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Ruthlessness, Impunity, and the Effacement of International Human Rights Law

Jamie Mayerfeld*

Brad Roth writes that his article “intends a radical statement, albeit in service of a set of moderate prescriptions.”¹ It would be more accurate to say that it combines a moderate and a radical argument. The former is a plea based on legal and human rights considerations to limit the use of extraterritorial prosecutions to acts legally defined as crimes at the time of their occurrence. The latter is an attempt to restrain the ambition of international criminal law by depicting a world characterized by deep moral disagreement and a propensity to ruthlessness. Linked to this latter argument is the claim that states retain the legal capacity to commit human rights violations that are not criminalized under positive international law. I admire the moderate argument, but am troubled by the radical argument. The article contributes greatly when it strengthens the case against retroactive punishment, but falters, in my opinion, when it discounts the normative significance and obligatory force of international human rights law.

Roth’s argument belongs to a school of thought that places great value on the preservation of state sovereignty. My rather different perspective is that while sovereignty can sometimes be a force for good it can also be a force for evil, and that we consequently need an organizing principle that sifts its positive from its

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1. Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT’L L. 231, 287 (2010).

negative elements. The defense of peace, human rights, and the law requires that we at least place significant limitations on sovereignty. The durable peace and remarkable progress in human rights experienced in Europe since the end of World War II are owed in substantial measure to the creation of strong supranational institutions that significantly reduce the policy discretion of individual states.² This difference of perspective makes it difficult for me to comprehend certain aspects of Roth's argument. Indeed Roth, who has read my response, believes that I have misrepresented a number of his views. I therefore want to emphasize that readers of my response should withhold any judgment of Roth's argument until they have carefully read his original article.

Roth claims legal authority for his view in certain principles and purposes of the United Nations Charter—above all in its commitment to the “sovereign equality” of nations.³ On Roth's reading of this principle, states retain a “presumptive monopoly of the last word on public order inside their respective territories.”⁴ Roth makes the startling claim that, while this monopoly is limited by international criminal law, *it is not limited by international human rights law*. “Although that monopoly no longer applies in respect to established international crimes,” he writes, “it continues to withstand violations of international obligations in general—including human rights obligations.”⁵ Thus, according to Roth, sovereign equality implies the right of states to violate international human rights law. Even when states ratify international human rights treaties, they do not, according to Roth, renounce the sovereign capacity to commit human rights violations prohibited by the treaties they have ratified:

Paradoxical though it may seem, renunciation of a practice does not, in itself, entail renunciation of the legal capacity to authorize that practice. . . [S]tates, as represented by the recognized governments, retain the legal capacity (even though not the right) to authorize measures in violation of the state's ordinary international legal obligations.⁶

2. I discuss the achievements of the European human rights regime in *A Madisonian Argument for Strengthening International Human Rights Institutions: Lessons from Europe*, in GLOBAL GOVERNANCE, GLOBAL GOVERNMENT: INSTITUTIONAL VISIONS FOR AN EVOLVING WORLD SYSTEM (Luis Cabrera ed., SUNY Press) (forthcoming 2010).
3. Roth, *supra* note 1, at 235.
4. *Id.* at 278.
5. *Id.* Roth also writes: “Short of international penal thresholds, states have maintained a monopoly of domestic authority over their agents' conduct within national territory, in full contemplation that states from time to time exercise that authority in breach of their international legal obligations.” *Id.* at 259-60.
6. *Id.* at 279. As I discuss later, the elusive distinction between an unrenounced “legal capacity” and a “right” evaporates elsewhere in Roth's text.

What I call the “radical argument” is intended by Roth as a philosophical defense of this position. As I shall argue, the argument is as unconvincing as its consequences are profound. Before turning to the radical argument, however, let us examine the policy question that is the immediate occasion for Roth’s article as well as the “moderate argument” that forms an important strand of his discussion.

At stake in Roth’s article is the question of how the world should respond to extreme human rights violations. Though I cannot provide a definition of this term, I intend it to cover acts such as extrajudicial killing, intentional or indiscriminate killing of civilians, torture or inhuman treatment, cruel and unusual punishment, severe persecution, and prolonged arbitrary detention. Extreme human rights violations need not rise to the level of genocide or crimes against humanity. Acts that violate human rights but do not constitute extreme human rights violations would include, for example, certain kinds of acts involving discrimination, the invasion of privacy, or the restriction of freedom of movement (when the violations do not exceed a certain level of intensity).

We normally expect that extreme human rights violations will be prosecuted by the government on whose territory the violations take place or whose citizens commit the violations. But governments are sometimes unwilling or unable to prosecute—unwilling because the abuses occur with their authorization or support, unable because the abuses are perpetrated by an insurgent organization or invading force too powerful to subdue. Under these circumstances, perpetrators can continue their abuses with impunity, and entire populations are reduced to a condition of utter vulnerability. Impunity is not a pretty picture, as the past lynching of blacks in the American South, the death squads in 1980s El Salvador, and many other examples remind us.

One remedy for impunity is extraterritorial prosecution by international or foreign national courts. How widely should this remedy be used? We might like to see it used whenever governments bearing primary responsibility (meaning, in most cases, those with territorial or nationality jurisdiction) ignore patterns of extreme human rights violations. But positive international law does not currently permit extraterritorial prosecutions to be used this broadly. It erects a presumptive ban on extraterritorial prosecutions that lack the consent (usually as transmitted by treaty) of states having primary jurisdiction, unless the prosecuted acts are international crimes under customary international law.⁷ Although customary

7. When the acts are committed by state officials, this presumption is strengthened by the doctrine of immunity *ratione materiae*. On the question of criminal jurisdiction in

international law universally prohibits extreme human rights violations,⁸ it does not treat all of them as international crimes under all circumstances. To be considered a “crime against humanity,” for example, a violation must form part of a widespread or systematic attack on a civilian population.⁹ To count as a “war crime,” it must be one of a specified set of acts committed in the context of an international or non-international armed conflict.¹⁰ Under the Torture Convention, and probably customary international law as well, torture committed under official auspices is an international crime without exception.¹¹ But whether inhuman treatment falling short of torture is in every circumstance an international crime is a more complex and controversial question.¹²

These restrictions may cause a certain amount of impatience: we may be tempted to override them if doing so is necessary to bring perpetrators of extreme human rights violations to justice. Roth’s article is written to warn us against this temptation. Barring rare exceptions, he argues, extraterritorial prosecutions are legitimate only if they are authorized by positive international law. The reason is that extraterritorial prosecutions not authorized by positive international law constitute an (almost always) impermissible violation of the principle of *nullum crimen, nulla poena sine lege* (no crime, no punishment without a law).¹³ This is especially the case for extraterritorial prosecutions conducted by foreign national courts under the principle of universal jurisdiction.¹⁴

Nullum crimen sine lege is so fundamental a principle of law that it is also known as the “principle of legality.” Roth, in what I call the “moderate argument,” ably articulates the reasons for the principle.¹⁵ It honors the right of individuals to receive notice that certain acts are not only illegal, but also criminal. It further

international law, see RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, Vol. II § 402-03 (1987). On the question of immunity in international criminal law, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW ch. 14 (2nd ed., 2003). See also Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT’L L. 407 (2004).

8. See RESTATEMENT, *supra* note 7, § 702.

9. See Rome Statute of the International Criminal Court art. 7, July 15, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

10. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 568-621 (2005).

11. Roth, *supra* note 1, at 282-83.

12. *Id.* at 259 & note 94.

13. Roth states that in extraordinary cases only, substantive justice may permit or require a breach of the *nullum crimen* principle. *Id.* at 260, 276.

14. *Id.* at 237.

15. *Id.* at 246-47, 250-51.

recognizes that such notice must issue from a legitimate authority—not an organized crime unit, say, or the unilateral decree of a foreign state, but a lawmaker with the acknowledged right to criminally proscribe the acts in question. Indeed *nullum crimen sine lege* is part of international human rights law. Article 15 of the International Covenant on Civil and Political Rights (“ICCPR”) states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”¹⁶ Human rights advocates defeat their own mission when they seek the prosecution of perpetrators by means that violate human rights. There is another very basic reason to respect *nullum crimen*: it is the law. These arguments constitute a sufficient justification of the *nullum crimen* principle.¹⁷

I would note that there is no deep conflict between the *nullum crimen* principle and the elimination of impunity. The chief priority of the anti-impunity movement is the enforcement of *existing* international criminal law (hereinafter “ICL”) despite the frequent resistance of governments and insurgencies.¹⁸ It also seeks the further development of ICL, so that acts that ought to be regarded as international crimes become universally recognized as such under positive international law. Transgressing the limits of positive international law is nowhere close to being a central strategy of the movement.¹⁹ Indeed, respect for *nullum crimen* helps the

16. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 15, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].
17. See also Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory of the Principle of Legality in International Criminal Law Sentencing*, J. OF CRIM. L. AND CRIMINOLOGY (forthcoming) (connecting the principle of *nullum crimen*, *nulla poena sine lege* to a family of values bound up with the integrity and fairness of the criminal justice system).
18. Such resistance adopts various strategies. One is the frequent attempt by governments to shut down criminal prosecutions in the name of preserving state secrets. For several examples, see EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, CIA “EXTRAORDINARY RENDITION” FLIGHTS, TORTURE AND ACCOUNTABILITY—A EUROPEAN APPROACH (2nd ed. 2009).
19. This is not to deny that tensions exist. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN L. J. 119 (2008). Van Schaack argues that contemporary international criminal tribunals have sometimes stretched or even evaded the requirements of the *nullum crimen* rule, strictly interpreted. She nonetheless concludes that the jurisprudence of these tribunals “is consistent with the purposes underlying the principle, the precise formulations of the [*nullum crimen*] principle in omnibus human rights instruments, and the concomitant interpretations emerging from authoritative institutions charged with enforcing human rights protections.” *Id.* at 173.

movement achieve its own goals, inasmuch as the movement (1) has a vested interest in maintaining the integrity of international law, and (2) seeks to *deter* atrocities by providing advance notice that they are prohibited and punishable under ICL.

ICL is advancing rapidly. Roth observes, “[P]enal norms have, in recent decades, developed substantially within the corpus of positive international law.”²⁰ Besides the Torture Convention, the Pinochet precedent, and the impact of the rapidly expanding case law of the international criminal tribunals, there is of course the Rome Statute of the International Criminal Court (“ICC”), ratified by 111 countries and signed by 139.²¹ The Statute’s detailed and extensive definition of crimes against humanity and especially war crimes (the latter numbering 50 substantive clauses) betokens a significant development of customary international law, given the absence of any appreciable opposition (even from non-signing states, including the United States) to the characterization of the enumerated crimes.²² As ICL expands, there will be less temptation to combat impunity by transgressing positive international law. Roth himself denies that “any great number of actual prosecutions that have occurred so far have contravened” *nullum crimen* requirements.²³ Hence “[t]he real issues lie at the margins.”²⁴ They will grow increasingly marginal with time.

If anti-impunity activists feel constrained by the *nullum crimen* principle, there is a straightforward solution: expand the reach of ICL. Roth’s “moderate prescriptions”—adherence to *nullum crimen*—do not bar the way. And yet, puzzlingly, Roth casts himself as a philosophical critic of the anti-impunity movement. He rejects an “exclusively . . . pejorative” view of impunity,²⁵ and writes that “the sweeping promise to ‘end impunity’ for human rights violations should be a source of anxiety rather than enthusiasm.”²⁶ He is in favor of “coming to terms with ruthlessness” (the title of his article). Much of his discussion is an

20. Roth, *supra* note 1, at 235.

21. United Nations Treaty Collection, Status, Rome Statute of the International Criminal Court, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited May 3, 2010).

22. For an authoritative account of the definition of war crimes under contemporary customary international law, see HENCKAERTS & DOSWALD-BECK, *supra* note 10, at 568-621. Included are most of the acts listed as war crimes in the ICC Statute, as well as some that are not listed there.

23. Roth, *supra* note 1, at 242.

24. *Id.* at 236.

25. *Id.* at 231.

26. *Id.* at 287.

argument for the accommodation rather than elimination of impunity. He criticizes the ambition of the authors of the Princeton Principles on Universal Jurisdiction to promote the continued development of universal jurisdiction.²⁷ The subtitle of his article refers to “the limits of international criminal justice.” Roth’s “moderate prescriptions” cloak a resistance to future and perhaps recent expansions of ICL.

This resistance is tied to what I call the “radical argument.” For reasons left unclear, Roth believes that the above-noted legal and human rights arguments for *nullum crimen sine lege* need further grounding. He writes: “At the core of the defense of international law’s constraint on the pursuit of substantive justice is the phenomenon of moral disagreement.”²⁸ This disagreement, we are told, runs very deep: the only thing the world can agree on is the prohibition of those extreme human rights violations that do not serve a “cognizable” government (or insurgent) objective.²⁹ ICL must therefore be constrained by “an agreement to disagree.”³⁰ When ICL is extended into zones of disagreement—that is, when it is applied to anything beyond those extreme human rights violations that are committed in pursuit of “inadmissible ends”—it disregards persistent principled disagreement between sovereign states. This endangers peace and encourages illicit interference by powerful states in the domestic affairs of weak states. Though Roth claims that his “radical statement” has the moderate aim of opposing extraterritorial prosecutions that transgress the *nullum crimen* principle, it clearly represents a much broader challenge to ICL.

27. *Id.* at 232-33. Roth may be right to argue that the authors of the Principles allow themselves to stretch or distort customary international law when in the commentary (though not explicitly in the text of the Principles themselves) they designate inhuman treatment as an international crime punishable under universal jurisdiction. *See id.* n. 66. But this particular trespass does not discredit the overall project of promoting universal jurisdiction. We need to distinguish between the development of international criminal law and the transgression of its limits. Only the latter involves a breach of *nullum crimen*. It should be noted that the Principles at least *claim* to respect positive international law. They consistently refer to universal jurisdiction as applying to “crimes under international law.” *See* The Princeton Principles on Universal Jurisdiction 29, Principle 2(1) and (2) (Princeton University Program in Law and Public Affairs 2001). *See also id.* at 29, Principle 1(5) (“A state shall exercise universal jurisdiction in good faith and in accordance with its rights *and obligations* under international law.”); *id.* 35, Principle 13(2) (“Nothing in these Principles shall be construed to limit the rights and obligations of a state to prevent or punish, *by lawful means recognized under international law*, the commission of crimes under international law.”) (emphasis added).

28. Roth, *supra* note 1, at 270.

29. *Id.* at 238-39.

30. *Id.* at 236, 286.

The radical argument is as alarming in its implications as it is unpersuasive in its reasoning. An initial puzzle is why disagreement is relevant at all. Roth cites the argument of Immanuel Kant and Jeremy Waldron that moral disagreement creates the need for positive law.³¹ This is beside the point, because extreme human rights violations *are prohibited by positive international law*.³² That some governments may dissent is no more relevant than the fact that some citizens may dissent from domestic laws prohibiting violent assault.³³ It is true that some extreme human rights violations are not universally recognized as international crimes under positive international law. The moral disagreement that is salient here is about *criminalization*, not prohibition. Yet the disagreement that Roth emphasizes is about the permissibility rather than the criminalization of extreme human rights violations. Since positive international law has ruled against the permissibility of these acts, why not treat the matter as settled?³⁴

Roth does not treat the matter as settled, because he does not think that international human rights law is fully binding on states. It becomes fully binding, in his view, only when accompanied by a criminal sanction:

The [international] system's default position is that a state retains the sovereign capacity to authorize the act [a human rights violation it deems necessary for a compelling societal end], thereby taking collective responsibility for the violation and shielding state agents from personal liability. Only where the international community of states comes to acknowledge the violation as an international crime is the state deemed to have renounced this sovereign capacity.³⁵

Elsewhere he applies this logic to the infliction of inhuman treatment that falls short of torture. Even states that ratify the Torture Convention reserve the capacity to inflict such treatment, because although it is prohibited by the Convention it is not therein made subject to an obligatory criminal penalty.³⁶ Roth elaborates:

31. Roth, *supra* note 1, at 271-72.

32. See RESTATEMENT, *supra* note 7, § 702.

33. The human rights violations Roth has in mind tend to fall into what I call the "extreme" category. They include torture and inhuman treatment, intentional and indiscriminate killing of civilians in wartime, and death squad killings and mutilations. See, e.g., Roth *supra* note 1, nn. 22, 25 & 26 (describing extreme human rights violations in the "War on Terror," the Korean War, the Vietnam War, and the civil war in El Salvador).

34. The intractability of moral disagreement is a common theme in arguments that seek to limit the authority of international human rights law. I criticize another version of the argument in Jamie Mayerfeld, *The Democratic Legitimacy of International Human Rights Law*, 19 *IND. INT'L & COMP. L. REV.* 49 (2009).

35. Roth, *supra* note 1, at 285.

36. However, inhuman treatment is in many contexts subject to a mandatory criminal penalty under the grave breaches provisions of the Geneva Conventions and under customary

Short of international penal thresholds, states have maintained a monopoly of domestic authority over their agents' conduct within national territory, in full contemplation that states from time to time exercise that authority in breach of their international legal obligations. Those agents cannot properly be held responsible to a supra-positive standard of "socially desirable conduct," because states have reserved the last word on what counts as "socially desirable" for purposes of evaluating their own agents' conduct.³⁷

As the quoted passages show, Roth goes so far as to assert the right of states to commit human rights abuses in violation of international law. He tries to avoid the word "right," preferring to speak of an un-renounced "legal capacity," but the difference between the two is hard to discern.³⁸ Roth sometimes forgets to heed the distinction himself. He writes:

International legal constraints on the use of force are predicated not on a principle of non-violence, but on a principle of respect for a foreign state's authority within its boundaries. To put the point colorfully, but without substantive exaggeration, the right against coercive intervention is the right of territorial political communities to be ruled by their own thugs and to fight their civil wars in peace.³⁹

Since thuggery is prohibited by customary international law, the right being asserted here is a right to violate international law. Roth, citing Carl Schmitt's notorious maxim that "sovereign is he who declares the exception," asserts that in the absence of international criminal law sovereign states may violate international law on grounds of exceptional circumstances and that they have sole authority to determine when the exceptional circumstances exist.⁴⁰ He does not mention the obvious objection to this claim—that it is explicitly excluded by the derogation provisions of international human rights law.

Roth's stance goes far beyond the "dualist" proposition that sometimes an act that is prohibited under international law is nonetheless permitted under domestic law. Not only does he uphold the right of states to violate international human rights law, but he implies that such a right has the backing of international law itself.⁴¹ He thus controversially and provocatively enlists international law in its

international law. See, e.g., HENCKAERTS & DOSWALD-BECK, *supra* note 10, at 574, 575, 590 (2005); CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 7, at 113-14.

37. Roth, *supra* note 1, at 259-60.

38. *Id.* at 279.

39. *Id.* at 275.

40. *Id.* at 279.

41. "The international rule of law . . . is predicated on respect for states' presumptive monopoly of the last word on public order inside their respective territories. . . . [That monopoly] continues to withstand violations of international obligations in general – including human rights obligations." *Id.* at 278.

own demotion, and flirts with a kind of “reverse monism”⁴² that subordinates international law to domestic law. Even this understates the tendency of his remarks, given that human rights obligations are so deeply entrenched in the domestic law of most countries. Readers will easily infer the message that in the name of ruthlessness states are entitled to violate domestic as well as international law—an inference supported by Roth’s invocation of the “foundational Schmittian insight” that “whereas norms govern in normal times, they give way in exceptional times” and that “sovereignty is the power to suspend valid law.”⁴³ That said, however, Roth is rhetorically more emphatic in his effacement of international human rights law than domestic human rights law. Schmitt’s maxim, “while debatable in application to domestic legal orders, captures the essence of the relationship between domestic and international authority wherever an international crime has not been authoritatively established.”⁴⁴

Moreover, Roth gives us dualism with a twist. Only in the realm of domestic policy does he emphasize the right of states to violate international law. Dualism traditionally draws no distinction between domestic and foreign policy. Roth is defending a particular *kind* of dualism—one that is tailored to his interpretation of the principle of sovereign equality, according to which states retain a “presumptive monopoly of the last word on public order inside their respective territories.”⁴⁵ Another twist—and a puzzling one—is that Roth suspends his Schmittian dualism in the case of ICL. One wonders why sovereign states may not flout ICL as freely as international human rights law. It is true that in doing so a state exposes its agents to the danger of criminal prosecution by external authorities. But a state may decide to take its chances, especially since the risk of external prosecution is often negligible. Why should the obligation to obey ICL be so much stronger than the obligation to obey international human rights law?

The fact that international law *obligates* states not to abuse human rights carries little weight in Roth’s analysis.⁴⁶ States that violate international human rights law,

42. I steal this term from Roth himself, who has used it in oral presentations to criticize the approach of John Yoo, author of several notorious Bush-era Office of Legal Counsel “torture memos.” I thank Roth for coining this helpful term, and apologize for using it to criticize his own argument. By no means should Roth’s approach be likened to that of John Yoo.

43. Roth, *supra* note 1, at 249.

44. *Id.* at 279.

45. *Id.* at 278.

46. In subsequent correspondence, Roth argues that, “ordinarily, treaties do not prohibit violations in the same way that domestic laws prohibit violent assault.” Letter from Brad R.

he placidly observes, “incur responsibility for breach, and render themselves susceptible to adverse legal consequences, including the (appropriately limited) countermeasures of specially affected states or of the community of states.”⁴⁷ Here the force of obligation *qua* obligation drops out, and international human rights law is converted into something like a schedule of payments. States may violate international human rights law in exchange for the stipulated fee. International human rights law (on this account) is more about structuring incentives than establishing prohibitions. Needless to say, this understanding does violence to the entire project of international human rights law; its widespread adoption would be fatal to the project. Moreover, the “adverse legal consequences” to which Roth alludes are rather slight in international human rights law. Where formal penalties exist (as under the European and Inter-American Courts of Human Rights), they tend to be mild. In major UN-based human rights treaties such as the International Covenant on Civil Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child, there are no legally binding penalties at all. The power of international human rights law is erected on an altogether different foundation, in which respect for legal obligation figures prominently.

While Roth’s vision of state sovereignty undermines the obligatory force of international human rights law, it also threatens to impede the development of both international human rights law and ICL in the first place. In several passages, Roth endorses the controversial and increasingly discarded view that the creation of a rule of customary international law requires the consent of all states in order to be universally binding.⁴⁸ Leading authorities reject this view.⁴⁹ Antonio Cassese writes:

Roth to author (Aug. 6, 2009) (on file with author). He writes that the better analogy is with contract law, explaining that “contract law does not disable an individual from committing a breach act, or even from validly undertaking contractual obligations inconsistent with the terms of prior obligations to another party.” *Id.*

47. Roth, *supra* note 1, at 279.

48. I have in mind the following passages: “Where the purported norms providing for the exercise of extraterritorial jurisdiction, for the invalidation of immunity, or for the criminality of a government-authorized act at the time and place in question *cannot by credible methods be attributed (directly or indirectly) to the affirmations of the relevant sovereign states*, and where the effort to fill the gap relies on a ‘universal’ abstract principle that enjoys no actual consensus in application—however lamentably, from a moral standpoint—the prosecutorial interest must give way.” Roth, *supra* note 1, at 241 (*emphasis added*). (The word “indirectly” implies that the highlighted passage expresses Roth’s view

[The unanimity requirement], assuming that it was formerly sound, is no longer tenable today. At present, when they gradually crystallize in the world community, customary rules do not need to be supported or consented to by all States. For a rule to take root in international dealings it is sufficient for a majority of States to engage in a consistent practice corresponding with the rule and to be aware of its imperative need . . . That universal (express or implicit) participation in the formation of a customary rule is not required is evidenced by the fact that no national or international court dealing with the question of whether a customary rule had taken shape on a certain matter has ever examined the views of all States of the world.⁵⁰

of the necessary conditions for the creation of a customary international law norm. That's because there is no need for indirect attributions where treaty law is concerned. The text thus implies that a state cannot be bound by a customary norm of ICL unless it has given direct or indirect affirmation to the norm in question.) "Even with respect to acknowledged serious human rights violations, states only exceptionally consent to subject their agents to international penal norms; absent such consent, express or tacit, states cannot be said to have authorized such external exercises of power over their agents. The authority for prosecution, which needs to be specifically conferred, is to that extent withheld." *Id.* at 257-58. "A territorial state's consent is most often a requisite, not only to a norm's recognition, but also to its implementation." *Id.* at 272. "The international rule of law . . . is predicated on respect for states' presumptive monopoly of the last word on public order inside their respective territories." *Id.* at 278. (Although the apparent intent of this sentence, in context, is that states are permitted to violate international human rights law, it may also suggest that a state is not *subject* to a rule of international human rights law as long as it withholds its consent.)

49. *See* *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 186 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."); INTERNATIONAL LAW ASSOCIATION, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, Principle 14, 734 (London 2000) ("For a rule of customary international law to come into existence, it is necessary for the State practice to be both extensive and representative. It does not, however, need to be universal."); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 63 (1990) ("Of further significance is the fact that relevant patterns of legal expectation . . . need only be generally shared in the international community. Universality or unanimity are not required."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (7th ed., 2008) ("Complete uniformity is not required, but substantial uniformity is required."); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 47 (7th ed., 1997) ("Can the opposition of a single state prevent the creation of a customary rule? If so, there would be very few rules, because state practice differs from state to state on many topics.").
50. ANTONIO CASSESE, INTERNATIONAL LAW 162 (3rd ed., 2005). It is worth noting that Justice Geoffrey Robertson of the Special Court for Sierra Leone, in a passage approvingly cited by Roth, implicitly rejects the unanimity requirement: "There must be evidence (or at least inference) of *general* agreement by the international community that breach of the

The unanimity requirement is an implausible representation of how customary international law is actually made. Its adoption would cut a large swath through existing customary international law, including human rights law and ICL.⁵¹ In Roth's discussion, it is made to suggest a formidable obstacle to the development of ICL.⁵²

Roth upholds the unanimity requirement in the name of state sovereignty, but the truth is that the unanimity requirement, even if we were to adopt it, delivers much less than state sovereignty demands. That is because it applies only to the *creation* of customary international law. A state does not have the option of

customary law rule would or would now, entail international criminal liability for individual perpetrators, in addition to the normative obligation on States to prohibit the conduct in question under their domestic law. . . . [I]t must be clear that the overwhelming *preponderance* of states, courts, conventions, jurists and so forth relied upon to crystallize the international law "norm" intended—or now intend—this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them." Roth, *supra* 1, at 278 (*emphasis added*).

51. This implication may be avoided if one adopts a flexible understanding of consent, in which the absence of persistent explicitly stated opposition is construed as consent. Other passages in Roth's article suggest such an understanding, for he accepts the International Committee of the Red Cross' (ICRC) broad conception of the customary international law of war crimes (*id.* nn. 75 & 94) (but notice that the ICRC, contrary to Roth, explicitly rejects the unanimity requirement; HENCKAERTS & DOSWALD-BECK, *supra* note 10, at xxxviii), and he states that torture today is probably an international crime under customary international law (Roth, *supra* note 1, at 283). Yet the move to a flexible understanding of consent creates a troubling ambiguity. A strong state sovereignty view would seem to demand a more robust form of consent. If one insists on the unanimity requirement, one adopts a robust understanding of consent at the cost of invalidating much existing human rights law and ICL, whereas one preserves existing human rights law and ICL at the cost of adopting a tenuously weak understanding of consent. Either consent doesn't really mean consent (in which case, why use the word?) or ICL and international human rights law are radically cut back. There will be a temptation to strengthen or relax the meaning of consent depending on the rhetorical needs of the moment. The ambiguity is heightened in Roth's article, precisely because his vigorous defense of sovereignty encourages a genuine rather than cosmetic understanding of the word "consent." The unanimity requirement is like a loaded weapon: there is always the danger that someone will use it. The doctrine is best avoided, as both dangerous and unnecessary. It is noteworthy that Cassese in the above-quoted passage does not say that the consent required for a customary rule may be "imputed" rather than real. He takes the more straightforward route of saying that consent of all states is unnecessary. Note his specific denial that consent *whether explicit or implicit* is necessary for the creation of a customary rule. CASSESE, INTERNATIONAL LAW, *supra* note 50, at 162. The sources cited in note 49 *supra* take a similar approach.
52. "Even with respect to acknowledged serious human rights violations, states only exceptionally consent to subject their agents to international penal norms; absent such consent, express or tacit, states cannot be said to have authorized such external exercises of power over their agents. The authority for prosecution, which needs to be specifically conferred, is to that extent withheld." Roth, *supra* note 1, at 257-58.

unilaterally withdrawing from a customary rule, even if its previous consent (explicit or implicit) was given long ago and under a different political regime.⁵³ The power of customary international law to obligate states in the absence of *current* consent (a point not in dispute among international law scholars) is elided in Roth's discussion, and undercuts his image of sovereign states free to refuse international law obligations as they choose.⁵⁴

Thus (to sum up) Roth's effacement of international human rights law makes disagreement about rights appear more relevant than it really is. Another problem is that "moral disagreement" is a misleading description of the phenomenon he alludes to. What is true is that states and other political groups sometimes find themselves divided by incompatible goals, and the resulting conflict is often morally charged, each party believing that justice is on its side.⁵⁵ The classic example is that of two groups claiming ownership of the same land, each drawing on a collective narrative in support of its claim. (One may still hesitate to ascribe a "moral" dimension to these conflicts. Because the invocations of justice are rarely determined by rigorous study, self-scrutiny, and openness to all points of view, it would appear that the parties do not care very much about morality, their indignation notwithstanding.) But it is a leap from this to posit the existence of "ideological pluralism,"⁵⁶ "disparate conceptions of justice,"⁵⁷ "incompatible conceptions of political morality,"⁵⁸ or "differing moral sensibilities."⁵⁹ Contemporary international and civil wars are rarely (if ever) driven by disagreements over the content of morality. More typically, the warring parties share a similar conception of morality and justice, but disagree on other grounds

53. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 22 (1994) ("A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*.").

54. Some scholars subscribe to the "persistent objection" doctrine according to which states can opt out of a customary rule if they state their opposition at the time of the rule's formation and steadily thereafter. See ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 7 (2005). Not all jurists agree: see CASSESE, INTERNATIONAL LAW, *supra* note 50, at 163. But not even those who subscribe to the doctrine believe that persistent objection can exempt a state from a customary rule to which it has previously consented.

55. I discuss this problem, but derive conclusions different from those of Roth, in Jamie Mayerfeld, *The Myth of Benign Group Identity: A Critique of Liberal Nationalism*, 30 POLITY 555 (1998).

56. Roth, *supra* note 1, at 236-237.

57. *Id.* at 237.

58. *Id.* at 275.

59. *Id.* at 287.

which side is acting contrary to justice. They dispute the facts, or interpret them differently, or remember the wrongs they have suffered while forgetting the wrongs they have inflicted. This pattern is partly owing to simple human partiality, and partly owing to the slanted versions of history and current events inculcated by the schools, the media, and the political and cultural leaders of each community. The fact that moral appeals predictably correspond to non-moral interests suggests that morality is not the underlying motivation.

Be that as it may, morally charged conflicts (along with non-morally-charged conflicts) are a fact of political life. The moral principle that needs to be asserted here is that states and other political groups are free to pursue their respective goals, even at the cost of opposing other states and political groups, provided that they respect certain limits. International law spells out a great number of these limits. Among many other proscriptions, the use of armed force between states is forbidden, barring very narrow exceptions, and states must respect basic human rights. (Domestic laws restate the prohibition of human rights violations, and add a ban on armed rebellion.) Human rights law and the law of armed conflict serve the function of keeping inter-group conflicts, including those fueled by moral grievance, within reasonable bounds.

Roth claims, however, that agreement to maintain strict respect for human rights is lacking. He writes, "The hypothesized conscience of the international community is deontological; the empirical conscience of the international community . . . is consequentialist."⁶⁰ He means that the states (and other armed groups) composing the international community believe that basic human rights may be sacrificed when important goals are at stake.⁶¹ He calls this view

60. *Id.* at 284-285.

61. Roth uses the terms "deontological" and "consequentialist" in a loose sense. Simple versions of consequentialism (those which evaluate every act separately in terms of its consequences) are implausibly far-removed from our ordinary moral and political judgments. Sophisticated versions of consequentialism (those which evaluate general practices and policies in terms of their consequences) are compatible with strict respect for human rights. *See, e.g.*, JOHN STUART MILL, *UTILITARIANISM* CH. 5 (1861); WILLIAM J. TALBOTT, *HUMAN RIGHTS AND HUMAN WELL-BEING* (forthcoming). Moreover, consequentialism (requiring impartial promotion of the good) should not be confused with instrumentalism (involving steady pursuit of a desired goal). When atrocities follow an instrumental logic, the good being pursued is usually that of the group, not the universe. (When groups think that the violent assertion of their interests is morally justified, they usually do so for a complex mixture of consequentialist and non-consequentialist reasons, though even this formulation may lend too much dignity to the lazy reasoning typical of these situations.) Nor should we overlook the power of motives, such as the desire for revenge, that are neither consequentialist nor self-interested.

“ruthlessness.” In an important sense, therefore, his picture is not one of pluralism, but rather international consensus in favor of ruthlessness.

The ruthlessness that Roth posits as the shared morality of the international community authorizes all acts that are deemed necessary to the achievement of a “compelling societal end.”⁶² Members of the international community agree on the principle while disagreeing on its application, because they disagree what constitutes a compelling societal end. They can agree only in condemning those policies that “entail or suggest inadmissible ends.”⁶³ What’s left is the category of “ruthless measures,” defined as those “*substantially related to cognizable governmental (or insurgent) objectives.*”⁶⁴ For the sake of an “agreement to disagree,” members of the international community should generally abstain from punishing one another’s ruthless actions.⁶⁵

Very little, if anything, is excluded by the “ruthlessness” code. Roth claims that it excludes genocide, crimes against humanity, and ethnic cleansing, because they “entail or suggest inadmissible ends.”⁶⁶ This is confusing, because these policies rarely if ever are undertaken as ends in themselves. Genocides have been undertaken to acquire land and resources, eliminate and deter resistance, vindicate group honor, serve God’s will, save one’s group from attack or extermination, preserve the state, preserve the ethnic character of one’s state, and create a just society.⁶⁷ Even the desire to eliminate populations deemed corrupt, unclean, or impure may be construed as a means to the end of preserving societal good health. The truth is that genocide, crimes against humanity, and ethnic cleansing⁶⁸—like torture, inhuman treatment and other extreme human rights violations—are

62. Roth, *supra* note 1, at 284. *See also id.* at 239.

63. *Id.* at 238. Such policies are described as those undertaken for sadistic, venal, or manifestly illegitimate purposes, or in “furtherance of a governmental purpose that is ruled out by the fundamental purposes of the international legal order (e.g., genocide, crimes against humanity, ethnic cleansing).” *Id.* at 239.

64. *Id.* at 238-39.

65. *Id.* at 236, 286.

66. *Id.* at 238, 285.

67. *See* DANIEL CHIROT & CLARK MCCAULEY, *WHY NOT KILL THEM ALL?: THE LOGIC AND PREVENTION OF MASS POLITICAL MURDER 19-45* (2006). Fear is a motive in many genocides. For example, the Armenian genocide during World War I was partly driven by a fear of the dissolution of the Ottoman Empire. *See* ERIC D. WEITZ, *A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND NATION 1-7* (2003).

68. Roth adds that these policies have been repudiated by the international community. Roth, *supra* note 1, at 239, 285. This is of course true, but not for the “inadmissible ends” reasoning posited by Roth. And the international community has repudiated many other kinds of human rights violations as well.

perpetrated for ends that are all too “cognizable.” They adhere to the logic of ruthlessness that, on Roth’s account, constitutes the consensus morality of the international community.⁶⁹ The distinction that Roth tries to draw between ruthlessness and unrestrained brutality is not sustainable.⁷⁰

What should we make of the claim that the international community believes in sacrificing basic human rights for compelling societal ends? Roth’s account is not the brave unmasking of a grim reality. It is completely untrue. International law, which is formed by the will of the international community, places an emphatic prohibition on ruthlessness. Extreme human rights violations are prohibited by the International Covenant on Civil and Political Rights (ICCPR), ratified by 165 countries;⁷¹ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), ratified by 146 countries;⁷² the 1949 Geneva Conventions, ratified by all 194 countries in the world;⁷³ and many other human rights and humanitarian treaties also receiving widespread ratifications. Customary international law makes the prohibition of extreme human rights violations universally binding.⁷⁴ Many of these prohibitions are well-entrenched in domestic law.

It is noteworthy that the ICCPR does not permit derogation from any of its obligations except in times of “emergency that threaten the life of the nation,” and then only “to the extent strictly required by the exigencies of the situation.”⁷⁵ Even then, stringent procedures must be followed, and certain rights—among them the right to life, the right to freedom of religion, and the right not to be subjected to

69. As examples of ruthless measures, Roth’s footnotes refer to cases of torture, large-scale intentional bombing of civilians, and death squad mutilations and killings that have been ordered or abetted by U.S. policy makers. Those who would characterize these policy makers as international criminals, he writes, “engage in flights of deontological self-righteousness.” *Id.* nn. 22 & 25.

70. Roth, *supra* note 1, at 240.

71. United Nations Treaty Collection, Status, International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited May 3, 2010).

72. United Nations Treaty Collection, Status, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited May 3, 2010).

73. International Committee of the Red Cross, Geneva Conventions of 1949, <http://www.icrc.org/web/Eng/siteeng0.nsf/html/genevaconventions> (last visited May 3, 2010).

74. See RESTATEMENT, *supra* note 7, § 702; Henckaerts & Doswald-Beck, *supra* note 10.

75. ICCPR, *supra* note 16, art. 4.

torture or cruel, inhuman or degrading treatment or punishment—may not be suspended under any circumstances.⁷⁶ Similar non-derogation clauses appear in the European Convention on Human Rights and the Inter-American Convention on Human Rights. The European Court of Human Rights recently affirmed, in a unanimous ruling of its 17-member Grand Chamber, that the prohibition of torture and ill-treatment may not be suspended even as a means of combating international terrorism.⁷⁷ The Geneva Conventions impose a firm prohibition on inhuman treatment and other extreme human rights violations in wartime—precisely when states perceive that their fundamental purposes, including national security, are most imperiled.⁷⁸

Roth never tries to explain why an international community that approves ruthlessness would go out of its way to prohibit it legally. It is an odd morality that lacks the courage to declare itself, even when faced with public prohibition and repudiation. We are left to imagine some kind of alien force that, by imposing a categorical prohibition and widening penalties on ruthlessness, both subdues and silences the true will of the international community. The implication that international law is at variance with the real will of the international community is implausible. If taken seriously, it would undermine the legitimacy and standing of international law.

Thus far I have not said anything about international criminal law, since doing so is unnecessary to rebut the claim that the international community is united in its support of ruthlessness. But it is a significant fact that over half the world's countries (110 by latest count) have empowered an international court to prosecute their own citizens and leaders, not only for genocide and crimes against humanity, but also a detailed catalogue of war crimes applying to both international and internal armed conflicts.⁷⁹ An increasing number of states have incorporated ICC

76. *Id.*

77. Saadi v. Italy, Appl. No. 37201/06, Eur. Ct. H.R. 28 (2008), available at <http://www.unhcr.org/refworld/docid/47c6882e2.html>.

78. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3, 12, 49-50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S.; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3, 12, 50-51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 13, 129-30, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 5, 27, 31, 32, 37, 146-47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

79. In one footnote, Roth, *supra* note 1, n.19, Roth states that a policy to commit any of the war crimes catalogued in the Rome Statute of the ICC exceeds the bounds of ruthlessness. Yet

crimes into their domestic codes.⁸⁰ It is significant, too, that 146 countries, by ratifying the Torture Convention, have promised to treat torture as an international crime.⁸¹ These developments add to the implausibility of the ruthlessness view.

Roth is not oblivious to these developments, but he handles them in an equivocal manner. He notes the criminalization of torture under the Torture Convention, without acknowledging that it contradicts the ruthlessness paradigm.⁸² Of ruthless measures, he states that “some . . . have been unambiguously criminalized.”⁸³ “Some” is an understatement, as the Torture Convention, Article 8 of the ICC Statute, and the expanding reach of customary ICL attest.⁸⁴ Regardless, Roth holds that we live “in a ruthless world.”⁸⁵ Roth’s dilemma is that if he trains attention on the significant and growing portion of ruthless conduct that is criminalized under positive international law, he undermines the premise of the radical argument. The dilemma is reflected in his inconsistent classification of war crimes. When claiming a general predisposition to ruthlessness, he classifies them as ruthless acts; when claiming that ICL does not focus on ruthless conduct (“the elements of the most uncontroversial international crimes themselves entail or suggest inadmissible ends”)⁸⁶ he classifies them as acts that exceed the bounds of ruthlessness.⁸⁷ How much clearer and more persuasive this article would be if Roth omitted the claims about ruthlessness, and simply said: “The international community is unable to agree whether certain extreme human rights violations

his examples of ruthless policies, *Id.* at 239-40, nn. 22, 24 & 25, are war crimes as defined by the ICC Statute. At this point, the reader gives up in confusion.

80. See Coalition for the International Criminal Court, *Implementation of the Rome Statute*, <http://www.iccnw.org/?mod=romeimplementation>; See also Matthias Goldmann, *Implementing the Rome Statute in Europe: From Sovereign Distinction to Convergence in International Criminal Law*, 16 FINN. Y.B. INT’L L. 5 (2008); and Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 J. INT’L CRIM. JUSTICE 421 (2007). Although Bacio Terracino criticizes the incomplete implementation of ICC crimes, his discussion nonetheless reveals the significant and increasing extent of such implementation.
81. See United Nations Treaty Collection, Status, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 72.
82. Roth, *supra* note 1, at 282.
83. *Id.* at 238.
84. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4-9, Dec. 10, 1984, 1465 U.N.T.S. 85; Rome Statute, *supra* note 9, art. 8; HENCKAERTS & DOSWALD-BECK, *supra* note 10.
85. Roth, *supra* note 1, at 236.
86. Roth, *supra* note 1, at 238.
87. See *supra* note 80. The truth is that ruthlessness persists *and* that the international community is increasingly determined to criminalize it. Roth’s mobile definition of ruthlessness seems designed to obscure the latter fact.

should be classified as international crimes. When the proposal to criminalize a particular type of human rights violation cannot generate the level of agreement needed to constitute positive international law, the violation should be exempt from extraterritorial prosecution.”

It is true that extreme human rights violations persist all over the world. This does not prove an international consensus in favor of ruthlessness, just as persistent crime does not prove a domestic or international consensus in favor of crime. An international community of state actors and civil society organizations has worked tirelessly to develop domestic and international law mechanisms for the prevention and deterrence of human rights violations. Their efforts have borne fruit in a thickening web of treaties, agreements, statutes, court rulings, bureaucratic agencies, monitoring systems, educational programs, and NGO advocacy and watchdog activities dedicated to safeguarding human rights.⁸⁸ Among the most effective transnational strategies is the creation of reciprocal rights regimes that bind participating states to common measures of enforcement. Examples include the ICC, the compulsory jurisdiction of the European Court of Human Rights, and the international inspection committees established under the European Convention for the Prevention of Torture and the Optional Protocol to the Torture Convention.⁸⁹ Of utmost significance is the growing incorporation of international human rights law into domestic law.⁹⁰ This trend is buttressed by the reciprocal influence of domestic human rights law on international law, in what Fionnualla Ní Aoiláin calls a process of “circular reinforcement.”⁹¹ In Europe, Latin America,

88. There is a large amount of literature, including the following studies: CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* ch. 2 (2009); JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* (3rd ed. 2007); MICHAEL D. GOLDBERGER, *A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007); MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (2004); WILLIAM KOREY, *NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE"* (1998); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (2nd ed. 2003); and *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., 1999).

89. For the European case, see Mayerfeld, *A Madisonian Argument*, *supra* note 2. The 47 countries that participate in the European human rights system under the auspices of the Council of Europe comprise nearly one quarter of all the countries in the world.

90. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 *INDIANA L. J.* 1397 (1999); *FUNDAMENTAL RIGHTS IN EUROPE* (Robert Blackburn and Jörg Polakiewicz eds., 2001); and *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (Hellen Keller and Alec Stone Sweet eds., 2008).

91. Fionnualla Ní Aoiláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in *TORTURE: A COLLECTION* 219 (Sanford Levinson ed., 2004). For an insightful

and much of Asia and Africa, the human rights movement—specifically dedicated to rejecting the logic of ruthlessness—has made undeniable progress.⁹² Roth writes as if none of this happened.

To prove that the international community favors ruthlessness over human rights, it is not enough to cite patterns of human rights violations in the present, much less the past, when human rights law was much less developed; or the atrocities that have accompanied the United States' foreign wars and interventions; or a law review article defending torture; or selective survey results on torture and terrorism in the wake of 9/11.⁹³ The will of the international community is not ascertained by opinion poll, but rather by the public deliberative processes that contribute to the formation of international law. Nor is it helpful to assert that, during violent political conflict, ruthless measures “in the best of circumstances . . . are the rule, whereas in the worst, they give way to unrestrained brutality.”⁹⁴ (If this is so, then, according to Roth's logic, shouldn't we also forbear to punish one another's unrestrained brutality?) In many violent conflicts there is an effort to adhere to the “laws and customs of war.”⁹⁵ But the more salient point is that today violent political conflict is rare—and it is rare in large part because an increasing number of states have committed themselves to respect for human rights. They

discussion of the logic of human rights regimes, see Michael Goodhart, *Human Rights and Global Democracy*, 22 ETHICS & INT'L AFFAIRS 395, 410 (2008) (noting that “states become socialized to widely shared normative expectations through logics of appropriateness that inform their interests and shape their actions.”).

92. This progress can be tracked in the annual reports of Freedom House. See www.freedomhouse.org.
93. Roth, *supra* note 1, nn.22 & 25. Roth writes that the article, by Eric Posner and Adrian Vermeule, is “deeply reasoned, if problematic.” *Id.* at n.22. For a very different view, see Jamie Mayerfeld, *In Defense of the Absolute Prohibition of Torture*, 22 PUB. AFF. Q. 109 (2008). Roth cites results of one poll showing that torture in rare cases is supported by a majority of respondents in the U.S., France, Britain, and South Korea. He omits the poll's findings that a majority of Italian and Spanish respondents opposed torture under any circumstances. Other polls show much less support for torture. See the World Public Opinion Poll on Torture, June 24, 2008, at http://www.worldpublicopinion.org/pipa/pdf/jun08/WPO_Torture_Jun08_packet.pdf. In a comprehensive survey of polls taken since 9/11, Darius Rejali and Paul Gronke conclude that “a majority of Americans continue to reject government use of torture, even when confronted with the ‘ticking time bomb’ scenario.” Rejali & Gronke, *Accepting Torture?*, HUFFINGTON POST, May 1, 2009, http://www.huffingtonpost.com/darius-rejali/accepting-torture_b_194830.html.
94. Roth, *supra* note 1, at 240.
95. For numerous historical examples of voluntary compliance with conventional wartime restraints, see MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

have renounced those goals the pursuit of which places human rights in danger, and have self-consciously emphasized human rights as a peace-building measure.⁹⁶

To repeat: widespread and systematic human rights violations persist. But we should not capitulate before this fact by stating, in spite of the clear intent of domestic and international law and the increasingly successful efforts of the human rights movement, that ruthlessness has our principled support. That claim is an obvious distortion. Why does it appear in Roth's article? Perhaps it is a disappointed reaction to the hypocrisy of states that perpetrate cruelties in violation of their own laws, promises and declarations. If so, the reaction swings too far. Or perhaps it is a belief that a consequentialist or instrumentalist rejection of strong human rights constraints is the only defensible moral view. If so, Roth should acknowledge the view as his own and not project it onto others. But I do not know enough to reconstruct Roth's thinking; these are only speculations.

Roth fears that the use of extraterritorial prosecutions will encourage a double standard, whereby some states (strong ones in particular) will seek to punish the human rights violations of others (weak ones in particular) while overlooking their own.⁹⁷ This is a legitimate worry, though one that can be examined independently of the ruthlessness paradigm. Notice that the tendency of states to decry the speck in their neighbors' eye without noticing the beam in their own is common across a wide range of policy issues. Careful study is needed to evaluate the danger of double standards and to devise remedies for it. One general remedy is to strengthen national mechanisms of criminal accountability for domestic officials. Another is to accept the jurisdiction of the ICC.

Roth also fears the potential of extraterritorial prosecutions to hinder the peaceful settlement of violent conflicts.⁹⁸ This issue—the so-called “peace vs. justice” controversy—has received considerable journalistic and scholarly attention.⁹⁹ It, too, is best separated from claims about the “inherent pluralism of

96. This strategy has been a key element to building a peaceful Europe. An example of this strategy is the use of human rights standards by the High Commissioner for National Minorities of the Organization of Security and Cooperation in Europe to defuse ethnic conflict. For the successes achieved by this strategy, see JUDITH G. KELLEY, *ETHNIC POLITICS IN EUROPE: THE POWER OF NORMS AND INCENTIVES* (2004).

97. Roth, *supra* note 1, at 237, 273.

98. Roth, *supra* note 1, at 276-78.

99. For the argument that prosecutions threaten peace and undermine stability, see Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of Transitional Justice and International War Crimes Tribunals*, 7 *ANNUAL REVIEW OF POLITICAL SCIENCE* 345 (2004). For the contrary argument, see Kathryn Sikkink & Carrie Booth Walling, *The*

the international legal order”¹⁰⁰ or shared proclivities to ruthlessness. Let us note that it cuts across the *nullum crimen* principle as well as the ruthlessness/brutality divide. The threat of angry retaliation is not diminished when transnational prosecutors target acts that unambiguously constitute international crimes or that reach the heights of brutality, as reaction to the ICC’s indictments of Sudanese President Omar al-Bashir and Uganda’s Lord’s Resistance Army vividly remind us.

Any dangers that ICL poses to peace must be set against its potential *contributions* to peace. The concept of “war crimes” remains a powerful stigma, one that no doubt acts as a partial deterrent to the acts so described. By punishing and stigmatizing war crimes and other extreme human rights violations, ICL can reduce their occurrence.¹⁰¹ By reducing atrocities, it combats a notorious cause of the outbreak and prolongation of violent conflicts. Where atrocities occur, prosecutions offer a non-bloody alternative to the remedy of violent reprisal.¹⁰² ICL rules out, and may help deter, those conflicts that can be waged only by resort to war crimes. In short: as people deepen their commitment to ICL, applying it to themselves no less than their enemies, the less violence there will be. While ICL can be abused, the abuses can be addressed. It is difficult to imagine a more peaceful future without a stronger role for international criminal law.

Impact of Human Rights Trials in Latin America, 44 JOURNAL OF PEACE RESEARCH 427 (2007).

100. Roth, *supra* note 1, at 277.

101. For a general argument that ICL has the power to deter human rights violations, see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001). For evidence that the ICC has had a deterrent effect in the Democratic Republic of Congo (DRC), see William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. OF INT’L L. 557, 586-89 (2005). We can also note the role of ICL in catalyzing a national and international campaign to combat the use of child soldiers in the DRC. The campaign has achieved some successes, including the demobilization of 30,000 child soldiers, though there have also been major setbacks. See The Secretary-General, *Report of the Secretary General to the U.N. Security Council on Children and Armed Conflict in the Democratic Republic of Congo*, U.N. Doc. S/2007/391 (June 28, 2007). In Chile and Argentina, ICL triggered new revelations and greater public awareness of past atrocities and the reinforcement of domestic human rights protections. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005). For more skeptical views of the deterrent capacity of ICL, see David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L. J. 473 (1999); and Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777 (2006).

102. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1999).

I have criticized what I call Roth's "radical argument"—the attempt to limit international criminal law by appeal to a supposed tacit consensus of the international community that extreme human rights violations are justified by compelling societal ends. I shall close by reviewing some ways in which the radical argument undermines international human rights law. First, it claims that the real will of the international community favors ruthlessness over basic human rights. The implication is that international human rights law is a pretense, not worth taking seriously. Second, it suggests that ruthlessness—the resort to extreme human rights abuses in violation of international law—is entitled to our respect. Maturity means “coming to terms with ruthlessness.”¹⁰³ “International criminal justice must . . . respect the inherent pluralism of the international legal order,” meaning the right of sovereign states to commit extreme human rights violations in accordance with their “conflicting consequentialist moralities.”¹⁰⁴ The real offense is “vilification” of public officials who commit such violations when “respectful accommodation” is called for.¹⁰⁵ Third, it asserts the legal capacity of states to violate international and domestic human rights law unless international criminal sanctions have been established.¹⁰⁶

The pity is that Roth's discourse on ruthlessness is allowed to overshadow his initial excellent arguments for *nullum crimen sine lege*. He should stay where he began, with the argument that *nullum crimen* honors the rights of the potential accused and maintains the integrity of law. He takes the wrong path when he argues for the right of states to commit extreme human rights abuses in violation of international law. It is strange that an article ostensibly written to affirm the principle of legality develops a sustained defense of illegality.

103. Roth, *supra* note 1, article title.

104. Roth, *supra* note 1, at 278, 285.

105. *Id.* at 277.

106. *Id.* at 285.