
The Democratic Legacy of the International Criminal Court

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In the controversy that has swirled around the International Criminal Court (ICC), too little attention has been paid to its role in promoting democracy at the national level. Commentators understand that the stated goal of the Court is to buttress the protection of human rights; what they have generally failed to notice is that the ICC will achieve this goal primarily through the cultivation, consolidation, and improvement of democratic institutions. The Court offers states a means to improve the administration of domestic justice and to face down anti-democratic challengers. In other words, it promotes its objectives by working through national institutions and reorienting those institutions in a democratic direction. At the same time, the Court needs a democratic constituency in order to succeed: it can preserve its effectiveness and integrity only if a healthy majority of its member states are democracies. Therefore, by helping democracy, the Court is helping itself.

The ICC's investment in democracy is poorly understood by its critics, especially the U.S. government, its most vehement opponent. The United States' most well-known objection is that the Court exercises potential jurisdiction over non-party nationals, including American citizens. U.S. critics have woven this complaint into a larger argument that the Court abandons the democratic model because it acts above and independently of national representative institutions.¹ When the United States formally withdrew support from the ICC in May 2002, it listed among its central objections (1) that countries should be allowed to choose their own way of responding to human rights atrocities committed in the recent past, without having a "prosecution model" imposed on them from above; (2) that the spread of democracy, rather than the creation of new international courts, is the surest way to promote respect for human rights; and (3) that the

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ICC will become an “institution of unchecked power.”²² The critics charge that by separating itself from the democratic model, the ICC subverts its own purpose.

Let us say of this line of argument that (to borrow terms of logic) it combines a reasonable major premise—about the value of democracy—with an erroneous minor premise—about the role of the ICC. Yes, democracy is a necessary bulwark against human rights atrocities. Yes, we should generally favor human rights strategies that democratic countries choose for themselves. But, and this is precisely the point, the ICC upholds these principles more decisively than any alternative arrangement. It gives states an otherwise unavailable resource for reinforcing democratic institutions at home. Some states will avail themselves of the opportunity; others will not. Those that do so use the Court as an instrument of their own democratic goals, so that democratization is advanced from within, not imposed from without.

The description of the ICC as an “institution of unchecked power,” meanwhile, is belied by the inclusion of numerous safeguards against overzealous action by prosecutors and judges. These include: the right of convicted individuals to an appeal; the rule that a prosecutor may not launch a formal investigation on his or her own initiative without permission from a pre-trial chamber of judges; and the right of any state to challenge the legality of an investigation or prosecution of its citizens. The ultimate check is the power of member states to elect and remove judges and prosecutors. The value of this check is enhanced by the fact that, as we shall see, the Court’s member states are disproportionately democratic. In short, the ICC knits together the values of democracy, choice, and accountability, allowing each to reinforce the others.

A word about the Court’s mandate and structure: the ICC is a court of last resort, empowered to prosecute individuals for genocide, war crimes, and crimes against humanity, but only when national courts of primary jurisdiction prove unwilling or unable to do so themselves. Moreover, it may not prosecute any crimes committed before July 1, 2002. Prosecutions may be undertaken at the request of the United Nations Security Council, at the request of a state party, or on the initiative of the Court’s prosecutor if he or she gains approval from a pre-trial chamber of judges. The Court’s personal jurisdiction depends on how prosecutions are initiated. The Security Council may request prosecution of any crimes, regardless of the nationality of the accused party or the location of the alleged crimes. In prosecutions triggered by state party referral or prosecutorial initiative, however, jurisdiction is limited to citizens of a consenting state or individuals accused of committing crimes on the territory of a consenting state. The normal means of conferring consent is ratification of the treaty establishing the Court (commonly referred to as the Rome Statute), but states can also accept jurisdiction of the Court on a temporary, ad hoc basis. The Court’s judges and prosecutors are elected, and may be removed, by its member states, meeting in an

Assembly of States Parties. As of April 26, 2004, 93 countries had ratified the Rome Statute.³

The *raison d'être* of the Court is to deter genocide, war crimes, and crimes against humanity. The expectation obviously cannot be that it will completely put an end to these crimes, but that its existence will succeed in preventing some human rights atrocities that would otherwise have been committed. The strength of the ICC's deterrent effect will depend on its ability to project or reinforce a credible threat that perpetrators of genocide, war crimes, and crimes against humanity will be punished for their deeds. Measuring the Court's effectiveness at establishing and maintaining that threat requires a careful study of its interaction with international institutions, national governments, and nongovernmental actors.

Normally the task of deterring violent crime, through maintenance of a credible punishment regime, falls to national governments. When governments make it their policy to commit human rights atrocities, however, the specter of punishment vanishes, and state officials and their agents can wreak havoc without fear of repercussions. Under these circumstances, often the only thing to do is to wait for the introduction of

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a more civilized regime that will install penalties for barbaric conduct. Whether the new regime should also prosecute crimes committed by its predecessor can be a hard question. In many cases it has little choice but to declare amnesty: it lacks the resources to mount fair and effective trials, or leading perpetrators have demanded amnesty as a condition for turning over power.⁴ The obvious danger of amnesties, however necessary they may be in the short term, is their potential to be read as precedents, and thus to encourage the future commission of human rights atrocities, at home or abroad, by individuals hoping to take shelter under subsequent amnesties. Looking ahead, a democratic country has good reasons to announce that, whatever it may have done in the past, there will be no amnesties in the future; and it is well advised to get all the international help it can to lend credibility to that announcement.

Enter the ICC. Under the rules of the Court, prosecution of human rights atrocities is left to national governments; however, the Court will take action when national governments prove unwilling or unable to mount such prosecutions themselves. This allows democracies to say to would-be tyrants, terrorists, and warlords: we will prosecute you for your crimes, and if by any chance we should lose our nerve or our capacity to do so, we have empowered an international court

to act on our behalf. Like Ulysses tied to the mast, such democracies steel themselves against future unwise temptations, thereby disarming their enemies in advance. To borrow the jargon of social science, they adopt a democratic “pre-commitment” strategy.⁵ As such strategies go, however, this is a remarkably dramatic one. It is astonishing that 93 countries have voluntarily agreed to make their own leaders vulnerable to prosecution and punishment before an international court. This is an unprecedented development in world history—one that challenges longstanding assumptions about the behavior of states.

The genius of the ICC is that it leaves the decision of taking this step to states themselves. Given that, in most cases, the Court’s jurisdiction over a state’s citizens depends on the state’s prior decision to join the Court, the Court acts with the legitimacy conferred by state endorsement. Therefore, it thoroughly misses the point to say that the Court imposes its model of criminal justice from the top down, just as it thoroughly misses the point to say that it blocks productive strategies for the creation of lasting peace. While the South African Truth and Reconciliation Commission (TRC) has been justly admired for its creative response to the crimes committed under Apartheid, admirers of the TRC should note that South Africa is also one of the ICC’s most fervent supporters. It was among the first countries to ratify the Rome Statute and to enact domestic implementing legislation. Moreover, a distinguished South African jurist, Navanethem Pillay, was elected to serve as one of the Court’s 18 inaugural judges. One may thus conclude that South Africa is determined never again to find itself in circumstances that would make the establishment of a truth and reconciliation commission necessary.

In other words, the ICC is not only an agent of the international community, determined to prevent the commission of human rights atrocities around the world; it is also, and more importantly, an agent of individual states, determined to preserve the liberty and security of their own inhabitants. It performs this role in several ways. First, as noted, it enables ratifying states to warn anti-democratic actors that any resort to terror will occur under the shadow of a potential ICC prosecution—a threat that, in the age of the Milosevic trial, can no longer be regarded as fanciful. Second, ICC membership motivates ratifying states to enact implementing legislation that authorizes domestic prosecution of major human rights crimes and, in order to make domestic law conform to ICC standards, strengthens protection of defendants’ due process rights.⁶ Third, the ICC can coordinate legal assistance to embattled governments struggling to maintain law and order.

It is worth noting that the first actions of the ICC have assumed a state-building rather than an interventionist character. In January 2004, Uganda became the first member state to refer a case to the ICC when it asked the Court’s prosecutor, Luis Moreno-Ocampo, to investigate human rights crimes committed

on its territory by the rebel Lord's Resistance Army. In April 2004, the Democratic Republic of Congo (DRC), a member state since 2002, submitted a general request to the prosecutor to investigate prosecutable crimes committed on its territory. This follows the prosecutor's announcement, in the summer of 2003, that he was opening a preliminary investigation into atrocities committed in Ituri, a rebel-dominated district in the east of the DRC. The prosecutor has signaled his readiness to cooperate with local attempts to secure justice. With regard to the DRC, he stated:

The Court and the territorial State may agree that a consensual division of labour could be an effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible.⁷

The assistance of the ICC, though presumably welcome to Uganda and the DRC, comes with an important condition: government officials themselves become vulnerable to ICC prosecution if credibly accused of genocide, war crimes, or crimes against humanity.⁸

Few non-democratic states have ratified the ICC. (The exceptions, like Uganda and the DRC, are those with vivid memories of state terror or brutal civil war.) This is hardly surprising. Governments lacking democratic legitimacy are more likely to use terror as a means of retaining power. For this reason, the ICC has become an association of predominantly democratic states. Freedom House assigns its "Not Free" ranking to 25 percent of countries in the world, but only to 6 percent of those countries belonging to the ICC. It describes as "Free" 46 percent of countries in the world, compared with 66 percent of those belonging to the ICC.⁹

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The democratic composition of the ICC is the unsurprising result of the jurisdiction rules hammered out at the 1998 Rome Conference where the treaty was negotiated. If the ICC had been given the power to prosecute crimes anywhere in the world, as many human rights enthusiasts had urged, the world's most brutal regimes would have little to lose by ratifying the treaty, just as countries like China, Syria, and Libya have had little to lose by actively participating in the United Nations Human Rights Commission. But the ICC emerged from Rome with a limited form of jurisdiction that left non-ratifying states largely outside its reach;

repressive regimes therefore have a clear incentive to withhold ratification. Human rights advocates are understandably disappointed that the Court provides no protection to inhabitants of the world's harshest tyrannies. However, political realism tells us that this is a price well worth paying for its corollary benefit: namely, a Court whose members are genuinely committed to its mandate and strive for it to be a success. If violent dictatorships flooded the Assembly of States Parties, we would have every reason to expect that they would use their membership to politicize or obstruct the Court's activities. As it is, non-membership in the ICC casts an embarrassing light on such regimes and publicly raises the question: what exactly do they have to fear from being held accountable for genocide, war crimes, and crimes against humanity? These questions can create pressure for the reform or removal of such regimes, to be succeeded by governments whose own values, rather than external pressures, lead them to ratify the Rome Statute.

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In light of these considerations, the call by some human rights advocates for prompt universal ratification of the ICC seems politically unwise. Better for the Court to grow slowly with its integrity intact, than to absorb a large non-democratic membership that could undermine it from the inside. A genuine commitment to human rights should precede ICC membership; membership cannot be the ticket to such a commitment. The European Court of Human Rights (ECHR) provides an

instructive model. Fifty years ago, few could have predicted the remarkable contributions of the ECHR to the consolidation of human rights and democracy. The Court accumulated power slowly over time, building its prestige on a legacy of wise and principled decisions.¹⁰ It was a necessary condition of this evolution that the Court's parent organization, the Council of Europe, restricted membership to countries exhibiting a genuine commitment to democracy. As a result, the desire of states to prove their democratic credentials has become a principal motive for joining the Court. This dynamic is one that both spurs democratization and enhances the legitimacy of the Court.

Though the ICC differs from the European Court in crucial respects, the same lesson holds. Too easy an entrance into the ICC would lower the quality of its rulings, thus diminishing its legitimacy and sapping its power. The wisdom of encouraging mostly democratic regimes to join is manifested by the recent election of the Court's personnel by the Assembly of States Parties. The 18 inaugural judges are accomplished legal experts and practitioners, all from democratic

countries. The inaugural prosecutor, Luis Moreno-Ocampo, is an Argentine lawyer and visiting Harvard professor who has won worldwide recognition for his work in battling corruption in several countries and prosecuting human rights abuses committed by Argentina's former military regime. His performance to date has won wide praise for its judgment and skill.

The United States' most vocal complaint against the ICC concerns the Court's power to prosecute non-party nationals for crimes committed on the territory of member states. Washington objects, claiming that this rule exposes U.S. military service members and their civilian superiors to the danger of unscrupulous prosecutions. However, the solid credentials of the first prosecutor and the first panel of judges should allay fears about the judicial abuse of power. It bears repeating that the Court can take action only in the case of genocide, war crimes, and crimes against humanity, and

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then only if the implicated state fails to investigate those crimes itself. Even so, some U.S. critics object as a matter of principle that no one should face trial in an international court from which one's government has withheld its consent.¹¹ This objection flies in the face of the fundamental norm that governments have the right and the duty to protect the security of their inhabitants—a norm asserted by the United States whenever it arrests, tries, punishes, or indeed executes foreigners for crimes committed on U.S. soil. Countries have every right to protect their inhabitants from horrors like those unleashed by Iraq in Kuwait in 1990-1991 and by the Federal Republic of Yugoslavia in Bosnia between 1992 and 1995; and they have every right to enlist the help of an international court to this end.

Contrary to U.S. criticisms, ICC jurisdiction over non-party nationals is not an infringement of sovereignty or of democracy. In truth, it upholds sovereignty by helping countries defend themselves against foreign-perpetrated atrocities on their territory, while states that enlist the ICC for this purpose fulfill a democratic obligation to the security of their inhabitants. To claim that ICC jurisdiction transgresses sovereignty and democracy, one would have to believe that, by virtue of these two principles, each state is entitled to behave as it pleases on the territory of other states, just so long as its actions do not constitute genocide, war crimes, or crimes against humanity in its own eyes. Such an understanding of democracy, or even sovereignty, is implausible. Democracy has never meant the right of an individual or group, even one possessing great power, to do whatever it wants. As John Locke taught long ago, the insistence by the powerful on being judges in their own cause is the antithesis of democracy.¹² U.S. critics of the ICC have confused democracy with imperial prerogative.¹³

As one of its anti-ICC measures, the Bush administration, with congressional authorization, has announced that it will cut off military aid to most countries that ratify the Rome Statute unless they also promise by formal agreement never to surrender any U.S. citizens to the Court. This policy punishes precisely those countries that are most determined to prevent human rights atrocities, and that insist on protecting their inhabitants from these crimes. It punishes those countries most fully committed to the consolidation of democracy. At the same time, it will potentially rechannel the United States' huge military assistance budget in the direction of countries whose human rights records leave much to be desired. This is a perverse result from any point of view and is one more reason why Congress and the Administration should reexamine their hostility to the ICC.

The war in Iraq, which U.S. officials have increasingly justified in humanitarian terms, brings the virtues of the ICC into sharper relief. People who disagree about the justice of the war ought to agree that the history of Iraq since the notorious Ba'ath regime came to power over 35 years ago has been a tragedy. The United States and its allies are implicated in the tragedy as they generally supported the regime at the time of its worst atrocities in the 1980s, then confronted

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it with two major wars and a decade of economic sanctions at enormous cost to the Iraqi people. Now Iraq faces the specter of chronic terrorism and possible civil war, while the United States incurs mounting casualties and a huge financial burden. Foresight should inspire us to seek the prevention of similar tragedies in the future. Some may say that the United States has learned its lesson: it finally understands that American national interest and global security depend on a steadfast commitment to human rights and democracy around the world. But that commitment is not consistently honored even today, as the United States continues to cut deals with abusive

regimes for reasons of short-term expediency. The United States has neither the purity of motive, nor the attention span, nor even the capacity to be the world's guarantor of democracy. Democracy needs all the help it can get. We are foolish to spurn the opportunity provided by the ICC, whereby states, acting on their own initiative, can take steps to lock in democratic institutions, and non-participating states must face embarrassing questions about their intentions.

U.S. critics of the ICC are correct when they remind us that democracy calls for institutional checks on power.¹⁴ As Locke, Montesquieu, and Madison

understood, unchecked power invites abuse, whereas the mere consciousness of institutional checks improves the behavior of government officials, and each check enhances the effectiveness of the others. Purely domestic checks are vulnerable to the danger that a determined despot will dismantle them at one fell swoop. They are strengthened, therefore, by the presence of an external check in the form of international supervision; the ICC provides such a check. The ICC in turn operates under the check of its member states, which, because of the rules governing jurisdiction, consist disproportionately of democracies. Viewed in this light, the ICC is as much a domestic as an international institution, and one that harnesses both domestic and international sources of accountability. In short, the United States' opposition is misguided: the International Criminal Court stands not only for the moral ideals but also for the principles of prudent political design with which our country has long been identified. ■

NOTES

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- 1 See, for example, Madeline Morris, "The Disturbing Democratic Deficit of the International Criminal Court," *Finnish Yearbook of International Law* (12) (2001): 109-118; and John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," *Law and Contemporary Problems* (64) (Winter 2001): 167-180.
- 2 Marc Grossman, "American Foreign Policy and the International Criminal Court," Remarks to the Center for Strategic and International Studies, U.S. Department of State, May 6, 2002, <www.state.gov/p/9949.htm> (accessed April 6, 2004).
- 3 For excellent overviews of the ICC, see Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsey, New York: Transnational Publishers, 2002); and William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2001).
- 4 Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* (52) (Spring 1999): 646-667.
- 5 Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984).
- 6 For more information, see the Coalition for the International Criminal Court website at <www.iccnw.org> (accessed April 6, 2004).
- 7 International Criminal Court, "Report of the Prosecutor of the ICC to the Second Assembly of States Parties," September 8, 2003, <www.icc-cpi.int/otp/030909_prosecutor_speech.pdf> (accessed April 6, 2004).
- 8 Regarding Uganda, the prosecutor has made it clear that government conduct is not shielded from investigation: "The Prosecutor has explained that he will conduct independent investigations and receive complaints about all crimes." International Criminal Court, Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda, February 23, 2004, <<http://www.icc-cpi.int/otp/PIDS.OTP.002.2004-EN2.pdf>> (accessed April 6, 2004).
- 9 The intermediate "Partly Free" category applies to 29 percent of countries in the world, and 28 percent of ICC member states. Figures calculated from Freedom House, "Freedom in the World, 2004," <www.freedomhouse.org/research/survey2004.htm> (accessed April 6, 2004).
- 10 Lawrence Hilfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* (107) (1997): 273-391.
- 11 Morris, 109-118.

- 12 Jamie Mayerfeld, "Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights," *Human Rights Quarterly* (25) (February 2003): 93-129.
- 13 The Bush administration will not even promise to investigate all serious accusations of genocide, crimes against humanity, and war crimes committed by U.S. citizens. In a speech to the American Enterprise Institute, Under Secretary of State John Bolton stated, "We fully commit ourselves, *where appropriate*, to investigate and prosecute serious, credible accusations of war crimes, crimes against humanity and genocide that have been made against any of our people." Bolton, Remarks at the American Enterprise Institute, November 3, 2003, <www.state.gov/t/us/rm/25818.htm> (accessed April 6, 2004), emphasis added.
- 14 Grossman.