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ETHICS OF SCALE: RELOCATING POLITICS AFTER LIBERATION

Rethinking Africa through its Exclusions: The Politics of Naming Criminal Responsibility

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Abstract

The African focus on the International Criminal Court (ICC) rule of law movement is far from incidental. It has everything to do with the identification of particular crimes as of gravest concern to humanity, crimes which, when viewed in political terms, foster cooperation by the majority of state parties. This article explores the workings of a global elite of liberalist lawyers and policy makers engaged in establishing what particular types of violence are considered part of an international moral and political agenda. I argue the ICC's emphasis on "command responsibility," conceptions of "justice," and human rights overlooks colonial history and its continuing postcolonial effects and the geo-political implications of resource competition. [Key Words: criminal possibility, transnational legal processes, command responsibility, violence in Africa, Sudan]

In the past ten years, significant scholarship on sub-Saharan Africa has begun to explore contemporary life in relation to the end of the Cold War, European integration, and Africa's new trade alliances. This article focuses on the transformations precipitated by the reconfiguration of sub-Saharan Africa's treaty-based management obligations in the context of these geopolitical shifts. The implications of these changes are monumental as they shape what constitutes the domains of international versus national concern and how controversial issues are relegated to the responsibility of the African nation. Those issues relegated to national and bi-lateral scrutiny have ranged from drug trafficking to arms trading and have been dealt with using a range of mechanisms. The post-violence truth and reconciliation commissions (TRCs) of the late-20th century provided a space for victims to narrativize their suffering while also providing an opening for peaceful transitions in post-violence contexts (Wilson 2001, James 2010). Under TRC mechanisms in South Africa, Rwanda, Sierra Leone, and Morocco, a range of persons claiming "victim" status developed discourses through which they articulated their losses and avenged their anger within these national domains. This was the human rights path for recourse in the 1980s in much of Latin America and the 1990s in Africa. However, by the turn of the new century, the exponential growth of international courts surpassed that of TRCs.

The challenge of how we understand "justice" through international jurisprudence is one of the most controversial of our time. At the heart of this challenge are questions about how and when to mobilize international, regional, and local justice mechanisms. When should International courts, regional courts, national or local traditional courts intervene? And what crimes should be the subject for their intervention? Most critical to the controversy, especially in sub-Saharan Africa, is the fact that the new International Criminal Court (ICC), established to bring those responsible for the most serious international criminal offenses to justice, is focusing its first cases in sub-Saharan Africa. However, this focus is proceeding with inadequate attention both to the consequences of its jurisdictional intervention, its less than ideal timing with the potential of disrupting peace talks underway,¹ and the conditions of possibility in which it is some crimes and not others, some commanders and not others that are under the scrutiny of the ICC. Instead, the ICC's focus on mass violence draws not on "forgiveness and transition," like earlier TRCs, but on arresting and punishing those responsible for killing or com-

missioning the death of the most explicit forms of violence to humanity. This is the focus for addressing violence in particular sites in Africa today. It is the individualization of criminal responsibility through international adjudication that has provided the language for avenging victims and for articulating justice, writ large.

This attention to individualized responsibility and guilt draws on Western liberalist thought and its construction of self-reflective images of justice and freedom for all of humanity. In doing so, it does not allow for a rethinking of the root causes at the core of violence in sub-Saharan Africa, or for an interrogation into the disparity of state power between those under the jurisdiction of the Court (Uganda, the Democratic Republic of the Congo) versus those outside its reach (the United States, China, Japan, India, Pakistan, for example). What prevails instead, is the discourse of liberty, freedom, and human rights—articulated as the mission of the Court. As such, liberalism, popularly identified as a political doctrine committed to maximizing individual liberty balanced against a state, provides the framework through which such forms of justice operate. And command responsibility is providing a new, although contested, moral economy of victim's rights writ large. At the same time, however, the drafting of ICC crimes has left room for public differences over which crimes should be punished by the court (e.g. arms trading and drug trafficking) and why some crimes—but not others—have been assigned to the court for adjudication. This is the focus of the article. I examine the politics of vying for the sovereign management of resource-rich regions, such as Sudan's oil fields, as a way to rethink the efficacy of assigning individual criminal responsibility to a few agents and not examining the larger context of enabling crime: aiding and abetting the Sudanese government's violent military and their mercenaries through the sale and export of arms. As I show, the management of Africa's violence within a new sphere in pursuit of international justice is directly connected to the management of postcolonial African resources and to Europe and America's new transnational economies. In this way, my intervention expands upon this special volume's interest in re-examining Africa in light of the relationship between "neoliberal political economies and postcolonial life" (Shipley: this volume). Cases before the ICC involve significant struggles over resources, struggles that are articulated through local histories, yet are often recast exclusively as ethnic and religious violence. Yet, economic issues integral to these cases also include the

unequal distribution of wealth and the failures of the state to provide what Jim Ferguson (1999) has called “expectations of modernity.”

One result of the burgeoning power of international justice is the shifting definition of criminal responsibility and its exercise through the retooling of state power. The problem is that where there are mass struggles over management of resources and their control, reassigning guilt neither ends violence nor captures the complicity of multiple agents involved in the making of war. How are we to extrapolate the meaning of criminal responsibility for violence interpolated on a world stage, and then justice itself, when the causes of violence are rooted in histories of colonial subject formation, contested governance and resource ownership—all features contributing to the ongoing conflict in so many of the recent African wars? The African focus on the ICC rule of law movement is far from incidental. It has everything to do with the identification of particular crimes as those of gravest concern to humanity, crimes which when viewed in political terms, foster an agreement of cooperation by the majority of state parties. In this way, this article explores the workings of a global elite of liberalist lawyers and policy makers engaged in establishing what particular types of violence are considered part of an international moral and political agenda. I argue that the ICC’s emphasis on *command responsibility* through conceptions of “justice” overlooks two important features of conflict in Africa: 1) colonial history and its continuing postcolonial effects; 2) the geo-political implications of widespread resource competition and the resultant interest of more powerful nation-states. Rethinking these formations must involve rethinking Africa in a neoliberal context in which we detail the histories and politics of internationalism at play in the making of human rights/rule of law interventions. Given these realities, I depart from assumptions about the universality of human rights and theories that insist upon the spread of the rule of law as simply a matter of law internalization. Most studies of the ICC do not examine the *a priori* processes that determine which crimes are to be pursued, what selection process will be used for their determination and codification, and ultimately, what factors are contributing to the current conditions in which it is African countries—exclusively—that are under the scrutiny of the ICC.

The *rule of law* becomes the central mechanism for adjudicating such domestic issues. I ask what the shift to the rule of law means and the way the rule of law is being applied in the African context in the wake of the

collapse of the former Soviet Union and what these changing issues mean for understanding what I call the *tribunalization of African violence* (Clarke 2009). An approach such as this that interrogates the expansion of the rule of law campaign in sub-Saharan Africa requires asking why it is Africa and not Europe, the Sudan and Uganda and not the United States, that are subjects of the ICC. In other words, rather than simply asserting the need to implement human rights norms, asking “why Africa” and in what context, allows us to focus on the ways that human rights principles travel; how they are transmitted, propelled, anchored; and, in the end, how they bury the normative political apparatus that constitutes them as distinct. Recasting criminal responsibility in this way forces us to examine the factors that facilitate and define human rights violations in the Sudan. We must evaluate whether ICC’s issuance of an arrest warrant for Sudan’s President Bashir at the expense of state destabilization, risking further violence, is the best plan of action in a region that has suffered extreme violence and displacement of its citizens for over a decade.

As the world’s first permanent court with a specific jurisdiction to prosecute individuals who are responsible for genocide, war crimes, crimes against humanity, and crimes of aggression, the ICC has spent the first few years of its existence involved in controversies resulting from two central areas of debate: 1) the primacy of international law over national law, or the preferencing of international criminal prosecutions over concessions to national amnesties or truth commissions, and 2) public disagreement over the reassignment of the guilt of thousands of people to a single chief commander and a few of his top aides. The inherent challenges are especially acute in contexts where a range of other justice approaches carried out alongside the threat of prosecution might represent a more effective peace oriented process in war-torn areas. For at the intersection of global and more circumscribed legal formations are culturally and politically constituted conceptions of justice that shape definitions of crime as well as the ways that people express their understanding of appropriate forms of recompense. Here, ethnographic inquiry can help to theorize how the imbrication of multiple legal forms shapes people’s understandings of “justice,” how they are historically constituted and articulate their place in a shifting global political economic framework, and how they act upon these understandings. For example, how is the uneasy confluence of approaches to justice made meaningful in the interstices of everyday life? And what are the implications of international justice for individuals’

“material realities” and “bodily practices” (Shipley, this volume). Jean Comaroff’s *Body of Power, Spirit of Resistance*, published in 1985, examined how the rule of law under apartheid created a set of lived forms that attempted to erase the violence of missionization and colonial over-rule. Local actors negotiated the complexity of consent and resistance in embodied forms. The contemporary politicized focus on legal discourse emphasizes individual culpability over historical structure and collective morality. The changing nature of the rule of law in Africa—and the need for a genealogy of legal discourse—shows the ways that the 21st century is differentiated from the epoche of high apartheid through shifts in institutions of governmentality.

One result of the burgeoning power of international justice is the shifting definition of criminal responsibility and its exercise through the retooling of the statecraft. This retooling has involved the reconfiguration of new forms of governance that emerge as multiple actors work toward managing what constitutes “justice” beyond the nation-state and through the reclassification of individual culpability. Known in international criminal justice circles as *command responsibility*, this reclassification provides supranational technologies of control over violent crimes committed under the jurisdiction of the Rome Statute. It serves as a critical domain for assigning guilt and, as used in new internationalist realms, should also be seen as representing a new form of governance for producing the “spectacularization of justice” (Clarke 2009). The problem is that where there are mass struggles over the management of resources and competing forces vying for their control, reassigning the guilt of thousands of people to a single chief commander and a few of his/her top aides neither ends violence nor captures adequately the complicity of multiple agents involved in the making of war. In most of the Africa-based cases, the basis for “justice” in war-torn regions is founded in the grassroots call for brokering peace first and then setting in place post-violence structures for rebuilding. Yet, how are we to understand “justice” in 21st century Africa when notions of violence and related criminal responsibility are embedded in shadows of causality that presume assigning guilt to a handful of actors will address social injustice? It is crucial to recognize the root causes of post-colonial African violence and long-term conflicts as underlain by histories of colonial subject formation, contested governance and boundary-making, foreign resource extraction, and endemic poverty. But from the ICC’s perspective, this backdrop has no adjudicative relevance in

decision-making. Instead, the unproblematized consensus is that African cases targeting high-ranking African leaders should be the first before the court and this is, therefore, where the ICC has put much of its investigatory and prosecutorial energy. In all ICC-identified situations in sub-Saharan Africa, the problem for the prosecutor has involved not only the admissibility of certain types of evidence collected under agreements of nondisclosure, but also the legitimacy of assigning to a handful of people the murders committed by thousands.

The African focus of the ICC is far from incidental. In fact, it has everything to do with the identification of which crimes are of the gravest concern to humanity. For they are also crimes that, when viewed in political terms, foster an agreement of cooperation by the majority of state parties. Because the majority of resource wars in progress were African-based, it became clear to key leaders that related cases would not be pursued in the West. In this way, a global elite of liberalist lawyers and policy makers are engaged in setting the moral and political agenda for addressing violence. Setting these terms involves merging morality and political economy, and it involves the selective process of defining criminal responsibility in very narrow terms. Given these realities, I depart from assumptions about the universality of human rights, or theories that insist upon the spread of the rule of law as simply a matter of norm internalization (Koh 1998), but that do not examine the *a priori* processes that determine which crimes are to be pursued, what selection process will be used for their determination and codification, and ultimately, what processes led to the conditions in which it is African countries—exclusively—that are under the scrutiny of the ICC.

The vast and growing international justice literature has tended to emphasize the expansion of jurisdiction and the emergence of a new rights agenda without much attention to the particular practices that make some new norms possible but not others (Henkin 1990, Bass 2001). This process has not been a unidirectional, top-down, Western, hegemonic imposition; rather, it has involved a widespread collaborative “consent” of the majority of world states in which particular rules have come to represent domains of acceptability. In this context, I explore circulating local knowledge forms and how decisions that may sometimes be seen as unconnected, following Lieba Fairer (2009), “come into productive relation” with other knowledge forms to yield social realities that are highly political, though not accidental.

Genealogies of Criminal Responsibility: Selecting the Crime of the Rome Statute

As of the fall of 2008, the ICC has pursued investigations in four regions: the Sudan, Uganda, The Democratic Republic of the Congo (DRC), and the Central African Republic (CAR). In the emergent corpus of human rights-driven international law, the current trend requires states to prevent and punish various crimes against humanity and to restrict the space within which national amnesties can emerge through TRCS or local justice mechanisms (Laplante 2007). Yet all four ICC investigations raise critical questions about when and under what circumstances the independent prosecutor of the ICC should intervene in national contexts. Does national reconciliation alone constitute sufficient judicial resolution? Are there other mechanisms for achieving justice for victims? And how do interventions such as those of the ICC inform the way that individuals in the Sudan understand and experience justice? Focusing on the Sudan, we see a range of challenges having to do not only with the rising power of international bodies, but also with the gap in the way that criminal responsibility is understood.

In May 2007, the Prosecutor issued arrest warrants against two Sudanese men and, with the support of the United Nations and the UN–African Union force in Darfur, the Prosecutor hopes to execute arrests. On June 1, 2005, the lead Prosecutor for the ICC, Luis Moreno-Ocampo, “decided to initiate an investigation in relation to the crimes committed in Darfur.” He hoped to engage the ICC in prosecuting a small number of top officials for the genocide, systematic torture, enforced disappearance, rape, destruction of villages, and pillaging of households—actions that appear to have led to the forced “displacement of approximately 1.9 million civilians.”² State officials in Sudan have signed the Rome Statute of the ICC; however, its governing bodies have not yet ratified it through their executives. The position of the Sudanese officials, therefore, is that since Sudan is not yet among the official States Parties of the ICC, it is not bound to relinquish jurisdiction to the court. Although the Sudanese government has insisted that it will not engage in the extradition of its citizens to be adjudicated in “foreign” courts, in keeping with UN Security Council Resolution 1593, the government has established a Darfur Special Criminal Court with its own rules, jury, and venue to adjudicate cases related to the Darfur crisis.³

In July 2008, however, the Prosecutor presented evidence that the president and commander in chief of the Sudanese armed forces, Omar

Hassan Ahmad al-Bashir, had planned, ordered, and commissioned the crimes of genocide and crimes against humanity, through his alleged recruiting and arming of the Janjaweed militia, known to have inflicted bloodshed in the region for more than five years. After the UN Security Council referred the case to the ICC, a warrant for al-Bashir's arrest was officially issued on March 4th, 2009 citing ten counts of genocide, war crimes, and crimes against humanity. In defiance, al Bashir has responded by ejecting aid workers from the country, setting conditions for controversy and desperation. Until early March 2009, there were more than 26,000 peacekeepers, AID organizations, embassies and UN installations in the country. However, al Bashir's indictment has also put significant pressure on the party in power, the National Congress Party, which is concerned that this absence of international support might produce a violent Islamic response and that increased tension along the Sudan-Chad border might lead to political destabilization in the region as well as in southern Sudan. The ICC rule of law movement is being shaped by what Mark Goodale (2006, 2007, 2008) has referred to as *technocratic instrumentalities*, that is forms of practices that are producing instruments for the management of human rights that, in this case, have evolved through various forms of contestation, state interests, and justice-making initiatives. As I show, it has also involved particular genealogies of criminal possibility in which there are particular sets of histories and negotiations that have put in place the possibility for normalizing some crimes as adjudicable by the world community and not others, in some temporalities and not others.

Such realities in the shifts in understanding Africa in the contemporary world requires that we rethink postcolonial adumbrations in neoliberal terms—terms that entail the mapping of new regionalisms and redrawn contours of African subject making, the making of victims, the making of perpetrators, the making of a moral economy of humanitarianism. This rethinking requires that we also rethink Africa's complex fields of power—the power of naming, classifying, and omitting categories that are shaping the management of daily life in various regions on the African continent. This power of naming and codifying law is not without significance. Africa—a continent with states struggling to exist as members of a world community—requires that we understand its plights also in relation to the power to classify that constitutes criminal responsibility in the first place. It demands that we rethink the meaning of Africa—its people, its representation, its histories and the ways that its moral economies buck

up against that of rule of law. In doing so, we consider some of the changing modalities of sub-Saharan African governance that have accompanied various forms of political liberalization in sub-Saharan regions.

The ICC was formed with the signatory power of 120 nation-states in support of the Rome Statute of the ICC, and its eventual ratification by 60 of the 120 (Schabas 2004:18, 20). By July 1, 2002, the ICC had entered into force (Schabas 2004:19), asserting that those states that had both signed and ratified the statute had placed themselves, and any of their nationals (especially high-ranking officials) deemed responsible for large-scale atrocities, under the jurisdiction of the Court.⁴ With its formation, the Court became the first permanent international body empowered to adjudicate individuals for four categories of offense: war crimes, the crime of genocide, crimes against humanity, and the crime of aggression (when defined).⁵ The statute, a comprehensive text that established the ICC and determined its composition and function,⁶ borrows its presumptions of criminal liability from precedents established at the end of World War II that address the aftermath of violence (Gurule 2001-2:2-3; Schabas 2004). The crimes selected for inclusion in the ICC's jurisdiction were the result of several years of negotiation.

The original 1954 version of the Code of Offences was based on the laws and legal principles codified in the Geneva Conventions (1864–1949) and the Nuremberg War Crimes Trials (1945–1949).⁷ Later versions of the draft continued to incorporate laws and principles based on treaties, tribunals, and customary laws covered under *jus cogens* rather than to codify new practices into the statute. In 1981, the International Law Commission (ILC) resumed its work on the draft “Code of Offences against the Peace and Security of Mankind” (hereafter, Code), at the request of the United Nations (UN) General Assembly.⁸ By 1989, representatives from Trinidad and Tobago requested that the ILC resume the process of establishing an international criminal court to deal with the major drug-trafficking issues in the region.

Over the next few decades, however, the process of creating the ICC passed through several phases of negotiation and refinement. The ILC used government reports in the drafting process to create the comprehensive Draft Statute for an International Court. In 1994, it presented a draft for the establishment of the ICC to the UN General Assembly, which convened the Preparatory Committee to advance the process the next level.⁹ The Preparatory Committee met six times over the course of two

years (1996–1998), during which time it gathered feedback from national delegates, government reports, NGOs, and intergovernmental organizations. Once the revisions were completed, the Code was presented to a diplomatic convention and ultimately resulted in the Rome Statute of the ICC in 1998.

The UN General Assembly established another Preparatory Commission to review and refine the document through the adoption and ratification process. This commission convened ten times between 1999 and 2002 during which time it prepared the Rules of Procedure and Evidence and the Elements of Crimes for the Court.¹⁰ At the forty-third session of the ILC in 1991, the commission adopted a draft Code, which defined the following crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing, and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and willful and severe damage to the environment.¹¹

In 1995, the Special Rapporteur omitted six of the twelve crimes in the subsequent draft created at the forty-seventh session. The omitted crimes included colonial domination and other forms of alien domination; apartheid; recruitment, use, financing, and training of mercenaries; willful and severe damage to the environment; international terrorism; and illicit traffic in narcotic drugs. The Special Rapporteur presented several justifications for the omission in a topical summary report to the UN General Assembly. If the court were to gain universal acceptance among nations, it would have to avoid crimes that were too controversial or widespread.

A number of delegations expressed support for the Special Rapporteur's recommendation to limit the list of crimes against the peace and security of mankind to those which were difficult to challenge—namely, acts that were so serious, they would unquestionably fall into the category. Many expressed the view that the commission needed to strike a balance between legal idealism and political realism, and the Special Rapporteur's approach was commended as appropriately leaning toward the latter, as likely to facilitate the work of the committee and as justified given the lack of consensus on certain crimes in the draft code. Bearing in mind that the aim of the Code was to make possible the prosecution and punishment of individuals who had perpetrated crimes of such grav-

ity that they victimized humankind as a whole, it seemed sound to reduce the list to a “hard core” of crimes, making it easier for the draft Code to operate in the future, possibly in conjunction with a permanent international criminal court.¹²

The topical summary also stated:

(t)his restrictive approach would avoid devaluing the concept of crimes against the peace and security of mankind, that crimes incapable of precise definition or which had political rather than legal implications should be left out and that the six crimes proposed for deletion, however reprehensible, had no place in the Code and could only impede the preparation of a generally acceptable instrument.¹³

Those in support of the omissions presented specific justifications for the exclusion of the crimes, such as the claim that colonial domination no longer existed and was therefore not an issue that required redress. The opposing opinion—or those who did not favor omissions—argued that:

recent scientific progress had led to the opposite conclusion, and that, for example, the exploitation of new sources of wealth was expected to be reserved for a few countries having the requisite financial and technical resources. It was also observed that, while most of the crimes which the Special Rapporteur had proposed for deletion reflected practices that no longer existed, deterrence considerations justified the inclusion in the Code of practices which might reappear.¹⁴

Opponents of the omissions were dissatisfied with the outcome of the debate and suggested it should continue at greater length. They argued that these crimes “constituted serious offences against the human conscience and threats to the peace and security of mankind”;¹⁵ therefore, “there was no justification for excluding from the draft Code serious crimes such as intervention, colonialism, apartheid, mercenarism and international terrorism.”¹⁶ In contrast, those who supported omissions argued with the Special Rapporteur as follows:

the Special Rapporteur had been obliged to select the incontrovertible crimes to be included in the Code on the basis of the reserva-

tions or views of a small number of States, which were not representative of the international community's position, since the majority of developing countries had failed to submit comments on the draft articles adopted on first reading.¹⁷

Additional justifications made for excluding particular crimes included "the view that the disappearance of the symptoms of apartheid was no reason for apartheid to be excluded from the Code, which should include acts because they were criminal in nature and not exclude them because they were no longer likely to occur."¹⁸

The counterargument to this position argued that:

Although apartheid as such had ceased to exist, the problem of "institutionalization of racial discrimination" still persisted in some parts of the world and that consideration should be given to the Special Rapporteur's proposal to include a general provision that would apply to any system of institutionalized racism by whatever name in any State. It was suggested that consideration should be given to including not only racial discrimination, but also economic, political and cultural discrimination as a crime. It was also suggested that the continued existence of situations of institutionalized racial discrimination should be addressed as systematic violations of human rights rather than as a separate crime.¹⁹

Later debates regarding terrorism and drug trafficking occurred during the Preparatory Committees. For example, India and the Russian Federation proposed the inclusion of acts of international terrorism based on widespread and vast destruction that result in serious cases. Representatives from Austria, Sweden, Malaysia, the Republic of Korea, the Netherlands, and the United States argued that treaty-based crimes, such as terrorism, should be adjudicated at the national level. The representatives from Lebanon, Pakistan, Libya, and Qatar emphasized the distinction between terrorism and struggles for self-determination and national liberation. In particular, the representative from Pakistan raised the point that "colonial and occupying powers had always sought to suppress liberation movements by designating their activities as 'terrorist.' Foreign domination itself was a form of terrorism."²⁰ Ultimately, after decades of debate, the crimes that would be covered under the

jurisdiction of the Rome Statute were reduced from the twelve previously defined in 1991 draft to four. The result was that only “the most serious crimes” of concern to the international community were to be included as admissible.

In the end, the crimes classified as the “most serious” were those that involved mass death and widespread killing of such gravity that they were threats to peace and security of the international community. Thus, the crimes that came to occupy the moral and legal concerns of the Court were those that involved explicit forms of mass violence—akin to the forms of violence being perpetrated in sub-Saharan Africa and Latin America at the time. As of the adoption of the Rome Statute for the ICC in 2002, the crimes under its jurisdiction as outlined in Articles 5 to 8 included genocide, war crimes, crimes against humanity, and the crime of aggression.²¹ These crimes are managed by the ICC as an independent institution rather than by individual states *per se*.

With their focus on the individualization of criminal responsibility (Art. 25), those engaged in the ICC have succeeded in operationalizing command responsibility, a concept that in the 20th century had been used only in the case of serious international violations (e.g., in Nuremberg or International Criminal Tribunal for the former Yugoslavia).²² As a form of legal classification, command responsibility thus has important antecedents in international criminal law. Article 25, section 2 of the Rome Statute indicates that “a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”; section 3(a) stipulates “whether [committed] as an individual, jointly with another or through another person.” In articulating the commission of crime through another person, the writers were especially concerned with addressing those who are responsible for ordering, soliciting, or inducing a crime that occurs or is attempted (Art. 25 (3)(b)). Also included is one who “(f)or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission” (Art. 25 (3)(c)). Military commanders are then specifically included, with provisos, in Article 28.

At two critical moments in the 20th century, comparable shifts in the adjudicatory implementation of individual responsibility took place. The first involved the major war trials held in Nuremberg and Tokyo after the Second World War. These episodes addressed the principle of individual

criminal responsibility for particular violations of international law applicable in armed conflict contexts (Twist 2006). The second moment occurred with the adoption of the four Geneva Conventions on August 12, 1949,²³ in which a specific framework for the prevention and punishment of grave crimes was established for the protection of war victims (Ratner and Abrams 2001). Similarly, the Rome statute is often heralded by its advocates for revolutionizing the ways that people understand states' responsibilities to "humanity" (Art. 1). It thus creates a new relationship between international and national forms of justice, emphasizing that the ICC "shall be complementary to national criminal jurisdictions."²⁴ However, its preamble also identifies the international, rather than the national, as the principal unit for acting out of humanitarian concern, establishing the court "with jurisdiction over the most serious crimes of concern to the international community as a whole" (Rome Statute). These principles are further detailed in Article 17, which reiterates the ICC's complementary jurisdiction while ensuring that national courts retain initial jurisdiction. As used in the statute, "complementary" is meant both to represent a nod to the primacy of the nation-state and to ensure that the standards of international adjudication are used as the ultimate measure of justice.

In practice, however, the relationship between the international and the national spheres of governance is highly volatile (Schabas 2001:1–20) and is contributing to ongoing forms of resistance. In fact, sub-Saharan African states have been so weakened over the past fifty years that the reduction of state supported social services combined with the rise in paramilitary formations has led to struggles over governance that result in war—wars that are often the product of various entities vying for economic possibilities within particular competitive domains. In this regard, one goal of the ICC today is to ensure that high-ranking government officials who commit crimes against humanity are apprehended and prosecuted through an international body working in conjunction with states that have both signed and ratified the Rome Statute. Yet, although the 120 states that initially signed the Rome Statute of the ICC also participated in its development, its writing, and the passing of amendments, relations of dominance that have privileged particular norms of juridical justice over others remain cloaked in the universalist language of the ICC. This is so because the conditions for inclusion in the ICC already presuppose the supremacy of international law over quasi-judicial mechanisms.

During the UN Assembly of States Parties meetings and the UN-based General Assembly in which the provisions of the Rome Statute were established,²⁵ politically “weak” states were rarely in positions to overpower “stronger” ones. And as a matter of course, the relations between different types of nation-states and international institutions derive from contests over the power of authority—the power to decide to claim universal jurisdiction and form alliances with international institutions or to implement amnesty laws and defer to state sovereignty.

The path to international justice in Sub-Saharan Africa has thus come to cloak an unequal distribution of power in a language of jurisdiction and membership. This new form of governance, in which states in the global North control the terms of judicial and social compliance for states in the South, highlights what Suárez-Orozco (2005:6) has referred to as the *hyper-presence* and *hyper-absence* of the state—a concept that I articulate here with reference to the ultra expansion of statecraft, but not necessarily of the state, as a result of the change in governance mechanisms based in networks of international, national, and local spheres of individual and institutional power. Crucially, these networks do not themselves represent sovereignty. Rather, they work with states and operate through international courts and human rights agencies, which coordinate and determine new disciplinary principles in strategic relation to one other. In this regard, though African states have signed and ratified treaties such as the Rome Statute, they are actually experiencing a form of governmental reorganization that some interpret as a weakening of capacities to protect borders, manage populations, and control markets and currencies (Hansen and Stepputat 2005:32). In addition, this reconfiguration is taking shape alongside the strengthening of regional forms of governance and attempts by state actors to consolidate power for resource control. Indeed, multiple brokers—including postcolonial state actors in Africa and elsewhere—are vying to control the terms of governance that constitute the basis for justice.

Beyond Individual Criminal Responsibility: Understanding Resource Wars

The first “scramble for Africa” was part of the European imperial rush of the 1880s, with African colonies created and ownership claimed with a focus on the extraction of their resources. Today, with the temporal end

of both European colonialism and the Cold War and at the height of neoliberal capitalism, a new scramble for Africa has begun in which local, national, regional, and international interests—in particular, the dramatically increased economic presence of both China and India—are competing for regulatory control of Africa’s vast mineral resources. From the mining of coltan in Central Africa to the dumping of millions of tons of toxic “e-waste” along Africa’s coasts each year, these extraction and disposal activities are crucial nodes in interlinked markets and in cycles of computer production. New competitors—African and non-African alike—are inserting themselves in African locales and international market forces remain an integral aspect of local power formations as well as new sites of territorial and occupational identity. It is their presence that shapes and fuels the regional conflicts so often perceived, outside Africa, as atavistic ethnic clashes.

These conflicts, in turn, provoke still other local–global interrelations: from the sale of firearms to African warlords, to the intervention of humanitarian workers, to the curious US military presence in Africa through United States Africa Command (AFRICOM)—a new hybrid alliance between the US Department of Defense and African governments created to promote “security” and “nation-building” throughout the continent.²⁶ These manifestations of the international linkages are shaped by long-standing histories of interaction that further blur the boundaries between internal and external dimensions of the continent’s newly evolving competition for governance.

The political vacuum created in Africa after the collapse of the Soviet Union has affected the conditions for resource struggles and has produced violence in the Middle East and West, Central, and East Africa. Yet in addition to the large number of civilian deaths, the most disastrous consequences of increased conditions of war and resultant displacement on the continent has been the movement of people—victims, perpetrators, civilians—from less affluent to wealthier countries, leaving behind war-torn villages, cities, and regions. The regions of African countries embedded in such violence—Darfur in the Sudan, Uganda, Eastern DRC, and the Central African Republic—are part of a larger set of global interconnections in which violence, war, arms, and mineral resource extraction are all part of the same cycle.

These contemporary struggles have involved the management of extra-state paramilitary forces, mercenaries, and independent security

forces working alongside international corporations. With increasing struggles over the management of violence, we are seeing a growing industry of militarization in various sub-Saharan African states, leading to some of the most violent deaths since World War II. The 21st century's two most visible new "global" presences in Africa—the new scramble for Africa and AFRICOM—are indeed significant and transformative presences. Both of these provocative new entities, Asian and American, have been perceived alternately as new forms of colonization and as new vehicles of deliverance. Yet among the most disastrous consequences of the increasing conditions of war and resultant displacement has been not only the large numbers of civilian deaths, but also the movement of people—victims, perpetrators, civilians—from less affluent to wealthier countries, leaving behind war-torn villages, cities, and regions. The impact of such violence thus extends beyond the boundaries of a conceptualized detached continent or an individual actor responsible for mass killings. It also involves a range of actors engaged in deeply socio-economic phenomena.

Over the past twenty years, the majority of armed conflicts have involved civil wars in the global South, in places such as Cambodia, Iraq, Sri Lanka, and a range of countries throughout sub-Saharan Africa, including Somalia, Rwanda, Sierra Leone, Liberia, Uganda, the Sudan, and the DRC (Urdal 2005). The responsibility of many of these hostilities in Africa involve struggles to control the plunder of natural resources and are buttressed by a thriving underground military and resource war economy (Allen 1999, Billon 2001, Mattei and Nader 2008) in which many are engaged. Through such conflicts, we have witnessed in the 20th and early-21st centuries the widespread militarization of everyday life, including the production of killing fields that also involve the recruitment of child soldiers. Seen in these terms, the responsibility of such violence goes well beyond that of an individual commander.

The Sudan Example: Darfur

As a case in point, the current situation in Darfur bears closer examination. According to the Sudan's first census in 1956, 39 percent self-identified as Arab and 61 percent as black (the largest group of the country's population). 70 percent of the country is Muslim and continue to occupy the northern two-thirds of the country. The remaining non-Muslim citizens live

in the south and have been marginalized by the country's Muslim elite since independence in 1956. The discovery of oil in Sudan's southern region has propelled ongoing conflict that has led to extreme losses of life. Darfurians and the Sudanese south in general have been engaged in struggles over autonomy since the European amalgamation of the Sudanese state. Some of these tensions have further reinforced autochthonous claims to land, resulting in violence for most of its years of independence, and have led to the complicated ways in which group alliances and community—including diasporic linkage—are constituted in that region.

Between 1969 and 1985, the Sudan was controlled by the military government of Jafa'ar Nimeiri. In order to develop oil resources, Nimeiri put in place a two-pronged strategy to divide and displace the southern population. Effected over the course of two decades, this entailed the displacement of southern agro-pastoralists and the murder and capture of those who resisted. A range of events, such as the revival of the old Sharia Islamic code and militarization of resource-rich areas, led to struggles over the control of southern land and, in particular, the clearing out of Nuer and Dinka people to the south and the east by Arabic-speaking armed militias. Land, schools, and livelihood were destroyed and whole communities separated.

By 1989, an Islamist-military government had taken power, determined to develop further Sudanese oil potential. Before continuing their investments, oil companies demanded signals of the government's willingness to settle the violence with its competing Nuer and Dinka populations. In 1999, with the fighting continuing, the Sudanese army began to displace more Dinkas who resided in oilfield areas. These government militia forces engaged in widespread displacement measures, often resorting to violence. Oil extractions continued alongside this offensive; but what also grew was a new alliance of radical antigovernment Nuer troops known as the Upper Nile Provisional Military Command Council (UMCC), who brokered arms deals for their own cause and declared that the government had abrogated the Khartoum Peace Agreement (Rone 2003:44-45). What followed was a series of struggles between the then Sudanese Liberation Movement (SLM) and the Justice and Equality Movement (JEM) subgroup of the SLM, in addition to negotiations and ongoing forms of displacements that resulted in the February 2001 standstill agreement and peace covenant.

Nevertheless, the United Nations Special Rapporteur on Sudan, Gerhart Baum, advised the UN Commission on Human Rights in 2002 that the

human rights situation in the region had still not improved. As he indicated, “oil exploitation is closely linked to the conflict which...is mainly a war for the control of resources and, thus, power” (Rone 2003:58). Further, “oil has seriously exacerbated the conflict while deteriorating the overall situation of human rights,” and noted he had heard that “oil exploitation is continuing to cause widespread displacement” (Rone 2003:58). By 2002, the Sudanese government was said to be generating enough income from oil revenues to support a domestic arms industry. It purchased new attack helicopters in two years and bought various arms from abroad that enabled it to deploy its Janjaweed (tribal, equestrian) militias not only to target and clear populations, but also to secure the next oil concession area as well (Rone 2003). As of February 2003, the International Crisis Group (ICJ) has described the violence in Darfur as emerging as a direct result of the attacks on Darfurian as well as associated Massalit and Zaghawa civilian groups, by government forces and the Janjaweed. The tactics have ranged from systematic attacks against villages to the burning of crops and buildings, arbitrary killings, rape, and looting. The government of the Sudan has allegedly used aerial bombardments to attack all those “harboring SLM/A or JEM terrorist forces.”²⁷ This combined with other attacks have led to prolonged violence in the area.

Having fought ten civil wars in the past two decades—many rooted in mineral resource management, ethnic strife, and religious politics—the African continent is where the majority of new innovations in international courts and tribunals can be found. The signing of international treaties increasingly serves as an economic linkage to democratic restructuring mandates. For, as I have shown in this article, the current international rule of law movement is closely aligned with the economic force of neoliberal capitalism. And as one of many policy trajectories within which human exchange and value are shaped, neoliberal capitalism has been widespread since the 1970s when it was imposed onto a range of developing countries by powerful financial institutions such as the International Monetary Fund (IMF), the World Bank, and the Inter-American Development Bank. It has had the effect of deemphasizing governmental (and nongovernmental) intervention in national economies and privileging instead free-market methods that liberate business operations.

As we know, neoliberalism does not rely on direct government intervention to apply multilateral political pressure through labor politics and collective bargaining. Instead, it is informed by *laissez-faire* economics

and works through international institutions such as the World Trade Organization (WTO), the World Economic Forum, the International Convention on Labor (ITO), and various free-trade treaty agreements. In this way, neoliberalism has served to open foreign markets to corporate colonization. Critics have argued that the consequences of this program throughout sub-Saharan Africa and Latin America include unfair competition, the erosion of workers' rights, and an escalation in resource-related struggles that are often refracted through religious and ethnic conflicts. Indeed, in postcolonial African states, neoliberal expansionism renews an earlier-told narrative: that of management policies around export-driven growth being developed with the support of global institutions including the World Bank, the IMF, and other lending institutions. The ongoing trend is one in which rich corporate interests supported by market democracies work alongside international organizations to shape new economic values and practices in the Global South. Yet, these new global economic alliances are making it increasingly difficult for postcolonial states to maintain economic independence and political autonomy, particularly in resource-rich areas. Instead, in sub-Saharan Africa, response to the changing market has led to increasing paramilitary contests over resources and thus, to increasing militarization and sectarian violence.

In this context, the rule of law as a discourse of justice highlights not only the power of the individualization of criminal responsibility, but also particular knowledge fields within which liberalist capitalism circulates. In other words, the rule of law has been just as committed to the spread of neoliberal capital as it has been to the eradication of unmediated violence. Key here, is that there exist divergent fields of conceptualizing the relationship between political economy and just intervention because the individuals involved also live within uneven spheres, often in an attempt to lay claim to contemporary domains of power. Complex and undecided relationships between the international and the national (including constitutional provisions and legal norms) characterize the new regime. For example, the inequalities between refugee status and those in positions of privilege are theorized by what Giorgio Agamben (1998, 2005) has referred to as the "state of exception," in which constituent power (the actual power to create government or to create laws before they are brought into judicial consideration) is seen as being outside of the judicial order and in the realm of an extraordinary state that operates beyond the law. *State of exception* in African contexts is also reflected in the power of individuals

working through global institutions to manage international justice mechanisms, to codify treaties and laws, and, of course, to suspend national-level processes or to insist on particular forms of corporate responsibility and intervene into setting new terms of aiding and abetting the trade of illegal and legal arms that further propel violence. This is directly relevant to the competition between the ICC codifications of crime and national-level strategies for peace in the Sudan: it governs the power to decide when and with respect to whom the law does or does not apply.

The key here, however, is that those crimes that might also be relevant to the Sudan and ICC jurisdiction in addressing criminal responsibility are no longer within the domain of adjudicatory possibility. Rather, the analysis of the guilt of contemporary violence focuses on the identification of the act of killing itself. This has made it possible to focus on a few commanders for the crimes committed by many. The reality is that the modernity of resource wars is such that it exists in relationship to those who aid and abet the worst crimes against humanity—the mediators of arms and the corporations engaged in resource extraction through agents of violence. However, the selective process of codifying the crimes admissible in the Rome Statute has undermined the possibility of inclusion, and, as such, has produced new inscriptions into the terrain of the possible. This terrain has operated within a particular landscape in which command responsibility and particular notions of guilt have been popularly assigned.

Conclusion: The Politics of the Political

What projects are being enabled by the rise in the rule of law? What directions are not being pursued as a result of these projects? These questions lie at the heart of this inquiry and ask us to rethink questions of individualism and political rights that are being mobilized in this process. The international spheres of interaction under scrutiny here reflect not simply viable spaces for internalizing constitutional rule of law principles, but also the locus for rethinking what justice really means and for whom. Yet, this current enactment of ICC political rights secured under the Rome Statute represents the active construction of conditions for “justice.” In other words, by focusing on political and civil rights, the neoliberal rule of law project has produced conditions for securing rights in the contemporary arena in a way that has left unaddressed a way to make sense of economic, social, and cultural rights as necessary preconditions for rights

themselves. What remains critical is to question the various transnational webs of influence and power that make explicit the workings of uneven domains of justice production and that disclose the political processes of codification as central to the legal project. The power to name the causes and consequences of root violence is key to the ways in which we articulate criminal responsibility and not the reverse.

Neoliberal values are gaining global traction through the efforts of international justice institutions and organizations to provide those who have been socially marginalized with spaces from which to make justice claims. These processes, though, have come to involve an uneven set of possibilities that privilege law, rather than “justice,” as the end objective. The presumption here is that people’s sense of justice can be achieved through a range of means—economic redistribution, the rebuilding of legal and political infrastructures in war torn areas, the end of sexual violence, and so on. But the uneven emphasis on legal infrastructures as the mechanism that will assure “justice” presumes that the law is the sole way to achieve such ends, when it is only part of the story. In neoliberal Africa, an expanding international consensus is made through legal codification reliant upon a naturalized idea of the force of law. The limits of justice rest in law.

ENDNOTES

¹Sudan is one example. In the midst of the indictment of Sudan’s president Bashir, the country was headed toward peace. However, his indictment led to the halting of the peace talks and the reinstatement of violence (See also Mahmood Mamdani and Alex de Waal, 2009).

²“Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 Pursuant to UNSCR 1593 (2005)” (quotations on pp. 2–3). Accessed from <http://www.icc-cpi.int/press/pressreleases/108.html> on January 12, 2008.

³Rubin, Elizabeth. 2006. “If Not Peace, Then Justice.” *New York Times*, April 2. Accessed from <http://www.nytimes.com/2006/04/02/magazine/02darfur.html> on January 12, 2008.

⁴Rome Statute, Arts. 5 and 12. Clauses of immunity have in the past protected governmental officials from being prosecuted for crimes against humanity committed while in office. The International Law Commission structured the Rome Statute in such a way that eradicated protections against immunity; see *ibid.* Art. 27.

⁵Rome Statute, Art. 5(1).

⁶The text of the Rome Statute of the ICC contains a preamble and 128 articles, which are grouped into thirteen parts. It delineates the court’s subject matter and jurisdiction, both temporally and substantively; it codifies the crimes and appropriate sentences. Procedural rules are set forth and means are noted for the development of pro-

cedural norms in conjunction with the general principles of criminal law that are to serve in the operation of the ICC.

⁷Yearbook of the International Law Commission 1951, vol. II. Second Report on a Draft Code of Offences Against the Peace and Security of Mankind by Mr. J. Spiropoulos, Special Rapporteur (Part I). UN document A/CN.4/44. Accessed from <http://www.un.org/law/ilc/index.htm> on January 7, 2009.

⁸UN General Assembly Resolution 36/108 of December 10, 1981. Accessed from <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/407/32/IMG/NR040732.pdf?OpenElement> on January 9, 2009.

⁹Yearbook of the International Law Commission 1994, vol. II (2). "Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10." Accessed from http://untreaty.un.org/ilc/documentation/english/A_49_10.pdf on January 8, 2009.

^{10a}Report of the Preparatory Commission for the International Criminal Court." July 6, 2000. United Nations Preparatory Commission for the International Criminal Court, UN Document PCNICC/2000/INF/3. Accessed from <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/519/95/pdf/N0051995.pdf?OpenElement> on January 5, 2009.

¹¹Yearbook of the International Law Commission 1991, vol. II (2). "Report of the International Law Commission on the work of its forty-third session, 29 April–19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10. Vol. II A/46/10." Accessed from http://untreaty.un.org/ilc/documentation/english/A_46_10.pdf on November 10, 2008.

¹²See p. 10, §27, in "Report of the International Law Commission on the Work of Its Forty-Seventh Session. 1995. Topical summary of the discussion during its fiftieth session prepared by the Secretariat." UN document A/CN.4/472, February 16, 1996. Accessed from <http://daccessdds.un.org/doc/UNDOC/GEN/N96/038/77/PDF/N9603877.pdf?OpenElement> on January 7, 2009.

¹³*Ibid.* p. 10, §28.

¹⁴*Ibid.* p. 11, § 32.

¹⁵*Ibid.* p. 9, § 23.

¹⁶*Ibid.* p. 11, § 31.

¹⁷*Ibid.* p. 12, § 34.

¹⁸*Ibid.* p. 11, § 32.

¹⁹*Ibid.* p. 31, § 122

²⁰Preparatory Committee on Establishment of International Criminal Court, First Session, 6th Meeting (PM) March 27, 1996, UN doc. L/2766. "Terrorism Should Be 'Core Crime' of Proposed International Court," India Tells Preparatory Committee.

²¹However, because of diplomatic controversies over which acts constitute "aggression," the crime of aggression remains undefined in the corpus of crimes under the statute.

²²The Nuremberg Tribunal recognized that "a person who committed an act which constitutes a crime under international law" was not relieved of responsibility by having "acted as Head of State or responsible Government official" or "pursuant to order of his Government or of a superior." See Principles III and IV in "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950." Accessed from <http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument> on January 18, 2008. Relevant cases at the ICTY are *The Prosecutor v. Zejnil Delali et al.* (case

no. IT-96-21-T); *The Prosecutor v. Timohir Blaški* (IT-95-14-T); *The Prosecutor v. Zlatko Aleksovski* (IT-95-14/1-T); *The Prosecutor v. Dario Kordi and Mario erkez* (IT-95-14/2); and *The Prosecutor v. Dragoljub Kunarac and Radomir Kova* (IT-96-23). See Levina, Eugenia. 2005. "Command Responsibility: The *Mens Rea* Requirement." *Global Policy Forum*, February, n. 36. Accessed from <http://www.globalpolicy.org/intljustice/general/2005/command.htm> on December 14, 2007.

²³The four Geneva Conventions and their agreements are as follows: First, "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (1864; last revised 1949); Second, "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (1949; succeeding the 1907 Hague Convention X); Third, "relative to the Treatment of Prisoners of War" (1929; last revised 1949); Fourth, "relative to the Protection of Civilian Persons in Time of War" (1949, drawing on the 1907 Hague Convention IV). See, e.g., "1949 Conventions & Additional Protocols." Accessed from <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> on September 2, 2008.

²⁴This is in sharp contrast to earlier tribunals, such as the ICTY and the ICTR, in which the sphere of the international simply claims primacy over the national. (See further Brown 1998, Holmes 1999.)

²⁵Many of the legal documents generated for the production of the Rome Statute were the result of heated negotiations during the United Nations Conference of Plenipotentiaries (June 15–July 17, 1998), held in Rome. During 1996–8, ten sessions of the UN Preparatory Committee had been held in at the UN headquarters in New York to work on a draft statute that would create the legal authority to establish a permanent International Criminal Court. The UN's International Law Commission had produced a first draft. A working draft followed and was presented and debated by representatives from more than one hundred countries at the 1998 Rome Conference.

²⁶Stout, David. 2007. "U.S. to Create a Single Command for Military Operations in Africa." *New York Times*, February 7.

²⁷"SUDAN—Complex Emergency." May 7, 2004. U.S. Agency for the International Development Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA) and the Office of U.S. Foreign Disaster Assistance (OFDA). Accessed from www.usaid.gov/our_work/.../Sudan_CE_SR03_05-07-2004.pdf on April 24, 2010.

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