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## International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?

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*It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair . . . .*

*Charles Dickens, A Tale of Two Cities*

At the beginning of the twenty-first century, we might say of our times, it was the age of human rights, it was the age of genocide and torture, it was the era of abundance, it was the era of hunger, it was the dawn of global justice, it was the enduring night of deprivation and abuse. Despite the relentless reports of atrocities and human suffering, human rights activists and critics alike have recently identified human rights as “the idea of our time, the only political-moral idea that has received universal acceptance,”<sup>1</sup> “the dominant moral narrative for thinking about world affairs,”<sup>2</sup> and “the major article of faith of a secular culture that fears it

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1. LOUIS HENKIN, *THE AGE OF RIGHTS* xvii (1990). Professor Henkin also writes, “The international human rights movement has established the idea of human rights, and that idea is not likely to be superseded.” *Id.* at 29.

2. David Rieff, *The Precarious Triumph of Human Rights*, N.Y. TIMES MAG., Aug. 8, 1999,

believes in nothing else[,] . . . the lingua franca of global moral thought.”<sup>3</sup>

And just as the language of human rights dominates international moral discourse, an international criminal justice paradigm has recently come to dominate human rights discourse. Michael Ignatieff has called the development of institutions for holding human rights abusers criminally accountable “the enforcement revolution in human rights.”<sup>4</sup> Human Rights Watch, which has been at the forefront of efforts to establish and utilize such mechanisms of international criminal justice, calls these developments “the beginning of a new era for the human rights movement” and describes this era as one “in which the defense of human rights can move from a paradigm of pressure based on international human rights law to one of law enforcement.”<sup>5</sup> Indeed, until recently, discussing the progress of human rights largely meant recognizing the establishment and proliferation of conventional and customary norms, while lamenting the weakness of international enforcement mechanisms. Advocates for the protection of human rights yearned to make the increasingly well-settled international law of human rights work like effective municipal legal systems by providing for courts that could prosecute and punish violators. As the international community greets with enthusiasm the emerging realization of this goal—the establishment of a prosecutorial model of human rights protection—it is appropriate to ask whether getting what we wished for may be cause for concern as well as hope.

The key elements of the “enforcement revolution” are well known: the creation by the U.N. Security Council of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda; their jurisprudence and their record of indictments, arrests, trials, and sentences; the adoption of the Rome Treaty to establish the International Criminal Court; the arrest of General Augusto Pinochet and the

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<http://www.nytimes.com/1999/08/08/magazine/the-precarious-triumph-of-human-rights.html>; see also *id.* at 37 (“The age of human rights is upon us.”).

3. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 53 (2001). Ignatieff notes that the Universal Declaration of Human Rights has been called a “world-wide secular religion” by Elie Wiesel, the “yardstick by which we measure human progress” by U.N. Secretary General Kofi Annan, and “the essential document, the touchstone, the creed of humanity” by Nobel Laureate Nadine Gordimer. *Id.*; see also Costas Douzinas, *Human Rights and Postmodern Utopia*, 11 *L. & CRITIQUE* 219 (2000). Douzinas writes:

A new ideal has triumphed in the global world stage: human rights. It unites left and right, the pulpit and the state, the Minister and the rebel, the developing world and the liberals of Hampstead and Manhattan. Human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents. . . . Human rights are the fate of post-modernity, the energy of our societies, the fulfilment of the Enlightenment promise of emancipation and self-realisation. . . . Human rights are trumpeted as the noblest creation of our philosophy and jurisprudence and as the best proof of the universal aspirations of our modernity, which had to await our postmodern global culture for its justly deserved acknowledgement.

*Id.* at 219-20.

4. IGNATIEFF, *supra* note 3, at 12.
5. HUMAN RIGHTS WATCH, *WORLD REPORT 2000*, at xiii-xiv (2000).

proceedings in Britain and Chile that followed; and the “post-Pinochet” efforts to bring human rights abusers from one state to justice in the courts of another on the basis of universal jurisdiction. All of these institutions and processes reflect a single approach to international human rights enforcement: the retrospective criminal prosecution of individuals alleged to be responsible for particularly egregious human rights violations. Advocates for this international criminal justice, or prosecutorial, model generally presume that its achievement will advance human rights, not only because bringing serious abusers to justice is a good in itself, but because it will be a boon to human rights protection. Justice for perpetrators of serious human rights abuses is a good, and international prosecutions are important both because they may achieve justice in cases where it would be impossible domestically and because they help solidify international norms prohibiting these abuses. For these reasons alone, the recent development of international criminal justice represents a significant advance. But the relationship between all this and *protection* cannot be as easily assumed.<sup>6</sup> In fact, the current domination of human rights discourse by international criminal justice may have implications that are problematic for human rights protection.

It is only a modest oversimplification to attribute the ascendance of a prosecutorial model to the predominance of lawyers within the human rights field. The first casualty of this predominance seems to be a common sense understanding of the meaning of protection. According to the Random House College Dictionary, Revised Edition, to protect is “to defend or guard from attack, loss, insult, etc.; cover or shield from injury or danger.”<sup>7</sup> If, instead of “protect,” the more legalistic word “enforce” is used, the dictionary definition is “to put or keep in force; compel obedience to.”<sup>8</sup> In the human rights context, protection ultimately means defending or guarding individuals or peoples from violation; enforcement means bringing about obedience by relevant actors to human rights norms. Human rights protection means stopping or preventing abuses. The retrospective prosecutorial model responds to violations after they occur by imposing criminal sanctions on the perpetrators. To assess the effect of the international criminal justice model on human rights protection, it is necessary to evaluate the extent to which its implementation is likely to prevent abuse and bring about greater actual respect for these legal norms.

Contemporary enthusiasm for international criminal justice reflects a confidence in its potential to achieve the fundamental goal of human rights law: the

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6. This paper proceeds from the assumption that international criminal justice is good because achieving justice for serious abusers is good in itself and a universal interest. It does not address the complex issues of whether international or domestic processes of criminal justice are more beneficial for states emerging from periods of conflict or atrocity, the impact of demands for justice on prospects for peace or reconciliation in such states, or the legitimacy and effect of amnesties, all of which continue to be thoughtfully and abundantly addressed in the growing literature of transitional justice. Rather, the paper attempts to assess a number of concerns that the perceived domination of human rights discourse by a criminal justice model raises for international human rights protection.

7. THE RANDOM HOUSE COLLEGE DICTIONARY (rev. Jess Stein ed. 1975).

8. *Id.*

protection of people from abuse. This confidence, which relies on a belief, almost wholly speculative, in the power of international prosecution as a general deterrent for would-be abusers, may even undermine efforts to protect human rights. First, the delusion of deterrence may provide the international community with a rationalization for avoiding timely, effective protective action. Second, the emphasis on retroactive individual responsibility may shift focus away from the state and other powerful institutions, diminishing the likelihood that the international community will hold them contemporaneously accountable for, and take effective political action to stop or prevent, abuses. Third, the narrow focus of international criminal justice—on a few individuals in a few states for the very worst crimes—relegates the vast majority of rights to a second-class status; this may contribute to the global failure to address the marginalization and poverty underlying most abuses affecting most people, abuses that are the usual precursors of the gross violations that international criminal justice addresses. These concerns gain significance in light of the tremendous cost of international prosecutions and the minimal resources the international community has been willing to devote to human rights. Finally, respect for human rights requires social change, which ultimately relies on effective social movements. Overemphasizing prosecutions in international tribunals—extremely remote, elite institutions—can reinforce local forces that weaken or suffocate social movements.

I. CONFIDENCE IN THE PROTECTIVE VALUE OF INTERNATIONAL CRIMINAL JUSTICE RESTS ON A BELIEF IN GENERAL DETERRENCE

At the core of the discourse of enthusiasm about international criminal justice is an expectation that it will enhance human rights through its deterrence effect. Advocates often extol the potential of ad hoc tribunals, the International Criminal Court, and exercises of universal jurisdiction to deter human rights violations.

Judge Richard Goldstone, former chief prosecutor of the International Criminal Tribunals for Former Yugoslavia and Rwanda and a respected champion of international criminal justice, concludes his memoir with a series of optimistic declarations about the future of international criminal justice. “In establishing the tribunals, the Security Council has struck a meaningful blow against impunity. It has sent a message to would-be war criminals that the international community is no longer prepared to allow serious war crimes to be committed without the threat of retribution.”<sup>9</sup> He adds:

If [the twentieth century trend of wars, war crimes, misery and hardship] is not to continue into the twenty-first century, then the international community will have to take positive steps to arrest it. One effective deterrent would be an international criminal justice system, sufficiently empowered to cause would-be war criminals to reconsider their ambitions, knowing that they might otherwise be hunted for the rest of their days

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9. RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 126 (2000).

and eventually be brought to justice.<sup>10</sup>

After citing a few recent examples of tyrants and abusers who had been arrested or fled a threatening jurisdiction to avoid prosecution, Judge Goldstone concludes with what has become the standard nostrum of the general deterrence argument: “Other present and former dictators must be carefully reviewing their foreign travel plans.”<sup>11</sup>

Human Rights Watch has long emphasized the link between international prosecutions and deterring future human rights abuses. In its annual human rights report for the year 2000, Human Rights Watch discussed four transnational efforts, in Africa and the Americas, to hold human rights abusers accountable and concluded that such cases reflected a global trend of seeking “to bring abusive officials to justice. The trend is still at a rudimentary stage, but it is clearly working against the impunity that so many ruthless officials enjoyed. This smaller world may make tomorrow’s dictators think twice before embarking on the path of slaughter taken by their predecessors.”<sup>12</sup>

These views expressing faith in international criminal justice rest on the simple, largely unexamined equation of international prosecution, an end to the pervasive culture of impunity with which tyrants violate human rights, and general deterrence of future abusers. But advocates of the prosecutorial model fail to acknowledge the pallid theory of general deterrence that is critical to their enthusiasm.<sup>13</sup> Scholarly discussion of justice in transitional societies notes the

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10. *Id.* at 135.

11. *Id.* at 136; *see also, e.g.*, Norimitsu Onishi, *He Bore Up Under Torture. Now He Bears Witness*, N.Y. TIMES, Mar. 31, 2001, <http://www.nytimes.com/2001/03/31/world/he-bore-up-under-torture-now-he-bears-witness.html> (describing a Chadian’s efforts to help bring former dictator Hissene Habre to justice for human rights abuses, detailing the new strategy of seeking Habre’s extradition to and trial in Belgium under the Pinochet precedent, and stating that “[i]f they succeeded—still a big if—other African despots might then think twice about abusing citizens at home and taking their shopping trips abroad in Paris and New York”).

12. HUMAN RIGHTS WATCH, *Introduction*, in WORLD REPORT 2001: EVENTS OF 2000 (2001), available at <http://www.hrw.org/wr2k1/intro/intro16.html>. More than a decade later, Human Rights Watch again stressed the “need to end impunity,” criticizing the international community’s failure to hold former Yemeni president Ali Abdullah Saleh and the Syrian regime to account for grave human rights abuses in the midst of the Arab upheavals. HUMAN RIGHTS WATCH, WORLD REPORT 2012: EVENTS OF 2011 16-17 (2012). Advocates’ accounts of the potential of international criminal justice rarely mention the more limited specific deterrent effect—eliminating the ability of individual violators to engage in further abuses—except as the essential precondition for the ultimate protective tool, general deterrence.

13. *But see* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, THINKING AHEAD ON UNIVERSAL JURISDICTION: REPORT OF A MEETING HOSTED BY THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 15 (1999) (discussing the rationale for prosecutions based on universal jurisdiction and recognizing “that what evidence exists may actually demonstrate the failure of such prosecutions to deter further crimes,” but asserting that “the most compelling rationale for universal jurisdictional prosecutions is the steadfast belief that such prosecutions would deter further crimes”); *cf.* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001). Akhavan argues that international prosecutions have effected a “spread of accountability,” *id.* at 9, that has transformed international rules of legitimacy, *see id.* at 30, and “instilled long-term inhibitions against international crimes in the global community,” *id.* at 27, which, over time, may allow “a new

tenuous connection between trials and deterrence within those societies.<sup>14</sup> To date, there has been scant systematic or conclusive evidence of the general deterrent effect of international criminal law.<sup>15</sup> Indeed, much of the scholarship expresses significant skepticism of the deterrent effect of international criminal justice.<sup>16</sup> Some have observed that criminal trials have failed to deter further abuses, noting, for example, that the slaughter of seven thousand men and boys in Srebrenica occurred two years after the ICTY's founding.<sup>17</sup> Moreover, even for ordinary crime at the local, domestic level, claims of the deterrent value of criminal justice are controversial: Deterrence relies on a web of factors, including cultural norms; a sense of community; and well-established police, courts, and other institutions.<sup>18</sup>

None of this has restrained grander claims of a general international deterrent effect, even in the absence of comparatively effective norms, institutions, and community. The argument that international prosecutions will deter potential abusers is speculative: It depends not on evidence, but on faith in the logic of

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- reality of habitual lawfulness [to] take root and develop," *id.* at 13. Akhavan, however, is realistic about the difficulty of preventing atrocities through the deterrent effect of international criminal justice, acknowledging that "international criminal prosecutions may 'strengthen whatever international bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.'" *Id.* at 31 (quoting David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 488 (1999)).
14. Mark Drumbl, for example, observes that "retribution and deterrence[] resonate more deeply within dominant criminal justice systems than in systems, in particular local systems, in which atrocity is becoming internationally judicialized." MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 63 (2007). *See generally id.* chs. 4 and 5 (describing the punishment of international crimes in national and local criminal justice systems).
  15. *See id.* at 169; *see also* Julian Ku, *How System Criminality Could Exacerbate the Weaknesses of International Criminal Law*, 8 *SANTA CLARA J. INT'L L.* 365, 366-70 (2010) (arguing that the efficacy of international criminal law as a deterrent to future abuses is "woefully under-theorized and unsupported by any empirical evidence"). Julian Ku and Jide Nzelibe have attempted a preliminary empirical analysis of the merits of the deterrence rationale for international criminal justice. Their findings suggest that international criminal tribunals hold little deterrent value. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 *WASH. U. L. REV.* 777 (2006).
  16. *See, e.g.,* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *HARV. HUM. RTS. J.* 39, 65-71 (2002); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *STAN. J. INT'L L.* 39, 71-75 (2007).
  17. *See* NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* 48 (2007); *see also* DRUMBL, *supra* note 14, at 169 (recognizing that the continuation of atrocity following the creation of criminal tribunals does not itself mean that the tribunals have no deterrent value but also noting that "just because we may have some cause to think that some deterrence has been achieved does not mean that the extant paradigm effectively deters").
  18. *See, e.g.,* Tracey L. Meares, *It's a Question of Connections*, 31 *VAL. U. L. REV.* 579, 580-81 (1997) (giving an overview of Clifford Shaw and Henry McKay's theory of how disruptions in community social organization account for variation in crime and delinquency); *cf.* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 *MICH. L. REV.* 2477, 2477 (1997) (describing the shortcomings of both sociology- and economics-based theories of deterrence).

deterrence. Speculation that international prosecutions are unlikely to have a significant general deterrent effect is supported by logic that is at least as compelling.<sup>19</sup> This is not a reason to oppose international prosecutions; if they achieve justice, they are probably, all things considered, worth pursuing.<sup>20</sup> The apparent lack of ability or will to bring perpetrators to justice may serve as an actual encouragement to some tyrants to abuse human rights as a means of social and political control. To the extent international prosecutions combat patterns of impunity, they may at least diminish the effect of this sense of incentive, but that is hardly deterrence.<sup>21</sup> It is important to be realistic about the deterrence potential of international criminal justice, and to consider the broader context within which prosecutions will operate. Delusions are dangerous, and the stakes for international human rights protection are high. Unwarranted faith in the potency of international deterrence risks lulling international actors, states as well as nongovernmental organizations, into excessive reliance on international criminal justice as the primary means of human rights protection.

## II. THE INTERNATIONAL COMMUNITY MAY RELY ON CRIMINAL JUSTICE TO JUSTIFY FAILURE TO TAKE EFFECTIVE PROTECTIVE ACTION

International criminal justice risks becoming a kind of panacea, a substitute for effective protective action. The danger is not merely international complacency based on false confidence in the deterrent potential of the prosecutorial model; it is the more insidious prospect that states and international institutions, particularly those with the power and resources to implement policies that advance human rights protection, will shrink from more difficult and costly courses of action, invoking as justification their commitment to international criminal justice. The delusion of deterrence allows the international community to witness atrocities, declare that those responsible had better be aware that they face the threat of future

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19. See, e.g., GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 291, 294-95 (2000) (noting that “it is far from clear that war crimes tribunals have much of a deterrent effect, either in the near- or long-term”); DRUMBL, *supra* note 14, at 171-72 (explaining that deterrence assumes a degree of perpetrator rationality that does not accurately describe those who perpetrate atrocity); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1253-54 (2000) (summarizing irrelevance of rational-choice theory upon which deterrent value of punishment depends for “acts motivated by non-rational impulses,” particularly in context of international mass violence) (quoting Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 162 (1998)).

20. See, e.g., International Council on Human Rights Policy, *supra* note 13, at 16 (noting that because the inability to prove the deterrent effect of prosecution could provide an excuse not to prosecute, deterrence must not be seen as “the sole rationale for pursuing universal jurisdiction prosecutions,” but as one of many important objectives).

21. See, e.g., BASS, *supra* note 19, at 295 (arguing that threatening prosecution and even military action to enforce human rights is a moral necessity, but cautioning that expectations of a deterrent impact should be kept in check and that there is not much basis for optimism about achieving global deterrence of war criminals in the longer term by establishing international norms).

prosecution, and believe that this constitutes a protective response.

The record so far is not encouraging. Having failed to do anything to protect the people of Bosnia from ethnic cleansing and the people of Rwanda from genocide, the international community established the two ad hoc tribunals to assuage the West's guilt and restore its authority. Even efforts to prosecute Pinochet and Hissene Habre emerged from the international failure to take action to protect the people of Chile and Chad from years of official murder, disappearance, and torture. Advocates who celebrate the establishment of the ad hoc tribunals and the nascence of prosecutions based on universal jurisdiction surely recognize the failures of protection that brought these initiatives about. But they apparently fail to consider that the historical motivations underlying them may have negative implications for the adequacy of these mechanisms as a response. Gary Bass articulates a pessimism about the two ad hoc tribunals that necessarily and compellingly casts doubt on the protective role of international criminal justice.

In the last analysis, the two international war crimes tribunals in The Hague and Arusha stand largely as testaments to the failure of America and the West. Had the West managed to summon the political will to stop the slaughters in Rwanda and Bosnia, there would have been no need for these two fragile experiments in international justice. No war crimes, no war crimes tribunals. But having abdicated the responsibility of stopping war crimes, the West has now put its faith in weak international institutions to restore the world community's good name. No matter how successful the two tribunals may come to be in the fullness of time . . . [,] they will not be able to fulfill that task. Legalism will never make up for the lives lost; but legalism is all we have now.<sup>22</sup>

The international response to killing and destruction in Darfur is troubling in the way that Bass laments. It provides a recent example of the continuing reliance on international criminal justice as a replacement for effective action in the face of human rights violations. By early 2003, the world was aware that death and devastation—no matter whether one deems it genocide or not—were rampant in Darfur. Not until much later did the Security Council began to pass a series of resolutions about the conflict. Between June 2004 and March 2005, the Security Council passed six resolutions concerning Darfur. The resolutions urged, declared, condemned, demanded, welcomed, and called for reports and monitoring.<sup>23</sup> In March 2005, the Security Council required member states to impose travel bans and asset freezes on those who violated human rights and humanitarian law in

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22. *Id.* at 283 (footnote omitted).

23. S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005); S.C. Res. 1585, U.N. Doc. S/RES/1585 (Mar. 10, 2005); S.C. Res. 1574, U.N. Doc. S/RES/1574 (Nov. 19, 2004); S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004); S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1547, U.N. Doc. S/RES/1547 (June 11, 2004).



connection with the conflict in Darfur.<sup>24</sup> Finally, later that month, in Resolution 1593, the Security Council approved U.N. action specific to Darfur.<sup>25</sup> That action was to refer the situation to the International Criminal Court for investigation. It would be another two years before the Security Council authorized a peacekeeping force for Darfur;<sup>26</sup> by then, the number of casualties had risen, by the United Nations' own estimates, to at least 200,000.<sup>27</sup>

When future atrocities do not implicate any important interests of the North, when the international community and its member states perceive the costs of protective action as too high, might not the apparatus of international criminal justice offer a tempting alternative, a salve for the anticipated guilt of inaction? The retrospective criminal justice model, regardless of its virtues, risks becoming an inappropriate and unwise justification for abdicating responsibility to protect international human rights. Rather than promote change that brings about greater respect for human rights, the ascendance of international criminal justice may function as a source of protection for the status quo.

### III. FOCUS ON INDIVIDUAL CRIMINAL RESPONSIBILITY CAN UNDERMINE SYSTEMATIC, STATE-CENTERED APPROACH TO PROTECTING FULL RANGE OF HUMAN RIGHTS

The prosecutorial model's great advance, the ability to hold individual perpetrators of human rights violations criminally liable, is likely to discourage international protective action by shifting attention away from states and other institutions of power. The focus of protective action must be the state, which has a duty under the U.N. Charter and conventional and customary human rights law to respect and protect human rights. More important than the legal obligation is the fact that the most effective protector of rights is still a strong and competent state.<sup>28</sup>

24. S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

25. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

26. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007). Over the next several years, the Security Council issued further resolutions extending the mandate of the Darfur peacekeeping force. *See* S.C. Res. 2063, U.N. Doc. S/RES/2063 (July 31, 2012); S.C. Res. 2003, U.N. Doc. S/RES/2003 (July 29, 2011); S.C. Res. 1935, U.N. Doc. S/RES/1935 (July 30, 2010); S.C. Res. 1881, U.N. Doc. S/RES/1828 (Aug. 6, 2009); S.C. Res. 1828, U.N. Doc. S/RES/1828 (July 31, 2008). For a compilation of all Security Council Resolutions relating to Sudan since October 2006, see *News Focus: Sudan—Resolutions By: UN Security Council*, U.N. NEWS CENTRE, <http://www.un.org/apps/news/docs.asp?Topic=Sudan&Type=Resolution> (last visited Mar. 5, 2013).

27. *Fact Sheet: The United Nations and Darfur*, U.N. DEP'T OF PUB. INFO. 1 (2007), [http://www.un.org/News/dh/infocus/sudan/fact\\_sheet.pdf](http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf).

28. *See, e.g.*, CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* 106-13, 122-25 (2009); Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfers*, 49 *STAN. J. INT'L L.* 371, 375 (2013) (“[H]uman rights . . . strengthen the state’s claim to political authority; it is the state which [is] the ultimate enforcer and protector of human rights, and . . . it is to the state’s sovereign power and legal responsibility that one turns when confronted with a non-state actor which flouts liberty”); *see also* Diana Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 *COLUM. HUM. RTS. L. REV.* 119, 127 n.30 (2010) (recognizing that states remain the primary protectors of human rights, even as NGOs have assumed a growing role in the promotion of human rights).

International criminal justice, with its exclusive emphasis on individual culpability, endangers this focus. Its reliance—and, thus, its necessary insistence—on a theory of individual responsibility can subvert serious efforts to understand the causes of human rights abuse and develop effective policies to prevent or stop them—that is, to protect human rights.

Concern about the focus on the individual also has a temporal component. Once abuses are committed, justice may require sorting out those who are culpable, those who are less culpable, and those who are not culpable. But at the time of the abuses, when the goal of protection still has meaning, international actors must resist the temptation to make their first priority the search for individual wrongdoers in anticipation of arresting, prosecuting, and punishing them.

For the very crimes that the emerging international criminal justice system is designed to address—genocide, crimes against humanity, and war crimes—retrospective international prosecutions of individuals are a feeble, unsatisfying response. If not for the dominance of lawyers and legal language within the advocacy community, that response would appear so inadequate to the problem as to be profoundly demoralizing to the entire international human rights endeavor. Prosecutions are a narrowly legalistic response to radical political evil, which demands, instead, a radical political response. Such a response must be contemporaneous with the evil—awaiting completion of a murderous project may amount to complicity in the evil—and it must confront forthrightly the structures of power that are the engines of the evil.<sup>29</sup> Again, the Security Council referral of the Darfur situation to the International Criminal Court as abuses continued reinforces this concern: The focus on bringing individual perpetrators to justice while leaving intact flawed social or political structures fails to address the root causes of human rights abuses. If protection is the goal, the state, or other institutions of power with the ability to inflict these abuses, must be held accountable, not for purposes of eventual retrospective sanctions, but to develop effective protective measures before or as the abuses begin.<sup>30</sup> The prosecutorial model's emphasis on individual responsibility is a barrier—institutionally, temporally, and tactically—to effective international action designed to prevent or stop genocide, crimes against humanity, and war crimes.<sup>31</sup>

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29. See, e.g., Drumbl, *supra* note 14, at 1324-25 (noting that by dividing post-genocidal society into the “guilty” and the “innocent,” trials “run[] the risk of oversimplifying history by negating the importance of collective wrongdoing, acquiescent complicity, and the embeddedness of ‘radical evil’”).

30. Recent work by André Nollkaemper on “system criminality” recognizes the systematic causes—and permission or tolerance—of international crimes; prosecution of individual perpetrators for violations of international criminal law fails to address the root causes of atrocities. See André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT’L L. 313, 323 (2010). Nollkaemper seeks to identify mechanisms within international criminal law for establishing state or systemic liability—and for effective implementation of state responsibility. This Essay, in contrast, questions whether international criminal justice itself can effectively contribute to protection against human rights abuses.

31. See *id.* at 352 (arguing that the criminal law’s focus on individual responsibility cannot adequately capture the dynamics of systemic criminality).

Moreover, for the vast array of other human rights, international criminal justice neither purports nor is suited to bring about the prospective changes necessary to achieve protection. The disconnect between the few particularly heinous abuses within the purview of international criminal justice and the rest of the human rights corpus has begun to effect a *de facto* hierarchy of rights. Such a ranking of rights has been anathema to the human rights movement; any hierarchy necessarily makes some rights less important and suggests to those in power that they can violate these “lesser rights” with relatively little concern that international actors will care enough to condemn them, let alone impose any consequences. While the nature of genocide, war crimes and crimes against humanity compels a distinct and decisive response, the focus on international criminal justice—and within international criminal justice, the exclusive focus on these few crimes and on individual responsibility for them—constitutes a potential impediment to the effective protection of human rights more generally.

Even if the prosecutorial model achieves some progress in eliminating the gross crimes with which it is concerned, for most of the people of the world, things will remain as they have always been. They will continue to suffer what Tom Farer has called the “quotidian violations”<sup>32</sup> that largely affect the poor and marginalized people of the world. Human Rights Watch, while extolling the promise of international criminal justice, has acknowledged that when governments fail to protect their people from “less severe human rights violations,” “the human rights movement can resort to its usual techniques: exposure, denunciation, ostracism, and calls for sanctions.”<sup>33</sup> But these are the same techniques to which international criminal justice has been touted as a more hopeful alternative. Furthermore, by focusing human rights discourse generally on the most severe violations and on individual culpability, the international criminal justice model perpetuates a failure to confront the systemic causes of human rights violations. It fails to address inequalities of power due, in particular, to extreme, entrenched poverty. It fails to address the radically uneven benefits and costs of globalization.

International criminal justice will deal only with the most egregious crimes and, for the foreseeable future, only in a limited number of places. For the great mass of human rights violations, and for the great mass of the world’s people, prosecutions at the International Criminal Court or under universal jurisdiction will be irrelevant. The danger in establishing a hierarchy of rights is that it reinforces the tendency to relegate the “ordinary” rights that affect the majority of the world’s people to the sphere of international neglect.<sup>34</sup> The human rights concerns of the vast majority of the world’s people will be addressed, indirectly at best, through the promotion of democracy and the free market. But there is no evidence that promoting either can address the abuses or the poverty that underlies them.

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32. Tom Farer, Remarks at the Robert L. Bernstein Fellowship in International Human Rights Annual Symposium, Politics and Human Rights: A Bipartisan Agenda for U.S. Foreign Policy? (Mar. 31, 2001).

33. HUMAN RIGHTS WATCH, *supra* note 5, at xiv.

34. See, e.g., Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 22 (1986).

This narrow focus, this *de facto* establishment of a small category of fundamental rights, ultimately undermines the potential even to prevent future atrocities of the kind international criminal justice concerns itself with. It is likely to diminish the importance of the wide web of rights and the culture of rights that the idea of a “web” signifies. Abusive regimes rarely start with genocide or crimes against humanity. Abuse builds gradually, and early violations at the edge of the web are often a precursor of gross abuses. But if the prosecutorial model continues to gain dominance within human rights discourse—and especially as it achieves a record that can begin to reinforce a sense of doing something for the protection of human rights—it will be in tension with the need to take early and effective international action to protect the vast majority of human rights.

#### IV. HUMAN RIGHTS PROTECTION IN A CONTEXT OF LIMITED RESOURCES

The delusion of deterrence, and its redirection of national and international concern, may not seem to constitute a significant risk to human rights protection, particularly in light of the ineffectiveness of the international community before this recent turn to prosecutions. But to appreciate the significance of this turn, it is necessary to consider the extremely limited resources available for human rights activities. International criminal justice is expensive. From the ICTY’s inception in 1993 to the end of 2011, a staggering \$1,887,386,000 was spent to bring perpetrators of international crimes in the former Yugoslavia to justice.<sup>35</sup> For the 2010-2011 biennial budget, the United Nations appropriated US\$290,087,500 to the ICTY.<sup>36</sup> The net assessment for the International Criminal Tribunal for Rwanda (ICTR) for the same period was US\$245,327,400.<sup>37</sup> The total budget allocated to the International Criminal Court for the years 2010 and 2011 was €207,231,200, approximately US\$300 million at 2011 exchange rates.<sup>38</sup> And the Special Tribunal for Lebanon, which has indicted four people and has yet to initiate a trial,<sup>39</sup> had a total approved budget for 2010 and 2011 of more than US\$120 million.<sup>40</sup> By contrast to the combined budget for these four tribunals of more than US\$ 950 million for 2010-2011, the Office of the High Commissioner for Human Rights, with a sweeping mandate to promote and protect human rights globally through programs that include technical cooperation, assistance to human rights victims,

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35. *See The Cost of Justice*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/325> (last accessed July 1, 2012).

36. *See* G.A. Res. 65/253, U.N. GAOR, ¶ 3, U.N. Doc. A/RES/65/253 (Mar. 2, 2010).

37. *See* G.A. Res. 54/240, U.N. GAOR, ¶ 9, U.N. Doc. A/RES/54/240 (Jan. 26, 2000).

38. *See* INT’L CRIMINAL COURT ASSEMBLY OF STATES PARTIES, PROGRAMME BUDGET FOR 2011, ICC-ASP/9/Res.4 (Dec. 10, 2010), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf); INT’L CRIMINAL COURT ASSEMBLY OF STATES PARTIES, PROGRAMME BUDGET FOR 2010, ICC-ASP/8/Res.7 (Nov. 26, 2009), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.7-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.7-ENG.pdf).

39. *Ayyash et al.*, SPECIAL TRIBUNAL FOR LEBANON, <http://www.stl-tsl.org/en/the-cases/stl-11-01> (last visited Apr. 15, 2013).

40. *Second Annual Report 2010-2011*, SPECIAL TRIBUNAL FOR LEBANON 23 (2011), <http://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/Second-Annual-Report-2010-2011>.

field operations, support for peacekeeping and peace-building activities, and support for the charter- and treaty-based human rights organs of the United Nations, had a total budget, including allocations from the U.N. regular budget and voluntary contributions, of approximately US\$126 million.<sup>41</sup>

As of January 2012,<sup>42</sup> the ICTY had a staff of 869;<sup>43</sup> in 2011, the ICTR had 628<sup>44</sup> and the ICC had 702;<sup>45</sup> the Special Tribunal for Lebanon employed 362 staff as of February 2012.<sup>46</sup> The four tribunals' combined staff of more than 2,500 undoubtedly dwarfs that of the OHCHR (850 as of 2007),<sup>47</sup> as well as the combined staffs of Amnesty International (213 employees in 2009),<sup>48</sup> Human Rights Watch (250 employees in 2010)<sup>49</sup> Global Rights (approximately 50 staff as of 2013),<sup>50</sup> Human Rights First (approximately 60 staff),<sup>51</sup> Physicians for Human Rights (54 employees in 2010),<sup>52</sup> the International Federation for Human Rights (FIDH) (approximately 50 members of the International Secretariat in 2013),<sup>53</sup> the International Commission of Jurists (approximately 70 staff in 2013),<sup>54</sup> and the

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41. The OHCHR biennial budget for 2010-11 comprises appropriations of about 2.8% of the U.N. regular budget (\$142,743,800) and voluntary contributions (approximately \$109,000,000). *Funding and Budget*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx> (last visited July 1, 2012) [hereinafter OHCHR].
42. Staffing of these tribunals has been diminishing as part of the tribunals' completion strategy. In April 2001, the ICTY had a staff of more than 1,100 and the ICTR 800, according to figures displayed on those tribunals' websites at that time.
43. *See The Cost of Justice*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/325> (last visited July 1, 2012).
44. *See General Information*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited July 1, 2012).
45. *See* INT'L CRIMINAL COURT, REPORT ON ACTIVITIES AND PROGRAMME PERFORMANCE OF THE INTERNATIONAL CRIMINAL COURT FOR THE YEAR 2011, ICC-ASP/11/8 (May 4, 2012), *available at* [http://www2.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-8-ENG-ProgrammePerformance.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-8-ENG-ProgrammePerformance.pdf).
46. *Third Annual Report (2011-2012)*, SPECIAL TRIBUNAL FOR LEBANON 27 (2012), <http://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/third-annual-report-2011-2012>.
47. *Who We Are*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> (last visited Apr. 15, 2013).
48. *Form 990: Financial Year 2009*, AMNESTY INT'L USA (2010), [http://takeaction.amnestyusa.org/atf/cf/%7B74ba1956-0c57-4b8e-9d15-d6ab8ce64cf1%7D/Amnesty\\_990\\_2010.pdf](http://takeaction.amnestyusa.org/atf/cf/%7B74ba1956-0c57-4b8e-9d15-d6ab8ce64cf1%7D/Amnesty_990_2010.pdf).
49. *Form 990: Financial Year 2010*, HUMAN RIGHTS WATCH (2011), [http://www.hrw.org/sites/default/files/related\\_material/form990-2011.pdf](http://www.hrw.org/sites/default/files/related_material/form990-2011.pdf).
50. *Our Staff*, GLOBAL RIGHTS, [http://globalrights.org/site/PageServer?pagename=wwa\\_staff](http://globalrights.org/site/PageServer?pagename=wwa_staff) (last visited Apr. 15, 2013).
51. *Staff*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/about/staff/> (last visited July 2, 2012).
52. *Form 990: Financial Year 2010*, PHYSICIANS FOR HUMAN RIGHTS (2011), [https://s3.amazonaws.com/PHR\\_forms/fy11-form-990.pdf](https://s3.amazonaws.com/PHR_forms/fy11-form-990.pdf)
53. *See* International Secretariat, FIDH, <http://www.fidh.org/International-Secretariat> (last visited Apr. 15, 2013).
54. *Staff*, INT'L COMM'N OF JURISTS, <http://www.icj.org/staff> (last visited Apr. 15, 2013).

other international nongovernmental organizations that have been instrumental to every advance in human rights.

Although a meaningful cost-benefit analysis of international criminal justice is impossible, we should, at least, ponder the costs of these tribunals in light of the outcomes they achieve. In this regard, the ICTY, for example, has indicted 161 individuals of whom 26 were in proceedings before the Tribunal in 2013;<sup>55</sup> 35 completed trials had required a total of 4,829 days.<sup>56</sup> This is not to belittle the work of the Tribunal; these are grave and difficult cases, with complex evidentiary and legal challenges. But it indicates the tremendous investment in financial and human resources required to sustain these two ad hoc tribunals established to prosecute perpetrators of serious human rights crimes during a discrete period of time in two relatively small countries.

The international community has so far not been willing to invest tremendous resources in the protection of human rights. Finding adequate resources to sustain protective efforts, including international peacekeeping missions, has been a persistent and difficult challenge. Indeed, the Office of the High Commissioner for Human Rights reported in its annual appeal for 2000: “Yet as the need to protect and promote those rights increases around the world, the U.N.’s financial resources to fund those activities are diminishing.”<sup>57</sup> There is no assurance that the growing demand for resources occasioned by the development of institutions and processes of international criminal justice will be met by a corresponding overall increase in support. It is more likely, particularly with U.S. political realities gravitating toward reduced financial support for the United Nations and no support for the International Criminal Court, that resources for the protection of human rights will be further strained.

#### V. THE PREDOMINANCE OF THE INTERNATIONAL CRIMINAL JUSTICE MODEL CAN WEAKEN LOCAL SOCIAL MOVEMENTS

Achieving real human rights protection will require fundamental social change in countries where violations persist. Social change, in turn, requires political action by social movements in these countries themselves. International human rights law, institutions, and processes interact in complex and varied ways with local social movements, but it is unlikely that international criminal justice will contribute significantly to such movements. The international prosecutorial model may even have a tendency to contribute to the weakening of the local social

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55. *Key Figures of ICTY Cases*, INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/x/file/Cases/keyfigures/key\\_figures\\_130301\\_en.pdf](http://www.icty.org/x/file/Cases/keyfigures/key_figures_130301_en.pdf) (last visited Feb. 28, 2013).

56. For information on completed cases before the ICTY (including trials in which final judgments were rendered and cases closed without a final judgment due to the death of the person indicted or the withdrawal of charges), see *The Cases*, INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4> (last visited Mar. 5, 2013). The number of trial days includes only completed trials. Similar data for the ICTR was not readily accessible.

57. OFFICE OF THE U.N. HIGH COMM’N FOR HUMAN RIGHTS, ANNUAL APPEAL 2000: OVERVIEW OF ACTIVITIES AND FINANCIAL REQUIREMENTS 6 (2000).

movements that are critical for achieving greater respect for human rights.

Social movements, defined usefully by Doug McAdam as “rational attempts by excluded groups to mobilize sufficient political leverage to advance collective interests through noninstitutionalized means,”<sup>58</sup> are generally fragile and prone to suffocation, taming and manipulation by power elites.<sup>59</sup> In the local context, elite-generated reform efforts tend ultimately to sustain the status quo; they “diffuse indigenous discontent by assuring the public that ‘something is being done’ about the problem in question, . . . [and] serve to confine change efforts to institutionalized channels, thus preserving [elite] member control of the process.”<sup>60</sup> This tends to “render[] the movement impotent by confining it to the forms of ‘participation without power’ that prompted insurgents to abandon ‘normal’ political channels in the first place.”<sup>61</sup> But “it is within these ‘proper’ channels that the power disparity between [elite] members and challengers is greatest.”<sup>62</sup> Co-optation by elite sponsorship of reform is complemented by the way “[p]ower works to develop and maintain the quiescence of the powerless. . . . Together, patterns of power and powerlessness can keep issues from arising, grievances from being voiced, and interests from being recognized.”<sup>63</sup> Quiescence is maintained not only by the direct application of power, but also by such factors as the complexity of important institutions,<sup>64</sup> the shaping and manipulation of language and symbols,<sup>65</sup> and the remoteness of decision-making processes. For those without power, these elements of the power relationship can produce a psychological “sense of powerlessness [that] may manifest itself as extensive fatalism, self-deprecation, or undue apathy about one’s situation.”<sup>66</sup>

It is not hard to imagine how the ascendance of international criminal justice, and the workings of its institutions, would contribute to those local forces that weaken or stifle social movements. International criminal tribunals are the ultimate, impenetrable elite institutions. They are remote geographically and intellectually. Law itself, and particularly international criminal law, is complex and entrusted, in its development and its implementation, to a small cadre of the initiated. The workings of international criminal justice are slow and the outcome uncertain. Resort to legal processes generally can act as a disincentive to social action; even using the law to stop grievous conduct or win rights, which can sometimes be an

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58. DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930-1970*, at 37 (1982).

59. *See generally id.*; JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1979); STEPHEN LUKES, *POWER: A RADICAL VIEW* (1974).

60. MCADAM, *supra* note 58, at 25-26.

61. *Id.* at 28 (citation omitted).

62. *Id.* at 57.

63. GAVENTA, *supra* note 59, at vii.

64. *See id.* at 254.

65. *See id.* at 15.

66. *Id.* at 17.

instrument of mobilization, has a tendency to chill political action.<sup>67</sup> International human rights activism's intensive commitment to and involvement in prosecuting individual wrongdoers from far-away societies in far-away courts can surely contribute to dispossessed people's sense of powerlessness and the tendency toward acquiescence.

These phenomena are likely to make the powerless feel increasingly excluded from participation in the forces shaping their world.<sup>68</sup> A 2001 *New York Times* article pointed out that in Latin America, where military governments and scorched-earth practices have largely disappeared, the armies still help maintain the power of elites, and the region's increased stability "preserves the old economic and political order."<sup>69</sup> Looking back to the beginning of the armed conflict in El Salvador twenty years before, the article recalled a reporter's conversation with José Napoleón Duarte about "why the guerrillas were in the hills. . . . 'For 50 years the same people had all the power, all the money, all the jobs, all the education, all the opportunities.' By and large, they still do."<sup>70</sup> As part of a global structure of elite rule-making and enforcement, international criminal justice can easily become a force for the maintenance of the status quo, adding its effect to already powerful local forces.

As the language of human rights is increasingly dominated by international criminal justice, it becomes less available to marginalized members of society as a language of social change. The value of human rights language has been its availability as a tool to hold oppressors accountable for their abuses—not only in a narrowly legal sense, but morally, politically and in a variety of practical ways—and to gain leverage for change. What Human Rights Watch celebrates as "mov[ing] from a paradigm of pressure based on international human rights law to one of law enforcement"<sup>71</sup> has a darker side, the tendency to forget one half of the origins of the human rights movement. The creation myth of the human rights

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67. During the Free Speech Movement (FSM) in the 1960s at the University of California in Berkeley, the activists chose not to take their cause to court. According to one of the activists, Brian Shannon: "Going to the courts tends to stop all demonstrations—people think, 'You don't have to act, the courts will settle it.' During the early period it would have dulled the FSM. Second, even though we were sure we were right on constitutional grounds, it could have been two or three years before it got to the Supreme Court." Robert Starobin, *Graduate Students and the Free Speech Movement*, GRADUATE STUDENTS J., Spring 1965, at 17-18.

68. See GAVENTA, *supra* note 59, at 18. Gaventa argues that "those denied participation—unable to engage actively with others in the determination of their own affairs—also might not develop political consciousness of their own situation or of broader political inequalities." *Id.* In circumstances of very unequal power, the powerless "are prevented from either self-determined action or reflection upon their actions," which creates a "culture of silence" and may "encourage a susceptibility among the dependent society to internalization of the values of the dominant themselves." *Id.* (quoting PAULO FREIRE, *CULTURAL ACTION FOR FREEDOM* 52 (1972)).

69. Tim Weiner, *The World: Friendly Fire: In Latin America, Foes Aren't the Only Danger*, N.Y. TIMES, Apr. 29, 2001, <http://www.nytimes.com/2001/04/29/weekinreview/the-world-friendly-fire-in-latin-america-foes-aren-t-the-only-danger.html>.

70. *Id.*

71. HUMAN RIGHTS WATCH, *supra* note 5, at xiii-xiv.



movement makes the Holocaust and the Nazi trials at Nuremberg the wellspring of the modern conception of human rights. Certainly there is a clear path from Nuremberg to the International Criminal Court. But the traditions of the human rights movement lie also in the post-war decolonization movements, the civil rights movement in the United States, and the global anti-apartheid movement. These movements relied on the nonviolent resistance, or civil disobedience, taught by Gandhi and Martin Luther King. In this part of the human rights tradition, international human rights norms are important as a set of universal standards upon which social movements can base just demands.<sup>72</sup> In this role, as an instrument of social movements, human rights language is largely a language of affirmation, of individuals and groups asserting their rights. By overemphasizing the legalistic conception of human rights and its origins, the contemporary enthusiasm for international criminal justice deflates the value of the human rights movement's activist component and risks turning the "dominant moral narrative" of human rights increasingly into an instrument of retribution.<sup>73</sup>

## VI. CONCLUSION

The protection of human rights is too important to leave to lawyers, particularly to prosecutors removed geographically, culturally, intellectually, and socioeconomically from the great majority of the people who suffer or are likely to suffer from human rights violations. In fact, nonlegal paradigms are emerging that have in common an emphasis on changing the circumstances in which abuse can flourish. The movement to provide care and rehabilitation services to survivors of torture, which has grown and evolved over the last 25 years, has developed a strategic approach that begins with the "argument that the intent of torture is indeed to transform cultures and create societies based on apathy and fear."<sup>74</sup> Treatment is seen as "help[ing] the survivors to recover their leadership abilities and their capacity to take risks," thus empowering them and their communities to take "action [that] begins to break down the apathy, fear, and inaction that is common to most repressed communities."<sup>75</sup> The human development approach links the realization of human rights, poverty eradication, inclusive democracy, the measurement and achievement of indicators of human development, and a shift "[f]rom a punitive to a positive ethos in international pressure and assistance;" it seeks to promote practical international action toward these goals.<sup>76</sup>

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72. See, e.g., IGNATIEFF, *supra* note 3, at 7. ("Human rights has gone global . . . primarily because it has advanced the interests of the powerless. Human rights has gone global by going local, imbedding itself in the soul of cultures and worldviews independent of the West, in order to sustain ordinary people's struggles against unjust states and oppressive social practices.")

73. I am indebted to Shaheena Ahmad for articulating the concern that the prosecutorial model carries the danger of contributing to the growth, throughout an increasingly global culture, of a more retributive orientation.

74. Douglas Johnson, *Healing Torture Survivors as a Strategic Advancement of Human Rights*, 8 TORTURE 128, 129 (1998).

75. *Id.*

76. See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at iii-iv, 1-13 (2000).

The limitations of the international criminal justice model as a means of achieving human rights protection suggest the need for an alternative model that is conceptually suited to embrace a range of protective methods. An appropriate alternative might be derived from a modern, progressive health care model, with a dual emphasis on prevention and treatment, supported by medical and epidemiological research. When viewed in this light, the prosecutorial model looks like a health care system dominated by emergency care units or, more cynically, coroners and forensic pathologists. With a progressive health care model of human rights protection, international criminal justice would have its place as one tool, with important symbolic and practical potential, along with a wide range of strategies designed to prevent and stop human rights abuses and to nurture fundamental change in the social, political, and economic conditions that underlie human rights abuse. A health care model would involve commitment to partnerships between international actors and oppressed people to achieve both short-term protection and the social change necessary for longer-term protection.<sup>77</sup>

The progress of international criminal accountability has been a crucial step for human rights and justice. At the same time, this development has created risks for meaningful human rights protection. New, more appropriately broad language would put international criminal justice in proper perspective and could invigorate human rights protection. It may also save the international rule of law from the hubris of its claims.

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77. While such a model would require the international community to take seriously the duty to intervene to prevent or stop human rights abuses and the duty to provide resources to promote appropriate, sustainable development, it would also require taking seriously the duty to act responsibly and in consultation with affected people to avoid the danger of another kind of hubris.