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Global Constitutionalism / Volume 2 / Issue 03 / November 2013, pp 498 - 530

DOI: 10.1017/S2045381713000178, Published online: 17 September 2013

Link to this article: http://journals.cambridge.org/abstract_S2045381713000178

How to cite this article:

EAMON ALOYO (2013). Improving global accountability: The ICC and nonviolent crimes against humanity. *Global Constitutionalism*, 2, pp 498-530 doi:10.1017/S2045381713000178

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Improving global accountability: The ICC and nonviolent crimes against humanity

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Abstract: Scholars have proposed a number of different ways to improve global accountability, but none has adequately addressed how individuals who commit widespread or systematic nonviolent wrongs can be held to account. I argue that for moral reasons individuals should be held accountable for nonviolent crimes against humanity and that an existing legal institution, the International Criminal Court (ICC), has the authority to prosecute such crimes. The ICC's prosecutor should start exercising this legal authority because widespread or systematic nonviolent harms can be just as morally wrong as violent ones. What matters on my account is the gravity of a wrong, not whether it was committed violently or nonviolently. I situate these arguments in contemporary discussions of accountability, and provide evidence that individuals can cause widespread or systematic nonviolent harms that meet the legal definition of a crime against humanity in the Rome Statute, the ICC's foundational document.

Keywords: accountability; crime against humanity; International Criminal Court; international law; nonviolence

Introduction

Global accountability deficits persist which are widespread, acute, and threaten the lives of many. Accountability gaps are present with respect to global democracy (Borowiak 2011: Chapter 6; Dahl 1999; Goodhart 2008; Goodin 2007; Gould 2004: Chapter 7), global governance (Grant and Keohane 2005; Borowiak 2007), foreign aid (Wenar 2006), economic sanctions (Gordon 2006; Gordon 2010) and international law (Altman and Wellman 2004; Rubenstein 2007; Drumbl 2007). Perhaps the easiest way to improve global accountability is to discover a previously overlooked power of an existing institution that could fill one of these gaps in accountability.

I argue that the International Criminal Court (ICC) can play this role by prosecuting individuals who commit what I call nonviolent crimes against

humanity. Such crimes meet the legal requirements for a crime against humanity as codified in the Rome Statute, the foundational document of the ICC, but individuals commit the underlying acts nonviolently. Briefly and roughly, according to the ICC a crime against humanity is a policy that someone intends to enact that causes widespread or systematic severe harms of certain types (although these harms need not be intended) to civilians where the author of the acts knows that such harms will occur in the normal course of events. I use common-sense and conservative definitions of violence and nonviolence (Coady 1986; Bufacchi 2005). Violence here means harming or killing people through physical force by methods such as shooting, bombing, shelling, knifing, and so on. Nonviolent harms include many other types of wrongs and rights violations, such as causing malnutrition or starvation, withholding medical care, and so on.

To defend the idea that the ICC can and should prosecute nonviolent crimes against humanity, I use moral and legal arguments. First, I argue that individuals who commit avoidable widespread or systematic nonviolent serious harms can be morally blameworthy because such harms cause immense suffering comparable to severe violent wrongs. Nonviolent methods such as purposive starvation or withholding medical care can harm or kill large numbers of people, as I show below. Second, I argue that powerful leaders should be held accountable, define accountability, and sketch the reasons why global legal ‘surrogate’ accountability is the method by which powerful nonviolent criminals should be held to account (Rubenstein 2007). A central purpose of this article is to provide theoretical as well as practical guidance on how accountability can be extended. Third, I provide evidence and examples of probable nonviolent crimes against humanity. I demonstrate that even compared with arguments such as those proposed by Sonja Starr, who argues that the ICC can try individuals for major corruption, there are more actions that probably qualify as a nonviolent crime against humanity (Starr 2007; Marcus 2003; Edkins 2007; Altman and Wellman 2004; Skogly 2001; Davidsson 2005). Fourth, I advance a legal argument to show that the ICC already possesses broader legal powers than it is widely considered to have to try individuals who commit nonviolent crimes against humanity. Before concluding, I discuss possible perverse incentives from implementing my argument and consider other objections.

I. The moral gravity of nonviolent crimes against humanity

One might assume that nonviolent harms are less grave than violent ones and therefore they should not be crimes at all or that the ICC should not prosecute them. In this section, I argue that this view is incorrect. I contend

that nonviolent crimes against humanity can be just as morally objectionable as violent ones based on the gravity of the harms and number of people affected (Starr 2007: 1257). The central moral intuition this argument draws on is that what matters is the severity of a harm and how many people are affected by it, not how such a harm is executed. Just as, *ceteris paribus*, a murder by knife is as bad a murder by gun, I argue that nonviolent killing and severe harms can be just as morally objectionable as violent killing and severe harms.

Although gravity is not defined by the Rome Statute, considerations such as the following are important in deciding whether a crime is sufficiently grave to be tried at the ICC: the number of dead and severely harmed victims; the severity; scale; how systematic; and impact of the crimes (SáCouto and Cleary 2008: 824–5; Moreno-Ocampo 2006: 8–9; Moreno-Ocampo 2005: 498). The former chief prosecutor of the ICC suggests that at least hundreds or thousands of people must be severely harmed in order for the numerical aspect of the gravity requirement to be met (Moreno-Ocampo 2006: 8–9). Nonviolent harms can be just as grave according to these criteria. I consider first the gravity of nonviolent harms, and then show that proponents of moral approaches grounded in individual rights and consequences morally condemn severe nonviolent harms as much as they condemn violent ones.

Just as many people can be victims of nonviolent crimes against humanity as violent ones and the harms can be just as severe. Tens of millions of people have been killed by nonviolent methods over the twentieth century. Perhaps the worst instance of nonviolent crimes against humanity in recent memory is Mao's policies associated with the Great Leap Forward that new research shows killed at least 45 million people in the period 1958–1962 mostly by starvation (Dikötter 2010; Dikötter 2011). To put this in perspective, this is of same magnitude as the number of people killed in the Second World War. It is more than 50 times as many as were killed in the Rwandan genocide (Power 2002: Chapter 10). Others too implemented policies that foreseeably and avoidably caused mass starvation. Stalin's policies of starving to death people 'whom he considered enemies of his regime' left 7–10 million people dead in Ukraine (Pogge 2007: 15). This is ten times the number of people killed in Rwanda in 1994. Innocent civilians were the vast majority of the victims in China and the USSR. There are numerous other cases of severe nonviolent crimes against humanity that I discuss further below. The worst nonviolent harms of the twentieth century had vast numbers of victims and were just as deadly and severe as some of the worst violence.

The severity of these harms is reflected in leading moral theories that provide no reason to weigh nonviolent crimes against humanity any less than violent ones. First, consider a rights-based account of morality. One

of the central human rights that individuals possess is the right to physical security and the right to life (United Nations 1948: section 3; Griffin 2008; Beitz 2009b). If what matters morally is a violation of a right, nonviolent methods of killing someone are just as morally blameworthy as nonviolent ones. Nonviolent violations of rights are also problematic for instrumental reasons. Henry Shue argues that the individual rights to security and subsistence are basic by which he means any right that is required to exercise all other rights (Shue 1996). For instance, if one were sufficiently incapacitated by violence or hunger, one could not exercise one's right to an education. According to Shue, killing someone by nonviolent methods is problematic because it prohibits the exercise of all their other rights (as well as the right to life). Thomas Christiano makes a similar argument by contending that everyone deserves a human right to democracy because it is necessary to protect all other rights (Christiano 2011). According to rights-based theories of morality, then, severe nonviolent violations of rights are just as wrong as violent offences that violate the same rights for intrinsic and instrumental reasons.

Consequentialists would also generally condemn nonviolent crimes against humanity as much as they condemn violent ones. Consequentialists believe that an action is good insofar as it brings us closer to, and bad insofar as it moves us further away from, some state of affairs that is identified as good (Foot 1988: 224–5). One of the most popular types of consequentialism is utilitarianism. Proponents of utilitarianism hold that an act is good insofar as it increases utility or a plurality of pleasures and bad insofar as it causes pain (Bentham 1780; Mill 1861; Singer 2011).¹ Many severe nonviolent harms greatly decrease utility without a corresponding increase for anyone, and thus are generally prohibited according to consequentialists in general and utilitarians in particular. For instance, according to a consequentialist, Mao and Stalin are blameworthy for their nonviolent harms because they needlessly caused the suffering of tens of millions of people. It would be right to hold such perpetrators to account if this increased the utility of victims, deterred other actors from committing similar crimes, or in any other way increased utility (assuming the utility gained by allocating resources to the trial is more than would be gained by spending them on anything else). A consequentialist thus makes no distinction between severe violent and nonviolent harms.

The worst nonviolent episodes of recent history may not be as widely remembered, referenced, or studied, as the violent ones. Nonetheless, they

¹ Of course, rights-based and consequentialist accounts are not always mutually exclusive. Mill famously argued consequentialist ends can and should be achieved by protecting individuals' rights (Mill 1859; Mill 1861). More recently, William Talbot has extended Mill's argument to human rights (Talbot 2005; Talbot 2010).

can be just as blameworthy according to leading theories of morality and according to the gravity requirement of the ICC.

II. Global accountability

Leading moral theories produce a consensus that individuals who commit widespread or systematic harms to innocents are morally blameworthy. In this section, I argue that leading theories of accountability suggest a method by which to hold to account those who commit severe nonviolent harms. I argue specifically that the ICC is a ‘surrogate accountability’ holder, meaning that the ICC can act on behalf of those who were wronged when they are not in a position themselves to hold leaders to account (Rubenstein 2007).

Standard definitions of accountability require at least two actors or two sets of actors, a power wielder and an accountability holder, who are positioned in a relationship that includes the following:

1. *Standards* according to which the power wielder will be judged, and which the power wielders and accountability holders jointly acknowledge.
2. *Information* must be available to the accountability holders so they may adequately judge if the power wielder met the standards.
3. *A right and power to sanction* possessed by the accountability holders regarding the power wielder (Grant and Keohane 2005: 29; Rubenstein 2007; Gordon 2006: 80; Wenar 2006: 5–7).

A standard version of accountability is exemplified by representative democracy. In a representative democracy, accountability holders are the voters, and the power wielders are the elected representatives who are sanctioned by not being re-elected. What is permissible for an elected representative is widely understood and at least tacitly agreed upon by those running for office. Information on the power wielders’ performance is made available to voters through the media, voting records, and so on.

This standard model is only one of many forms of accountability. 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: 35–7; Walzer 1983).

Globally, an alternative to these models of accountability is needed for three reasons. First, many countries are not democratic and thus possess inadequate domestic accountability mechanisms. Second, even those countries that are now democratic have no guarantee that they will remain so. Third and perhaps most importantly, there are no global institutions that are equivalent to domestic accountability structures. Even though democratic leaders are less likely than autocratic leaders to commit some types of harms domestically (Davenport 2007) and even if all countries were democratic, global accountability would still be important because domestic democracy does not guarantee that leaders will not commit international crimes.

Jennifer Rubenstein presents a second-best type of accountability called ‘surrogate accountability’ that is a useful model for attempts to expand global legal accountability (Rubenstein 2007). ‘Surrogate accountability occurs when a third party sanctions a power wielder on behalf of accountability holders because accountability holders cannot sanction (or play their role in helping to sanction) the power wielder’ (Rubenstein 2007: 624). Ideally, surrogate accountability holders act in the interests of the original accountability holders. An NGO, for instance, may advocate 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 and because the farmer wants compensation. Surrogate legal accountability is the variety exercised by the ICC because the ‘complementarity principle’ holds that if and only if a state is ‘unwilling or unable’ to prosecute the crimes enumerated in the Rome Statute may the ICC try individuals (Rome Statute 1998: Article 17.1(a); Schabas 2007: 174–86). Under a typical system of democratic accountability, citizens would be able to vote to remove an unpopular political leader or that political leader could be tried for violations of domestic law. Only when the domestic legal accountability mechanism is blocked can the ICC take action. Under Rubenstein’s model, those represented are the harmed or killed. The surrogate accountability holder is the ICC. The standards are those enumerated in the Rome Statute.

In section IV, I argue that the ICC can and should implement one type of global surrogate legal accountability that it has heretofore failed to exercise. Because this argument is controversial, I will deliberately walk the reader through the pertinent sections of the Rome Statute and other relevant legal documents to make my case that the ICC has the authority to try nonviolent crimes against humanity.

III. Acts that constitute nonviolent crimes against humanity

In this section I provide examples and evidence of probable nonviolent crimes against humanity so that in the following section on the legal basis for prosecuting such harms the reader can easily imagine and compare the legal requirements with this evidence. My basic point here is that any policy that foreseeably and avoidably results in widespread or systematic severe harms to civilians may constitute a (nonviolent) crime against humanity and should be considered seriously for prosecution by the ICC. For my argument to succeed, I need not prove definitely that all the evidence and each case show that such harmful governance directly caused these harms. 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 such horrific governance and widespread or systematic harms to civilians, as well as all of the other elements. What I need to show is that there are good reasons to believe that some leaders enact policies that result in the relevant types and numbers of harms that qualify as a (nonviolent) crime against humanity. I do not restrict these examples to the temporal jurisdiction of the ICC of after 30 June 2002. I do this because my point is to show that an individual's actions can constitute nonviolent crimes against humanity, not only give guidance to the prosecutor on whom she should investigate.

In the process of providing empirical evidence and examples of probable nonviolent crimes against humanity, I differentiate myself from Starr by showing that widespread or systematic severe harms of civilians that are caused in ways other than major corruption probably meet the ICC's definition of a crime against humanity. Starr's central argument is that major corruption can constitute a crime against humanity under the Rome Statute (Starr 2007: 1281–1305). Her central point is that major corruption foreseeably results in severe harms to numerous civilians, and meets the other requirements of a crime against humanity. If the ICC's prosecutors adopted her reasoning, they could probably indict individuals such as Teodoro Obiang in Equatorial Guinea, Idriss Déby in Chad, and Mobutu Sese Seko in the Democratic Republic of the Congo (DRC). Obiang has taken hundreds of millions of dollars while most Equatorial Guineans live on less than a dollar a day (Wenar 2008: 6–7). The DRC's (previously Zaire) former dictator, Mobutu, pilfered billions of dollars from state coffers, while his citizenry survived on an average of less than the equivalent of \$120 per year in 2000 dollars (Wenar 2008: 6–7; Meredith 2005: Chapter 17; Wrong 2001: Chapter 11 and *passim*). Chad's president, Idriss Déby, reneged on his promise to share oil wealth from a pipeline the World Bank funded and has been pocketing the estimated \$1.4 billion per year of oil revenues

as one in four adults in Chad is literate, child mortality increased from 1990 and 2006, and more than one in three children are underweight (BBC 2008; Polgreen and Dugger 2006; Polgreen 2008; World Bank 2008).

Starr restricts her argument unnecessarily. By focusing on grand corruption, she does not emphasize that the ICC can and should indict individuals who are responsible for policies that result in widespread or systematic harms and meet the other elements of crimes against humanity, but who did not profit illicitly from their actions. Grand corruption, in other words, is only one way an actor can inflict the relevant harms and meet the other elements. Individuals can impose the relevant harms in any number of ways such as by formulating policies that cause mass starvation, devastate a health care system, or result in acute pollution or environmental degradation. Compared with Starr's thesis, my argument expands which acts would constitute nonviolent crimes against humanity. This extension of Starr's work is important because it provides a wider net by which to try individuals who unnecessarily wrong or kill numerous civilians.

The following individuals could probably be indicted under my argument but not Starr's. Mao and Stalin's policies were an indispensable reason for the famines in the territories they controlled. Recent research estimates that Mao killed at least 45 million people, mostly by starvation, and continued with his policies despite knowing that they resulted in widespread famine (Dikötter 2010; Dikötter 2011; Waal 1997). Stalin's policies, too, caused the deaths of millions in what is now Ukraine in the early 1930s (Conquest 1987). Thomas Pogge puts the number Stalin killed in Ukraine at 7–10 million (Pogge 2007: 15). Ethiopia's government caused the 1984–5 famine that killed perhaps 1 million people as part of a counterinsurgency strategy (Waal 1997: 112–32). Ethiopia's acting foreign minister at the time, Tibebe Bekele, even admitted that 'food is a major element in our strategy against the secessionists' (Meredith 2005: 343).

Another example of a probable nonviolent crime against humanity is Mugabe's horrific mismanagement of Zimbabwe since 1 July, 2002 (Sollom *et al.* 2009: 41–2). Human Rights Watch identified Zimbabwe's nonviolent problems as 'a humanitarian crisis that is the result of a political crisis' (Human Rights Watch 2009: 3). Because of horrific governmental mismanagement, Zimbabwe's health system collapsed: infant mortality increased to its highest rate in Zimbabwe's history, cholera 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). Mugabe's policies caused what was formerly a breadbasket (Power 2003) to have five million people who were food insecure in the late 2000s (Human Rights Watch 2009: 3). Mugabe has additionally been culpable for terrible violent wrongs. But my point is that even if Mugabe did not commit these violent wrongs, the nonviolent harms he

inflicted probably constituted a nonviolent crime against humanity. These harms resulted from policies he made, and, under the Rome Statute, there is probably sufficient evidence to investigate and indict Mugabe and perhaps some other high-ranking officials for his actions resulting in nonviolent systematic and widespread severe harms.

A more recent case that may have constituted a nonviolent crime against humanity is Burma's leaders' refusal of international aid for victims of, and their inadequate response to, Cyclone Nargis. In 2008, a major cyclone hit Burma that killed or left missing 130,000 individuals (*New York Times* 2008). Leaders should not be held responsible for random acts of nature. Nor does the magnitude of this destruction alone indicate that anyone committed even a single wrong let alone an international crime. In the crucial hours and days after the cyclone, however, Burma's leaders initially refused international assistance that very likely resulted in the deaths of innocents. The magnitude and severity of harms to civilians combined with the policy of refusing aid that was directly connected to some deaths provides preliminary evidence that the ICC should investigate the leaders for actions that anyone could have predicted would lead to avoidable severe harms (Albright 2008; Cohen 2009; Ford 2009).

Having presented some cases of probable nonviolent crimes against humanity, I now turn to more systematic empirical evidence that policies can result in widespread or systematic harms to innocents. Amartya Sen found that famines do not occur in democracies (Sen 1981; Sen 1999: 152–3). His findings hold even for poor democracies and ones that have previously suffered famines before becoming democratic, such as India. The inference Sen and others make is that famines in the modern age are the result of bad governance and not just natural disasters (D'Souza 1994; Plümper and Neumayer 2009; Sen 1981; Sen 1999: 152–3).² For example, Plümper and Neumayer argue that it can be rational for leaders to allow famines to occur depending on the size of the 'selectorate', the size of the population the politicians rely on for their power, if the politicians' goal is to stay in power (Plümper and Neumayer 2009). This may help explain the actions of Mao, Stalin and Bekele, among others.

In recent years, international aid agencies have openly acknowledged that governance is directly linked to harms to civilians. For example, the US's Millennium Challenge Corporation makes aid contingent on good or improving domestic governance, and the World Bank's Governance Matters Project concentrates on governance research in order to improve development (Millennium Challenge Corporation no date; World Bank 2012).

² There have been anomalies and some have questioned whether Sen's theory is applicable in all cases. For examples, see Devereux 2007; Rubin 2008; Shiva 2002.

These examples and evidence raise the question of whether we can develop a more general typology of what sorts of actions, intentions, and outcomes qualify as a nonviolent crime against humanity. My central point is that rather than unnecessarily prosecuting only a subset of the crimes that the ICC can try, including major corruption, a variety of policies that leaders implement that foreseeably and avoidably result in widespread or systematic nonviolent severe harms or deaths of civilians probably qualify as a nonviolent crime against humanity.

One might object that this requires leaders to maximize the protection of some fundamental human rights of people not only within their country but also globally. For instance, most democratic and autocratic politicians implement policies that favour their own citizens over foreigners even if this foreseeably and avoidably results in the deaths of thousands of foreign civilians. Because the cost of saving a life in a rich Western country is far higher than saving a life in a poor country, this is not merely a hypothetical example (Singer 1972). A requirement for leaders to maximize the protection of human rights would clearly undercut collective self-determination, democratic autonomy, and state sovereignty. Instead of taking such a radical stance, even if the text of the Rome Statute would allow such an interpretation, the prosecutor should view some constraints on leaders' choices such as democratic ones as legitimate reasons to not maximize global human rights protection (in the *Objections* section I discuss the legal basis for not trying some individuals). For normative reasons grounded in democratic legitimacy and gravity considerations, instead of trying to capture every instance of a crime against humanity, it is preferable to clearly identify cases that meet the legal requirements for a crime against humanity and are so depraved that leaders should be held accountable for moral reasons. It is preferable to have a high threshold for depraved actions above which actors should be investigated for horrific governance that probably meets the standards for a nonviolent crime against humanity, not set so low a bar as to unintentionally capture actions of legitimate leaders.

These examples and empirical evidence show that policies leaders enact can result in severe widespread or systematic nonviolent harms that probably qualify as crimes against humanity. Furthermore, it shows that a wide variety of actions can qualify as a crime against humanity; there is no moral reason to restrict it to major corruption, and in the next section I show that there is no legal reason either.

IV. The ICC and nonviolent crimes against humanity

The ICC was established to bring to justice those individuals who commit 'the most serious crimes of concern to the international community as a

whole' (Rome Statute 1998: Preamble; see also Article 1). Those include four broad categories of crimes, namely genocide, crimes against humanity, war crimes and aggression. Aggression was defined in the summer of 2010, but the earliest the court can prosecute it is 2017 (Scheffer 2010). My argument focuses on parts of Article 7 on crimes against humanity and Article 30 which is the mental element (Rome Statute 1998: Article 7; May 2005; May 2006a; May 2006b; Altman 2006; Luban 2004; Luban 2006; Mayerfeld 2006; Schabas 2007: 98–112; Starr 2007).

The Rome Statute uses widely accepted types of criminal liability that do not require the suspect to have directly committed violence. For instance, individuals can be found guilty through commanding, ordering, soliciting, inducing, aiding, abetting, or inciting to commit genocide others who actually harm someone (Rome Statute 1998: Article 25). This is important for two reasons. First, it shows that nonviolent actions are widely accepted means of criminal liability. There is no requirement that someone must personally commit violence in order to be convicted by the ICC. Second, these same forms of criminal liability would apply to nonviolent crimes against humanity.

To preview my claim, I argue that the Rome Statute has the legal jurisdiction to try leaders³ for actions and policies that will foreseeably and avoidably cause widespread or systematic violations of some types of human rights to civilians, even if leaders do not intend the harms. This argument holds because the Rome Statute defines some terms broadly. My argument widens the jurisdiction of the ICC compared with the types of crimes over which the ICC is generally thought to have jurisdiction and which it has prosecuted as of March 2013. In the sections that follow, I first discuss the *chapeau* elements as they appear in the text of the Rome Statute and then focus on the enumerated elements.

Chapeau elements of a crime against humanity in the Rome Statute

The Rome Statute defines the *chapeau* elements of crimes against humanity in Article 7, paragraph 1, as: '*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*'.⁴ I discuss in turn 'widespread', 'systematic', 'attack', 'policy', 'civilian', and later discuss 'intent', and

³ Everyone is potentially under the ICC's jurisdiction since the treaty came into effect on July 1, 2002, because art 13(b) of the Rome Statute allows the United Nations Security Council to refer anyone to the ICC. This politicized referral system is far from ideal, but it is better than not having jurisdiction over certain people. The UN Security Council referral of Sudan's Bashir is an example of the benefit of having this option.

⁴ All italics of the Rome Statute are added by the author unless otherwise noted.

‘knowledge’, I use a variety of sources to expound the definitions of these key terms, including the Rome Statute, its Elements of Crimes, case law from the ICC and ad hoc tribunals, and scholars’ interpretations of these terms. I additionally cite the Oxford English Dictionary (OED) because some key terms in the Rome Statute differ substantially from everyday usage; it provides a useful comparison to these common words, and the ICC itself refers to it (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 29).

Consider first the meanings of ‘widespread’ and ‘systematic’. The language in the Rome Statute is disjunctive: either ‘widespread or systematic’. Now consider some definitions from the OED and cases. According to the OED, widespread means ‘distributed over a wide region; occurring in many places or among many persons’.⁵ Systematic refers 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’.⁶ These commonsensical meanings are consistent with interpretations of similar language in the statutes defining crimes against humanity offered by judges of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). According to an ICTY judgment, widespread can be assessed by the ‘large-scale nature of the attack and the number of the victims’ (*Prosecutor v Vidoje Blagojević and Dragan Jokić* 2005: para 545). Other factors that can be taken into account to determine if an attack is systematic are ‘consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes’ (*Prosecutor v Vidoje Blagojević and Dragan Jokić* 2005: para 546). ICTR judges in the *Akayesu* case wrote:

The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. (*The Prosecutor v Jean-Paul Akayesu (Trial Judgment)* 1998: para 580)

State actors need not carry out such policies in order for an act to qualify as widespread or systematic.

Given these definitions, many people must be harmed severely in order for an action to qualify as widespread or systematic. Being too specific

⁵ Accessed online 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’.

⁶ Accessed online at <http://www.oed.com> and the definition quoted is from section 3(a), the first definition.

about what this number is will not permit inclusion of cases that should qualify, but being too broad will allow the inclusion of too many crimes or be too vague to be helpful. For instance, if I suggest that at least 1,000 or 10,000 people must have their relevant rights violated by a leader's actions to qualify as widespread or systematic, it is unclear how we can move from the language in the Rome Statute to such a specific claim. The problem with this approach, too, is that leaders might harm 999 or 9,999 and thereby avoid prosecution, but this intuitively seems wrong. There is little moral difference between harming 999 or 1,000 people. What may be helpful here is the former chief prosecutor's suggestion regarding the gravity requirement that at least hundreds of people must be severely harmed (Moreno-Ocampo 2006: 8–9). This suggests, without requiring, that 'widespread' or 'systematic' typically means that at least hundreds or thousands of people must be severely harmed or killed. Such a number is consistent with the gravity requirement as well. All of my examples of nonviolent crimes against humanity easily meet this requirement.

Unlike widespread and systematic, the definition of 'attack' in the Rome Statute differs substantially from its common usage. It is normally taken to mean 'the act of falling upon with force or arms, of commencing battle',⁷ Rather, the ICC defines 'attack' in Article 7.2(a) as:

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. (emphases added)

Unlike earlier formulations of crimes against humanity that required a nexus to armed conflict such as those in the Nuremberg Charter, following the 1954 Draft Code of Offenses against Peace and Security of Mankind the Rome Statute's definition of attack thus does *not* require the use of armed forces or a nexus to armed conflict (International Law Commission: Article 2(11); Schabas 2007: 99–102). The Rome Statute's absence of a requirement of an attack being committed by armed forces is consistent with the *Tadić*, *Kunarac*, *Akayesu*, *Musema*, and *Vasiljević* decisions from the ICTY and ICTR wherein the tribunals considering those cases concluded that a crime against humanity can be effected without force or military action (*Prosecutor v Dusko Tadić aka 'Dule'* 1995: para 141; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Appeal Judgment)* 2002: para 86; *The Prosecutor v Jean-Paul Akayesu (Trial Judgment)* 1998: para 581; *Prosecutor v Mitar Vasiljević* 2002: para 29; *The Prosecutor v Alfred Musema* 2000: para 205; *The Prosecutor v George Anderson*

⁷ Accessed online at <http://www.oed.com> and the definition quoted is from section 1(a).

Nderubumwe Rutaganda 1999: para 70). Thus, ‘attack’ means simply conduct involving the multiple commission of acts that are part of or constitute a policy, which includes almost any state policy and many nonstate actors’ deeds (Schabas 2007, 101–2; *The Prosecutor v Jean-Paul Akayesu (Trial Judgment)* 1998: para 580). ICC judges wrote that an attack does ‘not necessarily equate with a “military attack”’ (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 75). They continued, ‘the commission of the acts referred to in Article 7(1) of the Statute constitute the “attack” itself and, beside the commission of the acts, no additional requirement for the existence of an “attack” should be proven’ (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 75). The broad definition of attack in the Rome Statute allows nonviolent crimes against humanity to meet the attack criterion.

Third, a ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population’ (‘Elements of Crimes of the International Criminal Court’ 2002: 5). Although the policy requires encouraging the attack (‘the multiple commission of acts’), it does *not* require the intention that these actions result in harms or deaths. (Like the broad definition of attack, this definition of intention will be important for my argument.) In fact, there is no malice requirement for either ‘attack’ or ‘policy’ (Starr 2007: 1304). It is important to note what is not included in the policy requirement. Actions need not be part of a *larger* state or organizational policy – although they can be – because the language in the Elements of Crimes allows any person in power to make policy, even if it diverges from the official policy or orders of superiors. Those actually committing multiple harms of the relevant types could also be convicted of a crime against humanity if their actions were part of the relevant policy. A serial killer does not commit crimes against humanity because the decision to kill is taken alone (Ambos 2011: 285). But those same actions might be prosecutable if the killings were part of an organizational policy (assuming the other elements of a crime against humanity were met). ICC judges held that the policy requirement ‘implies that the attack follows a regular pattern’ (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 81). Any ‘attack which is planned, directed or organized . . . will satisfy this criterion’ (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 81). Proving intent and knowledge 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 terms.

Civilians are defined in international law as not combatants (‘Protocol Additional to the Geneva Conventions of 12 August 1949’ 1977, section 50). Four conditions are necessary and sufficient to be a combatant: wearing a symbol recognizable at a distance that identifies one as part of a military

force, carrying arms openly, following the laws of war, and being subject to a command structure (May 2007: 103). Nonstate rebels may qualify as combatants as well as regular military personnel. Controversial cases of who qualifies as a combatant are not important for my argument because all of the examples I focus on clearly affect large numbers of civilians and for this reason I will not focus on debates about who qualifies as a civilian.

Having clarified the *chapeau* elements, I now turn to the enumerated elements of a crime against humanity. Instead of reproducing all of the enumerated elements in Article 7.1, which includes 11 main and many more clarifying definitions of what constitutes the relevant acts, I focus on only Article 7.1(k) here. I do this because in order to qualify as a crime against humanity only one of the 11 transgressions included in Article 7 must be met, in addition to the *chapeau* elements. Article 7.1(k) reads as follows:

- (k) Other inhumane acts of a similar character intentionally *causing great suffering*, or serious injury to body *or* to mental *or* physical health.
(emphases added)

Paragraph 2 of Article 7 clarifies possibly controversial terms in paragraph 1, but the Rome Statute does not elaborate on (k). Acts that cause great suffering or serious injury to one's body, physical, or mental health that are widespread or systematic could constitute part of the *actus reus* of a crime against humanity.

During the Rome Statute's formative debates, some pressed for crimes such as human-caused mass starvation to be included as a crime against humanity, but that language was ultimately rejected (Schabas 2007: 105; von Hebel and Robinson 1999: 103). Given this rejection, is it legally permissible to argue that some acts can constitute nonviolent crimes against humanity? The standard way to interpret treaties comes itself from a 1969 treaty called the 'Vienna Convention on the Law of Treaties' ('Vienna Convention on the Law of Treaties' 1969). The relevant clause says that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' ('Vienna Convention on the Law of Treaties' 1969, section 31(1); Schabas 2007: 200–1). This highlights a possible tension in how to interpret international law. On the one hand, it is valid to read and interpret the language of an international treaty straightforwardly. On the other hand, there is a long tradition of looking to the intent of the founders by referring to the *travaux préparatoires* to assess how any given clause of an international treaty should be interpreted if the language is unclear or controversial. The strategy I take in this paper is to use a straightforward reading of the Rome Statute and to support this claim through multiple

sources of jurisprudence and secondary literature. Thus, it is legally permissible to argue that those who aimed to have human-caused famine included as a crime against humanity did not ultimately fail.⁸

What sorts of harms qualify as ‘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))? Causing someone to die unnecessarily is a serious injury to physical health. Severe malnutrition is another example of serious injury to physical and mental health, even if one can sometimes recover from it. Such harms violate the international law codified in the ICESCR (‘International Covenant on Economic, Social and Cultural Rights’ 1976). Because some might object to the mental injury component, I limit my argument to physical harm. I assume it is uncontroversial and therefore provide no further argument that causing death by starvation or severe malnutrition is a severe physical harm. Of course, not all death or malnutrition is or should be criminal. Death and malnutrition can be caused in numerous ways including through poverty that no one is responsible for causing. But death and severe malnutrition can result from the 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, by stealing money that would otherwise go to life-sustaining programmes, or by other policies. The Elements explicitly allow that a crime against humanity can occur through extermination by ‘deprivation of access to food and medicine’ (‘Elements of Crimes of the International Criminal Court’ 2002, Article 7(1)(b) 1. note 9) so such deprivation meets the ‘inhumane acts’ criteria.

Intent and knowledge

I will now show that even if a policy maker does not intend the outcomes of some acts that result in widespread or systematic harms, she can still be legally liable for a (nonviolent) crime against humanity. What I do not have to show for my argument to be convincing 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 broad way the Rome Statute defines those two terms. What I must show is that the ICC has the authority to try such types of crimes (as I did above) and that there is good reason to think that some actions do qualify as nonviolent crimes against humanity under Article 7.

⁸ Intentionally causing famine could also be grounds for conviction of genocide under Articles 6(c) and war crimes under 8, 2. (b, xxv). Of course, the other elements of those crimes would also have to be met.

The definition of intent in the Rome Statute is broad. According to the OED, ‘intent’ means ‘that which is willed’,⁹ When one intends something, one tries to realize an outcome that one has in mind. The Rome Statute’s definition differs substantially from this commonsensical usage. The Elements of the Crimes defines intent regarding ‘other inhumane acts’ as ‘The perpetrator was aware of the factual circumstances that established the character of the act’ (‘Elements of Crimes of the International Criminal Court’ 2002: Article 7(1)(k) 3). Starr takes this to ‘refer to those circumstances that render the consequences the ordinarily expected result of the act’ (Starr 2007: 1257).

This coincides with what the ICC’s own judges have decided the intent requirement of Article 30 requires. Before discussing this, I quote Article 30, which discusses the mental element (*mens rea*). It reads as follows:

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. (emphases added)

To be legally responsible, a person must have both intent and knowledge, which seems at first to significantly raise the bar for criminal liability (see May 2005: 124–32). However, ‘intent’ and ‘knowledge’ are defined broadly. A person must mean to engage in some conduct, but the second half of Article 30(2)(b) reads as follows. Someone must simply be ‘aware that it [a consequence] will occur in the ordinary course of events’ as a result of their action. Intent, here, just means being aware that an action will cause some effect ‘in the ordinary course of events’ – one need not want or hope to cause the consequences. This radically broadens what intent means when compared with a common-sense understanding of the term. ICC judges used this reasoning in the conviction of Thomas Lubanga Dyilo (*Prosecutor v Thomas Lubanga Dyilo* 2012: paras 1273–9 and 1351).

The meaning of ‘knowledge’ is similarly broad. To have knowledge according to the Rome Statute, one needs only ‘awareness that a circumstance

⁹ Accessed online at <http://www.oed.com> and the definition quoted is from section 1(a).

exists or a consequence will occur in the ordinary course of events'. The ICC's judges have determined on several occasions that the knowledge requirement is met if the perpetrator 'knew this [an outcome] would occur, or was aware that there was a substantial likelihood that the crimes would occur' (*Prosecutor v Thomas Lubanga Dyilo* 2011: para 40). In the *Bemba* case, the judges ruled that 'the perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack' (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 88). To be convicted, the accused need not know the details of the attack (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: para 88). He simply must be aware only that the relevant wrongs will occur in the ordinary course of events (*Prosecutor v Jean-Pierre Bemba Gombo* 2009: paras 87–88).

The standard of knowledge the ICC uses requires a minimal capacity to reason, knowledge of how the world functions, and responsibility for learning the probable outcomes of one's actions. There need not be actual evidence of this knowledge. The Elements hold that 'existence of intent and knowledge can be inferred from relevant facts and circumstances' ('Elements of Crimes of the International Criminal Court' 2002, General Introduction section 3; *The Prosecutor v Thomas Lubanga Dyilo* 2007: paras 350–354). The ICC can reasonably assume that leaders generally possess the requisite knowledge of first-order effects of their actions because any reasonable person would who is an adult of average intellectual ability. Moreover, leaders typically keep themselves informed. Even Mao's fawning Communist party underlings informed him of the famine he was causing through his collectivist agricultural policies (Dikötter 2010; Waal 1997: 18–19). Peng Duhai confronted Mao with evidence of the great famine he was causing. Instead of taking this seriously and changing his policy, Mao purged Duhai (Waal 1997: 18–19).

The Rome Statute's definition of intent additionally undermines a widespread intuition that intentionally wronging others or the state is worse morally than unintentionally causing identical harms. This intuition is reflected in many legal systems. Individuals who commit a crime through negligence or recklessness are generally treated less harshly than those who premeditate and intend to inflict a severe harm. But the Rome Statute's definition of crimes against humanity blurs that typical distinction because of its definitions of knowledge, intent, and policy. Individuals can be held criminally responsible for some outcomes they do not mean to cause, but which will occur in the normal course of events. The policy requirement of crimes against humanity holds that someone must mean to make the relevant policy, but the intent and knowledge requirements do not require that the suspect intend (in the everyday definition of the term) the outcomes

which result. The basic point I wish to make here is that doing certain things in a position of power will produce lots of consequences in the normal course of events just because one is in that position of power. The Rome Statute assigns international legal responsibility for some acts *even if the power wielder does not intend the outcome*. (I address in the *Objections* section whether this is a design flaw of the Rome Statute.)

The Rome Statute thus stretches our commonly held beliefs about the limits of legal responsibility for political leaders and many powerful nonstate actors. My interpretation of the Rome Statute would probably make many more leaders criminally liable because many set avoidable policies that they know will result in widespread or systematic harms of the relevant types to civilians. This has a parallel in Michael Walzer's argument regarding political action and the problem of 'dirty hands' (Walzer 1973). Walzer claims that the structures in which politicians and some individuals must act put them in positions in which all of their available choices are morally wrong. Even if Walzer is correct that extremely powerful people sometimes face a moral dilemma, the powerful do not face a legal dilemma. The powerful can avoid committing crimes against humanity, as I discuss in the *Objections* section below.

In sum, to be convicted of a crime against humanity, someone can intend to commit multiple acts as part of a policy (7.2(a)) that result in widespread or systematic harms of the relevant types (7.1) which cause great suffering or serious injury to bodily or mental health (7.1(k)) to civilians (7.1) with the knowledge that these harms will occur in the normal course of events (30).

V. Objections

So far, I have argued that there are strong moral and legal reasons why prosecuting individuals who commit nonviolent crimes against humanity is important and possible. In this section, I consider eight possible objections to my argument.

Unintended perverse incentives

Prosecuting nonviolent crimes against humanity might create perverse incentives by making current leaders clutch to power ever more tenaciously and ruthlessly in order to avoid punishment. These leaders may reason they have everything to lose if they fall from power because the ICC could prosecute them, and that killing more people violently or nonviolently to stay in power would not increase their punishment much if at all. This may be the true. There are several responses to this objection.

First, alleged international criminals already have strong incentives to remain in power. It is uncertain whether the threat of prosecution would change leaders' incentives. The prosecutor has the power to not indict individuals under Article 53, if not prosecuting an alleged perpetrator were in the interest of justice, taking into account the interests of victims. Because the Rome Statute does not define the interests of justice or victims, the prosecutor has wide leeway in making this assessment. Therefore, the prosecutor can claim credibly to not prosecute a leader if he changes course and refrains from or stops committing nonviolent crimes against humanity, undercutting the perverse incentive.

Second, the opposite side of such an incentive is deterrence. Individuals may choose not to commit nonviolent crimes against humanity if they could be prosecuted for such offences. Although the research on deterrence for international crimes and associated harms is mixed (Drumbl 2007: 169; Mennecke 2007: 323; Snyder and Vinjamuri 2004), there is some evidence that prosecutions deter others in similar cases (Kim and Sikkink 2010). I do not advocate *fiat justitia, et pereat mundus*, however. Elsewhere I argue that the ICC should not indict and prosecute any alleged international criminals if it were likely to result in many more people being harmed severely over the long term. In general, the prosecutor can and should prosecute nonviolent suspects, but she should assess carefully the trade-offs for each case and may sometimes decide to not prosecute – just as she would with violent international criminals.

Third, the creation of perverse incentives should be weighed against the intrinsic importance of holding leaders to account and the instrumental importance of prosecuting in order to deter others. Another important aspect of international criminal law may be norm enforcement (Damrosch 1994; Drumbl 2007). Mark Drumbl calls this 'expressivism' and Luban calls this 'norm projection' which roughly hold that an important function and justification of international law is bolstering respect for international norms (Drumbl 2007: 11–12, 16–17, 60–3, Chapter 6; Luban 2006: 354–5). Even if some leaders have marginally more incentive to remain in power, the moral value of holding individuals to account may outweigh such negative factors in some cases.

Fourth, trying nonviolent offenders may prevent perversely incentivizing sly political leaders from shifting their strategies from violent ones to nonviolent ones to avoid ICC prosecution. Expanding the scope of who can be prosecuted pressures those in office to refrain from and avoid committing nonviolent crimes against humanity. Thus, on intrinsic and instrumental grounds – and because the prosecutor has the power to make exceptions – the perverse incentives are outweighed by the positive ones.

Given limited resources, the ICC should only prosecute violent international criminals

A related, second, objection is that my argument undercuts the stated purpose of the ICC, namely, to hold to account those who perpetrate the most egregious international crimes. If the ICC prosecuted all nonviolent crimes against humanity, its docket could swell to an unwieldy size, individuals could languish in legal limbo, and states might withdraw their support for the young court. This criticism is weak for several reasons.

First, notice that this objection does not undermine any of my interpretation of the Rome Statute, or the view that it is morally important to prosecute nonviolent international criminals. Second, even as a practical suggestion, it fails because there is no reason to assume that all nonviolent crimes are less deserving of punishment than are violent ones. Why would someone like Qaddafi, who violently killed a few thousand people in 2011, be more deserving of punishment than someone who intentionally starved to death a million people? Because the prosecutor has the power to decide when not to indict alleged international crimes, she can strategically decide who to prosecute and who to not prosecute. Instead of trying all possible international criminals, the prosecutor could indict only those who perpetrate especially egregious violent or nonviolent crimes against humanity, at least for now. Indeed, rather than undermining the purpose of the ICC, my argument bolsters it. Now the ICC lets nonviolent international criminals walk free. If the ICC's prosecutor adopted my argument, she would be able to expand who she decides to prosecute and indict and try the worst of the worst whether they were violent or nonviolent perpetrators. I acknowledge that the ICC and the prosecutor have scarce resources that must be used carefully, but there are moral reasons to include nonviolent offences in the calculation of who is most deserving of prosecution, and I have shown that the ICC has the legal authority to do this.

Is some of the language in the Rome Statute a design flaw?

A third objection is that the language in Articles 7 and 30 contains a design flaw and should thus be changed. The language is a design flaw in the sense that the authors of the Statute did not intend for it to be interpreted in the way I do, so far as I can tell. The drafters of the Rome Statute, for example, rejected the idea that mass starvation should be included as a crime against humanity (Schabas 2007: 105; von Hebel and Robinson 1999: 103). But the authors of the Rome Statute may have intended such actions as I term nonviolent crimes against humanity to be included under the section on 'other inhumane acts'. The language is also not a moral flaw because nonviolent crimes against humanity can be as severe and kill as many

people as violent ones, and individuals who commit such crimes deserve punishment.

Those who want to remain faithful to the founders' intentions might suggest that because the Rome Statute can be interpreted in the way I do, it should be edited to exclude nonviolent crimes against humanity. One way to achieve this aim would be to delete section 7.1(k). That would preserve all of the language of the *chapeau* elements, as well as the majority of underlying acts that constitute a crime against humanity. This and any other modification that would preclude prosecution of nonviolent crimes against humanity should be rejected on moral grounds. It is more important to improve the global accountability of individuals who cause the deaths and harms of great numbers of people than it is to remain faithful to the possible original intent of the state representatives and others who composed the Rome Statute when doing so can remain within the law.

Another legal reason why the language does not need to change is because the current language does not violate the *nullum crimen sine lege* principle because it does not expand the scope of one of the core crimes of the ICC to an extent that it is unclear how to avoid committing a crime against humanity. The principle of *nullum crimen sine lege* requires that laws have sufficient specificity to allow any reasonable person to know how to avoid violating them. Although given my argument it is more difficult for powerful individuals to avoid committing a crime against humanity, it is not impossible. That there is an expansion of a law and that it is more difficult to avoid violating it does not mean that it is impossible to avoid committing a crime or that it is impossible to know how to not commit the crime. Legally, leaders can avoid prosecution by refraining from committing the acts that I discuss above. Practically, if democratic leaders act in good faith to avoid committing nonviolent crimes against humanity, the ICC's prosecutor should avoid indicting these individuals because there are numerous more deserving cases.

The ICC is itself unaccountable

A fourth objection is that because the ICC itself is not sufficiently accountable, it should not have its mandate expanded, lest it more easily abuse its power. John Bolton used a similar argument in an attempt to derail realization of the ICC (Paris 2009: 61 and *passim*). A purportedly powerful institution that is undemocratic and unaccountable to state governments is dangerous because it might indict people for political purposes, some might claim. Another way the objection might be framed is to query who can hold the surrogate accountability holders to account (Rubenstein 2007).

There are a few responses to this objection. The main point is that my argument does not alter any of the institutional checks and accountability mechanisms already in place. The ICC has internal accountability mechanisms. The prosecutor can proceed with an investigation only if the Pre-Trial Chamber confirms that there are ‘substantial grounds’ for the charges (Articles 15; 61.5). The Pre-Trial Chamber exercises their power. As of late January 2012, the Pre-Trial Chamber disallowed the prosecutor to proceed with over 25 per cent of investigations (Schabas 2012). Just as the Pre-Trial Chamber checks the power of the prosecutor for violent crimes, so would they vet the prosecutor’s attempt to prosecute nonviolent offences. Another accountability mechanism is that state parties can remove the prosecutor with a simple majority vote for ‘serious misconduct or a serious breach of his or her duties’ (Rome Statute 1998: Article 46; Rodman 2006: 33). A third, external accountability mechanism rests with the UN Security Council, which can postpone indefinitely, subject to yearly renewals, any case for any reason (Article 16).

Consider the problems if the ICC were more responsive and accountable to member states. Being more directly accountable to state governments would make the court even more political, and would not eliminate the criticism of problematic accountability. Look to the critics of the IMF and World Bank for objections to this sort of accountability. Recall the groundbreaking arguments of the Federalists who argue that judicial independence is important for fair trials and the rule of law (Hamilton, Madison, and Jay [1787], sections 78–9). Similarly, some judicial independence is vital for the ICC. Expanding the court’s jurisdiction would not undermine the extant checks and accountability mechanisms already in place. Finally, it is better to try some from a whole class of heretofore mostly unprosecuted miscreants than to try none. The small possibility of the ICC abusing its power does not trump the importance of bringing nonviolent international criminals to justice.

If the ICC is not performing well, why should it expand its powers?

Fifth, someone might object that despite these checks and accountability mechanisms, Ocampo did a poor job and therefore there should be no expansion of the prosecutor’s mandate until Fatou Bensouda proves her merit. Why should we expand the powers of a poorly running institution? First, notice that this does not undermine my moral or legal arguments, but rather suggests the ICC should postpone prosecuting nonviolent crimes against humanity. This objection addresses a whole class of arguments, including mine, that would expand the ICC’s mandate. Individuals who raise such an objection make two assumptions and one implicit argument.

First, they assume that the ICC is performing poorly. Second, they assume that the ICC will perform as poorly when it prosecutes nonviolent crimes against humanity as it has in the past, even under a new prosecutor. The argument implicit in this objection is that the ICC is and will perform poorly enough to outweigh the benefits of holding to account individuals who commit nonviolent crimes against humanity. I do not think these assumptions and argument are sustainable. But I attempt to put forward the most convincing components of this objection in order to fairly evaluate them.

One possible way to make this objection is to argue that the prosecutor has made mistakes. For example, Adam Branch suggests the ICC's arrest warrants against the Lord's Resistance Army's (LRA) leadership may have been detrimental to the Ugandan peace process, and possibly even contrary to international law because it is not at all clear that Uganda's government was either unable or unwilling to try the LRA leadership (Branch 2007: 186–7). Furthermore, the ICC tacitly exonerated the Ugandan government, which may have committed abuses punishable under the Rome Statute (Branch 2007: 187–8). Another way that the prosecutor exercised his powers poorly was by issuing an open instead of a sealed arrest warrant for Sudan's president even though Bashir had threatened publicly to expel aid organizations if he were to be indicted. Bashir's expulsion of aid organizations very likely cost lives. A third charge is neocolonialism. As Sriram puts it, this claim is 'difficult to source, because while it is a concern that has been aired in conferences and in diplomatic circles, it is seldom articulated fully or in print' (Sriram 2010: 320). The idea is that because the court is located in the Netherlands and has so far indicted and prosecuted only Africans, the ICC is a neocolonialist institution.

These criticisms are generally reasons why the prosecutor should be more politically astute, and I admit that Ocampo made mistakes. Ocampo should have investigated and possibly indicted Ugandan government officials and issued a sealed warrant for Bashir. But these objections do not undermine my argument for the expansion of crimes against humanity to nonviolent offences for the following reasons. First, trying some alleged international criminals is better than trying none, and trying more is generally better than trying fewer. Adopting my argument would allow the ICC to bring to trial more individuals suspected of unjustly killing and harming multitudes. Second, it would allow for a wider range of individuals to be brought to trial, including those from outside Africa, and also for the prosecutor to avoid the charge of neocolonialism. The charge of neocolonialism is somewhat confusing for another reason. One of the main problems of colonialism was that colonial authorities were unaccountable and hence were able to get away with harming and killing masses of people

to further their own ends. The ICC in general and my argument in particular aim to close a gap in accountability. What is more, the ICC can exercise its jurisdiction only if a state is unable or unwilling to prosecute, preserving a large degree of state sovereignty. It is difficult to sustain the claim that an institution is neocolonialist if the vast majority of those victimized by an alleged international criminal indicted by the ICC wants the accused prosecuted at the ICC. That is exactly what occurred in one case where individuals were polled. Some 98 per cent of Darfuri refugees in Chad wanted Bashir tried at the ICC (Hamilton 2011: 160). Third, and perhaps most importantly, none of these arguments even attempt to trump the idea that holding to account individuals who commit international crimes is important. Another way to put this is to imagine the alternative: not holding individuals to account who commit nonviolent crimes against humanity is unjustifiable. Despite these criticisms – which are healthy and which will accompany any institution, especially a new one that challenges inveterate ideas and practices about law and state sovereignty – the ICC is working to a degree that expanding its mandate is morally justifiable. Alleged international criminals are behind bars, trials are proceeding, and the court is not in imminent danger of collapse.

My argument dilutes crimes against humanity

Sixth, because the concept of a crime against humanity 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 violent harms are no worse than nonviolent ones. Indeed nonviolent harms may result in more severe suffering than some violent ones. Imagine someone who has led a relatively healthy life, with adequate opportunity, a fine education, comfortable housing, adequate health care, 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 a kleptocratic president stole the money that was earmarked to fund a food security programme and local health clinic. I do not want or need to claim one scenario is worse than the other. I want to suggest only that the nonviolent death is sufficiently morally abhorrent, and that the ICC's prosecutor has the authority, to investigate high-ranking Chadian officials on charges of crimes against humanity.

Second, if someone wants to term the crime something different than 'a crime against humanity', and objects to the language of the Rome Statute, I might agree: the category of crimes against humanity is theoretically

suspect. 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’. Altman writes, ‘The vital interests of most humans are simply not at stake’, when crimes against humanity are committed (Altman 2006: 371). As some define it, 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, 2006a, 2006b; Luban 2004, 2006; Mayerfeld 2006; Vernon 2002). My argument does not weaken the moral foundations of a crime against humanity even while it allows room to reformulating the concept of a crime against humanity.

Pogge’s explanatory nationalist critique

Seventh, Pogge might object that holding to account only national and nonstate actors overlooks those international leaders who sustain global economic and political orders that are probably morally and legally liable according to my argument because the global economic order sustains severe poverty from which 18 million people needlessly die every year (Davidsson 2005; Øverland 2011; Pogge 2008: 2 and *passim*). Pogge might suggest that my analysis is overly nationalistic and does not sufficiently consider international actors who perpetuate the global property rights regimes that he argues harms the poor. I accept that the global institutional economic order, especially concerning property and borrowing rights, is problematic and needs modification (Pogge 2008: 118–22). Pogge might suggest that international actors could be tried for other harms as well. For instance, UN-imposed and US-backed sanctions against Iraq in the 1990s caused the deaths of half a million innocents (Gordon 2006: 87; Gordon 2010). Pogge’s objection is not an argument against my thesis that state and nonstate actors should be held to account for nonviolent crimes against humanity. Pogge’s objection is an argument to further expand the reach of my argument.

My argument problematically undermines state sovereignty

Eighth, some might object to my attempt to expand global legal accountability by arguing that states are sovereign and therefore state leaders should not be accountable to anyone other than their citizens. Due to limitations of space, I cannot adequately defend my views here on why states should have conditional and limited sovereignty. States leaders themselves and scholars have argued and come to accept that state sovereignty should not be absolute. For instance, a broad range of scholars have advanced a diverse set of views grounded in collective self-determination

and human rights for why an absolutist interpretation of Westphalian state sovereignty is morally unsupportable (Pogge 1992; Walzer 1977; Walzer 1980; Beitz 1980; Beitz 1999; Beitz 2009a; Luban 1980a; Luban 1980b; Doyle 2009). State leaders themselves have agreed to many of these limitations to their sovereignty through international laws, universal human rights, and international institutions. It is important to note that the ICC exists only because states ratified the Rome Statute. Now, more than half of all states have ratified it. In 2005, state leaders themselves even accepted the 'responsibility to protect' which allows foreign military intervention as a last resort if states are unable or unwilling to protect their citizens from mass atrocities (ICISS 2001; United Nations 2005; Evans 2008; Bellamy 2009). In one sense, this objection is lifeless because states have already agreed to the Rome Statute and my argument merely argues that the ICC should try a category of crime that it has avoided prosecuting so far so state sovereignty is no weaker now than 1 July, 2002, when the Rome Statute entered into force. A stronger way to rebut this objection is to again weigh the relative moral values of state sovereignty and holding to account individuals that slaughter nonviolently large numbers of people. I have attempted to show that such harms are on par with widely accepted violent international crimes and concomitant infringements of state sovereignty. Crimes against humanity are explicitly actions that states have agreed limit their sovereignty in the nonbinding 2005 World Summit Outcome Document (United Nations 2005: paras 138–139). Even if my argument does undermine somewhat current conceptions of state sovereignty, it is legally permissible and morally essential.

VI. Conclusion

My argument advances a method by which an existing global actor, the ICC, can and should prosecute nonviolent crimes against humanity in all of their forms. This has implications for the degree to which states are and should be sovereign and what types of governance are illegitimate. It curtails further than is commonly accepted the morally and legally permissible realm of state sovereignty by suggesting that some nonviolent harms are never legitimate. This applies to democratic and nondemocratic regimes, just as it applies to state or nonstate actors, although democratic regimes have more legitimate leeway in enacting policies that represent and favour their own citizens. This is advantageous because any power wielder may commit nonviolent crimes against humanity domestically or abroad, although the incentives different actors face to do so vary. Notice that I did not argue that the type of expanded accountability proposed in this paper should be the only type of global accountability. Indeed, only

with a multi-pronged approach to global accountability that carefully assesses every case and minimizes adverse externalities can global accountability be realized. Other methods of accountability and checks and balances should be taken seriously and weighed against using the ICC as a method of holding nonviolent international criminals to account. Buchanan's proposal of 'recognitional legitimacy' is one such example (Buchanan 1999). How to integrate prosecuting nonviolent crimes against humanity into the imperfect global and state systems of accountability that currently exist is an important question, but not one I have space to consider here. That said, when the conditions are right, the ICC should urgently investigate potential nonviolent crimes against humanity including acts that do not include major corruption even given the ICC's limited resources. Holding nonviolent international criminals to account is morally important, legally feasible, and potentially deters others from committing similarly horrific offences.

Acknowledgements

I would like to thank the following individuals, as well as the anonymous reviewers, for providing excellent feedback on this article: Ceren Altincekic, Jon Bellish, Brian Bernhardt, Yvonne Dutton, Michaele Ferguson, Jeff French, Hannah Garry, Alison Jaggar, Elizabeth King, David Mapel, Conor Seyle, Roberta Spivak, Steve Vanderheiden, and Scott Wisor. Any mistakes remain solely my own. I would like to thank David Vaughan for meticulous editorial assistance.

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