Did international crimes decrease after the ICC was established? Causal arguments could be made, but they would be fragile at best. Many more nuanced questions should be asked: Did states that were under its jurisdiction see a decrease in international crimes? Did the ICC deter only certain types of international crimes under the ICC's jurisdiction? Did only certain geographical locations (such as Africa) see a decrease in violence because that is where, for political and prudential reasons, the ICC focused its first cases? Although empirical evidence for deterrence remains unsatisfactory at best, it remains important to think about deterrence carefully and rationally, as potential international criminals might. The following argument, then, should not be taken as definitive, but rather should be assessed for its logic and plausibility, perhaps the best we can expect from international deterrence arguments.

Deterrence may be more effective for major property and mismanagement crimes than for war crimes or other crimes against humanity, especially genocide. The basic idea is that because powerful people committing different types of international crimes have different motivating factors, the deterrence effects will likely differ as well. Although the cost-benefit calculation that leaders conduct may not be influenced by potential ICC punishment for violent crimes, leaders contemplating nonviolent crimes may be more deterred from committing them. The logic is as follows: because leaders whose goal is ethnical cleansing or committing genocide can achieve their goal no other way, they may be willing to pay the cost of going to jail or being killed in combat to achieve their goals, (Drumbl 2007: 171). These types of international criminals have ideological, not material, aims. Materialist crimes, however, may be more effectively deterred through the ICC because such leaders presumably steal for the luxury,

power, and lifestyle fabulous wealth allows. Sitting in a jail, even in The Hague, does not permit them to enjoy their plundered wealth and influence.

Leaders who have been brought before international tribunals for crimes of genocide (e.g., Milosevic in the Balkans or Bagosora in Rwanda) largely achieved their aims before being arrested. Despite explicit statements that the International Criminal Tribunal for the former Yugoslavia (ICTY) aimed at specific deterrence, the tribunal did not have sufficient deterrent effect (ICTY 1996: para. 58. Mennecke 2007: 322). The ICTY's staff had been investigating cases for two years at the time of the worst massacre of the Bosnian war, Srebrenica (1995), and for five years during the 1998 ethnic cleansing in Kosovo (Rodman 2006: 40. Drumbl 2007: 169. Snyder and Vinjamuri 2003/4: 20-24). Deterrence, here, did not work, or at least did not work well enough. This is not to argue that deterrence in general is ineffective for violent crimes, but only to argue it is likely to be more effective for those who consider committing international non-violent crimes.

The paradox of punishing kleptocratic crimes.

Counterintuitively, I suggest punishment should be similar for crimes of omission and commission, as well as for violent and non-violent crimes with similar outcomes. This opposes the commonsense notion that the severity of punishment should correspond with the severity of crime committed (see Drumbl 2007). Three axes along which punishment can be meted out deserve consideration. One concerns intent, another compares violent to non-violent crimes, and a third involves the peace versus punishment tradeoff.¹⁴

The discussion of intent here differs from the discussion above because here intent is used to determine severity of punishment, rather than to discuss the binary categorization of criminal and non-criminal acts. Intent is widely considered important in determining the extent of criminal or moral culpability, and hence degree of deserved punishment. For the worst crimes that are not intended, just as for the worst crimes that are not violent, whether intended or not, the harms may be so severe and widespread that the limits of justifiable punishment are reached. For example, should one really receive less jail time if that person only orchestrated the killing of 1,000 people, compared to someone who killed 10,000? Should someone who, by stealing funds that would have nourished 1,000 people, causes them to starve to death, receive a lesser jail sentence than someone who through theft caused 10,000 to starve? Our common assumptions, in other words, may break down at the large scale, though just where the cut off is for severity of punishment would require another paper, or book.¹⁵ Note that this allows for the common assumption that one may be more *morally* at fault if one commits, as opposed to fails to prevent, a wrong. The problem is that normal methods of punishment conflict with the upper limits of what individual punishment can justly entail, especially regarding incarceration time.¹⁶ I am not

¹⁴ The latter is normally categorized as a peace versus justice tradeoff, but for a number of reasons this mischaracterizes the second half of the debate, concerning justice or punishment, because it is far from clear that the domestic analogy of equating punishment with justice can be easily laid down onto the international realm, especially for the vast crimes discussed here. Punishment, in other words, is often insufficient for justice, internationally. This is a claim I cannot defend here and will have to leave this for discussion at a later date.

¹⁵ For a related, but different, argument about individual morality, see Fishkin (1982).

¹⁶ There are other harsher methods of punishment that have been and still are used, such as torture, but I accept that there are limits to justifiable punishment. In other words, there are only a limited number of human rights that can be forfeited or overridden, even if the perpetrator of the crime respected none.

arguing that all international criminals should receive the maximum punishment possible; punishment may need to vary according to rank.

This argument opposes the former discussion regarding deterrence. Deterrence is normally thought to work in degrees: The harsher the punishment, the more likely the threat of punishment will deter. If punishment is not increasingly severe attendant to the crime committed, there are no incentives to commit lesser crimes. Thus the incentive system of maximal punishment would only work to prevent international crimes from being committed at all, not by leaders moderating their criminality to lessen their sentence. Where does this leave us?

Still one further thorny issue is how to decide if international criminal law, as the ideal of domestic law, should be applied uniformly. Should similar crimes be treated alike, or should the potential cost of punishment –igniting a civil war, killing for revenge, or other, worse, harms— be considered?. This is far too large of a subject for this paper, but one that has rightly received detailed examination, and one that, given my argument here, would need to be at least reconsidered (e.g. Branch 2007).

V. Objections

Unintended perverse incentives.

Effecting such a change in the ICC's strategy might create its own perverse incentives, such as making current autocrats clutch power ever more tenaciously and ruthlessly. They may reason they have everything to lose if they fall from power, and more killing or looting would not subject them to any greater punishment. This may be the case, but because ruthless leaders have little or no moral qualms about brutal techniques and because they already have strong incentives to remain in power, the marginal incentive will be negligible.

Another perverse incentive is that the ICC's power may be applied poorly, as Branch (2006) argues in the case for the ICC's first ever arrest warrants for Uganda's Lord's Resistance Army (LRA) commanders. Branch suggests it was detrimental to the peace process, possibly against international law because it is not at all clear that Uganda's government is either unable or unwilling to try the LRA leadership. The ICC permitted the government—which also has committed abuses arguably punishable under the Rome Statute—to have its actions exonerated. First, note that this objection applies not only to my argument, but to the ICC more generally, and perhaps even to domestic courts and prosecutors. I see no way around this objection, and perhaps the best we can hope for is a prosecution team that is politically astute.

These unintended perverse incentives may, in fact, be the case for those crimes committed after the ICC came into being (July 1, 2002), but they do not outweigh the possible good from implementing my suggestion. Moreover, this will limit clever political leaders from shifting strategies, say from militarily destroying a group of people to starving them to death, to avoid ICC prosecution.

Diluting Crimes against humanity.

Because the concept of a crime against humanity, both in language and meaning, is such a serious claim, some may believe that expanding its legal or moral scope must necessarily, and problematically, dilute it. I do not think this is the case for two reasons. First, theoretically I see no reason why property or mismanagement crimes that result in widespread or systematic harms

are any less severe than violent crimes; indeed the suffering may be even more severe. Imagine someone who has led a relatively healthy life, with adequate opportunity, a fine education, and so on until they were murdered or expelled from their home, say in ethnic cleansing in the Balkans. I see no reason why that person suffered more than someone in Chad who had poor health most of her life, who was malnourished, and who finally succumbed to a treatable disease because malnutrition attributable to kleptocratic governance weakened her immune system.

I do not want or need to claim one scenario is worse than the other, but only want to suggest that the latter death is sufficiently morally abhorrent to qualify as a crime against humanity as defined by the Rome Statute. Second, if someone wants to term the crime something different and objects to the language of the Rome Statute, I would actually agree: The category of crimes against humanity is theoretically suspect at best. I do not have space to develop this argument, but I will briefly note a key point Altman (2006) makes in an article titled “The Persistent Fiction of Harm to Humanity.” He writes, “The vital interests of most humans are simply not at stake” when crimes against humanity are committed (Altman 2006: 371). The concept of harm has to be stretched beyond useful meaning to support the theoretical, as opposed to legal, concept of crime against humanity (see May 2005, 2006, 2006a. Luban 2004, 2006. Mayerfeld 2006. Vernon 2002).

The ICC is itself not accountable.

There is a deep dilemma at the heart of the ICC: The ICC is only necessary when states are unable or unwilling to bring perpetrators to account, and by design the ICC is not accountable to any single government. Some find this problematic, or paradoxical: A purportedly powerful institution that is undemocratic and unaccountable to state governments is dangerous, just as not being globally accountable is objectionable. John Bolton, of the second Bush administration, used this argument in an attempt to derail realization of the ICC (Paris 2009: 61 and *passim*). Might not the ICC abuse its power for political ends? The question might be framed, to borrow Rubenstein’s (2007) language, as: Who can hold the surrogate accountability holders to account?

There are a few responses to this question. First, note that this is not only an objection to my argument, but to the entire structure and jurisdiction of the ICC. Second, consider the alternatives. Being more directly accountable to state governments would make the court highly political, and would not eliminate the criticism of problematic accountability. Look to the critics of the UN, the IMF, the World Bank, or the WTO for objections to this sort of accountability. Finally, consider the arguments of the Federalists, among others, who suggest that judicial independence is important for fair trials and the rule of law. International judicial independence, and its domestic parallel, are far from perfect, but it is a better solution than any alternative.

Pogge’s explanatory nationalist critique.

Perhaps a final objection is that only holding to account national and nonstate actors is an incomplete moral assessment, leaving out those who implement and sustain the international economic and political order and who perhaps might also be morally or legally liable (Pogge 2008). Recall the difference in property rights between what developed democracies employ domestically and the property rights regimes countenanced internationally (Section III. 2.). Pogge might suggest that my analysis is overly nationalistic, and does not sufficiently consider international actors. For example, perhaps the ICC should focus its jurisdiction on international actions and regimes, or that reforms should be focused instead on the global institutional order,

and not country-level problems. I accept that the global institutional order, especially concerning the property rights regime, is problematic and needs modification. Perhaps international actors should be tried for crimes against humanity as well: The UN-imposed and US-backed sanctions against Iraq in the 1990s led to perhaps 500,000 deaths—the US even blocked the export of child vaccines to Iraq (Gordon 2006: 87, 83, respectively). But this is neither an argument against mine, nor does it obviate the need to try state and non-state actors that act terribly. It is an argument for further expanding the scope of international criminal law.

VI. Conclusion

The form of global accountability advanced here does not distinguish between democratic and non-democratic regimes. Holding both to higher global accountability is advantageous because both have incentives, for criminally bad governance, although the incentives are different. Nor did I argue that the type of expanded accountability proposed in this paper should be the only type of accountability, or that the incentives proposed be the only type of incentives used (Grant 2006). Indeed, only with a multipronged approach that carefully assesses every case and minimizes adverse externalities can the broad goals of achieving better international accountability and preventing wide-scale and serious harms be realized. That said, the ICC should urgently investigate and indict some of the world's worst governing actors, even given the ICC's limited resources. At once signaling its intent to use its full legal mandate to deter potential perpetrators, the ICC would at the same time bolster its legitimacy by investigating leaders who are widely considered horrific by the international community. Crises beyond violent conflicts are a daily affliction for too many.

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