The Mutual Dependence of External and Internal Justice: The Democratic Achievement of the International Criminal Court

Jamie Mayerfeld*

The externalization of justice — the use of foreign and international courts to prosecute human rights crimes after the breakdown of domestic justice — has been criticized on the grounds that it is too detached from domestic legal and political processes. I shall challenge this view from two directions. First, I shall argue that the creation of a supplemental international regime of external justice is a morally necessary step. Second, I shall argue that external justice and internal justice are closely connected, and that both stand in need of each other. The availability of external justice promotes national democracy, while national democracy guards the integrity of external justice. My focus will be on the International Criminal Court, which, as I shall argue, avoids many of the defects associated with the hitherto existing forms of external justice — the assertion of universal jurisdiction by national courts and the creation of ad hoc tribunals by the UN Security Council — and which is best understood as a partnership between a transnational community of human rights advocates and national governments committed to the defense of human rights. To construe the Court merely as a form of imposing justice from the top down misunderstands its real significance, and such a construal, taken too much to heart, could end up damaging the Court's value and effectiveness.

* Associate Professor of Political Science, University of Washington. This paper could never have been written if I had not had the great fortune to receive a Human Rights Teaching Fellowship from Columbia Law School in the spring of 2000. My thanks to the Human Rights Institute for providing the experience, as well as to José Alvarez, Arturo Carrillo, Jack Greenberg, Louis Henkin, Gerald Neuman, Catherine Powell, and Abdul Tejan-Cole for making it so rewarding. For helpful comments on earlier drafts I wish to thank José Alvarez, Stephen Hanson, Beth Harris, Ran Hirschl, Elizabeth Kier, Peter Mack, Amy Ross, Brad Roth, Leila Sadat, and Chandra Sriram. My thanks also to Jayme Ribaudo for invaluable research assistance.

Why Human Rights Demand International Protection

Human rights are both a moral and a political concept. As a moral concept, they remind us that the fundamental interests and moral status of every human being imply both (1) a set of moral permissions allowing one to act in certain ways and (2) a set of duties requiring other people to treat one in certain ways. But among the duties owed to one by others is the duty to organize or coordinate their behavior in suitably helpful ways. Human rights imply the need for certain kinds of social institutions, and that is why they are a political, not just a moral, concept. This point has been well understood at least since the 17th century, when the classic social contract theorists argued that human rights entitle their bearers to institutional protections. The institution that the social contract theorists had in mind was the nation state, which could protect individuals from each other, but could also, of course, violate human rights on a much larger scale. To guard against this danger, Locke argued that the only appropriate kind of state was a representative democracy, in which the enforcement of human rights was entrusted to 'collective bodies of men' properly dedicated to upholding the law of nature.[1]

But human rights are not adequately fulfilled if we entrust their protection to the nation state alone. Too many nation states do a poor job of upholding human rights. Sometimes they fail because of a lack of capacity, as for example when a state has too few resources to guarantee the subsistence rights of its citizens, or to build a competent and independent judiciary. And all too often they fail from a lack of will: many states violate rights as a matter of deliberate policy. International institutions are needed to correct the failures of national ones — for example, to compensate for the resource deficiencies of poor states, or to bring pressure to bear on (and if necessary depose) repressive regimes. The moral principle is well captured in the Universal Declaration of Human Rights, whose 28th Article proclaims, 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

Recognition that the fulfillment of human rights is a global and not just a national responsibility has spurred the effort, since World War II, to create an effective international regime for their protection. The Universal Declaration, adopted by the United Nations in 1948, has been the manifesto of this movement. It serves as a moral benchmark for all governments and a summons to international action on behalf of human rights, calling in its Preamble for 'progressive measures,

[1] John Locke, *Second Treatise of Government* (first published 1690) (edited with an introduction by Thomas P. Peardon, Prentice Hall: New Jersey, 1997) at para. 94. I join those who view Locke's argument as democratic in its premises and implications. For a contrary reading of Locke, see C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962). For criticisms of Macpherson, see Richard Ashcraft, *Locke's Two Treatises of Government* (Allen & Unwin: London, 1987); and Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press: Ithaca, New York, 1989), ch. 5.

national and international, to secure their universal and effective recognition and observance'. A growing number of regional and global agreements bind member states to the respect of human rights at home and to cooperative schemes for their transnational promotion.

The primary function of international human rights institutions is to strengthen, not replace, protections at the domestic level. Monitoring bodies like the Human Rights Committee advise governments how domestic protections can be improved; regional courts like the European Court of Human Rights issue such instructions as legally binding judgments. The UN Security Council, though not a human rights body per se, may direct and even force recalcitrant governments to halt gross violations of human rights when such violations are deemed a threat to international peace and security. In one way or another, these organizations are empowered to correct the abusive or neglectful policies of states. Governments committed to human rights have reason to welcome such interventions. Whether they change policy in response to international correction, or in the attempt to forestall such correction in the first place, governments are guided toward the more reliable protection of human rights.

When international organizations reinforce national protections of human rights, they recapitulate a domestic process of institutional reinforcement whose importance is well understood. The secure enjoyment of human rights within any society depends on the presence of multiple overlapping protections. The principle is emphasized in the major human rights declarations, which always demand, in addition to a list of primary entitlements, the protection of those entitlements and the protection of those very protections. The Universal Declaration of Human Rights asserts not only (among other primary entitlements) 'the right to life, liberty, and security of person' (Art. 3) but also the right to 'equal protection of the law' and 'equal protection against any discrimination in violation of this Declaration' (Art. 7), the 'right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [to one] by the constitution or by law' (Art. 8), and the right 'to a fair and public hearing by an independent and impartial tribunal, in the determination of [one's] rights and obligations' (Art. 10). Democracy itself may be understood as the institutional arrangement whereby the people are best positioned to monitor and ensure the continued protection of their human rights. This understanding may furnish the strongest ground for claiming that democracy is a human right.

It is significant that protections of primary entitlements are recognized as human rights in themselves, not just as means to the fulfillment of human rights. To leave fundamental entitlements without protection is to leave persons exposed and thus to harm their dignity. Human dignity is not adequately respected unless the protection of fundamental entitlements may be demanded as a matter of right. Our rights include the protection of our rights.

The most crucial protections are those erected against the power of the state. Precisely because the state is authorized to use force in the punishment of criminals, there is a need to build a strong bulwark of defenses against the misuse of its police powers. It is appropriate that the International Covenant on Civil and Political Rights (following the cue of the U.S. Bill of Rights) devotes detailed provisions to the rights of criminal defendants. The primary entitlements are the presumption of innocence and the prohibition on cruel and degrading punishment, but extended attention is given to an elaborate network of safeguards necessary to protect these entitlements. These safeguards include the right to a speedy and public trial before a fair and competent tribunal, defense counsel of one's choosing, cross examination of witnesses, appeal of conviction, and habeas corpus procedures. The redundant character of these protections may try the patience of some citizens, but their very redundancy is integral to the idea of due process. A large package of overlapping protections is needed because any smaller package could fail. It is a crucial feature of this arrangement that higher-level protections improve the effectiveness of lower-level protections. Police may be trained to respect the due process rights of criminal suspects, but even so they are much less likely to infringe these rights when they know that suspects will have access to competent counsel, are protected by habeas corpus rules, and can appeal convictions. Similarly, public officials are less likely to abuse their power when they must anticipate the judgment of a free press and an independent legislature.

Left to itself, however, a national system of human rights protections is fragile, because the withdrawal of higher-level protections tends to lead very quickly to the collapse of lower-level protections. Dissolve the legislature, muzzle the press, or intimidate judges, and ordinary people soon find themselves with few or no defenses against abusive agents of the state. With a few deft strokes, an authoritarian leadership can dismantle the entire network of overlapping protections so carefully elaborated in the Universal Declaration and the International Covenant on Civil and Political Rights. From the standpoint of human rights, such vulnerability is an anomaly. To leave our rights exposed in this fashion is to betray the promise of human rights; it negates our right to the reliable protection of our rights. What is needed is an international order that helps build and preserve the protection of human rights at the national level; national protections must be bolted into an international system of guarantees. The creation of such a system is itself a human right, as the Universal Declaration correctly asserts. The international protection of human rights is the logical completion of the human rights idea.

The Function of Punishment

An essential component of an adequate system of human rights protection is the maintenance of a credible threat that assaults on physical integrity will be punished.[2] This is one of the primary tasks entrusted to government, a task which must be performed in a manner that does not itself entail the violation of human rights.

To maintain a credible threat that violations of physical integrity will be punished, the punishment of past violations must actually be carried out. It is not necessary — nor is it desirable — that every single violation be punished. We know that common criminals often escape punishment for violent acts by eluding detection, hiding from the authorities, winning acquittal, or obtaining clemency. It is enough for government to confront criminals with a serious level of risk. In reasonably stable societies, criminals expect the government to pursue them; they gamble that it will fail. For most people, however, the gamble is too risky. The fear of punishment reinforces, and helps implant, the moral inhibition felt by most people against the commission of violent crime.

Because punishment may be inflicted only on the guilty, it has an expressive as well as a deterrent function. It sends a message that the individual being punished has acted wrongly. Thus the punishment of violations of physical integrity communicates the valuable message that such acts are wrong.[3]

The enforcement powers entrusted to government pose their own temptations, so special vigilance must be exercised over public officials, who need to expect punishment as the consequence of the violent abuse of their authority. The nightmare is that governments — or armed movements that imitate the power of governments — may come to violate integrity rights as a matter of policy. Then the punishment of human rights abuses by government is out of the question, and public officials inflict violence without fear. Ordinary people find themselves in a condition of utter vulnerability.

In such circumstances, the most that can usually be hoped for is that punishment will be applied at a later date — after the transition from authoritarian rule, or civil war, to a stable democratic regime. But at that point it may be felt in some quarters that punishment no longer serves any worthwhile purpose and that it raises dangers of its own. For example, it may be thought to threaten the democratic

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[2] My understanding of the role of punishment is informed by Warren Quinn's seminal article, 'The Right to Threaten and the Right to Punish', 14 *Philosophy and Public Affairs* (1985) 327-73, reprinted in A. John Simmons, Marshall Cohen, Joshua Cohen, and Charles R. Beitz (eds.), *Punishment: A Philosophy and Public Affairs Reader* (Princeton University Press, 1995).

[3] See Joel Feinberg, 'The Expressive Function of Punishment', in Feinberg, *Doing and Deserving* (Princeton University Press, 1970), reprinted in Antony Duff and David Garland (eds.), *A Reader on Punishment* (Oxford University Press, 1994); and Jean Hampton, 'The Moral Education Theory of Punishment', 13 *Philosophy and Public Affairs* (1984) 208-38, reprinted in Simmons et al. (eds.), *Punishment*, *supra* note 2.

transition itself, or undermine social reconciliation, or place an excessive strain on a weak judicial system, or demand scarce resources that are more urgently needed elsewhere. A debate frequently ensues between those who believe that some or all of those responsible for past abuses should be punished, and those who favor a policy of amnesty. A large scholarly discussion has arisen around this so-called problem of transitional justice.

The topic is notoriously troubling. It is true that the costs of prosecution may be considerable; often they prove decisive. Although people have a right to live under the rule of law — to live in an institutional environment in which violent aggressors can expect to be punished — often the first step to setting up such an environment is to displace the very institutions premised on the rule of impunity. The leaders of those institutions may negotiate a partial impunity (in the form of amnesty) as the necessary price of their leaving the scene. So the very human rights considerations that condemn impunity may sometimes require us to compromise with impunity. That is the cold reality. But although compromise with impunity may be necessary, it is always regrettable. Humanity always pays a price when past violations go unpunished.

What is lost when past violations go unpunished? The issue is difficult, because the concept of punishment is itself difficult. As I have noted, the human right to physical integrity remains insecure unless society issues a credible threat that violations of the right will be punished. Human rights depend in the first instance on the *threat* of punishment, not on the *infliction* of punishment; the infliction of punishment is necessary only as a means of maintaining the threat. We punish aggressors today for violations committed yesterday so that the rights of people tomorrow are better protected.[4] Moreover, the infliction of punishment always signifies the failure of the preceding threat. Hence the consciousness of failure or futility which inevitably attends every application of punishment.

The sense of futility is heightened in the context of democratic transition. The threat of punishment was not in place when it should have been (while human rights violations were being committed). Now it seems to come too late. (And in a sense it does, as punishment always arrives too late.) But the other side of the question is the obligation we owe to current and future generations. We should not allow the impunity of human rights violators from a previous regime to serve as encouragement to people now and in the future who are tempted to follow their example.

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[4] That is why punishment is properly understood as the right of society, not of the victim — a point all too often disregarded by the so-called victims' rights movement. Locke emphasizes the distinction: '[T]he damnified person has the power of appropriating to himself the goods or service of the offender, *by right of self-preservation*, as every man has a power to punish the crime, to prevent its being committed again, *by the right he has of preserving all mankind*, and doing all reasonable things he can in order to that end.' *Second Treatise*, *supra* note 1 at para. 11.

One answer to this dilemma is to try to draw a bright line between the past and the future. That was the evident intent of the South African government when it saw itself obliged to implement a conditional amnesty for human rights violations committed during the Apartheid regime. The message powerfully conveyed by the Truth and Reconciliation Commission — simultaneously charged with administering the amnesty and uncovering the truth about past crimes — was that while some past violations would go unpunished, human rights would be fiercely guarded in the future. South Africa had committed itself to a profound democratic transformation, and the TRC, as the midwife to this transformation, would help model and teach the values of freedom, equality, tolerance, and human dignity that would henceforth prevail. Future generations could look back to this era as the time when everything changed and a new society was born.

Two points are in order. First, it must be emphasized that the South African amnesty was conditional, not total. To receive amnesty, perpetrators had to provide a full disclosure of their crimes. Indeed the threat of withholding amnesty was one of the most effective tools for uncovering the truth about past violations. Moreover, the process of disclosure was not without its punitive aspects.[5] The line drawn by the TRC between past and future was not a solid one.

Second, while the policy of the bright line (in one version or another) may sometimes constitute the best feasible strategy in the immediate context of transition, it is not an ideal policy. The nagging worry remains that a line drawn once might be drawn again, the slate wiped clean a second time, so that what we had initially foreseen as a safe future will be subsequently reclassified as a dark past whose crimes will be pardoned for the sake of a more distant future.[6] Perpetrators might bank on a second amnesty as protection for crimes committed in the meantime. Moreover, a dangerous signal is sent to other countries, where violent regimes can draw encouragement from the thought that their own crimes will lie safely on the 'past' side of some subsequently drawn line between past and future.

Amnesties, in other words, have ramifications across time and space. They dilute the general expectation that violators of human rights will face punishment, and just to that extent they place everyone in danger.[7] Though conditional amnesties

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[5] See Desmond Mpilo Tutu, *No Future Without Forgiveness* (Doubleday: New York, 1999) at 51.

[6] It is no secret that violent actors have viewed amnesties as a green light to resume atrocities at some suitable occasion. A succession of amnesties in Guatemala in the late 1980's and in Sierra Leone in the late 1990's fit this pattern. On Guatemala, see Amnesty International, *Guatemala: The Right to Truth and Justice*, AI Index: AMR 34/026/1996 (10 September 1996), available at <www.web.amnesty.org/ai.nsf/index/AMR340261996> (visited 5 August 2002). On Sierra Leone, see Abdul Tejan-Cole, 'Will United States Learn from Britain in Sierra Leone?', Democratization Policy Institute, *Democracy Activist*, Issue 3, 11 June 2002, available at <www.anonime.com/dpinstitute.org/africa/west_africa/sierra_leone/democracy_activist/200020611.htm> (visited 11 December 2002); and Steve Coll, 'The Other War', *Washington Post Sunday Magazine*, 9 January 2000.

[7] For an excellent discussion of this problem, see Thomas Pogge, 'Achieving Democracy', 15 *Ethics and International Affairs* (2001) 3-23 at 5-8.

may sometimes be necessary in present circumstances, we must lay the foundations for a future without amnesties. We must undertake as our project the construction of a credible global threat that violations of human rights will be punished. Otherwise we make hostages of future generations.

We are brought once again to the conclusion that the enforcement of human rights is an international responsibility. There are at least three reasons for this proposition. The first reason is what Locke calls the duty to preserve mankind: morally speaking, we have a reason to protect the human rights of everyone everywhere in the world. The second reason is that individuals need the help of the international community to prevent the emergence or perpetuation of abusive governments at home. The third reason (just discussed) is that impunity for human rights violations in one country threatens the safety of people in other countries, too.[8]

Doubts are sometimes expressed about the deterrent effect of human rights trials. But no one seriously doubts that the existence of a functioning domestic criminal justice system deters a considerable amount of violent crime, given the significant risk of punishment facing would-be criminals. The goal of the anti-impunity movement is to create an equivalent risk for perpetrators of human rights atrocities. Needless to say, the accomplishment of this goal is a formidable task — one that requires the coordinated efforts of diverse actors around the world.[9] It can only be realized in a gradual, incremental, and cumulative fashion. The futility of the project is not demonstrated by pointing to the apparently modest impact of one or another step. But even at this early stage, we can detect, in Payam Akhavan's words, 'an unmistakable contagion of accountability. This spread of accountability reflects the early glimmerings of an international criminal justice system and the gradual emergence of inhibitions against massive crimes hitherto tolerated or condoned by the international community'.[10] We must remember, too, that a credible system of international justice will make its greatest contribution to deterrence not by getting the instigators of massacre to reverse course after their crimes are unleashed, but by subtly steering leaders and followers away from the consideration of such crimes in the first place. As Akhavan observes, 'individuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty. The central issue is whether and how punishment can prevent such aberrant contexts prior to their occurrence, or prevent their recurrence in postconflict

[8] The idea is implicit in the term 'crimes against humanity.' See Hannah Arendt, *Eichmann in Jerusalem* (Viking: New York, 1963) at 249.

[9] For an important study of the successes won by transnational coalitions of human rights activists, see Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights* (Cambridge University Press, 1999).

[10] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' 95 *American Journal of International Law* (2001) 7-31 at 9.

situations'.[11] Deterrence is typically most significant where it is least noticeable. Outcomes by themselves do not establish its failure or success; one must think counterfactually to try to determine what would have happened if the deterrent effort had not been made. In subsequent pages I will suggest some ways in which the International Criminal Court has the potential to deter human rights atrocities.

The Case for External Justice

One way to promote the global effort against impunity is to make use of external justice. If national governments cannot afford or willfully reject the burden of prosecution, the international community can shoulder that burden for them. When human rights violators escape punishment at home, let them be punished elsewhere.

To date, external justice has taken two main forms: the assertion of universal jurisdiction by national courts, and the creation by the UN Security Council of ad hoc war crimes tribunals. Universal jurisdiction is jurisdiction that does not depend on a direct connection between the prosecuting state and the crime being prosecuted: the crime need not have occurred on the territory of the prosecuting state, and neither the defendant nor the victim needs to be a citizen of the state. Courts in several West European countries have asserted universal jurisdiction to prosecute human rights crimes committed in East Africa and the Balkans.[12] The 1984 Convention Against Torture strengthens the legal basis for universal jurisdiction by giving member states the obligation to prosecute or extradite individuals credibly accused of torture. In 1998 Britain's highest court ruled that under the terms of the Convention Britain was authorized to extradite former dictator Augusto Pinochet to Spain to stand trial for acts of torture committed in Chile.

The other main vehicle for external justice (prior to 2002) has been the use of ad hoc international courts. Two such tribunals were created by the Security Council in the 1990s to prosecute human rights atrocities in Rwanda and the former Yugoslavia. To date, over a score of individuals have been sentenced to prison, and scores more are undergoing or awaiting prosecution. Recently the Security Council authorized the creation of a hybrid court — partly international and partly national in composition — to prosecute human rights atrocities committed in Sierra Leone, and there are continuing negotiations to establish a similar tribunal for Cambodia.

The International Criminal Court represents the most ambitious attempt to create a forum for external justice. Established on July 1, 2002, and ratified by 86 countries as of December 2002, the ICC has the power to prosecute genocide, war crimes, and crimes against humanity when either committed by the citizen of a

[11] *Ibid.* at 12.

[12] See Chandra Lekha Sriram, 'Exercising Universal Jurisdiction: Contemporary Disparate Practice', 6 *International Journal of Human Rights* (2002) 49-76.

consenting state or committed on the territory of a consenting state. In cases referred by the Security Council, the Court's potential jurisdiction is broadened to cover any adult person in the world accused of committing the aforementioned crimes after July 1, 2002. Under the so-called Principle of Complementarity, the ICC may undertake judicial proceedings only when the state of primary jurisdiction proves itself 'unwilling or unable' to launch a serious criminal investigation (Art. 17).[13]

External fora offer obvious advantages in the global struggle against impunity. They can overcome failures of capacity or will at the national level. Some national governments, however willing, are simply unable to mount adequate prosecutions. They lack sufficient money, facilities, qualified personnel, or necessary expertise. Sometimes conditions are so chaotic that there is no national government to speak of. An international or foreign court, by contrast, may have the resources to undertake a serious trial that also guarantees due process protections to the accused.

A national government may wish to prosecute human rights abusers, but fear the reaction that trials would provoke. Those opposed to prosecution (for example, the members of a previous authoritarian regime) can kill or harass public officials (especially judges and prosecutors), organize military rebellion, foment public unrest, or threaten to overturn a governing coalition. Indeed a democratic regime may owe its existence to an earlier promise (overt or secret) not to convene human rights trials. These are common impediments. They make it difficult to separate incapacity and lack of will as the sources of a state's inaction; in fact, both are intertwined. The advantage of external justice is that it is removed from these sorts of pressure. Judges and prosecutors are far away, and they are protected by foreign governments, as are those who make the official decision to set up trials. It is much harder for human rights abusers to bully their way out of foreign prosecution than domestic prosecution. A system of external justice puts actual and potential abusers on notice that it will be harder to get away with their crimes.

Pressure may, of course, be directed against external justice, but its effect is greatly attenuated. The agents of external justice are in a much better position to tough it out. Prosecutors for the International Criminal Tribunal for the Former Yugoslavia (ICTY) have repeatedly insisted that political considerations played no role in their decision whether to indict specific individuals.[14] Some people may be skeptical that they played no role whatsoever, but the crucial point is that prosecutors in a foreign or international court can make such an assertion with a

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[13] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, UN Doc. A/CONF. 183/9.

[14] See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) at 220; and Tim Judah, 'The Star of the Hague', 49 *New York Review of Books*, 25 April 2002.

straight face, and in doing so create an expectation of legal integrity against which their performance can then be measured.[15]

It is worth pointing out that external actors who take advantage of their comparative insulation to initiate judicial proceedings can sometimes boost the movement against impunity back home. Britain's arrest of Pinochet breathed new life into the Chilean justice system, as domestic prosecutors found new ways to bring charges against military officers, information tumbled out about past violations, and the national courts eventually withdrew immunity from Pinochet himself (though they later restored it on grounds of poor health).[16]

Sometimes governments simply do not want to prosecute. The will isn't thwarted; it is lacking. A democratic government that could prosecute the human rights violations of a previous regime or defeated insurgency without incurring major cost or danger in the process prefers not to do so. More commonly, will is absent because the government (or an insurgent movement in control of territory) is itself engaged in human rights violations. A noteworthy feature of external justice is that, unlike domestic prosecution, it need not await a transfer of power in the relevant locale before getting underway. Of course there are practical obstacles to the apprehension of human rights abusers whose sponsoring government remains in place. One can nevertheless use an external forum to set the wheels of justice in motion. The ICTY was created while atrocities continued to occur in Bosnia, while Karadzic and Mladic held sway in the Republika Srpska, and while Tudjman and Milosevic ruled from Zagreb and Belgrade respectively.[17]

A diminished demand for prosecution is to be expected when the primary victims of atrocity are foreigners or perceived outsiders. The fact that Serbian crimes were directed against Croats, Bosnian Muslims, and ethnic Albanians has constituted the main obstacle to effective prosecution of war crimes inside the Federal Republic of Yugoslavia, even after Milosevic's overthrow. This also explains why Milosevic can still rouse sympathy among the home audience from his prisoner's dock in the Hague. Few countries have mounted serious prosecutions for war crimes against foreigners, at least in the absence of international pressure. Here again, external justice can fill the gap left by an exclusive reliance on domestic courts.

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[15] The pressure most difficult to withstand is that applied by the world's major powers, as witnessed by the successful effort of the United States to win temporary immunity for its peacekeepers from action by the ICC. See *infra* text accompanying note 34.

[16] Tina Rosenberg, 'In Chile, the Balance Tips Toward the Victims', *New York Times*, 22 August 2000; and Clifford Krauss, 'The Chileans v. Pinochet', *New York Times*, 13 December 2000.

[17] With regard to universal jurisdiction, the situation is more complicated. The International Court of Justice recently ruled that universal jurisdiction may not be asserted by a national court over another state's incumbent minister of foreign affairs for war crimes and crimes against humanity, unless immunity is waived by the minister's own state. It is uncertain to what extent the ICJ's reasoning applies to other high-ranking officials. *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo* v. *Belgium*) (2002), <www.icj-cij.org> (visited 5 August 2002).

Problems of External Justice

Nevertheless, external justice has provoked a number of concerns. Some echo reservations about domestic prosecution; others are specific to external justice. Among these concerns are worries about retroactivity, illegitimacy, distance, double standards, retaliation, impediments to peace, and unscrupulous prosecutions.

Retroactivity. The fear is that external justice (like domestic prosecution) authorizes reckless intrusions into the past.[18] The imputed recklessness is both legal and political. On the legal side, it may be felt that the external prosecution of human rights abuses of a previous regime runs afoul of the *nulla poena sine lege* rule (no punishment without a law). The natural reply to this charge is that major human rights crimes (particularly genocide, war crimes, and crimes against humanity) have been international crimes at least since the late 1940s. It may nonetheless be alleged that such international norms lack the necessary domestic authority to count as relevant law. Their dubious relevance, it may be thought, renders the exercise of external justice illegitimate. On the political side, there is a fear that prosecutions will stir up old bitterness and thus undermine social harmony. They focus attention on a disputed past, whereas our energies should be directed to the construction of a peaceful and stable future. I have argued above that the failure to prosecute the human rights crimes of a previous regime exacts a social cost, but there is another side to the issue and that is, precisely, that *prosecution* may also exact a social cost.

Illegitimacy. Some doubt the legitimacy of external justice. Such doubts reflect a number of the concerns listed above (such as retroactivity). But one source of doubt is the very externality of external justice. Such justice reaches beyond the established forms of jurisdiction, and proceeds without authorization of the state in whose jurisdiction the matter originally falls. It imposes itself from the outside. It may thus be perceived as an encroachment on national sovereignty. For some people, these features place its legitimacy in doubt; for others, delegitimize it entirely. Such illegitimacy is unfortunate for practical as well as principled reasons. Prosecutorial action perceived to be illegitimate stirs resentment and possible backlash.

Distance. Nations emerging from the experience of mass violence need to come to terms with their past. They may choose the route of truth commissions, or prosecutions, or both, but in one way or another they must assume the difficult tasks of investigation, testimony, and judgment. Otherwise nothing is learned. The danger of external justice is that it too conveniently delegates these tasks to the international community, removing them from the location where their educational impact has the greatest value.[19] When prosecutions are carried out abroad they may

[18] See Brad R. Roth, 'Anti-sovereigntism, Liberal Messianism, and Excesses in the Drive against Impunity', in this volume; and Roth, 'Peaceful Transition and Retrospective Justice: Some Reservations. A Response to Juan E. Mendez', 15 *Ethics and International Affairs* (2001) 45-50.

[19] See Mark A. Drumbl, 'Judicial and Jurisdictional Disconnects', in this volume; and José E. Alvarez, 'Crimes of States/Crimes of Hate', 24 *Yale Journal of International Law* (1999) 365-483.

receive less publicity at home. And since national citizens are not involved (or less fully involved) in the judicial reckoning, an opportunity is lost to internalize values of due process and human dignity. The nation is relegated to the role of spectator, or sometimes even non-spectator.

Double standards. External justice could become an exercise in one-way justice, with one group of countries always sitting in judgment and another other group of countries always being judged. There is nothing necessarily wrong with this, provided the first group of countries has a clean record. The danger arises that they may not, and that they choose to judge other countries for crimes of which they are also guilty. Such danger is inherent in the privileged position of the permanent five members of the Security Council, who can appoint international war crimes tribunals to prosecute leaders of other states while using the veto to shield their own conduct from similar judgment. Though universal jurisdiction by national courts does not insulate countries in the same way, it still permits governments to prosecute the alleged crimes of other governments, even when their own conduct warrants equal examination.

One-way justice often takes the form of victors' justice. Some argue that victors' justice is better than no justice at all; others are less sure. What may be agreed is that it leaves much to be desired. It can be used as an excuse to reinforce an unequal balance of power, or to humiliate the loser of a military conflict. It lends itself to double standards, which may be reflected not only in decisions over whom to prosecute, but also in the definition of what counts as a prosecutable crime. Victors' justice, especially when characterized by double standards, can give rise to politically dangerous resentments.

Retaliation. External justice may provoke retaliation. Such retaliation may be fueled by resentment, or employed in a calculated strategy to stop the application of external justice. (Of course both factors may be in play.) Gary Bass has described the difficulty Britain and France faced in prosecuting war crimes by captured German officers during World War I: Germany responded to such attempts by putting captured Allied officers in criminal jails. The Allies backed off until the end of the war.[20] Wherever external justice is applied to the agents of governments or armed movements that still retain military capacity, retaliation remains a possibility. It might be directed at the official personnel or ordinary citizens of countries leading the drive for external justice. (Such retaliation could potentially take the form of counter-prosecutions.) Or it could be directed, in terrorist fashion, against a local population, using their suffering as extortion against the international community. (This could take different forms. A government or armed movement already engaged in human rights violations could escalate them in explicitly calibrated fashion as a response to the application of external justice. Or a deposed military could threaten or carry out a coup d'état.) The specter of retaliation places the

[20] Bass, *Stay the Hand of Vengeance*, *supra* note 14, at 61-62, 83.

would-be agents of external justice in a quandary, confronting them with the eternal dilemma whether resistance or appeasement is the best answer to tyranny. Perhaps one ought to say that whereas appeasement is sometimes necessary, it must always be fitted into a long-term project of resistance: the international community should strive to subdue tyrants and warlords in the long run, using punishment as a strategy when it is safe to do so. But saying this hardly dissolves the problem.

Even when resentment does not give rise to retaliation, it remains dangerous in its own right. The popular German backlash against Allied insistence on war crimes trials after World War I helped draw support to the Nazi party.[21] External justice has pedagogy as one of its purposes: it is intended to teach respect for human rights. But the lesson may be drowned out in the resistance that it generates. The challenge is to teach the lesson as persuasively as possible, so that, among other things, less resistance is directed to the application of external justice itself. Anything that casts doubt on the process — such as the application of double standards, or perceptions of unfairness — interferes with that goal.

Impediments to peace. The purpose of external justice is to increase the likelihood that human rights violators will be punished. But this very feature may constitute one of its greatest defects.[22] Repressive regimes or violent armed movements, perceiving an increased risk of prosecution, may cling to power with ever greater desperation. If necessary, they may ratchet up their abuses in order to do so. In this way, external justice could delay or even prevent democratic transition. Restoration of peace and democracy often requires negotiation, and accountability may be one of the items that must be bargained away. This, it is claimed, is the original problem with insistence on domestic prosecution. External justice doesn't help; it makes matters worse. It takes away the flexibility that is necessary to the successful negotiation of a political settlement.

The overall force of this objection is hard to judge. The inflexibility of external justice may sometimes be a help rather than a hindrance to peace. It was feared that the ICTY's indictments of Karadzic and Mladic might impede a peaceful settlement of the war in Bosnia. In retrospect the indictments seem to have helped, by pushing these men to the sidelines.[23] Because of the indictments, Karadzic and Mladic were excluded from the Dayton conference, and barred from positions of official responsibility under the terms of the peace settlement. Their marginalization gave a freer hand to Milosevic, who proved more willing to reach a deal. But what if Milosevic himself had been placed under an indictment — as he subsequently was — for war crimes in Bosnia? Would a peace settlement then have been harder to

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[21] *Ibid.* at 92.

[22] See Chandra Lekha Sriram, 'Universal Jurisdiction: Problems and Prospects of Externalizing Justice', in this volume; and Jack Snyder and Leslie Vinjamuri, 'Principle and Pragmatism in Strategies of International Justice', typescript on file with author.

[23] See Bass, *Stay the Hand of Vengeance*, *supra* note 14, at 232-39.

achieve? (Some will argue that this question cannot be abstracted from its larger context, and that the real problem was the West's unwillingness to undertake a vigorous military response to Serbian aggression.) On the other hand, would an early indictment of Milosevic have prevented Serb atrocities later committed in Kosovo? And did Milosevic's eventual indictment hasten or delay his removal from power? These are difficult questions to answer. In addition, the short-term value of a policy of external justice may differ from its long-term value, and the overall value of foreign indictments may depend on the willingness of the international community to back them up with force. This issue — a reprise of the general dilemma between appeasement and resistance — is exceedingly complex.

Unscrupulous prosecution. External justice poses a risk of unfair prosecutions. One danger is the denial of due process to the accused. There is a general consensus that such rights have been well protected in the ad hoc international tribunals and also in the trials of East African and Balkan defendants under universal jurisdiction in West European courts. Nevertheless, one could imagine, in countries with weaker legal traditions, trials of foreign officials under universal jurisdiction that made a mockery of due process. A related danger is that of prosecutions brought on trumped up charges. Trials of foreign functionaries could be mounted on patently political grounds, without any solid basis in the law. As noted before, such trials could be undertaken in retaliation for the prosecution of a government's own agents in foreign courts. The legitimate exercise of external justice may inspire its illegitimate exercise elsewhere. And even when prosecutions are fair, the *perception* of their unfairness is dangerous in itself, for reasons we have already seen. (Such perceptions might arise spontaneously, or as the result of organized propaganda.)

The International Criminal Court and the Improvement of External Justice

These are the some of the misgivings to which the idea of external justice has, not unreasonably, given rise. It is the signal achievement of the International Criminal Court that it goes a long distance to solving these problems. Though it does not tackle all the enumerated problems with equal success, it greatly reduces their collective impact.[24]

Two crucial features of the Court are that it is created by an international treaty and that its jurisdiction is prospective. These features, in concert, cure some of the

[24] There are now two excellent overviews of the Court: Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers: Ardsley, New York, 2002); and William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2001). An articulate discussion and defense of the Court is provided in Rod Jensen, 'Policing the Global Village: Globalization and the International Criminal Court', paper presented at the annual conference of the Law and Society Association (Vancouver, 2002).

most significant problems of illegitimacy and retroactivity, and by extension help to mitigate other concerns as well.

The Court's existence, structure, and powers are a function of ratification by individual states. The founding treaty, known as the Rome Statute, provides that the establishment of the Court requires ratification by 60 states — a threshold passed in April of 2002. Through ratification, a state earns a seat on the Assembly of States Parties, whose powers include the election and removal of prosecutors and judges, selection of a budget, adoption of Elements of Crimes and Rules of Procedure and Evidence, and approval of treaty amendments (which, however, must be ratified by seven eighths of states parties before entering into force). Ratification of the Statute by individual states determines the Court's personal jurisdiction in the following way. Although there are no antecedent limits on personal jurisdiction in prosecutions undertaken at the behest of the Security Council, Article 12 stipulates that jurisdiction in prosecutions triggered by state party referral or begun at the initiative of the Prosecutor is limited to individuals who are citizens of a consenting state or who are accused of committing one of the prosecutable offenses on the territory of a consenting state. Ratification is the normal means of transmitting consent, although non-member states may consent on a temporary ad hoc basis.

The unlimited personal jurisdiction in cases of Security Council referral formalizes a power which the Council had already asserted, prior to the Court's inauguration, when it established ad hoc tribunals for Rwanda, the Balkans, and Sierra Leone. Here it might be said, exaggerating only slightly, that the Court creates nothing new. Moreover, Security Council referral may be rare, given the United States' open hostility to the Court, and the individual veto power enjoyed by each of the Council's permanent five members. What is both new and significant is the Court's power to initiate proceedings at the request of a state party or upon the determination (pending approval by a pre-trial chamber of judges) of the Prosecutor. This power opens up a new forum for external justice. But, importantly, the scope of this power is limited by the requirement of a tie based on citizenship or territory to a consenting state.

This requirement bolsters the legitimacy of the Court. Except for cases referred by the Security Council, the Court may act only with the authorization of those states most directly concerned. When it asserts jurisdiction under Article 12, it does not impose itself in a unilateral way. It acts with the prior consent of the state whose citizens are implicated in human rights atrocities or on whose territory such crimes have allegedly taken place. Because the Court's powers originate in the state's consent, citizens of that state have less grounds to complain about the usurpation of national sovereignty. Perhaps the staunchest supporters of sovereignty may argue that no state has the right to delegate the power of prosecution to an international court. But to this we may reply that a state is fully justified in doing so as a means of upholding its most fundamental responsibility — the protection of human rights. If

a state ever has the right to limit its powers by means of a treaty for some legitimate end, surely it may do so for the sake of human rights. I say more about this below.

The limits on the Court's jurisdiction underscore the significance of ratification. When a state ratifies, it declares, first of all, that the Court henceforth enjoys complementary jurisdiction over its citizens. The jurisdiction extends not only to ordinary citizens, but also, since Article 27 rules out official capacity as grounds for immunity, to high-ranking officials in government and the armed services. The government officials who oversee ratification consequently bind themselves in the strongest and most dramatic way possible to the defense of human rights, because they voluntarily renounce whatever immunity protections they may otherwise have enjoyed, and, by their undertaking, make their successors and *themselves* personally liable to prosecution by an international court for major human rights crimes. This is what social scientists like to call a 'pre-commitment strategy' — but with a vengeance. That eighty-six countries (as of December 2002) have willingly taken this step represents an astonishing and unprecedented development in world history. The courage of these states is worthy of celebration.[25]

The Court's jurisdiction includes crimes committed by a member state's citizens against citizens of other countries. It thus brings under its protection a category of people (namely foreigners) for whom (as mentioned above) a member state's population may feel less overall sympathy, and whose rights it may feel less obligated to protect. Current international and municipal law offers imperfect protection to the rights of non-citizens. Thus the commitment by ratifying states to assume equal obligations towards foreigners represents another bold step forward from existing practice.

By the act of ratification, a state also gives the Court the power to prosecute human rights atrocities committed on its territory. Such crimes will most often be committed by the territorial state's own citizens, but they may also be committed by foreigners, including in some instances citizens of states that have not ratified the Statute. The latter case is most likely to arise from armed operations by a non-member state on a member state's territory during a war or military intervention. Because Article 12 jurisdiction extends in this limited way to citizens of non-member states, it has aroused the ire of the United States, which fears that its own citizens could become targets of prosecution.[26] In defense of the provision, we should recall the undisputed right and responsibility of all states to preserve domestic order, a right which gives rise to the equally undisputed right of states to prosecute crimes committed on their territory. It does not seem unreasonable that a

[25] The revolutionary significance of the Court is stressed by Sadat in *The International Criminal Court*, *supra* note 24; and by Frédéric Mégret in 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', 12 *European Journal of International Law* (2001) 247-68.

[26] I discuss US opposition to the Court in 'Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights', *Human Rights Quarterly*, forthcoming.

state might seek the assistance of an international court to insure that such prosecutions are actually carried out.[27] It would be highly anomalous if a state party, having made its own citizens and leaders vulnerable to the Court's prosecution for human rights atrocities, including those inflicted on foreigners, could not invoke the Court's assistance in the protection of its own inhabitants against foreign abuses committed on its territory.[28]

The Court's jurisdiction, as previously noted, is complementary. It initiates proceedings only if the state of primary jurisdiction fails to do so. To avoid the embarrassment of having their citizens and officials investigated before the Court, ratifying states have an increased incentive to prevent human rights crimes from occurring, and, in case their precautions fail, to prosecute such crimes in national courts. Some member states have begun revising their penal codes to include prohibitions on genocide, war crimes, and crimes against humanity as these terms are currently defined; other states are being urged to do so. The Court thus contributes to the 'domestication' of international humanitarian law and human rights norms. As one scholar observes, 'The influence of the Rome Statute will extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to greater zeal in the repression of serious violations of human rights'.[29] The Court, having derived its existence from the express authorization of states guided (at least in this instance) by a commitment to human rights, serves in turn to internalize that commitment at the domestic level. It nurtures the values that inspire its creation.

To avoid ICC intervention, member states with fragile protections of human rights will need to do more than revise their criminal code. If they are wise, they will seek to develop bureaucracies more capable of administering justice and upholding

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[27] Notice, therefore, that national courts already enjoy the jurisdiction over non-party nationals (for crimes committed on the state's territory) which Article 12 grants to the International Criminal Court. The dire implications which the United States sees in Article 12 — that U.S. nationals could be tried in foreign courts — are already here.

[28] For the argument that Article 12 jurisdiction over non-party nationals is in violation of international law, see Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-party States', 64 *Law and Contemporary Problems* (2001) 13-66. For the opposing view, see Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 67-117; and Mégret, 'Epilogue to an Endless Debate', *supra* note 25.

I do not believe that a state acts at all contrary to democratic principles if, in foreseeing that it may lack the judicial capacity to prosecute genocide, war crimes, and crimes against humanity committed by foreign nationals on its soil, it empowers an international court operating in accordance with due process to undertake such prosecutions on its behalf. Such a policy is a legitimate form of self-defense, consistent with and supportive of democratic norms. I am therefore unpersuaded by the argument of Madeline Morris, 'The Disturbing Democratic Deficit of the International Criminal Court', in this volume.

[29] Schabas, *Introduction to the International Criminal Court*, *supra* note 24 at 19. The significance of complementarity is described in Jensen, 'Policing the Global Village', *supra* note 24.

the law, reform military and police procedures, institute a program of civic education that emphasizes human rights, and seek to remove the sources of ethnic tension.[30] Such multifaceted strategies deserve the support of well-established democracies and international NGO's.

While state consent bestows legitimacy on the Court, the fact of multiple ratifications adds another dimension of legitimacy. When several states ratify, the Court passes from being a unilateral or bilateral to a collective undertaking. It makes a difference that not one but several states are observed to possess the necessary courage to bind themselves to the Court's complementary jurisdiction. Ratification is no longer an isolated or eccentric act, but one whose rationality is acknowledged by other states. It simultaneously expresses a national commitment and the power of an international movement. Supporters of the Court know that they are joined by like-minded individuals around the world. The Court answers to an international constituency (even though it has not yet attained a global membership).

If the jurisdiction-ratification tie is vital for understanding the character of the Court, so too is the prospective nature of its jurisdiction (Art. 27). The Court may only prosecute crimes committed after its entry into force (July 1, 2002). Moreover (except for cases referred by the Security Council, or requested through a state's ad hoc acceptance of the Court's jurisdiction), it may not prosecute crimes that are committed before the state of nationality or the territorial state becomes a party to the Treaty (Art. 11). Ratification thus draws a boundary in time: a member state makes its citizens liable to the Court's prosecution for crimes committed after, but not before, the date of accession.

The prospective jurisdiction of the Court skirts the problem of retroactivity, but without introducing new problems in turn. We have noted the dilemma that transitional justice poses regarding the future and the past: there are understandable pressures to institute amnesties for past crimes, but the expectation of renewed amnesties spells disaster. The Court navigates this dilemma in a skillful way. It is oriented toward the future, but the future it seeks to construct is one in which it will *no longer* be possible to preserve impunity by drawing a protective curtain over the past. It protects people in the future, by ruling out amnesties in the further future.

Of course in the future new pressures for amnesties may present themselves. By joining the ICC, however, a state undertakes not to yield to such pressures. Through such an undertaking, it does two things: first, it acquires an added incentive never to find itself in the position of looking back on a history of human rights crimes and feeling pressure to institute a collective amnesty for such crimes; and second, it sends a signal that should it nevertheless find itself in such a position it will, despite all the difficulties involved, refuse to institute an amnesty. As a member of the ICC, it will have no choice in the matter. All the relevant parties must adjust

[30] In 'Principle and Pragmatism', *supra* note 22, Snyder and Vinjamuri stress the dependence of human rights on strong institutions of justice and public administration.

their calculations accordingly: in particular, potential human rights abusers can no longer bank on a future amnesty, to be obtained by extortion or other means. We see once again how ratification of the Court takes the form of a pre-commitment strategy.[31]

The Bush Administration misses the point of all this when it lists among its objections to the Court that it is too rigid in its treatment of the past. In a statement explaining the reasons for the United States' recent withdrawal of support from the Treaty, Under Secretary of State Marc Grossman declared: 'When a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC.'[32] What this statement ignores is that a government might prefer a third choice — to bind itself, through ICC ratification, not to issue amnesties in the future. This is not only a legitimate option for a democratic government; it is the *best* option — as should become clear when we think through the implications of the Bush Administration's preferred alternative, which is to preserve the permanent possibility of amnesty.[33]

Among the dangers enumerated in the previous section, I have dwelled on those of illegitimacy and retroactivity, because I believe the ICC deals with them in a particularly constructive way. The forward-looking character of the Court and the foundation of its jurisdiction on state consent set it apart from previous forms of external justice and will come to be seen, I think, as constituting two of its greatest strengths. I shall speak more briefly about the Court's ability to handle the other dangers I mentioned. Some of these dangers are diminished by its effective handling of the problems of illegitimacy and retroactivity.

Concerns about double standards should be greatly allayed by the collective character of the Court. Before a country can refer a case for prosecution, and before it can win a seat on the Assembly of States Parties and thereby take part in the election of the Prosecutor and the judges, it must first accept the jurisdiction of the Court. The countries that sit in judgment are thus liable to judgment themselves.

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[31] Some have argued that the Court can respect national amnesties in special circumstances. See Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 507-27. But if the Court is to succeed, this practice must be strictly limited. In his reading of the Statute, Scharf finds that acceptable amnesties must satisfy a demanding set of criteria, and even then the Court 'should defer prosecution only in the most compelling of cases' (at 527).

[32] Marc Grossman, 'American Foreign Policy and the International Criminal Court.' The text can be found at <www.usis.usemb.se/newsflash/grossman_icc_may02.html> (visited 5 August 2002).

[33] States that are *currently* enduring civil war are placed in a more difficult dilemma, since the withdrawal of amnesty as an option may complicate prospects of negotiated settlement; on the other hand, allowing the parties engaged in violence to hope for amnesty encourages the continued commission of atrocities here and now. This quandary is the source of the divided feelings of many Colombians toward the ICC. See 'Colombia Ratifies International Criminal Court', *Associated Press,* 5 June 2002.

(The exception is the Security Council, which can refer cases for prosecution whether or not its members have ratified the Treaty, but as we noted the Council has already in effect laid claim to this power, with or without the ICC.) The danger of double standards is not dispelled entirely. Conceivably a bloc of member states could win an effective immunity by political maneuver, and the power to prosecute non-party nationals could be abused. The question is whether this is likely. In the final part of this paper I take up the question of the possible corruption of the Court.

As I discuss later, the Court's membership consists disproportionately of democratic states. Since these also tend to be comparatively rich states, concerns have arisen that the Court might display a bias towards its wealthier members. A Court that directs its investigations disproportionately toward officials of poor states is not guilty of discrimination if the activities of the investigated parties merit that level of attention. The Court must nonetheless beware of cultural biases that would lead it to apply a stricter standard to poor states. (It should also beware of a misplaced cultural sensitivity that would lead it to apply a *weaker* standard to poor states.)

The Court's supporters are deeply committed to avoiding double standards. On July 12, 2002, at the insistence of the United States, the Security Council voted to give UN-sponsored peacekeepers from non-ratifying states a one-year exemption from investigation or prosecution by the Court.[34] The United States had originally demanded permanent immunity, but moderated its position in the face of intense resistance from the rest of the Council and the UN as a whole. The other members of the Council did not like the substance of the compromise measure; they approved it only because the United States vowed that it would otherwise cast its veto against future peacekeeping missions. The showdown in the Council was recognized by everyone as a battle between the supporters and opponents of the ICC. What the Court's supporters objected to was the creation of a double standard within the ICC regime and the consequent weakening of the Court's legitimacy. In this case, we should note, the double standard was imposed from without, not developed from within. The Court's supporters are determined to block the renewal of immunity after the first year.

The same factors that mitigate the danger of double standards should reduce the threat of unscrupulous prosecution. States are more likely to guard against prosecutorial abuse when, as members of the ICC, they are its potential targets. The Court will, in addition, be the beneficiary of an accumulated fund of global expertise on international criminal law, and will be placed under an intense public spotlight. The democratic states and human rights NGO's which have provided the main impetus for the Court will be quick to cry foul if any abuses begin to take root. It

[34] SC Res. 1422 (2002). The Resolution takes advantage of language in Article 16 of the Rome Statute which presumably was never intended to be used in this way

will have both the means and the motive to adhere to standards of fairness. The ad hoc international tribunals, on which the Court is most closely modeled, are generally acknowledged to have conducted themselves honorably. Still, the danger of corruption never disappears entirely.

As for distance, the Court will be located in the Hague, and therefore its proceedings are likely to be far removed from the scene of the crimes being prosecuted. Nonetheless, the Principle of Complementarity is designed to decrease the likelihood that cases are actually heard by the ICC, and to increase the likelihood of their being heard in the courts of those states most directly implicated. States will step up prosecutorial activity to avoid the embarrassment of the ICC's intervention. The norms embedded in the Rome Statute (along with the record of any cases the Court may previously have heard) will provide national governments with a road map to prosecutorial and judicial policy should they find themselves in the unhappy situation of responding to major human rights crimes. In this way the Court indirectly advances the cause of locally administered justice.

Retaliation will remain a danger. To the extent, however, that the Court's legitimacy is enhanced by state consent, the resentment that helps inspire retaliation should find itself reduced. The reminder that the state whose citizens now face prosecution voluntarily joined the Court is a helpful argument against nationalist resentment. (Unfortunately, the argument does not apply when non-party nationals become defendants.) Much will depend on the Court's reputation for fairness and impartiality. To reduce the danger of politically calculated uses of retaliation, it will also be important for the Court to cultivate an appearance of immovability in the face of extortion. The repeated assertion by the ICTY Prosecutors that they are not swayed by political considerations provides a useful model.

Will the Court delay negotiations leading to the end of civil war or the transfer of power from dictatorship to democracy? It is hard to know, because one can foresee either of two contrary dynamics. Indictment by the Court can contribute to the isolation and ultimate weakening of tyrants and warlords, but it can also stiffen their effective resistance to the introduction of peace and democracy. Nonetheless, in the longer term, there is reason to hope that the Court will make a net contribution to peace. That is because the primary role of the Court will not be to respond to atrocities that have already occurred, but to prevent them from occurring in the first place.

The greatest cloud over the ICC is the danger of not being able to enforce its mandate. Member states are obliged by the Rome Statute (Articles 86-93) to surrender accused individuals to the Hague, assist in the collection of evidence, and permit witnesses to testify at trial. But it does not require a vivid imagination to foresee that an outlaw government might flout its treaty obligations by sheltering suspects, concealing evidence, and intimidating witnesses. Armed intervention will sometimes be necessary to apprehend the accused and secure meaningful cooperation with the prosecution. The Security Council, however, is often reluctant

to authorize humanitarian intervention, and individual states are generally (though not always) unwilling to act without the Council's blessing. The danger here is that the ICC will threaten prosecution without actually carrying it out. The combination of threatened prosecution and military inaction may not only disappoint expectations of justice; it also has the potential to do great harm, because it removes an incentive for criminal leaders to negotiate peace while doing nothing to defeat them.[35] Supporters of the Court must think carefully and creatively about how to back up justice with power.[36] The continued hostility of the United States to the ICC may unfortunately complicate that effort.

How the ICC Benefits Democracy

I have stressed the domestic sources of the Court's legitimacy, and emphasized what is gained when the personal jurisdiction of the Court is tied to state consent. Yet some human rights advocates may be dismayed by the direction of this argument. It cedes too much, they will object, to the principle of state sovereignty. It makes the protection of human rights depend on decisions by national governments. Where international crimes are concerned, however, we should seek the widest possible jurisdiction for the Court. We should base its legitimacy on the very principle of human rights — rights which no government may deny to its citizens. This objection is the opposite of that which I mentioned at the start of the paper. The earlier complaint is that external justice is too removed from domestic politics and does not respect the agency of (democratic) national governments. This new complaint is that the Court should not have to wait for the invitation of national governments.

Both complaints fail to grasp what is necessary to secure the effective long-term global protection of human rights. The domestic protection of human rights is strengthened by the availability of a credible and fair system of external justice. But the effectiveness of that system depends on the support and participation of democratic nation states strongly committed to the protection of human rights. The International Criminal Court is an institution under which a system of external justice reinforces national democracy, and vice versa. Hence the title of my paper: 'The Mutual Dependence of Internal and External Justice'. Partly by intention and partly by chance, the Court is particularly well organized for this task. An attempt either to reduce its powers or to broaden its jurisdiction would undermine its long-term effectiveness.

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[35] This problem is discussed, though not in direct reference to the ICC, in Snyder and Vinjamuri, 'Principle and Pragmatism', *supra* note 22.

[36] This point is made by Robert Fine in 'Cosmopolitanism and Social Theory', *European Journal of Social Theory* (forthcoming).

It helps to distinguish two possible conceptions of the Court's role. Each may be illustrated by a different image drawn from John Locke's *Second Treatise of Government*. On the first conception, the Court functions as a kind of world sheriff, whose responsibilities and whose legitimacy are suggested by Locke's account of the state of nature. In the state of nature, which is defined by the absence of political authority, everyone is endowed with human rights. These rights imply a set of duties, collectively termed the law of nature, and summarized in the command that 'no one ought to harm another in his life, liberty, health, or possessions'.[37] The duties are to be enforced — not by government, since it does not exist, but by everyone acting as judge and executioner of the law of nature. As judges, each of us is authorized to punish the human rights violator 'so much as may serve for *reparation* and *restraint*'.[38] Offenders have in no sense consented to be punished by us — no social contract has been signed. Nevertheless, we are authorized to punish them because the human rights of each member of society demand nothing less. As Locke puts it, 'The Law of Nature would … be in vain, if there were no body that … had a *Power to Execute* that law'.[39]

This story is easily applied to the current international arena. Individuals inhabiting the state of nature may be compared to nation states not bound by any world government. The ICC does not claim to be an international government, and anyway its reach is not global. Many states have not ratified it and are unlikely to do so in the near future. Ratifying states stand to non-ratifying states as individuals stand to one another in Locke's state of nature. Just as individuals in the state of nature are authorized to punish non-consenting offenders in order to uphold the law of nature, so rights-respecting states should be allowed, under the auspices of the Court, to seek the punishment of human rights violators from non-ratifying states in order to shield all of humanity from gratuitous assault. One hopes that all states will eventually ratify, but in the meantime we shouldn't simply stand on the sidelines and watch criminal governments commit atrocity with impunity.

But there is another way to conceive the purpose of the Court. To illustrate the alternative conception, we can turn to a different part of Locke's *Treatise*. Here the reasoning does *not* rely on an analogy between the state of nature and the international states system; we read Locke's account as a theory of domestic government. As is well known, Locke views the state of nature as an unstable arrangement, because people make poor judges in their own case. Being prone to exaggerate the offenses of others and to deny any of their own committing, they can be led by individual exercise of the executive power into violent conflict. Locke's proposed remedy is the establishment of representative government in which the execution of natural law is entrusted to a common judge. We are safest when laws

[37] Locke, *Second Treatise*, *supra* note 1 at para. 6.

[38] *Ibid.* at para. 8.

[39] *Ibid.* at para. 7.

ensuring our rights are made by an assembly of our elected representatives and applied by an independent judiciary. Locke gives us, in embryo, a democratic theory of rights protection. Having identified the protection of rights as the primary purpose of government, he argues that democratic political institutions are those best suited to this purpose. We can build on his account by noting that to secure rights and deter abuses of political power most effectively we require not only representative legislatures, legislative supremacy, and an impartial judiciary, but also the separation of powers, checks and balances, a free press, universal education, a vigorous civil society, and public schemes of social insurance. (This is not a complete list.) Democracy is connected to human rights because it has the protection of human rights as one of its central purposes, and because the institutional forms by which it is recognized are conducive to that goal.

But democratic forms do not always fulfill democratic purposes, as Locke well understood. Representative government is not danger-free: there is always the risk that it may degenerate into tyranny, either because the executive trespasses on legislative power, or because the legislature abuses its authority. When that happens, we are left worse off than under the state of nature. Locke's solution to the problem is powerful but crude: the people retain a residual right to overthrow tyranny by revolution. His hope is that the very awareness of this right will sober up public officials and place a check on domineering tendencies. And sometimes the right must actually be used in order to restore civil government. But the disadvantages of this device are obvious enough. Revolution may fail, in which case blood will have been spilled in vain and the tyranny is likely to accentuate its cruelties. Or revolution may succeed, and (as all too often happens) replace the preexisting tyranny with something worse. Locke is honest enough to call revolution a form of war, but human rights fare notoriously poorly in wartime. They suffer even under the threat, real or imagined, of war. It would be a tragedy if the main strategy chosen to defend against political brutality exacerbated the very disease it was meant to cure.

We therefore have reason to seek other back-up protections, so that the resort to revolution can be avoided as long as possible. One idea is to supplement the standard internal safeguards (separation of powers, competitive elections, free press, etc.) with an *external* check: some sort of supranational authority that can monitor government's conduct from the outside and take corrective action when government veers away from the protection of human rights. Citizens of a democratic state might voluntarily appoint such an authority to serve as an insurance policy against tyrannical encroachment.[40]

[40] Clearly some such process helps to explain the remarkable development of the European Court of Human Rights. Andrew Moravcsik shows how representatives of fragile democracies who sought to 'lock in' democratic institutions in their own countries provided the major impetus for the European Court's creation. See 'The Origins of Human Rights Regimes', 54 *International Organization* (2000) 217-52. Moravcsik hypothesizes that well-established democracies are likely to oppose the creation of strong international human rights courts, but this has not been true for the ICC.

The International Criminal Court has the potential to play this role. Democracies join the Court so that potential instigators of atrocity receive an external deterrent. They are liable in advance to punishment by an international court, even if they seek to evade domestic prosecution. (It is true that a tyrannically inclined leader might try to leave the Court's jurisdiction. Withdrawal is legally possible (Art. 127), but, one assumes, politically difficult. When attempted before tyranny is made manifest, it constitutes an early warning of a regime's intentions. In any event, withdrawal only takes effect after a year's delay, and cannot be used to halt proceedings already initiated by the Court.) Membership in the Court can also be used to foster broader understanding of human rights domestically and the development of a human rights culture. The Principle of Complementarity will have its bracing effect on the judicial system. We may think of ICC ratification as a vaccine for democratic good health.

I have argued in preceding sections for precisely this understanding of the Court's role. The Court functions as a device whereby democracies commit themselves to the preservation of democratic institutions and diligent protection of human rights. They commit themselves by increasing the costs to those who would try to divert the state from the fulfillment of these responsibilities. The Court is a creative strategy for extending democracy far into the future. In structure and logic, it resembles an array of similar democracy-preserving strategies recently proposed by Thomas Pogge.[41]

Though the Rome Statute does not oblige its member states in formal terms to preserve democratic institutions, it gives them a powerful incentive to do so. State terror is not inevitable in the absence of democratic institutions, but it is statistically much more likely, because it faces far fewer barriers. States that take seriously their pledge to the Court have a reason to guard democratic institutions as the first line of defense against the emergence of politically organized violence. Ratification of the ICC entails a democratic commitment in this instrumental sense, but also in the deeper sense that the defense of human rights is central to the meaning of democracy; it is implied in the democratic vision of the equal freedom and dignity of all persons.

Ratification of the ICC strengthens democracy not only by increasing the costs of non-democratic deviation. The Principle of Complementarity encourages prompt domestic reforms to deepen human rights protections and make anti-democratic maneuvers more difficult. Recent research underscores the importance of domestic incorporation of human rights norms. A UN-funded study of the impact of

[41] In a path-breaking article, Pogge recommends that democracies ratify constitutional amendments declaring that the nation will honor neither foreign debts nor sales of natural resources that are transacted by any future dictatorial regime. The merits of this device are that it ties the hands of tyrannical usurpers in advance so as to deter usurpation in the first place, and that it invites the genuine cooperation of the advanced industrial states, not just their rhetorical support, in behalf of democracy. See Pogge, 'Achieving Democracy', *supra* note 7.

international human rights treaties concludes: 'The international system has had its greatest impact where treaty norms have been made part of domestic law more or less spontaneously (for example as part of constitutional and legislative reform), and not as a result of norm enforcement.'[42] A similar process of domestic incorporation helps explain the power of the European Court of Justice and European Court of Human Rights.[43]

It should come as no surprise that the Court's membership consists disproportionately of democracies. When we apply the rankings of Freedom House to the 86 current members of the Court, we find that 65 per cent are 'free', 31 per cent are 'partly free', and 4 per cent are 'not free'. This compares favorably to a breakdown of all the countries in the world, 44 per cent of which are 'free', 31 per cent are 'partly free', and 25 per cent are 'not free'.[44] Members of the International Criminal Court include both the well-established democracies of Western Europe, Canada, Australia, and New Zealand, but also newer and more fragile democracies in Southern and Western Africa and Latin America. Even the non-democratic outliers help prove the rule. Three of the Court's members are categorized as 'not free' by Freedom House. Two of those three are Cambodia and the Democratic Republic of Congo, which share recent harrowing experiences of officially sponsored mass violence.[45] One may safely surmise that their ratification of the Statute expresses a commitment not to permit the repetition of similar tragedies in the future; it may even express more ambitious democratic aspirations that have yet to achieve institutional realization.[46]

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[42] Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23 *Human Rights Quarterly* (2001) 483-535 at 487.

[43] Lawrence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273-391, esp. 290-97.

[44] Numbers as of 10 December 2002. My thanks to Jayme Ribaudo for calculating these figures. The rankings are reported in Freedom House, 'Freedom in the World 2001-02', available at <www.freedomhouse.org/research/freeworld/2002/essay2002.pdf> (visited 10 December 2002).

[45] The third is Tajikistan, which endured a bloody civil war in the 1990's.

[46] Here it is worth noting the reminder of Lawrence Helfer and Anne-Marie Slaughter that democratically oriented supranational courts can form alliances with democratic actors that find themselves inside oppressive regimes: 'Even in a political system that is otherwise corrupt or oppressive, it is possible that a particular government institution — a court or administrative agency or even a legislative body — will choose to forge a relationship with a supranational tribunal as an ally in a domestic political battle against corruption or oppression . . . Participation in the 'community of law' constructed by a supranational tribunal is open not only to countries but also to individual political and legal institutions, regardless of how the state of which they are a part is labeled.' 'Toward a Theory', *supra* note 43 at 335. Ratification has the potential to spur democratization in authoritarian states, because it encourages democratic reforms under the logic of complementarity, and because it narrows the range of strategies available to anti-democratic leaders, who notoriously have organized atrocities as a means of achieving or retaining power. However, ratification should not be viewed as some sort of magic democracy pill for authoritarian regimes. As I discuss below, it would be unwise to seek a large influx of non-democratic states into the ICC. The basic point is that countries with the strongest

It is all the more disheartening, therefore, to learn that the Bush Administration cites the dependence of human rights on democratic governance as an argument *against* the ICC. In his statement to the press, Under Secretary Grossman explained: 'We believe that states, not international institutions, are primarily responsible for ensuring justice in the international system [and] that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.' The statement closes with these words: 'In the end, the best way to prevent genocide, crimes against humanity, and war crimes is through the spread of democracy, transparency and rule of law. Nations with accountable, democratic governments do not abuse their own people or wage wars of conquest and terror. A world of self-governing democracies is our best hope for a world without inhumanity.'[47] All of which is true — but the Court is one of the best means for promoting this objective. The Bush Administration bravely ignores the Court's vital role in strengthening democracy. It tries hard not to notice that almost all democratic nations have been quick to embrace the Court, while non-democracies are, almost without exception, visibly reluctant to do so. The Court promotes the global spread of democracy, because it makes it significantly harder for new or well-established democracies to slip back into dictatorship. (It does so, moreover, by wisely rejecting the Bush Administration's view that amnesty for human rights crimes should always be kept on the table.) As I argue below, the Court also gives non-democratic nations an incentive to undertake the transition to democracy. The reasons cited by the Bush Administration as arguments against the Court are more properly arguments in its favor.

As I have noted, there can be slippage between the forms and purposes of democracy. Democratically organized states sometimes carry out human rights atrocities, most notoriously in the form of war crimes against foreign populations. But every human rights violation is a betrayal of democracy. States prove their democratic credentials by respecting human rights and by taking measures to secure their enhanced protection. Thus, to repeat: ratification of the ICC is an important measure of democratic commitment. One cannot help feeling that, in its attack on the ICC, the United States has allowed democratic values to be displaced by its fascination with global power.

The role of the Court is not only or even primarily that of world sheriff; it also serves as an insurance policy for democratic states. I belabor this point because the world sheriff model is the first to suggest itself; it is the model which has most energized the Court's supporters and opponents alike. While I do not reject the world sheriff model — indeed I support its underlying rationale — I believe that it

commitment to the democratic project — a category consisting predominantly though not exclusively of countries that already enjoy democratic institutions — are those with the clearest incentive to join the Court.

[47] *Supra* note 32.

has distracted us from an important part of the story. It is easy to focus on the high drama of court trials and rulings, but we need to be attentive to the subtler and more indirect consequences of the Court. Above all, we need to remind ourselves of its invisible achievement: all the atrocities, non-democratic regime changes, and outbreaks of civil war that will never have taken place because of its salutary presence.

How Democracy Benefits the ICC

Admittedly, the two models of the Court's role are not entirely separable. After all, democratic insurance works only on the assumption that the Court has the power to impose its judgment on unwilling parties. The underlying difference between the models is that the world sheriff model makes the Court's authority independent of the consent of national governments, while on the democratic insurance model state consent is the heart of the story.

During the 1998 negotiations in Rome that led to the adoption of the Treaty text, a choice was effectively made in favor of the democratic insurance model. Delegates argued strenuously and at length over the question of personal jurisdiction. A wide spectrum of views was presented, with Germany arguing that the Court should be empowered to prosecute any adult in the world for crimes committed after its entry into force, and other states, principally the United States and India, arguing for a much narrower range of jurisdiction.[48] The rule eventually adopted was closer to the narrow end of the spectrum. As we have seen, prosecution requires consent of the state whose citizen stands accused. There are two exceptions: (1) prosecution is also permitted for crimes committed on the territory of a consenting state, and (2) the Security Council may authorize the Court to investigate and prosecute individuals from anywhere in the world, regardless of nationality and the location of the alleged crime.

Many human rights advocates were understandably frustrated by the narrow jurisdiction awarded to the Court. They pointed out that tyrannical regimes can escape the danger of prosecution simply by not ratifying the Treaty and by confining their crimes to their own territory or the territory of other non-ratifying states. Such regimes are vulnerable in theory to a Security Council referral, but power politics and mutual divisions among the veto-wielding Permanent Five will shield many tyrants from that fate. What's the point of an international criminal court, many have asked, if it will be so easily evaded by the world's worst offenders?

The democratic insurance model has a clear benefit: democratic states, by joining the Court, can strengthen and preserve democratic institutions. But the

[48] See Kenneth Roth, 'The Court the US Doesn't Want', 45 *New York Review of Books*, 19 November 1998, 45-47; and Diane F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', 32 *Cornell International Law Journal* (1999) 489-97 at 490.

model has an obvious cost: citizens of non-democracies are left without the Court's protection. Can anything be said to reconcile us to this cost? I believe the answer is a partial yes. The cost proves, in an odd way, also to be a benefit.

This claim rests on two hypotheses: first, that a large influx of non-democracies would threaten to bring about the corruption of the Court; and second, that a broadening of the Court's jurisdiction would encourage more non-democracies to join. On this reasoning, narrower jurisdiction helps protect the integrity and reputation of the Court and, as a consequence, its long-term effectiveness.

We need to think seriously about protecting the Court from corruption. However much human rights NGO's and the epistemic community of international criminal lawyers hope to shape the Court's direction, they do not possess the immediate levers of control. These are in the hands of member states meeting in the Assembly of States Parties. The Assembly has the crucial responsibility of electing the eighteen judges, the Prosecutor, and the Deputy Prosecutors. It also has the right to remove a judge or prosecutor for misconduct or incapacitation. To elect or remove a judge, a two-thirds majority is required; to elect or remove a prosecutor, a simple majority is necessary. Each state party may nominate one judge; judges must be citizens of ratifying states; and no more than one judge may be citizen of the same country (articles 36, 42, 46). Articles 36 and 42 spell out in greater detail the required qualifications of judges and prosecutors. The Assembly also has the power to approve Rules of Evidence and Procedure and Elements of Crimes, and to adopt amendments preliminary to their ratification by the required seven eighths of the states parties.

We have reason to believe that the character of judges and prosecutors will be affected by the political orientation of the Court's member states. The election of judges and prosecutors to international courts is often highly political.[49] The consequences of this can be dire. Because of political wrangling and obstructionism, it took the UN Security Council *eighteen months* to agree on a Prosecutor for the Yugoslavia Tribunal.[50] All this, while in Bosnia massacres, rapes, torture, and ethnic cleansing continued unabated. Not surprisingly, the Coalition for the International Criminal Court — an alliance of over one thousand NGO's joined in support of the

[49] See Henry G. Schermers, 'Election of Judges to the European Court of Human Rights', 23 *European Law Review* (1998) 568-78; and Cherie Booth and Philippe Sands, 'Keep Politics out of Global Courts', *Guardian*, 13 July 2001. Booth and Sands write: 'Though many members of the international judiciary are excellent, the selection of international judges is often a highly politicised affair, with some of the most independent and qualified candidates being passed over by the electing bodies, usually [consisting of] states. Regrettably, in many states, nominations are handed out to reward political loyalty rather than legal excellence.'

[50] Bass, *Stay the Hand of Vengeance*, *supra* note 14 at 215-219; and Michael P. Scharf, *Balkan Justice* (Carolina Academic Press: Durham, 1997) at 75-79.

Court — has devoted considerable effort to monitoring and assisting the process of selecting judges and prosecutors.[51]

The presence on the Assembly of a large number of states lacking a sincere commitment to the protection of human rights poses several dangers. The worst-case scenario is that an anti-democratic coalition seizes temporary or permanent control of the Court. Perhaps this is unlikely, but there are other problems short of outright subversion. Hostile or uncommitted states might press for the appointment of unsuitable judges and prosecutors, or block the selection of qualified ones. They might seek to apply pressure, subtly or unsubtly, on the judges and prosecutors already chosen. This danger is present under the best of circumstances, but the inclusion of states with an uncertain commitment to human rights seriously exacerbates it. Fears have been raised that politicization would lead to irresponsible prosecutions, but perhaps the likelier danger is paralysis, with prosecutors and judges intimidated from taking appropriate action. The perception of a politically paralyzed Court would seriously damage its prestige and legitimacy.

More is at stake in the danger of paralysis than the decision whether to prosecute a particular case. The Treaty Statute is sure to contain flaws whose full significance will be revealed only after the Court is up and running. Some of its provisions will prove outdated as new forms of violence and crisis are bound to emerge. Ample measures of trust and good faith will be needed to navigate the difficult process of amendment and revision, and a Court bloated with half-hearted and antagonistic members will not help. The biggest challenge is likely to lie in the area of war crimes law, which contains many areas of uncertainty and which has provoked the greatest nervousness among governments. There may come a time when state delegations will have reason to rewrite the war crimes law of the Statute in response to unsatisfactory rulings by judges. Successful revision will depend on the vision, courage, and moral acuity of the drafters — qualities more likely to be found among the representatives of committed democracies than in an assembly some of whose members show up precisely because they fear the strengthening and improvement of human rights law.

I have leaned on the view that the conduct of the Court will be shaped by the character of the states belonging to it. But a contrary hypothesis is possible: namely, that non-democratic member states, through their participation in the Court, will be socialized into its values. This dispute echoes a larger debate about the sources of compliance with international regimes. One view, which I will call the constitutive thesis, holds that compliance depends on a state's pre-existing preferences, which are shaped in turn by its regime type. According to the most influential version of this view, democratic states are those most likely to abide by their international

[51]See the numerous papers posted by the Coalition for the International Criminal Court on the subject at <www.igc.org/icc/html/new.html> (visited 5 August 2002), along with the Coalition fact sheet, 'Election of Judges', at <www.igc.org/icc/html/presselectionofjudges.pdf> (visited 5 August 2002).

commitments.[52] The other view, known in the literature as the transformational thesis, holds that international regimes have the power to elicit compliance from a wide variety of states, which despite differences in regime type share common interests in international legitimation, problem-solving, and the avoidance of conflict.[53]

I neglect a richer description of these two schools of thought,[54] and invoke them only to generate a pair of contrasting hypotheses about the relation between the ICC and its member states. The transformational thesis predicts that the Court has the power to tame non-democratic states; the constitutive thesis predicts that non-democratic states have the power to corrupt the Court. Our question then may be framed as follows: Can the Court civilize a large non-democratic membership faster than such a membership will corrupt the Court?

I believe that in the case of the ICC, corruption is the likelier consequence. In the first place, it is well known that international agreements concerning human rights are those with the weakest record of compliance: many nations flagrantly disregard such commitments. This is the area, therefore, in which the transformational school has the least predictive success.[55] This should not come as a

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[52] For important statements of this thesis, see Helfer and Slaughter, 'Toward a Theory', *supra* note 43; Anne-Marie Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', 4 *Transnational Law and Contemporary Problems* (1994) 377-419; Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995) 503-38; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* (1997) 513-53; and Moravcsik, 'The Origins', *supra* note 40. For a critique of this view, see José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *European Journal of International Law* (2001) 183-246. This school commonly goes by the name of 'liberal international relations theory' — a somewhat awkward description, as the school's main proponents seem to recognize. See Moravcsik, 'The Origins', *supra* note 40 at 246; and Slaughter, 'International Law in a World of Liberal States', at 507, note 5.

[53] See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press: Cambridge, Mass., 1995). For a discussion and critique of this view, see George W. Downs, Kyle W. Danish and Peter N. Barsoom, 'The Transformational Model of International Regime Design: Triumph of Hope or Experience?' 38 *Columbia Journal of Transnational Law* (2000) 465-514.

[54] We should note, for instance, that the constitutive model does not *exclude* the potential of international organizations to steer seemingly unfit states toward compliance. However, it explains this result (when it occurs) differently than the transformational model. On the transformational model, international organizations obtain compliance from seemingly unfit states by appealing to their existing preferences for such things as respect and cooperation in the international arena. On the constitutive model, international organizations obtain compliance from these states more indirectly, by changing their underlying preferences, sometimes in such a way as to transform their regime type. (Thus there is room for a 'transformational' dynamic in the constitutive model.) See Slaughter, 'The Liberal Agenda', *supra* note 52 at 401: 'A primary function of an international organization. . . is to shape State preference formation. Its success is more likely to depend on the extent to which it can influence what States want rather than its ability to constrain the ways in which they can get it.'

[55] Chayes and Chayes, *The New Sovereignty*, *supra* note 53 at 16-17.

surprise. Unlike other international obligations, human rights commitments are primarily concerned with domestic policy. They require the adoption of internal policies and institutions that by their nature are inimical to repressive regimes. We should expect human rights commitments to encounter stubborn and enduring resistance from these regimes.[56]

Second, the ICC violates all the prescriptions laid out by the transformational school for the achievement of compliance. These prescriptions are that the initial commitments of an international regime should be non-threatening, decisions should be reached by consensus or near-unanimity, and failures to comply should be addressed through non-confrontational methods such as negotiation.[57] The centerpiece of the ICC is the criminal trial — the very antithesis of the gentler and more consensual methods of persuasion envisaged in the transformational model.

The inapplicability of this model to the ICC can be illustrated by a comparison with the most celebrated example of the transformational approach in the field of human rights: the so called Helsinki Process in the last years of Soviet sponsored communism. In 1975, following years of negotiations, the Soviet Union and its client states joined Europe and North America in an agreement promoting East-West cooperation and exchange. At the insistence of the European Community, and despite the reluctance of the Soviet bloc, the framework included a general statement committing the signatories to respect for human rights and fundamental freedoms. This commitment was adroitly used by dissident groups in Eastern Europe and the Soviet Union to organize protest, build up an international support network, and persuade foreign governments to apply pressure for the curtailment of repression. The ensuing domestic and international mobilization is widely credited as one of the main factors leading to the demise of the communist system.[58]

Once the Helsinki process got underway, the communist regimes found there was little they could do about it. Formally, the process rested on little other than the statement of principle signed by the regimes themselves, and a scheduled series of international conferences in which their human rights records could be held up to public criticism. The underdetermined structure proved highly beneficial to transnational activists working against these regimes. Contrast this to the high legalism of the ICC. The Court establishes a formalized and centralized adversarial process with high stakes, clear winners and losers, and a dense legal machinery that provides opportunities for subversion and manipulation. All eyes will be on the Prosecutor's decisions regarding whom to indict, and intense political maneuvering

[56] For a study of how transnational human rights advocates have achieved democratic reforms over the resistance of repressive governments, see Risse et al. (eds.), *The Power of Human Rights*, *supra* note 9.

[57] Downs et al., 'The Transformational Model', *supra* note 53 at 471.

[58] See Daniel Thomas, *The Helsinki Effect* (Princeton University Press, 1999); Thomas, 'The Helsinki Accords and Political Change in Eastern Europe', in Risse et al. (eds.), *The Power of Human Rights*, *supra* note 9, 205-33; and Chayes and Chayes, *The New Sovereignty*, *supra* note 53 at 256-59.

can be expected to shape that outcome. The trial, the composition of the Court, and the rules all become strategic foci for those with a political stake in the Court's conduct. Given the publicity and high drama of the Court's proceedings, the intense emotions involved, the geopolitical interests at stake, and the levers available for political influence, we should expect that antipathetic member states are likelier to approach the Court with an attitude bent on strategic manipulation than to become socialized into its governing values. The likelier model for an inclusive Assembly of States Parties is not the Helsinki Process but the notoriously politicized UN Human Rights Commission.[59]

The International Criminal Court would suffer from the inclusion of a large number of non-democracies, as the NGO community is beginning to appreciate.[60] The danger of mischief is too great. Some non-democracies may be safely admitted, but not enough to form a critical mass. The European Union and NATO, which require democratic governance as a condition of membership, constitute an approximate (though too strict) model. I stress that my purpose is not to reject the transformational model of international cooperation, only to say that it does not apply to the ICC. Indeed the Court could form a productive relationship with more inclusive human rights regimes organized on transformational principles: the latter could serve as a training ground for the former. Once more Europe serves as a model, with the Organization for Cooperation and Security in Europe, the Council of Europe, NATO, and the EU forming a continuum from larger, less democratically constituted organizations to smaller, more democratically constituted organizations, and with the quest for admission into the EU entailing a long-term process of socialization into democratic values.[61]

In retrospect, we have reason to be grateful that the proposals to give the Court a very broad or even universal form of personal jurisdiction were not adopted. The reason is simply that broad jurisdiction would have given repressive regimes too great an incentive, and the wrong *kind* of incentive, to join the Court. If a repressive regime is liable to having its officials prosecuted whether or not it belongs to the Court, it has little to lose by joining, while it also has something to gain: the opportunity to influence the Court's direction.[62] The only cost of joining is

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[59] See 'U.N. Fears "Bloc" Voters Are Abetting Rights Abuses', *New York Times*, 28 April 2002, at 17. Unlike the official membership of the Commission, the Assembly of States Parties has only an indirect influence on the decisions of the Court. Yet even an indirect influence could, under the wrong conditions, prove seriously damaging.

[60] See the Coalition for the International Criminal Court fact sheet, 'Court of Democracies', at <www.igc.org/icc/html/pressfreedom20020322.pdf> (visited 5 August 2002).

[61] See Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in Philip Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999).

[62] We get a flavor of this logic in the argument frequently offered to coax the United States into ratifying the ICC despite its objection to Article 12 jurisdiction over non-party nationals. If US citizens are already vulnerable to ICC prosecution, it is said, the United States should at least be in the position

that of lending symbolic support to an institution it prefers did not exist, but this cost might be easily outweighed by the strategic advantages of membership. The danger of opportunistic membership is enhanced by the fact that ratification of treaties is most easily accomplished under authoritarian regimes.

The flip side of this is that *restrictive* jurisdiction gives *democratic* regimes a certain incentive to ratify the Treaty. Ironically, this is because restrictive jurisdiction makes membership more dangerous by comparison with non-membership. When a state does not ratify, the danger that its officials will be prosecuted remains low; after ratification, that danger increases substantially. But where the risks are greater, the glory is also. A ratifying state proclaims its democratic courage; it shows itself so deeply committed to the protection of fundamental human rights, that it does not fear, and on the contrary welcomes, its vulnerability to the prosecutorial activity of an international court. Such a message will be clouded, however, to the extent that a country is already vulnerable to prosecution prior to ratification.

This indicates one respect in which restrictive jurisdiction may be expected to enhance the luster and prestige of the Court. It causes the Court to be seen as an assembly of brave nations. Non-member states may wish that they were equally brave, and might consequently aspire to the level of democratic self-confidence permitting them to join the heroes' club. Under a rule of restrictive jurisdiction, in other words, the Court can appeal more powerfully to the democratic vanity of states. Moreover, citizens of non-member states may begin to ask why they do not enjoy the Court's protection, concluding that the answer lies in the skewed priorities of their regimes, which need as a consequence to be altered. In this way, the Court serves as a spur to democratization. Add to this that the democratic pride of member states will presumably deepen their commitment to the Court and their ability to cooperate with each other. Such esprit de corps will be reinforced by the confidence placed in the solidly democratic credentials of judges and prosecutors.

The greatest disadvantage of restrictive jurisdiction is that it could prevent the Court from doing much in the way of judicial action. This is a serious price to pay in a world as violence-prone as ours. But the long-term advantages should make up for the loss. The ECHR offers an encouraging example of an international court that took little action in its first two decades, but built up reserves of legitimacy that helped raise it to its current stature.[63] Today its power is sustained by the trust and respect bestowed on it by the civil society of an entire continent. The International Criminal Court will be fortunate to command similar respect. The hope is that, under a rule of restrictive jurisdiction, it will experience similar growth. The growth would be different in form, but not wholly disanalogous. The ECHR grew as an

of shaping the court from the inside. Given the bullying posture adopted by the United States to a wide range of multilateral institutions to which it belongs, one wonders whether this is in fact such a good idea. See Ian Williams, 'The US Hit List at the United Nations', *Foreign Policy in Focus*, 30 April 2002, available at <www.fpif.org/commentary/2002/0204un_body.html> (visited 5 August 2002).

[63] See Helfer and Slaughter, 'Toward a Theory', *supra* note 43.

institution by increasingly challenging the laws of its member states. The ICC would expand by bringing into its orbit a growing number of states, attracted by the fairness of its proceedings, and by the prestige of joining a partnership of brave democracies.[64]

The foregoing considerations show why supporters of the Court should be cautious in the means they use to obtain expanded membership. Other things being equal, more ratifications are better, but other things are not always equal. Ratification should express a genuine pledge; it should be undertaken in full consciousness of its significance, not without some terror of the consequences of non-compliance. The gravity of the commitment should be felt throughout all levels of society. Ideally, countries should not be pushed into joining the Court, but should be pulled by attraction to the values it enshrines. In that way ratification will be accompanied by a process of democratic transformation or consolidation.[65]

The Bush Administration alleges that the Court will become an 'institution of unchecked power'.[66] However, the Court has a check in the Assembly of States Parties, with the power both to elect and remove the Court's personnel. I have argued that this check will be exercised responsibly because of the democratic composition of the Court, a logical outgrowth of the rules governing personal jurisdiction.

Conclusion

The ICC is an attempt to construct something new in world affairs. Unlike the great war crimes trials of the past — Nuremberg, Eichmann, Arusha, and the Hague — it is not established in the wake of atrocity to address crimes that have already occurred. It looks forward in time. It protects people in the future by warning in advance that perpetrators of genocide, war crimes, and crimes against humanity will be held accountable for their deeds regardless of their official status. Though one can hardly expect it to be without flaw, and though it is certain to encounter serious difficulties in the years ahead, one must nonetheless admire the virtues of its design. Chief among these are its sensible balance of ambition and restraint and its skillful welding together of international and domestic sources of legitimacy and accountability. The Court prods national governments into the more determined prevention of the gravest human rights crimes, while enlisting the same governments as guarantors of its trustworthiness. Through its symbolism and its

[64] After the fall of the Berlin Wall, the ECHR also expanded its geographic jurisdiction through the admission of formerly communist states.

[65] The UN Secretary General has called for the swift universal ratification of the Rome Statute. I believe this would be imprudent. See 'International Criminal Court Enters Force; Annan Hails 'Historic' Occasion', *UN News Centre*, 1 July 2002.

[66] *Supra* note 32.

interaction with domestic legal systems, it has the potential to transform political culture. Because it unites a vision of human rights with institutional mechanisms to bring that vision closer to reality, it is a democratic achievement in the truest sense.

We need to beware of two errors. The first is to think that the protection of human rights is safely entrusted to nation states without benefit of international reinforcement. The second is to suppose that international reinforcement can function without supervision from below, and to forget the hard work that must be done at the national level before the global protection of human rights can be achieved. It is a fantasy to trust in the self-sufficiency of national institutions, and likewise in the possibility of a global *deus ex machina* that can be depended on to solve our problems for us. The wisdom of the International Criminal Court is that under its auspices national democracy and external justice are made to bolster each other.