

EXTRAORDINARY CRIMES AT ORDINARY TIMES: INTERNATIONAL JUSTICE BEYOND CRISIS SITUATIONS

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INTRODUCTION

International criminal law is generally understood to be a mechanism for responding to, punishing, and preventing war crimes and mass atrocities. This understanding pervades scholarship. The transitional justice approaches that dominate the field emphasize the reestablishment of stability, justice, and rule of law following a period of extraordinary upheaval. And the scholarship reflects reality: to date, international criminal tribunals have focused entirely on crimes committed in crisis situations, mostly wars. They have wholly ignored entrenched, longer-term abuses of the sort that cause everyday suffering far out

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of proportion to the minimal headline ink expended on them. Thus, for the perpetrators of massive systemic crimes committed during peacetime—such as the world’s worst tyrants, kleptocrats, and profiteers of state-enabled sexual slavery—impunity remains the order of the day.

This Article asks why. It assesses the crisis focus of international criminal law and considers what the field could look like through a different lens. A crisis focus has been built into the jurisdictional mandate of most international and hybrid criminal tribunals, which have been established specifically to respond to periods of extreme violence in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and East Timor, as well as to World War II and the Holocaust. The establishment of the International Criminal Court (“ICC”) changes that picture. The ICC’s mandate is not temporally or geographically confined to particular crises. Although the drafters omitted some major systemic crimes from the Statute, other crimes—such as sexual slavery, apartheid, murder, and enforced disappearance—are included as crimes against humanity and could readily be prosecuted outside crisis contexts.

So far, however, the ICC has focused exclusively on armed conflicts. This choice illustrates the powerful impact of the crisis mentality on the exercise of both prosecutorial discretion and the discretion enjoyed by member states and the Security Council in referring cases to the court. Of course, the ICC’s broad mandate and limited resources make hard choices inevitable. Consequently, this Article asks not just whether it is legally possible to prosecute long-term human rights abuses as international crimes, but whether it is worth doing so.

Should international criminal tribunals address systemic human rights violations untethered to mass atrocity or war? The answer is not obvious. It depends on difficult normative judgments about what international justice can and should accomplish, in comparison to other strategies for addressing the problems in question and other uses of tribunals’ limited resources. Moreover, limiting principles are needed, so as not to erase completely the distinctions between international and domestic courts.

I explore these questions and conclude that there is no categorical reason to limit international criminal tribunals’ reach to war crimes and mass atrocities. This is not to say that tribunals should stop prosecuting such crimes. However, their exclusive crisis focus has sometimes led to poor allocations of resources. Furthermore, the tribunals’ effectiveness in crisis response may itself be undermined by an interpretive lens that abstracts crises from underlying structural injustices. Institutionally, tribunals—particularly the ICC—may actually be better equipped to respond to serious long-term crimes than to emergency situations.

Instead of focusing exclusively on crises, tribunals should spend their resources on the cases where their involvement is likely to do the most to reduce human suffering. This assessment should encompass not only the gravity of crimes, but also the particular tribunal’s institutional capacities relative to other actors. The tribunals should construe international criminal law doctrines to enable that prioritization, so long as there is a legitimate basis for international

jurisdiction. This approach would not mean internationalizing “ordinary” crime or diverting the tribunals’ focus from the “most serious” crimes. Rather, it would mean recognizing that extraordinary crimes do not just take place at extraordinary times.

This paper’s principal case study is a crime not specifically mentioned in the statute of any international criminal tribunal: “grand” governmental corruption—not garden-variety graft, but the large-scale ransacking of treasuries by heads of state and their associates. This practice has catastrophic consequences that are foreseeable to the perpetrators. These include extreme poverty and decimated government services, resulting in widespread deaths from food- and water-borne diseases and HIV/AIDS.

International criminal tribunals could contribute meaningfully to the fight against kleptocracy. They have considerable powers to trace, freeze, and seize stolen funds, and can exercise jurisdiction where other domestic or international remedies are unavailable. They might also have norm-shaping or deterrent effects. Nonetheless, these tribunals have not seriously considered targeting kleptocracy. This omission illustrates how the crisis mentality has shaped the substance of international criminal law as well as prosecutors’ choices. There is a strong legal argument for treating grand corruption as a crime against humanity based on existing treaties. Under some circumstances, when its consequences are sufficiently severe and predictable, grand corruption could fall within the category of “other inhumane acts,” long recognized under customary international law and included in the Rome Statute (the treaty that created the ICC). Still, this approach faces hurdles, in part because the relevant doctrines were developed exclusively in crisis contexts.

A significant caveat is in order. Although I argue for eventual expansion of international criminal law’s focus beyond crisis crimes, I suggest a relatively gradual path toward that end. International criminal tribunals, particularly the nascent ICC, face serious political obstacles to their effectiveness. They cannot cavalierly add new categories of crimes to their agendas. Instead, they must carefully consider the consequences of their actions for their legitimacy and for states’ willingness to cooperate with them. With this in mind, I conclude that crisis-centered strategies in the near term might help to catalyze international acceptance of new legal principles that could then be applied in other contexts. This has happened historically, for example, with the development of modern international human rights law, which emerged largely in response to World War II and the Holocaust but which now systematically regulates the peacetime relationship of governments with their citizens. International criminal law could undergo a similar transformation. If so, its exclusive focus on war and mass atrocity might amount to a transitional stage in this young and evolving field.

Part I of this article reviews relevant theoretical literature and assesses the crisis focus of international criminal law by examining its historical origins, its impact, and—in a general sense—its alternatives. Part II argues for the prosecution of grand corruption as a crime against humanity. Part III returns to the

theoretical questions raised in Part I and modifies the position taken there in light of the political constraints on international tribunals.

I. THE CRISIS MENTALITY IN INTERNATIONAL CRIMINAL LAW

International criminal law is broadly seen as a mechanism for responding to crises that threaten international security—specifically, mass atrocity and war. Section A reviews scholarship critiquing similar emphases in international law as a whole and in other aspects of Western interactions with the Third World. Section B analyzes the crisis' focus in international criminal law and its provenance in psychology, history, politics, and transitional justice theory. Section C addresses some of the consequences of this focus and begins to explore alternative approaches.

A. *Scholarship Critiquing Crisis Emphases in Related Fields*

Hilary Charlesworth has described international law, as a whole, as a “discipline of crisis.”² She argues that international law’s evolution has been largely driven by crises, on which international lawyers thrive as a chance to feel relevant.³ Charlesworth argues that this emphasis impoverishes international law. First, she contends that international lawyers analyze crises poorly, considering “incidents” devoid of historical and cultural context, accepting oversimplified and selective versions of the “facts,” and engaging in analysis so circumstance-specific that the wheel must be reinvented with each new emergency.⁴ This reductionism, Charlesworth contends, also distorts the assessment of the choices available in crisis response. International lawyers tend to frame choices as binary, between “action” and “inaction.”⁵ Unsurprisingly, they typically prefer “action,” and construct crisis narratives in which law and lawyers play a “heroic” role, rescuing passive victims.⁶

In addition, Charlesworth argues, the crisis focus “diverts attention from structural issues of global justice” and the “politics of everyday life.”⁷ In particular, she argues that systemic gender persecution and violence against women “do not constitute a crisis for international lawyers.”⁸ Rather, they are

¹ I use this term to refer to wars and other periods of extraordinary upheaval.

² Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 377 (2002).

³ *Id.*; see Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT’L L. 70, 72 (1999).

⁴ Charlesworth, *supra* note 2, at 382–86. Gerry Simpson argues that a similar “ahistoricism” infects international law teaching: students are presented with “disputes” that seem to “arise from nowhere, pre-existing, offering themselves up for legal resolution.” Simpson, *supra* note 3, at 88–89.

⁵ Charlesworth, *supra* note 2, at 387.

⁶ *Id.* at 387–88; see also Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT’L L. 679, 683, 695, 699, 702 (1999).

⁷ Charlesworth, *supra* note 2, at 382, 389.

⁸ *Id.* at 389.

“seen as part of the status quo and not truly the business of international law.”⁹ Other scholars have likewise criticized international law’s failure to address structural justice issues, “serenely treating the everyday divisions of wealth and poverty, the background norms for trade in arms and military conflict as part of the global *donnée*.”¹⁰

This crisis emphasis is not, of course, limited to international lawyers. Western news media, for example, have often been criticized for ignoring poor countries except during natural disasters and sudden outbreaks of violence, and for selecting arbitrarily which such crises merit extensive coverage.¹¹ This bias distorts public perceptions, because dramatic events are perceived “without a context . . . against which to evaluate [their] significance.”¹² Likewise, government and private humanitarian aid is disproportionately funneled to sudden disasters, such as the 2004 tsunami.¹³ The media and aid dynamics are interrelated: media coverage drives public opinion and hence aid patterns,¹⁴ while government emphasis on particular “trouble spots”—which may be selected for political reasons¹⁵—drives media coverage.¹⁶ The crisis focus may also be driven by financial incentives built into the aid industry’s structure.¹⁷

Erica Burman has called the predominant media images of Third World life “disaster pornography,” arguing that these images infantilize and dehumanize aid recipients while glorifying their “rescuers” and justifying paternalistic

⁹ *Id.*

¹⁰ David Kennedy, *The Nuclear Weapons Case*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 472 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999); see also Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, 18 LEIDEN J. INT’L L. 717, 725 (2005); Makau Mutua, *What is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31, 31 (2000); B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1, 2 (2004).

¹¹ See William C. Adams, *Whose Lives Count? TV Coverage of Natural Disasters*, 36 J. COMM. 113 (1986); Jack Shafer, *Disaster by Numbers*, SLATE, June 1, 2006, <http://www.slate.com/id/2142768/> (quoting Alexander Cockburn, *Death Rampant! Readers Rejoice*, [MORE], Dec. 1973).

¹² Fred H. Cate, *Media, Disaster Relief and Images of the Developing World*, Report of the Annenberg Washington Program, Northwestern University, March 1994, <http://www.annenberg.northwestern.edu/pubs/disas/disas10.htm>.

¹³ See, e.g., Declan Butler, *Agencies Fear Global Crises Will Lose Out to Tsunami Donations*, 433 NATURE 94 (2005); Egbert Sondorp & Olga Bornemisza, *Public Health, Emergencies and the Humanitarian Impulse*, 83 BULL. OF THE W.H.O. 163 (2005).

¹⁴ See, e.g., Douglas A. Van Belle, *Bureaucratic Responsiveness to the News Media*, 20 POL. COMM. 263 (2003); Jean-Sébastien Rioux & Douglas A. Van Belle, *The Influence of Le Monde Coverage on French Foreign Aid Allocations*, 49 INT’L STUD. Q. 481 (2005).

¹⁵ See A. Cooper Drury et al., *The Politics of Humanitarian Aid*, 67 J. POL. 454 (2005).

¹⁶ See Ken Silverstein, *Follow the Leader*, AM. JOURNALISM REV., Nov. 1993, at 30.

¹⁷ Claire Sayce, *Hard Truths and Soft Solutions: The Aid Industry’s Approach to the Emergency in Zimbabwe*, Sept. 2004, at 9, <http://www.sarpn.org.za/documents/d0000952/index.php> (citing “the need to earn and spend money fast”).

policies.¹⁸ Others have argued that emergency-driven relief strategies are short-sighted and likely to backfire in the long run,¹⁹ and that emergency humanitarian assistance is a “sop to western conscience” that results in longer-term problems being ignored.²⁰ Donors that understand little about the broader dynamics surrounding crises are ill equipped to respond to them.²¹

In addition, many scholars have critiqued the emphasis—in foreign policy, international relations theory, media coverage, and other areas—on “security” concerns rather than issues of social, economic, and environmental justice. Notably, the protection of “international peace and security” is the stated purpose, and limit on the authority, of the U.N. Security Council,²² and is a central organizing principle of the United Nations as a whole.²³ Critics contend that traditional security discourse reflects the perspective of states (especially powerful ones) and not that of people, and over-emphasizes military risks and military solutions.²⁴ Some argue for a broader conception of “human security” encompassing numerous aspects of human well-being.²⁵ This “human security” paradigm has considerably influenced contemporary security discourse, particularly at the U.N.²⁶ It has itself been criticized, however, on the ground that the “international security” lens will distort understanding of problems like poverty.²⁷

These bodies of scholarship (which I do not aim to assess in detail) have identified important questions about what kinds of problems ought to occupy international attention. Today, as international criminal law comes of age, it should be confronted with similar questions. Have international criminal tribu-

¹⁸ Erica Burman, *Innocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies*, 18 *DISASTERS* 238, 246–48 (1994); see also Thomas Keenan, *Mobilizing Shame*, 103 *S. ATL. Q.* 435 (2004).

¹⁹ Alina Sajed, *Between Scylla & Charybdis: The Ethical and Moral Dilemmas of Humanitarian Action* 6, 16 (York Centre for Int’l & Sec. Stud. Working Paper No. 31, Jan. 2005); Adam Jones, *Genocide and Humanitarian Intervention: Incorporating the Gender Variable*, *J. HUMANITARIAN ASSISTANCE*, Nov. 26, 2002, <http://jha.ac/articles/a080.htm>.

²⁰ David Rieff, *The Humanitarian Trap*, 12 *WORLD POL’Y J.* 1, 1–11 (1995–96).

²¹ For example, the international community largely misunderstood the Ethiopian government’s role in creating and exploiting the famine of 1983–85, and gave assistance that advanced the government’s agenda of mass forcible displacement. See, e.g., Sajed, *supra* note 19, at 10–11; David Marcus, *Famine Crimes in International Law*, 97 *AM. J. INT’L L.* 245, 255–59 (2003).

²² See U.N. Charter arts. 24(1), 33–34, 37, 39, 48.

²³ See *id.* at pmb1.

²⁴ See, e.g., BARRY BUZAN ET AL., *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 49–52 (1998); see also Hilary Charlesworth, *The Missing Voice: Women and the War in Iraq*, 7 *OR. REV. INT’L L.* 5, 21–23 (2005).

²⁵ See generally S. NEIL MACFARLANE & YUEN FOON KHONG, *HUMAN SECURITY AND THE UN: A CRITICAL HISTORY* (2006) (tracing the rise of the “human security” paradigm); BUZAN ET AL., *supra* note 24 (discussing various contemporary conceptions of security).

²⁶ See UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT* (1994); Kofi Annan, *Towards a Culture of Peace* (Aug. 22, 2001), <http://www.unesco.org/opi2/lettres/TextAnglais/AnnanE.html>; see also MACFARLANE & KHONG, *supra* note 25, at 139–42.

²⁷ See, e.g., Mark Neufeld, *Democratization in/of Canadian Foreign Policy: Critical Reflections*, 58 *STUD. POL. ECON.* 97 (1999).

nals emphasized crisis situations and security threats while ignoring longer-term, systemic causes of human suffering? If so, has this focus enabled them to respond to crises and security threats effectively? Could they confront systemic problems effectively, or would attempting to do so through methods and doctrines developed in crisis contexts be counterproductive? Would a shift in focus enable better use of international resources? What changes in approach would be necessary? These questions have been essentially ignored by scholars, even though, as the next section demonstrates, international criminal law has indeed been overwhelmingly crisis-focused—considerably more so than international law as a whole. This Article seeks to fill that gap.

B. Extent and Origins of International Criminal Law's Crisis Focus

This section sets forth this Article's central descriptive claim: that international criminal law, by which I refer to the direct criminalization of individual conduct under international law,²⁸ has overwhelmingly emphasized crisis situations—war crimes and mass atrocities. In this section, I begin by providing an initial overview of this crisis focus in scholarship and tribunal practice. Second, I analyze the reasons for this focus. Finally, I consider some counterarguments to my descriptive claim.

1. Extent of the Crisis Focus.—Scholarship in the field often explicitly states that the objective of international criminal justice is to respond to war crimes and mass atrocities.²⁹ Countless law review articles and books address

²⁸ Today, this is the most common meaning given to “international criminal law,” although the term can be defined in multiple ways. I have picked the definition that corresponds to the body of law that international criminal tribunals enforce (although it can also be enforced by domestic courts). A broader interpretation of “international criminal law” would encompass “suppression treaties” that compel states to criminalize certain conduct (usually “transnational” crimes like drug trafficking) as a matter of domestic law and to cooperate with one another in enforcement. Suppression treaties impose international legal responsibility on the state; in contrast, international criminal law as I have defined it imposes responsibility directly on the individual. See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT* 9–10 (2003); ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 1–3 (2005). Suppression treaties have not been limited to crises, but deal regularly with acts viewed as “nothing out of the ordinary.” James Crawford, *The Drafting of the Rome Statute*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 120–22 (Philippe Sands ed., 2003). I do not focus on these treaties because my concern is whether international criminal tribunals could be useful in addressing non-crisis crimes, in comparison to alternative mechanisms. Suppression treaties must be considered among those alternatives, and I do so in Part II with respect to grand corruption.

²⁹ See, e.g., *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT* xi (Dinah Shelton ed., 2000) [hereinafter *INTERNATIONAL CRIMES*] (“The aim of international criminal justice is essentially to deter crime and help restore international peace and security by punishing those responsible for international crimes committed during armed conflicts.”); Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law*, in *INTERNATIONAL CRIMES*, *supra*, at 43 (“The [ICC] is being established in order to address . . . the fact that too many atrocities are committed during [armed] conflicts.”); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 77, 79 (2005) (“Contemporary inter-

the role of international criminal tribunals in accomplishing this objective.³⁰ Many consider international criminal tribunals from the perspective of “transitional justice,” focusing on their capacity to help societies reconstruct after a period of exceptional upheaval, such as armed conflict or sudden regime change.³¹ Many treat restoration of peace and stability as the goal, or at least one of the principal goals, of international criminal justice.³² Few scholars have addressed the potential utility of tribunals in addressing systemic human rights abuses committed in places that have *not* undergone an extraordinary crisis or political transition—and those few who have made such proposals with respect to particular categories of crimes have not assessed the crisis focus of international criminal law in any sustained or comprehensive manner.³³ The crisis fo-

national criminal law is largely concerned with holding individual defendants responsible for mass atrocities.”); M. Cherif Bassiouni, *The Future of International Criminal Justice*, 11 PACE INT’L L. REV. 309, 312 (1999); Theodor Meron, *Procedural Evolution in the ICTY*, 2 J. INT’L CRIM. JUST. 520, 520 (2004); Michael P. Scharf, *Self-Representation Versus Assignment of Defense Counsel Before International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 31, 39 (2006).

³⁰ See, e.g., PIERRE HAZAN, JUSTICE IN A TIME OF WAR (James Thomas Snyder trans., 2004); Laurel E. Fletcher & Harvey M. Weinstein, *A World Unto Itself? The Application of International Justice in the Former Yugoslavia*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 29 (Eric Stover & Harvey M. Weinstein eds., 2004); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1759 (2005).

³¹ See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 7–9 (2001); Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1017 (2005). Transitional justice goals include punishing perpetrators of mass violence, providing an accurate historical record, and enabling shattered societies to reconcile and heal. See International Center for Transitional Justice, *What Is Transitional Justice?*, <http://www.ictj.org/en/tj/> (last visited Feb. 3, 2007).

³² See, e.g., M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 34, 8–9, 36 (2001); INTERNATIONAL CRIMES, *supra* note 29, at xi.

³³ A few scholars have, in passing, criticized international criminal law’s failure to provide remedies for systemic human rights abuses. See Evelyn A. Ankumah & Edward K. Kwakwa, *Editors’ Note*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 5 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005); CRYER, *supra* note 28, at 330. Some articles have called for international criminal law to address particular problems such as corruption, see *infra* notes 115–18, drug trafficking, see Molly McConville, *A Global War on Drugs*, 37 AM. CRIM. L. REV. 75 (2000), and sex trafficking, see Alison Cole, *Reconceptualizing Female Trafficking*, 26 WOMEN’S RTS. L. REP. 97 (2005); cf. Catharine A. MacKinnon, *Women’s September 11: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1, 5–14, 29–30 (2006) (arguing that violence against women should be conceptualized as a war and an international crime, but arguing for military intervention rather than tribunal prosecution as a remedy). But these have not explored tribunals’ crisis focus as a reason for the present exclusion of those crimes. Nor have such proposals gained traction in mainstream international criminal law scholarship, much less in practice.

Two scholars have identified other patterns in international criminal law: the privileging of violent over non-violent crimes, see Elias Davidsson, *Economic Oppression As an International Wrong or As Crime Against Humanity*, 23 NETHERLANDS Q. OF HUM. RTS. 173, 207 (2005), and that of civil and political rights over social and economic rights, see Sigrun I. Skogly, *Crimes Against Humanity—Revisited: Is There a Role for Economic and Social Rights?*, INT’L J. HUM. RTS., Spring 2001, at 58. These critiques are distinct from my own. As this Article shows, international tribunals have also

cus of international criminal law has gone unexamined—indeed, it has largely been taken for granted.

This dominant scholarly understanding accurately describes how international tribunals have thus far implemented international criminal law. The international community has not established tribunals to try the worst perpetrators of ongoing, entrenched abuses that take place during peacetime, such as the worldwide trade in women and girls forced into prostitution, widespread torture and disappearances under past and present dictatorships, persecution of women in countries like Saudi Arabia, or the ravaging of Third World economies by kleptocratic tyrants. Rather, it has established ad hoc tribunals to respond to the horrors of war, genocide, or both in Nazi-occupied Europe, Japan, Yugoslavia, Rwanda, and Sierra Leone, and to other relatively short periods of violence in East Timor (1999) and Cambodia (1975–1979). It has also established a permanent International Criminal Court that, although empowered to prosecute non-crisis crimes, so far has not done so. Instead, the Court is officially investigating three armed conflicts in Sudan, Uganda, and the Democratic Republic of Congo, and is considering investigating another in the Central African Republic.

2. *Explanations for the Crisis Focus.*—In light of the prevalence and widespread condemnation of numerous massive, long-term human rights abuses, *why* have international tribunals never prosecuted them? In this subsection, I consider explanations grounded in psychology, history, international legal theory, and the international political process—all of which, in my view, tell important parts of the story.

a. *Psychological explanations.*—Charlesworth’s core explanation of international law’s crisis emphasis is psychological: a tendency of international lawyers to seek out excitement and a sense of relevance. Is the crisis emphasis of international criminal law merely an example of this general phenomenon? This is no doubt part of the explanation. International criminal justice draws people who seek cutting-edge and important work—people who want to be where the action is, geographically and intellectually. It is a sexy field, at least by lawyers’ standards.³⁴

International criminal law scholars are prone to romanticization, viewing their discipline as a bulwark against atrocities. Frédéric Mégret writes cuttingly of the “hype” stemming from the “occasionally brash youthfulness of the disci-

wholly ignored widespread personal violence and violations of fundamental civil and political rights—such as torture, disappearances, extrajudicial killing, and sexual violence—when committed outside crisis contexts. Conversely, international tribunals sometimes consider crimes that are not personally violent and that violate economic and social rights—like economic persecution and deportation—when those crimes are connected to crises. Moreover, as explained further below, my approach eschews reliance on economic and social rights as well as Davidsson’s overreaching extension of the “crimes against humanity” label to a broad range of policies he calls “economic oppression.”

³⁴ Indeed, the ICC Prosecutor declared in an interview last year, “This will be a sexy court.” Jess Bravin, *For Global Court, Ugandan Rebels Prove Tough Test*, WALL ST. J., June 8, 2006, at A1.

pline,” citing a review of a textbook on crimes against humanity that describes it as “a book to stop another Holocaust” and calls for a “triumphal arch” to be erected in its author’s honor.³⁵ Reviewing several recent books himself, Mégret observes that

[a]ll seem almost designed to have reviewers gasp at their wonderful timeliness, complete with last minute addenda and epilogues. . . . Clearly, the saga of international criminal justice with its (occasionally) intense courtroom drama and its (occasionally) larger-than-life characters, against the background of a thundering and bloody history, lends itself well to all forms of literary romanticization.³⁶

Thus, international criminal law may provide a particularly strong case study supporting Charlesworth’s theory. Nonetheless, there must be additional reasons beyond psychology that explain *why* international criminal tribunals attract excitement-seekers and involve “thundering and bloody history” in the first place. After all, not all fields of international law are this way—consider trade law, international commercial law, or the above-mentioned suppression treaties governing “ordinary” crimes.³⁷ Certainly, for instance, trade law scholars pay attention to trade crises, but not at all exclusively. Indeed, it is hard to think of any other subfield of international law that is so overwhelmingly crisis-focused as is international criminal law, other than the law of armed conflict.³⁸

This distinction illustrates the core weakness of Charlesworth’s argument as a descriptive matter: she does not acknowledge or explain the fact that some subfields of international law are much more susceptible to her critique than others. In my view, these differences are crucial in illuminating both the extent and the origins of the crisis focus. There are three main reasons for the particularly strong crisis emphasis in international criminal law in contrast to other subfields: its historical and doctrinal roots, the theories used to support international criminalization, and the mechanisms by which tribunals come into existence and take jurisdiction over cases. To those reasons I now turn.

b. Historical origins in international humanitarian law.—

Modern international criminal law is a direct outgrowth of the older system of international humanitarian law—the law of armed conflict.³⁹ The initial turn toward international criminal law was a direct response to

³⁵ Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT’L L. 1261, 1262 & n.2 (2002) (quoting Michael Foot, *Liberty, Fraternity, Statuary*, OBSERVER, Aug. 15, 1999).

³⁶ *Id.* at 1260–61, 1283.

³⁷ See *supra* note 28; see also discussion *infra* Part III (discussing human rights).

³⁸ Charlesworth’s own principal example, regarding the bombing of Kosovo, concerns the legality of military intervention for humanitarian purposes. See *supra* note 2.

³⁹ See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 60–69 (2d ed. 1999); Danner & Martinez, *supra* note 29, at 81–82; Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 682 (1997).

World War II and the Holocaust.⁴⁰ The International Military Tribunal at Nuremberg was designed to try war crimes and the crime of aggression. Its jurisdiction extended also to crimes against humanity, but only when committed in armed conflict. This nexus requirement may have been required at the time by the legality principle,⁴¹ but it also conveniently helped the Allies to avoid attention, in the form of *tu quoque* claims, to their own systemic human rights violations, such as U.S. racial segregation, Soviet gulags, and British and French colonialism.⁴²

The Nuremberg experience was a crucial model for the modern international criminal tribunals. It was an unprecedented experiment that established that putting war criminals on trial was a viable alternative to summarily executing them or letting them go free.⁴³ The International Criminal Tribunals for the former Yugoslavia and Rwanda (“ICTY” and “ICTR”) were created in part because of public reaction to certain parallels to the Nazi atrocities: concentration camps in Bosnia and genocidal slaughter in Rwanda.⁴⁴

Today, the ICTY and ICTR often draw on the Nuremberg jurisprudence.⁴⁵ More broadly, although those tribunals have concluded that crimes against humanity need not be linked to armed conflict,⁴⁶ they sometimes rely on international humanitarian law when interpreting the elements of crimes against humanity.⁴⁷ The legality principle requires the tribunals to define those crimes by reference to legal principles that existed before the acts took place. And what existed, for the most part, was international humanitarian law, including the Nuremberg precedents and the Geneva Conventions’ text and commentaries. The ICTY’s and ICTR’s case law has, in turn, heavily influenced the subsequent hybrid tribunals and the Rome Statute of the ICC, amplifying the impact of international humanitarian law precedents and the Nuremberg legacy.

⁴⁰ BROOMHALL, *supra* note 28, at 44; ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 64–66 (1986).

⁴¹ BASSIOUNI, *supra* note 39, at 265 (arguing that to punish crimes against humanity outside the context of armed conflict would have been impermissibly retroactive, since pre-existing international humanitarian law principles were limited to that context).

⁴² CRYER, *supra* note 28, at 206, 248.

⁴³ See Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 551–52 (2006).

⁴⁴ See Mégret, *supra* note 35, at 1272 (citing, for example, HAZAN, *supra* note 30, at 76).

⁴⁵ See, e.g., Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A, Appeal Judgement, ¶ 518 (2004); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶¶ 76–78, 109 (2004).

⁴⁶ Prosecutor v. Tadić, Case No. IT-94-1-A72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Oct. 2, 1995). This view also prevailed, despite some opposition, during the ICC negotiations. Darryl Robinson, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 62 (Roy S. Lee ed., 2001).

⁴⁷ See, e.g., Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgement, ¶¶ 284–85 (2006); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 110–16, 145 (2004).

Perhaps as a result, the “conventional wisdom for a long time was that international criminal justice was essentially a problem of ‘justice and war.’”⁴⁸ That conventional wisdom has not entirely faded.⁴⁹ Although crimes against humanity and genocide can be committed outside armed conflict, they are often lumped, at least rhetorically, into the category of “war crimes.”⁵⁰ Scholarship and the popular press ubiquitously refer to the ad hoc tribunals as “war crimes tribunals”⁵¹—including the ICTR, which, although there was an armed conflict in Rwanda in 1994, is not principally focused on war crimes as such.⁵² It should, if anything, be called a “genocide tribunal.”

c. Theories supporting international criminalization.—Although tribunals have focused on and derived their legal principles from wars, no one seriously contends today that armed conflict is the *only* legitimate basis for international criminal jurisdiction. No universally accepted formula establishes when such jurisdiction is appropriate. But the most widely accepted theories—while going beyond war—heavily privilege crisis situations.

What constitutes a crime under international law? Before Nuremberg, some transnational component was critical, as with piracy and slave-trading.⁵³ But a transnational component alone was never sufficient to qualify a crime as international.⁵⁴ Furthermore, in the human rights era, in which internal affairs are no longer shielded from international regulation, a transnational component is no longer necessary. International humanitarian law now governs internal conflicts, while crimes against humanity and genocide can occur in a purely domestic context. Nonetheless, it is broadly accepted that *some* kind of international interest is necessary to justify international criminalization, as is some degree of seriousness. The Rome Statute’s language typifies this approach, limiting jurisdiction to “the most serious crimes of concern to the international community as a whole.”⁵⁵

The question thus becomes how seriousness and international concern are defined. Two formulations have dominated: “threats to international peace and security” and conduct “shocking the conscience of humankind.”⁵⁶ The first

⁴⁸ Mégret, *supra* note 35, at 1264.

⁴⁹ *See supra* note 29.

⁵⁰ *See* Mégret, *supra* note 35, at 1264–65 (citing, *e.g.*, HAZAN, *supra* note 30).

⁵¹ *See, e.g., War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT’L L. REV. 1383, 1384, 1389 (1999) [hereinafter *War Crimes Tribunals*]; *see also* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 313 (2003) (noting that as of that date, “not a single person ha[d] been convicted of a war crime by the ICTR”).

⁵² *See, e.g., War Crimes Tribunals, supra* note 51, at 1389; *see also* Askin, *supra* note 51, at 313 (noting that as of that date, “not a single person ha[d] been convicted of a war crime by the ICTR”).

⁵³ BROOMHALL, *supra* note 28, at 25.

⁵⁴ *Id.*

⁵⁵ *See* Rome Statute of the International Criminal Court, July 17, 1998, pmbl., U.N. Doc. A/Conf.183/9, 37 I.L.M. 999, 1002 [hereinafter *Rome Statute*].

⁵⁶ *See* BROOMHALL, *supra* note 28, at 39, 44.

is the principal traditional foundation for international criminalization⁵⁷ and has been interpreted increasingly broadly—a development perhaps linked to the U.N.’s embrace of “human security.”⁵⁸ Nonetheless, it remains oriented toward crises, particularly wars, since the “stability of the international order . . . is the most fundamental interest of the post-War international system.”⁵⁹ That statement is certainly accurate as a historical description of the system’s priorities.⁶⁰ As a normative claim, it should be interrogated: why is stability so paramount? Its importance would be obvious if the international legal system’s priorities encompassed only protection of state interests vis-à-vis threats from other states—but as noted above, this approach is broadly considered obsolete in the human rights era. Unquestionably, of course, the human consequences of war are truly terrible, and avoiding them should be a major international priority. But the overarching premium on stability risks precluding international criminal law from being used to challenge structural injustices that constitute stable (and sometimes even stabilizing) aspects of the world order.⁶¹

The “conscience-shocking” standard presents its own difficulties. Originally linked to “peace and security,” it has now evolved as an independent justification for international criminalization.⁶² Conduct identified as a shock to the international conscience virtually always consists of mass atrocity.⁶³ Meanwhile, systemic crimes like peacetime sexual slavery are generally omitted—implicitly suggesting, perhaps, that because such crimes happen every day, they are insufficiently “shocking.”⁶⁴ Thus, the two principal justifications employed for the international criminalization of conduct each orient international criminal law to crises—war and mass atrocity, respectively.

d. International political processes.—The crisis focus of international criminal tribunals is also shaped by the mechanisms through which tribunals come into existence and take jurisdiction over cases. All international criminal tribunals so far have been created through negotiation between states—whether a few states, as at Nuremberg, or many, as with the ICC. Most states heavily emphasize security concerns in conducting foreign policy. Liberal states may also respond to public opinion⁶⁵—which is shaped, as discussed above in Part I.A, by crisis-driven media coverage.

⁵⁷ See, e.g., INTERNATIONAL LAW COMMISSION, DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND art. 1(2) (1996).

⁵⁸ See *supra* note 26.

⁵⁹ BROOMHALL, *supra* note 28, at 44.

⁶⁰ See, e.g., U.N. Charter art. 1, para. 1.

⁶¹ Cf. *supra* part I.A (discussing critiques of security discourse).

⁶² BROOMHALL, *supra* note 28, at 45–46, 49.

⁶³ See, e.g., *id.* at 50 (noting that “atrocities of a magnitude” capable of satisfying this standard often are linked to armed conflict).

⁶⁴ Cf. Davidsson, *supra* note 33, at 173.

⁶⁵ See GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 31–32, 35, 278–79 (2000) (addressing states’ responsiveness to public opinion); see also *supra* note 11 and accompanying text (discussing crisis-driven media coverage).

A focus on security threats is especially unsurprising in the context of the Security Council's actions, given that body's express purpose to preserve international peace and security.⁶⁶ The ad hoc tribunals were established specifically under the Security Council's power under Chapter VII of the U.N. Charter to address threats to peace and security. Furthermore, referral by the Security Council provides the mechanism through which the ICC can take jurisdiction over situations arising in the territory of non-party states.

3. *Counterarguments.*—There are some anomalies in this picture of international criminal law's crisis focus. First, the pre-Nuremberg origins of international criminal law lie in the international prohibition of two crimes that need not be related to crises: slave-trading and piracy.⁶⁷ Thus, the international criminalization of non-crisis crimes is perhaps not a novel concept—just a forgotten one. Of course, there were no international criminal courts in existence at that time. Instead treaties compelled states to try these crimes domestically.⁶⁸ In practice, then, these historical precedents bear a closer relationship to the “transnational” crimes addressed today by suppression treaties, than to those addressed by international tribunals. Piracy, indeed, remains a problem today but is not within the mandate of any of the tribunals; instead it is covered by suppression treaties.⁶⁹

Second, the early stages of the ICC negotiations were not limited to the four categories of crimes that were eventually included in the Rome Statute (war crimes, crimes against humanity, genocide, and aggression). To the contrary, the idea of the ICC first emerged from Caribbean states seeking a solution to transnational drug trafficking.⁷⁰ Drug trafficking and terrorism were major topics of discussion at the Preparatory Commissions involved in formulating the Rome Statute, but no consensus was reached; possible criminalization of these crimes was deferred for later consideration.⁷¹ The refusal to criminalize drug-trafficking and terrorism might be explained by states' views that these crimes were already adequately addressed by existing international regimes,⁷² and by doubts about the Court's investigative capacities.⁷³

⁶⁶ See *supra* note 22 and accompanying text.

⁶⁷ See *The Case of the S.S. "Lotus,"* PCIJ Rep. (ser. A) No. 10, at 70 (1927) (Moore, J. dissenting).

⁶⁸ See BROOMHALL, *supra* note 28, at 23–24.

⁶⁹ These include the Geneva Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11, 82, and the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. See also *supra* note 28 (discussing suppression treaties for transnational crimes).

⁷⁰ CRYER, *supra* note 28, at 285.

⁷¹ *Final Act of The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/10 (July 17, 1988); see CRYER, *supra* note 28, at 285–86; Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 102, 102–03, 112 (Roy S. Lee ed., 1999) (noting that delegates also considered provisions on economic embargoes and mass starvation).

⁷² See von Hebel & Robinson, *supra* note 71, at 80–81.

Other concerns might explain the exclusion of other systemic crimes. Clearly, some delegations feared the expansion of the court's jurisdiction to reach conduct that was culturally "ordinary." For instance, a coalition of delegations to the Working Group on Elements of Crimes (mostly from Arab states) sought to shield policies concerning "family matters" and other culturally entrenched practices from possible prosecution. "These States feared that the law of crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of 'social engineering.'" ⁷⁴ Although this coalition did not succeed in obtaining a broad cultural exemption, the controversy suggests that a move beyond a crisis focus will likely face political resistance—a factor prosecutors must consider, as discussed further in Part III. ⁷⁵

Third, and most significantly, the final version of the Rome Statute in fact extends the ICC's jurisdiction to a number of crimes against humanity that can clearly be committed outside extraordinary crisis situations. These include sexual slavery, apartheid, enslavement, torture, forced pregnancy, enforced sterilization, and enforced disappearance. I return to the significance of these provisions in Part III.

Meanwhile, it bears noting that the principal barrier to the ICC's prosecution of those crimes outside crisis contexts will probably not be doctrinal. It will be the discretion of its Prosecutor, as well as that of states and the Security Council in referring cases. So far, however, that discretion has produced an exclusive focus on conflict situations. Taking into account the ad hoc and hybrid tribunals (whose jurisdiction limits them to specific crises), the overall picture is stark: out of many hundreds of prosecutions brought in eight international or hybrid criminal tribunals, including thousands of charges, nobody has ever been charged with a crime unconnected to a crisis, and it does not look like it will happen soon.

Fourth, one could argue that even if international criminal *tribunals* have been purely crisis-focused, that does not mean the same is true of the enforcement of international criminal law as a whole. After all, international criminal law is not exclusively enforced by international (or hybrid) criminal tribunals. Rather, it can also be enforced by domestic courts, either in the states directly affected by the crime or in other states pursuant to the principle of universal ju-

⁷³ See Comments of the United States of America on the Establishment of an International Criminal Court, at 10–13, U.N. Doc. A/AC.244/1/Add.2 (Apr. 3–13, 1995) [hereinafter U.S. Comments].

⁷⁴ Robinson, *supra* note 46, at 65–66, 70 (noting fear that "the definition of crimes against humanity might be stretched to cover all human rights abuses").

⁷⁵ Another proposal during the very early stages of discussion of an international criminal court, from U.S. Senator Arlen Specter, would have given the Court a bigger role in prosecution of systemic transnational crimes. His vision, though, was radically different from the form the Court ultimately took; under his proposal, the Court would primarily have existed to provide institutional support to domestic governments and courts in their domestic prosecutions of cases involving transnational components. See 136 CONG. REC. 14,365, 14,367 (1990); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 4 STAN. J. INT'L L. 1, 33–34 (2005).

risdiction. And the enforcement of international criminal law in domestic courts has not been exclusively oriented toward crises. Notably, the Pinochet and Habre cases have involved attempts to use universal jurisdiction to prosecute leaders for the systemic torture and extrajudicial killing committed by their regimes over the course of many years. These cases represent small but significant steps toward the expansion of international criminal law's focus beyond crisis situations.

This Article, however, focuses on the agenda of international criminal tribunals, not domestic courts. As I explain further below, the first option for prosecuting international crimes should always be the domestic courts of the states affected by the crime.⁷⁶ International tribunals should step in only where there is no viable domestic remedy. Unfortunately, however, that is quite frequently the case; indeed, domestic courts fail so often to provide an adequate remedy that there is far more than enough work available for international criminal tribunals to do. Therefore, it is necessary to develop principles to decide which cases international tribunals should undertake.

As for the universal jurisdiction approach, I do not emphasize it largely for practical reasons. Enforcement of international criminal law through international tribunals is a reality (and, I believe, a permanent one), with hundreds of defendants already having been tried. In contrast, only a handful of universal jurisdiction prosecutions have been brought. While there have been a few successes, there have also been retrenchments, most notably Belgium's retraction of its groundbreaking legislation in 2003.⁷⁷ Domestic prosecutions of senior officials might also face obstacles of immunity or the act of state defense, depending on the prosecuting state's domestic law. This problem is for the most part not shared by the ICC,⁷⁸ and similarly, the ICTY and the Special Court for Sierra Leone have indicted high-ranking leaders including heads of state. Moreover, in defining the substantive reach of the law, domestic courts (and legislatures) acting under universal jurisdiction are likely to take their cues principally from the ICC and the ad hoc tribunals.⁷⁹ This means they will likely replicate the crisis focus of the ICC. Furthermore, as I argue below, compared to courts in non-territorial states, the ICC has a far greater capacity than domestic courts to gain access to defendants, assets, and information by issuing binding orders to member states.

⁷⁶ By this I principally mean states with territorial jurisdiction, although theories of passive personality or protective jurisdiction are also conceivable.

⁷⁷ See Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT'L CRIM. JUST. 679 (2003).

⁷⁸ See Rome Statute, *supra* note 55, art. 27, 37 I.L.M. 1017 (voiding immunity on the basis of official position); *but see id.*, art. 98(1) (providing limited exception for certain diplomats arrested in third countries).

⁷⁹ States have already begun to modify their criminal codes to reflect the expanded list of international crimes in the Rome Statute. See William Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT'L & COMP. L. 195, 201 (2003).

Finally, it could be argued that international humanitarian law is not in fact “crisis-focused” because war is in some places not extraordinary, but a long-term and systemic condition. In the West, at least today, we are accustomed to thinking of peace as the norm and war as a short-term disruption. That is, sadly, not the case everywhere. The civil war in Sudan lasted over fifty years, with brief interregna; that country’s entire population knows war as its normal state of affairs. Uganda, Guatemala, Eritrea, Colombia, Aceh and others have likewise recently experienced decades of conflict. But perhaps because it has not been shaped by these countries’ perspectives, international humanitarian law operates on the premise that war is an exceptional period—meriting a temporary suspension of ordinarily applicable legal rules—with a defined beginning and end.⁸⁰ And as the next section shows, even where international tribunals have considered long-term conflict and repeated, drawn-out atrocities (notably in East Timor), they have artificially narrowed their focus to short crisis periods.

C. *Consequences and Alternatives*

Is the crisis focus described in the previous section defensible? That is, *should* international criminal tribunals exclusively hear cases stemming from wars and mass atrocities? If tribunals were better equipped institutionally to confront such crimes, or if such crimes were more serious, this crisis focus might be justified on the basis of resource constraints. Money is “no less the lifeblood of justice as it is of war.”⁸¹ For the indefinite future, international criminal tribunals will have the capacity to prosecute very few cases. Hard choices must therefore be made, both in defining the crimes over which a tribunal has jurisdiction, and in deciding which examples of those crimes merit prosecution.⁸² It is thus unfair to criticize the tribunals, as some have, for their “selectivity”;⁸³ they cannot avoid being selective.⁸⁴ However, as I show here, there is no reason to believe that exclusively trying crisis crimes is the best use of tribunals’ resources. Instead, tribunals’ institutional capacities and the relative gravity of the crimes may often favor non-crisis prosecutions.

⁸⁰ See Gabor Rona, *When Is a War Not a War? The Proper Role of the Law of Armed Conflict in the “Global War on Terror,”* Official Statement of the ICRC, Workshop on the Protection of Human Rights While Countering Terrorism (Mar. 16, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList575/3C2914F52152E565C1256E60005C84C0>. This does not mean that long-running civil wars are not “armed conflicts” or that international humanitarian law does not apply to them. But international humanitarian law is clearly designed as an exceptional legal regime for exceptional circumstances. Likewise, human rights law also treats war as an exception, allowing derogation from certain legal principles during wartime. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221 (entry into force Sept. 3, 1953).

⁸¹ Mégret, *supra* note 35, at 1276.

⁸² CRYER, *supra* note 28, at 191; see also McCormack, *supra* note 39, at 683.

⁸³ McCormack, *supra* note 39, at 683.

⁸⁴ See CRYER, *supra* note 28, at 191.

1. Reduced Tribunal Effectiveness and Resource Allocation Problems.—

International criminal tribunals have not been uniformly effective in responding to wars and mass atrocities—and at least one reason is the shortsighted and reductionist strategies encouraged by the crisis focus. This point is illustrated by the East Timor Serious Crimes Unit (“SCU”) and Special Panels, a hybrid system established by the U.N. following Indonesia’s 1999 withdrawal from East Timor. That system, now defunct, failed for numerous reasons that I have discussed elsewhere.⁸⁵ But one of the most glaring flaws was that the prosecutors’ focus was “simultaneously over- and under-inclusive, attempting to reach too many crimes committed within too short a period of time.”⁸⁶ Indonesia occupied East Timor for twenty-five horrifically brutal years. Although the SCU’s jurisdiction encompassed that entire period, prosecutors chose to focus exclusively on the last year, 1999, the time of Indonesia’s pullout:

[V]ictims’ groups and other justice advocates in East Timor have widely condemned this focus, observing that the some 1500 lives lost in 1999 constituted less than 1 percent of the total death toll from violence and famine throughout the occupation. . . . Furthermore, the SCU’s exclusive focus on 1999 cannot be defended as a necessary choice in the face of limited resources, because its approach has been astonishingly expansive in another sense: it has indicted literally hundreds of defendants, the great majority of whom have been low-level perpetrators whose offenses fall far short of the threshold for crimes against humanity.⁸⁷

The SCU’s decision to try to prosecute *every* crime committed during a narrowly defined crisis period, rather than the most serious ones throughout the history of the occupation, amounted to a poor allocation of U.N. resources. It also undermined the legitimacy of the process in the eyes of victims, many of whom resented the harsh sentences being meted out to low-level Timorese perpetrators of individual assaults while the main architects of the Indonesian occupation went unpunished. And it lacked any credible reason.⁸⁸

This approach illustrates a pattern similar to those observed by many of the critics cited in Part I.A. Crisis-driven decision-making can cause poor crisis response. Analysts who do not appreciate the longer-term dynamics at play, or who deliberately ignore those dynamics for political reasons, are prone to defining crises arbitrarily and abstracting them from their context. The events in East Timor in 1999 had been understood worldwide as an emergency (despite fewer deaths than the average annual toll during the occupation) for three inter-related reasons: a political transition, international observers on the scene who

⁸⁵ See Kelly Askin, Stefanie Frease & Sonja Starr, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, REPORT OF THE OPEN SOCIETY JUSTICE INITIATIVE AND COALITION FOR INTERNATIONAL JUSTICE, Nov. 2004, at 35–44.

⁸⁶ *Id.* at 35–36.

⁸⁷ *Id.* at 36–37.

⁸⁸ *Id.* at 37.

were at risk, and massive international media coverage.⁸⁹ Moreover, another political factor also likely created pressure in favor of a narrow definition of the “crisis”: the international community had materially supported the persistent violence and cruelty of the occupation, and probably did not want that shameful history scrutinized.⁹⁰

The East Timor example also illustrates another striking disconnect: international tribunals have sometimes been willing to prosecute crimes that are surprisingly small in scale, so long as they have occurred in crisis situations—while ignoring non-crisis crimes affecting many more victims. To be sure, none of the other international tribunals so far has similarly attempted to prosecute *every* individual crime committed in a crisis context, and some tribunals have focused fairly consistently on major offenders.⁹¹ The ICTY, however, has tried a number of fairly “small fish,” many of whom ultimately are given relatively minor sentences,⁹² reflecting the Tribunal’s assessment of their individual culpability.⁹³ There are reasonable defenses of this strategy: during the Tribunal’s early years the higher-ranking indictees could not be apprehended;⁹⁴ those first small-fish cases allowed legal theories to be tested when the stakes were lower;⁹⁵ prosecuting small fish sends the message that those implementing criminal orders are criminally responsible;⁹⁶ and prosecution could result in lower-level indictees cooperating with the prosecution against their superiors. But the first two factors can only justify the initial small-fish cases, not the more recent ones. The significance of the third, expressive rationale is doubtful given that only a few of the thousands of culpable small fish could be charged. And the possible advantages of “flipping” small fish, while theoretically significant, have not actually been realized in many cases.

⁸⁹ See *id.* at 16–18.

⁹⁰ See *id.* at 15–16.

⁹¹ Indeed, the ICTR can be criticized for many things, but not for trying insignificant crimes. Meanwhile, the Sierra Leone Special Court’s prosecution has charged just thirteen people it deemed the most responsible for the atrocities there. See About the Special Court for Sierra Leone, <http://www.sc-sl.org/about.html> (last visited Feb. 3, 2007).

⁹² See, e.g., Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, ¶ 191 (2000) (sentencing camp head to seven years); Prosecutor v. Predrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, ¶ 96 (2003) (sentencing camp guard to eight years); Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, ¶ 23 (1998) (sentencing young soldier to five years). Other cases with still lower sentences are pending on appeal.

⁹³ Gravity of the offense is the most important factor in the Tribunal’s sentencing. See, e.g., Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgement, ¶ 380 (2006).

⁹⁴ Marieke L. Wierda, *Milosevic, Killing Fields, and “Kangaroo” Courts: Symposium on an Emerging International Criminal Justice System: What Lessons Can Be Learned from the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT’L L. POL’Y 13, 16 (2002).

⁹⁵ Aram A. Schvey, *Striving for Accountability in the Former Yugoslavia*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 83 (Jane E. Stromseth ed., 2003).

⁹⁶ Madeline Morris, *Complementarity and its Discontents*, in INTERNATIONAL CRIMES, *supra* note 29, at 177, 187–88.

Furthermore, it is not clear whether the benefits stemming from these “small fish” prosecutions have been worth the costs, especially compared to other crimes that presently escape international prosecution. The ICTY spends over \$10 million per defendant, conservatively estimated.⁹⁷ Of course the seriousness and large number of victims of international crimes may well justify such expenditures. On the other hand, there are many unprosecuted non-crisis crimes that also have many victims. The answer depends on the point of comparison, that is, what the \$10 million would or could have been spent on otherwise. As the remainder of this article will argue, prosecuting certain serious systemic crimes could, depending on the circumstances, be a better alternative.

2. *How Should Tribunals Select Crimes for Prosecution?*—In light of these problems with the exclusive crisis focus, what criteria *should* guide international criminalization of different acts and the exercise of prosecutorial discretion in choosing cases? First, in order for a criminal conviction to be entered by an international tribunal, the act in question must be within the tribunal’s jurisdiction (crossing a “threshold” distinguishing international from domestic crimes)⁹⁸ and must have been criminal under some applicable law existing at the time. I do not question these black-letter principles, and will consider below the legal basis for prosecuting grand corruption. The basis for prosecuting other systemic crimes, like sexual slavery, is explicit in the Rome Statute.

Among the thousands of potential crimes that meet these basic legal criteria, I propose that prosecutors should choose the cases in which the international tribunal’s involvement can contribute the most to the reduction of human suffering. This means considering both the amount of suffering caused by the crime (the seriousness question) and the tribunal’s institutional capacity to reduce that suffering, relative to the capacities of domestic courts and other available remedies.⁹⁹ My emphasis on suffering as the relevant criterion is not in

⁹⁷ The Tribunal’s website lists budgets for 1993 through 2007 totaling about \$1.24 billion, and states that it has indicted 161 people—6 are at large, 33 have had their indictments withdrawn, and 8 have been transferred to regional courts. See ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm> (last visited Feb. 3, 2007). Counting all 114 of the others (including a few who have died), and assuming (unrealistically) that all cases will be completed by 2007, this comes to about \$10.9 million per defendant. Because trials are not scheduled to be completed until at least 2008, and appeals thereafter, a more realistic assumption is that a further 3–4 years and, at current spending rates, half a billion dollars will be spent, totaling about \$15.3 million per defendant.

⁹⁸ See BASSIOUNI, *supra* note 39, at 243.

⁹⁹ I have emphasized the reduction of suffering rather than the protection of human rights largely because suffering is a more concrete, less contested, less conceptually fraught concept. See, e.g., Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 634–37 (1991). Suffering is what is actually experienced by people who are tortured, raped, starved or infected with cholera; “rights” are a legal construction, albeit a valuable one. I prefer to focus not on formal legal categories but on identifying substantive harms. See DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 145 (2004) (arguing for a focus on “how we wish to transform the distribution of power, status and authority in society to humanitarian ends”). Nor have I emphasized degrees of moral culpability, for similar reasons. These distinctions are not, in any event,

itself particularly revolutionary. International criminal tribunals already purport to focus on the “most serious” crimes, and surely, in identifying those crimes, any prosecutor must already place heavy weight on the suffering inflicted. The main change that I propose is to recognize that neither massive suffering nor tribunals’ potential effectiveness in reducing it is limited to extraordinary circumstances of mass violence. Massive suffering is instead inflicted on a daily basis under circumstances too often taken for granted as an inherent part of the world order. In some of those circumstances, tribunals could provide an effective remedy that is not being provided by domestic courts.¹⁰⁰

Seriousness alone cannot justify a categorical preference for crisis over non-crisis crimes. As terrible as wars are, one cannot say categorically that all war crimes, or even all serious war crimes, cause more suffering than all peacetime crimes. Nor are all crimes against humanity that take the form of a sudden onslaught worse than those committed slowly—for instance, compare a single day’s massacre of 200 people to a regime’s systematic extrajudicial killing of tens of thousands, one by one, over the course of a decade. Nor have all of the specific crisis crimes addressed by tribunals thus far—presumably, those crimes that the international community has deemed the most serious—caused more suffering than have the world’s worst systemic crimes. Finally, there is no reason to believe that tribunals are categorically more effective in dealing with crisis crimes. Indeed, the East Timor example above suggests that they are sometimes quite ineffective, in part because of their crisis focus.¹⁰¹

One might suppose that tribunals’ expertise in international humanitarian law makes them better equipped to handle war crimes cases. In reality, however, most tribunal judges have not been war crimes specialists; rather, their prior accomplishments lie in a variety of different fields, particularly domestic criminal law, human rights, and public international law.¹⁰² Likewise, the prior experience of most prosecutors and defense attorneys stems primarily from domestic criminal law, while attorneys in chambers have varied backgrounds. In short, most new attorneys and judges at the tribunals (and because of high

critical to my argument. Whether the criterion is suffering, rights violations, moral wrong, or injustice—or indeed, almost any reasonable criterion one could fathom—there is no defensible justification for categorically limiting the focus of international criminal law to crisis crimes.

¹⁰⁰ Under my formulation, international criminal tribunals would continue to serve a very different purpose than do domestic criminal courts. Although reduction of suffering can be a benefit of domestic criminal law, it is not usually considered to be its principal purpose. But domestic criminal law is a comprehensive system of social regulation. Its purposes are numerous and varied; they might include preventing violence, protecting property rights, environmental or animal protection, child welfare, enforcement of moral, religious, or cultural norms, and so forth. International criminal tribunals will never have the resources to fill such a broad role, and even if they did, for a host of reasons (cultural difference and efficiency, for instance), virtually nobody would want them to. Instead, they are confined to enforcing a global minimum standard, responding, where domestic courts cannot or will not respond, to the world’s worst crimes.

¹⁰¹ See *supra* notes 85–90 and accompanying text.

¹⁰² See, e.g., <http://www.icc-cpi.int/chambers/judges.html> (links to biographies of ICC judges); <http://69.94.11.53/default.htm> (ICTR); <http://www.un.org/icty/glance-e/index.htm> (ICTY).

turnover, a large fraction at any given time are rather new) are not particularly trained in the highly complex and specialized field of international humanitarian law, and might in fact be better equipped to handle cases that do not involve war crimes. Over time, judges and attorneys develop valuable experience—but not entirely, or even principally, in international humanitarian law. Instead, most cases center on crimes against humanity or genocide. Experience with the former, in particular, would carry over directly to cases involving such crimes committed outside crisis situations. And, of course, if tribunals started to take on new kinds of cases, their staffs would soon develop new areas of expertise.

Likewise, there is no reason to believe tribunals will be incapable of investigating longer-term, systemic crimes. This concern was central to U.S. opposition to proposals to include terrorism and drug trafficking in the ICC's jurisdiction. The U.S. argued that only domestic authorities could successfully track major criminal organizations over extended periods and that international prosecution could interfere with domestic investigations.¹⁰³ That argument assumes the continuation of a crisis-driven approach to investigation modeled on the ad hoc tribunals, whose investigations have necessarily been relatively short-term and geographically confined because the tribunals themselves are temporary and limited in focus. But the permanent ICC need not construct its investigations that way. As Part II illustrates, the ICC has considerable power to gather information through cooperation with domestic authorities, allowing it to take advantage of domestic investigative expertise. Moreover, the complementarity principle, discussed further below, should allay concerns about interference with domestic investigations.

Indeed, as described below in the context of grand corruption prosecutions, the ICC's institutional capacities favor a shift away from crisis crimes. Critics have raised a number of serious concerns about the ICC's effectiveness. These include its lack of universal jurisdiction, its inability to capture suspects without state cooperation (especially without U.S. involvement), and its possible interference with states' ability to grant criminal amnesties in exchange for peace or political reforms.¹⁰⁴ In addition, many skeptics question the overall utility of international criminal justice, either for improving the lives of victims or for preventing future crimes.¹⁰⁵

As a general matter, these issues are beyond the scope of this article. However, even assuming that all these objections are generally correct, international prosecution of grand corruption specifically could still be effective. As I

¹⁰³ See U.S. Comments, *supra* note 73.

¹⁰⁴ See, e.g., Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999). Goldsmith also argues that risk of ICC prosecution of military personnel may discourage U.S. humanitarian intervention in crises—a factor that, if anything, argues in favor of a shift in the ICC's focus away from war crimes and crisis situations. See Goldsmith, *supra*, at 95–99.

¹⁰⁵ See, e.g., Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation, in MY NEIGHBOR, MY ENEMY, supra* note 30, at 4–5; Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. (forthcoming 2007).

argue in Part II, jurisdiction over grand corruption is likely to be relatively easy for the ICC to obtain. Prosecution offers significant potential advantages even if the primary suspects are not captured. Amnesties have not been an effective remedy for corruption. ICC prosecution could offer direct and important remedies for victims. Finally, major players in corruption schemes are likely to be relatively responsive to changes in international norms and the threat of international prosecution. The same could be true for other non-crisis crimes—case-by-case analysis would be necessary.

In all cases, however, the advantages offered by the tribunal's involvement must be evaluated in comparison to what would or could be done without that involvement. The first step in that assessment is to ask whether there is an effective domestic remedy. When able and willing to prosecute perpetrators fairly and securely, domestic courts will almost always be the best option. Their advantages have been well explored elsewhere: they are accessible to victims and affected communities; they are more likely to be seen as reflecting the community's judgment rather than outsiders' justice; investigations and enforcement of judgments may be easier; and they are nearly always far more time- and cost-efficient.¹⁰⁶

For these reasons and others, the Rome Statute codifies a preference for domestic courts. The ICC cannot exercise jurisdiction over a case if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁰⁷ This "complementarity" principle breaks from the approach of the ICTY and ICTR, which enjoy statutory primacy over domestic courts.¹⁰⁸ It is a positive step. But domestic courts sometimes cannot or will not do the job—and not just during crises. Crises may sometimes render an otherwise effective domestic legal system ineffective, but in many cases, those systems are long-term failures. Domestic governments are often unwilling to prosecute serious systemic crimes, as the kleptocracy example below will illustrate.¹⁰⁹

¹⁰⁶ See, e.g., José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 482 (1999); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 17–29 (2005).

¹⁰⁷ Rome Statute, *supra* note 55, art. 17(1)(a). Article 17 further sets out various rules for determining whether a state is genuinely able and willing to carry out the investigation. See *id.* art. 17(1)–(3).

¹⁰⁸ See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 9(2), May 3, 1993, U.N. Doc. S/25704, 32 I.L.M. 1159, 1177 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 8(2), Nov. 8, 1994, U.N. Doc. S/RES/955, 33 I.L.M. 1598, 1605 [hereinafter ICTR Statute].

¹⁰⁹ Factors similar to those discussed here will also affect the choice between wholly international tribunals and hybrid tribunals like those in Sierra Leone, East Timor, and Cambodia. Hybrid tribunals offer many of the advantages of domestic courts, but also some of their disadvantages; their effectiveness depends on whether the domestic government is willing and able, with international assistance, to make them work. See generally James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616 (2005) (critiquing the effectiveness of the hybrid approach); Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International*

In exploring the potential expansion of international criminal law's focus, it is important to identify limiting principles so that the exceptional remedy of international prosecutions is reserved for exceptional cases. For it might be objected that if international criminal tribunals were to turn their attention to those responsible for major structural sources of suffering like extreme poverty, an enormous range of previously non-criminal actions would become subject to international prosecution. Indeed, Davidsson has argued that macroeconomic policies that exacerbate "economic oppression," including "IMF-imposed conditionalities," economic sanctions, "failure to provide humanitarian relief," and even "gross negligence in eradicating extreme poverty" *should* constitute crimes against humanity, even if purportedly "moved by humanitarian concern for other nations' well-being."¹¹⁰

I would not go so far. First, such prosecutions would be politically untenable, and politics matters. If an international tribunal attempted to impose its views on controversial issues of economic policy by prosecuting previously lawful and even well-meaning actions as crimes against humanity, it would likely be seen as a renegade institution, and would have difficulty gaining state cooperation. Second, prosecuting controversial economic policies would be unfair to individual defendants who reasonably believe their conduct to be lawful. Third, unlike in the case of grand corruption, there are serious arguments that economic policies, such as sanctions and loan conditions, ultimately benefit the populations of the countries they target. Prosecutors and judges may be ill-equipped to resolve such policy disputes, especially with the confidence necessary to declare action on the basis of an opposing view not only misguided but a crime against humanity. Fourth, identifying the individuals most responsible for economic policies, demonstrating causation between their actions and the harm caused, and demonstrating a culpable mental state would be enormous hurdles.¹¹¹ Finally, if *inaction* in the face of extreme poverty or disease, without more, constituted an international crime, the number of potential defendants would be enormous. Nearly all of us in rich countries are guilty of some degree of "moral blindness" toward the suffering of the global poor.¹¹² For these reasons, in exploring the case for prosecution of grand corruption—as I do in the next Part—I will point to doctrinal bases for distinguishing that form of egregious and deliberate criminal conduct from other economic acts or omissions not meriting international prosecution.

Criminal Justice, 38 CORNELL INT'L L.J. 725 (2005) (defending the hybrid approach on the basis of an expressive rationale).

¹¹⁰ Davidsson, *supra* note 33, at 176, 209–10; *see also* RAMSEY CLARK, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* 242–43 (1992) (making a similar suggestion in passing).

¹¹¹ Davidsson points to mass tort cases and the U.N. Compensation Commission as examples of successful judicial resolution of complex causation problems. *See* Davidsson, *supra* note 33, at 203. But these involve neither ascription of individual liability nor criminal standards of proof.

¹¹² *Id.* at 174.

II. PROSECUTING GRAND CORRUPTION

This Part focuses on a specific type of crime that could be prosecuted before international tribunals: grand corruption or kleptocracy.¹¹³ I do not mean garden-variety graft, but the large-scale ransacking of public treasuries and resources by heads of state and their families and associates. This practice has devastating consequences, including extreme poverty, ruined social services, and widespread death due to easily preventable diseases. Corrupt acts on this scale are criminal in every country but cannot or will not be prosecuted effectively in domestic courts, even though this crime constitutes one of the gravest problems in the world today in terms of the suffering caused.

This seems to be a clear case in which international prosecution should be considered—and yet there has been no significant move in that direction. Corruption has never been prosecuted internationally, and did not rate a mention in the ICC’s Rome Statute or in the statute of any other existing international criminal tribunal. It therefore presents a comparatively hard case for prosecution from a doctrinal perspective, relative to crimes such as murder and torture that *are* listed in the Rome Statute and could readily be prosecuted outside crisis situations. Nonetheless, it deserves inclusion on the agenda of international criminal justice.

The Cairo-Arusha Principles on Universal Jurisdiction, a declaration issued by an African legal coalition in 2002, called for, among other things, the treatment of “acts of plunder and gross misappropriation of public resources” as a crime subject to universal jurisdiction.¹¹⁴ A few scholars have argued that grand corruption should be treated as an international crime. Ndiva Kofele-Kale, in particular, has done important work drawing attention to the problem and calling for its identification as an international economic crime.¹¹⁵ Chile Eboe-Osuji and Paul Ocheje have each argued that the Rome Statute should be amended, or a new treaty adopted, to cover grand corruption specifically.¹¹⁶

¹¹³ “[K]leptocracy” is defined as “[a] government characterized by rampant greed and corruption.” AMERICAN HERITAGE DICTIONARY 968 (4th ed. 2000). See also Jennifer M. Hartman, Note, *Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT’L L. & COM. 157, 157 (1997).

¹¹⁴ Cairo Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective, <http://www.kituoachakatiba.co.ug/cairo-arusha.htm> (last visited Feb. 3, 2007); see also Report of Interregional Seminar, The Hague, Dec. 11–15, 1989, *Corruption in Government*, at 24 (1990), TCD/Sem. 90/2, INT-89-R56.

¹¹⁵ See Ndiva Kofele-Kale, *The Right to a Corruption-Free Society As an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT’L LAW. 149 (2000) [hereinafter Kofele-Kale, *Corruption-Free Society*]; cf. Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT’L L. 45, 55, 56 & n.27 (1995) [hereinafter Kofele-Kale, *Patrimonicide*] (arguing that indigenous spoliation, a phenomenon related to but broader than corruption, should be illegal).

¹¹⁶ See Chile Eboe-Osuji, *Kleptocracy: A Desired Subject of International Criminal Law That Is in Dire Need of Prosecution by Universal Jurisdiction*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 132 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005); Paul D. Ocheje, *Reforming International Law on the Quest for Accountability in Africa: The Case Against the “Other” Im-*

Ocheje and Kofele-Kale further argue that it satisfies the various criteria for international criminalization outlined by leading scholars in the field.¹¹⁷ And Ilias Bantekas has suggested that some transnational corruption offenses should constitute crimes against humanity.¹¹⁸

I agree with most aspects of these scholars' arguments and will draw on them below. My approach differs in several respects, however. First, I am particularly concerned with evaluating the value of international prosecution of such crimes against a background of limited resources. Second, I evaluate potential prosecutorial strategies in light of the current statutory language, because widespread ratification of an effective new treaty is politically unrealistic in the near term. I thus argue that certain acts of grand corruption amount to "other inhumane acts," a crime against humanity already included in the Rome Statute. Third, I use grand corruption as a case study to shed light on the crisis focus of international criminal law and its alternatives.

To these ends, section A gives a brief overview of the problem of grand corruption, and sections B and C consider the practical and doctrinal cases, respectively, for prosecuting it in international tribunals.

A. *The Problem*

Looting of public resources by corrupt government officials is a pervasive problem throughout much of the world. It explains a well-documented paradox: on average, the richer a country is in natural resources, the poorer most of its citizens are likely to be.¹¹⁹ In many of those countries rich in oil, diamonds, and gold, most of the population lives in abject poverty, lacking in the most basic health, sanitation, and educational services.¹²⁰ Meanwhile, government officials accumulate fabulous personal wealth, as billions of dollars vanish from

punity, 15 LEIDEN J. INT'L L. 749, 777–79 (2002); see also Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159 (2000) (making a similar argument).

¹¹⁷ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 172 (citing M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27, 27 (1983)); Ocheje, *supra* note 116, at 775–76.

¹¹⁸ See Ilias Bantekas, *Corruption As an International Crime and Crime Against Humanity*, 4 J. INT'L CRIM. JUST. 466, 474–76 (2006). Bantekas does not develop this argument beyond a "glimpse." *Id.* at 2.

¹¹⁹ See, e.g., OXFAM AMERICA, EXTRACTIVE SECTORS AND THE POOR: AN OXFAM AMERICA REPORT 3, 16 (2001), available at http://www.oxfamamerica.org/newsandpublications/publications/research_reports/art2635.html/OA-Extractive_Sectors_and_the_Poor.pdf; Erwin H. Bulte et al., *Resource Abundance, Poverty, and Development* 19–20 (Agric. & Dev. Econ. Div. (ESA) Working Paper No. 04-03, 2004), available at <ftp://ftp.fao.org/docrep/fao/007/ae058e/ae058e00.pdf>; cf. GLOBAL WITNESS, ALL THE PRESIDENTS' MEN: THE DEVASTATING STORY OF OIL AND BANKING IN ANGOLA'S PRIVATISED WAR 59–60 (2002) (explaining that reliance on resource revenues impedes economic growth); HUMAN RIGHTS WATCH, SOME TRANSPARENCY, NO ACCOUNTABILITY: THE USE OF OIL REVENUE IN ANGOLA AND ITS IMPACT ON HUMAN RIGHTS 57 (2004) (describing this paradox as the "Resource Curse").

¹²⁰ See James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1006, 1012–13 (2003).

the state's coffers.¹²¹ The worst perpetrators are often heads of state and their family members, who "directly access public treasuries" to fund their "epicurean lifestyles."¹²²

Contrary to the myth that moderate graft greases "the wheels of commerce," even low-level corruption undermines a country's economic growth and development.¹²³ In turn, the consequences of theft of a country's resources in far greater quantities—what I call "grand corruption"—are simply devastating. As Michael Reisman explains, "[t]he amounts involved can be stunning, at times reportedly equaling the national debt. In some cases, absconding officials have left the economies of their countries ransacked and destroyed."¹²⁴ In Angola, for instance, human rights NGOs recently documented the disappearance of over four billion dollars from the public coffers over the course of a few years—an amount "roughly equal to the total amount spent on the humanitarian, social, health, and education needs of a population in severe distress."¹²⁵ Notwithstanding Angola's enormous oil reserves, three quarters of the country's population of 13 million subsists on less than \$1 a day per capita.¹²⁶ Similar examples abound, especially—but by no means exclusively—in Sub-Saharan Africa.¹²⁷

Looting of national wealth on this scale cannot be understood simply as an economic crime. The sums are enough to make a drastic difference to the ability of the state to provide basic services for its people, translating directly to the loss of "[u]ntold millions" of human lives.¹²⁸ Moreover, in addition to stealing

¹²¹ See Hartman, *supra* note 113, at 158; Kofele-Kale, *Patrimonicide*, *supra* note 115, at 59; Ocheje, *supra* note 116, at 753–54; Owens, *supra* note 120, at 1011.

¹²² Ocheje, *supra* note 116, at 756.

¹²³ Alhaji B.M. Marong, *Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa*, 30 DENV. J. INT'L L. & POL'Y 99, 107–09 (2002); see also Harms, *supra* note 116, at 165–66.

¹²⁴ W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoiliations*, 83 AM. J. INT'L L. 56, 56 (1989); see also HUMAN RIGHTS WATCH, *supra* note 119, at 40.

¹²⁵ HUMAN RIGHTS WATCH, *supra* note 119, at 1 (stating that between 1997 and 2002, approximately \$4.22 billion disappeared from the Angolan government's coffers, while \$4.27 billion were spent on domestic social services by the Angolan government, private sources, and international donors during that same period).

¹²⁶ *Angola and IMF 'to Sign Deal'*, BBC NEWS, Mar. 16, 2004, <http://news.bbc.co.uk/1/hi/business/3515550.stm>.

¹²⁷ See Owens, *supra* note 120, at 1006 (stating that "[h]ome of some of the world's richest sites of natural resources, the people who live [in sub-Saharan Africa] nevertheless remain mired in inconceivable poverty," and citing the specific examples of Nigeria, Angola, the Republic of the Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Sierra Leone, Liberia, Chad, and The Gambia); see also Transparency International, *Corruption Perceptions Index Table*, http://www.transparency.org/news_room/in_focus/cpi_2006/cpi_table (last visited Feb. 1, 2007) (listing Haiti, Bangladesh, Myanmar, Iraq, and Cambodia as among the most corrupt states); Press Release, Transparency International, *2006 Corruption Perceptions Index Reinforces Link Between Poverty and Corruption* (Nov. 6, 2006), available at http://www.transparency.org/news_room/in_focus/cpi_2006#pr (describing findings concerning the correlation between corruption and poverty).

¹²⁸ Owens, *supra* note 120, at 1012.

money directly, corrupt leaders are far likelier to agree to exploitative international economic arrangements, entering deals and debts that are personally profitable but harmful to the population.¹²⁹

The consequence is extreme poverty, and extreme poverty kills. Angola's life expectancy, for instance, is 36.1 years; one-third of all children die before age five.¹³⁰ As Thomas Pogge puts it:

Roughly one-third of all human deaths, 18 million annually, are due to poverty-related causes, easily preventable through better nutrition, safe drinking water, cheap rehydration packs, vaccines, antibiotics, and other medicines. . . . Each day, some 50,000 human beings—mostly children, mostly female, and mostly people of colour—die from starvation, diarrhoea, pneumonia, tuberculosis, malaria, measles, perinatal conditions and other poverty-related causes. This continuous global death toll matches that of the December 2004 tsunami every few days, and it matches, every three years, the entire death toll of the Second World War, concentration camps and gulags included.¹³¹

Corruption also strips the public funds available to deal with HIV/AIDS and undermines administration of prevention and treatment programs.¹³² AIDS today is a pandemic of truly stunning proportions; tens of millions have been infected, with numbers increasing.¹³³ Corruption also interferes directly with aid programs,¹³⁴ and health care programs are often particularly vulnerable to misappropriation.¹³⁵

Grand corruption is also intimately intertwined with a range of other human rights concerns. First, “[o]ne cannot talk realistically of a fundamental right to life when this life can barely be sustained because it is cut off from the most basic necessities of food, shelter, and medical care.”¹³⁶ Some African feminists have framed the issue of corruption as one of gender justice, arguing that it underlies other causes of women's oppression, including poverty, conflict, and disease.¹³⁷

Furthermore, kleptocracy “affords both motive and opportunity to violate human rights violently,” as leaders will often engage in killings, torture, and

¹²⁹ See Pogge, *supra* note 10, at 731–32, 736, 739.

¹³⁰ HUMAN RIGHTS WATCH, *supra* note 119, at 65.

¹³¹ Pogge, *supra* note 10, at 719, 722.

¹³² See Liz Tayler & Clare Dickinson, *The Link Between Corruption and HIV/AIDS*, IAPAC MONTHLY, Feb. 2006, at 36–39, available at <http://www.thebody.com/iapac/pdfs/feb06.pdf>.

¹³³ See, e.g., Michael H. Merson, *The HIV-AIDS Pandemic at 25—The Global Response*, 354 NEW ENG. J. MED. 2414 (2006).

¹³⁴ See, e.g., GRAHAM HANCOCK, LORDS OF POVERTY: THE FREE-WHEELING LIFESTYLES, POWER, PRESTIGE AND CORRUPTION OF THE MULTI-BILLION DOLLAR AID BUSINESS 174–83 (1989).

¹³⁵ U4 Anti-Corruption Resource Centre, *Corruption in the Health Sector* (2006), <http://www.u4.no/themes/health/corruptioninhealth.pdf>.

¹³⁶ Kofele-Kale, *Patrimonicide*, *supra* note 115, at 113; see also Harms, *supra* note 116, at 161.

¹³⁷ See, e.g., Angela Dwamena-Aboagye, *African Perspectives on Gender Justice*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, *supra* note 116, at 72.

disappearances to suppress exposure of their wrongdoing.¹³⁸ It can also cause civil wars, as dissatisfaction spurs military coups and competing groups struggle for access to fabulous wealth.¹³⁹ David Crane, when he was head prosecutor at the Sierra Leone Special Court, recognized this point:

The devils we dance with everyday are not only the criminal actors being prosecuted, but the peripheral players who have been involved in this decade long tragedy. These actors include gun runners, diamond dealers, the Russian and Ukrainian mafia, other international criminal organizations, and terrorists, to include Hezbollah and Al Qaeda. All of them were involved in West Africa taking blood diamonds from the mines of eastern Sierra Leone and trading them for cash to buy weapons to sustain the conflicts. . . . The catalyst for this type of non-traditional conflict is impunity and corruption. . . . This lack of respect for the law and for institutions becomes a powder keg which any warlord in the region can ignite for their own personal criminal advantage and gain.¹⁴⁰

These secondary effects are not necessary or sufficient to qualify grand corruption as an international crime, but they provide additional reasons that corruption-related crimes may be worth prosecuting. Moreover, the interrelationship between corruption and violence may mean that efforts to prosecute war criminals are undermined by failure to address the corrupt networks that support them. This dynamic illustrates one of the problems described in Part I.B—the blinkered approach to crisis response produced by the tendency to abstract crises from their broader contexts.

It bears emphasis that grand corruption cannot be characterized as a Third World phenomenon, even though its victims are overwhelmingly the Third World poor. The problem is global. It depends on multinational corporations that knowingly exploit, support, and profit from kleptocracy, often making huge off-the-books payments to corrupt leaders in exchange for sweetheart deals granting access to natural resources or arms markets.¹⁴¹ It depends on international banks that launder stolen assets.¹⁴² In some cases, notably illustrated by the recent oil-for-food scandal, it depends on corrupt officials of inter-

¹³⁸ Eboe-Osuji, *supra* note 116, at 123.

¹³⁹ Owens, *supra* note 120, at 1010–11. A U.N. panel report, for instance, found that the corrupt, unlawful exploitation of natural resources has played a critical role in fueling the DRC's devastating conflict and atrocities. See *The Secretary-General, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, delivered to the Security Council and the General Assembly*, U.N. Doc. S/2002/1146 (Oct. 16, 2002).

¹⁴⁰ David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 CASE W. RES. J. INT'L L. 1, 2, 4 (2005).

¹⁴¹ Angola provides one illustration. See HUMAN RIGHTS WATCH, *supra* note 119; GLOBAL WITNESS, *supra* note 119. See generally Emad Mekay, *Multinational Firms' Corrupt Practices Continue in Developing World*, INTER PRESS SERVICE, July 12, 2002, available at <http://www.commondreams.org/headlines02/0712-04.htm> (describing similar dynamics elsewhere).

¹⁴² See, e.g., United Nations Office on Drugs and Crime, *Global Programme Against Money Laundering*, http://www.unodc.org/unodc/money_laundering.html (last visited Feb. 1, 2007).

national organizations.¹⁴³ Finally, it depends on powerful states that have often actively supported kleptocratic regimes.¹⁴⁴ Any assessment of the potential international prosecution of kleptocrats must also consider the possibility of prosecuting their partners in crime.

For these reasons and others, a few critics have argued that fixating on corruption as a cause of Third World suffering amounts to victim-blaming, ignoring the role of the international community.¹⁴⁵ These critiques do not, however, argue persuasively against the prosecution of kleptocrats. No serious anti-corruption advocate fails to recognize the enormous role of companies and governments in rich countries in promoting Third World corruption (and most do not ignore other structural sources of poverty).¹⁴⁶ Indeed, as the next section illustrates, the existing international anti-corruption regime focuses almost exclusively on that role. To instead focus solely on the Third World recipients of their largesse would certainly amount to an indefensible double standard. But to say that international institutions and individuals within them are at fault does not absolve corrupt government officials.¹⁴⁷ Heads of state who loot their treasuries and leave their people destitute are not passive victims of an unequal world order. Rather, they are sophisticated and active shapers and exploiters of that order—and, like their accomplices in wealthy states, deserve to be recognized as callous perpetrators of catastrophic crimes.¹⁴⁸

B. *Why International Criminal Law?*

The fact that kleptocracy is a major problem does not, of course, mean that international criminal prosecution is necessarily a desirable solution. However, there are several strong arguments in favor of such prosecutions, at least in

¹⁴³ See Guy Stessens, *The International Fight Against Corruption*, 72 INT'L REV. PENAL L. 891, 912–13 (2001).

¹⁴⁴ See, e.g., GLOBAL WITNESS, *supra* note 119.

¹⁴⁵ See Orford, *supra* note 6, at 699.

¹⁴⁶ See, e.g., Pogge, *supra* note 10, at 736–37.

¹⁴⁷ See *id.* at 735.

¹⁴⁸ More generally, it should be acknowledged that many of the critics cited in Part I.A might well be skeptical of international prosecution of grand corruption. Critiques of the discourse surrounding crises—Western heroes rescuing passive victims—may be equally applicable to a situation in which international courts try the leaders of poor countries for systemic crimes. See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (critiquing human rights discourse); Orford, *supra* note 6, at 696 (criticizing depictions of “leaders or élites of states like Iraq or Somalia as oppressors, criminals or primitive barbarians, requiring disciplining and controlling”); see generally ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995). Orford also cites related critiques of development discourse and its “symbol[s] of poverty and helplessness.” Orford, *supra* note 6, at 697. In my view, these critiques provide reason to listen carefully to what victims say they want as a response to crimes committed against them and to be on guard against use of demeaning or overly romantic tropes. But they do not provide adequate reason for ignoring serious crimes that take place in poor countries, or for refusing to use the tools the international community has available to address those crimes in cases where those tools could prove effective.

some cases. In this subsection, I first evaluate the likely effectiveness of ICC prosecution as a response to grand corruption. Second, I compare the advantages of international prosecution to those of other international and domestic anti-corruption approaches. Finally, I consider the question whether grand corruption prosecutions would be a worthwhile use of limited tribunal resources.

1. Effectiveness of International Prosecution of Grand Corruption.—

There are several reasons to believe that international prosecution, in particular before the ICC, offers significant potential as a response to grand corruption. First, this approach offers a realistic prospect of getting substantial amounts of the stolen money back. The ICC has the power to order asset forfeitures as a penalty and asset freezes and tracing at the investigation stage, and all member states must comply.¹⁴⁹ Assuming the defendants can be captured, tried and convicted, the court can distribute forfeited funds and fines to victims through a trust fund or, alternatively, order defendants to pay reparations directly to victims.¹⁵⁰ Criminal findings could also enable subsequent civil suits, including against corporations and banks.¹⁵¹

Second, international prosecution is likely to interfere substantially with ongoing patterns of grand corruption. It is at least plausible to assume that many kleptocrats and their cronies could be actually captured, given the successes of other tribunals in taking custody of high-ranking suspects, even heads of state.¹⁵² However, even if that assumption proves false, investigations, trac-

¹⁴⁹ See Rome Statute, *supra* note 55, arts. 77, 86–87, 93, 109. Most states parties generally support the Court or at least have a political stake in appearing to support it (or they would not have ratified the Statute), and can be expected to comply voluntarily with its orders. Direct enforcement mechanisms in case of state refusals to comply are, however, relatively weak. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 527–28 (2003). In such circumstances, much will depend on the Court's credibility—on how effective it can be in bringing international political pressure to bear on recalcitrant states. This is a factor prosecutors must take into account in designing strategy. See *infra* Part III.

¹⁵⁰ See Rome Statute, *supra* note 55, arts. 75, 79; INT'L CRIM. CT. R. P. & EVID. 94–98; Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667, 668 (2002); see also Bantekas, *supra* note 118, at 14 (noting potential utility of this provision in corruption context). The ICTY Statute and ICTR Statute provide for return of property acquired through criminal conduct, but these provisions are much less detailed than the ICC's reparations regime and have never been employed. See ICTY Statute, *supra* note 108, art. 24(3); ICTR Statute, *supra* note 108, art. 23(3).

¹⁵¹ See Andrew Clapham, *Issues of Complexity, Complicity, and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 30, 48–49 (Philippe Sands ed., 2003) (noting that “contemporary claims brought against Germany and the German companies over the last decade can be traced back to the Nuremberg trials”).

¹⁵² The ICTY, ICTR, and Sierra Leone Special Court have eventually succeeded in capturing almost all indictees. The prosecutions of Slobodan Milošević, Ramush Haradinaj, Charles Taylor and others have shown that international tribunals can realistically hope to capture even the highest-ranking national officials: indictments can help to build sustained international pressure that leads to abdications of power and eventual arrests. However, critics of the ICC have suggested that (particularly without U.S. cooperation) it will have difficulty obtaining arrests, see *supra* note 104, and problems are certainly

ing and freezing of assets, and issuance of indictments in grand corruption cases could have significant value even if defendants evade arrest and trial. These steps would prevent stolen money from being used for ill ends (such as illegal arms transfers) and preserve it for eventual return after a regime change or other change in circumstances. Indictment by an international tribunal could seriously interfere with the ability of kleptocrats to keep stealing even if they manage to remain in power (which is unlikely to be the case for long).¹⁵³ Sources of foreign bribes might well dry up once a leader is an indicted international criminal, and foreign banks might likewise become unwilling to hide assets. Grand corruption could not be committed on anything like the present scale absent such foreign actors' involvement.

Third, international prosecution could also contribute to transparency, including by exposing the roles of foreign companies and potentially subjecting them to further domestic investigations. The importance of this effect should not be underestimated. There is a reason kleptocrats around the world use off-budget transactions that violate their own domestic laws, rather than, for instance, openly declaring that they are entitled to take astronomical sums from the treasury (for example, via a "tax"). Even these strongmen face domestic and international pressures that limit their powers; they could not get away with open looting. Nor could their international collaborators get away with funding a regime that openly used the proceeds for the leaders' personal enrichment. Transparency is thus a crucial anti-corruption measure; corruption could not flourish without secrecy.¹⁵⁴ Finally, all of these advantages would be amplified if prosecutions targeted not only the kleptocrats themselves but also the most culpable international players in the crime.

Asset tracing will remain a challenge, but not an insurmountable one.¹⁵⁵ Although it remains important to see how the Court resolves conflicts with national laws, such as bank secrecy laws, its authority to do so should not be in doubt. The Rome Statute requires member states to change their national laws to the extent necessary to comply with the Court's requests, and many have already done so.¹⁵⁶ Importantly, a number of major money-laundering centers are

possible; Indonesia, for instance, has sheltered its military officials from prosecution for violent crimes in East Timor. Prosecutors should consider the likelihood of successful capture of suspects, and the likelihood of at least driving them from power or successfully seizing their assets, in deciding which situations to investigate.

¹⁵³ As noted above, the ICTY, ICTR, and Sierra Leone Special Court have captured almost all their indictees. The few who remain uncaptured have uniformly at least been driven into hiding, suggesting that it would be rather difficult for a leader indicted by the ICC to remain in power, even if the ICC's critics are right that it will have difficulty capturing suspects.

¹⁵⁴ See GLOBAL WITNESS, TIME FOR TRANSPARENCY: COMING CLEAN ON OIL, MINING, AND GAS REVENUES (2004); Ann M. Florini, Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency 17–18, 20–22 (1999), <http://www.worldbank.org/wbi/governance/pdf/florini.pdf>.

¹⁵⁵ See Ocheje, *supra* note 116, at 774 (observing that recent anti-terrorism efforts have demonstrated feasibility of tracing internationally laundered funds).

¹⁵⁶ Rome Statute, *supra* note 55, art. 88; see Ferstman, *supra* note 150, at 679–83.

party to the Rome Statute.¹⁵⁷ States that are not party to the Statute have no obligation to cooperate with the Court, but they may do so voluntarily.¹⁵⁸ In addition, the Statute gives an incentive (sentence mitigation) to defendants themselves to help the Court trace and obtain assets.¹⁵⁹

Fourth, as explained further in the next subsection, the ICC could exercise jurisdiction in a number of cases in which domestic courts cannot or will not provide effective remedies for prosecution. Notably, the ICC's own major jurisdictional weakness—lack of universal jurisdiction over crimes committed in the territory of non-party states—is less of a barrier to the successful prosecution of grand corruption than to that of most crisis crimes. For one thing, many states with serious corruption problems are party to the Rome Statute.¹⁶⁰ Perhaps more significantly, in contrast to many other crimes under the ICC's jurisdiction, mass-scale corruption offenses are rarely confined to a single state but involve broad transnational criminal networks.¹⁶¹ Under Article 12(2)(a) of the Rome Statute, the Court's territorial jurisdiction extends to situations in which *any one* of the states in which “the conduct in question” occurred is party to the Statute. In the case of grand corruption offenses involving international transactions, the “conduct in question” often takes place in many states, and so the court's jurisdiction should reach fairly broadly. Thus, the Court should be able to reach the conduct of kleptocrats who receive bribes from, or hide money in, the territory of member states even if their own countries are not party.

Fifth, attaching the label of “crimes against humanity” to an offense might have a deterrent effect, either on the kleptocrats themselves or on the banks and corporations that deal with them. My argument does not rest principally on this advantage because there is at this point little empirical evidence about the deterrent effect of international criminal law.¹⁶² Even if it does not directly deter crimes, however, labeling an offense a crime against humanity might help to

¹⁵⁷ See *infra* note 192.

¹⁵⁸ Rome Statute, *supra* note 55, art. 87(5); see Ferstman, *supra* note 150, at 678.

¹⁵⁹ Rome Statute, *supra* note 55, art. 110(4)(b).

¹⁶⁰ For instance, most of the African states listed by Owens as examples of resource-rich countries rendered destitute by corruption, see *supra* note 127, are party to the Statute, including Nigeria, the Republic of the Congo, the Democratic Republic of the Congo, Gabon, Sierra Leone, Liberia, and The Gambia.

¹⁶¹ See *supra* notes 141–44 and accompanying text; see also Stessens, *supra* note 143, at 895–96.

¹⁶² See Gustavo Gallón, *The International Criminal Court and the Challenge of Deterrence*, in INTERNATIONAL CRIMES, *supra* note 29, at 93; Schvey, *supra* note 95, at 71–72; Weinstein & Stover, *supra* note 105, at 4; Jenny S. Martinez, Book Review, 99 AM. J. INT'L L. 523, 527 (2005). The deterrent effect of international criminal sanctions for corruption and other systemic crimes might be more readily subject to empirical testing than that of similar sanctions for crisis crimes. In contrast to war crimes and mass atrocities, considerable data on corruption levels exist, in quantified and readily comparable forms, collected worldwide by Transparency International and other organizations. See, e.g., Transparency International, Corruption Perceptions Index, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited Feb. 2, 2007) (providing links to Transparency International's Corruption Perceptions Index and other worldwide indices of corruption-related activity). Moreover, the conduct is not inherently sporadic, making it easier to draw meaningful comparisons over time.

build respect for a norm against it.¹⁶³ These norm-shaping effects may be more important in the corruption context than with respect to many other crimes. Corruption crimes involve numerous actors worldwide, many of whom may be more responsive to pressure than are the soldiers and commanders who typically perpetrate war crimes and mass atrocities. For instance, international prosecutions may encourage consumers, activist groups, or governments to pressure corporations to change their behavior, and encourage humanitarian organizations to get serious about monitoring corruption in the receipt of aid.¹⁶⁴

Finally, one significant counterargument merits discussion. Critics of the ICC have argued that risk of international prosecution might discourage criminal regimes from leaving power, if the ICC's authority to prosecute is understood to override any domestic grant of amnesty that might result from negotiations.¹⁶⁵ There is debate over whether the Rome Statute does in fact preclude honoring domestic grants of amnesty.¹⁶⁶ If it does, whether this is on balance a bad thing is also debatable; amnesties are extremely controversial and are viewed by critics as an official embrace of impunity.¹⁶⁷

These broader issues are beyond the scope of this paper. But even if it might be useful in other contexts, there is no evidence that amnesty is effective in bringing an end to the harms of kleptocracy specifically. By insulating perpetrators from investigation, it may make it impossible to get stolen money back—and it forgoes the other possible benefits of prosecution, such as exposing ongoing wrongdoing and thereby improving transparency in governance.¹⁶⁸ And even if an offer of amnesty succeeds in persuading a corrupt head of state to leave office, this—while certainly a valuable first step—has historically not

¹⁶³ See, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004) (arguing that “[t]he phrase ‘crimes against humanity’ has acquired enormous resonance in the legal and moral imaginations of the post-World War II world”); Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 719 (2004); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1289–92 (2006) (book review) (citing Nuremberg’s impact on norm acceptance); cf. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

¹⁶⁴ See, e.g., Robert McCorquodale, *Feeling the Heat of Human Rights Branding: Bringing Transnational Corporations Within the International Human Rights Fence*, 1 HUM. RTS. & HUM. WELFARE 21, 25–26 (2001) (book review) (noting a study showing that multinational corporations respond to public pressure on human rights issues).

¹⁶⁵ See H. Abigail Moy, *The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate Over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267, 270–72 (2006).

¹⁶⁶ See Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 316–22, 336–38 (2005); José E. Arvelo, Note, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT'L L. 411, 466–68 (2006).

¹⁶⁷ See Bassiouni, *supra* note 32, at 7–8; MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 15–16 (1998). *But see* MINOW, *supra*, at 20–21, 56–57 (defending some conditional amnesties).

¹⁶⁸ See Ocheje, *supra* note 116, at 768.

been enough to eradicate entrenched corruption.¹⁶⁹ This is not to say that amnesty should be categorically ruled out in corruption cases, but there is no reason to believe it will be a desirable option in most of them. If it is desirable in a particular case, the Prosecutor has discretion to decline to investigate or prosecute.¹⁷⁰

2. *Comparison to Other Domestic and International Remedies.*—The desirability of international prosecution of grand corruption cannot be assessed in a vacuum—rather, it must be compared to alternative means of addressing this problem. The first alternative that must be considered, in accordance with the ICC’s complementarity regime, is domestic prosecution in territorial states. That alternative, however, is not a serious one in most cases of grand corruption. Although the acts in question are criminal in virtually every country,¹⁷¹ effective domestic remedies in the kleptocrats’ countries are almost never available.¹⁷² The political branches are generally headed by the worst offenders, and courts are not sufficiently independent to check them.¹⁷³ After regime changes, successful prosecution of past leaders has occasionally been possible, but even in such cases, leaders have more often managed to flee the country with the proceeds of their looting.¹⁷⁴

Likewise, domestic prosecutions in other states involved in the crimes, such as money-laundering havens or the home states of companies that enter corrupt deals, are conceivable in some cases, but in most cases are equally unlikely. Even setting aside the crucial question of political will, the laws are in most cases simply not there. Until very recently, “most developed states did not merely legally authorize their firms to bribe foreign officials, but even allowed them to deduct such bribes from their taxable revenues.”¹⁷⁵ The United States is the only exception, but its Foreign Corrupt Practices Act (“FCPA”) focuses narrowly on the supply side of bribery—that is, the companies that give bribes to foreign officials.¹⁷⁶ Large-scale bribe-giving is a part of the dynamic that enables kleptocracy, but it is not the whole story. The FCPA does not ad-

¹⁶⁹ See Susan Rose-Ackerman, *Establishing the Rule of Law*, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 182, 185 (Robert I. Rotberg ed., 2004).

¹⁷⁰ Rome Statute, *supra* note 55, art. 53; see Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, in INTERNATIONAL CRIMES, *supra* note 29, at 81.

¹⁷¹ See Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?: Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT’L L. 451, 453 (1999); Hartman, *supra* note 113, at 168.

¹⁷² See, e.g., Ocheje, *supra* note 116, at 762–63.

¹⁷³ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 174–75.

¹⁷⁴ See Kofele-Kale, *Patrimonicide*, *supra* note 115, at 105.

¹⁷⁵ Pogge, *supra* note 10, at 736.

¹⁷⁶ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.); Lucinda A. Low, Andrea K. Bjorklund & Kathryn Cameron Atkinson, *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT’L L. 243, 245 (1998).

dress the demand side—that is, the role of the corrupt government officials themselves—and thus does not provide a means of obtaining assets illicitly obtained by those officials. Supply-side approaches alone cannot succeed in preventing bribery unless perfectly enforced against all potential suppliers—an impossible task, especially because potential suppliers come from all over the world. Perhaps even more importantly, the FCPA does not address a wide range of forms of corruption that do not constitute bribery at all, such as leaders' large-scale theft of funds directly from public treasuries.¹⁷⁷

This legal landscape has been altered substantially within the last decade by the adoption of seven new international treaties addressing corruption.¹⁷⁸ All are suppression treaties obliging states to take various civil and criminal measures domestically and to cooperate in enforcement. These treaties provide important but incomplete remedies. First, many critical states—particularly most of the kleptocracies themselves—have not ratified them.¹⁷⁹ Second, some of them are modeled on the FCPA,¹⁸⁰ and thus limited to supply-side bribery, while others address the demand side of bribery but ignore other important forms of corruption that do not constitute bribery at all.¹⁸¹ Third, considerable

¹⁷⁷ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 157.

¹⁷⁸ See United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (Dec. 11, 2003), 43 I.L.M. 37 (2004) [hereinafter UNCAC]; African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003 [hereinafter African Union Convention], available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf; Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1 (1998) [hereinafter OECD Convention]; Inter-American Convention Against Corruption, 35 I.L.M. 724 (1996) [hereinafter Inter-American Convention]; Council of Europe Civil Law Convention on Corruption, E.T.S. No. 174, Nov. 4, 1999 [hereinafter Civil Law Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>; Council of Europe Criminal Law Convention on Corruption, E.T.S. No. 173, 38 I.L.M. 505 (1999) [hereinafter Criminal Law Convention]; United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25 (Nov. 15, 2000), 40 I.L.M. 335 (2001).

¹⁷⁹ As of the publication of this Article, the African Union Convention has been ratified by 16 out of 59 African nations. See <http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>. The OECD Convention has been ratified by 35 mostly wealthy countries. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 24 November 2005, <http://www.oecd.org/dataoecd/59/13/1898632.pdf?channelId=34859&homeChannelId=33725&fileTitle=OECD+Convention+on+Combating+Bribery%3A+Status+of+Ratification> (last visited Feb. 3, 2007). The two European regional conventions have each been ratified by about three-quarters of the countries in Europe. See Criminal Law Convention on Corruption, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=23/03/04&CL=ENG> (last visited Feb. 3, 2007); Civil Law Convention on Corruption, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=23/03/04&CL=ENG> (last visited Feb. 3, 2007). The Inter-American Convention has been widely ratified in the Western hemisphere. See Organization of American States, Office of International Law, Multilateral Treaties: Inter-American Convention Against Corruption, March 29, 1996, <http://www.oas.org/juridico/english/Sigs/b-58.html>.

¹⁸⁰ See Low et al., *supra* note 176, at 245; Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 376–77, 383–84 (2000).

¹⁸¹ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 157–58.

doubts have been raised regarding each of the treaties' enforcement mechanisms.¹⁸² Fourth, most of these treaties are regional and not global in scope. This is an obstacle to enforcement against truly large-scale corruption crimes, which almost always involve overseas actors and intercontinental movement of funds. Fifth, the treaties do not specifically target grand corruption, but rather corruption on any scale. Enforcement regimes are therefore not tailored to the former problem and may be less effective in responding to it.¹⁸³ Moreover, to place catastrophic grand corruption "on the same moral plane as [ordinary] bribery is to trivialize" it.¹⁸⁴ Finally, immunity doctrines, which do not constrain the ICC, may interfere with domestic prosecutions of the highest-level offenders even under the new treaty regimes,¹⁸⁵ and the act of state doctrine may impede prosecution of these and other perpetrators.¹⁸⁶

I will not separately address each of the treaties in detail here. However, the recent U.N. Convention Against Corruption deserves a more detailed inquiry. The Convention is not confined to bribery. Although many of its provisions are rife with soft language (for example, requiring states to "consider" changing their laws),¹⁸⁷ the Convention does clearly require criminalization of bribery of foreign and domestic officials, embezzlement of public funds, and money laundering.¹⁸⁸ It also has asset tracing and forfeiture provisions, but emphasizes that these shall be "defined and implemented . . . subject to the provisions of" domestic law.¹⁸⁹ The Convention requires states to provide means of overriding bank secrecy laws.

Ninety-two states are currently party to the Convention, leaving most states off the list, but the ratification campaign continues apace.¹⁹⁰ Even if the Convention is eventually widely ratified, however, critical enforcement ques-

¹⁸² See, e.g., Pogge, *supra* note 10, at 736 (criticizing effectiveness of OECD Convention); Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191, 194–95 (2005) (criticizing implementation of the Inter-American Convention); *id.* at 197–98 (arguing that the OECD Convention has been ineffective due to under-funding and widespread ignorance of its provisions); *id.* at 202–03 (noting that the African Union Convention has no enforcement mechanism other than self-reporting); *id.* at 203–04 (criticizing Organized Crime Convention); *The Short Arm of the Law*, THE ECONOMIST, Mar. 2, 2002, at 63.

¹⁸³ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 161 (arguing that "the conventional definitions of corruption can be likened to fishing nets that bring in smelts and minnows but are not sturdy enough to trap the bigger catch").

¹⁸⁴ *Id.*; see also *id.* at 174.

¹⁸⁵ See Stessens, *supra* note 143, at 935, 937; Marc Henzelin, *L'immunité Pénale des Chefs d'Etat en Matière Financière: Vers une Exception pour les Actes de Pillage de Ressources et de Corruption?*, 12 REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPEEN 179, 212 (2002).

¹⁸⁶ See Henzelin, *supra* note 185, at 211.

¹⁸⁷ See, e.g., UNCAC, *supra* note 178, art. 8.

¹⁸⁸ *Id.* arts. 15–17, 23.

¹⁸⁹ *Id.* art. 31; see Webb, *supra* note 182, at 209–11 (arguing that the asset recovery mechanisms are an important step but that they will be undermined by clawback clauses).

¹⁹⁰ See http://www.unodc.org/unodc/en/crime_signatures_corruption.html (last visited May 15, 2007).

tions remain. In contrast to the ICC Statute, the Convention does not set up any independent body with authority to give binding orders to states.¹⁹¹ States may request legal assistance from one another, but such requests may be denied for reasons including conflicts with domestic laws (other than bank secrecy laws) or where “the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.” Although the Convention does override bank secrecy laws, the benefit of that provision may be mooted by the fact that popular off-shore financial havens and states with serious recent money-laundering problems have mostly declined to become parties; a number of these *are* party to the Rome Statute.¹⁹² Also, the Convention does not require states to exercise extraterritorial jurisdiction over corruption crimes, nor to honor other states’ extradition requests unless an extradition treaty already exists between the states in question.¹⁹³

Thus, gaps remain in the new treaties’ substance and enforcement. International criminal justice could help to fill those gaps and, unlike other approaches to filling them,¹⁹⁴ would not necessarily require negotiating and obtaining widespread ratification of a new treaty, a process likely to run up against political obstacles.¹⁹⁵ The states that have declined to join the existing anti-corruption treaties (especially the money-laundering havens and the kleptocracies themselves) may be unlikely to join any future treaty specifically and vigorously targeting corruption. But, as noted above, many are already party to the Rome Statute.

¹⁹¹ See Webb, *supra* note 182, at 221–22, 228. It does establish a Conference of States Parties with a general oversight role. See UNCAC, *supra* note 178, art. 63.

¹⁹² For example, the following states and territories are party to the Rome Statute but not to the Convention Against Corruption: Switzerland, Barbados, Dominica, St. Vincent and the Grenadines, St. Kitts and Nevis, the Netherlands Antilles, Nauru, Fiji, and the Marshall Islands. Compare http://www.unodc.org/unodc/en/crime_signatures_corruption.html (last visited Feb. 5, 2007) (listing, *inter alia*, Netherlands ratification as limited to “the Kingdom in Europe”) with <http://www.icc-cpi.int/statesparties.html> (last visited Feb. 5, 2007). Many of these states have been listed in recent years on the so-called “blacklist” compiled by the Financial Action Task Force, which evaluates compliance with anti-money-laundering initiatives. See FATF Annual Review of Non-Cooperative Countries and Territories 2005–2006, <http://www.fatf-gafi.org/dataoecd/0/0/37029619.pdf> (last visited Feb. 5, 2007). Some have also been subject to advisories issued by the Financial Crimes Enforcement Network of the U.S. Department of the Treasury. See http://www.fincen.gov/pub_main.html (last visited Feb. 5, 2007).

¹⁹³ UNCAC, *supra* note 178, arts. 42, 44.

¹⁹⁴ For instance, Reisman called in 1989 for an international anticorruption declaration and formation of a U.N. high commission with the power to order return of diverted national wealth. Reisman, *supra* note 124, at 58–59. This remains a plausible possibility, but the watered-down implementation mechanisms of the present treaties suggest that states are unlikely to agree to a commission with serious enforcement powers. And even Security Council action, while not requiring a large number of states to cooperate, faces political obstacles, particularly from Russia and China, two states with serious corruption problems. Also, one of the Security Council’s main enforcement mechanisms, economic sanctions, is too blunt an instrument; even if sanctions are effective in cutting off kleptocrats’ supply of funds, they cannot restore assets to victims and may in fact harm them.

¹⁹⁵ See Webb, *supra* note 182, at 220–21 (explaining that proposals to build stronger verification measures into the UNCAC did not gain sufficient support).

That said, the seven new suppression treaties—and the domestic remedies those treaties require—offer significant potential benefits that should not be ignored, even though it is too early to tell how widely the treaties will be ratified or how effective they will be. This Article does not suggest that international criminal prosecutions should be the only, or the main, response to grand corruption. A problem this massive and complex requires a multi-prong approach. Whether international prosecution is necessary and appropriate should be evaluated on a case-by-case basis. That is the point of the ICC's complementarity regime—to allow the Court to defer to domestic authorities where they offer an effective remedy, but to step in where none is available. In addition, because of the complementarity rule, the ICC's articulation of international legal principles may actually push governments toward the creation of effective domestic remedies for corruption-related offenses, precisely in order to avoid international prosecution of their citizens.¹⁹⁶

3. *Allocation of Tribunal Resources.*—The question remains whether prosecution of grand corruption would be a better use of tribunals' limited resources than are prosecutions of other crimes. This is impossible to answer without comparing the details of specific potential cases, but it seems probable that some corruption-related cases would be worth bringing. The magnitude of the harm is vast, and it is ongoing harm that prosecution could reduce substantially. In comparison to some relatively minor crimes that have been prosecuted internationally in crisis contexts, prosecution of the worst cases of grand corruption could likely contribute much more significantly to the reduction of suffering.

As detailed in subsection 1, international criminal prosecution of grand corruption can improve the lives of victims and alleviate suffering in very concrete ways. By helping to restore diverted funds to victim populations, to interfere with ongoing thefts and destructive uses of diverted funds, and to improve transparency, these prosecutions can help to remedy the grotesque maldistribution of resources within kleptocracies. The usual benefits to victims cited as a result of international trials are quite a bit more abstract—a sense of justice, satisfaction in the establishment of an accurate historical record, personal healing, possibly reconciliation. I do not doubt the importance of these objectives or that in some circumstances trials may achieve them; indeed, some of these objectives could potentially also be achieved in grand corruption trials. But in the grand corruption case, seizure and restitution of stolen assets (and cessation of continued theft) offer an additional and far more direct remedy for the core harm caused by the crime—extreme poverty and its health consequences.

To be sure, the ICC Statute allows for reparations for non-economic crimes as well. But monetary remedies for violent crimes risk being perceived

¹⁹⁶ See Burke-White, *supra* note 79, at 201–03 (arguing that the ICC itself is relatively weak but can powerfully influence domestic prosecutions).

by victims as inappropriate and even potentially insulting,¹⁹⁷ and moreover, such remedies are worthless if the defendant does not have assets. In grand corruption cases, in contrast, not only does the nature of the remedy more closely match the offense, but the assets in question are enormous—often equal to the total national debt or the total social services budget, enough to make a real difference in people’s lives. Thus, the potential for a meaningful remedy, if not a complete one, is extremely strong.

Thus far, this Article has considered the resource-allocation question from the perspective of a prosecutor confronted with fixed resources—that is, it has considered whether prosecutors should use their resources to address certain categories of crimes as opposed to others. Another way to consider the question is from the broader perspective of the “international community” seeking to solve a particular problem—for instance, extreme poverty. Is prosecuting kleptocrats more useful than other potential expenditures targeted at that problem? To put it concretely, assuming an international prosecution costs \$10 million,¹⁹⁸ are there other poverty-reduction strategies—direct humanitarian assistance, for instance—that would make better use of \$10 million?

It is certainly possible. But given that the sums involved in grand corruption cases often measure in the *billions* of dollars, if a particular case offers a reasonable prospect of getting back a substantial portion of the stolen assets, it seems evidently worthwhile compared to other poverty-reduction approaches because it could actually generate funds that could then be used for those other approaches (for instance, using the ICC’s victims’ fund to finance direct assistance programs). This is true even setting aside the many other potential benefits of prosecution for the directly affected country (stopping continuing diversion of funds, enabling effective administration of aid, discouraging the state from entering worthless contracts) as well as other countries (deterrence and norm-shaping).¹⁹⁹

In determining what crimes to prosecute, international prosecutors must also consider strategic factors, such as the likelihood of capturing suspects, winning cases, and being able to enforce judgments, as well as the effects of their choices on a new tribunal’s legitimacy and on governmental cooperation. Prosecuting corruption-related offenses may well be unpopular with some states, particularly those that have resisted the inclusion of effective enforcement mechanisms in existing statutes. Thus, inclusion of corruption-related offenses may discourage these states from joining or cooperating with the treaty regime as a whole. These considerations make the decision to prosecute grand corruption a closer call and suggest that prosecutors should carefully select

¹⁹⁷ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 93 (1998).

¹⁹⁸ This assumes the high-cost ICTY model, rather than the cheaper hybrid approach, prevails. See *supra* note 97.

¹⁹⁹ Cf. Susan Rose-Ackerman, *Establishing the Rule of Law*, in *WHEN STATES FAIL* 185 (Robert I. Rotberg ed., 2004).

which cases get brought, when, and in what order. I will return to these strategic issues in Part III.

Given the massive suffering caused, the inadequacy of other remedies, and the potential benefits of international criminal prosecution, grand corruption seems to amount to a paradigmatic example of what should be considered an international crime. The existence of systematic criminal conduct causing devastating suffering to millions of people each year should be enough to at least put the possibility of prosecuting this conduct on the international criminal justice agenda. Crisis-focused international criminal tribunals have flatly ignored these harms. As noted, there remain strategic questions to consider before proclaiming that any such prosecution should be brought. In addition, prosecutors must obviously establish a legal basis for prosecution (a question I consider in the next section), and must also take into account a host of case-specific factual considerations before deciding to bring any particular case. But the failure ever to reach any of these questions—the categorical exclusion of grand corruption and other horrific long-term crimes—is understandable, given the historical roots of international criminal law, but ultimately difficult to defend.

C. The Doctrinal Basis for Tribunal Prosecution of Grand Corruption

Grand corruption cannot be prosecuted internationally without some legal basis. The ideal option would be widespread ratification of a new treaty, or an amendment to the ICC's Rome Statute, spelling out the elements of the crime. This would remove any doctrinal doubt and would send a clear and loud signal as to what conduct is prohibited—valuable in terms of fairness to defendants as well as potential deterrent and norm-shaping effects.²⁰⁰ Nonetheless, express codification is extremely unlikely for the indefinite future.²⁰¹ Even if enough states could be convinced to put an amendment or a new treaty into effect, many of the most crucial states—kleptocracies and money-laundering havens—would probably refuse to sign on, for the same political reasons discussed in the previous section.

Therefore, unlike other scholars who have advocated international prosecution of corruption crimes,²⁰² I rely exclusively on the current language of the Rome Statute. In cases with no link to mass atrocities or wars, the most plausible option is prosecution as a crime against humanity—specifically, under the category of “other inhumane acts” encompassed by Article 7(1)(k) of the Statute. I consider that theory here, and then turn to other possible theories that might work when corruption *is* linked to a crisis. Although present and future

²⁰⁰ See Marcus, *supra* note 21, at 279 (arguing for codification of famine crimes for similar reasons); see also *supra* note 116 and accompanying text.

²⁰¹ Amendments to the Rome Statute *cannot* be considered until 2009, and thereafter the process is extremely difficult. Seven-eighths of all states parties must ratify an amendment for it to go into effect, and any that did not do so would then have the option of withdrawing from the Statute entirely. See Rome Statute, *supra* note 55, art. 121.

²⁰² See *supra* notes 115–18.

ad hoc and hybrid tribunals might likewise be able to bring corruption cases under corresponding provisions of their statutes, I focus on the ICC as the most likely and most promising potential venue. I draw guidance from the existing body of international criminal law jurisprudence, however, which has principally been developed by the ICTY and ICTR.

Article 7(1) of the Rome Statute reads (emphasis added):

1. For the purpose of this Statute, “crime against humanity” means 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:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any [protected] group . . . in connection with . . . any crime within the jurisdiction of the court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The ICC’s Elements of Crimes, a separate document designed to “assist the Court in the interpretation and application” of the Statute,²⁰³ further defines crimes under paragraph (k):

- 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
- 3. The perpetrator was aware of the factual circumstances that established the character of the act.
- 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

²⁰³ Rome Statute, *supra* note 55, art. 9(1).

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁰⁴

Taken together and distilled into their essential ingredients, these texts suggest seven characteristics of Article 7(1)(k) crimes:

- there was an inhumane act;
- this act was “of a similar character” to any of the other acts listed in Article 7(1);
- the act caused great suffering, or serious injury to body or to mental or physical health;
- these consequences were intentional, in that the accused was aware of the factual circumstances giving rise to them;
- the act was part of an attack directed against any civilian population;
- the attack was widespread or systematic; and
- the accused knew that his act was connected to this attack.

If these elements are satisfied, the prosecution need not prove any additional elements constituting a specific kind of inhumane act. An “other inhumane act” constitutes, under long-standing customary international law, a crime against humanity in itself.²⁰⁵ Thus, to convict a person for an “other inhumane act,” an international criminal tribunal need not define “grand corruption,” or any similar term. The charge would simply be “other inhumane acts,” although the specific material facts would have to be pleaded in the indictment. The ICTY has held—correctly, in my view—that it does not offend the legality principle for courts to recognize new categories of “other inhumane acts” not specifically recognized previously under international law, since defendants are already on notice that it is unlawful as a general matter to undertake inhumane acts that intentionally cause great suffering or serious injury.²⁰⁶

Under some circumstances, grand corruption could satisfy each of these seven elements. First, the ICTY Appeals Chamber defines “inhumane act” as “an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity.”²⁰⁷ Applying this interpretation

²⁰⁴ Elements of Crimes, ICC-ASP/1/3, art. 7(1)(k), available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf (last visited Feb. 5, 2007) [hereinafter “Elements”].

²⁰⁵ See *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeal Judgement, ¶ 314 & nn.649–50 (2006); see also *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgement, ¶ 624 (2005).

²⁰⁶ *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeal Judgement, ¶¶ 313–18 (2006). In any event, the legality principle protects only conduct “reasonably believed to be lawful,” and thus cannot insulate corrupt transactions that violate domestic law in the corrupt official’s country, even if a lack of jurisdiction or political will inhibits effective prosecution. Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 822 (2005).

²⁰⁷ *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeal Judgement, ¶ 362 (2006).

to the Rome Statute, which already spells out the suffering/injury element, would render the term “inhumane” redundant. Notwithstanding the usual canon discouraging such constructions, this could be what the drafters intended; there is no clear evidence to the contrary in the drafting history.²⁰⁸ Under any theory, it is hard to imagine that a corrupt act knowingly inflicting great suffering or serious injury, such as extreme poverty and severe preventable health harms, on a civilian population could fail to be characterized as “inhumane.”²⁰⁹

Even if the “inhumanity” requirement is unlikely to exclude grand corruption, it may serve as an initial limiting principle by excluding many or all omissions—as opposed to affirmative acts—from criminal liability. Neither the Rome Statute nor the ICC’s Elements of Crimes (“Elements”) mention criminal liability for omissions, other than in the context of superior responsibility. Instead, the Elements refer repeatedly to “acts.” This does not necessarily mean that omissions will never give rise to responsibility; as noted above, the ICTY interprets “act” to mean “act or omission” in this context.²¹⁰ But even if the ICC follows the ICTY’s approach, omissions will only be subject to prosecution if they breach a legal duty.²¹¹ Because international law does not impose a general affirmative duty to assist those in need throughout the world, mere failure to give such assistance will not be a basis for international criminal prosecution.

The second statutory requirement for ICC prosecution is that the act be “of a similar character” to listed crimes.²¹² This provision was inserted to satisfy some delegates’ concerns that the crime was otherwise too vague.²¹³ Still, it is not a model of clarity: the listed crimes are disparate in character and the degree of similarity required is not specified. It bears noting that lack of a crisis nexus cannot itself be a disqualifying dissimilarity, for clearly systemic crimes like apartheid are among the listed acts. Indeed, *none* of the listed crimes specify that they must take the form of mass atrocities; only extermination might

²⁰⁸ See generally, e.g., <http://www.un.org/law/icc/docs.htm> (last visited Feb. 5, 2007) (collecting official documents related to drafting process); <http://www.un.org/icc/index.htm> (last visited Feb. 5, 2007) (collecting floor statements of Rome Conference delegates); <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited Feb. 5, 2007) (collecting documents relating to the Preparatory Commission process); No Peace Without Justice, The Preparatory Commission (Prep Com) for the International Criminal Court: Third Session, <http://www.npwj.org/prepcom/report2.shtml> (last visited Feb. 5, 2007) (reporting on the concerns raised by Preparatory Commission delegates concerning the definition of “other inhumane acts”).

²⁰⁹ For instance, “inhumane” is defined in a common dictionary as “lacking pity or compassion; cruel.” WEBSTER’S II NEW RIVERSIDE DICTIONARY 357 (rev. ed. 1996). In cases of egregious grand corruption resulting in destitution and widespread disease, it ought to be straightforward for the prosecution to establish a lack of pity or compassion so long as it can prove that the consequences were inflicted knowingly.

²¹⁰ See *supra* note 207 and accompanying text.

²¹¹ See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 663 (2004).

²¹² Rome Statute, *supra* note 55, art. 7(1)(k).

²¹³ See von Hebel & Robinson, *supra* note 71, at 102.

inherently constitute a mass atrocity, and even that can be committed over time through imposition of living conditions that make life unsustainable.

The worst acts of grand corruption share significant similarities with other listed acts. Like all of the listed acts, they are gross violations of fundamental human rights.²¹⁴ Like murder and extermination, they kill people, often in large numbers.²¹⁵ Like deportation, forcible transfer, and economic persecution, they inflict severe deprivation affecting the fundamental conditions of life. Like apartheid, kleptocracy is a governmental regime that systematically oppresses part of the population in order to benefit those imposing the system. Moreover, no categorical dissimilarity distinguishes grand corruption from all of the other acts. The most plausible distinction—the kleptocrat’s lack of active antipathy toward the victims—in fact makes no difference, for it is well established that crimes against humanity can be committed for purely self-interested reasons.²¹⁶ Indeed, the manufacturers of the deadly gas Zyklon-B were convicted and given death sentences for crimes against humanity based on their roles in the Nazi Holocaust, despite no evidence that they were motivated by hatred rather than profit.²¹⁷ While the requisite *intent* must be established (a point discussed further below), there is no motive element.

Third, it should by now be clear that some acts of massive corruption cause great suffering or serious injury. Those that do not should not be prosecuted as international crimes—one crucial distinction between garden-variety graft and grand corruption. There is no requirement that the suffering or injury be an *immediate* consequence of the crime, with no intervening causes, as in an act of violence.²¹⁸ Likewise, it is not necessary to identify the individual vic-

²¹⁴ I do not ground my argument for criminalization in a positive conception of social and economic rights, as other anti-corruption advocates have. Eboe-Osuji, *supra* note 116, at 124–27 (advocating “freedom from want”); Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 163 (advocating fundamental right to a “corruption-free society”); Ocheje, *supra* note 116, at 763, 766, 777–78; *see generally* Skogly, *supra* note 33 (arguing for criminalization of social and economic rights violations). I have declined to take this approach because I think it is politically far less viable, *see* Marcus, *supra* note 21, at 250, and because it is not necessary to make the case. A negative conception of the most universally recognized fundamental human rights—such as the right to life—will do just fine. *See* Pogge, *supra* note 10, at 720. One need not believe, for instance, that the state has a duty to provide life-saving medications to AIDS patients in order to conclude that a leader who intentionally steals funds that have been allocated for those medications has violated victims’ human rights. That leader has not merely failed to fulfill a duty, but has actively violated the right to life through his affirmative conduct. He has not merely failed to provide the medications; he has in effect stolen them.

²¹⁵ Neither murder nor extermination requires an affirmative act of violence. *See* Davidsson, *supra* note 33, at 192–94.

²¹⁶ *See, e.g.*, Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgement, ¶ 689 (2005).

²¹⁷ Trial of Bruno Tesch and Two Others, Brit. Mil. Ct. Hamburg 1946, in 1 LAW REP. OF TRIALS OF WAR CRIMINALS 93 (William S. Hein & Co., Inc. 1997) (1947).

²¹⁸ KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 127 (2001) (“Pillage, plunder, arbitrary destruction or expropriation of public and private property may cause ‘great suffering, or serious injury.’”); *see also* Davidsson, *supra* note 33, at 189.

tims of crimes causing collective harm; thus, the prosecution need not prove that any particular act of corruption caused any particular victim to suffer.²¹⁹

Fourth, the mental state element amounts perhaps to the most significant limit on the prosecution of grand corruption—and another important way to distinguish that crime from both ordinary graft and merely negligent or misguided policies.²²⁰ Article 7(1)(k) uses the word “intentionally.” The ICTY/ICTR Appeals Chamber has held that a consequence is “intended” when the accused deliberately undertakes conduct while knowing of a risk (or a substantial probability) that the conduct will cause the consequence.²²¹ This interpretation of “intent” is something close to the concept of recklessness in U.S. law. It is not clear, however, whether the ICC will follow that approach. Article 30 of the Rome Statute states, with respect to all statutory crimes:

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. . . .

It has been much remarked,²²² although not universally agreed,²²³ that this intent standard retreats from customary law by excluding recklessness or constructive knowledge or both. Still, it is not clear how restrictively the Court will interpret this language. The notion of the “ordinary course of events” seems to imply that the consequences need not be certain; rather, they must be what one would ordinarily expect. This is not necessarily different from the substantial probability standard.

To complicate matters, the Elements of Crimes concerning Article 7(1)(k) do not refer to the Article 30 standards at all. Instead they require “aware[ness] of the factual circumstances that established the character of the act.” Perhaps this language is meant somehow to incorporate the Article 30 standards,²²⁴ or

²¹⁹ See, e.g., Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgement, ¶ 434 (2005).

²²⁰ See Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgement, ¶¶ 36–37 (2002) (rejecting negligence as a standard for international criminal liability).

²²¹ See Prosecutor v. Tadić, Case No. ICTR-95-1-A, Appeals Judgement, ¶¶ 657, 659 (1999); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 251–54 (2004).

²²² See, e.g., CRYER, *supra* note 28, at 276–77; Davidsson, *supra* note 33, at 209.

²²³ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 164, 168–69 (Oxford 2003) (arguing that the consensus at the ICC negotiations was that the intent standard was meant to cover recklessness).

²²⁴ See Robinson, *supra* note 46, at 108.

perhaps it signals that Article 30 is inapplicable because, by specifying that other inhumane acts must be committed “intentionally,” Article 7(1)(k) “otherwise provided” for the applicable mental state.²²⁵

Given the placement of the word “intentionally” in Article 7(1)(k), the phrase “factual circumstances that established the character of the act” in the Elements must logically be read to refer to those circumstances that render the consequences the ordinarily expected result of the act. For example, consider a head of state who loots a billion dollars from the treasury through black-market transactions over the course of a few years.²²⁶ The relevant factual circumstances are those giving this conduct its devastating impact—the extremely poor population, pervasive threats of preventable disease, the cash-strapped government, and so forth. The mental state element is satisfied, under the Elements approach, if the perpetrator is aware of those facts—as a head of state surely would be.

The Article 30 approach merely adds a further requirement that the results be predictable to the perpetrator. Like all aspects of mens rea, this may be proven by inference from the circumstances.²²⁷ If a population is sufficiently vulnerable and a diversion of funds sufficiently large relative to the total amount available to serve that population’s needs, it is clear that great suffering or health injury will follow from the diversion in the ordinary course of events. This is especially true given that, in cases of systemic corruption over time, it is not merely a matter of prediction: a perpetrator can see the consequences of his crimes unfold even as he continues to commit them. It may well be that he does not know *which* individuals within the population will suffer, but that is so with many crimes against humanity—for instance, an accused who tells others to rape Tutsi women will not know who the individual victims will be, but is still liable for instigating rape.²²⁸

Thus, whether a corrupt act satisfies the mental state requirement depends on the relationship between the magnitude of the diversion and the underlying vulnerability of the population. This requirement provides another key distinction between ordinary graft and grand corruption. When a theft is minor in magnitude, it cannot be considered obvious to the perpetrator that great suffering will result from it. The same is true of larger-scale diversions that do not threaten especially vulnerable populations. A leader who stole a billion dollars in a wealthy country that could easily absorb that loss would be guilty of an economic crime—one stunning in magnitude, but not a crime against humanity. A theft of the same amount in a country in which a billion dollars amounts

²²⁵ See Rome Statute, *supra* note 55, art. 30(1).

²²⁶ In cases of repeated misconduct, one would not need to prove knowledge that *each* individual transaction, taken separately, would cause great suffering. See KITTICHAISAREE, *supra* 218, at 117 (citing *Kupreškić and Others* Trial Judgement, ¶ 622) (“Although individual acts may not be inhumane, their overall consequences may . . . be termed ‘inhumane.’”).

²²⁷ See Prosecutor v. Gacumbitsi, Case No. ICTR-2004-64-A, Appeal Judgement, ¶ 41 (2004).

²²⁸ See *id.*, ¶ 107; see also Davidsson, *supra* note 33, at 189 (citing Eichmann trial).

to five years' social services budget, in which median per capita income is less than a dollar a day and one-third of children die before the age of five from preventable diseases—that is a crime against humanity.

It might be complained that this imposes a double standard, but the standard is consistent. The magnitude of a crime is measured by the suffering it causes, not by an arbitrary dollar figure. International criminal justice cannot be blind to massive differences in circumstances. Notably, intent might be easier to prove, even with smaller amounts of money, if the diversion comes from a specified fund such that its consequences are more obvious. For instance, the theft of a million dollars from a childhood immunization or AIDS treatment fund will, in the ordinary course of events, cause deaths and great suffering.

The fifth requirement for prosecution under the Rome Statute is an “attack directed against a civilian population.” Notably, in the context of the Statute, this phrase does not imply malice against victims, as the colloquial meaning of either “attack” or “directed against” might imply. Rather, Article 7(2) specifically defines it as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

The first clause of that definition is unproblematic. In a true kleptocracy—that is, a government in which large-scale corruption is deeply embedded—a specific corrupt act will always be part of a broader pattern of corrupt acts. Much more significant is the “policy” aspect of this definition, which, according to the Elements of Crimes, requires “that the state or organization actively promote or encourage such an attack.” Bassiouni identifies the policy element as the critical “threshold” requirement distinguishing crimes against humanity from other forms of “mass victimization”—such as crime waves—that are not properly subject to international jurisdiction.²²⁹

It might be argued that illegal and covert corruption, consisting of an individual acting *against* the interests of a state, cannot constitute state policy. And this might be true in the case of ordinary corruption—say, an individual official embezzling funds from a relatively non-corrupt state. But a true kleptocracy, as the term implies, embeds corruption in its system of government. Where corrupt leaders dominate a state, such that corruption “fundamentally warps the decisionmaking process of government agencies,”²³⁰ in any realistic sense, the systematic exploitation of public resources for a kleptocrat’s private gain constitutes the state’s policy.²³¹

Furthermore, it is clear from the ad hoc tribunals’ case law and the ICC’s negotiating history that a policy need not be formalized to be prosecutable and

²²⁹ BASSIOUNI, *supra* note 39, at 245–46.

²³⁰ See Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 20 MICH. J. INT’L L. 451, 465 (1999).

²³¹ See Kofele-Kale, *Corruption-Free Society*, *supra* note 115, at 173.

can indeed be denied by the relevant authorities.²³² In any event, grand corruption often involves official state actions, such as the entry of public contracts, even though the illegal payments take place off the books. It is a prototypical example of abuse of “governmental institutions, structures, resources, and personnel”—the essence of state policy.²³³

Sixth, the “widespread or systematic” prosecution requirement is straightforward in the kleptocracy context. The requirement is disjunctive. In the cases of grand corruption that are worth pursuing, the acts will essentially always be widespread (and generally also systematic, provided the policy element is met).

The seventh requirement, the defendant’s knowledge of the nexus between his acts and the broader attack, will be easy to prove when it comes to kleptocrats themselves, who are surely aware of the context of systematic corruption. The requirement may be a more significant hurdle in prosecutions of other participants in corruption schemes, including those located overseas, who may claim ignorance. Whether such claims will succeed will depend on the facts—many overseas bribe-givers are repeat players who are well aware of the underlying circumstances. But the requirement may be a desirable barrier to prosecuting—as aiders and abettors or members of a joint criminal enterprise—actors whose roles are too minor to justify international prosecution.

There is thus a fairly strong case that the worst cases of grand corruption will satisfy each of these seven requirements and can be prosecuted as crimes against humanity, even with no link to crisis situations. When corrupt acts *are* linked to crisis situations such as armed conflict, as in the Sierra Leone and DRC cases,²³⁴ the doctrinal case may be easier. In such instances, corruption-related prosecutions would not necessarily need to rely on the “other inhumane acts” theory. Instead, war crimes prosecutions could be expanded to incorporate the underlying corruption that enables them, as well as, conversely, the kinds of corruption that are enabled by armed conflict, such as plunder and diversion of relief supplies. Some relevant crimes under international humanitarian law, listed in the tribunals’ statutes, include extensive, unlawful and wanton appropriation of property, plunder of public property, and willfully impeding relief supplies. In addition, those who profit from international crimes could be charged with the underlying offense, for example, persecution or murder, under modes of liability such as aiding and abetting or joint criminal enterprise.²³⁵

In at least some cases, corruption occurring in the context of other crimes or armed conflict will pose a comparatively easy case for international prosecu-

²³² See *Prosecutor v. Tadić*, Case No. IT-94-1-A72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 653 (Oct. 2, 1995); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 204–05 (2004); KITTICHAISAREE, *supra* note 218, at 98; Robinson, *supra* note 46, at 77.

²³³ BASSIOUNI, *supra* note 39, at 249; *see id.* at 257.

²³⁴ *See supra* notes 139–40 and accompanying text.

²³⁵ *See generally* William Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT’L REV. RED CROSS 439 (2001) (discussing such strategies).

tion—albeit one that has too often been ignored. There are precedents in the prosecution of German industrialists at Nuremberg and ICTY cases recognizing economic harm as a means of persecution.²³⁶ A detailed consideration of these questions—encompassing a wide range of legal theories and potential factual scenarios—is beyond the scope of this paper, but merits further inquiry.

III. REASSESSING PROSECUTORIAL STRATEGY IN LIGHT OF POLITICAL CONSTRAINTS

Several times in the preceding discussion, I have alluded to strategic considerations that may shape the decision whether, when, and how to prosecute non-crisis-related crimes. This Part addresses those issues directly, and modifies the case made in the rest of this Article for the expansion of tribunals' focus. Section A outlines the political constraints on international tribunals and the risks posed by prosecution of crimes such as grand corruption. Section B argues that historically, crisis situations have sometimes played a positive role in catalyzing widespread acceptance of new legal principles, helping to overcome similar political barriers. Section C sets forth, in light of these considerations, a two-part strategy oriented toward the eventual expansion of tribunals' exclusive crisis focus.

A. *Constraints on the Rapid Expansion of International Criminal Law*

If international criminal courts wish to participate in the progressive expansion of substantive criminal prohibitions, they are generally well advised to proceed gradually. This is for two reasons. First, fairness requires conformity to the legality principle, which means that criminal defendants must have been on notice at the time of the offense that their conduct was unlawful. Such notice can be provided by case law, but only if it proceeds incrementally enough that each defendant can be reasonably expected to have inferred the unlawfulness of his conduct on the basis of the precedents that existed at the time.²³⁷ This point is less crucial in the context of grand corruption, since as noted above the conduct in question is generally patently unlawful under domestic law, and moreover, the crime of "other inhumane acts" has long been established under international law.

More significant is a second reason: tribunals' legitimacy may be undermined if they are perceived to be engaging too nakedly in judicial legislation.²³⁸

²³⁶ See Andrew Clapham, *Issues of Complexity, Complicity, and Complementarity*, in FROM NUREMBERG TO THE HAGUE, *supra* note 28, at 37–39 (Philippe Sands ed., 2003); CRYER, *supra* note 28, at 41 (discussing abandoned plans for a "second IMT at Nuremberg . . . intended to prosecute the industrialists").

²³⁷ See Meron, *supra* note 206, at 822–23.

²³⁸ See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Law of War*, 59 VAND. L. REV. 1, 57 (2006); cf. Laurence Helfer, *Overlegalizing Human Rights*, 102 COLUM. UNIV. L. REV. 1832 (2002) (describing how judicial expansion of the provisions of human rights treaties caused a backlash that led three Caribbean states to exit the treaties).

The ICC in particular must be careful in this regard, since it is a new institution and remains controversial in many quarters, including the United States.²³⁹ Because its Statute does not establish universal jurisdiction over crimes committed in the territory of non-party states—nor does it bind non-parties to cooperate with investigation and enforcement—the ICC’s long-run effectiveness will be heavily contingent on its success in continuing to gain ratifications. Like the other tribunals, it will depend on international cooperation in investigating cases, capturing suspects, and enforcing judgments. For these reasons, the ICC Prosecutor might reasonably choose to focus in the early years on legally airtight cases relating to universally condemned atrocities, rather than risk losing a high-profile, envelope-pushing case, appearing ineffectual, discouraging ratifications, or antagonizing powerful states.²⁴⁰

ICC prosecution of grand corruption outside crisis contexts would probably be controversial. Nobody defends grand corruption, and, indeed, the new international treaties reflect considerable momentum toward addressing the problem more seriously.²⁴¹ However, the enforcement and ratification gaps in those treaties exist because of real political obstacles. Likewise, the fact that specific inclusion of corruption was never on the table in Rome, while proposals to include other systemic crimes like drug trafficking were shelved, suggests that ICC prosecutions of peacetime grand corruption might well take delegates by surprise. This is not to say the Court has no authority to try such cases. The “other inhumane acts” category was deliberately included in order to give the ICC the flexibility to reach crimes the delegates did not mention specifically. But it does warrant caution as a matter of political strategy.

B. Historical Role of Crises in Catalyzing Legal Change

The above-described political constraints provide a possible defense of international tribunals’ exclusive crisis focus—but only, in my view, as an interim step in the development of international criminal law. Crisis-focused litigation can help to overcome political barriers to the articulation and widespread acceptance of legal norms that can then be applied more broadly. Once an international crime has been articulated in one context, it is far more likely that it will be recognized in other contexts, for to do otherwise would invite charges of bias.²⁴² Conversely, courts and the international community may be reluctant to recognize grand corruption as an international crime if the question is initially put to them in a context that does not (albeit because of the blinders

²³⁹ See U.S. Dep’t of State, *Frequently Asked Questions About the U.S. Government’s Policy Regarding the International Criminal Court* (2003), <http://www.state.gov/t/pm/rls/fs/23428.htm>.

²⁴⁰ Cf. Patricia Wald, *Is the United States’ Opposition to the ICC Intractable?*, 2 J. INT’L CRIM. JUST. 19 (2004) (arguing that careful prosecutorial strategy in the early years could soften or reverse U.S. opposition to the ICC).

²⁴¹ See *supra* Part II.B.2.

²⁴² See CRYER, *supra* note 28, at 212.

put in place by the crisis mentality) seem to raise critical international interests.²⁴³

Crisis response has sometimes played an important and positive role in catalyzing the development of international law. An instructive example can be found in the history of international human rights, my treatment of which will necessarily be cursory. International protections of human rights were almost wholly lacking prior to the First World War.²⁴⁴ That war's horrors spurred the first tentative steps toward the creation of international instruments protecting individuals against state abuses, but these were extremely limited in geographic and substantive scope.²⁴⁵ Although it had antecedents in, for instance, the anti-colonial and anti-slavery struggles,²⁴⁶ the modern international human rights movement, and the conventional and customary legal regime it has produced, was born in response to the Nazi genocide:

Those atrocities definitively paved the way for a new understanding of the relationships between the individual, the state, and the international community. Never again could it be maintained that human beings were placed, by law, under the exclusive jurisdiction of their home state. It had been learned during the horrendous years from 1933 to 1945 that a state apparatus can turn into a killing machine. . . . The fate of the individual had definitively become a matter of international concern.²⁴⁷

Accordingly, the first major focus of international human rights advocates was on punishing the architects of the Holocaust (the Nuremberg trials) and on seeking to prevent its recurrence (through the adoption, in 1948, of the Genocide Convention). However, the movement soon expanded its concerns to encompass "ordinary" violations of human rights, notwithstanding the obvious obstacles to achieving international consensus on such issues at a time when, for instance, much of the United States remained racially segregated by law.²⁴⁸

Although the movement's aims were global, it progressed most rapidly on the continent devastated by the Nazi atrocities.²⁴⁹ After the non-binding Universal Declaration of Human Rights, passed in 1948, the world's first major, binding human rights treaty—the European Convention on Human Rights—was signed in 1950, just two years after the Genocide Convention. Some scholars have attributed its passage directly to the impact of the Nuremberg tri-

²⁴³ See BROOMHALL, *supra* note 40, at 25.

²⁴⁴ CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 6–16 (Oxford 2003).

²⁴⁵ *Id.* at 16–22.

²⁴⁶ See Mutua, *supra* note 148, at 205.

²⁴⁷ TOMUSCHAT, *supra* note 244, at 22. Mutua is right to note the inexcusability of the international community's failure to reach these realizations earlier, in light of the horrors of slavery and the "bone-chilling atrocities" of the colonial era. Mutua, *supra* note 148, at 211.

²⁴⁸ See TOMUSCHAT, *supra* note 244, at 22.

²⁴⁹ *Id.* at 30.

als in forming a new consensus on fundamental human rights.²⁵⁰ Other regional and global treaties followed, covering a broad range of civil and political rights and eventually social and economic rights—none of which were confined to crisis situations.²⁵¹

I do not mean to be overly sanguine. The proliferation of treaties and scholarship is not the same as effective implementation, and human rights are trampled every day. Still, in terms of development of the discipline of international law, the story just outlined provides a counter-narrative to Charlesworth's critique. That critique is powerful as applied to deliberately crisis-centered approaches to international law pedagogy, and to the interpretive and prescriptive errors commonly made by international lawyers in analyzing crises. Read more broadly as a statement about the overall priorities of international lawyers, however, it is oversimplified. Charlesworth acknowledges that crises catalyze legal change, but contends that by and large this is a bad thing, because principles developed in such contexts tend to be short-sighted and reductionist. But while this contention may certainly sometimes be true, it cannot readily be generalized. While international human rights lawyers certainly pay close attention to crises that threaten human rights, they also have invested vast amounts of energy in developing wide-ranging, forward-looking legal principles that regulate the relationship between individuals and the state on an everyday basis.

Moreover, it cannot simply be said that the latter phenomenon has come to pass in spite of the former. To the contrary, the relationship is causal. The response of the international legal community to the Holocaust crystallized certain shared principles, not just against genocide, but in favor of a robust conception of humanity, dignity, and freedom from oppression. The human rights movement cannot be considered a mere exception to a general rule. It is the rule, the dominant force that defines the development of international law over the past sixty years. Today all international lawyers live in the "age of human rights."²⁵²

²⁵⁰ Richard Overy, *The Nuremberg Trials: International Law in the Making*, in FROM NUREMBERG TO THE HAGUE, *supra* note 28, at 28–29.

²⁵¹ See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, 993 U.N.T.S. 3 (Dec. 16, 1966) (entered into force Jan. 3, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014, 660 U.N.T.S. 195 (Dec. 21, 1965) (entered into force Jan. 4, 1969); International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR (No. 50), U.N. Doc. A/9233/Add.1, 1015 U.N.T.S. 243 (Nov. 30, 1973) (entered into force Jul. 18, 1973) [hereinafter Apartheid Convention of 1973]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

²⁵² Theodor Meron, *International Law in the Age of Human Rights*, 301 REC. DES COURS I (2003); see generally LOUIS HENKIN, THE AGE OF RIGHTS (1990).

A transformation of this kind has not yet taken place in international criminal law. But it could—and, indeed, perhaps we can already see its outlines. The very establishment of the ICC as a permanent body is a significant step toward the systematization of international criminal law. This step was enabled by the prior successful establishment of the crisis-focused ad hoc tribunals, which articulated international legal principles and showed that international criminal courts could function effectively.²⁵³

As noted in Part I, the Rome Statute expressly includes numerous crimes that could readily be prosecuted outside crisis contexts. Indeed, *most* of the offenses it lists as crimes against humanity could be so prosecuted, including murder, rape, forced pregnancy, sexual enslavement, enforced sterilization, enforced prostitution, torture, apartheid, persecutions, enforced disappearance, and imprisonment. Some of those crimes had been listed in the statutes of the ad hoc and hybrid tribunals as well, but those statutes' temporal and geographic limitations on jurisdiction effectively ensured a crisis focus—the Rome Statute was the first to provide the possibility of prosecuting them internationally without that focus. As to the rest, with the exception of apartheid,²⁵⁴ the Rome Statute was the first binding treaty to define them as crimes against humanity.

These were significant developments,²⁵⁵ and they provide another historical example of the strategic benefits that framing problems in crisis terms can have. For instance, the Statute's broad-reaching provisions on sexual violence are the product of extensive advocacy by feminists whose arguments focused almost exclusively on sexual violence in armed conflict. During the 1990s, the period surrounding the establishment of the ICTY and ICTR and leading up to the ICC's establishment, a burst of scholarship²⁵⁶ and advocacy²⁵⁷ addressed the problem of rape in armed conflict. Advocates emphasized the special vulnerability that armed conflict and mass atrocity imposed on women, a fact illus-

²⁵³ See CRYER, *supra* note 28, at 57–58; Danner, *supra* note 238, at 56.

²⁵⁴ Apartheid was established as an international crime in the Apartheid Convention of 1973, *supra* note 251, but no one has been prosecuted for it outside South Africa. Shadrack B.O. Gutto, *Africa's Contradictory Roles and Participation in the International Criminal Justice System*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, *supra* note 33, at 22–23.

²⁵⁵ See BASSIOUNI, *supra* note 39, at 376–77.

²⁵⁶ See KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN (1997); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmeier ed., 1994); BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326 (1994); Theodor Meron, *Rape As a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993). This degree of scholarly attention to the problem was a new phenomenon, although neither the problem itself nor the legal prohibition of rape during war were at all new. See Meron, *supra*, at 425; ASKIN, WAR CRIMES AGAINST WOMEN, *supra*, at 18–95.

²⁵⁷ See, e.g., Doe v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (lawsuit brought on behalf of Bosnian Muslim and Croat rape victims); HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDA CONFLICT AND ITS AFTERMATH (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm>.

trated dramatically by the enormous numbers of rapes committed during the Yugoslavia conflict and the Rwandan genocide.²⁵⁸ Some specifically emphasized the differences between rape as a war crime and “ordinary” rape. Catharine MacKinnon—a scholar who cannot be accused of failing to take “ordinary” rape seriously²⁵⁹—wrote of the Bosnian conflict:

*This war is to everyday rape what the Holocaust was to everyday anti-Semitism. . . . This is ethnic rape as an official policy of war. . . . It is rape to be seen and heard by others, rape as a spectacle. It is rape to shatter a people, to drive a wedge through a community. It is the rape of misogyny liberated by xenophobia and unleashed by official command.*²⁶⁰

MacKinnon and many other advocates no doubt believed genuinely that wartime rape *was* a more serious offense or more widespread problem than peacetime rape; but this emphasis subsequently taken in the ICC negotiations was certainly also motivated in part by political strategy.²⁶¹ Emphasizing the uniqueness of rape in the context of war and genocide helped to make the provisions politically palatable to the Statute’s ratifiers, some of whom might have balked had they understood them to target what their language plainly also encompasses: widespread sexual crimes occurring in “ordinary” situations.²⁶² Now that that language is in the Statute, however, it could readily be applied outside crisis contexts.

The history of the human rights movement thus demonstrates that it is possible for crisis-based articulation of legal norms to play a powerful role in catalyzing the development of legal principles for non-crisis situations. And the history of the Rome Statute’s language demonstrates that similar strategies could pay off in the context of international criminal law. Still, however, as Part I demonstrated, the broad potential reach of the Statute’s language has been circumscribed by the ICC Prosecutor’s exclusive focus on armed conflict. If the ICC is to move beyond that focus in practice and not just on paper, a new strategy must be developed that takes into account the serious political constraints the Court faces. I turn to that strategy in the next section.

²⁵⁸ ASKIN, *supra* note 256, at 290; Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 71, at 358–59.

²⁵⁹ *See, e.g.*, MacKinnon, *supra* note 33.

²⁶⁰ Catharine MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN’S L.J. 59, 665 (1993) (emphasis added).

²⁶¹ Interview with Kelly Askin, Senior Legal Officer, Open Society Justice Initiative, in The Hague (July 12, 2006); *see also* Catherine MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 953 (2006) (“The less rapes are framed as mass atrocities, and the more they are framed as potentially wanted individual sexual interactions, the less courts may be willing to hold others responsible for them.”).

²⁶² Askin Interview, *supra* note 261. The negotiation of some of the gender crimes provisions already involved significant controversy. *See* Steains, *supra* note 258, at 364–68, 371–75.

C. *Strategic Conclusions*

In Part II.C, I outlined possible doctrinal bases for prosecution of grand corruption *within* crisis contexts as well as outside of them, observing that the former might provide fewer legal hurdles. The discussion in this Part suggests that crisis-linked corruption prosecutions might also face fewer *political* hurdles. It also points to a promising strategy: prosecutors could push initially for recognition of the crime when linked to wars or atrocity, and in subsequent cases work toward its application to instances lacking such a nexus. That is, prosecutors could seek to establish the precedents for future international (or domestic) prosecutions of non-crisis-linked grand corruption by first including corruption-related charges in cases brought for other crimes against humanity or war crimes.

Crisis-linked prosecution of corruption-related offenses may be a real possibility in the foreseeable future. For example, the head prosecutors of both the ICC and the Sierra Leone Special Court have made public references to the international criminal responsibility of participants in the conflict diamond trade, although no cases have yet been brought.²⁶³ Prosecutions like this could pave the way for future prosecutions of similarly catastrophic grand corruption unlinked to wars and mass atrocities.

The case for proceeding slowly is especially strong in the context of grand corruption, in comparison to many other systemic crimes. Grand corruption is not listed specifically in the Rome Statute. It has never before been prosecuted as an “other inhumane act”—indeed, it has never been prosecuted by any international tribunal in any context, whether crisis-linked or otherwise. In addition to the lack of legal precedents, grand corruption also does not fit neatly into most people’s paradigms of the kinds of acts that constitute international crimes; it lacks not only a crisis nexus but also a direct connection to physical violence. These problems make the short-term political obstacles to international prosecution relatively significant.

In contrast, a large number of other non-crisis crimes *are* listed specifically in the Rome Statute, and acts materially identical to them have already been prosecuted by other international tribunals, except in crisis contexts. For instance, as discussed above, prohibitions on rape and several other sexual crimes are codified in the Rome Statute, and many of the issues associated with them have been litigated. The ICTY and ICTR have entered numerous convictions in rape cases.²⁶⁴ The prosecution at the Sierra Leone Special Court has likewise confronted sexual crimes, including forced marriage, in the context of

²⁶³ Crane, *supra* note 140; Karl Emerick Hanuska, *War Crimes Court Eyes ‘Blood Diamond’ Buyers*, REUTERS, Sept. 23, 2003. The ICC prosecution has continued to emphasize the responsibility of corrupt actors in supporting war crimes, but it has so far taken the role of supporting and encouraging domestic prosecution of such actors. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 1004–06 (2007).

²⁶⁴ See generally Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals*, HUM. RTS. BRIEF, Spring 2004, at 16.

armed conflict.²⁶⁵ But similar crimes occur on a systemic basis daily. For instance, high-level government officials often facilitate and profit from the widespread trafficking of women and girls who have been forced into prostitution.²⁶⁶ I do not propose to address this issue in detail here, but it seems—given the codified prohibitions of rape, forced prostitution, enslavement, and sexual slavery—that characterization of such facts as crimes against humanity would be an easy theory for the Prosecutor to defend, both legally and politically.²⁶⁷

In the context of sexual crimes, therefore, the first steps in the gradual process that I advocate have already been taken. In crisis-linked cases, the relevant legal norms have already been established and gained widespread acceptance. Thus, while postponing pursuit of non-crisis-linked grand corruption, the ICC Prosecutor could begin immediately to investigate crimes that take place outside crisis contexts but that otherwise bear all the hallmarks of crimes that have already been prosecuted in international tribunals. In addition to sexual slavery, these could include, for instance, the systematic murder or torture of political opponents practiced by many of the world's most brutal regimes. Prosecution of similar crimes in crisis contexts has already firmly established the principle that these acts constitute crimes against humanity. There is now no reason not to apply that principle outside the context of wars and mass atrocities.

IV. CONCLUDING REFLECTIONS

At this stage in its development, international criminal law remains in practice an exclusively crisis-focused discipline. Ad hoc criminal tribunals have been limited to particular wars and mass atrocities as a jurisdictional matter, and the ICC—despite its much broader authority—has so far been similarly limited as a matter of prosecutorial discretion. International criminal law scholarship has broadly taken this crisis focus for granted.

Although fairly easily explained as a historical matter, this exclusive focus on war crimes and mass atrocities is difficult to defend. The world's worst regimes commit egregious international crimes on a daily basis, some of which are at least as serious in their consequences and scope as many of those that have given rise to international trials. And, at least in some cases, international tribunals are probably better suited institutionally to respond to such systemic crimes than they are to respond to emergency situations.

The strategy that I have urged for redressing this problem is relatively modest. I do not suggest that tribunals should stop punishing crisis crimes, nor

²⁶⁵ See Michael P. Scharf, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity*, in *AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 33, at 77.

²⁶⁶ See, e.g., Vesna Perić Zimonjić, *Government Officials in Sex Trafficking Ring Arrested*, *INDEPENDENT* (London), Dec. 6, 2002; Donna M. Hughes, *The Demand: Where Sex Trafficking Begins* 1–2, http://www.uri.edu/artsci/wms/hughes/demand_rome_june04.pdf (last visited Feb. 5, 2007).

²⁶⁷ See Cole, *supra* note 33.

that they should turn suddenly in unprecedented directions. Rather, I argue only that prosecutors should be creative and open-minded in the cases they bring, looking everywhere, not just in war zones, for the circumstances in which the tribunal's involvement can do the most good. In doing so, they must consider the political constraints on the tribunal's effectiveness, and should therefore err on the side of a gradual strategy that applies legal norms to new, non-crisis situations only after they have already been firmly established in the traditional contexts of wars and mass atrocities. Moreover, it is critical that crisis-derived doctrines, practices, and procedural mechanisms not be applied blindly or inflexibly to human rights violations in other contexts—rather, they must adapt and evolve.

Notwithstanding the tribunals' current exclusive crisis focus, history tells us that an evolution in the role of international criminal law is definitely possible. The establishment of the ICC itself signifies the "normalization" of international criminal law as a permanent part of the legal landscape. Although the ICC has so far taken an approach that closely tracks the crisis orientation of earlier tribunals, it is just getting off the ground, and could easily diverge from that path. In the long run, one possibility is a division of responsibilities, in which ad hoc or hybrid tribunals continue to be created to deal with the worst crises, while the ICC would embrace a substantially broader mandate. It is too early to predict, and too early to move too quickly in that direction. But it is not too early to lay the foundations.