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Global Constitutionalism and the International Criminal Court: A Relational View

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Abstract

International criminal law (ICL) poses distinctive challenges to the scholarly agenda of global constitutionalism. Descriptively, ICL qua criminal law implies a distinctive institutional process – the trial – that is largely unknown to constitutional processes. It is nonetheless via the trial and its assigned functions that global authority is exercised in the international criminal realm. Can global constitutionalism account for the role of the international criminal trial? Further, international criminal tribunals employ particularly coercive tools to perform its functions: it arrests suspected offenders (with the assistance of states), interrogates them, judges them, may convict and ultimately imprison them. Can global constitutionalism normatively account for this coercive aspect?

In this article, I argue that global constitutionalism can successfully tackle these challenges. My argument builds upon three interconnected propositions (P1-P3) with emphasis on the context and practice of the International Criminal Court (ICC). First, I reconstruct the collective dimension of Rome Statute crimes through the ICC’s predominant modes of criminal liability. I then use global constitutionalism to interpret this collective dimension. This collective dimension indicates, I argue, that Rome Statute crimes are not only concerned with the gravity of the acts performed on the victims but also with the necessary conditions to form and preserve a political community that can exercise constituent power (P1).

The second step is to justify the specific role of the international criminal trial in global constitutional terms. On this point, I suggest that Antony Duff’s relational account of criminal responsibility is particularly suited to provide the structure of a global constitutional argument. Indeed, Duff precisely focuses on the relational question of who has the authority to call wrongdoers to account. Using Duff’s relation model of criminal responsibility, I suggest that the international trial hence embodies a community of responsible states and state-like authorities calling each other to account (P2).
Finally, I explain the coercive dimension of Rome Statute crimes through an dis-analogy with constitutional and human rights law. While human rights violations may benefit from restriction clauses through the application of the proportionality test (e.g. national security, public health, etc.) and/or protecting other rights (e.g. “the rights of others”), Rome Statute crimes indicate a deliberate enterprise of perverting the constitutional relation and this explains the need to coercively interfere with the offending agent (P3).

1. Introduction

Scholars of global constitutionalism have recently come to examine international criminal law (hereafter, ICL) and its associated institutions, in particular the International Criminal Court (hereafter, the ICC). In conformity with the dual descriptive and normative agenda of global constitutionalism as a scholarly field, the emerging literature has identified a number of global constitutional aspects in the ICL system and provided a normative justification for them. For example, in the context of the ICC, it has been argued that the existing relationship between the Assembly of State Parties and the Office of the Prosecutor exemplifies the separation of powers that should characterize a global constitutional institution (Lang and Birdsall 2018). Similarly, it has been suggested that international criminal tribunals play a global constitutional function when they prosecute state or state-like leaders for having grossly abused their authority – a form of “constitutional impact” (Elderkin 2015).

Yet, while accurately highlighting these aspects, the literature tends to overlook salient and deeply rooted differences between global constitutionalism and ICL that cannot be neglected for the comfort of theorizing. Indeed, ICL poses distinctive challenges to global constitutionalism as a descriptive and normative framework. Descriptively, ICL qua criminal law implies a distinctive institutional process – the trial – that is largely unknown to constitutional processes. It is nonetheless via the trial and its assigned functions that authority is exercised in the international criminal realm. Can global constitutionalism account for the particular role of the international criminal trial? Further, an international criminal tribunal such as the ICC employs particularly coercive means to perform its functions: it arrests suspected offenders (with the assistance of states), interrogates them, judges them, may convict and ultimately imprison them. Normatively, how does global constitutionalism account for this coercive dimension? Surprisingly, the emerging literature has not addressed these two issues
with sufficient depth despite that they pertain to the core interest of global constitutionalism, namely the exercise of global authority.

One may reply that the limitations of the current literature are only a half-surprise. The criminal law and its institutions may be assigned different purposes across the domestic-international divide and not all of them may neatly match the deontological principles of global constitutionalism. Think for example of the consequentialist line of argument for which the end of criminal law lies in its beneficial consequences (e.g. deterrence, international peace, etc.). Or the retributivist for whom punishment should be proportional to the harm inflicted to the victims – a principle that poses intractable problems when it comes to finding proportionate punishment for massive and atrocious crimes (Drumbl 2003: 165-169). This forms the methodological component of my critique: that the literature on global constitutionalism has not sufficiently engaged with criminal law theory. Hence, I suggest that a detour through criminal law theory is necessary to first establish how the ICL system in general and the ICC in particular can be apprehended from a global constitutional standpoint. I understand this project as an exercise of “constitutional imagination” that global constitutionalism encourages. Rather than tying constitutional imagination to established narratives, global constitutionalists “argue (in a Kantian vein) that imagination should broaden and deepen the context of judgment and, in so doing, foster self-reflective attitudes” (Angeli 2017: 369).

In that vein, I argue that global constitutionalism can successfully tackle the aforementioned challenges. My argument builds upon three interconnected propositions (P1-P3). It starts with the global constitutional principle of constituent power. In a nutshell, constituent power insists that the legitimate authority to make and unmake law ultimately lies with the people over which authority is exercised. How could this principle be relevant to reconstruct and interpret the jurisdiction and practice of the ICC? It becomes relevant, I argue, when one reconstructs the ICC’s predominant personal jurisdiction, namely that it focuses on “individuals in positions of power who have the capacity to cause massive harm if they should abuse the trust and authority vested in them” (Elderkin 2018: 236). This familiar observation, however, needs refinement. As any criminal lawyer will know, the principle of culpability implies that criminal responsibility is always individual even when the crime requires “a state or an organizational policy” as in the case of crimes against humanity (Article 7 of the Rome Statute). How could the jurisdiction of the ICC meaningfully connect to global constitutionalism then?
To envision this link, I suggest exploring the modes of criminal responsibility that are distinctive of ICL – some say sui generis (Ohlin 2014) – and that have developed in the jurisprudence of the ICC in recent years. More precisely, the control theory of Claus Roxin and the notion of Organisationherrschaft (Roxin 2011; Jain 2014) that has informed the ICC’s reasoning suggest that international crimes are perpetrated through a hierarchically organized apparatus of control. In the words of Jens David Ohlin, “the individual uses the organization as a tool at her or his disposal” (Ohlin 2014: 117). This is particularly true of crimes against humanity (Article 7 of the Rome Statute) and genocide (Article 8). I suggest re-interpreting the personal jurisdiction of the ICC and its favored modes of liability as concerned not only with the gravity of the crimes committed – the harm inflicted on the victims – but also with the responsibility of individuals having large-scale, organizational control. This responsibility arises in virtue of the damage that this control can do to the very formation and preservation of constituent power. That is certainly not the only wrongdoing that international crimes perpetrate but one that remains highly relevant from a global constitutional standpoint.

Once the global constitutional subject matter of the ICC is refined in that way (in descriptive terms), the second step is to account for (in normative terms) the central and distinctive feature of (international) criminal justice, namely the trial, in global constitutional terms. On this point, I suggest that Antony Duff’s relational account of criminal responsibility (Duff 2007, Duff 2010) is particularly suited to provide the conceptual structure of a global constitutional account. Indeed, Duff precisely focuses on the relational question of who has the authority to call wrongdoers to account and how this authority is to be justified. For Duff, there must be a normatively defined community – of which the prosecution and the accused wrongdoer(s) can be shown to be members – that justifies criminal courts exercising authority. This is where P1 matters: in the international context, one can conceive of the trial as allowing state or state-like authorities (state parties to the Rome Statute and the ICC) to call individuals exercising large-scale control to account for grossly attacking their subjects. I shall explain how this vertical and constitutional relation specifies Duff’s account of domestic criminal law as premised upon the horizontal relation of citizenship. That will be the second proposition of this article (P2).

The third step of the paper is to account for the distinctively coercive functions of the ICC in
global constitutional terms. It is one thing to define the relevant normative community of ICL using the Duffian framework. It is another to justify why the ICC remains a criminal court empowered to call wrongdoers to account. International criminal offences remain criminal; their violation results in the wrongdoers’ liability to a penalty. On this point, I suggest exploring an analogy between human rights violations and international crimes to the extent that both – according to P1 – are committed by public authorities (the former) or by individuals in position of public authority (the latter). Yet, while human rights norms more easily benefit from restriction clauses through the proportionality test (e.g. national security, public health, “the rights of others”, etc.), Rome Statute crimes imply a deliberate enterprise of perverting the constitutional relation and this intentionality explains, I argue, the need to coercively interfere with the offending agent (P3). This also explains why the criminal law, whether domestic or international, tracks the intention of the perpetrator (mens rea requirement), which remains also central to the subjective approach of Roxin imported by the ICC. The overall argument is distinctively constitutional and differs from strands of the literature that explain the wrongs of international crimes by focusing exclusively on the kind of harm inflicted on the victims (Renzo 2012).

2. ICL and global constitutionalism: mapping the field

In a recent anthology of ICL, Sarah Nouwen aptly suggests that the theory of international criminal law often replicates categories of the domestic level (in particular, retribution, deterrence, incapacitation, or rehabilitation) and the distinctive problems that come with their application at the international level (Nouwen 2016: 752). Nouwen labels these theories “foundational” and distinguishes them from “external” theories originating in other social-scientific disciplines, such as political science, sociology or economics, which address “the effects of international criminal law rather than the foundational theories” (Nouwen 2016: 75). Less explored, however, is the attempt to conceive of ICL and its associated institutions through the lens of another, yet still legal discipline. This article lays down the ground for a global constitutionalist approach to ICL and its associated institutions, in particular the ICC.

The approach of global constitutionalism to ICL is not entirely new, however. The first and preliminary step of this article is therefore to articulate a critique of the current literature. As stated in the introduction, this critique has a negative and positive side. I first argue that the
literature has failed to address some foundational aspects of ICL and in fact cherry-picked the features that square the global constitutionalist framework particularly well. I then turn to my own contribution and explain how these deficits can be remedied through global constitutionalism (positive critique) via a detour through criminal law theory. As the contributions to this issue primarily focus on the ICC, I shall also refer to the characteristics and processes of that institution. But before developing this two-fold critique, I suggest starting with a brief reminder of the central tenets of global constitutionalism as a broad scholarly agenda. This field of research is vast, and I certainly cannot do justice to its breadth within the remit of this article. Rather, I want to focus on some central tenets, both methodological and substantive, that are particularly relevant to my subsequent investigation of ICL.

Global constitutionalism as a scholarly agenda refers to the rise of constitutional principles and values (human rights, democracy, the rule of law, constituent power, separation of power, proportionality, subsidiarity, etc.) at the regional, international or global level. Methodologically, global constitutionalism’s distinctive ambition is to both describe and to evaluate these structural changes. The first, descriptive task amounts to reconstructing an existing institutional context where rule-based authority is exercised by or over the makers and subjects of international law, namely, states, individuals, IOs, international courts and tribunals, NGOs, or corporations. In his recent attempt to clarify the “object of interest” of global constitutionalism, Mac Amhláigh explains that “the context within which constitutionalism is ‘apt’, is the existence, in fact, of a pattern of rule-based obedience to an authority, an empirically verifiable ‘habit of obedience’” (Mac Amhláigh 2016: 189). The rule-based authority of the ICC governed by the Rome Statute and its legal framework in which it operates (both procedural and substantive) is the institutional and empirical focus of this article.

This descriptive task of reconstructing the actual exercise of rule-based authority in turn shapes the task of attempting to normatively justify it. That is, there is no reason to assume that such reconstruction may be achieved with the help of one normative political theory. Here again, I follow Mac Amhláigh’s suggestion that the normative basis of global constitutionalism is a blend of republicanism and liberalism. For example, the core republican idea of self-legislation and its concern for non-domination informs the global constitutional tenets of constituent power and democracy. This explains that, “in institutional terms, the accent in republican theory is on deliberation, contestation and participation, which makes it the natural foundational theory for
political forms of constitutionalism” (Mac Amhlaigh 2016: 191). Liberalism in turn places emphasis on a catalogue of values and rights geared towards the self-development of individuals – “its belief in the ability to legally isolate certain values as fundamental to individual flourishing by reference either to metaphysical ideas of natural rights” (Mac Amhlaigh 2016: 192). Liberalism hence better informs the tenets of human rights and their possible restrictions as well as the precepts of the rule of law or proportionality. Still, whether and how these principles apply at the post-national level remains an empirical and interpretive enterprise.

In that regard, I follow Aoife O’Donoghue in characterizing global constitutionalism as an “aspirational process” – “a process where some particular norms are present, others nascent and others non-existent, while still others merely have the potential to emerge as the system matures” (O’Donogue 2014: 154). Whether the international level replicates the domestic, or whether they find a distinct institutional expression, cannot be established a priori. O’Donogue takes the example of the separation of powers: “certainly, the executive, legislative and judiciary separation of powers model does not need replication within global constitutionalisation. Instead, funneling power into different avenues to prevent the over-grasping nature of power’s character is of central importance and underlies the division required” (O’Donogue 2014: 33). In the next section, I illustrate this protean character of the separation of powers in the ICC context with the intra-institutional interaction between the Prosecutor and the Court.

Finally, it worth noting that despite these aspirational and multifaceted features, the overarching function of (global) constitutional principles remains the same, namely a dual enabling and constraining function, which applies to the various levels of authority implicated. As Anne Peters puts it, “the idea is not to create a global, centralized government, but to constitutionalize global, polyarchic, and multilevel governance” (Peters 2009: 404). The complementarity regime of the ICC is a good example; the ICC triggers jurisdiction only when states are “unable or unwilling” to address a situation (Article 17 of the Rome Statute). The subsidiarity regime of the European Court of Human Rights (hereafter, ECtHR) is another example: state parties to the ECHR, for example, hold primary responsibility to interpret and enforce the ECHR and right-holders must have exhausted domestic remedies in order to secure admissibility at the ECtHR (Article 34 of the ECHR). These regimes both empower states and supra-state
institutions and limit their authority.

### 2.1. Example 1: the separation of powers

With this background in mind, let us now zoom in on one global constitutional principle, the *separation of powers*, and see how it plays out in the ICL system and at the ICC in particular. While this principle classically refers to the tripartite division between the legislative, the executive and the judicial within the state, its core normative function is to protect subjects from the *abusive*, and in extreme cases, *tyrannical* exercise of authority – historically, from the potential tyranny the absolute monarch – although its operation may also serve accountability functions (promote transparency, publicity and effectiveness) or simply the rule of law. As Carolan explains in a recent contribution, “these process values promote institutional accountability, which in turn fosters the substantive principle of non-arbitrariness, which is at the core of legitimate governance” (Carolan 2018: 217).

Moving from the normative to the descriptive, how is the separation of power principle reflected in the international criminal procedure at the ICC? In their seminal and recent contribution, Andrew Lang and Andrea Birdsall take the example of the first ever completed trial at the ICC, the one of Thomas Lubanga Dyilo\(^1\), and in particular the interaction between two constitutive organs of the ICC, the Office of Prosecutor (hereafter, OTP) and the Pre-Trial Chamber of the Court (hereafter, the Chamber). While the former receives information pertaining to the potential commission of international crimes (including referrals from the UN Security Council), the opening of investigations is premised on the fulfillment of admissibility criteria, which is examined by the Chamber. In the *Lubanga* case, the Chamber was notably concerned that the OTP did not abide by a number of evidentiary rules, such as the disclosure of documents that may have “disculpatory effect” (Lang & Birdsall 2018: 387). In doing so, the OTP may then interfere with the defendant’s right to a fair trial, which reflects another global constitutional principle (the protection of human rights). Lang and Birdsall conclude that the Chamber both enables and limits power by making the OTP’s investigative powers contingent upon certain conditions, thereby illustrating the dual function of global constitutionalism highlighted earlier: “by both limiting the power of one particular actor within the system while

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\(^1\) See https://www.icc-cpi.int/drc/lubanga
at the same time enabling power, that power is channeled towards productive and useful ends” (Lang & Birdsall 2018: 387).

While I fully agree that global constitutionalism and the separation of powers help interpret and justify this *intra*-institutional process, they do not capture what is distinctive about the ICC. That is, the separation of powers principle captures the interplay between different constitutive organs of the ICC but only when a particular situation has been opened and investigated. But clearly, the ICC operates other functions – hence exercises authority – before and after that particular stage. I suggest that one of these further, broader and distinctively criminal stages is the trial. Authority is exercised and deployed in a very particular way at this stage; specific roles and statuses (e.g. defendant, victim, prosecutor, witness, etc.) are assigned and specific processes (e.g. interrogating, hearing, evidencing, convicting, sentencing, imprisoning, etc.) take place. How can global constitutionalism account for these functions? There are various and not necessarily competing answers for why a trial is normatively important – e.g. the determination of guilt or the resolution of disputes. How global constitutionalism understands these purposes is an important deficit of the current global constitutional literature on ICL and this article aims to remedy it specifically.

2.2. Example 2: the protection of human rights

Another example of the on-going development of global constitutionalism in the ICL context is the *protection of human rights*. Clearly, this constitutional function is most clearly instantiated by human rights courts and/or by domestic courts and authorities applying human rights norms. As Stephen Gardbaum puts the point, “whatever the general degree of analogy or dis-analogy between international and constitutional law, domestic bills of rights and international human rights law perform the same basic function of stating limits on what governments may do to people within their jurisdictions” (Gardbaum 2008: 750). ICL tribunals such as the ICC however perform this function in their own way. The basic idea here is that, as far the Rome Statute is concerned, the ICC interferes with the sovereignty of states when these states are “unable or unwilling” to remedy gross violations of these rights within their jurisdiction. I will here focus on another recent and illuminating contribution, Elderkin (2015). This contribution very helpfully explains the “constitutional impact” of the ICC that in fact may in principle outweigh the one of human rights systems. While I fully endorse Elderkin’s
account, I again contend that it does not exhaustively capture all the aspects of the ICC system that are relevant to global constitutionalism. This is because Elderkin’s contribution focuses on one global constitutional principle, the protection of human rights, which explains that he conducts a comparative analysis of the ICC performance vis-à-vis human rights courts. But his analytical lens is limited to the consequences and impact of both systems. Again, it neither reconstructs nor justifies the dissimilarities between human rights and international criminal processes. The trial is one of them.

I shall however retain one central point from Elderkin’s account, namely that the ICC focuses on prosecuting persons in positions of authority – a position that proved decisive to the very possibility of committing crimes of that scale. In agreement with Elderkin, this personal jurisdiction renders the ICC prima facie global constitutional. It is global constitutional in two ways. The first is that it applies to a function prototypically reserved to constitutional and human rights law, that is: “constraining officials from certain abuses of their constitutional powers; and offering a means for officials to be removed from office where they have committed such abuses” (Elderkin 2015: 232). As I will illustrate later, not only state officials (formally defined) but also individuals occupying position of political or public authority fall within the jurisdiction of the ICC. Now, Elderkin’s distinctive contribution is to examine how the global constitutional function of ICL differs from human rights law and constitutional law:

“whereas constitutional law and international human rights law exhibit a degree of subject matter overlap insofar as they both concern rights provisions, constitutional law and ICL exhibit a kind of jurisdictional overlap in the sense that they both apply limits to individuals in positions of power who have the capacity to cause massive harm if they should abuse the trust and authority vested in them” (Elderkin 2018: 236).

It should be noted that the “jurisdictional overlap” that Elderkin identifies as an “abuse of trust” (Elderkin 2018: 236) has been carefully conceptualized by the theorists of ICL, in particular David Luban, who famously argued that crimes against humanity, for instance, constitute a “perversion of politics”: “for a state to attack individuals and their groups solely because the groups exists and the individuals belong to them transforms politics from the art of managing our unsociable sociability into a lethal threat” (Luban 2004: 117). I shall return to this point
later in the article. What matters for now is to capture rule-based authority of the ICC as *vertical* and global constitutional to that particular extent.

The second point is comparative: the constitutional intrusion of ICL may in principle be greater than the intrusion of other global constitutional institutions such as human rights courts. This results from two more specific principles relative to the ICC regime specifically. On the one hand, the ICC regime benefits from “universal jurisdiction”, which detaches the jurisdiction of the court (and other state parties to the ICC) from the location of the crimes. While human rights courts may exercise jurisdiction *extra-territorially* (Besson 2012), this application is far from being the rule, and certainly state parties to human rights treaties cannot exercise jurisdiction over potential violations not committed by them or their agents, unlike state parties to the Rome Statute. On the other hand, the ICC may claim jurisdiction only if domestic authorities are “unwilling or unable” to do act. One may say that an individual bringing a case to the ECtHR does not need state assistance to do so, but the exhaustion of domestic remedies to gain admissibility at the court will be strictly required (Article 34 ECHR). Now, what happens when the rule of law – and therefore the very possibility to exhaust domestic remedies – has vanished? Elderkin rightly points out that “in these circumstances, IHRL may be a source of moral comfort, confirming that the minority’s rights have been infringed, but it does not provide any mechanism by which to sanction the president. ICL, however, does offer the possibility to act” (Elderkin 2015: 242). The point is well taken.

I am now in a position to articulate the first (negative) part of my critique. While I agree with Lang and Birdsall (on the separation of powers) as well as with Elderkin (on the protection of human rights), it remains to be explained why, unlike other global constitutional institutions, the ICC is a distinctively criminal court with its typical coercive functions (indicting, arresting, judging, sentencing, imprisoning, etc.). I submit that the (international) trial is the distinctive institutional process towards which the rule-based authority of the ICC culminates that global constitutionalism should aim to account for. Neither the first (Lang and Birdsall) nor the second contribution (Elderkin) can offer this account. It is however important to qualify this negative critique: both the “separation of powers” argument and the “human rights protection” argument touch upon the dynamics of the trial. As we have seen, in the Lubanga case the Pre-Trial Chamber orders the OTP to disclose evidence in order to protect the accused’s right to a fair trial, while the protection of human rights argument emphasizes that trials “offer the means to
put an end to the abuse of power and giving recognition to the rights of the victims of the abuse” (Elderkin 2015: 252). Yet, it is striking that both arguments understand the trial as a means to some further end; the trial seems to have no role of its own. This assumption remains unclear: does it follow that the trial is only truth- or justice-seeking, which leans toward some consequentialist justification? This issue, I argue, is the impensé of global constitutionalism in its application to ICL.

3. Global constitutionalism and the ICC: a relational view

In this section, I turn to my positive critique and articulate an argument that can conceive of the ICC in global constitutional terms. Three steps form the thread of this critique. First, I expand and specify P1 through the distinctive modes of responsibility favored by the ICC. Second, I turn to the justification of the international trial, introduce Antony’s Duff relational view and then apply it to P1. Third, I address the coercive dimension of ICL, which aims to explain why, unlike human rights systems, the ICC remains a distinctively criminal court with the coercive powers that such courts entail. These functional differences need to be justified normatively from a global constitutional standpoint.

3.1. The constitutional matter of ICL revisited

As a start, it is worth noting that although my negative critique points to the limits of the current literature, it also builds upon it. In particular, it builds upon Elderkin’s emphasis on the distinctive – and constitutional – subject matter of ICL, namely individuals in position (and their gross abuse) of state or state-like authority. Indeed, international criminal tribunals are rarely concerned with the criminal responsibility of the “rank-and-file perpetrator of the crime” (Jain 2014). Rather, they focus on the “most responsible” as the Preamble to Rome Statute already indicates, which often are persons in positions of authority who are quite far removed from the commission of the reprehensible acts but whose role(s) in planning and coordinating the attack(s) remain decisive. More generally speaking, it is widely established that international crimes as a broader category of offences are collective enterprises. Their legal structure enshrined in statutes – e.g. the requirement of “a state or organizational policy” in the specification clauses of crimes against humanity (Article 7 of the Rome Statute) – but more importantly the structure of their commission in practice points to what Ohlin calls “organizational criminality” (Ohlin 2014).
Intuitively, however, the very idea of criminalizing an organization as a whole and labeling them global constitutional faces an obvious difficulty. Indeed, (international) criminal law remains foundationally different from global constitutional processes through the principle of *individual culpability* (Article 25 of the Rome Statute). It goes together with the *nulla poena sine culpa* principle, according no one should be held responsible (and hence have her freedoms severely limited) without having committed, contributed to or furthered a criminal act. It follows that, in principle, any individual but only individuals can commit, contribute to or further an international crime (Article 27 of the Rome Statute). In the words of Elies Van Sliedregt, “international criminal law subscribes to the liberal justice model, requiring proof of personal culpability for a finding of guilt and the imposition of punishment” (Van Sliedregt 2012: 1172-1173).

Yet, the principle of culpability has not prevented the discipline and practice of ICL from accommodating the irretrievably collective nature of international crimes in its conceptual architecture. This has been achieved through the development of particular modes of criminal responsibility, which answer the central question of *who is to blame*. As Jens Ohlin explains, “if we insist on individual blameworthiness to the point of ignoring the reality of collective conduct, then we have enforced a fallacious fidelity to the principle of culpability that is blind to the reality of human collaboration” (Ohlin 2014: 117). Modes of responsibility are widely discussed among scholars of ICL and this incursion certainly cannot render justice to their fascinating complexity both in theory and practice. In nutshell, approaches have oscillated between two models: on the one hand, a *common law* approach based on the notion of *Joint Criminal Enterprise* (hereafter, JCE) focused on a collective design and execution of the crime. As Van Sliedregt puts it, “central to common purpose liability is the common plan or purpose, which compensates for the lack of physical involvement in the crime and enables imputation of the crime at the same level as the physical perpetrator” (Van Sliedregt 2012: 1175). On the other hand, a *civil law* approach informed by Claus Roxin’s *control theory* of perpetration, that emphasizes a single but *indirect* perpetrator controlling and instrumentalizing an entire organization (human and material resources) to perpetrate the crime (Roxin 2011; Jain 2014). Each approach has its shortcomings: the former does not differentiate between *principals* and *accomplices* – hence blurring the hierarchical structure and the distance between the planner and the executor of the crime – while the latter treats all individuals involved in the common design as causally responsible regardless of their level of participation.
While the relevant articles of the Rome Statute (in particular Article 25(3)) do not clearly determine which model of criminal liability to opt for, the ICC has clearly come to privilege Roxin’s model of Organisationsherrschaft as a version of indirect perpetration in its practice. What is again central to this model is the individual – the so-called Hintermann – sitting at the top of a hierarchical apparatus of power that is instrumentalized to enable and commit the crime. The defendant is convicted as principal perpetrator without having committed the actus reus of the crime. The Kenya case of The Prosecutor v. Muthaura, Kenyatta & Ali particularly reflects that approach. Here the OTP precisely had to demonstrate that the defendant and or his co-perpetrators controlled and instrumentalized a hierarchical organization. The Decision of Confirmation on the Charges\(^2\) states the following:

“the Prosecutor submits that Mr. Muthaura and Mr. Kenyatta activated and utilized pre-existing structures, such as the Mungiki to perpetrate the widespread and systematic attacks and the Kenya Police to ensure that the Mungiki operations were not interfered with” (para. 103).

The Mungiki refer to an ethnic organization that was effectively performing public functions at the time of the alleged atrocities in the Kenya post-electoral context:

“The Prosecutor avers that ‘[u]p until the time of the [post-election violence], the Mungiki controlled the public transport system, provided power through illegal electricity connection, demanded a fee for accessing public toilets and sold water to residents in the poorest parts of Central Province and Nairobi. It also provided protection services to businesses and was enlisted by politicians to intimidate opponents’” (para 103).

Now, modes of criminal responsibility under ICL are not only central to account for the collective nature of international crimes, in particular the Rome Statute crimes. They also are central, I argue, to better identify and imagine their global constitutional relevance. More precisely, our incursion above lays down the ground for refining Elderkin’s notion of “jurisdictional overlap” with human rights and global constitutional law. It appears that one

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\(^2\) The Prosecutor v. Muthaura, Kenyatta & Ali, Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute”, ICC 01/09-02/11, available at https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF.
does not need to be a state or even a state-like leader to fall within the jurisdiction of the ICC – the precise formal or informal status of the Hintermann does not matter much. Rather, it is the act of (mis-)using a hierarchical organization to commit the crimes that is distinctive of international criminality. The example of the Mungiki organization is quite telling; it is not a state organ created and maintained to commit the alleged crimes. Rather, it is their instrumentalization by individuals at the top of the chain that enabled these atrocities. This suggests that the structure of international crimes does not lend itself to a strict constitutional interpretation, which would require that only state or state-like officials are prosecuted. But it remains, I argue, of high global constitutional relevance.

To better explain this relevance, I suggest returning to the catalogue of normative principles of global constitutionalism surveyed in the first part of the article and to introduce another principle, constituent power. This is where our “constitutional imagination” (Oliviero 2017) can properly operate. Constituent power expresses the core normative idea that the authority to make and unmake laws should ultimately lie with the people over which authority is exercised. This basic proposition can be unpacked in two ways. One is through the link to the notion of sovereignty. Political theorists have well explained that constituent power overlaps with sovereignty to the extent that it presumes a political community with supreme political authority that is not subject in any way subject to the command of another – an idea seminally articulated in the work of Jean Bodin (Bodin 1992). In the words of Andreas Kalyvas, sovereignty implies that “the institution of the state is sovereign over its own territory and has absolute jurisdiction over its subjects” (Kalyvas 2012). However, this basic notion of sovereignty remains premised upon a constituted entity – the state – exercising supreme coercive power over its subjects: “the emphasis is on the moment of (coercive) command, while the constituent version privileges the act of establishing and instituting” (Kalyvas 2012). Constituent power indeed requires pairing the self-constituting and the self-governing aspects of a political community – and in that sense constituent power connects to another important notion, the one of democracy. This pairing implies that a political community remains unbound by any positivized or constituted framework – “the various names used to designate it – ‘the multitude,’ ‘the Community,’ ‘the People’, ‘the Nation’ – suggest, in the last instance, the utter limit of any politics, a politics that survives the dissolution of governments, the disruption of legal systems, and the collapse of instituted powers” (Kalyvas 2005: 227). As a result, government is legitimate only when its subjects are the authors of the laws that governs them – “an ideal and pure type of democratic
constitutional making in accordance with which we can measure and assess, that is recognize, the legitimacy of existing practices of constitutional founding” (Kalyvas 2005: 238).

Now, is there any conceptual space for the principle of constituent power in reconstructing the Rome Statute crimes and their particular modes of criminal responsibility? I suggest that there is when the ICC targets individuals with sufficient control to instrumentalize an entire hierarchical apparatus of power to commit their atrocities. More precisely, my claim here is that large-scale organizational control is particularly basic to the very possibility and maintenance of constituent power: if the de jure or de facto authority in place – the hierarchical apparatus of control governed by the Hintermann – is used to attack a significant number of civilian subjects in a systematic and widespread manner, the necessary conditions to even form and preserve constituent power – and eventually make and unmake laws – are clearly and profoundly lacking. From this perspective, it is necessary and important but not sufficient to say that the victims of international crimes are denied their most basic human rights – and, when state officials are behind or complicit in the attacks, that political or constitutional authority is perverted. The philosophical literature has well explained how crimes against humanity, for instance, deny their victim their most basic rights – “these rights that are necessary to all the other rights” (Renzo 2011; Shue 1983) as well as their “rights to have rights” (Arendt 1951, Luban 2004) when state authorities are implicated. But this does not imply that other forms of global constitutional wrongdoing occur. My reconstruction suggests that the self-constituting and self-governing aspects of constituent power are annihilated by the exercise of large-scale control and this concerns the entire community that the hierarchical apparatus could potentially reach, not just the victims of the crimes themselves.

3.2. The relational view

Having re-visited Elderkin’s notion of “jurisdictional overlap” through an incursion into the modes of criminal responsibility (P1) and having identified their constitutional significance in terms of constituent power, I now turn to the second task of this article namely, the normative justification of the international trial in light of P1. However, in order to capture this link, a detour through criminal law theory is necessary. Indeed, we may have refined the global constitutional subject matter of ICL in terms of constituent power. But we have not yet explained how the ICC exercises authority in this circumscribed domain. We therefore need an
account that speaks to the central and distinctive function of (international) criminal law, which is to call wrongdoers to account through the institutional process of the trial. In this section, I show how to fruitfully use criminal law theory in general and Antony Duff’s account of criminal responsibility to this end before developing some key aspects using a global constitutional framework.

I started this article with the premise that global constitutionalism is concerned with both identifying and evaluating political authority beyond the state. Antony Duff’s work offers a particularly smooth transition here. His account precisely starts with questioning the legitimate authority (hence the relation) that criminal courts in the domestic context hold over their subjects, namely individuals. As Duff explains, “the trial can be seen as an assertion or demonstration of the law’s authority”, that is, “the authority to assert and define the polity’s central values, those whose violation is to constitute a public wrong. It does not claim to create those values, or to create the wrongs that it punishes” (Duff 2018: 5). The starting point of Duff’s reconstruction is indeed that criminal wrongs are public wrongs (unlike the wrongs of private law) and that only these public wrongs justify the state triggering authority in these matters. But what makes these wrongs public? Duff posits that criminal courts ought to first establish – in normative terms – the relation in virtue of which they can call wrongdoers to account, and therefore render their authority public. This community supposes that both the ruler (the criminal court) and the ruled (the defendant called to account) are both members. Only then one can say that an individual can be held responsible for committing certain wrongs, and a court can recognize the wrongdoer “as a fellow member of a normative community who is called to answer to his fellows” (Duff 2010: 603).

Duff’s emphasis on the normative community as grounding the criminal law’s authority then helps shed light on the particular function of the criminal trial. In his view, the trial is not only an occasion to establish the facts of the matter, acknowledge the harm done to the victim(s) and potentially convict and punish the wrongdoer. The trial also implies that the defendant is called to account and asked to give reasons for her actions that amount to a breach of the normative community’s self-defined values: “he comes to the trial not merely as an object of inquiry but as a subject, an agent who called to account (although of course he cannot be forced) to take part in a rational process of proof and argument” (Duff 2007: 226). The core premise here is that every member of the normative community is criminally responsible to the extent that
every member is in principle able to respond to the charge of having violated the values that constitute this community. This grounds the very notion of criminal responsibility. As Duff puts it, “I am responsible for X to S as Φ – in virtue of satisfying some normatively-laden description, which makes me responsible (both prospectively and retrospectively) for X to S” (Duff 2007: 23).

While I cannot reconstruct Duff’s account fully, I shall retain and develop three essential points in transitioning to the context of ICL. First, Duff’s account specifically focuses on the trial’s function(s) as the main explanandum of criminal law theory. As such, it offers us a framework that I hope to prove useful in remedying the deficit of the current literature on ICL and global constitutionalism. It worth insisting that Duff’s justification of the trial is non-instrumental; it focuses on the standing of and the communication between the prosecutor and the court on the one hand and the defendant (and her counsel) on the other. The exercise of (international) political authority is here particular to (international) criminal law: the ruler (the prosecutor, the court) calls the ruled (the defendant and her counsel) to account for her wrongful actions. By calling to account, the defendant is treated as a responsible member of the normative community she is a member of: “the trial must initially, if it is to respect the presumption of innocence, address the defendant as a citizen who is presumptively innocent of wrongdoing, although he has been accused of it” (Duff 2007: 13). Then, the defendant is called to account on the basis of charges brought by the prosecution – “it is up to him to offer a response (usually through his counsel) to the prosecution’s case” (Duff 2009: 83). Finally, the stage of the criminal conviction (if any) becomes essentially communicative. It “communicates to the defendant the judgment that he committed the wrong described in the charge. As a communicative act, it is intended to elicit an appropriate response—of understanding and (ideally) remorseful acceptance” (Duff 2009: 83).

Second, the structure of Duff’s relational account remains independent from the precise nature and scope of the normative community in virtue of which the criminal law claims to derive its legitimate authority. It is a functional account of the criminal process and the relevant function-holder will be contingently captured. In the domestic context, this normative community consists of citizenship. In a recent contribution, Duff also contemplates extending his account to the European level: “it can portray systems of transnational criminal law, such as EU criminal law, as the criminal law of a (nascent or developing) supranational political community (…)”
Now, if we apply Duff’s initial question of legitimate authority to the ICC, which community does this international court embody? This is an important task for developing the relational account on the international plane. Duff has himself offered a response, which is to consider the relevant normativity community as the moral community of humanity: “What gives it the right to intervene on behalf of members of more local polities whose national courts have let them down is our shared humanity; but that is not far from saying that the perpetrators should have to answer not merely to their polity, but to humanity” (Duff 2010: 599). Yet, as I further argue later, this moral community only derives from the harm inflicted upon the victims, not from the position and function of the perpetrator. PI here again suggests that while harm is a necessary condition, it is not a sufficient one.

Third, and as a result, the relational account allows seeing that the criminal law’s authority is not distinct from the authority of public law generally: “the authority to assert and define the polity’s central values, those whose violation is to constitute a public wrong. It does not claim to create those values, or to create the wrongs that it punishes” (Duff 2018: 4). It is therefore misguided to distinguish the basic values of public law and criminal law or the values of human rights law and ICL. Rather, it worth exploring how the law’s authority is exercised in these domains, as I have suggested, and the trial plays a crucial role here.

3.3. The relational view and the ICC

Having explained the architecture of Duff’s account, I now return to the ICC context with a view to fill the gaps identified above. There is, though, a preliminary methodological similarity between Duff’s relational account and global constitutionalism that is worth mentioning here. Duff’s initial motivation is to question the legitimate authority of the (international) criminal law and criminal courts, as we have seen. In that sense, the relational approach is close to the global constitutional enterprise of identifying (descriptive) and evaluating (normative) the exercise of global political authority: “a normative account needs to be grounded in our existing criminal processes, as a rational reconstruction of the ends that such processes could be taken to serve” (Duff 2018: 2). This methodological stance is not found in all approaches to the criminal law: a retributivist or a consequentialist about the criminal law will view the trial as essentially truth-seeking – a means to some further end, in particular punishment, without reflecting on the normative significance of the trial beyond this instrumental function. As such,
it cannot explain the process of deliberation and communication – calling the wrongdoer to account – that is distinctive of the (international) criminal trial. As Duff himself puts it, “they connect crime to punishment by identifying those who, having committed crimes, are now to be punished; their significance is exhausted by their instrumental contribution to the aims of the penal system” (Duff 2018: 1). Duff’s relational account is here highly relevant to a global constitutional perspective to the extent that the authority of an international or supranational institution is not given – even when it concerns acts that “shock the conscience of humanity”, as the Preamble to the Rome Statute stipulates. The normative community is a distinctively political community – citizenship in the domestic context and, as I will argue, a global constitutional community in the international context.

The dual objective of identifying and evaluating global criminal authority also contrasts with revisionist accounts of ICL. For instance, Massimo Renzo (following Duff’s own intimations) has argued that international crimes such as crimes against humanity “deny their victims the status of being human” (Renzo 2011: 448). Renzo focuses on the particular normative value denied by these violations, namely “humanity”. Since this status is inherent to the human condition, any act (such as murder, rape, or deportation, etc.) becomes an international crime independently of the specifics the victims or the offender. The normative community of ICL, on that view, is simply the community of humanity, and wrongdoers are called to account for violating the community’s basic value: “crimes against humanity are those that properly concern the whole of humanity, where this means that they are wrongs for which we are responsible (i.e., accountable) to the whole of humanity” (Renzo 2012: 460). Yet, this revisionist would clearly contradict the descriptive approach of global constitutionalism (P1), which is first to reconstruct existing and developing forms of authority beyond the state.

This is where P1 comes to play a crucial role: we have established in the first part of this article that the ICC’s jurisdiction is vertical and concerns the grossest atrocities and abuses committed by individuals having instrumentalized an hierarchical apparatus. Under the Duffian framework, the ruler (the ICC) and the ruled (the accused perpetrator of crimes against humanity) are assigned the same (prior) normative status. I reach here the second core proposition of this article (P2): I argue that the authority of the ICC embodies a community of responsible states and state-like authorities calling each other to account. It is crucial to specify the steps that lead to this conclusion: first, community membership is not formally defined by
membership in the international community of states (and/or having signed and ratified the Rome Statute); rather, it is the very fact of committing these offences through a hierarchical organisation that confers membership and generates criminal responsibility. It is, in other words, a properly *normative* community of a global constitutional kind. This would explain the current jurisdictional regime of the Rome Statute, namely that not only the ICC but virtually any state can prosecute international crimes based on the principle of universal jurisdiction.

Second, and as a result, the deliberative and communicative process of the trial – our main object of investigation – will be informed by distinctively constitutional values. Since for Duff “communication requires the recognition of a community” (Duff 2009: 93), the defendant is not called to account solely as an individual or citizen, but also as an army general, a warlord, a president or a minister. The prosecutor shall treat her in accordance with that institutional and authoritative status” (…); “it requires that we respect the other as a participant in this process, so as someone to whom we must be willing to listen as well as talk” (Duff 2009: 90). Surely, calling to account is not the same as establishing criminal conviction. The prosecution will have to demonstrate the defendant’s guilt by establishing his role in the commission of these horrendous crimes. A number of distinctively criminal categories matter here, in particular the *mens rea* requirement – the knowledge that that performing certain actions will lead (or contribute) to committing (international) criminal offences. This is particularly important to international crimes as the *planner* of the crimes and the *executors* are often physically distant from one another, as we have seen. Showing that the planner enjoyed control over the actions of the executor constitutes the *subjective* element of the crime as opposed to the *objective* element constituted by the criminal acts themselves. As Jain further explains, “the perpetrator is part of and acts within a social structure that influences his conduct, and he acts with the consciousness that he is part of a common project” (Jain 2011: 161)

Let me pause here and replace the claim of this section in the overall structure of the paper. I aimed to demonstrate how the global constitutional subject matter of the ICC – captured descriptively – can operate within a normative account of the international criminal trial borrowed from Duff. This was the first part of my detour through criminal law theory. Now, as critics of Duff have pointed out, the relational account has one important limitation; it cannot fully explain the *coercive* dimension of (international) criminal law. Indeed, the deliberative and communicative process of the trial may very well occur in a number of communities, not
all public, and not all having the coercive powers of the criminal justice system: “because Duff’s account models criminal justice on the practice of a community calling its members to account for wrongdoing, it is unable to account for the criminal law’s fundamentally coercive nature” (Thorburn 2011: 87). Can global constitutionalism also provide insights as to the coercive powers of the ICC?

4. Explaining the coercive dimension of ICL

In the last section, I made three interrelated claims: methodologically, I showed that Duff’s relational account echoes the global constitutionalist query of identifying and evaluating global political authority; that it helps explain the particular normative role of the (international) criminal trial; and that, when applied to the ICL context, Duff’s account of the relevant normative community of ICL is distinctively global constitutional (P2) – a proposition I had descriptively inferred in the first part of the article (P1).

Now, if the criminal law depends on the existence of a normative community that the suspected offender is a member of in order to gain legitimate authority, not every normative community can exercise coercion the way the criminal law entitles criminal courts to. A family, a sports club or a political party may determine what counts as a wrong according to these communities’ values and rules. However, as Malcolm Thorburn puts it, “they are not entitled to take away our vested entitlements or to deprive us of liberty as the state may do in response to crime” (Thorburn 2011: 96). Indeed, while Duff requires paying the utmost attention to the trial, his account leaves the functions of arresting, interrogating, judging, imprisoning and punishing largely unaccounted for. This equally is a challenge to my global constitutional approach to ICL. These functions imply a particularly coercive form of authority. Here again, my methodological premise – that global constitutionalism ought to examine all forms of authority beyond the state – applies. Can our global constitutional imagination make sense of this coercive dimension? Here again, I aim to use insights from criminal law theory.

My strategy here is to build a two-layered analogy with i) domestic criminal law on the one hand and with ii) human rights law on the other. This is because ICL implies the coercive nature of the former but preserves the constitutional subject matter of the latter. Let me start with human rights law. Based on P1, one can interpret ICL and human rights law as functionally
analogous to the extent that both are committed by public authorities (the former) or by individuals in position of public authority (the latter). But surely, they differ in the kind of institutional response and sanctions imposed by domestic, international or supranational courts and tribunals for their violations. Most human rights treaties specify the grounds on which it may be permissible for state authorities to interfere with these rights. For example, the right to privacy (Article 8 ECHR) may be curtailed in order to secure “national security”; or the right to freedom of expression (Article 10 ECHR) may be restricted to preserve “public morals” – and therefore protecting other basic rights of individuals. All legitimate interferences aim to protect a greater public good that can also be casted in terms of rights.

Surely, the state may also fail to demonstrate the necessity of these interferences; the proportionality test is the device used in constitutional and human rights adjudication to establish this necessity in given circumstances. In conducting the test, courts distinguish between the legitimate aim underlying the interference with a right from the measures employed to secure that aim (or proportionality stricto sensu). On average, violations of human rights law are found in the latter case; the legitimate aim step is examined the courts’ substantive deliberations rather concern the proportionality of the interference stricto sensu. In other words, the state’s aim or intention might remain legitimate but the measures taken to pursue that aim are disproportional and may constitute a rights violation.

The dis-analogy between human rights law and international crimes arises precisely at this point: while P1 suggests that perpetrators of international crimes are exercising public authority by instrumentalizing an organizational framework, there is far less textual space in the Rome Statute to argue that these acts were instrumental to pursuing legitimate aim with a view to protect other basic rights of their subjects. The closest analogy to restriction clauses in (international) criminal law would be defenses for excluding criminal responsibility. However, the general grounds for triggering defenses are extremely narrow (e.g. destruction of capacity, imminent self-defense, etc.) in the Rome Statute, which add to the general fact that prosecutors

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3 In the case of the ECHR, for instance, Articles 8-11 (privacy, religion, expression, assembly) are subject to restriction conditions including: “the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

4 The Court usually follows a three-pronged test, namely whether the interference i) prescribed by law; ii) pursued a legitimate aim and iii) necessary in a democratic society. See for instance Article 10(2).
of international crimes concentrate on individuals with the least chance of benefiting from defenses. Further, a closer look at these grounds suggest that defenses do not operate like restriction clauses in that the potential exclusion of criminal responsibility is not granted based on the overall utility of the consequentialist kind that normally leads human rights courts not to find violations. Proportionality finds a very limited place in defenses with respect only to self-defense and the defense of others.\(^5\)

Rather, it is the intention to commit atrocious offences and that intentionality that is distinctive of international criminal responsibility. The idea of perverting, and not just interfering with, constitutional relations explains, I submit, the distinctively criminal functions of the ICC. It is crucial to specify the contours of this claim, in two steps. The first is that these attacks fall within the international criminal realm not only because of the kind of atrocious harm committed (murder, rape, deportation, etc.). Their global constitutional gravity lies in the fact that international criminal offenders commit crimes through an institutional channel that is instrumentalized (P1). The core idea of “role inversion” is therefore here crucial to capture. Two authors have brilliantly explained how international crimes pervert political authority. David Luban seminally diagnosed them as “politics gone cancerous” (Luban 2004: 90) while Richard Vernon argued that the triad of “administrative capacity, local authority and territoriality” distinguishes the travesty of states when they attack their subjects: “when, therefore, they play an essential role in an attack on a group of a state’s subjects, that group is absolutely worse off than it could be in the worst-case scenario of statelessness” (Vernon 2002: 243). As we have specified with P1, it is not so much the nature of the criminal agent that ultimately matters but the function of instrumentalizing an institutional apparatus that is constitutionally relevant. Further, the political wrongdoing is not limited to attacking subjects when they should be protected but extend to the conditions for the formation and preservation of their political community.

Further, while I agree with these authors on the point of role perversion (at the level of descriptive reconstruction), I diverge on their implications for defining (at the level of normative reconstruction) the relevant jurisdiction of international criminal tribunals such as the ICC. For Luban surprisingly extends the relevant jurisdiction – in this case crimes against

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\(^5\) Cf. Articles 31-33 of the Rome Statute of the ICC include mental incapacity, intoxication, self-defense or the defense of others, and duress as the grounds for potentially excluding criminal responsibility.
humanity – to any “vigilante jurisdiction” as long it meets the procedural standards of “natural justice” (Luban 2004: 90). This means that virtually anyone, subject to these standards, can claim jurisdiction over these crimes. Most importantly, this implication conflicts with the constitutional relation (P1) and the normative community consequently established (P2), which are distinctively vertical and global constitutional. On my Duffian account, the prosecution and the accused must form part of the same community. The principle of universal jurisdiction further suggests that only state or state-derived authorities can claim jurisdiction.

The last step of the argument is to gain further clarity by recounting an analogous process of norm-instrumentalization that characterizes criminal wrongs at the domestic level. It highlights that through the enforcement of the criminal law the liberal state does not enforce its own moral view or any particular view; it rather intervenes to protect the subjects’ sphere of equal personal freedom, and it does so on the basis of “a willingness on the part of the offender to displace the legal rules themselves – they are concerned not merely with an injury to some specific rights claim, but to the very idea of living together under law rather than subject to the wishes of specific individuals” (Thorburn 2011: 100). It here appears that that the same function of supplanting authority occurs in ICL. The instrumentalization of an institutional apparatus profoundly alters the conditions for free and equal individuals to live together (in domestic criminal law) and to exercise power together (in ICL). The constitutional premise remains: protecting the basic value of freedom and equality of individuals inevitably starts with how collective authority and control are exercised. Only then the very idea of living together under law becomes possible.

5. Conclusion

This article has been an exercise of global constitutional imagination. I have used global constitutionalism to reconstruct processes that are distinctive of the international criminal justice realm and conventionally confined to its imagination. What makes global constitutionalism attractive is that it uses a rich but flexible set of normative principles to reconstruct and evaluate legal normativity. Throughout the article, I have tried to preserve a dialogue between descriptive analysis and normative reconstruction in alignment with the global constitutionalist methodology.
The first step was to reflect on recent contributions that have framed both the procedural and the substantive norms of the Rome Statute in global constitutional terms. I have refined Elderkin’s idea of “jurisdictional overlap” through a reconstruction of the modes of responsibility that prevail at the ICC. I have used the global constitutional principle of constituent power to further illuminate the global constitutional wrongdoing of international crimes.

Moving to the normative justification of the trial, I have argued that Antony Duff’s relational account can offer a framework to fit the global constitutional subject matter previously established (P1). I have inferred that the ICC calls public authorities to account for failing to stand by the constitutional relations that is necessary to form and preserve a political community (P2).

Finally, I have built (dis-)analogies between human rights law and ICL to re-think the qualification of the latter as distinctively criminal. I have here suggested that unlike human rights law, ICL is concerned with the deliberate perversion of constitutional relations (P3). This both explains the limited scope of Rome Statute crimes and justifies the authority of the ICC as distinctively criminal.
References:


Antony Duff, “Process, not Punishment: The importance of Criminal Trials for Transitional and Transnational Justice”, manuscript on file with the author.


