In 1939 E. H. Carr published what was to become a modern classic on international relations, *The Twenty Years Crisis, 1919–1939*. Carr has usually been seen as a defender of realism and a debunker of idealism, but his thinking was much more subtle. He believed that power and interest – the bread and butter of realism – were the primary determinants of state behavior. But he also believed that peoples and their nations were motivated by normative values and aspirations, not merely by a desire to marshal power and defend material interests. Carr concluded that “Utopia and reality are thus the two facets of political science. Sound political thought and sound political life will be found only where both have their place.”

For Carr the problem of the interwar years was not international idealism itself, but rather international idealism run amuck. At the core of the international idealism he criticized was the assumption that right-minded human beings could agree on abstract normative principles to guide national behavior, and that these principles, once understood and embodied in international law, would influence nations to act with greater justice. By his account, international idealism discounted other factors, including the distribution of power and economic and political interests.

Carr famously argued that such idealism was self-defeating. Some nations, such as Germany, failed to comply with the principles of reason embodied by the League of Nations and similar institutions, and appealed instead to compet-
ing principles of law and morality to justify their self-interested and rapacious acts. Other nations, such as Britain and France, relied too heavily on the paper guarantees of international law, and not on a clear-eyed analysis of power and interest (both their own and Germany’s), to secure international harmony. Carr attributed the growing international crisis in 1939 (his book was sent to the printer in July of that year) to the idealistic international institutions that were supposed to make a second world war impossible.

The kind of idealism that Carr understood to be so damaging to international peace and stability in the interwar years is again informing many aspects of international politics. Three developments in particular – the rise of universal jurisdiction, the creation of a new International Criminal Court, and recurring demands for humanitarian intervention – reflect a renewed commitment to international idealism. Supporters of these institutions and policies tend to believe that justice is best served when it is isolated from politics and power. Only by insulating international institutions and practice from the bargaining and compromise that characterize political decision-making, and from the domestic political pressure to which politicians must always be alert, can justice be fully realized. On this view, institutions and principles that minimize the influence of power better achieve justice than those in which power plays an important role; and decisions made by unaccountable actors, especially judges, are more likely to be just than decisions made by political leaders responsible to their electorates.

We believe the new international idealism suffers from four fundamental flaws:

- First, it assumes the utopian premise that a global consensus can be reached, not just on normative principles, but also on when and how they should be applied.
- Second, it minimizes considerations of power, and assumes that norms of right behavior can substitute for national capabilities and material interests.
- Third, it neglects political prudence: it offers a deontological rather than a consequentialist ethics.
- Fourth, it consistently slights the value of democratic accountability.

Our claim is not that idealism in international politics is irrelevant or inherently harmful. With Carr, we believe that normative ideals can provide a hope for progress, an emotional appeal, and a ground for international action. But we also agree with Carr that ideals can be pursued effectively only if decision-makers are alert to the distribution of power, national interests, and the consequences of their policies. The lesson Carr teaches is that when idealism is not tempered by attention to these factors, the best can become the enemy of the good, and aspiration the enemy of progress.

1

Universal jurisdiction is the power of a domestic court to try foreign citizens, including government officials, for certain egregious international crimes committed anywhere in the world. This authority is premised on the idea that human rights violations are an affront to all humanity and thus may be punished anywhere, regardless of the defendants’ nationality or the place of the crime. Universal jurisdiction aims to strengthen international human rights law by marshaling politically independent domestic courts to enforce that law. The classic modern example is the Pinochet case, in
which Spain attempted to extradite Pinochet from England (where he was undergoing back surgery) to stand trial in Spain for torture and related international crimes he allegedly committed in Chile. (The extradition request originally charged Pinochet with crimes against Spaniards as well, but these charges were deemed inadmissible, thus making the case one of ‘pure’ universal jurisdiction.) The House of Lords ruled that international law required England to extradite Pinochet to Spain for these crimes, but the government of Great Britain eventually sent Pinochet back to Chile after determining that he was unfit to stand trial.1

The Princeton Principles of Universal Jurisdiction, a document drafted by leading scholars and jurists from around the world,2 are a comprehensive statement of the nature and scope of universal jurisdiction. The Principles extend universal jurisdiction to piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. They specify that “national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.” They strip all defendants – including sitting heads of state – of any official immunities. And they maintain that amnesties in particular “are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law.” In short, the Princeton Principles aim to replace impunity with accountability by extending universal jurisdiction as broadly as possible.

The Princeton Principles reflect conventional wisdom among idealists about the shape and direction that international law should take. The Principles will likely influence future universal jurisdiction prosecutions, because national courts interpreting international law give special deference to the views of scholars and jurists. In our view, however, the Princeton Principles are an unfortunate development that exemplifies the new idealism’s failure to take seriously the contested nature of international norms, the importance of prudence, and the possibility of abuse exacerbated by the absence of democratic accountability.

International criminal law is extraordinarily vague. Virtually everyone agrees that genocide and torture and crimes against humanity are international crimes. But when we attend to the details of what acts constitute these crimes, and of when these crimes can properly be tried by courts, there is much dispute and little definitive guidance. Consider three of many examples:

- Among the most clearly defined of international crimes is torture, which the Torture Convention defines to include any act inflicted by a public official “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” to obtain information, punish, or intimidate.3 Amnesty International claims that the United States violates this principle when its police use stun guns, pepper sprays, and restraint chairs, and when

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2 The drafting committee was comprised of seven jurists from American universities, and the meeting at which the Principles were adopted was attended by scholars and jurists from Canada, Ghana, the United Kingdom, China, and Turkey as well as the United States, and included former presidents of the International Court of Justice, the American Bar Association, and Tokyo University.
3 “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” art. 1.
its prison officials use solitary confinement and related maximum security detention techniques. The United States disagrees; it believes these practices are legitimate and do not constitute torture within the meaning of the Torture Convention. There is no definitive source or judicial decision that can resolve this disagreement. Under universal jurisdiction, any national court could try these U.S. officials if it, like Amnesty International and many other human rights groups, viewed these police practices as torture.

A crucial issue in any universal jurisdiction prosecution is whether the defendant has an official immunity from prosecution under international law. The existence and scope of these immunities as they apply to universal jurisdiction prosecutions are contested and unsettled. The House of Lords interpreted international law to lift Pinochet’s immunity as a former head of state. More recently, the International Court of Justice (ICJ) interpreted international law to hold that the Congolese foreign minister was immune from a universal jurisdiction prosecution in Belgium for alleged war crimes and crimes against humanity he committed in his country. The ICJ decision technically has no precedential effect beyond the case it decided. So the scope of official immunity from a universal jurisdiction prosecution remains an open question. Under universal jurisdiction, each national court gets to determine the proper scope for itself.

When the United States and its NATO allies bombed Yugoslavia in 1999, they violated the UN Charter’s prohibition on the use of force against sovereign nations in the absence of Security Council authorization. Under the Princeton Principles, NATO officials might be subject to universal jurisdiction prosecutions for “crimes against peace.” But they might not; many international lawyers believe there is a developing customary exception to the UN Charter for certain humanitarian interventions. In addition, Amnesty International and an independent group of law professors have concluded that NATO countries committed “serious violations of the laws of war” when they purposefully destroyed civilian targets (such as a television station and electricity grids) and when they killed civilians by dropping bombs from no lower than fifteen thousand feet. The prosecutor at the International Criminal Tribunal in The Hague investigated these allegations and concluded, after much internal wrangling, that they did not warrant prosecution. Under a regime of universal jurisdiction, a court in any nation of the world could prosecute NATO leaders and military members and decide whether such actions constitute acceptable humanitarian intervention or criminal acts.

Because the content of international human rights law is so contested, courts exercising universal jurisdiction in good faith are likely to interpret and enforce this law in ways that affected groups will view as unconvincing, self-serving, and

discriminatory. A universal jurisdiction prosecution can do more than provoke resentment among the affected groups; it can also provoke domestic unrest or international conflict. Until recently, Belgium was considering universal jurisdiction charges against both Ariel Sharon and Yassar Arafat for human rights violations each allegedly committed in the Middle East. (Such a prosecution remains a possibility.) A decision by a Belgian court that Sharon or Arafat, or both, are war criminals will not likely dampen discord in the Middle East. It is much more likely to make matters worse by legitimizing views of extremists on both sides.

Proponents of universal jurisdiction claim that these leaders should be held accountable for their international crimes, no matter what the consequences. This argument presupposes a consensus on the nature of the international crimes we have just questioned. The argument also overlooks the possibility that a universal jurisdiction prosecution may cause more harm than the original crime it purports to address. Universal jurisdiction courts and prosecutors possess neither the competence nor the incentive to fully consider these harms. They are doubly unaccountable in the sense that they are relatively unaccountable to their own government (to the extent that they are politically independent), and they are completely unaccountable to the citizens of the nation whose fate they are ruling upon. It doesn’t matter that they act with benevolent intent. What matters is that they may do something that harms people to whom they have no real connection and whose interests they are poorly positioned to assess. Because relevant constituencies cannot hold courts exercising universal jurisdiction accountable for the negative consequences of their rulings, the courts themselves will invariably be less disciplined and prudent than would otherwise be the case.

The inability of universal jurisdiction courts to consider the consequences of their actions in affected countries is a particular threat to amnesties, reconciliations, truth commissions, and similar programs that can successfully facilitate transitional justice. Modern international idealists tend to see these programs as a rejection of accountability. In fact, such programs often contain elements of individual accountability. More importantly, these programs are best viewed as prudential arrangements that sacrifice some benefits—such as punishment of the guilty and restoration of the respect and integrity of victims—for the sake of other values, including the minimization of human suffering, closure, a stable peace, and the like. In recent years, amnesties have been an important component in several peaceful settlements of bloody civil conflicts, including ones in Chile, Haiti, Sierra Leone, and South Africa.

As Michael Scharf correctly notes, a rejection of amnesty and an insistence on criminal prosecutions “can prolong ... conflict, resulting in more deaths, destruction, and human suffering.” Consider the Truth and Reconciliation process in South Africa. Under the Princeton Principles, this process would not preclude a universal jurisdiction prosecution, in a court outside South Africa, for example. The limits of idealism

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8 The original prosecution against Sharon was thrown out on the grounds that universal jurisdiction criminal prosecutions in abestentia were prohibited under Belgian law. The Belgium Parliament is currently considering amending that law to permit such prosecutions.

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of Apartheid-era governmental officials. This insistence on individual accountability at any cost could have terrible effects on the still-fragile South African reconciliation. And it might have precluded the reconciliation altogether (or at least made it even more rocky) had universal jurisdiction been widely practiced in the 1990s. In this way, universal jurisdiction can make political solutions to already difficult transitions to peace and democracy even more difficult.

The inability of universal jurisdiction prosecutors to weigh judiciously the consequences of their actions distinguishes them from purely domestic prosecutors, and attests to the importance of democratic accountability in the enforcement of criminal law. In a domestic prosecution, at least in the United States, the prosecutor is accountable to the community in which she serves in the sense that she is either elected (as in many states) or (as in the federal system) appointed and subject to removal by elected officials. As a result, in deciding whether and how to prosecute a crime, a domestic prosecutor will often take into account the consequences of the prosecution for community health, safety, and morale.10 In many instances the adverse community consequences of holding an individual accountable for a past crime can lead prosecutors to forgo prosecution, or to strike a plea deal favorable to the accused. (And of course political accountability also dampens the likelihood that this discretionary process will be abused.) Because universal jurisdiction prosecutions take place outside affected communities, universal jurisdiction courts and prosecutors lack the incentive, or the institutional capacity, to consider such tradeoffs.

The discussion thus far has proceeded on the optimistic assumption that nations will apply universal jurisdiction principles in good faith. But there is no reason to believe this will be true. It is not only the House of Lords and the Belgian courts that can prosecute under universal jurisdiction. Corrupt courts that lack political independence can as well. And many nations will have incentives to engage in politically motivated universal jurisdiction prosecutions.

The Princeton Principles rely on legal norms to preclude such prosecutions. They insist that a “state shall exercise universal jurisdiction in good faith,” and add that a “state and its judicial organs shall observe international due process norms, including...the independence and impartiality of the judiciary.” The reliance on legal norms in this context is wholly unconvincing. The Principles fail to consider why a nation with bad-faith motives to prosecute a universal jurisdiction crime would care about such due process principles – principles that, in any event, are manipulable in opportunistic ways.

To date, the costs of universal jurisdiction have not been obvious – at least in the United States and Europe – because most universal jurisdiction prosecutions have been brought by Atlantic alliance nations against offenders in weak countries. But there is no reason to think this pattern will continue. The rate of universal jurisdiction prosecutions has increased in recent years. And, as their potential and scope become clear, as human rights groups continue to pressure nations to bring such prosecutions, and as weaker countries realize that universal jurisdiction can be a tool for creating political mischief on the international stage, especially against more powerful countries, such prosecutions will in-

crease. Enthusiasm for universal jurisdiction might dampen in light of the ICC’s recent ruling on immunity for the Congolese foreign minister. If not, we expect that the many adverse consequences of universal jurisdiction we have discussed will become more apparent.

2

In July of 2002, international idealists realized a long-held dream: the creation of an International Criminal Court (ICC) with jurisdiction over genocide, crimes against humanity, war crimes, and, potentially, the crime of aggression.11

In some respects, the ICC is an improvement over a regime of universal jurisdiction by national courts. The ICC is a centralized institution. Its treaty defines the international crimes within its jurisdiction. It also rejects universal jurisdiction, requiring instead a nexus to the territory or persons of a treaty signatory.

And yet the ICC has most of the other characteristics – and flaws – of universal jurisdiction. Its norms are still much too open-ended and contested to permit a consensus on proscribed behavior; it suppresses considerations of power; it lacks democratic accountability; and it cannot reliably balance legal benefits against possible political costs.

The ICC defines the crimes within its jurisdiction. But these definitions rely a great deal on contested international law norms, and they leave the ICC great interpretive flexibility. For example, “crimes against humanity” include “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.” Unfortunately, international law provides little concrete guidance about what these fundamental rules require. After listing other examples of crimes against humanity, the ICC treaty describes as a final one “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health.” Such a criminal prohibition would almost certainly be void for vagueness under U.S. law.

To take another example, the ICC includes dozens of prohibitions under the heading of “war crimes,” including “willfully causing great suffering, or serious injury to body or health” of civilians, and “destroying or seizing the enemy’s property unless . . . imperatively demanded by the necessities of war.” The scope of these prohibitions is obviously uncertain, but it is easy to imagine them being applied to NATO actions in Kosovo and U.S. actions in Afghanistan. The ICC treaty is chock-full of many similarly vague and indeterminate criminal prohibitions.

One reason these vague norms are particularly troublesome is that the ICC prosecutor and court are unaccountable to any democratic institution or elected official. The ICC prosecutor is, to be sure, elected by a secret ballot by a majority of the signatory nations, each of which gets a single vote. But such an electoral system is problematic because, among other things, the vast majority of ICC signatories are weak nations that are never seriously involved in international police actions and thus have no incentive to consider the costs of zealous prosecutions.12

Even more importantly, the prosecutor can initiate investigations and prosecutions on his own, or at the suggestion of the UN or any signatory nation – all without restraint.

11 The ICC’s charter is available at <http://www.un.org/law/icc/statute/rome.htm>; all subsequent quotes come from this document.

12 As of November 15, 2002, ICC signatories were: Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bul...
without review, or the threat of review, by political actors. His prosecutions are subject to legal review by the trial and appellate courts of the ICC, but these courts are similarly unaccountable to any democratic institution.

This lack of accountability means that the ICC presents many of the dangers of universal jurisdiction. Its structure is remarkably similar to the much-maligned U.S. Independent Counsel statute. By guaranteeing independence at the price of political control, it invites questionable and even politically motivated prosecutions. Legal restrictions and definitional limitations are not likely to provide real checks on the ICC’s behavior, for the ICC itself is the ultimate interpreter of these norms. Experiences with the more accountable international tribunals in The Hague and Rwanda have shown that international courts will not be bound by the letter of their governing rules when justice as they conceive it requires otherwise. ICC jurisdiction can only be expected to expand.

In addition, the ICC, like a universal jurisdiction court, lacks the institutional capacity to identify and balance properly the consequences of a prosecution on potentially affected groups. The ICC treaty insists that “the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured.” Here again we see modern international idealism’s commitment to individual accountability at the expense of national amnesties and other forms of political reconciliation. The ICC theoretically permits the prosecutor to decline to investigate when there are “substantial reasons to believe that an investigation would not serve the interests of justice.” But the final call rests with the prosecutor, who has no reason to think he has the perspective, information, or incentives to make this decision wisely. (When Richard Goldstone, the Yugoslav Tribunal’s first prosecutor, was asked if he “worr[jed] about the consequences to the Bosnian peace process of indicting Radovan Karadžić and Ratko Mladić,” he responded that the indictment “was really done as, if you like, an academic exercise...Because our duty was clear.”)

It is true that the ICC treaty requires the court to dismiss a case if it is already under investigation in national court, “unless the State is unwilling or unable to genuinely carry out the investigation or prosecution.” But the ICC has the final word on what counts as a genuine investigation based on its perception of whether the domestic proceedings are “inconsistent with an intent to bring the person concerned to justice,” a provision that opens the possibility of double jeopardy if the prosecutor decides that a national conviction or investigation is too lenient and therefore not genuine. It is natural to expect the ICC to interpret its charter in ways that support its jurisdiction.

Perhaps the most troubling element of the ICC is its relationship to the U.N. Security Council. The United States argued that the ICC should prosecute only on the basis of referrals from the Security Council. The ICC drafters rejected the U.S. proposal on the grounds that it would inject international power politics into the decision whether to prosecute, and would give each of the Big Five powers a veto over any prosecution. The drafters viewed power politics, and the opportunistic use of Security Council vetoes, as an obstacle to individual accountability under international human rights law.

The ICC in its final form does permit the Security Council to delay a prosecution for twelve-month renewable terms. But this just means that an ICC case can go forward so long as a single permanent member vetoes a resolution of delay. And even if the Security Council votes to delay an ICC initiative (as it did when it granted UN peacekeepers a twelve-month immunity from prosecution in July of 2002), many commentators believe the ICC has the power to engage in ‘judicial review’ of the Security Council and possibly to disregard its decision.

There are at least two problems with this attempt to eliminate power politics from the enforcement of international criminal law and to subvert the recognition of national power incorporated in the UN Security Council. The first parallels a problem with universal jurisdiction: the ICC could initiate prosecutions that aggravate bloody political conflicts and prolong political instability in the affected regions. Relatedly, the possibilities for compromise that exist in a political environment guided by prudential calculation are constricted when political deliberation must compete with an independent judicial process. Many believe that the threat of prosecution by the international tribunal in The Hague made it practically impossible for NATO to reach an early deal with Milosevic, thereby lengthening the war and the suffering in the Balkans in the summer of 1999. The best strategy for stability often depends on context and contingent political factors that are not reducible to a rule of law. There is no reason to think that a politically unaccountable prosecutor and court will make such difficult, context-specific calls wisely, even assuming they had the discretion to do so.

The second problem results from what Carr would have described as a chasm between theory and practice. Proponents of the ICC believe that it may, in the words of Human Rights Watch’s Kenneth Roth, “save many lives.” This is wishful thinking. Even if the ICC turns out not to have the disruptive effects described above, and even if it is somehow able to prosecute low-level human rights abusers, it is hard to see how the ICC can stop, or even affect, persons responsible for large-scale human rights abuses.

The main reason for this conclusion is that the ICC can only prosecute persons it can get custody over. The Milosovics, Mullah Omars, and Pol Pots of the world, however, tend to hide behind national borders, where they are hard to reach. Moreover, the most notorious human rights abusers have been motivated by their own sense of mission and justice. They have seen themselves as saviors, not sinners. They have been determined to cling to power and they believe, as all leaders with a mission do, that they can reshape the world in their own image. If they have not been deterred by the threat of U.S. military intervention, they are unlikely to worry much about an ICC that lacks any real


enforcement mechanism of its own and
that must depend on its members,
whose decisions are uncertain, to arrest
and surrender suspects.

This brings us to the U.S. refusal to par-
ticipate in the ICC. There are many rea-
sons for the U.S. stance, most notably
the perception that the United States’s
disproportionate share of international
policing responsibilities exposes it to a
disproportionate risk of politically moti-
vated charges being brought before the
ICC.

It may seem odd that an institution
that will have little effect on rogue hu-
man rights abusers could so concern the
world’s greatest power. But U.S. troops,
unlike rogue government officials, do
not hide behind national borders. Hun-
dreds of thousands of them are deployed
around the globe, making them poten-
tially easy to grab and bring to The
Hague. (The United States is trying to
counter this danger by signing bilateral
agreements in which the signatories
agree not to surrender nationals of the
other to the ICC.)

Even if no U.S. defendant is brought
before the ICC, it can still cause mischief
for the United States by being a public
forum for official criticism and judg-
ment of U.S. military actions. For all
these reasons, the ICC will more likely
affect the activities of the generally
human-rights-protecting but militarily
active United States than rogue state ac-
tors who hide behind walls of sovereign-
ty (or in ungoverned areas) and care lit-
tle about world public opinion and inter-
national legitimacy.

Despite his opposition to the ICC trea-
ty, President Clinton signed it in 2001,
just before he left office, so that the
United States could participate in ongo-
ing negotiations. In May of 2002, how-
ever, the Bush administration officially
notified the United Nations that “the
United States does not intend to become
a party to the treaty.” In August of 2002,
President Bush signed the American
Servicemen’s Protection Act (ASPA), a
statute that enjoyed broad bipartisan
support. ASPA is sometimes called the
Hague Invasion Act because it authorizes
the president to use all necessary means
to release U.S. officials from ICC captivi-
ty. It also bars military aid to some na-
tions that support the ICC, and it re-
quires the president to certify that U.S.
peacekeepers will be immune from ICC
prosecution.

U.S. opposition to the ICC is important
because U.S. military and financial back-
ing have been crucial to the operation of
ad hoc international criminal tribunals.
Consider how Milosevic wound up in
The Hague. It was not the gravitational
pull of international norms that brought
him there. Rather, the United States
wielded enormous diplomatic and mili-
tary power to oust him from office, and
then threatened to withhold some $50
million in aid to the successor regime in
Yugoslavia until it turned over Milosevic
to the Yugoslav tribunal.

The Milosevic episode teaches a gener-
al lesson. The ICC simply cannot, with-
out U.S. support, fulfill its dream of
prosecuting big-time human rights abus-
ers who hide behind national borders.
This is why the ICC’s alienation of the
United States may actually hinder rather
than enhance human rights enforce-
ment. We have already seen this effect
on peacekeeping and ad hoc internation-
al tribunals. And of course the ICC will
most likely chill U.S. military action not
when central U.S. strategic interests are
at stake (as in Afghanistan), but rather in
humanitarian situations (like Rwanda
and perhaps Kosovo) where the strategic
effects of military action are low, and
thus even a low probability of prosecu-
tion weighs more heavily. In this way, the ICC may ironically increase rather than decrease impunity for human rights atrocities.

The establishment of an ICC that is unacceptable to the world’s most powerful nation (and also to other large and powerful nations, including Russia, China, Indonesia, and India) represents a folly reminiscent of the League of Nations, and portends a similar fate. The international idealists who rejected U.S. demands for Security Council control over ICC prosecutions aimed to decouple the enforcement of international criminal law from international politics. They wanted “equal justice under law” – the equal application of international human rights law to weak and powerful nations alike. Both aims are a fantasy strongly reminiscent of the interwar idealism that Carr so effectively and presciently criticized. In demanding a full loaf of neutral justice rather than a half loaf of justice that accords with the interests of nations that can enforce it, and in creating an institution that relies on legal norms wholly removed from considerations of power, international idealists may diminish rather than enhance the protection of human rights.

3

In the last decade alone, many hundreds of thousands of people have died in the Balkans, central Africa, Afghanistan, Indonesia, Haiti, and elsewhere, some before our eyes on CNN. Humanitarian disasters, of which genocide is the most appalling, are not pretty things. No reasonable person would argue that they should simply be ignored.

The question is what to do about them. Universal jurisdiction and the ICC are institutions designed to redress and – if deterrence can be made to work – to prevent such gross human rights abuses. A third practice more directly aimed at prevention or mitigation is humanitarian intervention.

Technically, humanitarian intervention in the absence of Security Council authorization violates the UN Charter. And until recently, many international idealists have viewed humanitarian intervention with suspicion on the ground that nations often use humanitarian intervention as a cover for an unjustified invasion of another country. But today many international idealists are arguing that states have a responsibility to act to prevent or rectify humanitarian catastrophes regardless of whether or not their material or security interests are at risk.

Typical of this trend is a report issued in 2001 by the International Commission on Intervention and State Sovereignty entitled The Responsibility to Protect. The Commission was supported by a secretariat housed in Canada’s Department of Foreign Affairs and International Trade and was composed of a group of international personages co-chaired by Gareth Evans, a former foreign minister of Australia, and Mohamed Sahnoun, an Algerian diplomat and special advisor to the UN secretary-general. The report argues that each nation has an international responsibility to avoid or mitigate humanitarian disasters that could result either from conscious policy or from indifference or ineffectiveness in the face of natural calamities. This responsibility rests first with the domestic government, but if that government fails to act then other states and international organizations have a responsibility to protect.

The Commission members, echoing Secretary-General Kofi Annan’s statements, aim to undermine the assertion, explicit in the UN Charter, that the principle of sovereignty precludes external intervention. Their report contends that sovereignty resides with individuals as well as states. The major purpose of government is protecting individual rights; if a government manifestly fails to protect these rights by engaging, for instance, in widespread killing or ethnic cleansing, then others have an obligation to intervene. Sovereignty and the responsibility to protect are mutually constitutive, not contradictory, principles. States that massively fail to protect individuals within their own borders are not properly exercising their sovereign authority and therefore cannot claim that external intervention is illegitimate.17

No one, regardless of his understanding of international affairs, would argue that humanitarian concerns should carry no weight in decisions about intervention. The hard issue is whether nations have an obligation or responsibility to intervene for humanitarian reasons alone.

The argument that nations are obliged to intervene ignores, or, at best, minimizes, the fact that electorates in advanced industrialized democracies have been reluctant to expend blood and treasure to deal with humanitarian catastrophes that do not affect their material interests. Despite the hundreds of thousands of deaths caused by human rights abuses during the past decade, despite the millions of such deaths in the last century, humanitarian intervention has not generated any wellspring of support among domestic publics in the advanced industrialized democracies that possess the military muscle to make a difference.

Germany and Japan have been extremely reluctant to engage in overseas deployment of their military forces for any purpose, humanitarian or otherwise. No major European state has made a sustained commitment to humanitarian intervention. Indeed, no combination of European countries has the military capability to conduct a serious military intervention of any kind outside of Europe, and none appears willing to make the budgetary commitments that would make such interventions possible. European forces do have the ability to participate in peacekeeping operations, but even here the tolerance for losses can be limited. Belgium, for instance, which had several hundred troops deployed in Rwanda at the beginning of the 1994 crisis, withdrew them after ten of its soldiers were killed by Hutu militia.

The extreme caution with which American presidents have engaged in humanitarian interventions suggests that they believe that they are walking on very thin ice when they cannot convincingly tie their activities to material interests that the voting public can understand. To be sure, the Clinton administration undertook humanitarian interventions in Somalia, Haiti, Bosnia, and Kosovo. But the last two were overtly tied to the viability of NATO and American security, and even here the United States relied on high-altitude air attacks that minimized the chances for American casualties. In Somalia, Clinton extricated the United States after eighteen soldiers were killed. He did not act in Rwanda where an estimated eight hundred thousand people died – a decision that caused him no discernible political problem.

The report of the International Commission on Intervention and State Sovereignty recognizes the problematic absence of democratic support for humanitarian intervention. It suggests that the budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive might actually be. Apart from economic or strategic interests, that self-interest could, for example, take the understandable form of a concern to avoid refugee outflows, or a haven for drug producers or terrorists, developing in one’s neighbourhood.18

The Commission here acknowledges a gap between its own prescriptions about the moral obligation to act to mitigate humanitarian disasters, and the views held by democratic electorates in Europe, Japan, and North America — electorates whose money would be spent and whose sons and daughters could be killed.

This absence of democratic support is a fundamental problem for those who insist that nations should intervene to arrest human suffering in other nations. A basic tenet of the idealistic outlook that underlies demands for humanitarian intervention is that liberal democracy is the morally preferable form of domestic governance.19 In a democracy, foreign policy must have national support and be justified in terms acceptable to the voting public. But this means that political leaders cannot engage in acts of altruism abroad much beyond what constituents and/or interest groups will support. This conclusion is fatal to the interventionist project. The most we can expect is that when a nation’s strategic interests dovetail with an inclination toward genuine humanitarian intervention, it will intervene — as the United States did in Bosnia, Haiti, and Kosovo.

Once again, this means that international justice will depend on the power and interest of nations, and will often result in uneven patterns of enforcement that critics deride as hypocritical. Opportunistic interventions are also what give rise to the (not unjustified) concern that many so-called humanitarian interventions are ruses for invasions motivated in large part by strategic ends. A clear-eyed analysis of interventions would realize that such mixed-motive cases are probably the best we can hope for. The presence of mixed motives does not detract from the fact that some such interventions might help local populations, as the Kosovo intervention arguably did.

Arguments for the duty to intervene and prevent human suffering suffer from another problem in addition to the democratic deficit: they underplay, even if they do not ignore, questions of political prudence. Political prudence demands that foreign policy actions be judged in terms of their consequences, not their intentions.

Information affecting the cost of intervention, including the state of affairs in the target country and the price of intervention — in money spent, lives lost, and other opportunities forgone — are hard to determine. Similarly, the consequences of intervention, including the costs and

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18 International Commission, The Responsibility to Protect, 36.

likelihood of constructing a social and political order superior to that which would exist in the absence of intervention, are hard to know in advance. These factors make it all the more difficult for responsible democratic leaders to intervene, even if they were willing to ignore the absence of domestic support.

In several articles and a widely praised book, Samantha Power has been highly critical of American policy for failing to prevent or react to the genocidal policy adopted by Hutu extremists in Rwanda. She faults, among others, American Ambassador David Rawson for his failure to anticipate the scale of the killings. She quotes Rawson as follows: “Most of us thought that if a war broke out, it would be quick, that those poor people didn’t have the resources, the means, to fight a sophisticated war. I couldn’t have known that they would do each other in with the most economic means.”

Rawson was, however, far from ignorant about Rwanda. He had grown up in Burundi, the son of an American missionary. He spoke the local language. He could not, in Power’s words, “have been more intimate with the region, the culture, or the peril.” Yet he totally missed what was about to occur. Power argues that Rawson and others suffered from what she calls “imaginative weakness.” She also claims that “US officials who ‘did not know’ or ‘did not fully appreciate’ usually chose not to.” But it would be more straightforward and obvious to say that policymakers must always make guesses about alternative states of the world with limited information and time – and absent overwhelming information to the contrary, there is no rea


Success requires creating institutional arrangements to which all of the relevant local actors will adhere. This is more easily done in some areas than in others. The highly developed institutional structures of Europe – the European Community, the Organization for Security and Cooperation in Europe, and NATO – offer alternatives to conventional sovereignty for the Balkans. These alternatives make it easier to maintain minority rights and prevent conflict, although even here the prospects for long-term success are uncertain. Other neighborhoods, such as ones in Africa and central Asia, are less hospitable. Building stable and tolerant societies in these areas is an enormous challenge, and there is no guarantee of success. Despite a clear security motive for intervention, widespread international support, and billions of dollars in assistance, the American-led effort to reconstruct Afghanistan might still fail. It is all the more difficult to sustain such efforts in countries where the direct security interests of powerful and rich states are not engaged.

The difficulty of assessing the costs and benefits of intervention and the absence of domestic support for purely humanitarian actions do not rule out such activities. But these considerations do suggest that it is wishful thinking to presume that the responsibility to protect will become a central norm in state decision-making. Any decision to engage in humanitarian intervention must take into account available resources, domestic support, probabilities of success, the danger of doing more harm than good, and, most importantly, the material interests of the intervener. This once again will lead, at best, to selective justice. In international politics, selective justice is the best we can hope for.

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We have offered reasons to be pessimistic about the efficacy of three regimes – universal jurisdiction, the ICC, and (certain conceptions of) humanitarian intervention – that aim to enforce international human rights norms. Our point is not to criticize the norms themselves, but to focus attention on pathologies that may result from the inadequate institutions in which they are embedded. International institutions can damage rather than promote international ideals if they are incompatible with the interests of those states whose support is needed for their success.

Consider two successful weddings of ideals, interests, and power – the first associated with the beginning of the modern state system, and the second with its possible transformation. The treaties of Westphalia (1648) that ended the Thirty Years War are famous for embracing the principle that the prince determines the religion of his territory. But the actual terms of the treaties limited the emperor’s right to regulate religious practices within the Holy Roman Empire. These restrictions, analogous to modern human rights, protected some minority religious practices, mandated the sharing of public offices in some cities with mixed populations, and most importantly, altered the domestic institutional structure of the Empire by requiring that religious questions be decided by a majority of Catholics and Protestants voting separately in the diet and courts of

the Empire. These protections were largely efficacious, not because the norm of religious toleration motivated leaders (in fact no European leader believed in this norm), but rather because the Thirty Years War had shown that efforts to repress religious practices in Germany were so politically volatile that they could threaten the very existence of the Empire.

The European Union is another example. The Union has transformed the continent from one riven by war in the first half of the twentieth century to one in which war is unthinkable, at least among member states. European integration was motivated by ideals, by an aspiration among a small number of leaders to bind the states of Europe into a peaceful web of relations from which they could not extricate themselves. An important element of this integration was the creation of a human rights regime that fostered democracy and tolerance in the domestic realm. But these ideals could only be realized by grounding them in interests, economic and political, and by creating institutions that made it possible for European leaders to ensure that no nation had an incentive to defect.

The Peace of Westphalia and the European Union are institutions that successfully harnessed the power and interest of nations to enforce moral ideals. These institutions worked because each nation benefited from the institution and had an interest in complying with its terms. Unfortunately, it is not always, or even usually, possible to yoke self-interest into such a self-enforcing mechanism to promote moral ideals.

When self-enforcement fails, the alternative is a system of selective justice enforced by the powerful, one consequence of which is effective immunity for the powerful. What has not proved possible in international affairs is universal international justice based on legal norms that operate in the absence of either self-enforcement or hegemonic dominance.

This is why we believe that the norm that states ought to intervene militarily to mitigate humanitarian catastrophes will not become accepted in practice. Persons motivated to commit the abuses have nothing to gain from forgoing the abuse out of deference to international norms alone. And the leaders of democratic states – or, perhaps more to the point, American presidents – will not be able to secure the domestic political support needed to place lives at risk when their states’ security interests are not directly at stake.

Universal jurisdiction and the ICC, in contrast, can matter, because they establish judicial procedures that rely on the authority and policing powers of national states for enforcement. The problem here is not that such institutional arrangements will be ineffectual. As we have suggested, these institutions can affect the costs of political action, and can have a special impact on nations like the United States that are globally active and care about public opinion and international legitimacy. The problem with these institutions is that they can do more harm than good.

The ICC and universal jurisdiction assume a consensus on human rights ideals and their applicability, and expect that compliance will follow. But no such consensus exists; non-national judicial proceedings will always be open to
charges of bias, an ambiguity that Milosovic has exploited in his trial before the International Criminal Tribunal for the Former Yugoslavia (an institution that avoids many of the pitfalls of the ICC). The ICC and universal jurisdiction sever the link between norm enforcement and political accountability. One consequence of this separation is that the institutions are practically, and in some circumstances legally, discouraged from engaging in assessments of costs and benefits that are often so important for the prevention of human suffering. As a result, such institutions may worsen rather than alleviate human rights catastrophes.25

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