

# Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights

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## ABSTRACT

The International Criminal Court, empowered to prosecute individuals guilty of the worst human rights atrocities, has encountered firm resistance from the United States. Underlying this dispute is a clash between two different models for achieving the global enforcement of human rights: a collective enforcement model exemplified by the Court, and a unidirectional enforcement model favored by the US. Both models present difficulties, but those of the collective model are curable, while those of the unidirectional model are not. Since the ICC cures the most significant difficulties associated with the collective model, it deserves US support. This paper addresses several of the specific legal, moral, and political controversies that have surfaced in debates over the ICC.

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## I. INTRODUCTION

Since World War II, an international movement has been engaged in a heroic quest for the global enforcement of human rights. After halting progress during the Cold War, the human rights movement has advanced dramatically closer toward its goal. Recent developments include the increased willingness of the European Court of Human Rights to overturn legislation of member states; the new practice of filing suit in US federal courts against human rights abusers from around the world; the entry into force of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the assertion by a growing number of states of universal jurisdiction over major human rights crimes (most famously illustrated by the British arrest of Augusto Pinochet on an extradition request from Spain); and the establishment of UN-sponsored war crimes tribunals for Rwanda, Sierra Leone, and the Former Yugoslavia.

Today the worldwide enforcement of human rights seems a less utopian goal than it once did. With success come a set of tough questions; political riddles that previously seemed remote have become more urgent. The fundamental challenge might be stated as follows: How can the world institute the global enforcement of fundamental human rights in a manner that is fair and accurate and that does not inflame international tensions? Part of our difficulty is that we lack a well worked *political* theory of international human rights. The most fully developed political theories of rights—for example, John Locke's *Second Treatise of Government*<sup>1</sup>—show us, in now familiar terms, how human rights are to be protected within a single country. When it comes to the protection of human rights across international borders, however, we find ourselves less well guided by experience or theory.

The challenges are vividly illustrated in the controversy surrounding the newly created International Criminal Court (ICC). Hailed at its inception as “a triumph for all peoples of the world”<sup>2</sup> and celebrated as a fulfillment of the principles articulated at Nuremberg over fifty years ago, the Court is authorized to prosecute individuals for genocide, war crimes, and crimes against humanity. The Statute authorizing the ICC was adopted by an intergovernmental conference in Rome in the summer of 1998. After collecting the required sixty ratifications more quickly than anyone antici-

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1. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., The Library of Liberal Arts, Inc. 1952).
  2. M. Cherif Bassiouni, Speech at Rome Ceremony (18 July 1998), in Bassiouni, *Negotiating the Treaty of Rome*, 32 *CORNELL INT'L L. J.* 443, 468 (1999).

pated, the Court began its official existence on 1 July 2002. As of 30 October 2002, it had been ratified by eighty-one countries.<sup>3</sup>

Support for the ICC was never universal. Alongside the 120 states voting for the Treaty at the Rome Conference, there were twenty-one abstentions and seven negative votes. Several major countries (including China, India, and Russia) have no evident intention of ratifying the Rome Statute. Yet no country has proclaimed its objections more vigorously than the United States. The Clinton Administration began by supporting the creation of an ICC, participated actively in the drafting process, and expressed satisfaction with most elements of the resulting Statute. However, it was unable to reconcile itself to certain of the treaty provisions; provisions which led it to cast a negative vote at Rome and which became the object of its persistent criticisms. President Clinton relented enough to sign the Treaty on the last possible date, 31 December 2000, but took the opportunity to restate his objections and to advise his successor against requesting ratification by the Senate.

Under George W. Bush, ambivalence has been replaced by undisguised hostility, manifested in a series of actions that typify the well-known unilateralism of the new administration. In May 2002, the United States declared that, its earlier signature notwithstanding, it had no intention of ratifying the Statute, thereby freeing itself, under Article 18 of the Vienna Convention on the Law of Treaties, to act contrary to the object and purpose of the ICC (hence the popular use of the term “unsigned” to describe the May declaration). In July 2002, immediately following the ICC’s entry into force, the US fought a pitched battle in the UN Security Council, threatening to veto all future peacekeeping operations unless the Council authorized the permanent immunity from legal action by the ICC of all UN peacekeepers whose governments had not ratified the Rome Statute. After encountering stiffer resistance than it anticipated, the US settled for a grant of immunity lasting one year, with the possibility of renewal.<sup>4</sup> At about the same time, Congress passed and the President signed the “American Servicemembers’ Protection Act of 2002” (ASPA), which bars US participation in UN peacekeeping missions to countries belonging to the Court; cuts off military aid to most countries that have ratified the Treaty unless they promise not to transfer US citizens to the Court; and authorizes military action to liberate US and allied service members taken into the Court’s custody. The President

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3. They include most European and South American countries, several countries in Africa, along with Canada, Australia, and New Zealand, and a few countries in Asia and Oceania.

4. S.C. Res. 1422, U.N. SCOR, 4572d mtg. at 1, U.N. Doc. S/RES/1422 (2002).

is permitted to waive certain of these provisions when the “national interest” so requires.<sup>5</sup> The Bush administration thereupon undertook an aggressive campaign to negotiate bilateral immunity agreements with foreign governments, invoking the ASPA to threaten the termination of military aid if the agreements are not forthcoming.<sup>6</sup>

This paper examines the debate which has pitted supporters of the ICC against a resistant United States. The dispute is not about the need for the global enforcement of human rights, a goal which both parties affirm. What is being contested instead is the proper means of achieving such enforcement. Supporters of the ICC favor what I call the collective model of enforcement; the United States favors what I call the unidirectional model. In this paper, I explore the logic of these two models, and the possible gains and costs of each. It may be tempting to dismiss the unidirectional model as self-serving, or else the collective model as naive. I shall take both models seriously, though in the end I shall suggest that the difficulties of the collective model are curable while those of the unidirectional model are not. If, as I intend to argue, the ICC cures the most significant difficulties associated with the collective model, then it merits US government support. US critics, wedded to the perspective of their original model, have exaggerated the dangers of the ICC and underestimated those of their preferred alternative. It is time for a paradigm shift.

In analyzing the conflict between the ICC and the United States, I draw on the insights of John Locke, whose theory of rights, though addressed to the domestic context, nevertheless sheds light on the choices that confront us on the international level. Locke helps us see the advantages and disadvantages of different models of rights enforcement. He is a cautious thinker, whose caution sometimes borders on pessimism. Despite his caution, he believes that the collective enforcement of human rights is possible. He offers a model of how to think realistically but imaginatively about the challenge of building institutions that provide lasting justice.

Needless to say, the “global enforcement of human rights” is a complex idea in need of elaboration. At the outset, we may distinguish between two levels of enforcement. At the domestic level, governments have an obligation to ensure reliable protection of the human rights of those residing on their territory and those affected by their actions abroad. Here enforcement means the imposition through a variety of legal and policy devices of those duties on which the reliable enjoyment of human rights depends. However,

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5. American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, §§ 2001–2008 (2002).

6. Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers’ Immunity*, N.Y. TIMES, 10 Aug. 2002, at A1.

governments may prove unable or unwilling to guarantee the human rights of persons under their jurisdiction. A secondary level of human rights enforcement takes the form of action by foreign governments and international organizations to help, pressure, or coerce governments into fulfilling their primary human rights obligations. Roughly speaking, the primary or domestic level of enforcement is directed towards individuals (where these include, importantly, public officials), while the secondary or international level of enforcement is directed toward governments.

The ICC regime, as we shall see, operates at both levels of enforcement. When governments ratify the ICC Treaty, they make a strong, albeit partly implicit, commitment to uphold the domestic enforcement of those human rights covered by the law of the Rome Statute. However, if governments fail to uphold these rights, the ICC is poised to take action on their behalf. It may do so even against the resistance of governments most immediately concerned. The very knowledge that the ICC may act in this way is intended to prod governments into the more energetic primary enforcement of human rights. Thus the two levels of enforcement are complexly intertwined. We may nonetheless distinguish between them for purposes of analysis. This paper is primarily concerned with the secondary or international level of human rights enforcement.<sup>7</sup>

The article begins with a very brief sketch of the ICC, followed by a discussion of its purpose and a summary of US objections. Next I argue that Locke's political theory illuminates the difficulties inherent in the global enforcement of human rights. Then follows an examination of alternative responses to these difficulties. This leads to a review of some of the main arguments for and against the ICC, and a conclusion that the balance of reasons weighs in the ICC's favor.

## II. A THUMBNAIL SKETCH OF THE ICC<sup>8</sup>

As determined by the Rome Statute, the ICC will consist of eighteen judges with the power to approve prosecutions, adjudicate trials, and hear appeals; a prosecutor and one or more deputy prosecutors; and an administrative staff. An Assembly of State Parties—with one vote per national delegation—

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7. I devote attention to the primary level of enforcement in another paper, Jamie Mayerfeld, *The Mutual Dependence of Internal and External Justice: The Democratic Achievement of the International Criminal Court*, Finnish Y.B. Int'l L. (forthcoming). The two papers may be read as companions.

8. See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENIUM* (2002); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2001), for excellent overviews of the ICC.

elects the judges, prosecutor, and deputy prosecutors, and may remove any one of them for misconduct. It can also approve amendments to the Statute for possible ratification by member states.

A prosecution may be started in three different ways: (1) at the behest of the United Nations Security Council, (2) at the request of a member state, or (3) at the initiative of the prosecutor, with the approval of a pre-trial chamber of judges. In the first case, referral by the Security Council, any adult inhabitant of the world is, in principle, subject to potential prosecution by the ICC. In the latter two cases (referral by a state party or prosecutorial initiative), the jurisdiction of the Court is limited to persons who are either citizens of a consenting state or commit crimes on the territory of a consenting state.<sup>9</sup>

Central to the operation of the ICC is the Principle of Complementarity, which stipulates that a prosecution may proceed only when the state of primary jurisdiction has proven itself, in the judgment of the Court, "unwilling or unable" to carry out a good faith investigation and, when investigation warrants, prosecution of a relevant case.<sup>10</sup> This rule gives the main responsibility for human rights enforcement to national governments, and restricts the ICC to the role of back-up if states fail to act.

### III. THE JUSTIFICATION OF THE ICC

The central purpose of the ICC is the protection of individuals from genocide, war crimes, and crimes against humanity. The Court aims to prevent a set of crimes that, potentially and in fact, encompass the violation of fundamental human rights of large numbers of individuals. It thus forms one piece of the effort to achieve the global protection of human rights.

Protection of individuals from genocide, war crimes, and crimes against humanity is sought through the punishment of the perpetrators. These crimes typically go unpunished because, in the usual cases, they are authorized or deliberately tolerated by the state or armed movement locally in charge. Punishment for atrocities is a non-starter where atrocities are the reigning policy. The ICC is intended, above all, to block the exemption from punishment that genocide, war crimes, and crimes against humanity may otherwise be destined to enjoy. It seeks thereby to prevent their adoption as policy in the first place.

Why punishment? Debate over the purpose of punishment has filled

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9. Rome Statute of the International Criminal Court, arts. 12–13, U.N. Doc. A/CONF.183/9 (1998).

10. *Id.* art. 17.

many volumes, without moving us noticeably closer to a consensus. My own view, which I cannot defend here, is that the obligation to deter constitutes the core rationale for punishing human rights violations.<sup>11</sup> Deterrence is often associated with a utilitarian or consequentialist rationale: we want to deter crime because we want to avoid bad outcomes in general. In my view, however, the value of deterrence is more wisely understood in terms of rights. The right to physical integrity<sup>12</sup> implies a right to certain measures of protection; among these is the establishment of a credible threat that those who seek the violation of our physical integrity will be harmed. To make current threats credible, past threats must be carried out. We owe it to people *here and now* (that is, if we want to respect their rights) to punish human rights violations that have previously taken place.

If we lodge the appeal to deterrence within a theory of human rights, we can side-step the familiar problems of consequentialist punishment. Consequentialism raises worries about treating people merely as a means to the overall good (most vividly in scenarios that involve the framing of the innocent, or the excessive punishment of the guilty). If we understand deterrent punishment as part of a general system of rights protection, however, we have a reasonable justification to offer the violent criminal for the punishment we inflict on him. Antecedently, he too enjoyed the benefits of the rights protection system. His continued protection from harm, however, depended on his respect for the rights of others. He cannot seriously complain when, in response to his violation of other people's rights, we subject him to a proportionate, non-excessive harm in the interests of collective safety. Warren Quinn puts the point well:

Violations of important moral rights are . . . *morally exposed*. That is, we may try to prevent or frustrate them by means that would, in other contexts, violate their agents' rights. That morality should withhold some protection from some seriously wrong actions is easily understood. For these are the very acts that, morally speaking, should not take place.<sup>13</sup>

Punishment of violent crime is a moral correlate of the individual right to physical integrity. To grasp the truth of this connection, it is enough to

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11. See Warren Quinn, *The Right to Threaten and the Right to Punish*, in *PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER* 47 (1995).

12. At a minimum, this right entails freedom from homicide, physical and sexual assault, torture, slavery, and cruel, inhuman or degrading treatment or punishment. But it is also closely intertwined with the protection of elemental liberties such as freedom of movement and freedom from arbitrary detention. See the International Covenant on Civil and Political Rights, arts. 6–10, 12, for the recognition of such rights under international human rights law.

13. Quinn, *supra* note 11, at 66.

consider the common situation in which government agents are free to commit violent abuses without fear of punishment. Their impunity constitutes a human rights violation in and of itself, because it signifies the utter defenselessness of vulnerable populations. The familiar cry of human rights groups to put an end to impunity is best understood, not as a clamor for retributive justice, but as a demand for the effective restoration of human rights.

Although, as I have claimed, deterrence is the main justification for punishing human rights violations, it does not displace, and indeed may be importantly linked to, other valid justifications. Punishment, as some have suggested, may have legitimate educative and expressive functions.<sup>14</sup> Where human rights are concerned, it communicates society's condemnation of their violation, and helps actual and potential aggressors to absorb the lesson that such violation is morally wrong. In addition, the prosecutions which precede punishment can themselves play a constructive role, beyond the punishments they authorize. Human rights trials can be the occasion for an open and honest conversation (painful but necessary) about the past, ultimately leading to a clarification of the historical record.<sup>15</sup> They can also encourage social reconciliation by modeling a fair procedure for the just disposition of violent conflicts fueled by bitter political and ideological divisions.<sup>16</sup>

Some people may argue that the preceding defense of punishment is challenged by the widespread use of collective amnesties, total or partial, in the aftermath of authoritarian rule and civil war. In the context of democratic transition, the argument runs, judicial prosecutions for the human rights violations of a previous regime may not be necessary or even desirable. The question of amnesty is indeed complicated. Without denying the potential value of punishment as a deterrent, we must also recognize that weak judicial systems may lack the resources to carry out comprehensive prosecutions, that such prosecutions may undermine democratic stability if a large percentage of the population is complicit in the abuses of the former regime, and that an emphasis on prosecution may divert energy from other, more valuable tasks of democratic reconstruction.

These are weighty considerations, which point out the potential cost of prosecution. What complicates matters is that they rarely constitute the principal motivation for amnesty. Most amnesties are extorted by dictators or warlords as the necessary price for the transfer of power to democracy.

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14. See Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 112 (1995).

15. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997).

16. *Id.*



When faced with such an ultimatum, domestic democratic actors may have little choice but to comply. That still leaves open the question whether foreign actors, not being subject to the same pressure, should extend their approval and cooperation to amnesties enacted under duress.<sup>17</sup>

Should foreign actors and international organizations—for example, the ICC—support or oppose domestic amnesties for human rights violations? The answer must depend to a considerable degree on the character of the amnesty in question and its role in the democratic transition. To pose the issue starkly: Is the amnesty linked to a fundamental democratic transformation of society, or does it serve principally to let human rights violators catch their breath before contemplating the resumption of violations? The challenge is to prevent amnesties from becoming a form of impunity. They must be seen to extend only to past crimes, and not create expectations of shelter for future crimes. Amnesties for past abuses are least objectionable when implemented by well-entrenched and unintimidated democracies that commit themselves to building a strong human rights culture and vigorously prosecute human rights violations in the present. If amnesties do not help usher in a sharp break with the past, if instead they soften the distinction between the old regime and the new, they contribute to the endangerment of human rights.

The historical record of amnesties is mixed. In some countries, such as Guatemala in 1986, they have failed to stop human rights abuses after the democratic transition is nominally carried out.<sup>18</sup> In other countries, such as Sierra Leone, successive amnesties repeatedly give way to the renewal of full-scale violence by their beneficiaries.<sup>19</sup> A more encouraging example is the South African Truth and Reconciliation Commission (TRC), which has been justly celebrated for its efforts to foster peace, dialogue, and respect for human rights.<sup>20</sup> Forced to promise amnesty in exchange for the transfer of power, and hampered by an understaffed judiciary, the post-Apartheid government made a virtue of necessity and channeled its resources toward

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17. This question is the subject of a special symposium on the externalization of justice to appear in the FINNISH Y.B. INT'L L. (forthcoming).

18. See AMNESTY INTERNATIONAL, GUATEMALA: THE RIGHT TO TRUTH AND JUSTICE, AI Index: AMR 34/026/1996 (10 Sept. 1996), available at <http://www.web.amnesty.org/ai.nsf/index/AMR340261996> (visited 1 Oct. 2002). A subsequent amnesty enacted under the auspices of the 1996 Peace Accords excluded genocide, war crimes, and crimes against humanity. Since 1996 there has been a decline in the number of extrajudicial executions, but human rights activists and community leaders continue to suffer harassment. See David Gonzalez, *War's Legacy: Many in Guatemala Still Fear Army*, N.Y. TIMES, 26 July 2001, at A3.

19. See Abdul Tejan-Cole, *Amnesty under the Lome Peace Accord in Sierra Leone*, 9 AFR. J. INT'L & COMP. L. (2000); Steve Coll, *The Other War*, WASH. POST, 9 Jan. 2000, at W8.

20. See Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647 (Spring 1999).

the public revelation and collective acknowledgment of past wrongs. Among its other powers, the TRC could grant individuals amnesty for politically motivated crimes in return for a full disclosure of their deeds. By promoting open dialogue and an honest confrontation with the past, the right of victims to be heard, and the collective affirmation of human rights norms, the TRC sought to remove potential sources of violence in the future. It reminds us that punishment of aggressors is not the only element, and an insufficient element in itself, of the protection of fundamental human rights. One should beware, however, of drawing the wrong lesson from the experience of the TRC. The conditions that made its achievements possible may be absent in some other societies undergoing political transition.<sup>21</sup> We should also remember that its success derived largely from the fact that it did *not* eliminate the specter of punishment. Perpetrators were encouraged to reveal their crimes by the threat of prosecution if they remained silent.<sup>22</sup>

While the domestic context should influence the international community's response to amnesties, it must not be the only consideration. We must bear in mind that amnesties have an external as well as internal impact. Even if they are not construed as a license to commit future crimes in the countries where they are adopted, they may encourage such crimes elsewhere by persuading potential abusers that they will enjoy the benefit of similar lenience.<sup>23</sup> Of course, the opposite argument has also been made: the fear of punishment may reinforce the determination of human rights violators to cling to power, perpetuating or redoubling their atrocities in order to do so. Which of these two possible dynamics should concern us more? Our answer will largely depend on the optimism with which we view the future of the human rights movement. If we think that democracy is globally stagnant or in retreat while dictators and warlords have reason to feel secure, propitiation by means of amnesty may represent the prudent course. Hope of amnesty may be necessary to induce secure tyrants to surrender power. But if we think that democracy is gaining ground and that the world's tyrants are vulnerable, the wiser policy over the long term may be to terrify them into submission. Even the fear of punishment may fail to stiffen the effective resistance of tyrants whose survival appears doubtful. If so, fear of punishment gives them a reason to cut their losses by halting or

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21. See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001) (setting forth a comprehensive study of truth commissions).
  22. This feature alone makes the South African example different from almost every other amnesty. See Ronald C. Slye, *Victims as the Heart of the Matter: The South African Amnesty as Promised in Practice* (unpublished manuscript, on file with author). The South African amnesty especially needs to be contrasted with the blanket amnesties that several countries have enacted. See Juan E. Méndez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 *ETHICS & INT'L AFF.* 25, 40 (2001).
  23. See Thomas Pogge, *Achieving Democracy*, 15 *ETHICS & INT'L AFF.* 3, 5–8 (2001).

reducing the violation of human rights, and it remains a useful deterrent to the initiation of violations by other potential tyrants. Whether optimism or pessimism about the future of human rights is warranted depends partly, of course, on the actions we take as democratic leaders and citizens—on the vigor with which we promote human rights around the world.

The decision by domestic actors whether to adopt an amnesty, and by foreign states and international organizations whether to respect the amnesty adopted, depends in each case on a multitude of factors. Some flexibility is called for, though not too much, since the right to physical integrity requires a general expectation that violent assault will be punished. Drafters of the ICC Treaty struggled over, without fully resolving, the question of amnesty. The language of the Statute stipulates a general obligation to prosecute, but includes some measure of “creative ambiguity” allowing an exception for amnesty in certain cases.<sup>24</sup> Significant in this regard is a provision which allows the Prosecutor to decline to pursue an investigation if he or she determines that, “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”; such a determination may, however, be overturned by the Pre-Trial Chamber.<sup>25</sup>

The central justification of the ICC, I have argued, is that the punishment of atrocity is a necessary and legitimate means of defending our right to physical integrity. When we look at the details of the Rome Statute, further virtues of the Court come to light. Among these is the power of the Court to order reparations to victims of human rights violations.<sup>26</sup> Perhaps the Court’s most significant contribution is the stimulus given to national governments to strengthen their own enforcement of human rights. Under the Principle of Complementarity, as we have seen, the ICC takes up prosecution only when the state of primary jurisdiction fails to act. One may expect that states, wanting to avoid ICC intervention, will work harder to prosecute and prevent the worst violations of human rights. Conceivably, the ICC could strengthen the international enforcement of human rights without ever hearing a case. An illustration of such a possibility is the galvanizing effect the British arrest of General Pinochet appears to have had on the Chilean judicial system. The arrest re-ignited a national debate about human rights abuses under Pinochet’s dictatorship; jump-started several cases that had languished in the courts; inspired successful new prosecutorial

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24. The phrase comes from Philippe Kirsch, Chairman of the Rome Conference, in Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 522 (1999). I am greatly indebted to Scharf’s article.

25. Rome Statute of the International Criminal Court, *supra* note 9, art. 53.

26. Rome Statute of the International Criminal Court, *supra* note 9, art. 75.

tactics, which in turn triggered a cascade of confessions by military officers; and emboldened judges, in the end, to remove immunity from General Pinochet himself.<sup>27</sup>

The ICC can also be expected to boost the prestige and importance of international law. It should strengthen awareness that, despite the legal maneuvers of dictatorial regimes, violations of the right to physical integrity remain forbidden and punishable under international law. It should enhance the utility of international law as a resource for domestic human rights advocates. In addition, the Rome Statute positively contributes to the content of customary international law—consolidating, and in some cases supplementing, welcome clarifications of international humanitarian law in the statutes and judicial opinions of the War Crimes Tribunals for Rwanda and the Balkans. Developments in four areas are particularly noteworthy: (1) The Statute spells out with greater precision prohibitions against sexual crimes, especially those likely to target women.<sup>28</sup> (2) It extends the degree to which war crimes prohibitions govern internal as well as international armed conflicts.<sup>29</sup> (3) It eliminates the so-called “war nexus” which formerly stipulated that crimes against humanity had to take place in the context of an international armed conflict.<sup>30</sup> And (4) it refuses immunity based on official capacity.<sup>31</sup> These developments represent significant advances in the protection of individuals from human rights atrocities.

#### IV. US OBJECTIONS

US objections have remained basically unchanged since the ICC Statute emerged from the drafting conference at Rome in 1998. The loudest, most frequent, and most emotional complaint has concerned the ICC’s potential jurisdiction over US citizens. If the United States ratifies the Treaty, all US citizens will fall under the Court’s personal jurisdiction. Even if the US does not ratify, Article 12 grants the Court jurisdiction over any US citizen accused of committing one of the relevant crimes on the territory of an ICC member state. US critics are alarmed that this provision could be used to prosecute American service members or their civilian superiors for alleged war crimes in other countries.

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27. See Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311 (2001); Tina Rosenberg, *In Chile, the Balance Tips Toward the Victims*, *N.Y. TIMES*, 22 Aug. 2000, at A20. After several months of judicial proceedings, the Chilean courts eventually spared Pinochet from prosecution on grounds of ill health.

28. Rome Statute of the International Criminal Court, *supra* note 9, arts. 7–8.

29. Rome Statute of the International Criminal Court, *supra* note 9, art. 8.

30. Rome Statute of the International Criminal Court, *supra* note 9, art. 7.

31. Rome Statute of the International Criminal Court, *supra* note 9, art. 27.

In the eyes of its critics, the Court's potential jurisdiction over US citizens highlights the seriousness of its other flaws. One target of criticism is the Treaty's inclusion of "aggression" as a prosecutable crime, as soon as 7/8 of member states have agreed on a definition of the term. The United States opposes any arrangement which does not give the Security Council the exclusive authority to determine when aggression has occurred. While conventional wisdom holds that 7/8 of member states will not approve a definition contrary to the US position,<sup>32</sup> the US government prefers not to rely on such assurances.

Another source of unhappiness is the power of the prosecutor to launch proceedings on his or her own initiative. The United States would have preferred Security Council referral to be the only route to prosecution. The possibility of state party referral was viewed as an unwelcome addition, and prosecutorial initiative as a positive mischief. Coupled with the Court's Article 12 jurisdiction over non-party nationals, it becomes, charge the critics, a potential license for arbitrary power and legal adventurism. Supporters of the Court cite a number of factors that check the power of the prosecutor: investigations launched by the prosecutor must first be approved by a three-member panel of judges;<sup>33</sup> the prosecutor is elected and may be removed by a simple majority of states parties;<sup>34</sup> and defendants are awarded generous procedural protections.<sup>35</sup> Against these assurances, the Bush administration charges that the Court is an institution without accountability; a power without a check, untethered to the supervision of national governments.<sup>36</sup> The heart of the matter is the ability of the ICC to act independently of the Security Council, and thus to evade the veto exercised by the United States as one of the five permanent Council members.

While their opposition is predictably linked to concerns about the power and status of the United States in the international arena, American

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32. See Kenneth Roth, *The Court the US Doesn't Want*, N.Y. REV. BOOKS, 19 Nov. 1998, at 45, n.2.

33. Rome Statute of the International Criminal Court, *supra* note 9, art. 15.

34. Rome Statute of the International Criminal Court, *supra* note 9, arts. 42(4) and 46(2)(b). Judges are elected by a two-thirds vote of the states parties. Any judge may be removed by a two-thirds vote of the states parties, following a recommendation for removal by a two-thirds majority of the other judges. Rome Statute of the International Criminal Court, *supra* note 9, arts. 36(6) and 46(2)(a).

35. See *infra* note 94. Some scholars believe that the safeguards are excessive and will clog up prosecutions to an inordinate degree. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 417 (2000).

36. See Under Secretary of State Marc Grossman, American Foreign Policy and the International Criminal Court, Remarks at the Center for Strategic and International Studies (6 May 2002), available at [http://www.usis.usemb.se/newsflash/grossman\\_icc\\_may02.html](http://www.usis.usemb.se/newsflash/grossman_icc_may02.html) (visited 16 Oct. 2002).

critics do not clothe their objections in the language of pure self-interest. They claim that the defects of the ICC are grounds for universal concern. Not only is the Court's jurisdiction over non-nationals an arbitrary assertion of power over non-member states; it will inhibit humanitarian interventions by the US military and thus undermine the global protection of human rights in the long run. Authorization of self-initiated prosecutions is an invitation to the abuse of judicial power, and the capture of the Court by politically motivated elements. In general, the excessive latitude enjoyed by the Court and the lack of adequate oversight threaten to create an unaccountable body, subversive of international peace and stability. US critics all profess allegiance to the primacy of human rights, but claim that the ICC in its current form is an unfair, illegitimate, and imprudent device for seeking their enforcement.

The attacks of September 11 and their aftermath have affected the controversy in complicated ways. On the one hand, new prospects of US military action abroad highlight concerns about the Court's jurisdiction over non-party nationals, and to some degree the need to combat terrorism may have displaced human rights as a priority in people's minds. On the other hand, the sense that the war against terrorism is a common struggle encourages the thought that collective rather than unilateral solutions are needed. Some have argued that, for reasons of perceived legitimacy, the International Criminal Court may provide the best forum to prosecute international terrorists charged with crimes against humanity. Furthermore, it has become harder for the United States to complain about the allegedly inadequate due process protections provided in the ICC after it has insisted on denying such protections to captives taken into its own custody during the War on Terrorism.<sup>37</sup>

## V. DILEMMAS OF ENFORCEMENT

In the confrontation between supporters and opponents of the ICC, we have a disagreement regarding the most effective and responsible means of upholding human rights in a world of independent states. To understand the contours of this debate, we can turn with profit to Locke's *Second Treatise of Government*, which maps out a strikingly similar dilemma. Inhabitants of Locke's State of Nature are entrusted with enforcing a Law of Nature which forbids them to "harm another in his Life, Liberty, Health or Possessions"<sup>38</sup>

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37. See the discussion in Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345 (2002).

38. LOCKE, *supra* note 1, ¶ 6.

and which, because it is “plain and intelligible to all rational creatures,”<sup>39</sup> recalls the contemporary international consensus prohibiting genocide, war crimes, and crimes against humanity. This arrangement, however, is far from ideal. The Law of Nature, perfect in itself, is enforced by imperfect human beings. Our chronic flaw is partiality of judgment: we exaggerate the wrongs done to ourselves, and underestimate the wrongs we inflict on others.<sup>40</sup> This shortcoming brings to mind Jesus’ parable of the mote and the beam.<sup>41</sup> It creates conditions for violence, as we seek to impose unwarranted punishment on others and resist lawful punishment applied to ourselves.

What is the best way out of this problem? One response would be to abandon the practice of enforcement altogether. That is the inference suggested by Jesus: “Judge not, that ye be not judged.”<sup>42</sup> But Locke does not consider this policy for long. He claims that “the Law of Nature would . . . be in vain, if there were no body that . . . had a *Power to Execute* that law.”<sup>43</sup> The overriding consideration is our right to protect ourselves and others, by force if necessary, from the unjust use of violence. Locke’s authorization of force in defense of self and of humankind identifies him as a prototypical theorist of human rights.

But enforcement poses serious difficulties, and no approach is entirely adequate.<sup>44</sup> In the State of Nature, where everybody remains judge and executioner of the Law of Nature, our natural partiality can lead to an escalating cycle of retribution and revenge. Paternal kingship promises the restoration of order, but by sliding into hereditary dictatorship it leaves us worse off than before, since absolute monarchs can enforce their biased conceptions of justice without resistance and without fear of being judged for their own conduct. By dint of experience, the people learn to entrust the enforcement of the Law of Nature to “collective Bodies of Men”<sup>45</sup> chosen by and accountable to themselves. The establishment of a popular legislature represents the true introduction of Civil Society and is Locke’s preferred outcome, but, owing to the persistence . . . of human bias, it does not free us from peril. There are dangers from two directions: on the one side, degeneration of civil government into tyranny, whether through encroachment by the executive or corruption of the legislature; on the other side, premature rebellion by the people, claiming without foundation that the government has turned tyrant. Locke’s extended attempt at the end of the

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39. *Id.* ¶ 124.

40. *Id.* ¶¶ 124–25.

41. *Matthew* 7:3–5.

42. *Matthew* 7:1.

43. LOCKE, *supra* note 1, ¶ 7.

44. Hobbes also understood these difficulties. See Garrath Williams, *Normatively Demanding Creatures: Hobbes, the Fall, and Individual Responsibility*, 6 *RES PUBLICA* 301 (2000).

45. LOCKE, *supra* note 1, ¶ 94.



Treatise to show how we may simultaneously avoid both dangers is not completely successful. If social trust erodes too far, the people will discover that they no longer place faith in a common judge. In the end, when arms are taken up in purported defense of humankind, we are left with only our conscience to determine whether our cause is the genuinely just one.

All the dangers which Locke locates in the enforcement of natural law are at stake in the debate over the ICC. Both discussions concern the protection of human rights. Both discussions feed on fears that a wrong step can lead to impunity, tyranny, war, or some combination of the above. There are, however, some differences. Locke's original question dealt with the enforcement of human rights within a national community. The analogous question asks how members of the international community can buttress the protection of fundamental human rights around the globe. Moreover, whereas Locke sometimes envisages individuals as both violators and enforcers of human rights, the international variant of his question assigns those roles primarily to states. The general assumption is that human rights do not become a matter of international concern until states (or other organized groups with a destructive capacity commensurate to that of states) actively participate in or negligently allow the violation of human rights. It is true that human rights prosecutions under international criminal law (as in the indictment of General Pinochet and the ICC Statute) make individuals their targets; but the individuals concerned are generally government officials and their agents, along with their counterparts in other armed groups. The point of such prosecutions, it is generally understood, is to reform the policy of states or other armed groups.

For several reasons, global enforcement of human rights is primarily a task of states rather than individuals. The most potent instruments for bringing other states into compliance with human rights norms—diplomatic pressure, economic sanction, military intervention—remain under state control. Human rights treaties and human rights bodies operating under the auspices of inter-governmental organizations like the United Nations are state-created. The prosecution of human rights violators under international criminal law is an activity either of national courts or international courts created by and ultimately answerable to states. There is no doubt that the most significant advances in human rights during the past fifty years were propelled by non-governmental organizations rather than government bureaucrats, but in the international arena NGOs have generally had to work *through* states.<sup>46</sup>

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46. See *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999); *WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE* (1998).



Another difference between Locke's original question and its international variant concerns the meaning of "enforcement." Locke equated enforcement with the punishment of transgressors, "so much as may serve for Reparation and Restraint."<sup>47</sup> I have argued that the individual right to physical integrity entails a general obligation, admitting of exceptions, to punish violations of that right. The global enforcement of human rights, however, is less a matter of the direct fulfillment of that obligation than of persuading the relevant states to fulfill it themselves. There are several strategies, including those mentioned in the previous paragraph, for bringing the necessary persuasion to bear. International criminal law, which is directly oriented to the punishment of the guilty, is only one aspect of the global enforcement of human rights. The other, non-prosecutorial strategies need not, and probably should not, be fitted into the model of juridical punishment, although they may share with the threat of punishment some element of coercion.

To recapitulate: Locke's original question was whether and how individuals should seek the domestic enforcement of human rights (where enforcement refers to the punishment of human rights violations). The analogous question is whether and how states, or individuals acting through states, should seek the global enforcement of human rights (where enforcement may include any of a variety of strategies).

Locke's political theory helps us identify four possible responses to the latter question: non-enforcement, anarchic enforcement, one-sided (or unidirectional) enforcement, and collective enforcement. I continue with an examination of each, so as to situate the argument between the United States and the ICC, which rests on a conflict between the latter two models of enforcement.

## VI. NON-ENFORCEMENT

One option is to refrain from the attempt to make other states adhere to human rights standards against their will. Until recently, non-enforcement was the prevailing norm in international affairs, a corollary of the sovereignty principle, which forbids states from intervention in each other's internal affairs. A building block of the so-called Westphalian system, the sovereignty principle is affirmed by Article 2(7) of the UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of

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47. LOCKE, *supra* note 1, ¶ 8.

any state or shall require the Members to submit such matters to settlement under the present Charter."<sup>48</sup> Today, China is perhaps the most outspoken defender of the view that states should not interfere in each other's affairs for the sake of promoting human rights.

A strict norm against intervention, even on behalf of human rights, may be supported by various rationales, some nationalistic, some pragmatic.<sup>49</sup> Perhaps the most influential defense is that a norm of non-intervention helps secure international peace. It not only removes an all-too-available pretext for war; it also rewards states for non-aggression by giving them, in exchange, a free hand in running their internal affairs. It preserves an ethic of deference and courtesy between nations.

The norm against intervention, however, no longer serves as a shield to domestic terror and repression. There is a widening consensus that the protection of human rights is a matter of collective international concern and a legitimate object of foreign policy. The behavior of the General Assembly and the Security Council proves that the United Nations no longer views human rights violations as being, in the language of Article 2(7), "matters which are essentially within the domestic jurisdiction of any state."<sup>50</sup> In particular, the Security Council's establishment of peace-keeping operations, observer missions, truth commissions, and international criminal tribunals reflects a new willingness to intervene in domestic conflicts in order to heal civil strife and promote the rule of law. Arguably, the cost of not responding to the genocide in Rwanda has jolted the international community into a new level of watchfulness. The recently established African Union is empowered under its Constitutive Act to intervene in a member state for the purpose of halting genocide, war crimes, and crimes against humanity. In his 1999 address to the opening session of the General Assembly, Secretary-General Kofi Annan offered a reformulation of the concept of sovereignty to suit a transformed set of norms of international behavior:

The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in

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48. U.N. CHARTER art. 2, ¶ 7, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945).

49. In an example of the latter argument, J.S. Mill argued that the attempt by foreign governments to liberate oppressed peoples from domestic tyrants is likely to be futile in the long term, and that we should instead wait for the people to free themselves. See John Stuart Mill, *A Few Words on Non-Intervention*, in MILL, *ESSAYS ON POLITICS AND CULTURE* 368, 381–82 (Gertrude Himmelfarb ed., 1962). Mill's advice loses some of its relevance in situations of brutal repression.

50. U.N. CHARTER art. 2, ¶ 7, *supra* note 48.

our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny.<sup>51</sup>

Annan went on to note a “universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences”<sup>52</sup> and a “developing international norm in favor of intervention to protect civilians from wholesale slaughter.”<sup>53</sup> The view that human rights are forbidden grounds for intervention belongs to an outdated conception of sovereignty. This is most clearly the case where human rights violations reach extreme proportions, amounting to genocide, war crimes, or crimes against humanity.

## VII. ANARCHIC ENFORCEMENT

Under anarchic enforcement any state, or group of states, may on its own authority employ various measures in an attempt to bring other states into compliance with human rights norms. Anarchic enforcement corresponds to the Lockean State of Nature, in which each of us is authorized to punish violations of natural law.

The available enforcement measures range from the mild to the severe. Milder measures include public criticism, the withholding of economic aid and trade concessions, and refusal of admission to international organizations. Such measures are frequently used, sometimes to considerable effect, as in the requirement of solid human rights protections for countries wanting to join the European Union. Their use has generally come to be seen as a foreign policy prerogative of states, even if those states targeted by such measures have been known to protest loudly. Sterner measures include commercial boycotts, criminal prosecutions of government officials, and military invasion. Oft-cited examples of the latter include the Indian intervention in the then East Pakistan in 1971, the Vietnamese intervention in Cambodia in 1978, and the Tanzanian intervention in Uganda in 1979.<sup>54</sup>

Anarchic enforcement poses certain risks. First, in their zeal to correct the behavior of other states, enforcing states can overlook their own human

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51. Kofi Annan, Secretary-General’s Annual Report to the General Assembly (20 Sept. 1999) available at <http://www.globalpolicy.org/secgen/sg-ga.htm> (visited 1 Oct. 2002).

52. *Id.*

53. *Id.*

54. In each case, the intervening country displaced a regime that had engaged in massive atrocities. Because the motives of the interveners are open to question (especially in the Vietnamese case), some have argued that the interventions should not be described as humanitarian. For an argument that their beneficial consequences made them humanitarian interventions, see NICHOLAS WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000).

rights shortcomings. Indeed it is a legitimate question whether a state with human rights problems of its own has any business seeking to amend the domestic behavior of other states. Second, target states may resent being chosen, rightly or wrongly, and may retaliate. The result could be an escalation of conflict, and the deterioration of human rights in the targeted state. Third, enforcing states may single out the wrong governments as targets for enforcement, either because their views of what constitutes human rights violations are distorted by ideology, or because an ostensible concern for human rights masks ulterior motives, or for other reasons. Fourth, the enforcement measures may unfairly burden the citizens of the offending state, rather than government officials responsible for the abuses. These hazards, all too often borne out by reality, lead some commentators to counsel restraint: "Overwhelming evidence from sad experience suggests that the doctrine of humanitarian intervention, whatever its moral attractions, is in practice likely to be just one more excuse for self-interested interventions by the powerful against the weak."<sup>55</sup>

Yet, the opportunities presented by anarchic enforcement may be too valuable to set aside altogether. As Jack Donnelly remarks, "Bilateral actors have more resources at their disposal, and operate with fewer constraints, than almost all multilateral organizations. If they choose, countries can exercise a considerable range of foreign policy resources on behalf of human rights."<sup>56</sup> The free-lance promotion of human rights has posted indisputable gains, particularly since the fall of the Berlin Wall, when it has no longer been enmeshed in the Cold War struggle, and has less frequently been used as a proxy for other foreign policy goals.

The clearest example of anarchic enforcement in the legal sphere is the assertion by some national judicial systems of universal jurisdiction over particular human rights crimes. Universal jurisdiction (originally applied to piracy and the slave trade, and more recently to terrorism and a growing list of human rights crimes) allows the courts of one country to try government officials of another country for human rights abuses bearing no direct connection to the prosecuting country. It is properly classified as a form of anarchic enforcement, even though it receives authorization from a number of international treaties.<sup>57</sup> We might say that these treaties give multilateral endorsement to the practice of anarchic justice.

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55. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 262 (1989).

56. *Id.* at 265. Despite the dramatic changes in world politics since these lines were written, bilateralism remains a more powerful and flexible vehicle than multilateralism for the promotion of human rights.

57. Most explicitly in the 1949 Geneva Conventions and the first 1977 Protocol on the Laws of War, the Convention on Apartheid, and the Convention against Torture. *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), *adopted* 12 Aug. 1949, 6 U.S.T. 3114, T.I.A.S. No.

Notwithstanding the publicity surrounding General Pinochet's indictment under a Spanish law establishing universal jurisdiction over genocide and terrorism, and some high-profile trials of foreign human rights abusers in Belgium, most national court systems have shied away from using universal jurisdiction to prosecute human rights crimes committed elsewhere.<sup>58</sup> Several risks merit attention. Universal jurisdiction could open the door to politically motivated prosecutions, as human rights trials become one more weapon to be used in the waging of inter-governmental quarrels.<sup>59</sup> It could expose individuals to foreign courts lacking adequate due process protections. Just as dangerous, perhaps, as the risk of unfair prosecutions and judgments is the *perception* of unfairness by the compatriots of the accused; such perceptions could seriously inflame international tensions. Finally, there is the simple fact, as reaction to the Pinochet arrest shows, that

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3362, 75 U.N.T.S. 31 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Geneva II), opened for signature 12 Aug. 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), adopted 12 Aug. 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), adopted 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956); Protocol I Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, U.N. Doc. A/32/144, Annex I, art. 76, 1125 U.N.T.S. 512 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, U.N. Doc. A/32/144, Annex II, art. 4, 1125 U.N.T.S. 513 (entered into force 7 Dec. 1978), reprinted in 16 I.L.M. 1442 (1977); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, adopted 17 June 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force 8 Feb. 1928) (entered into force for U.S. 10 Apr. 1975); Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), signed 27 Feb. 1967, 21 U.S.T. 607, T.I.A.S. 6847 (entered into force 27 Feb. 1970) (entered into force for U.S. 27 Feb. 1970); Protocol Relating to the Status of Refugees, done 31 Jan. 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force 4 Oct. 1967) (entered into force for U.S. 1 Nov. 1968); International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, 1015 U.N.T.S. 243 (entered into force 18 July 1976); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (entered into force 26 June 1987), reprinted in 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535 (1985).

58. The International Court of Justice recently ruled that universal jurisdiction cannot be asserted by a national court over a sitting head of government or cabinet minister, unless the state of the accused has ratified a treaty specifically allowing such jurisdiction. Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) (14 Feb. 2002).
59. These dangers are well described in Madeline Morris, *Universal Jurisdiction in a Divided World*, 35 NEW ENG. L. REV. 337 (2001).

many people do not accept the legitimacy of using universal jurisdiction to try foreign citizens for human rights abuses. The perception of illegitimacy would cling to any punishments imposed on that basis.<sup>60</sup>

The ICC, by centralizing prosecutions under a mutually approved and jointly supervised system not identified with any particular state, may do a better job of avoiding these problems. It might be seen as an advertisement for the superiority of collective enforcement over anarchic enforcement. But the ICC's coverage is incomplete. Because it sets a very high threshold for prosecutable crimes, many serious human rights violations escape its jurisdiction. For example, torture is not classified as a crime against humanity unless it is "committed as part of a widespread or systematic attack directed against [a] civilian population."<sup>61</sup> Moreover, the ICC does not offer protection to citizens of non-member states, absent a referral from the Security Council.<sup>62</sup> In addition, ICC prosecutors might, for political reasons, shy away from pursuing human rights violators who ought nonetheless to be brought before justice. Finally, the Court may find its activities constrained due to a simple limit of resources. The ICC leaves a partial vacuum which human rights advocates will understandably want to fill through the exercise of extraterritorial jurisdiction by national courts. Whether measures can be adopted to ensure the fairness and legitimacy of this practice is one of the most important questions facing the human rights movement today.<sup>63</sup>

### VIII. ONE-SIDED ENFORCEMENT

One-sided, or unidirectional, enforcement differs from anarchic enforcement in that the states seeking to enforce compliance with human rights norms claim a right of exemption from any such enforcement applied to themselves.

The clearest institutional embodiment of one-sided enforcement is the role accorded to the Permanent Five members of the Security Council. Since the end of the Cold War, the Council has increasingly intervened in civil conflicts, often with an explicit agenda of halting atrocities against civilians and upholding human rights. Its actions include the creation of International Criminal Tribunals for Rwanda and the Former Yugoslavia, and a hybrid

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60. See Chandra Lekha Sriram, *Contemporary Practice of Universal Jurisdiction: Disjointed and Disparate, Yet Developing*, 6 INT'L J. HUM. RTS. (forthcoming 2002).

61. Rome Statute of the International Criminal Court, *supra* note 9, art. 7.

62. The only exception is if the alleged criminal is a citizen of a member state, or if the victim suffers the crime while visiting the territory of a member state.

63. See THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001) (proposing a guide).

international-domestic tribunal for Sierra Leone. The veto enjoyed by the Permanent Five, however, insures their own exemption, and the exemption of their close allies, from becoming the receiving end of human rights enforcement measures.

The familiar ideology of the United Nations helps conceal the one-sided nature of its enforcement regime. The Security Council is described as offering a form of "collective" security. The term "unilateralism" is reserved for the use of force undertaken without the authorization of the Security Council or the blessing of Article 51, which permits armed action in self-defense. This usage has become so embedded in the language of international law that it is now difficult to dislodge. But it is misleading inasmuch as it obscures the unilateral power wielded by the Permanent Five, who, because of the veto, know that they can easily do unto others what others cannot do back.<sup>64</sup>

As a permanent member of the Council, for example, the United States has approved various humanitarian interventions, without fear that the Council will ever support an intervention contrary to its interests, much less single it out for criticism or sanction. Moreover, the United States has not waited for Security Council approval before carrying out interventions of its own, partly defended on human rights grounds, real or alleged, in Vietnam, the Dominican Republic, Central America, Afghanistan, Angola, Grenada, and, with NATO cooperation, Kosovo. Its status as one of the Permanent Five effectively shields these interventions from review by the Security Council.

The objections to one-sided enforcement are obvious enough. The assertion of a right to enforce human rights standards upon others while claiming an immunity from similar enforcement upon oneself flouts elementary axioms of fairness and reciprocity. Such a scheme is anathema to Locke's theory of law enforcement. It denies the equality of the parties. It removes restraints on the bias and vindictiveness of the enforcers. Worst of all, by eliminating the fear of sanction, it discourages enforcers from careful examination of their own conduct, and ultimately opens the door to a pattern of lawless behavior, however much the lawlessness is denied.

These dangers are manifest in attitudes that continue to exert influence on the shaping of US foreign policy. Here is Senator Jesse Helms addressing the Security Council at the invitation of then President Clinton:

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64. In response, it may be claimed that the Security Council exercises collective enforcement, because its powers are authorized by the consent of UN member states as transmitted through ratification of the Charter. But in consenting to the Security Council (and we may question how freely such consent is given), member states are still consenting to an asymmetrical enforcement regime.



When the oppressed peoples of the world cry out for help, the free peoples of the world have a fundamental right to respond. As we watch the United Nations struggle with this question at the turn of the millennium, many Americans are left exceedingly puzzled. Intervening in cases of widespread oppression and massive human rights abuses is not a new concept for the United States. The American people have a long history of coming to the aid of those struggling for freedom. In the United States during the 1980s, we called this the Reagan Doctrine.<sup>65</sup>

Senator Helms' sentiments sound admirable in the abstract, until we recall that in the name of "humanitarian intervention" the United States has a long record of supporting murderous governments and insurgencies around the world, perhaps never more vigorously than during the heyday of the Reagan Doctrine.

Though one-sided enforcement raises obvious problems, arguments may be offered on its behalf. One argument—which applies to the Security Council, though not to the purer form of unilateralism sometimes practiced by the United States—emphasizes the legitimacy conferred on Council actions by international law. Whatever one may think of the hierarchical structure of the Security Council, it enjoys the warrant of the UN Charter, the foundation of the current international legal system. Consequently, it acts with generally conceded, if sometimes resented, authority. It has the standing to approve forms of humanitarian intervention, particularly where force is involved, that are legally proscribed to other actors. It deserves credit for carrying out a number of successful peacekeeping operations, particularly since the end of the Cold War.<sup>66</sup>

Another argument, more realist and Hobbesian in flavor, stresses the incentives that must be offered to those powers which carry the greatest burden of enforcement. Granting them immunity from potential human rights sanctions, it may be claimed, is a reasonable price to pay for the obtainment of their services. A version of this argument is often heard from US critics of the ICC. During the past decade, the United States has not

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65. Senator Jesse Helms, Address Before the United Nations Security Council (20 Jan. 2000), available at <http://www.nytimes.com/library/world/global/012100helms-text.html> (visited 15 Oct. 2002). Helms added:

In none of these cases, however, did the United States ask for or receive the approval of the United Nations to legitimize its actions. And it's a fanciful notion that free peoples need to seek approval of an international body, some of whose members are totalitarian dictatorships, to lend support to nations struggling to break the chains of tyranny and claim their inalienable God-given rights. The United Nations, my friends, has no power to grant or decline legitimacy to such actions. They are inherently legitimate.

*Id.*

66. Of course, other peacekeeping missions have been notable failures. One plausibly may claim, nonetheless, that UN peacekeeping operations taken as a whole have reduced the overall level of violence and misery in the world.



demonstrated any particular enthusiasm for launching humanitarian interventions. The possibility that US service members could be charged with war crimes while carrying out such interventions might sour whatever enthusiasm remains. Putting the matter most bluntly: if the United States is to serve as beneficent world sovereign (for no one else is fitted to play that role), it must not be made to endure penalties by outsiders who object to the means it chooses.

There are limits to this argument. The July 2002 showdown in the Security Council over immunity for UN peacekeepers proved illuminating in several ways. It brought to light that the United States contributes relatively few service members to peacekeeping operations.<sup>67</sup> The reason in the end why the United Nations had to give some deference to US preferences was not its dependence on US manpower, but the fear that the United States would follow through on its promise to block future peacekeeping operations. The United States prevailed to the extent it did by threat rather than argument. It used its privileged position in the institutional architecture of the UN system to defeat a perceived challenge to that position. That the United States partly succeeded in cowing the opposition by means of its institutional power—a power which happens to make one-sided enforcement possible—is not an argument for the preservation of that power, but simply an expression of it.

A third argument rests on the plausible claim that democracies and dictatorships are not equally fitted to participate in the global enforcement of human rights. It is appropriate for democracies to judge dictatorships, but not for dictatorships to judge democracies.<sup>68</sup> Governments engaged in the systematic violation of fundamental rights disqualify themselves from judging other governments, but still need to be judged themselves. Where dictatorships are concerned, unidirectional enforcement is sensible policy.

I believe this argument has some merit, though it should be noted that it does not support the exemption of the United States from all external judgment. It rejects judgment of the United States by dictatorships, but not by other democracies. The argument does, however, raise necessary questions about the ICC. Will the participation of non-democratic regimes lacking a sincere commitment to human rights sabotage the mission of the Court? Of course, the larger version of this question has bedeviled the

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67. See Thom Shanker & James Dao, *U.S. Might Refuse New Peace Duties Without Immunity*, N.Y. TIMES, 3 July 2002, at A1.

68. See Helms, Address Before the United Nations Security Council, *supra* note 65. The inclusion of dictatorships as international overseers of human rights has been a notorious flaw of the UN Commission on Human Rights. See Felice D. Gaer, *Reality Check: Human Rights NGOs Confront Governments at the UN*, in NGOs, THE UN, AND GLOBAL GOVERNANCE (1996).

formation of international human rights law as a whole. Since international law is primarily derived from the will of states, the formation of human rights law is partly subject to the preferences of rights-abusing states. The hope has always been that the public conditions under which international law is created will force states to adopt commitments better than their own practices. But the power entrusted to the ICC—to imprison individuals, presumably including government officials—might tempt cynical member states to seek the manipulation of its mandate. Fortunately, the governments that so far have ratified the Treaty consist predominantly of democratic regimes. This indeed is what we should expect, since tyrannical governments have an obvious incentive not to join a Court to whose prosecution they make themselves immediately vulnerable. Theoretically, a collection of tyrannical states could, by mustering an effective majority on the Assembly of States Parties, succeed in appointing subservient judges and prosecutors. But if that happened, one may assume that the Court would lose all credibility and effectively destroy itself.

The Bush administration has cited its faith in democracy as a reason for opposing the ICC.<sup>69</sup> The claim is that human rights are best protected by the promotion of democracy at the national level, not by international mechanisms of enforcement. As I have argued elsewhere, this argument misses one of the most crucial features of the ICC—namely, its contribution to the preservation of democracy.<sup>70</sup> It is certainly the case that democratic institutions constitute a formidable barrier to the commission of human rights atrocities. That barrier is strengthened when a country ratifies the ICC, thereby making its citizens and leaders vulnerable to international prosecution for the commission of such crimes. Ratification is a courageous act by which a country publicly pledges itself to the prevention of atrocity and gives itself an added incentive to uphold the democratic institutions that make atrocity far less likely. The illogic of the Bush administration stance is manifest in its use of the American Servicemembers' Protection Act to withhold aid to ICC member states unless they sign bilateral agreements promising never to surrender US citizens to the Court. This policy punishes countries that have pledged to prosecute genocide, war crimes, and crimes against humanity, and that reasonably seek to protect their own inhabitants from the infliction of these crimes by foreign troops. The same policy makes the world's worst human rights abusers, which for obvious reasons have declined to join the Court, preferred recipients of the United States' huge military assistance program. It seems like a policy crafted with the very intention of subverting democracy.

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69. See Grossman, *supra* note 36.

70. Mayerfeld, *supra* note 7.

The driving force behind American opposition to the ICC is a reluctance to surrender the immunity from enforcement action which the United States enjoys under the current international legal order. The unwillingness is explicit in the demand of Congress and the Bush administration for the exclusion of any possibility that US citizens face prosecution. It explains the original US preference that prosecutions be triggered only by Security Council referral and the persistent US opposition to self-initiated prosecutions. Two areas of controversy cast a particularly revealing light on the US aversion to being judged: the issue of war crimes and the debate over jurisdiction. Of the three crimes made punishable by the Rome Statute (leaving aside aggression, which is not yet defined), the category of war crimes arouses the most nervousness in the United States. This nervousness takes different forms. The views of some officials reflect an attitude that, consciously or not, amounts to a hostility, or at best ambivalence, towards the most fundamental principles of war crimes law. Although US negotiators at the Rome Conference succeeded in establishing a high threshold for the definition of war crimes,<sup>71</sup> they did not place the threshold out of reach. Under Article 8(2.b.i), prosecutable war crimes include “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.” At hearings before the House International Relations Committee, Republican Congressman Chris Smith of New Jersey complained about the possibility that the ICC Statute, if enacted before World War II, would have prohibited the firebombing of Dresden and the dropping of the atom bomb on Hiroshima and Nagasaki.<sup>72</sup> Repeatedly pressed by the Congressman whether such actions would have fallen afoul of the ICC Statute, David Scheffer, Clinton’s Ambassador-at-Large for War Crimes and the chief US negotiator to the Rome Conference, artfully avoided giving an answer. Of course, if the bombing of Dresden and Hiroshima is not a war crime, that leaves little else; intentional killing of civilians is the paradigmatic war crime.<sup>73</sup>

Mr. Smith’s indignation is shared by members of the Bush administration.

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71. David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 16 (1999).

72. *The International Criminal Court: Recent Developments, Hearing before the House Comm. on International Relations*, 106th Cong., 26 July 2000.

73. See International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ¶ 78.

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; *States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets*. According to the second principle, it is prohibited to cause unnecessary suffering to combatants. . . .” (emphasis added)

Shortly before his appointment as Assistant Secretary of State for Arms Control and International Security, John Bolton wrote of the ICC:

A fair reading of the treaty . . . leaves the objective observer unable to answer with confidence whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II. Indeed, if anything, a straightforward reading of the language probably indicates that the court *would* find the United States guilty. *A fortiori*, these provisions seem to imply that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki. This is intolerable and unacceptable.<sup>74</sup>

The views of Smith and Bolton make nonsense of war crimes law, though these men presumably do not see themselves as rejecting the existence of such law. Their stance reflects the continuing inability, indeed refusal, of the United States to reflect on the meaning of Hiroshima.<sup>75</sup> That inability may perhaps be related to US habituation to its privileged status in the international enforcement regime.

Other fears expressed about the war crimes jurisdiction of the ICC are less intemperate. Some critics argue that because the content of war crimes law remains uncertain around its edges, the United States could find itself ensnared in prosecutions for military operations it had not unreasonably judged legitimate.<sup>76</sup> The provisions of major war crimes treaties have not until now been the subject of regular and systematic enforcement. An ICC with a permanent mandate to wield such enforcement may find itself interpreting the law in controversial ways. Had the ICC been established a few years ago, for example, US leaders and military personnel might conceivably have found themselves under threat of prosecution for some of the more legally questionable tactics employed by NATO during the Kosovo campaign.<sup>77</sup> The United States could find itself in honest disagreement with the ICC over the proper interpretation of the law of war.

This brings us back to the controversy over Article 12—specifically, the provision which grants the Court jurisdiction over citizens of non-party states for crimes allegedly committed on the territory of member states. Many have argued that Article 12 does not represent a significant departure

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74. John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 L. & CONTEMP. PROBS. 167, 170 (2001).

75. This was revealed most dramatically by the public outcry forcing the removal of a textual guide to accompany an exhibit of the Enola Gay at the National Air and Space Museum. The text broached, in the most cautious terms, the question of whether the dropping of the bomb was justified. The ensuing uproar led to the resignation of the museum's director after eighty-one members of the House of Representatives called for his departure.

76. See MARK OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAWS OF WAR* (1999) (describing the imprecision of war crimes law).

77. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13, 34 (2001).

from existing practice. Under current law, states have an indisputable right to prosecute violent crimes committed on their territory. In addition, the broadly recognized doctrine of universal jurisdiction allows states to prosecute war crimes, crimes against humanity, and genocide, even when not committed on their territory. All that Article 12 does is to let states delegate their well-recognized rights of territorial and universal jurisdiction to an international court. Individuals who are vulnerable to prosecution under Article 12 are already vulnerable to prosecution under existing law.<sup>78</sup> Critics respond that Article 12 increases the vulnerability of potential defendants for political, not legal, reasons. That is because an international court exercising jurisdiction under Article 12 would presumably be immune from the political pressures that often inhibit national states from prosecuting foreign citizens for human rights crimes.<sup>79</sup>

Some have argued that Article 12 jurisdiction over non-party nationals is in fact illegal—a violation of international law. It is beyond the scope of this paper to analyze the complex debate that has formed around this question. I merely wish to suggest that the legal criticisms of Article 12 may ultimately be based on the kind of overall political objections to the ICC noted in this paper. In the most formidable of the legal criticisms directed against Article 12, Madeline Morris makes the following (here crudely summarized) argument:<sup>80</sup> (1) Article 12 jurisdiction over non-party nationals represents a novel form of criminal jurisdiction (which may be described as either territorial or universal jurisdiction delegated to an international court); (2) there is no legal precedent for this form of jurisdiction; (3) it is therefore not authorized by customary international law; (4) a treaty by itself cannot legally subject citizens of a non-ratifying state to a form of criminal jurisdiction that is not independently authorized by customary international law, especially when the acts subject to possible prosecution are likely to be connected to the official policy of the non-ratifying state; (5) since Article 12 jurisdiction over non-party nationals is not authorized by customary law, the ICC Treaty cannot by itself make such jurisdiction legal; (6) therefore, Article 12 jurisdiction over non-party nationals is contrary to international law. Each of these claims is controversial, and each has been contested.<sup>81</sup>

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78. The exception is that national courts may be obliged to recognize immunity for heads of state, cabinet officials and diplomats. See *Democratic Republic of Congo v. Belgium*, *supra* note 58.

79. See Morris, *supra* note 77, at 32.

80. See Morris, *supra* note 77.

81. See Michael Scharf in *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position*, 64 L. & CONTEMP. PROBS. 67 (2001); Frédéric Mégret in *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT'L L. 247 (2001) (both spirited replies).

What I want to emphasize here is the nature of Morris' conclusion. On her own account, Article 12 jurisdiction need not remain contrary to international law. The international law of criminal jurisdiction has changed over time, because, Morris argues, legal innovations proposed in various treaties have met with the general acceptance of states, including non-ratifying states. The same could happen with Article 12. Whether Article 12 remains contrary to international law, therefore, depends partly (chiefly?) on whether the United States maintains its current objections. Should the United States maintain those objections? This is not in itself a legal question. It is a question of evaluating Article 12 politically, and such evaluation may prove inseparable from the evaluation of the ICC as a whole. It is interesting that the prudential reasons which Morris claims should lead the United States to oppose Article 12 are indistinguishable from arguments that the United States should avoid the jurisdiction of the ICC altogether.<sup>82</sup>

It is frequently alleged that Article 12 is unfair for the simple reason that it subjects individuals to the jurisdiction of a court that has not received their government's consent. This charge is difficult to sustain. It is one of the most firmly established principles of international law that governments have the right to punish crimes committed on their territory, whether by foreigners or citizens. This undisputed right flows from the paramount responsibility of governments to preserve order in their domains. Surely a government wanting to protect its inhabitants from genocide, war crimes, and crimes against humanity, but anticipating that it may one day lack the means or the will to prosecute such crimes, is entitled on grounds of self-defense to give an international court the back-up power of prosecuting these crimes on its behalf. Consider the war that has ravaged the Democratic Republic of Congo since the late 1990s. Rwandan troops are known to have massacred tens of thousands of civilians on Congolese territory. The DRC ratified the Rome Statute on 11 April 2002. Burdened with a weak judicial system, it is justified in seeking the assistance of the ICC to deter foreign troops from committing such atrocities in the future. Notice that as the necessary price for this protection, the Rome Statute makes all Congolese citizens vulnerable to the Court's prosecution for crimes committed at home or abroad. This is relevant not only because Congolese citizens have committed numerous atrocities in the civil war, but also because it was the massacres of Rwandan and Congolese Tutsi by Hutu militiamen and their

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82. See Morris, *supra* note 77, 17, 29–35. Morris' main argument is that the delegation of territorial or universal jurisdiction to an international court makes it more difficult for the state of nationality to apply political pressure on behalf of a defendant who is accused of crimes committed in another country. This difficulty pertains to ratifying states no less than non-ratifying states. The logic of Morris' political objection is directed against the ICC itself, not Article 12.

allies in the eastern DRC that precipitated Rwanda's intervention in the first place.<sup>83</sup>

The root of the fight over Article 12 is the United States' fundamental displeasure with a Court too independent of US control, and unamenable to guaranteeing in advance that US citizens will be exempt from prosecution.<sup>84</sup> Given the fundamental nature of these objections, one may wonder why, previous to the adoption of the Rome Statute, the Clinton administration had supported the establishment of an International Criminal Court. The answer is that among early backers of the Court there were two rather different conceptions of its role. On one conception, the Court would be the permanent equivalent of the ad hoc tribunals created by the Security Council to administer justice in Rwanda and the Balkans. A sitting court would allow the Council to initiate prosecutions of future atrocities without having to start from scratch each time.<sup>85</sup> On another conception, the Court would represent a new and more ambitious approach to the promotion of human rights. It would be an independent and impartial entity, able to launch prosecutions on its own initiative without waiting for the Security Council's cue. The distance between these two conceptions—an asymmetrical vs. a symmetrical model of human rights enforcement—proved unbridgeable in the end.

The ICC is not a perfect model of symmetrical enforcement. The Treaty Statute preserves pockets of immunity and elements of asymmetrical enforcement. The Security Council may take affirmative action to demand a twelve-month postponement, infinitely renewable, of ICC prosecutions.<sup>86</sup> It also has the unique power to refer a situation for investigation and prosecution whether or not the state of nationality or territory is a party to the Treaty.<sup>87</sup> Upon joining the ICC, a state has the option of declaring a seven-year exemption from the Court's war crimes jurisdiction.<sup>88</sup> Yet the

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83. Most of the militiamen were Rwandan citizens, but some Congolese citizens were also complicit, and a hypothetical ICC established in time to exercise prospective jurisdiction could have prosecuted any atrocities committed on Congolese soil.

84. "Though the United States has been at the forefront of the charge for international justice, it has never been willing to place itself at the mercy of a system it did not trust. And it has never been willing to trust a system it did not control." Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 165, 172 (2000).

85. Some advocates of the Court continue to peddle this conception. See the statement of Michael P. Scharf in *Hearing before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 106th Cong., 23 July 1998, available at <http://www.access.gpo.gov/congress/senate/senate11sh105.html> (visited 1 Oct. 2002).

86. Rome Statute of the International Criminal Court, *supra* note 9, art. 16. The United States has already taken advantage of this provision. See text accompanying S.C. Res. 1422, *supra* note 4.

87. Rome Statute of the International Criminal Court, *supra* note 9, arts. 16–17.

88. Rome Statute of the International Criminal Court, *supra* note 9, art. 124.



Court to which it is in the meantime lending its support is authorized to prosecute war crimes elsewhere, and the exempted state is apparently not barred from requesting such prosecutions.

Nonetheless, the enforcement regime of the ICC is far more symmetrical than that favored by the United States. This is why the US opposition to the ICC has been so difficult to justify to a bemused world. How can the United States attack the ICC while upholding the legitimacy of the ad hoc tribunals for Rwanda and the Balkans? It can hardly complain about the ambiguities or imperfections of the international law of armed conflict as contained in the Rome Statute, when it held Rwandans and citizens of the former Yugoslavia to the same law in the ad hoc tribunals. Complaints that the ICC extends partial jurisdiction over citizens of non-consenting states are hard to take seriously when the ad hoc tribunals never received the consent of the Federal Republic of Yugoslavia or Rwanda. Moreover, the tribunals were established after many of the prosecuted crimes took place, so that prospective consent was not even a theoretical possibility. To say that these states consented by virtue of their membership in the United Nations, thus approving all Security Council initiatives in advance, is an exercise in legalistic reasoning that places intolerable strain on the meaning of "consent."<sup>89</sup> In the end the United States must rest its position on the claim that the Security Council will exercise the task of enforcement more responsibly than the International Criminal Court. There are several difficulties with this claim. First, the ICC Statute imposes important checks and restrictions that are not present in the Security Council practice of establishing ad hoc tribunals. These include the complementarity rule, with repeated opportunities for the state of primary jurisdiction to challenge ICC proceedings, and enhanced due process protections for the accused. But the most important restraint on the ICC is the principle of reciprocity itself. Any state that joins the Court, and thereby shapes its direction through the selection of judges and prosecutors, understands that it makes its own citizens and leaders vulnerable to the Court's prosecution. Member states understand

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89. This kind of reasoning reaches an extreme in the attempt to argue that the Nuremberg tribunal possessed a legitimacy lacking in the ICC, because it enjoyed the consent of the state of nationality of the accused, the Allies by the summer of 1945 having become the effective sovereign of occupied Germany. (See Morris, *supra* note 77, at 37–42. Morris confesses uncertainty about the merits of this argument, then spells it out in detail. In doing so, she articulates the mandatory position of the United States, which stands by the legitimacy of Nuremberg.) Notice the absurdity of this position: if country A seeks the assistance of an international court to prosecute violations of international humanitarian law committed on its territory by the troops of invading country B, which does not recognize the court's jurisdiction, that is illegitimate. But if country A, having conquered and successfully declared sovereignty over country B, prosecutes citizens of country B for violations of international humanitarian law, including those previously committed on the territory of country B, that, by contrast, is legitimate.



that unscrupulous procedures which they tolerate in the treatment of other countries' citizens become precedents that can be used against their own citizens. No such sobering restraint applies to the permanent members of the Security Council.

The Bush administration charges that the ICC is unaccountable to any government. This is untrue: judges and prosecutors are accountable to the member states which, meeting in the Assembly of States Parties, wield the power of election and removal. The accountability of the ad hoc tribunals, however, is more questionable. They are, as the Bush administration boasts, accountable to the Security Council of the United Nations. In effect, this means that they are accountable to the Council's permanent five members, which, we may be forgiven for thinking, are ultimately accountable to no one but themselves. This is a good example of twisting the meaning of a word into its opposite. By the US logic, the ad hoc tribunals are accountable because their activity depends on the acquiescence of five states whose privileged position allows them to subject others to rules not binding on themselves. This, one might have thought, is the essence of unaccountable power.

The contradictions inherent in the US position make it difficult to sustain.<sup>90</sup> They reveal the underlying legitimacy problem facing the unidirectional model of human rights enforcement. If the norms are good enough to be enforced, they should be enforceable on the enforcer. The United States may find that, for simple reasons of coherence, it cannot preserve its current posture. In that case it may have to choose between the non-enforcement model and thus abandon the values it has affirmed at least since Nuremberg, or else prepare itself to accept the collective model of enforcement.

## IX. COLLECTIVE ENFORCEMENT

Locke believed that the only safe way out of the State of Nature was the establishment of a common and impartial system of justice. Natural law would be legislatively codified in the form of "establish'd, settled, known" rules;<sup>91</sup> applied by "a known and indifferent Judge";<sup>92</sup> and imposed by an authorized executive representing the common force of the people.<sup>93</sup> Such

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90. The contradictions are epitomized by the pressure of the United States on Yugoslavia both to grant US citizens immunity from the ICC and to cooperate with the Hague tribunal's war crimes prosecutions of Yugoslav citizens.

91. LOCKE, *supra* note 1, ¶ 124.

92. LOCKE, *supra* note 1, ¶ 125.

93. LOCKE, *supra* note 1, ¶¶ 126, 161.

a system would be entitled to the rational consent of the people, which in turn would confirm its legitimacy. Mutually authorized, jointly administered, and universally applied, it merits the description of "collective enforcement."

The virtue of this arrangement (when it functions according to plan) lies in the unitariness, fairness, and legitimacy of the judgments it produces. A unified system of justice avoids the chaos of the State of Nature, where the simultaneous attempt to impose conflicting judgments risks enmity, confusion, and ultimately war. Decisions are fair because they are rendered by impartial judges, not identified with either party to the dispute, and chosen on the basis of their competence and integrity. The fairness of the judgments contributes to their legitimacy, which is reflected in and underwritten by the people's consent. The true test of legitimacy is whether the people, from a belief in the overall fairness of the system, are willing to respect even those judgments which they believe to be erroneous.

The ICC is an attempt to institute a form of collective justice at the international level. A basic set of human rights norms, confirmed by customary international law and codified by treaty, are applied by an independent group of judges and prosecutors, not associated with any state. No member state has a privileged role in the adjudicative process or enjoys exemption from possible judgment. As we have seen, there are some minor exceptions to this rule; nonetheless, the ICC adheres much more closely to the collective justice model than any previously existing regime for the global enforcement of human rights.

The United States claims that the ICC could render false justice and become a forum for launching politically motivated attacks against the United States. As supporters of the ICC have pointed out, there are ample safeguards against this danger. Democratic states have been the principal force behind the ICC, and have supplied it with the largest number of ratifications; it is the interest and commitment of democratic states, along with human rights NGOs, that is likely to inform the Court's ethos. The Statute provides defendants with generous procedural protections and ample opportunities for appeal.<sup>94</sup> The International Criminal Tribunals for

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94. Rights of suspects are specified in Article 55 of the Rome Statute; rights of the accused are specified in Article 67. Most of the due process rights recognized under the US Constitution are matched, and some are exceeded, by the parallel provisions of the Rome Statute. The main exception is that the ICC, unlike the US Constitution, does not provide for trial by jury. We should note, however, that US law does not bar the extradition of Americans to stand trial in foreign jurisdictions lacking juries, nor does international human rights law regard the jury system as an essential component of the right to a fair trial. See International Covenant on Civil and Political Rights, art. 14. Moreover, there are insuperable logistical barriers to the use of juries in international courts. See Shannon K. Supple, *Global Responsibility and the United States: The*

Rwanda and the Former Yugoslavia, on which the legal apparatus of the ICC is closely patterned, have been widely praised for the fairness and professionalism of their proceedings. Central features of the Rome Statute, such as the complementarity rule and the high threshold for prosecutable crimes, are designed to restrain rather than encourage the activity of the Court. The limited mandate of the Court prevents legal fishing expeditions for the purpose of cornering a pre-selected target. Judges and prosecutors will be motivated to preserve their reputation among their professional peers. The intense international spotlight held over the Court will be unforgiving to any irregular conduct. Finally, the survival of the Court will depend on its legitimacy in the eyes of public opinion, not least among human rights NGOs, without whose backing it will rapidly lose credibility.<sup>95</sup> Its judgments will not, in political reality, be self-enforcing, but will require the cooperation of states and, to a considerable degree, the Security Council. (Whether a working relationship can be developed with the Security Council depends of course on the attitude of the United States.) To the extent the ICC becomes a force in world affairs, it will constitute the least dangerous branch of what will amount to a global separation of powers.

The Bush administration does not engage these points. Discounting the safeguards built into the ICC, it strings together a set of theoretically conceivable but factually implausible hypotheticals to imagine the worst that could occur, and concludes that the ICC is not worth the risk. No institution in the world could pass this kind of test. The criticisms expressed

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*Constitutionality of the International Criminal Court*, 27 HASTINGS CONST. L.Q. 181, 186–87 (1999). Nonetheless, some have felt that because the ICC diverges from the model of due process specified in the US Constitution, US ratification of the Treaty is constitutionally prohibited. See Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, 814–18 (1999); Kristofer Ailsieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns over Sovereignty and Constitutional Guarantees*, 39 WASHBURN L.J. 80, 92–101 (1999). For the contrary position, see Supple, *Global Responsibility and the United States*, *supra*, 185–93; Matthew A. Barrett, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83, 106–10 (1999). See also Scott W. Andreasen, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?* 85 IOWA L. REV. 697 (2000); Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 887–89 (1999).

95. Richard Goldstone, justice of the Constitutional Court of South Africa and former chief prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, predicts:

[I]f the Court acts as the United States fears and singles out the U.S. for inappropriate prosecution, it is going to die very quickly because that would not be acceptable to the United Kingdom or any Western European state or to South Africa, for that matter. Its life would be very limited.

Baltimore Sun, 14 Feb. 2001.

by the United States contain less than meets the eye. Charges that the ICC is an unaccountable institution do not stand up to scrutiny. Complaints that Article 12 jurisdiction over non-party nationals violates state sovereignty ring hollow when voiced by a nation that has frequently seen fit to infringe the sovereignty of other states, often in the name of human rights. Claims that Article 12 jurisdiction is a legal innovation are overdrawn, as are imputations of its unfairness, given the legitimate interest of states in protecting their inhabitants from genocide, war crimes, and crimes against humanity, whether committed by citizens or foreigners.

It is hard to see why nations should be denied the assistance of an international court in protecting their inhabitants from human rights atrocities committed by foreign or invading troops. States should be allowed to protect themselves juridically against the kind of crimes committed by Iraq in occupied Kuwait, or by the Federal Republic of Yugoslavia in Bosnia and Croatia. The emotional opposition to any form of ICC jurisdiction over US citizens generally carries with it the conviction that the United States is incapable of committing such crimes: its character renders such crimes unthinkable, so the potential vulnerability of US citizens to ICC prosecution is both unnecessary and insulting. However, the best proof of a law-abiding disposition is the willingness to make oneself accountable for violations of the law. The US assertion of a moral rectitude that renders external supervision superfluous resembles the ideology of absolute monarchy that Locke found so exasperating. To appoint oneself as the exclusive judge of one's conduct toward others is to encourage a degree of arrogance, bias, insensitivity, coarseness, greed, and self-flattery favorable to the abuse of power.

Despite some of the rhetoric used against the ICC, the United States is not opposed to the centralized international enforcement of human rights. It wants such enforcement to be directed by the Security Council (where the United States can veto any measure contrary to its liking) or by the United States acting outside the Security Council (with Kosovo and the contemplated invasion of Iraq serving as examples). The United States charges that the ICC fails the test of legitimacy and accountability, but its preferred alternative performs quite poorly by these standards. A self-appointed enforcer of justice that refuses to be judged for its own conduct is ill-equipped to gain the world's trust. Such a regime encourages abuse on one side and cynicism on the other; it undermines the enforcement of human rights in the long term.

Locke plausibly argued that the one-sided enforcement of justice, its temporary appeal notwithstanding, threatened to produce justice's collapse. The defects of one-sided justice were to be remedied by the institution of collective or reciprocal justice. Not any scheme of collective enforcement will work. A viable regime must be carefully designed with an eye to

political realities, and even then much work is needed to guard its integrity over time. The International Criminal Court offers considerable promise, for reasons I have tried to make clear. To convert its promise into success, it will require the dedicated efforts of well-intentioned and far-seeing participants. There is much still to learn about the effective global protection of human rights. A collaborative effort that includes the United States along with, and not to the exclusion of, the world's other voices can accelerate the necessary learning. It can extend what Locke called, referring to national legislatures, "the freedom of debating and leisure of perfecting"<sup>96</sup> what is good for society. If the US continues to reject the ICC, it will lose a precious opportunity to cultivate trust and trustworthiness at the international level, to foster a virtuous circle of fairness and legitimacy in the global enforcement of human rights, and thus to promote the twin goals of justice and peace.

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96. LOCKE, *supra* note 1, ¶ 215.