

NAILS IN THE COFFIN OF THE VAMPIRE: PERSONAL SOVEREIGN IMMUNITY AND ITS TIMELY BUT INCOMPLETE DEATH

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Judicial power has been a major factor in the curtailing of individual rulers being criminally immune for their actions. Such power has been exercised by courts of both nation and international origin, such as the International Criminal Tribunal for Rwanda or the International Criminal Court. The immunity this Note discusses must be differentiated from head-of-state immunity in civil actions, which may arise from wrongful activities, but where the stakes are for financial penalties or other remedies rather than the personal liberty of the defendant. A contemporary example is the recent civil litigation filed against Mexico's former President, Ernesto Zedillo, who was the last leader of the Institutional Revolutionary Party. The U.S. State Department has intervened in favor of Zedillo's civil immunity from suit, and this determination is considered highly persuasive though not binding on federal courts; indeed, on July 22, 2013, the judge dismissed the case.

Jurisdiction for courts is historically based on the individual's activities and presence within the area in which the police powers of the state are enforceable. This is the territoriality jurisdiction, upon which most criminal actions are based. A court may also try to exercise jurisdiction where a citizen of the nation in which the court is based, where the victim was harmed outside of the borders of the nation or where the tortfeasor is a citizen. Several national courts—based solely within the territorial jurisdiction of one country—have attempted to try leaders of other nations for activities that did not have any nexus to the country exercising jurisdiction. Universal jurisdiction, as it is called, is both a historical practice and, today, a novel measure engendering controversy. International courts, on the other hand, base their jurisdiction on the accession of state parties to the foundational treaties that create and govern the courts, and in other instances on the jurisdictional power—directly or indirectly—comes from a United Nations Security Council grant. By mutual as-

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sent in the form of treaty ratification and participation these member states have bound themselves to various treaties.

This Note explores the evolution of head of state immunity for criminal actions and the deconstruction of the doctrine over time. Using individual case studies, the Note explores the way that head of state criminal immunity has impacted rules throughout time. It further examines how Medieval changes in criminal immunity for leaders planted the seeds for change.

Dedicated to the victims and the vision of a future in which there is no need for these courts.

TABLE OF CONTENTS

I.	INTRODUCTION	1294
II.	THE POWER OF THE EXECUTIVE THROUGHOUT HISTORY	1301
	A. <i>The Middle Ages</i>	1302
	B. <i>Cracks in the Wall: The Early Modern Period</i>	1306
	C. <i>The Fall of the Doctrine</i>	1314
III.	TWO MILESTONES	1318
	A. <i>The General Structure of International Tribunals</i>	1319
	B. <i>The International Criminal Tribunal for the Former Yugoslavia</i>	1321
	C. <i>The Special Court for Sierra Leone</i>	1329
IV.	PRESENT AND FUTURE	1338
	A. <i>Africa</i>	1339
	B. <i>Asia</i>	1343
	C. <i>Middle East</i>	1347
	D. <i>The Americas</i>	1352
V.	CONCLUSION	1358

In the beginning, “God came down off his mountain and got to the business of making people”¹ He sat by the river, all day whistling a song, while he made the people from the clay that was by the river. By the end of the day, the people were almost perfect, six men and six women—the only thing missing was the spice. So God got to grinding the pepper, between two stones, which caused God to sneeze. “It was a sneeze so mighty that even God couldn’t stop it. It caused the pepper to fall on the still-wet clay people.”² And when the clay dried, the pepper burned in the people’s blood forever. It caused them to destroy themselves and everyone else in the world. God was very sad after that. He sat down and had a miserable sit, and after a while stood up, and reaffirmed his work, saying,

1. A Liberian creation myth, as recounted in WILLIAM POWERS, *BLUE CLAY PEOPLE: SEASONS ON AFRICA’S FRAGILE EDGE* 1–2 (2005).

2. *Id.* at 2.

*“Well, if you grind pepper, you have to expect to sneeze! And one thing’s for sure: You can never unsneeze a sneeze.”*³

I. INTRODUCTION

“[To] introduce into the philosophy of War itself a principle of moderation would be an absurdity.”⁴ So wrote Carl von Clausewitz in the first third of the 19th Century after soldiering in the Napoleonic Wars that engulfed Europe.⁵ Yet scarcely half a century later, about six hundred miles away from the Clausewitz’s *Kriegsakademie* in Berlin, a process began in Geneva, Switzerland that would forever change the way mankind thought about war, and the shield of immunity behind which warmongers—and their insatiable thirst for blood—hide.

This Note will examine the head-of-state or personal sovereign immunity doctrine before international tribunals and national courts. Head-of-state immunity is, simply put, a legal immunity enjoyed by the leader of a political organization, on a national level, that places this particular individual above the law—because they are president, king, kaiser, field marshal, or emperor.⁶ Like the mythical vampire, head-of-state immunity has been restrained, nailed into its coffin but not yet killed—and its evil aura remains.

It is judicial power, of a sort, which has curtailed such absolute power in recent times. These courts may be national in origin or may be internationally constituted, such as the International Criminal Tribunal for Rwanda or the International Criminal Court. The immunity this Note discusses must be differentiated from head-of-state immunity in civil actions, which may arise from wrongful activities, but where the stakes are for financial penalties or other remedies rather than the personal liberty of the defendant.⁷ A contemporary example is the recent litigation

3. *Id.* at 2.

4. CARL VON CLAUSEWITZ, ON WAR 14 (J.J. Graham trans., Project Gutenberg EBook 2006) (1874), available at <http://www.gutenberg.org/files/1946/1946-h/1946-h.htm>.

5. *Id.* at 13. Clausewitz does not suggest, however, in this passage that laws of war cannot and should not be implemented, rather that it is not in the nature of war to self-impose limitations and regulations.

6. The head of state is sometimes a different individual than the head of government in which case the former of which is a ceremonial leadership role. For example, in the United Kingdom in 2013 the head of state is Queen Elizabeth II whereas the Head of Government—the actual executive—is Prime Minister David Cameron. When this is the case the head of state does not have real power as the role is honorary, and such is the case for almost all who reign in a constitutional monarchy. *The Queen and the UK*, THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, <http://www.royal.gov.uk/monarchuk/themonarchytoday.aspx> (last visited May 28, 2014). In this Note the term “head of state”, the more accepted legal term, will be used synonymously with “head of government”—that is, the effective executive of a nation-state.

7. In the United States much has been made of the Alien Tort Statute, 28 U.S.C. § 1350 (2012); *Filártega v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (upholding an award of damages for the family of a Paraguayan teenager who was abducted and killed by the police there of which the respondent was commissioner). The implications of this decision are implicitly under review by the U.S. Supreme Court after the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2011) *a’ffd* 133 S. Ct. 1659 (2013) ruled that, unlike individuals, corporations are not subject to liability for violations of “the law of nations.” The case arose from the mistreatment of the Ogoni people of the

filed against Mexico's former President, Ernesto Zedillo, who was the last leader of a political dynasty, the Institutional Revolutionary Party, which ruled Mexico for seventy years.⁸ The lawsuit was filed by ten anonymous survivors of the Acteal Massacre in 1997, part of the larger Zapatista movement.⁹ The survivors accuse the president of exercising command responsibility over, or acting in concert, or aiding and abetting a joint criminal enterprise in violation of the laws of war and crimes against humanity.¹⁰ The U.S. State Department has intervened in favor of Zedillo's civil immunity from suit, and this determination is considered highly persuasive though not binding on federal courts;¹¹ indeed, on July 22, 2013, the judge dismissed the case.¹²

International law encompasses both history and agreements. Much of international law is built on custom—so-called peremptory norms (*jus cogens*), which states, by virtue of tacit agreement and historical practice, do not deviate from.¹³ Many of these norms came from teleological principles of politics and diplomacy; for example, prohibitions on assaulting diplomats or subjecting them to tort liability are the result of reciprocity. The diplomat-in-residence, or resident ambassador, is effectively a hostage if war breaks out between two nations, and states have long tread carefully to avoid offending other nations and impeding diplomacy.¹⁴

Niger Delta in Nigeria, and government persecution of those who stood in the way of Royal Dutch Shell's oil extraction efforts. This is in contrast to the Seventh Circuit which in *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1024 (7th Cir. 2011) held that corporations could be liable (though finding that Firestone in regard to the allegations related to child labor at Liberian rubber plantations had not violated customary international law).

8. Taylor Morris, *Mexico's PRI: Repeating History or Looking Forward?*, HARV. POL. REV., available at <http://iop.harvard.edu/mexico%E2%80%99s-pri-repeating-history-or-looking-forward>.

9. *The trails of Ernesto Zedillo*, ECONOMIST, Sept. 1, 2012.

10. *Id.*

11. Randal C. Archibold, *U.S. Moves to Grant Former Mexican President Immunity in Suit*, N.Y. TIMES, Sept. 8, 2012, at A4; see generally HAZEL FOX, THE LAW OF STATE IMMUNITY (2002) (reviewing the United Kingdom's decision to grant General Pinochet, former head-of-state of Chile, immunity from criminal proceedings for official acts committed during his time in office).

12. John Bellinger, *ATS/TVPA Suit Against Former Mexican President Zedillo Dismissed Based on U.S. Suggestion of Immunity*, LAWFARE BLOG, (July 24, 2013, 9:45 AM) <http://www.lawfareblog.com/2013/07/atstvpa-suit-against-former-mexican-president-zedillo-dismissed-based-on-u-s-suggestion-of-immunity/>. This came after a Mexican court invalidated a letter from a former Mexican-U.S. ambassador requesting immunity for Zedillo and stated that under the Mexican constitution Zedillo is not entitled to immunity. Aleksandra Gjorgievska, *Mexican Court Rules Zedillo Ineligible for Immunity*, YALE DAILY NEWS, (Mar. 25, 2013); <http://yaledailynews.com/blog/2013/03/25/mexican-court-rules-zedillo-ineligible-for-immunity/>. As Professor Curtis Bradley of Duke University points out in the article, however, the Mexican court's decision is not dispositive to the question of Zedillo's immunity in U.S. courts. *Id.*

13. "Customary rules are the result of a process—whose character has been qualified by a number of authors as 'mysterious'—through which elements of *fact*, empirically verifiable, acquire a legal character thus creating rights and obligations for the *subjects of international law*." Tullio Treves, Customary International Law, in MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008).

14. See EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTIONS ON DIPLOMATIC RELATIONS 276–79 (1976).

Agreement and conventions create more effective international laws, which can supersede individual state practice.¹⁵ Bilateral treaties are one form of such agreement, though they are not binding on any party but those which contract to it; multilateral agreements too have a long history, as will be seen with regards to the League of Constance in the 15th Century and the coalitions against Napoleon in the 18th, for example. Conventions can both embody peremptory norms and abrogate them; though a multilateral treaty is not (contractually) binding on states that do not ratify it, its terms may become peremptory norms of international law, thus binding noncontracting states.¹⁶ Other sources of international law include the United Nations General Assembly and Security Council resolutions, as well as those of subsidiary U.N. bodies, the laws and policies of states individually in national affairs, international court decisions, and scholarly articles.¹⁷

Head of state immunity offers a defense to a court's jurisdiction and immunity from prosecution or often investigation.¹⁸ It is, essentially, a supreme deference to the acts of a sovereign. It has an eminently long history, though one that shows that legitimacy and popularity are the strongest defenses to its breach and the piercing of the veil of sovereign immunity.¹⁹ Its rationale also inhabits diplomatic immunity, the protection of personnel and chattel part and parcel of foreign relations.²⁰ Between states at peace, diplomatic immunity is unassailable, save for extraordinary circumstances.²¹

15. The notion of "pacta sunt servanda," or that agreements must be honored, is the basic principle behind this. See Anthony Aust, *Pacta sunt servanda*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007).

16. Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, 6 MAX PLANCK Y.B. OF UNITED NATIONS L. 37, 58–59 (2002); see also J. Craig Barker, *Mechanisms to Create and Support Conventions, Treaties, and other Responses*, in ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS: CONVENTIONS, TREATIES, AND OTHER RESPONSES TO GLOBAL ISSUES 37, (UNESCO ed., 2004) available at <http://www.colss.net/EolssSampleChapters/C14/E1-44-01/E1-44-01-TXT-02.aspx>.

17. See, e.g., *Sources of International Law*, NORTHWESTERN PRITZKER LEGAL RESEARCH CENTER, available at <https://www.law.northwestern.edu/library/research/international/gettingstarted/sourcesofintlaw/>.

18. Arthur Watts, *Heads of State*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010).

19. See Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE J. OF INT'L L. 467 (2013).

20. See generally LINDA S. FREY & MARSHA FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* (1999).

21. Drugs and weapons being smuggled are a particular concern in the modern era. *Id.* at 494–95. This is, of course, not to say that diplomatic immunity is never ignored. For example, the revolutionary government actively colluded in the 1979 raid on the American embassy in Tehran in which dozens of diplomatic staff were held for 444 days at gunpoint and mistreated by armed students and fundamentalists. *Id.* at 470, 515–19. Between civilized nations comity has long established a large deference for the acts of diplomats, but as Frey and Frey note many times the diplomat would become a hostage in a suddenly-hostile land. *Id.* at 83–84, 515–25. Julian Assange of WikiLeaks fame is currently holed up in the Ecuadorean embassy in London seeking asylum after attempts to extradite him to face foreign criminal investigation. John Hisock, *Julian Assange: My Life in the Embassy*, TELEGRAPH, Oct. 14, 2013, <http://www.telegraph.co.uk/news/worldnews/wikileaks/10376799/Julian-Assange-my-life-in-the-embassy.html>. When a UK spokesperson off-handedly suggested using a dusty law to essentially use force to enter the embassy, it provoked much hand-wringing and indignation

Internal state affairs are generally considered private and not subject to more than the lobbying and approbation of other states and foreign citizens.²² Domestic legislation, executive action, even extralegal abuses of power are rarely chastised with more than words in United Nations resolutions and diplomatic cables and communiqués. In the more extreme cases of international friction, consular relations may be severed, embassies shuttered, and direct lines of communication cut. But more than seventy years after the world stood by helplessly as Germany's Jews, Communists and political opposition, and other minorities like the Roma and the mentally ill were persecuted, robbed, beaten and murdered under color of law, state-sponsored violence remains. As IMT-Nuremberg prosecutor Telford Taylor described, "the dagger of the assassin was concealed beneath the robe of the jurist" and all too often the world did little more than watch and scold.²³

Jurisdiction for courts is historically based on the projection of political power within the sovereign borders of the nation (or locality, for state or local courts).²⁴ This is to say, a court's power to try individuals is based on the individual's activities and presence within the area in which the police powers of the state are enforceable.²⁵ This is the territoriality jurisdiction, upon which most criminal actions are based.²⁶ A court may also try to exercise jurisdiction where a citizen of the nation in which the court is based, where the victim was harmed outside of the borders of the nation (the so-called passive personality) or where the tortfeasor is a citizen (the nationality principle).²⁷

around the world. *Julian Assange Row: Embassy Entry 'Would be Suicide for UK'*, BBC NEWS (Aug. 21, 2012, 1:12 PM), <http://www.bbc.co.uk/news/uk-19328335>.

22. Since the Westphalian Peace began, generally, as will be discussed in the next section.

23. Ralf Beste et al., *From Dictatorship to Democracy: The Role Ex-Nazis Played in Early West Germany*, SPEIGEL ONLINE INT'L (Mar. 6, 2012 5:41 p.m.) <http://www.spiegel.de/international/germany/from-dictatorship-to-democracy-the-role-ex-nazis-played-in-early-west-germany-a-810207-4.html>.

24. See, e.g., Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). With this in mind, one might think of the evolution of head of state immunity as the story of the empowerment of judicial and legislative bodies and the diffusion of power in both national and international governance—and the outlier nations where more anachronistic (i.e. non-democratic) governments rule. It may also correlate with the rise of effective bureaucracies and reflect some light on the use of secret police forces and the professionalization—as well as the occasional political self-awareness—of militaries. See generally MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 141–43 (1999) (detailing the rise of the bureaucratic state after 1648 and noting that as bureaucrats grew more powerful and accountable power ebbed from the individual executive).

25. See *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002) (examining the various principles of extraterritorial jurisdiction).

26. Bernard Oxman, *Jurisdiction of States*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007).

27. *Id.* Jurisdiction has classically been a serious issue of contention. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 5 (Sept. 7) is a (relatively) early case examining jurisdiction vis-à-vis maritime law where two vessels collided in international waters. The Permanent Court of International Justice—the League of Nations predecessor to the ICJ—decided that so long as international law did not expressly prohibit it, nations could take whatever action they please. *Id.* at 86. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) suggests jurisdiction where conduct takes place wholly or in substantial part in a state's territory where persons or interests in things are present in its territory, where a substantial effect is had in said territory, as well as governing its nationals and their interests and activities abroad, and finally against alien citizens acting against that

Several national courts—based solely within the territorial jurisdiction of one country—have attempted to try leaders of other nations for activities that did not have any nexus to the country exercising jurisdiction. Universal jurisdiction, as it is called, is both a historical practice²⁸ and, today, a novel measure engendering controversy.²⁹

International courts, on the other hand, base their jurisdiction on the accession of state parties to the foundational treaties that create and govern the courts, and in other instances on the jurisdictional power—directly or indirectly—comes from a United Nations Security Council grant. Chapter VII, Article 48 requires all nations who are parties to the United Nations Charter³⁰—virtually every country in the world—to act in accordance with the Security Council’s binding resolutions.³¹ By mutual assent in the form of treaty ratification and participation these member states have bound themselves to various treaties: in particular, the international conventions and declarations such as *Universal Declaration of Human Rights*,³² the *International Covenant on Civil and Political*

state’s security interests (and “against a limited class of other state interests”). Section 403 of this Restatement suggests that any jurisdiction under § 402 must be reasonable. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

28. In the heyday of classical piracy (i.e. the 17th and 18th Centuries) it was a crime of universal jurisdiction. Few individuals chose to disrobe the protections of a social contract. Generally, it would be considered a punishment to be declared an outlaw, and thus outside any legal protections, but pirates on the high seas chose such a stateless lifestyle. For a skeptical view on the use of piracy as a historical precedent for modern instances of universal jurisdiction see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183 (2004).

29. For example, the Spanish judge Balthasar Garzón presided over an aggressive case against Chile’s former President, General Augusto Pinochet, for the manifold human rights abuses committed by his government in which tens of thousands of Chileans were murdered. Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 312 (2001). Under Spanish law any person responsible for international crimes of this magnitude could be tried regardless of their or their victims’ nationality—otherwise known as universal jurisdiction. Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2134 (1999). In Britain where Pinochet was first arrested the House of Lords was called to examine whether he could be lawfully extradited. They decided he could, based on the UK legislation ratifying the international United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Roht-Arriaza, *supra*, at 313–14. The Spanish appeals court then found the domestic (i.e. Chilean) amnesty law did not bind Spain. Roht-Arriaza, *supra*, at 313; see also James Paul Benoit, *The Evolution of Universal Jurisdiction over War Crimes*, 53 NAVAL L. REV. 259, 273 (2006).

30. The United Nations, through the resolutions—“binding” and non-binding—it passes, the actions of the Secretariat, and through the various agencies under its auspices, helps create a body of international law. Embodying both a record of state practices and being a general consensus on what customary international law is and should be, it offers significant guidance to its subsidiary bodies (e.g. tribunals). Of course, like the Security Council, the United Nations is often internally conflicted and made up of overlapping and opposing interest groups.

31. The Security Council consists of fifteen nations—the United States, Russia, China, the United Kingdom, France, and ten other rotating nations (generally made up of geographically-organized blocs). Amber Fitzgerald, *Security Council Reform: Creating A More Representative Body of the Entire U.N. Membership*, 12 PACE INT’L L. REV. 319, 330 (2000). The five permanent members—the victors of the Second World War—have been at loggerheads for most of the existence of the United Nations trading recriminations about human rights, state sovereignty and non-interference, and economic interests. Yet as this paper shows, occasionally the Security Council comes together to delegate the power to get something done, and this has sometimes been successful.

32. G.A. Res. 217 (III) A, U.N. Doc A/810 at 71 (Dec. 10, 1948).

Rights,³³ and international criminal law treaties like the *Convention on the Prevention and Punishment of the Crime of Genocide*,³⁴ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.³⁵ The International Criminal Court (ICC), established through international agreement—the Rome Statute—written and signed by representatives of acceding nations is granted jurisdiction for three crimes³⁶ (with elements and various attaching liabilities) to a permanent international court. This is in some ways similar to the longstanding International Court of Justice,³⁷ but as a penal body with a fixed mandate to try only individuals for the gravest of crimes (along with the barrier to trial in absentia). The ICC's rulings cannot be avoided (at least, by the defendant) once custody has been secured.³⁸ This last point raises what may seem like a pedantic observation—that a court's power to try individuals or hear controversies and award damages only extends as far as individuals heed its judgments³⁹—or insofar as force is available to turn words into action.⁴⁰

33. G.A. Res. 2200 (XXI) (A), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Dec. 16, 1966).

34. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. One hundred and forty-four nations are now party to the convention. A number, however, have lodged reservations to the treaty. The United States did not ratify the Convention until 1987 after 3000 speeches on the subject—one daily—by Senator William Proxmire of Wisconsin.

35. G.A. Res. 39/46 U.N. Doc. A/39/51 (Dec. 10, 1984). This Convention has, troublingly, only 154 parties. The United States made its reservations—many of which objected to the subsidiary Committee Against Torture—that the treaty was not self-executing (i.e. that it would require Congressional action and a signature from the President) and substituting various legal judgments and interpretations. Regardless, it has been enacted as federal law, with extraterritorial application. 18 U.S.C. § 2340A (2012).

36. The Court may currently prosecute individuals for crimes against humanity, genocide, and war crimes. See *Elements of Crimes*, INT'L CRIMINAL COURT (2011) available at <http://icc-pi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

37. The International Court of Justice (ICJ) has been a forum for states to adjudicate differences peacefully if not always effectively since the founding of the United Nations. The ICJ issues both binding and advisory opinions and are considered highly persuasive authority in international law, but like much in international law it is incumbent upon states to self-enforce.

38. This is different from an international civil tribunal like the ICJ which deals with abstract legal entities like states. As it happens, the majority of binding ICJ decisions have been complied with. See Andrea K. Bjorklund, *Compliance with Decisions of the International Court of Justice by Constanze Schulte*, 101 AM. J. INT'L L. 524, 528 (2007) (book review). The United States after an adverse decision in a case against it, *Military and Paramilitary Activities in and Against Nicaragua* (Nicar.v.U.S.), 1986 I.C.J. 14 (June 27), used its veto power at the Security Council to prevent its enforcement, setting a rather poor precedent for international law. See generally Heather L. Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice Since Nicaragua*, 12 CHI.-KENT J. INT'L & COMP. L. 57, 58 (2012). (describing *Nicaragua* as the “turning point” for states' compliance and reviewing several factors that influence a state's decision to comply).

39. In most modern countries systems exist to effect financial awards made by courts, and bureaucracies—and more lawyers—can assist in enforcing judgments.

40. In early times political systems that could not reliably muster men to meter out rough justice could merely withdraw the benefits of the social contract thus declaring the malefactor (or accused) an outlaw—someone literally outside the bounds of the law with no rights of property and to which harm could be done with no punishment. *The Outlaw in Medieval and Early Modern England*, U.K. NAT'L ARCHIVES (last visited on May 29, 2014), <http://www.nationalarchives.gov.uk/records/research-guides/outlawry.htm>. In times past—especially in the United States as a frontier country for much of its history—lawmen could raise a group of residents—ordinary folk—to enforce the law. See “*Posse Comitatus*,” 80 C.J.S. *Sheriffs and Constables* § 48 (2014).

Additionally, there is a difference between state immunity—the idea that a state, as a juridico-political entity, is privileged from answering for acts⁴¹ before the courts of another nation—and immunity for state officials. Though the two overlap somewhat in effect and historical underpinnings, the law of state responsibility is not yet fully developed.⁴² The ICC was designed to try individuals for very specific crimes, and does not adjudicate cases against national governments *qua* corporate entities. But in the end, natural persons (representatives, lawyers, and ultimately, individually in international criminal law, politicians and soldiers) must answer for their nations under international law.⁴³

II. THE POWER OF THE EXECUTIVE THROUGHOUT HISTORY

Throughout much of history, the very wellspring of political power—the monopoly on physically coercive power, and all of the means of securing compliance with laws and mandates—rested in the hands and the minds of particular individuals.⁴⁴ Societies have long vested their allegiance in royalty, emperors, generals, chiefs, and dictators. Occasionally groups of individuals have ruled, but the corruption and paranoia of power have tended to breed conflict between and among groups. Most often, executive power has been placed in the hands of an autocrat Elevated above his peers, by claimed divine mandate, heredity, brutality, charisma, or often wealth, a ruler, commanding armies and police forces (sometimes employing secret police forces not subject to legal restraints) often had the power over the life and death (not to mention property) of his subjects.

41. Courts have often delineated between official and unofficial acts. See FOX, *supra* note 11, at 478 (discussing immunity *rationae materiae* for acts performed in the course of official duties).

42. See INT'L LAW COMM'N, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS in REP. OF THE INT'L LAW COMM'N ON THE WORK OF ITS FIFTY-THIRD SESSION, UN GAOR 56th Sess., Supp. 10, UN Doc. A/56/10 (2001).

43. For this principle in action in a somewhat related context see *Ex parte Young*, 209 U.S. 123 (1908). Of course governments can and are often sued in their organizational/political capacity to varying degrees of success. See, e.g., *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010).

44. This paper will focus solely on the “modern” period of history as opposed to the ancient (i.e., pre-Medieval) period. Though much can be learned from this period, especially the examples of Greece and Rome which experimented in antiquity with forms of both democracy and dictatorship. For the sake of relevance to contemporary readers a detailed accounting begins in the so-called Middle Ages and the feudal system. For those interested in earlier nation-state practice, see generally VAN CREVELD, *supra* note 24 (detailing the rise and development of the Greek *polis* and the Roman Republic as well as the creation of state institutions and popular assemblies). While the history section of this paper purposefully neglects any more than a cursory discussion of the extraordinary events in Chinese history, the reader can be assured that China's long history of dynastic conflicts, achieving centuries of fascinating bureaucratic, literary, and scientific discoveries through much blood spilled is fairly consonant with the analysis in the paper. See generally JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* (1990) (examining the development of the modern Chinese state by tracing its history through the Ming and Qing dynasties, the Chinese Revolution, and into the 20th Century). Theda Skocpol also examines the revolutionary transitions in China and Russia, and although Russia has transitioned toward democracy, unlike the People's Republic of China today, both struggle with long historical authoritarian tendencies. THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS ON FRANCE, RUSSIA, AND CHINA* (1979) (noting that the Russian and Chinese Revolutions led to party-centered state organizations that took control of the national economies which influenced how the states developed).

As was mentioned previously, modern international law has its roots in state practice—what countries have done throughout history creating the foundation for customary norms and *jus cogens*.⁴⁵ Thus, any examination of an international law doctrine must rest on a comprehensive evolutionary understanding of law and power in and between societies. This Note begins its examination of the development of legal practices surrounding heads-of-state in the early Middle Ages—arguably the first point in history where a monarch’s royal absolutism was constrained by law.

A. *The Middle Ages*

Though the monarch’s power over the life, death, and wealth of his subjects existed for many centuries, it gradually ebbed as the aristocracy tried to empower itself and establish its own political influence presaging the eventual forms of democratization. In 1215, rebellious English nobles entered the city of London, refusing to accede to King John’s entreaties.⁴⁶ Fed up by the taxes brought on by the loss of the Duchy of Normandy, the nobles demanded certain legal privileges and immunities.⁴⁷ Not until the Magna Carta was imprinted with the Great Seal of King John, signifying his acceptance, did the barons pledge fealty to him anew.⁴⁸ And though King John repudiated his acceptance of the Magna Carta—if his acceptance was ever genuine, a proposition much in doubt⁴⁹—this document became the foundation for future iterations, which would be accepted by future kings to greater extents. The Magna Carta remains a watershed document in the development of law even despite the realities of its birth.⁵⁰ The effect of the law—which remains on the books in the United Kingdom—took centuries to fully take root.⁵¹

45. See, e.g., I.C.J. Statute, June 6, 1945, 59 Stat. 1055, 1060 U.S.T.S. 933 (“The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . (b) international custom, as evidence of a general practice accepted as law.”).

46. Throughout this essay England remains a somewhat unique historical example and not only because of its *sui generis* culture vis-à-vis continental Europe (in part due to geography and to a greater extent, as history progressed, due to its common law heritage—both in form and content). An early example of innovative British thinking is the Domesday book which was commissioned in 1085 by King William the Conqueror. The book, relying on a prototypical government bureaucracy, was both a census and long-standing registry of land-ownership. See *Discover Domesday*, U.K. NAT’L ARCHIVES, <http://www.nationalarchives.gov.uk/domesday/discover-domesday/> (last visited May 29, 2014).

47. Mike Ibeji, *King John and the Magna Carta*, BBC HISTORY (last updated Feb. 17, 2011), available at http://www.bbc.co.uk/history/british/middle_ages/magna_01.shtml.

48. See *id.*

49. See, e.g., V.H. Galbraith, Penrose Memorial Lecture: Runnymede Revisited (Oct. 27, 1966), in 110 PROCEEDINGS OF THE AM. PHIL. SOC’Y 5, 307 (1966).

50. For an early skeptical view of the Magna Carta as a foundational document for political liberty generally—but examining its effects on the noble man for whom it was intended, see Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060 (1947). Radin writes of its effect by the sixteenth century, however

[w]hen lawyers raised the issue of a Charter-prohibition against the king in the cases of Empson and Dudley and Wolsey, the violation of the Charter was imputed to the king’s minister although the act was clearly and undeniably the king’s. But in 1587, in *Cavendish’s case*, at a time when

This is emblematic of the Middle Ages, when a three-way⁵² power struggle took place between the monarchies, the churches (both the Catholic church centered in Rome and local churches and places of ecclesiastical endeavor) and the nobility.⁵³ Ecclesiastical power declined slowly in the years before the Protestant Reformation in 1517. But two hundred years earlier, the phrase *rex in regno suo imperator est* (“the king is emperor in his own realm”) was coined by a lawyer in the court of the French king Phillip IV demonstrating the resolve of monarchs to wrest political power from religious authorities.⁵⁴

Warfare in the medieval era was largely characterized by armies of knights and peasants who would, trudge to locations without any sort of supply train when combat called; logistics were dictated by the resources that could be located and taken from wherever the army was at the time.⁵⁵ Victory came for foot soldiers in two ways: survival and by being lucky in his plundering.⁵⁶ Sieges were decisive and could be negotiated for the safety of the occupants and the lives of the besieged forces with of course sizable payments to the occupiers.⁵⁷ Where the besieged took the hard route by resisting the siege would become a grim stalemate, and if the area under attack fell—from starvation, disease, and military efforts such as employing siege engines⁵⁸—as they often did, the results would be

Elizabeth was at the very summit of her power and popularity, the judges of the Queen's Bench reminded her directly and repetitively that the Charter limited her power.

Id. at 1077; see also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268–73 (1989) (examining civil and criminal penalties in historical England).

51. Of course, this is the long view. In the short run Martin van Creveld notes that in the 15th Century the English monarchy suppressed revolt in part thanks to the dreaded Star Chamber and associated non-common law courts which were used to punish nobles for both real torts and crimes and as well sometimes as a façade for political punishments. VAN CREVELD, *supra* note 24, at 91; see also *Faretta v. California*, 422 U.S. 806, 821, 95 (1975); *United States v. Gecas*, 120 F.3d 1419, 1446 (11th Cir. 1997); Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 809 (2002) (reviewing the U.S. Supreme Court's invocation of the Star Chamber in various opinions to develop its self-incrimination jurisprudence).

52. Martin van Creveld also notes the towns as a fourth contender for power. Themselves corporate bodies of urban dwellers who rose—socioeconomically—above the peasantry if not as far as the noble estate owners towns would seek special privileges (e.g. against taxes and levies) and attempted to govern their own affairs including often organizing militias. VAN CREVELD, *supra* note 24, at 104.

53. *Id.* at 87–103. The nobility as van Creveld discusses was a varying class of individuals by both time and location. It could be made up of those who soldiered and found themselves favored, wealthy merchants who could afford to buy their way up the social ladder, or those who were merely born into an aristocratic caste of landowners.

54. *Id.* at 76.

55. GEOFF MORTIMER, *EYEWITNESS ACCOUNTS OF THE THIRTY YEARS WAR 1618–48*, at 55–58 (2002).

56. *Id.*

57. Sean McGlynn, *The Myths of Medieval Warfare*, 44 HIST.TODAY 28, 30 (1994).

58. Although the use of rudimentary biological warfare dates back to ancient times the medieval era brought the flinging of bodies over walls to a new importance. In fact, biological warfare brought the Black Death—generally considered to be *Yersinia pestis* or the bubonic plague—to the doorstep of Europe and beyond in 1346 when infected bodies were sent over the rampart walls by a retreating Muslim army that had been besieging Caffa in Crimea. This was not uncommon practice in the Middle Ages, and besides bodies manure and dead animals were also catapulted. See Mark Wheelis, *Biological Warfare at the 1346 Siege of Caffa*, EMERGING INFECTIOUS DISEASES (September 2002), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2732530/pdf/01-0536_FinalHR.pdf.

generally horrific for the weakened masses found inside.⁵⁹ The slaughter of opposing forces and those who had been under their protection was virtually assured at this point, unless the individual soldiers or civilians were wealthy enough to be able to buy their lives.⁶⁰ Pillage was a fully sanctioned right of conquering forces, and one attended to with zeal usually for valuables but often too for food.⁶¹ Even for civilians under the effective protection of an army the practice of billeting (the quartering of soldiers in homes) brought hardship.⁶²

To a greater or lesser extent, a civilian could expect no quarter to be given in the case of a hostile occupation. That said, within Christian nations a concept of harm mitigation arose through the chivalric codes, a loose canon of do's and do-not's for the medieval knight.⁶³ The realities of chivalric codes, and in particular, their narrow scope of application in combat and in the use of force⁶⁴ must not be ignored—but as a matter of establishing basic rules of engagement, their early presence is notable.

At this point, it is worthwhile to digress from the discussion of personal sovereign immunity to examine a fascinating and portentous historical anecdote. In 1474 an astonishing and unprecedented tribunal took place, perhaps the first international criminal tribunal in history.⁶⁵ Peter von Hagenbach, a member of the nobility placed in charge of the governance of Burgundy in France, was tried for murder, rape, and perjury.⁶⁶ He was, as he pled, merely following the orders of Charles the Bold Duke of Burgundy⁶⁷ in administering Breisach—but his rule had “trampled under foot the laws of God and man,” in the words of the prosecutor, Heinrich Iselin.⁶⁸ Hagenbach, whose military prowess and command of German and French gave him chances for advancement throughout

59. See generally MORTIMER, *supra* note 55.

60. *Id.*

61. *Id.*

62. Much of this section is drawn from *id.* at 55–58 (2002). Billeting, of course, was a long-standing practice of the era. Its unpopularity is reflected in the now-anachronistic Third Amendment to the U.S. Constitution, which prescribes that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

63. René Moelker & Gerhard Kümmel, *Chivalry and Codes of Conduct: Can the Virtue of Chivalry Epitomize Guidelines for Interpersonal Conduct?*, 6 J. OF MIL. ETHICS 292, 292 (2007).

64. *Id.*

65. Gregory S. Gordon, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law*, 1 (Feb. 16, 2012) available at <http://ssrn.com/abstract=2006370>.

66. *Id.* at 1, 31.

67. Charles the Bold, cousin—and competitor—of King Louis XI of the House of Valois was himself no stranger to bloodshed earning the alternative cognomen of “the Terrible” for massacres committed in his conquests. Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT’L REV. RED CROSS 531 (1999). Charles came into control of the land from Archduke Sigmund through a complicated mortgage contract in which he paid for control of the land according to a contract which had an option for redemption (which Charles endeavored to prevent). RICHARD VAUGHN, CHARLES THE BOLD: THE LAST VALOIS DUKE OF BURGUNDY 88 (2002).

68. Many of these details were drawn from Gregory Gordon. Gordon, *supra* note 65, at 31; see also Edoardo Greppi, *supra* note 67. Gordon notes that, in fact, there is a dispute in historical sources about whether Iselin did in fact say this, just as sources differ somewhat on the actual acts committed by Hagenbach (and his moral culpability for them). *Id.* at 43.

his life, put the will of the townspeople to the test when they rebelled against his heavy taxation of wine (in particular) along with his mistreatment of Swiss merchants (among others) traveling through the land.⁶⁹ Eventually the region grew sick of such indignities, and the mortgage was redeemed with Swiss funds.⁷⁰ With control of the region bought back from Charles the Bold (who, himself engrossed in military affairs, demurred to a request to send troops in support), an army rose to depose Hagenbach, who fled to the walled City of Breisach.⁷¹ The insurrection began on Easter Sunday April 10, 1474, and the figurative noose was drawn around his head as the very real executioner's blade was not far behind.⁷²

By this point, Hagenbach's situation was clearly untenable, and his mercenary force abandoned him.⁷³ Captured by the League of Constance; a coalition of free and imperial cities, the Swiss Confederacy, and Austria; he was within days tortured—perhaps on the rack—and most likely suspended by his hands tied behind his back (*strappado*). Upon such pains⁷⁴—and importantly while not being tortured (with of course the threat of further torture)⁷⁵—he admitted to the charges which included: the beheading of four residents of Thann, raping a number of women (including nuns), perjury by way of violating the laws which he swore to uphold, and conspiring to commit the expulsion and murder of the residents of Breisach.⁷⁶ For the first time in recorded history an international (Burgundian, Austrian and Swiss) *ad hoc* tribunal—twenty-eight members in all, including sixteen knights as justices—was assembled.⁷⁷ His tribunal was held on May 9, 1474; as he was a noble those in power saw fit to grant an open hearing.⁷⁸ Hagenbach repeatedly and forcefully asserted both jurisdictional defenses (stating that he could not be judged by such a tribunal but only by Charles, his lord).⁷⁹ Alternatively he offered affirmative defenses including that he was following orders⁸⁰ such that necessity of governance required a firm hand and ruthless fist

69. *Id.* at 32. Gordon points out that contemporary chroniclers of Hagenbach depicted him as a bloodthirsty local tyrant in a mix of both rumor and fact, whereas others—reflecting on his rule without having had to suffer it, while also without having been written for a political purpose—noted his improvements of roads and safety thereon though apparently stories of his depraved sexual appetite, noted in several varied sources may be true. Regardless, there is a general understanding that he was at best quite aggressive in administering affairs, and that his reign was generally brutish.

70. *Id.* at 28.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 29. Sources indicated that Hagenbach was tortured badly enough to have been transported by wheelbarrow from prison.

75. *Id.* For more on the practices of torture in medieval criminal inquiries and the Inquisition, see JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT RÉGIME* (1977).

76. Gordon, *supra* note 65, at 31–32.

77. *Id.* at 48.

78. Gordon notes that the trial, held literally in the open air in front of the mayor's residence, was hugely popular and many traveled to see it. *Id.* at 30–31.

79. *Id.* at 32.

80. Likely the first such time this defense was asserted. *Id.*

(and on the rape charges that both parties were equally guilty and a defense of consent).⁸¹ Though the judges adjourned to consider such protestations, all were rejected, and a resigned Hagenbach accepted his fate.⁸²

The Hagenbach trial represents what is probably the first substantial application of legal principles for an international crime as well as acts as a bellwether for the aura of invulnerability of the nobility.⁸³ Hundreds of years before the Enlightenment this lurid tale shines faintly like a light on the horizon of a long, dark period in Europe. In a time of seemingly casual violence by those in power against the laboring classes who toiled in conditions similar to slavery the convening of a tribunal to judge a noble is momentous and prefigures the decline of immunity over the next several centuries, though the idea of human rights remained several centuries away.

B. *Cracks in the Wall: The Early Modern Period*

The seed of the modern concept of the nation-state is founded in the Treaty of Münster,⁸⁴ the Peace of Münster, and the Treaty of Osnabrück⁸⁵ in 1648, which ushered in the period known as the Westphalian Peace.⁸⁶ Before then the brutal Thirty Years' War waxed and waned throughout Europe— particularly, in what is now Germany.⁸⁷ The Thirty Years' War arose in proximate cause from religious conflicts between Protestants and Catholics, but in many ways these were mere proxies for the struggles for power, land, and wealth throughout Europe's many states and quasi-states at the time.⁸⁸ The bilateral treaties that ended the long-simmering disputes were negotiated by Cardinal Jules Marazion of

81. *Id.* at 32–33.

82. “Another [herald of the court] . . . with a glove of mail, struck him a blow upon the right cheek.” The convict pled to the judges to “[h]ave pity . . . and execute me with the sword!”; the judges, evidently moved, so decided. *Id.* at 35 (quoting JOHN FOSTER KIRK, HISTORY OF CHARLES THE BOLD, DUKE OF BURGUNDY 499 (1864)).

83. *See id.* at 6–7 (citing M. Cherif Bassouni, Jules Deschênes, Michael Scharf and William Schabas).

84. This honor was bestowed on the representative from Colmar in Alsace described as “a ‘short man with a short sword.’” *Id.* at 35.

85. Peace Treaties of Westphalia, October 14/24, 1648, GHDI, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3778.

86. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569 (1999) (noting that though a multipolar system of sovereignty may not have been the goal of the negotiations it was the effect). Interestingly, in 1598 Maximilien de Béthune, Duke of Sully, proposed to King Henry IV of France—a competitor to the Holy Roman Empire—a bold plan for the creation of a new Europe of fifteen equal states, divided along natural geographic lines, and incorporating an international congress, army, and navy—down to specifics of 117 warships and 220,000 infantry, for example. Nothing came of this proposal. VAN CREVELD, *supra* note 24, at 85.

87. As Gregory Gordon notes, Europe at the time contained “lordships, principalities, cantons, grand duchies, prince-bishoprics, federations, abbeys, petty lordships, countships, fiefdoms, margraviates, and city-states” in addition to the kingdoms and the Holy Roman Empire's territories. *See supra* note 65 at 12.

88. *See generally* Peter H. Wilson, *The Causes of the Thirty Years War 1618–48*, 123 ENGLISH HIST. REV. 554 (2008), available at <http://ehr.oxfordjournals.org/content/CXXIII/502/554.abstract>.

France, representatives of Christina the Queen of Sweden, those of King Philip IV of Spain, a delegation from the breakaway Republic of the Seven United Netherlands, representatives from a number of the Imperial States of the Holy Roman Empire, those of several other large proto-states, and representatives of the Old Swiss Confederacy.⁸⁹ Though Pope Innocent X sent a legate to represent him, the envoy—most likely with support from above—refused to speak with Protestants during negotiations considering them heretics.⁹⁰ Effectively cut out of the treaties, Pope Innocent X declared the Peace of Westphalia “null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, empty of meaning and effect for all time.”⁹¹

One important facet of the Westphalian Peace was the inviolability of national borders. Though generally leaders would refrain from treading upon the land of one another without invitation, the right of a leader to chose the canon and lay legal policies without interference from another was finally accepted as the official practice.⁹² The treaty fixed Europe in a prototypical configuration of borders.

Following the Westphalian Peace the age of monarchies drew to a close. Merely one year after the end of the Thirty Years’ War, the English—in particular, the landed gentry—took the first step in holding a national leader accountable for grave crimes. King Charles I of England was the first head of state held to account for his policies, though it remains debatable whether or not the trial was merely a kangaroo court to wrest power from the king and to vest it in Parliament. After several expensive wars against Ireland and Scotland in the early half of the 17th Century, King Charles I attempted to have members of Parliament arrested after the Parliament voted against further military spending.⁹³ This so incensed the Parliament, and the aristocracy in general, that the king himself had to flee London marking the beginning of the English Civil War.⁹⁴ When the Roundheads—parliamentarians and those otherwise opposed to the return of the king—defeated the Cavaliers—their royalist counterparts—the king was captured, and placed before a trial in January 1649, charging that:

Whereas it is notorious that Charles Stuart, the now King of England, not content with the many encroachments which his predecessors had made upon the people in their rights and freedom, hath had a wicked design totally to subvert the ancient and fundamental laws and liberties of this nation, and in their place to intro-

89. See VAN CREVELD, *supra* note 24, at 86. See also Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. OF INT’L L. 20 (1948).

90. WILLIAMSON MURRAY & JIM LACEY, *THE MAKING OF PEACE: RULERS, STATES, AND THE AFTERMATH OF WAR 72–73* (2009).

91. The Papal Bull *Zelo Domus Dei* (Nov. 20, 1648) as quoted in VAN CREVELD, *supra* note 24, at 87. The treaties did not mention God. *Id.* at 86.

92. See Gross, *supra* note 89.

93. CHARLES ANTHONY SMITH, *THE RISE AND FALL OF WAR CRIMES TRIALS: FROM CHARLES I TO BUSH II* at 30–31 (2012).

94. *Id.*

duce an arbitrary and tyrannical government, and that besides all other evil ways and means to bring his design to pass, he hath prosecuted it with fire and sword, levied and maintained a civil war in the land, against the Parliament and kingdom; whereby this country hath been miserably wasted, the public treasure exhausted, trade decayed, thousands of people murdered, and infinite other mischiefs committed . . .⁹⁵

With the House of Commons⁹⁶ as his sole trier of law and fact it was a short walk to the chopping block for Charles I.⁹⁷ Though monarchy would be reestablished in 1661,⁹⁸ the aura of inviolability and divinity would not be.

A century later the seeds of revolution were planted in the British colonies of North America by a people few of whom had ever laid eyes upon King George III, the city of London, nore even the British Isles.⁹⁹ The colonists began to chafe under the cross-Atlantic rule of the king and Parliament.¹⁰⁰ By the 1770's these men inspired by Enlightenment ideals and natural law doctrines, the American revolution—in the name of equality and liberty, and that governments exist to protect the rights of man and should be altered and abolished when need calls for it—would sever the political bonds that connected them to king and country and institute for themselves a tripartite republican democracy.¹⁰¹ The Constitution itself clearly prescribes procedures for the impeachment of the President for “high Crimes and Misdemeanors,” as the famous locution goes.¹⁰²

This idea both of virulent and provocative natural human rights soon spread throughout France through secret and public discussions and through pamphlets for the literate. Ironically, it was in no small part thanks to the deep debt¹⁰³ that King Louis XVI of the Bourbon Dynasty

95. *The Act Erecting a High Court of Justice for the King's Trial*, (1649), in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660 (Samuel Rawson Gardiner, ed., 1906), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1434&chapter=194362&layout=html&Itemid=27.

96. Perhaps three-quarters of which was estate-owning nobility, but much of the impetus and financial support came from townspeople. VAN CREVELD, *supra* note 24, at 107.

97. SMITH, *supra* note 93, at 33, 38–39.

98. Ronald Hutton, *Charles II: The Masquerading Monarch*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/british/civil_war_revolution/charlesii_masq_01.shtml.

99. See generally CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES (1968).

100. See the Declaration of Independence U.S. (1776), http://www.archives.gov/exhibits/charters/declaration_transcript.html.

101. Of course, early American history is replete with genocide against Native Americans in the name of “manifest destiny” along with the “peculiar institution” of slavery, and their legacies are ones of continuing, if lesser, injustices today. See, e.g., Brendan Rensink, *Genocide of Native Americans: Historical Facts and Historiographic Debates*, Dissertations, Theses, & Student Research, Dep't of History, University of Nebraska Lincoln (2011), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=historydiss>; Gerald A. Foster, *American Slavery: The Complete Story*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 401, 406 (2004).

102. U.S. CONST., art. II, § 4. As will be discussed in the conclusion, however, high deference is paid to the President, and a culture of immunity has developed. See *infra* Part V.

103. SKOCPOL, *supra* note 44, at 60–63.

accumulated in supporting the U.S. insurgency against the British crown.¹⁰⁴ When the king moved to institute new taxes the nobles rebelled and a fever rose among the urban-dwelling bourgeoisie spreading to the peasantry straining under centuries of feudalism.¹⁰⁵ As the king tried to maneuver politically around the constituent assemblies a mob of Parisians stormed the Bastille fortress intent on seizing the munitions.¹⁰⁶ The fortress was eventually taken and sporadic violence gripped France for weeks.¹⁰⁷ At the end of August the national assembly published the *Déclaration des droits de l'homme et du citoyen* enshrining the putative human rights of all into an official document,¹⁰⁸ one imbued with the revolutionary fervor of the oppressed. The King was stripped of his political power, and though it would be several years before he was brought before the guillotine—accused of trying to raise a military coalition supplied by other European monarchs when he was found dressed in his servant's clothes, attempting to escape¹⁰⁹—his fate was hardly surprising and was a long time coming.¹¹⁰

Eventually in France the reign of terror that followed the revolution destroyed what little unity the different factions of revolutionaries had before the country was plagued by constant and chaotic violence.¹¹¹ Severely aggravating the situation, the surviving revolutionary leaders (not to mention, of course, the ordinary French people) had to fend off invasions in the War of the First Coalition and the War of the Second Coalition, in which the imperial powers of Europe sought to restore the king.¹¹² The successes of Napoléon Bonaparte early military campaigns through the shrewd use of artillery and ambitious tactics elevated his stature and after his defense of the National Convention from rebelling royalists with shrewd use of artillery his clout accumulated steadily until he seized power.¹¹³ Upon returning to France—aware of its defeats in the War of the Second Coalition—Napoléon shrewdly placed himself at the spearpoint of a *coup* against the then-ruling *Directoire exécutif*.¹¹⁴ As the 1910

104. *Id.* See also SIMON SCHAMA, *CITIZEN: A CHRONICLE OF THE FRENCH REVOLUTION* (1989); ALEXIS DE TOQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* (trans. Stuart Gilbert 1958) (1856).

105. SCHAMA, *supra* note 104.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 551.

110. *Id.* at 668.

111. Indeed, as Schama notes, “The violence did not stop, however, with the Terror. . . . Corpses were dumped in front of cafés and inns in the Midi or thrown into the Rhone or Saône. . . . Considerable areas of the country. . . remained in a virtual state of civil war, though the violence now proceeded in a haphazard, hit-and-run fashion rather than by organized insurrection. *Id.* at 852–853.

112. See generally LOUIS BERGERON, *FRANCE UNDER NAPOLEON* (R. R. Palmer trans. 1981) (1922). See also GEORGES LEFEBVRE, *NAPOLEON FROM 18 BRUMAIRE TO TILSIT 1799–1807* (Henry F. Stockhold trans. 1969) (1965). The Holy Roman Emperor of the time, Leopold II, was Marie Antoinette’s brother, not that the feudal powers of Old Europe did not have sufficient reason to fear the revolutionary fervor.

113. See generally ROBERT ASPREY, *THE RISE OF NAPOLEON BONAPARTE* (2000).

114. Commonly known in English as “the Directory,” it was a ruling council of five surviving revolutionary leaders.

Encyclopedia Britannica stated, “A shabby compound of brute force and imposture, the 18th Brumaire¹¹⁵ was nevertheless condoned, nay applauded, by the French nation. Weary of revolution, men sought no more than to be wisely and firmly governed.”¹¹⁶ Napoléon had himself crowned Emperor in 1804.¹¹⁷ By then, however, the British had declared war on France, and with Germany, Austria, and Russia formed the Third Coalition against Napoléon’s France.¹¹⁸ After the Battle of Austerlitz the Third Coalition was defeated and the Holy Roman Empire dissolved.¹¹⁹ Against Prussia and Russia, the Fourth Coalition, victory was had for France at Jena-Auerstadt¹²⁰ and a difficult war in Portugal engaged France’s attention in 1807.¹²¹ A Fifth Coalition was defeated, and Napoléon, ignoring the sound advice of his generals, invaded Russia.¹²² After a pitched battle at Borodino the French found themselves in control of a decimated Moscow.¹²³ Russia had in preparation for French invasion practiced scorched earth tactics on their own land leaving French troops in dire need of sustenance and shelter.¹²⁴ After a month, Napoléon ordered a retreat, and in the disastrous return during the Russian winter tens of thousands lost their lives. In all, over ninety percent of Napoléon’s 400,000-plus *Grande Armée* died in the expedition.¹²⁵ In 1812 the War of the Sixth Coalition—Austria, Prussia, Russia, Great Britain, Portugal, Sweden, and Spain—was launched against France, and eventually after Napoléon ordered his generals to march on an occupied Paris the army mutinied.¹²⁶ The Treaty of Fontainebleau exiled Napoléon on the Isle of Elba, a tiny island off Italy.¹²⁷ After escaping

115. November 9, 1799 for those not familiar with the utterly perplexing French Republican Calendar inspired by the decimalization of time.

116. *French Revolution*, in 11–12 THE ENCYCLOPEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES 168 (11th ed. 1910).

117. ALAN SCHOM, NAPOLEON BONAPARTE 333 (1997).

118. For analysis of the coalitions which took arms against France during this time, see Daniel Whiteneck, *Long-Term Bandwagoning and Short-Term Balancing: The Lessons of Coalition Behavior from 1792 to 1815*, 27 REV. OF INT’L STUDIES 151 (2001).

119. Peter H. Wilson, *Bolstering the Prestige of the Habsburgs: The End of the Holy Roman Empire in 1806*, 28 INT’L HIST. REV. 709 (2006).

120. *Battle of Jena*, in ENCYCLOPEDIA BRITANNICA (Last updated July 25, 2013), available at <http://www.britannica.com/EBchecked/topic/302522/Battle-of-Jena>.

121. LEFEBRVE, *supra* note 112, at 257.

122. SCHOM, *supra* note 117, at 595.

123. *Id.* at 628.

124. Contemporary sources differ on the nature of the combat and its brutality, but it is clear that despite at least French law against war crimes the Napoleonic wars were savage. Philip G. Dwyer, *‘It Still Makes Me Shudder’: Memories of Massacres and Atrocities During the Revolutionary and Napoleonic Wars*, 16 WAR IN HIST. 381, 381–85 (2009). Looting, rape, and murder were common-place. *Id.* at 385. Accounts of atrocities—mutilations and torture in particular—against French soldiers only stoked the fans of war for the French. Napoléon himself ordered rebellious villages destroyed. *Id.* at 387–88. Still Dwyer concludes, “[t]here was nothing exceptional in the viciousness” of these wars, relative to their time. *Id.* at 404.

125. For an early and innovative information graphic mapping Napoleon’s troops along his advance and retreat mapped against the temperature see Charles Joseph Minard, *Carte Figurative des pertes successives en hommes de l’armée française dans la campagne de Russie 1812-1813* (flow map, 1869), available at <http://upload.wikimedia.org/wikipedia/commons/2/29/Minard.png>.

126. SCHOM, *supra* note 117, at 694.

127. *Id.* at 700.

from Elba Napoléon returned to Paris and ruled for a short time before he was again defeated militarily and exiled to Saint Helena off the coast of Africa where would spend the rest of his life.¹²⁸ This final epoch of the French Revolution heralding the short-lived Bourbon Restoration¹²⁹ was a remarkable episode of international cooperation, morally ambiguous as it was and is, in which major European powers (and Russia) came together repeatedly both, militarily and politically, finally at the Congress of Vienna in 1815 after Napoléon's dramatic return to France.¹³⁰ After over a decade of violent combat with millions of casualties¹³¹ once Napoléon surrendered—unconditionally—the international coalition saw fit to give him exile for a second time.¹³²

The 19th Century saw the rise and spread of another revolutionary idea—an idea that saw feudalism and its attendant cruelties as a necessary step on the road to the emancipation of all peoples who are oppressed.¹³³ Marxism and communism saw capitalism not as the cure to feudalism—though it would undo the restraints which shackled serfs to their land and men to masters, generally—but as the next stage of human development, one that realigned mankind's economic prowess and mobilized resources as never before seen.¹³⁴ Reflecting on the French Revolution, Marx wrote

The centralized state power, with its ubiquitous organs of standing army, police, bureaucracy, clergy, and judicature—organs wrought after the plan of a systematic and hierarchic division of labor—originates from the days of absolute monarchy, serving nascent bourgeois society as a mighty weapon in its struggle against feudalism. Still, its development remained clogged by all manner of medieval rubbish, seignorial rights, local privileges, municipal and guild monopolies, and provincial constitutions. The gigantic broom of the French Revolution of the eighteenth century swept away all these relics of bygone times, thus clearing simultaneously the social soil of its last hindrances to the superstructure of the modern state edifice raised under the First Empire, itself the offspring of the coalition wars of old semi-feudal Europe against modern France.¹³⁵

128. Anthony Mancini, *St. Helena, 'Cursed Rock' of Napoleon's Exile*, N.Y. TIMES (Mar. 29, 2012), <http://www.nytimes.com/2012/04/01/travel/st-helena-cursed-rock-of-napoleons-exile.html>.

129. Itself followed by the rule of Napoléon Bonaparte's nephew, Louis Napoléon, in the Second French Empire in 1852.

130. The Congress declared Napoléon an outlaw upon hearing of his escape. They also molded the future political shapes of Europe's states. *Timeline: The Congress of Vienna, the Hundred Days, and Napoleon's Exile on St. Helena*, BROWN U. LIB. CENTER FOR DIGITAL SCHOLARSHIP, <http://library.brown.edu/cds/napoleon/time7.html> (last visited June 1, 2014).

131. Matthew White, *Statistics of Wars, Oppressions and Atrocities of the Nineteenth Century*, NECROMETRICS, <http://necrometrics.com/wars19c.htm#Napoleonic> (last visited June 1, 2014).

132. The second time, however, was far less hospitable. H. A. L. Fisher, *The Legacy of Napoleon*, 22 NEW ENG. REV. 186, 186–89 (2001).

133. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (Samuel Moore trans. 1888) (1848).

134. *Id.*

135. *Id.* at 58.

The anticipated output and goal of capitalism is profit—something that can theoretically be generated by the work of any man (though, of course, the politically and socially advantage, not to mention the already wealthy have enormous headway in most economic systems, including capitalism). With its advent in modern society the barriers erected around the upper class began to crack and socioeconomic mobility—and upheaval—began in earnest. Slowly improving social consciousness led to the recognition and antagonism of class conflict. All of this occurred at the same time as the “scramble for Africa” and the prying open of China that would lead to the Boxer Rebellion in 1898.¹³⁶ The fruits of colonial expansion spoiled by the end of the 19th Century.

In the United States, the American Civil War raged across much of the colonized continent. Though President Abraham Lincoln was unremitting in his attempt to disarm and defeat the Confederate states, on his orders a code of combat was drawn up and instituted—the Lieber Code.¹³⁷ The Code, one of the most influential professional codes of conduct for soldiers,¹³⁸ made several noteworthy advances such as prohibiting the destruction of great works of culture,¹³⁹ prohibiting acts that are crimes (rape, murder, and arson for example), along with prohibiting use of poisons, and prescribing procedures for Prisoners of War.¹⁴⁰ Of course, at the same time the Lieber Code promoted the principle that “[t]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”¹⁴¹ To that end the Code allowed declaring no quarter—that no prisoners shall be taken—when a commander determined taking prisoners would be too burdensome.¹⁴² Legal peculiarities of the time aside—and there are many—the Lieber Code was quite influential internationally with much of its content appearing in later treaties.¹⁴³ Two years later Union General Tecumseh Sherman’s *march to the sea*—the taking of Atlanta and push eastward toward the Atlantic—

136. SKOCPOL, *supra* note 44, at 76–77; *see also* SPENCE, *supra* note 44, at 141.

137. Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field* (Lieber Code) 24 April 1883, available at <http://www.icrc.org/ihl.nsf/FULL/110>. Francis Lieber was born in Germany and had soldiered in several conflicts before seeking political asylum, first in Britain and then in the United States. Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 229 n.32 (1998). Three of his sons fought in the American Civil War: two for the north and one for the south. Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 270 (1998). The Confederate son was killed in combat. *Id.*

138. The professionalization of military forces is a side-story in this historical analysis arising less from altruistic impulses by those in command (in response to, e.g., rape and pillage) but in the pursuit of creating a more able army. The process began in earnest with Oliver Cromwell’s New Model Army, after the trial and execution of Charles I, *see* SMITH, *supra* note 97, and became more common after the Napoleonic era. *See generally* MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 79 (1991). The professionalization of police forces—and proliferation of secret polices—is another manifestation of the growth of the Leviathan.

139. But allowing the appropriation of moveable works at least temporarily.

140. Lieber, *supra* note 137, arts. 16 & 49.

141. *Id.* at art. 29.

142. *Id.* at art. 60.

143. Doty, *supra* note 137, at 230–31. Doty likens the Lieber Code to the roots of a tree as opposed to an earlier “quarry” from which law of war was mined metaphor. *Id.* at 230.

augured the coming of “total war,” as soldiers lived off the land and its inhabitants¹⁴⁴ while burning warehouses and barns and pillaging abandoned houses.¹⁴⁵ A favored tactic was making *Sherman’s neckties*: cutting, heating, and bending railroad tracks.¹⁴⁶

Several savage wars of that century, meanwhile, planted seeds of a new world. Henry Dunant, a Swiss citizen happened to observe the Battle of Solferino in 1859 between Napoleon III, nephew of Napoleon Bonaparte and emperor of the Second French Republic, and Emperor Franz Joseph I of Austria.¹⁴⁷ Dunant saw the thousands of wounded soldiers left in agony after the battle with little to do but to get up and walk away from the battlefield or to die if not.¹⁴⁸ His experience led him to write of this horror¹⁴⁹ and in time to found the International Committee of the Red Cross (ICRC), which was dedicated to universal and neutral assistance to all who fight in combat and to those who do not but become victims.¹⁵⁰ The ICRC would eventually be instrumental in the creation of the Geneva Conventions which would for the first time in history create internationally-binding agreements on the methods and means of warfare, as well as laws to restrict the savageries of mankind’s worst impulses which for millennia had been unrestrained and unrelenting. The Convention for the Amelioration of the Condition of the Wounded in Armies in the Field¹⁵¹ was codified in 1864 and revised in 1906 and 1929; the next, the Convention Relative to the Treatment of Prisoners of War,¹⁵² in 1929. Several international conferences held in The Hague—which, inspired by the Declaration of St Petersburg in 1868, denounced explosive bullets¹⁵³ in 1899¹⁵⁴ and 1909¹⁵⁵—produced landmark conventions regulating hostilities and naval warfare, and prohibiting chemical and biological weapons and certain other weaponry.¹⁵⁶

144. Of course, as noted before this is an ancient practice, but never before had it been employed as an offensive strategy. A supply train of wagons loaded with rations accompanied the march. STEVEN E. WOODSWORTH, *THIS GREAT STRUGGLE: AMERICA’S CIVIL WAR 377* (2004).

145. Historical evidence suggests the Savannah campaign was actually quite cognizant of civilian lives and refrained from serious wrongdoing. *Id.*

146. *Id.*

147. HENRY DUNANT, *A MEMORY OF SOLFERINO* (American National Red Cross ed., 1959) (1862).

148. *Id.* at 44.

149. *See generally id.*

150. *Founding and early years of the ICRC (1863–1914)*, ICRC (last updated Dec. 5, 2010), available at <http://www.icrc.org/eng/who-we-are/history/founding/overview-section-founding.htm>.

151. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361 (entered into force June 22, 1865).

152. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343 (entered into force June 19, 1931).

153. *See, e.g.*, Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (entered into force Sept. 4, 1900).

154. *See, e.g.*, Declaration Concerning the Laws of Naval War, Feb. 26, 1909, 208 Consol. T.S.

155. Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817.

156. Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297. *See generally* FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS, 1898–1922* at 72 (1999) (stating “[t]he First Hague Peace Conference did adopt three Declarations that for-

C. *The Fall of the Doctrine*

It would take until the 20th Century, however, for the bell to toll for the legal doctrine of personal sovereign immunity. After the First World War, the Treaty of Versailles Article 227 called for Kaiser Wilhelm II to be handed over for an international trial.¹⁵⁷ An international commission determined that Germany, Austria, Turkey and Bulgaria were the prime aggressors.¹⁵⁸ The commission detailed thirty-two charges including among the various depredations killings of prisoners, tortures, the giving of no quarter, use of poison gases, and poisoning wells.¹⁵⁹ The Commission stated:

[T]here is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.¹⁶⁰

Unfortunately—for both the development of international criminal law and accountability under law generally and those who suffered the horrors of mustard gas and throughout the frozen nights and the endless days of the mind-numbing uncertainty and largely meaningless violence of trench warfare—the Netherlands provided safe haven for the Kaiser allowing him to escape his reckoning.¹⁶¹ Meanwhile, the Ottoman Empire in its final years carried out genocide against the Armenian people.¹⁶² The nascent world community's inaction during that time still resonates around the world.¹⁶³

bade the use of certain types of weapons, although arms control and disarmament were not their primary purpose”).

157. “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.” The Versailles Treaty, June 28, 1919, art. 227, available at <http://avalon.law.yale.edu/imt/partvii.asp>. Articles 227 through 230 lay out a surprisingly robust framework for the tribunal, including discovery, defense counsel, and the composition of the judges.

158. COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE 14 AM. J. INT’L L. 95, 114–15 (1920) [hereinafter PRELIMINARY PEACE CONFERENCE REPORT]. Evidently, the United States delegation, with the enthusiastic approval of President Woodrow Wilson, obstructed the commission’s progress. Wilson called it “folly.” M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT’L L. & POL’Y 244, 255 (2002).

159. PRELIMINARY PEACE CONFERENCE REPORT, *supra* note 158, at 114–15; Bassiouni, *supra* note 158, at 255.

160. PRELIMINARY PEACE CONFERENCE REPORT, *supra* note 158, at 116.

161. *Id.* at 117. French, Belgian, and British publics pressed for the tribunal.

162. *Armenian Genocide*, UNITED HUMAN RIGHTS COUNCIL, http://www.unitedhumanrights.org/genocide/armenian_genocide.htm (last visited June 1, 2014).

163. *Id.*

Though the Treaty of Versailles set a basic standard for accountability for heads of state, it also fostered conditions for the rise of fascism.¹⁶⁴ The Second World War was for millions around the world a nightmare of state-instituted genocide and atrocities and seemingly unending government mobilization of all but the most necessary items (and indeed, sometimes even the subsistence supplies of both occupied and home territories). The Allies' opinions were divided on the fate of the Nazi and Japanese leadership.¹⁶⁵ The Soviet Union favored summary execution, but in the end it was agreed that a multi-national tribunal would be the best option.¹⁶⁶ Though warfare was always savage, the Second World War was the apex of the "total war" doctrine. Total warfare involved the application of military force—i.e. destruction—to military, government, industrial, and civilian targets. In the Second World War, the Nazis as well as the Japanese pushed past the boundaries of implicitly acceptable tactics of war and aggressively attacked neighboring nations. The Nazis bombed London with little regard for civilian lives and applied the absolute terror that so often accompanies totalitarianism to occupied nations—crimes for which much of their leadership would eventually find themselves on the gallows.¹⁶⁷ The political realities of the time meant that to stop the Axis power, the Allies decided to employ aggressive force of their own¹⁶⁸—though to be sure in no way approaching the brutality of the Axis powers. To win the war the Allies not only destroyed the leadership of Germany and Japan but also broke the morale and shattered the lives of the citizens of those nations and their allies, culminating in the use of atomic bombs on Hiroshima and Nagasaki. The necessity and morality of this strategy is still debated today but its success is self-evident.

Much has been written on the Nuremberg trials, and to a lesser extent on the International Military Tribunals for the Far East.¹⁶⁹ Simply put, the foundation of modern international criminal law was built at these trials—including, ultimately, law regarding the crimes of genocide, crimes against humanity, war crimes, and ancillary crimes and their ele-

164. The concept of war reparations, which severely distorted Germany's economy and the German will to integrate with the rest of Europe culturally and diplomatically is an interesting twist on the longstanding use of war as a hunt for treasure. See generally ADAM TOOZE, *WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY* 673–74 (2008).

165. Ian Cobain, *Britain Favoured Execution Over Nuremberg Trials for Nazi Leaders*, *GUARDIAN*, October 25, 2012, <http://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders>.

166. *Joint Four Nation Declaration, October 1943*, AVALON PROJECT, available at <http://avalon.law.yale.edu/wwii/moscow.asp>.

167. *Nuremberg Trial Proceedings, Tuesday, 1 October 1946, Afternoon session*, AVALON PROJECT, available at <http://avalon.law.yale.edu/imt/10-01-46.asp>.

168. See, e.g., the fire-bombing of Dresden and Tokyo, See 1945: *Thousands of Bombs Destroy Dresden*, *BBC NEWS* (Feb. 14, 1945), available at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/14/newsid_3549000/3549905.stm.

169. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 *HARV. HUM. RTS. J.* 11, 23–29 (1997); see also KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 26–41 (2008).

ments.¹⁷⁰ While Adolf Hitler escaped his reckoning and the hangman's noose by choosing suicide, there can be no doubt that the respect normally accorded to the heads of state under international law is an impenetrable shield no longer.¹⁷¹ Of course this is not the whole story, and history is hardly so neatly packaged: the Allies hedged their bets with regard to Emperor Hirohito of Japan, removing from him the actual powers of government but leaving him as nominal head of state.¹⁷² But by this point, the great flip had occurred—before 1945, an accounting for a world leader accused of war crimes and crimes against humanity was a rarity and impunity and non-interference were *de rigeur* in international politics. After 1945, however, the dedication (or, sometimes, mere lip service) to human rights has come to mean that such grave crimes invite inquiry, opposition, and prosecution.

In 1949, international law was still relatively undeveloped, its promoters venturing into a new world with neither a map nor a guide. The United Nations was a mere four years old; before then, the International Court of Justice had heard only three cases.¹⁷³ It would be two decades until the *Vienna Convention on the Law of Treaties* would be adopted.¹⁷⁴ The Geneva Conventions of 1949 were the third iteration¹⁷⁵ having evolved from just ten articles in 1864 following Henri Dunant's call for humanitarian intervention after witnessing the horrors that followed the Battle of Solferino five years before. The 1949 Conventions comprehensively laid out certain specific norms and rules for combat, the treatment of sick and wounded and captured enemy personnel, and treatment of civilians and non-military institutions, buildings, and infrastructure. Following the ravages of total war the attentions of the major powers of the world turned to the nascent field of international humanitarian law to create a new set of Geneva Conventions to govern armed conflict for the future.¹⁷⁶

170. See, e.g., Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57 (1995); Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008).

171. If any such respect were to be accorded, Karl Dönitz, who had a brief tenure as the leader of Nazi Germany, after Hitler's death, would have been accorded it.

172. MOGHALU, *supra* note 169, at 42–44.

173. *Judgments, Advisory opinions and Orders by chronological order, 1947*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=1947> (last visited June 1, 2014).

174. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980).

175. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

176. See sources cited *supra* note 175.

The Geneva Conventions of 1949 can be seen as a success in the most vital ways. One hundred ninety-four nations, virtually all that exist today, have ratified the core four conventions.¹⁷⁷ The norms encompassed in the conventions form the basis for the rights afforded to combatants, civilians, nations, and non-state actors in armed conflict worldwide.¹⁷⁸ The provisions of the conventions, to modern readers, may seem common sense, but they are foundational for international humanitarian law and absolutely necessary toward the goal of helping contain the tragedy and destruction that ostensibly inevitably accompany war and armed conflict.

While the Geneva Conventions were a watershed moment in the development of international law, their Achilles' heel was evident in the scant means dealing with enforcement.¹⁷⁹ When a State Party violates the conventions, it risks opprobrium from other States Party, but little more. Even where the Geneva Conventions mandate that a State Party prosecute offenders for "grave breaches," little can be done to compel such prosecution.¹⁸⁰ In addition, the meaning of certain terms, even sixty years after the adoption of the conventions, remain cloudy and offer uncertain guidance to nations.¹⁸¹

177. *States party to the Geneva Conventions and their Additional Protocols*, ICRC Annual Report 2012, available at <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-map-conven-a3.pdf>.

178. Compared to the Geneva Conventions of 1949, Additional Protocol 1, which notably expanded the scope of the Geneva Convention protections to non-state belligerents, enjoys less official acceptance. One hundred sixty-nine countries are parties to it, but certain countries—e.g. India, Indonesia, Iraq, Iran, Pakistan, Singapore, and the United States—are not. *Id.* Generally, non-parties to an agreement—be it a business contract or international treaty—are not bound by it, but in international law, custom has power. Though the United States has neither signed nor ratified the Additional Protocol 1, it considers itself bound by it because it has accepted—no doubt based in part by the still-large number of state parties—that protections to guerillas therein codified are customary international law. *See* Treves, *supra* note 13.

179. *See, e.g.*, Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 76 (1984).

180. "Allegations of grave breaches left unprosecuted vastly outnumber actual prosecutions." Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. OF INT'L CRIM. JUSTICE 723–38 (2009).

181. Despite the relative maturity of the 1949 Conventions, the problems that the drafters faced are many of the same ones that persist today. When two persons form a contract and one of them breaches it, the injured party can pursue justice in that state's court of law. When two nations form a contract and one of the breaches it, the options for redress are limited. *See, e.g.*, George W. Downs and Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. OF LEGAL STUDIES 95 (2002); Robert J. Einhorn, *Treaty Compliance*, 45 FOREIGN POLICY 29 (1981). The Geneva Conventions of 1949, to their credit, used a somewhat novel means to promote justice for what it termed "grave breaches," the most serious offenses: willful killing, torture, inhumane treatment, behavior designed to cause suffering, and appropriation or destruction of property that is willful and wanton. Geneva Conventions Relative to the Treatment of Prisoners of War art. 50, Aug. 12, 1949, 75 U.N.T.S. 135. States are required, under the Conventions' Article 146 of the Fourth Geneva Convention, to "enact any legislation necessary to provide effective penal sanctions" against perpetrators of these grave breaches. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287. The United States has, in the War Crimes Act, 18 U.S.C. § 2441 (1996), enacted enabling legislation for the Conventions, and many other states have as well. The Constitution itself contemplates such legislation, giving Congress the power to "define and punish . . . offenses against the Law of Nations," U. S. CONST., art. I, § 8, cl. 10. Explicit legislation was not passed until 1996, though the Continental Congress, in 1775 and 1776, first enacted Articles of War which

The ICC acts to bring a certain measure of order to armed conflicts with jurisdiction over crimes against humanity, war crimes, and genocide and strengthens the normative power of the Geneva Conventions. Article 8 of the Rome Statute of the ICC specially references the Geneva Convention's grave breaches provision in its definition of war crimes. The ICC is unprecedented in human history as a permanent international tribunal with authority to bring perpetrators—soldiers, civilians, and government officials alike—to trial at the behest of the United Nations Security Council or at the ICC prosecutor's initiation (if a state is party to the Rome Statute or accepts its jurisdiction).

In all, history has shown that leaders who abuse power—even in the name of national development—quickly earn the enmity of their subjects, and though the use of power to suppress dissent has often functioned to ensure a hold on power, the famous words drawn from *Matthew 26:52* ring true—“they that take the sword shall perish with the sword.”¹⁸² The reality is that in the modern era those who are handed over for trial at The Hague are the lucky ones, as they are preserved from the righteous wrath of their long-brutalized citizenry.¹⁸³

III. TWO MILESTONES

Recent events shed light on the state of the doctrine today. On the one hand, the era of officially accepted impunity for leaders of nations has ebbed. Perhaps more than ever the criminalization of certain acts are punished whether they occur within the sovereign borders of a nation or not. Charles Taylor, the former President of Liberia, was tried and found guilty of aiding and abetting war crimes and crimes against humanity for the outrageous and inhuman behavior of rebels fighting in the adjacent nation of Sierra Leone. Similarly, Slobodan Milošević was tried for his role in the atrocities in the breakup of the former Yugoslavia, and though he died before his guilt could be adjudicated, his status as a for-

prohibited “capital crime[s], or having used violence, or committed any offense against the persons or property of the good people of any of the United American States” *Journal of the Continental Congress, Articles of War* (Sept. 20, 1776), AVALON PROJECT, available at http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp. See generally Hamed Adibnatanzi, *The U.S. Codification of War Crimes: 18 USCA § 2441*, 14 ANN. SURV. INT'L & COMP. L. 151, 161 (2008). Some treaties are considered binding upon ratification, and in some nations this is automatic with ascension to a treaty regime, but the U.S. Supreme Court cast a skeptical eye toward this practice in regards to American obligations in *Medellin v. Texas*, 552 U.S. 491 (2008).

182. *Matthew 26:52* (King James).

183. Some tyrants are lucky enough to escape when their time is up: Idi Amin of Uganda spent decades in Saudi Arabia, and indeed was refused even burial in Uganda, the former Shah Mohammad Reza Pahlavi's flight to the United States for medical treatment (presaging the escape of other heads of states during the Arab Spring) allowed him to escape the wrath of revolutionary Iranians; Pol Pot escaped to the outskirts of Cambodia; and Adolf Hitler chose a bullet to the head instead of facing accountability as Berlin fell to the Allies. Others were not so prudent: Benito Mussolini was found trying to escape and was hanged forthwith; when Nicolae Ceausescu's house of cards fell in Romania, he escaped from the capital by helicopter, only to be captured by the army; after a two-hour trial, he and his wife were executed by firing squad. Muammar Qaddafi met his ignominious and brutal end after being captured hiding in a drainage ditch, and was unceremoniously executed after pleading for his life.

mer leader of the Yugoslavian nation was no bar to his prosecution. These two cases will shed light on the current legal status of the immunity doctrine, as adjudicated by international courts.

On the other hand, while international law holds all individuals accountable for their acts, state practices with regard to international law—and in particular, the ICC—illuminate the shortcomings in enforcement. The President of Sudan, Omar al-Bashir, has been wanted by the ICC for several years, and yet even members of the ICC have stymied its efforts by refusing to honor the arrest warrant. Similarly, with Russia and China blocking effective action at the United Nations Security Council the President of Syria, Bashar al-Assad, has been able to continue his ongoing war against rebelling Syrians which has seen indiscriminate shelling and massacres of civilians, in a conflict that has disrupted hundreds of thousands of lives.¹⁸⁴ Even with evidence of chemical weapons attacks, the outside world is painfully divided on the idea of intervention.¹⁸⁵

A. *The General Structure of International Tribunals*

Nuremberg Chief Prosecutor Robert H. Jackson—a future U.S. Supreme Court Justice—stated that “[n]ever before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.”¹⁸⁶ These words are apt today in the context of the tragedies of Liberia, Sierra Leone, the former Yugoslavia, and elsewhere, and whosoever wishes to study international criminal law must keep in mind the immense breadth of the task of the prosecutor, judge, and to a lesser extent, the defense counsel.¹⁸⁷

As with any criminal trial certain elements established by statute (or, as here, international convention) must be proved beyond a reasonable doubt.¹⁸⁸ Generally a crime is defined by its *mens rea* and its *actus reus*—the guilty mind and the bad act.¹⁸⁹ In international criminal law the complexity of some of the crimes also calls for a specific intent (*dolus specialis*) which is the intended objective of one’s actions (e.g. that a ra-

184. *Security Council—Veto List*, UNITED NATIONS RESEARCH GUIDES AND RESOURCES (Last visited June 2, 2014), available at http://www.un.org/depts/dhl/resguide/scact_veto_en.shtml.

185. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 19, 2012, http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

186. Robert H. Jackson, Chief Prosecutor for the United States, *Opening Statement (Nov. 21, 1945)*, in THE TRIALS OF GERMAN MAJOR WAR CRIMINALS, HIS MAJESTY’S STATIONERY OFFICE [UK] 50 (1946).

187. In all of the tribunals, defense counsel may choose not to present a case, relying solely on casting reasonable doubt upon the prosecution’s case. That said, it is clear that most, if not all defendants, choose to present a case-in-chief.

188. Rome Statute of the International Criminal Court art. 66, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

189. By way of example, the Model Penal Code in the United States and promoted by the American Bar Association divides the mental element into purposeful, knowing, reckless, and negligent, in terms of diminishing culpability.

cial group be eliminated or that a religious group be driven from a region). International crimes may also require a *chapeau* element otherwise known as attendant circumstances (*i.e.* that they be committed in the midst of armed conflict).

One need not pull the trigger of the gun, however, to be held liable for the shooting. All of the international courts provide for individual criminal liability where the accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime as well as providing for command responsibility for superior officers.¹⁹⁰ Notably, all of the international statutes governing these courts make clear that government positions—including being head of state or head of government—are neither shields nor defenses to individual criminal liability.¹⁹¹

Most civilized systems—following either the common-law/adversarial¹⁹² or civil law/inquisitorial¹⁹³ tradition—have a prosecutor of a sort, and allow defense counsel to the accused (or the right to defend oneself) with established procedures for the admission of evidence.¹⁹⁴ The American influence on international criminal law can be seen in the burdens of proof the rights guaranteed to the defendant (including the warnings extended upon interrogation and the right against self-incrimination) and prosecutorial independence.¹⁹⁵ On the other hand, the liberal admission of evidence—hearsay, for example¹⁹⁶—skew more

190. Statute of the Special Court for Sierra Leone, appendix II, art. 6(1) UN Doc. S/2002/246, (July 17, 1998); *see also* Statute of the International Criminal Tribunal for Rwanda, art. 6, U.N. Doc. S/Res/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, art. 25, U.N. Doc. A/CONF. 183/9 (July 17, 1998); Statute of the International Criminal Tribunal for the Former Yugoslavia, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1–2, art. 7, U.N. Doc S/Res/827 (May 25, 1993).

191. *See supra* note 190; Rome Statute of the International Criminal Court art. 27.

192. The system predominating in the United States, England, Canada, Australia, and other English heritage nations (Hong Kong, Israel, India, Pakistan, Nigeria, etc.) employs judicial/case precedent from older and higher-order courts for legal guidance in interpretation, prefers independent prosecutorial discretion, a judge who acts as the gatekeeper for evidentiary issues, and a right to a lay jury as fact-finder.

193. This system permeates much of Europe and persists in former colonies of these nations. Arising from Roman law, many civil codes exist, but the most influential was that promulgated by Napoléon in 1804, which forms the foundation of much of the world's legal systems, including continental Europe and many former European colonies. The system is much more rules-oriented, and judges adhere to the code—the statutes as enacted by the legislatures and the executive—without engaging in deep, discursive interpretation. At the same time, judges are much more active in the fact-finding role, interrogating witnesses and hearing a wider range of evidence than generally allowed in the common-law system. *See generally* James Apple & Robert Deyling, *A Primer on the Civil-Law System*, FED. JUD. CTR., [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

194. The Special Court for Sierra Leone Rules of Evidence are relatively broad, allowing all relevant evidence generally, subject to a handful of restrictions. *See* SPECIAL COURT FOR SIERRA LEONE RULES OF PROCEDURE 89; Prosecutor v. Taylor, SCSL-03-1-T, Special Court for Sierra Leone, Judgment, ¶ 68 (on hearsay evidence admitted).

195. *See, e.g.*, SPECIAL COURT FOR SIERRA LEONE RULES OF PROCEDURE AND EVIDENCE 42, 62, 97.

196. No rule in the SCSL Rules of Procedure and Evidence, the ICC Rules of Procedure and Evidence, or those in the ICTY prohibits hearsay instead opting for a liberal admission standard toward the compilation of a greater trial record and a more accurate accounting of acts under the purview of the court.

toward the inquisitorial model. This duality has been effective both for engaging international supporters of both traditions as well as helping push for both rigorous rights for defendants while allowing a wide scope of evidence to be presented—a necessary quality in international criminal law where the scale and nature of the crimes, as well as the sophistication of those perpetrating them make the task of compiling evidence difficult. Hearsay, for example, is disfavored under the adversarial model, but its importance with regard to battlefield orders and conversations is paramount.

B. The International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first international criminal tribunal since those in Nuremberg and Tokyo.¹⁹⁷ Established under the guidance and direction of the U.N. Security Council,¹⁹⁸ the ICTY broke new ground in establishing individual criminal liability for a wide variety of atrocities committed by all sides and actors of varying power and responsibility. The scope of the acts being examined by the ICTY can be seen in the numbers: as of October 2012 one-hundred and sixty-one individuals have been indicted with sixty-four convicted; thirty-five proceedings are on going (including appellate cases); over 190,000 public filings have been made, with over 4000 individuals testifying; as of September 2012, 873 staff were employed.¹⁹⁹ One of the more telling numbers is the budget; despite the goal of finishing all activity in 2010²⁰⁰ the budget for 2012–2013 was a sizable \$250 million.²⁰¹

197. A near contemporary, the International Criminal Tribunal for Rwanda, established in 1994, was instrumental in the establishment of further new precedent in international criminal law. *See supra* note 190, Statute of the International Criminal Tribunal for Rwanda. The Hutu-led genocide against the Tutsi peoples of Rwanda—part of a conflict that engulfed millions throughout Rwanda, the Democratic Republic of the Congo, and Uganda, and roots far older than the turbulent time of Mobutu Sese Seko's Zaire in the 1970's—resulted in the deaths of many hundreds of thousands in a few short months. *See generally* JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011). The fevered intensity of the genocide was hard to comprehend, and paralyzed the Clinton Administration—not long after it had inherited the deteriorating situation in Somalia which led to the Battle of Mogadishu (Operation Gothic Serpent), leaving several American servicemen killed. By November 2012, the ICTR had completed trial level work for ninety-two of the ninety-three individuals indicted—a list which included Jean Kambanda, the Prime Minister of Rwanda, who pled guilty to counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and two counts of crimes against humanity (murder and extermination). Kambanda attempted to rescind his plea, but this was rejected. *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, P. 7 (Sept. 4, 1998). He was sentenced to life in prison. *Id.* at Verdict.

198. *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

199. *Key Figures of ICTY Cases*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> and <http://www.icty.org/sections/TheCases/KeyFigures> (last visited June 2, 2014).

200. *See* S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

201. *The Cost of Justice*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/325> (last visited June 2, 2014).

The Milošević trial, widely expected to be the key effort of the ICTY, was indeed a spectacle for observers. Charged with war crimes, crimes against humanity, and genocide Milošević was the political leader of the Socialist Federal Republic of Yugoslavia until its demise in 1992. After the collapse of the USSR Milošević attempted to prevent the wholesale fragmentation of the Federal Republic of Yugoslavia, the successor state, and at the same time to use the secessionist conflicts—of the constituent federal states Croatia and to a lesser extent Slovenia and Macedonia—to achieve ethnically-irredentist ambitions.²⁰² Simply put, while trying to hold together the long-amalgamated federal state of Yugoslavia Milošević, through the military operations of the Yugoslav National Army (JNA) under his command²⁰³ and those allied with him, used the civil wars to commit atrocities against Muslims to the ostensible benefit of the mostly Christian Serbian peoples.²⁰⁴

Though Milošević remained in power for years after the worst atrocities were committed, his hold on power in the Federal Republic of Yugoslavia began to crumble in the last years of the 20th Century. The *Otpor!* (“Resistance!”) political movement, first popular among Serbian youth and then metastasizing throughout Serbian society, brought events to a head when on October 5, 2000 tens of thousands of Serbians marched on the Parliament after Milošević tried to subvert the democratic processes that voted him out of power.²⁰⁵ Milošević was arrested on charges of corruption and abuse of power, and though the government was internally divided Milošević was eventually handed over to UN authorities and transferred to The Hague at the end of June 2001.²⁰⁶

Milošević made no pretenses about complying with the ICTY judicial processes. From the very beginning he rejected the competence of the court to examine his actions. Boisterous and obstreperous his outbursts grated on the judges and the prosecution but were tolerated lest the trial take on an oppressive air.²⁰⁷ At various times Milošević championed the Serb cause, denied atrocities, and shifted blame to NATO forces and opined on the inviolability of POW’s and civilian’s welfare expressing (or feigning) outrage over the acts at the heart of the charges.²⁰⁸

Indictments were prepared charging Milošević with violations of the laws and customs of war, grave breaches of the Geneva Convention and

202. Prosecutor v. Milošević, ICTY Case No. IT-02-54-T Amended Indictment, (Nov. 22, 2001).

203. The Yugoslav National Army remained under his control. *Milosevic and the Chain of Command in Kosovo*, HUMAN RIGHTS WATCH, June 1, 2001, available at <http://www.hrw.org/legacy/press/2001/07/chain-of-command.htm>.

204. *The Conflict*, INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <http://www.icty.org/sid/322>.

205. *Yugoslav Protesters Set Parliament on Fire*, N.Y. TIMES, Oct. 5, 2000.

206. Steven Erlanger & Carlotta Gall, *The Milosevic Surrender: The Overview; Milosevic Arrest Came with Pledge for Fair Trial*, N.Y. TIMES, Apr. 2, 2001. <http://www.nytimes.com/2001/04/02/world/milosevic-surrender-overview-milosevic-arrest-came-with-pledge-for-fair-trial.html>

207. Milošević’s first words to the court were “I consider this tribunal a false tribunal and the indictment a false indictment.” MICHAEL J. KELLY, NOWHERE TO HIDE 87 (2005).

208. Spanonski, *Milosevic on Trial 1/11*, YOUTUBE (Feb. 2, 2008), <https://www.youtube.com/watch?v=3zH2DzV8bHU>.

crimes against humanity in Croatia and Kosovo, and genocide in Bosnia.²⁰⁹ Specifically, it was alleged that as President of the Yugoslavia and then Serbia he was at the head of a joint criminal enterprise. By way of example the Bosnia and Herzegovina indictment contains annexes listing detention facilities, killings both in and out of the facilities, sniper shootings, shelling, and details the network of the Yugoslav/Serbian military chain of command and political structure.²¹⁰ Eventually joinder was ordered of the three indictments into one trial.²¹¹ The prosecution presented its case establishing through forensic analysis the reality of the horrors of war. At Potočari thousands of bodies had been found—the remains of the Muslim men and boys who after seeking refuge at Srebrenica in the United Nations Protection Force (UNPROFOR) safe zone were massacred by Serb forces.²¹² Evidence of this and other atrocities established proof of the *actus reus* of genocide. Brutalities were committed that history and the conscience cannot ignore, namely in this case mass murder.²¹³ Other camps and locations of alleged war crimes and crimes against humanity were tied in including Serb-administered concentration camps where detainees were brutalized.²¹⁴ Investigators, reporters, and those victims who survived provided eyewitness and expert witness accounts of Serb violence.²¹⁵ Complaining of persecution Milošević suggested Serbia was the victim in the conflagration and highlighted the effects of NATO airstrikes.²¹⁶

To establish the *mens rea* of genocide that the accused had that specific intent to achieve in some way the destruction of a protected group—ethnic cleansing, by the haunting neologism—the prosecution²¹⁷ called to the stand a number of the intermediary links many of whom were commanding officers. They testified to Milošević's presence at a number of key meetings and functions. As the commander-in-chief of the surviving Yugoslavian federal government President Milošević was imputed—through both circumstantial and more directly damning evidence—to

209. See BETH VAN SCHAACK ET AL., INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT (2d ed., 2010).

210. Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment, P 32 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 22, 2001).

211. Prosecutor v. Milošević, ICTY Case No. IT-02-54-T Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder (Nov. 22, 2001).

212. *Timeline: Siege of Srebrenica*, BBC NEWS, June 9, 2005.

213. Elements of a genocide prosecution were set out by the ICTY in Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); see also Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, P. 542 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

214. See, e.g., Mark Danner, *The horrors of a camp called Omarska and the Serb strategy*, PBS/FRONTLINE (Dec. 4, 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/atrocities/omarska.html>.

215. *Timeline: Milosevic prosecution*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/3528587.stm> (last updated Apr. 13, 2014).

216. *Milosevic, Calling Himself a Victim, Asks to be Freed by Court*, N.Y. TIMES, Jan. 31, 2002, <http://www.nytimes.com/2002/01/31/world/milosevic-calling-himself-a-victim-asks-to-be-freed-by-court.html>.

217. Geoffrey Nice and Carla del Ponte, principally.

have had knowledge of atrocities.²¹⁸ Through his fiery, combative, and violent rhetoric the desire to use any means necessary to reclaim long-sought lands was fixed in his designs plain enough for the court to see. Though Milošević exhibited a skillful mind at times in his cross-examination and lines of questioning (not to mention a forceful if unsophisticated orator) the judges seemed unconvinced. For many in the West this was hardly news. Television brought the viewer the uncomfortably grim video of refugee and casualty alike of indiscriminate shelling and timid-seeming United Nations soldiers.²¹⁹

Serb leaders from other areas of Yugoslavia were the links between Milošević and the ground forces that committed ethnic cleansing. Milan Babić,²²⁰ president of the Republic of Serbian Krajina, a breakaway portion of Croatia that was to be absorbed into “Greater Serbia,” testified for the prosecution that Milošević in meetings with him and Radovan Karadžić of the *Republika Srpska*, part of the Bosnia region, committed military aid in the name of expelling Muslims from certain areas.²²¹ At one point an outraged Milošević yelled at the witness, “God help me. Mr. Milan Babić, you are engaging in science fiction now.”²²² Former *JNA* general Aleksander Vasiljević’s testimony introduced a letter showing that Serbian rebel commanders pressured Milošević to provide Yugoslav National Army support.²²³ Further evidence suggested that police units under Milošević’s control operated in the area of Srebrenica indicating command liability for the accused.²²⁴ Though one witness stated that Milošević did not order the massacre at Srebrenica and was “outraged” by it evidence mounted that not only was it in line with his goals and aspirations of a Greater Serbia but that arms and personnel under his command operated in tandem with rebel Serb forces to commit ethnic cleansing.²²⁵ In all the prosecution case which closed in late February 2004, presented 352 witnesses many of whom presented testimony in writing.

The trial proceeded slowly as Milošević’s health became strained.²²⁶ Diabetes, cardiovascular problems, and high blood pressure, exacerbated

218. *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, HUMAN RIGHTS WATCH (Dec. 14, 2006), http://www.hrw.org/node/11081/section/5#_ftnref41.

219. An impression that arose not from any mere hesitancy of the UNPROFOR to use force, but from the rules of engagement, which prohibited most engagements save self-defense.

220. Babić was the first ICTY indictee to plead guilty, in 2004. Press Release, Int’l Crim. Trib. for the Former Yugoslavia, Milan Babić Found Dead in Detention Unit, U.N. PRESS RELEASE AM/MOW/1046e (Mar. 6, 2006), available at <http://www.icty.org/sid/8801>. He was sentenced to thirteen years in prison. In 2006, while testifying against his successor, he committed suicide in his cell. *Id.*

221. KELLY, *supra* note 197 at 104.

222. *Id.* at 106.

223. *Id.*

224. Emir Suljagic, *Milosevic Linked to Srebrenica Massacre*, INSTITUTE FOR WAR AND PEACE REPORTING, Apr. 30, 2005. Available at <http://iwpr.net/report-news/milosevic-linked-srebrenica-massacre>.

225. KELLY, *supra* note 197, at 109.

226. Sixty-six days of the prosecution case were lost due to postponement on account of the health of the accused. See Kevin Parker, *Report to the President: Death of Slobodan Milošević*, p. 14, INT’L CRIM. TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS

by a long love of cigarettes and whiskey took their toll on both the defendant and the trial.²²⁷ Milošević railed at a trial conference after the resignation and death of one of the judges against the 150-day time limit for his defense.²²⁸ He also put forward a motion to dismiss the genocide count which was denied by the judges. The judges suggested that sufficient evidence existed, to show that Milošević was a participant in a joint criminal enterprise, that command liability existed and that he had aided and abetted genocide. The defense case was to proceed, though in response to the 1631 witnesses Milošević intended to call (including former U.S. President Bill Clinton)²²⁹ the court ruled he would have to submit a list of the first fifty witnesses.²³⁰

Milošević's defense opened with a nearly six hour-long diatribe blending history with conspiracy theory and finger-pointing.²³¹ He stated that the West had "supported a totalitarian chauvinist elite, terrorists, Islamic fundamentalists, neo-Nazis, whose objective was an ethnically pure state. That is to say, a state without any Serbs."²³² His tirades continued essentially unabated. On the second day he called the indictment "a sum of unscrupulous manipulation, lies, crippling of the law and an unjust presentation of the history."²³³ That day the Trial Chamber appointed two British barristers to assist the defense²³⁴ cutting Milošević's microphone off as he protested. Eventually, this decision would be overturned by the Appeals Chamber.²³⁵ Acting in his own defense Milošević conducted severe and pointed cross-examination earning the grudging but effusive respect of the media.²³⁶ Yet his tendency to bluster and thunder pronouncements against the proceedings no doubt earned him more ire

OF INT'L HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 (May 30, 2006), http://www.icty.org/x/cases/slobodan_milosevic/custom2/en/parkerreport.pdf.

227. *Id.* at p. 100; *see also Interview: Analyst Comments on Milosevic's Health*, RADIO FREE EUROPE/RADIO LIBERTY (Mar. 11, 2006), <http://www.rferl.org/content/article/1066605.html>.

228. KELLY, *supra* note 197, at 113.

229. Ian Fisher & Marlise Simons, *Milosevic Vows a Parade of Witnesses, Including Clinton*, N.Y. TIMES, Feb. 16, 2002, <http://www.nytimes.com/2002/02/16/world/milosevic-vows-a-parade-of-witnesses-including-clinton.html>.

230. PROSECUTOR V. MILOŠEVIĆ, CASE NO. IT-02-54-T OMNIBUS ORDER ON MATTERS DEALT WITH AT THE PRE-DEFENCE CONFERENCE, ICTY (NOV. 22, 2001).

231. KELLY, *supra* note 197, at 113–14.

232. *Id.* at 114; *see also* Toby Sterling, *Milosevic denies Atrocities, Points Finger at U.S.: Begins Defense at Hague Trial*, BOSTON GLOBE (Sept. 1, 2004) http://www.boston.com/news/world/articles/2004/09/01/milosevic_denies_atrocities_points_finger_at_us/?camp=pm.

233. KELLY, *supra* note 197, at 114.

234. *Id.*

235. *Id.* at 115.

236. One New York Times headline stated "Milosevic cannily cross-examines Kosovo massacre survivor." Ian Fisher & Marlise Simons, *Milosevic Cannily Cross-Examines Kosovo Massacre Survivor*, N.Y. TIMES (Feb. 21, 2002), <http://www.nytimes.com/2002/02/21/world/milosevic-cannily-cross-examines-kosovo-massacre-survivor.html>. *Time Magazine* called Milosevic's cross-examination "solid, forceful and accomplished." Lauren Comiteau, *Milosevic as Defense Lawyer*, TIME (Feb. 20, 2002), <http://content.time.com/time/magazine/article/0,9171,211541,00.html>. The BBC ran a column with the byline "If Slobodan Milosevic had decided to use his law degree to practise as a barrister, instead of becoming a banker-turned-politician, he would almost certainly have been a striking success." Jon Silverman, *Analysis: Milosevic Shines as Lawyer*, BBC NEWS (Feb. 19, 2002), <http://news.bbc.co.uk/2/hi/europe/1830203.stm>.

than sympathy in the eyes of the international staff and jurists, few of whom outside of the defense seem to have had familial ties to the long-festering strife in Yugoslavia.²³⁷ Further, the poor health of the accused led to the trial continuing in his absence, and this created significant disruption in the proceedings.²³⁸ On March 11, 2006, Slobodan Milošević was found dead in his cell of an apparent heart attack.²³⁹

In all the proceedings lasted for five years despite never finishing.²⁴⁰ Much of the delay came from the accused—both his in-court behavior and his health conditions.²⁴¹ A veritable blizzard of motions related to rules of evidence and witness protection had been volleyed. Milošević himself had submitted a “Presentation on the illegality of ICTY”—its title hand-scrawled across the top of the page above the typed text laying out his argument that “three fatal legal flaws in the *so-called*” ICTY arguing that (1) the U.N. Charter did not empower the Security Council to create a criminal court; (2) “A one-time, one-episode court targeting one country, created by international political power to serve its geo-political interests is incapable of equality and conducive to division and violence;” and (3) that even were the ICTY established legally, it is incapable of protecting defendant’s rights and due process.²⁴² Over thirty-six pages, Milošević rails against political prosecutions and *ad hoc* tribunals generally suggesting that the U.N. Security Council has unbridled discretion to pick enemies and destroy them.²⁴³ A section about the bombing of Dresden, Berlin, Hamburg, Tokyo, Hiroshima, and Nagasaki was crossed-out but remains legible as were several sections regarding the ICTR. Other sections highlighting American involvement in conflicts overseas remain. The U.S. is alleged to have “injected” over \$100 million to defeat Milošević in his final election and then paid a \$1.3 billion bribe to the Constitutional Court of Yugoslavia.²⁴⁴ Briefs of *amici curiae* submitted by Steven Kay, Michail Wladimiroff, and Branislav Tapušković²⁴⁵ laid out in much more eloquent (and verbose²⁴⁶) language

237. SPANONSKI, *supra* note 198. None of the prosecutors or judges were from the Balkan region.

238. See Prosecutor v. Milosevic, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, p. 2 (Int’l Crim. Tribunal for the Former Yugoslavia May 13, 2005), http://www.icty.org/x/cases/slobodan_milosevic/tjug/en/bulatovic.pdf (defense witness Kosta Bulatović was held in contempt and given a suspended four-month sentence for refusing to testify in the absence of the accused) (holding defense witness Kosta Bulatović in contempt for refusing to testify in the absence of the accused).

239. PARKER, *supra* 216, at 5. Suspicions of poisoning were immediately voiced. *Id.* at 9.

240. Scott Benjamin, *Slobodan Milosevic Found Dead in Cell*, CBS NEWS (Mar. 11, 2006, 7:37AM), <http://www.cbsnews.com/news/slobodan-milosevic-found-dead-in-cell/>.

241. KELLY, *supra* note 197, at 104, 113.

242. Slobodan Milosevic, *The ICTFY is Illegal*, ANTIWAR.COM (Aug. 30, 2001), <http://www.antiwar.com/rep/milosevic1.html>.

243. See *id.*

244. See *id.*

245. Press Release, International Criminal Tribunal for the former Yugoslavia, Milosevic case: The Registrar appoints a Team of Experienced International Lawyers as Amicus Curiae to assist the Trial Chamber (Sept. 6, 2001).

246. The number of motions, rulings, and other documents available on the ICTY and international litigation in general can be bewildering for even the scholar or attorney. The goal of compiling a complete record of the facts and ensuring due process tend to err on the expansive side. “[L]awyers

the challenge to the constitution of the court and its jurisdiction competence to try the defendant. In blunt language the contention that Article 7(2)²⁴⁷ of the Statute of the ICTY was invalid because it contravened customary international law²⁴⁸ was laid bare. This is the essential nature of the beast that Count Dracula because he is a nobleman need not answer the accusations of the townspeople (similarly a story with dark and very real roots).²⁴⁹ Simply put, Milošević asserted that as a former head of state he was immune from prosecution.

As the *amici curiae* noted the prosecution of a national leader was unprecedented, although attempts including the Treaty of Sèvres in relation to the genocide against the Armenians and the Treaty of Versailles after WWI, were made.²⁵⁰ As one might expect, however, the Trial Chamber was neither entertained nor particularly moved.²⁵¹ “There is absolutely no basis for challenging the validity of Article 7, paragraph 2 . . .” the Chamber’s opinion made clear, noting that customary law clearly supports criminal liability for heads of state alluding to international conventions, the ICC, the ICTR, and the *Pinochet* case.²⁵²

With a view of the outcome of the trial one can see clearly the shortcomings of the ICTY. The length of the proceedings as well as their nature—sometimes bordering on farcical—stretched the distance—temporal as well as proximal—between the victims and the justice that was sought on their behalf. ICTY Prosecutor Carla del Ponte stated, “I

are suspicious of brevity in any form.” Richard Posner, *The Bluebook Blues*, 120 YALE L. J. 850, 859 (2011) (book review).

247. “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, (as amended Jul. 7, 2009), art. 7(2), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

248. *Id.*

249. Vlad III Dracula, known as Vlad Țepeș or Vlad the Impaler, was a Wallachian prince whose reign in the mid-15th century was known far and wide for its cruelty—to intriguing nobles, criminals and townspeople suspected of wrongdoing, and foreigners alike—in an era where the use of torture in criminal investigations and capital punishments were commonplace. See Vladimir Socor, *Vlad Țepeș: By Nicolae Stoicescu*, 37 SLAVIC REV. 337, 337–38 (1978) (book review). Though some efforts have been made to rehabilitate his image, emphasizing his interest in modernization and maintenance of order in a fiefdom under constant threat of Ottoman attack, Vlad’s zeal for cruelty was truly inhuman (thus was born the Dracula legend) and led to heinous crimes against humanity and war crimes by today’s standards (and achieved infamy in his time). See *id.*

250. Press Release, International Criminal Tribunal for the former Yugoslavia, Milošević case: The Registrar appoints a Team of Experienced International Lawyers as Amicus Curiae to assist the Trial Chamber (Sept. 6, 2001).

251. Milošević’s challenges to the jurisdiction of the court were hardly unexpected; in *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 3 (Int’l Crim. Tribunal for the Former Yugoslavia Oct. 2, 1995), the Appeals Chamber considered the attack on the jurisdiction of the court to be a preliminary matter. The Appeals Chamber stated that it was incumbent upon the ICTY to examine its own “*compétence de la compétence*” and thus “examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.” *Id.* at p. 19. The Appeals Chamber, it may not surprise the reader to find out, then upheld the ICTY’s jurisdiction, embracing an expansive (i.e. the conventional) view of U.N. Security Council “discretionary powers” with regard to armed conflicts. *Id.* at p. 39–40.

252. *Prosecutor v. Milošević*, Case No. IT-99-37, Decision on Preliminary Motions, p. 28 (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 8, 2001).

am furious In an instant, everything was lost. . . . The death of Milošević [sic] represents for me a total defeat.”²⁵³ Croatia’s president, Stjepan Mesić summarized a shared sentiment, saying “It’s a pity that Milošević did not live . . . and get his deserved sentence.”²⁵⁴ While the trial record remains as a historical record—an important function of international tribunals generally—it is hard to disagree with Carl Bildt, a former UN envoy to the Balkan region, who stated that “[d]espite years of trials we will never have a verdict, and thereby a conclusion regarding important questions of guilt.”²⁵⁵

While it is tempting to compare the length of the Milošević trial—five years for one defendant—against the Nuremberg Trials in which 22 defendants were tried in less than a year,²⁵⁶ the two cannot fruitfully be compared in such a way as the Nazi government contained an entrenched bureaucracy that produced undeniable evidence in extraordinary volumes, essential and effective to the Nuremberg Trials.²⁵⁷ The evidence presented at Milošević’s trial came from letters between government officials and orders to soldiers, expert witness testimony on financial assistance by the then-government of Yugoslavia, and minutes and notes of the Supreme Defense Council of Yugoslavia, and the testimony of those who were in the Yugoslavian government and military.²⁵⁸ This evidence established the support—weapons, ammunition, money, and personnel—between the Yugoslav government headed by Milošević and the various military/police/paramilitary forces which actually committed the atrocities.²⁵⁹ Yet the wide latitude given to Milošević to conduct his own defense not only stretched the trial to an untenable length but allowed Milošević to make a mockery of the court that if legally unconvincing certainly cast a shadow on the solemnity of the trial. As the political leader of the decaying state of Yugoslavia Milošević had access to the armaments of the army and thus had the force advantage to accompany his ambitions. Sadly though he presided over the worst atroci-

253. Edward M. Gomez, *Milosevic's Death Leaves War-Crimes Trial Unfinished*, S. F. GATE (Mar. 13, 2006), <http://blog.sfgate.com/worldviews/2006/03/13/milosevics-death-leaves-war-crimes-trial-unfinished/>.

254. *Id.*

255. *In quotes: Milosevic death*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/4796704.stm> (last updated Mar. 12, 2006).

256. *Nuremberg Trial Timeline*, ROBERT H. JACKSON CTR., <http://roberthjackson.org/the-man/nuremberg-trial/nuremberg-trial-timeline/> (last visited June 2, 2014).

257. The German civil service’s roll in the functioning of the Nazi government has long been recognized. *See generally* Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963); Edwin Black, *IBM and the Holocaust: The Strategic Alliance Between Nazi Germany and America’s Most Powerful Corporation* (2001); Albert Breton & Ronald Wintrobe, *The Bureaucracy of Murder Revisited*, 94 J. of Pol. Econ. 905 (1986); Franklin G. Mixon Jr, et al., *The Bureaucracy of Murder: Empirical Evidence*, 31 Int’l J. of Soc. Econ. 855 (2004); Judy Dempsey, *Reich Bureaucrats Seen in a New Light*, N.Y. TIMES, Dec. 26, 2010, http://www.nytimes.com/2010/12/27/world/europe/27iht-berlin27.html?pagewanted=all&_r=0.

258. *Weighing the Evidence*, HUMAN RIGHTS WATCH (Dec. 14, 2006), http://www.hrw.org/node/11081/section/5#_ftnref41.

259. *Id.*

ties since the Second World War, his crimes were not to be the last of the 20th Century.

The denouement of the ICTY it has taken a curious twist. In May 2013 the acquittal of a number of Serb leaders accused of crimes against humanity as part of being in a joint criminal enterprise with Milošević raised fresh questions about the impartiality of the tribunal. The foreign minister of Sweden put it succinctly: “it is becoming increasingly difficult to see the consistency or logic in the different judgements [sic].”²⁶⁰ At issue in particular were the burdens of proof for conviction which seemingly shifted upward from earlier cases. One day earlier six Bosnian Croats were convicted of war crimes and crimes against humanity for their part in a joint criminal enterprise with, among others, Franjo Tudjman who was then Prime Minister of Croatia. Indeed, a former spokesman for the ICTY suggested that the court was undergoing a “baffling self-destruction.”²⁶¹

The ICTY in its decades of work and at a cost of hundreds of millions of dollars has accomplished much in terms of the technical jurisprudence of international criminal law. In holding many individuals accountable—from Milošević at the top to many of the actual perpetrators of violence the ICTY has ensured that history will not soon forget the despicable acts of violence that arose in the Balkans. Yet only in light of the ICTY’s pioneering post-World War II situation can the Yugoslavia Tribunal be seen in fully positive terms; the legacy as a whole is more mixed.

C. *The Special Court for Sierra Leone*

Conflicts in Africa have long attracted the attention of international jurists.²⁶² To some this focus is myopic, and it is indeed a criticism made by both thoughtful advocates of African self-sufficiency and elites who benefit from squelching efforts for meaningful accountability.²⁶³ This situation, however, arises because the history of colonialism catalyzed by

260. T.J., *War Crimes in the Former Yugoslavia: Two Puzzling Judgments in The Hague*, ECONOMIST, (June 1, 2013), <http://www.economist.com/blogs/easternapproaches/2013/06/war-crimes-former-yugoslavia>. The Economist goes as far as to say that the ICTY’s credibility is “in shreds.” *Id.*

261. *Winding Down with A Whimper*, ECONOMIST (June 8, 2013), <http://www.economist.com/news/europe/21579049-controversial-recent-judgments-tribunal-hague-winding-down-whimper>. A Danish non-permanent judge on the court, Frederik Harhoff, emailed fifty-six international lawyers, expressing his concern. Owen Bowcott, *Hague War Crimes Ruling Threatens to Undermine Future Prosecutions*, GUARDIAN, Aug. 13, 2013, <http://www.theguardian.com/law/2013/aug/13/hague-war-crimes-ruling-prosecutions-serb>.

262. See, e.g., Press Release, ICC-Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx.

263. Fatou Bensouda, *We are not against Africa: But Can She Bring Any Real Change to Africa-ICC Relations?*, NEW AFRICAN (Sept. 11, 2012).

the power vacuum which proceeded from its end has fueled extraordinarily bloody and brutal conflicts across the continent.²⁶⁴

The story of Charles Taylor is rife with intrigue and conspiracy theory, and his exploits near mythical in his homeland and abroad—but in many ways it is emblematic of much of the continent's miseries born of strongmen. Born in 1948 to Americo-Liberian parents, Taylor as a young man earned a rare chance to go abroad and study, and he did so at Bentley College near Boston.²⁶⁵ He became involved in Liberian affairs and networked among the expatriate Liberian communities on the East Coast and eventually returned to Liberia to work for the post-Tolbert government lead by Samuel Doe.²⁶⁶ Taylor worked for Samuel Doe's government in the early 1980's as a head of the General Services Administration, but fled back to America after being accused of embezzlement.²⁶⁷

Taylor reappeared in Africa, and wasted little time in seeking to empower himself. With training from Muammar Qaddafi Taylor spearheaded a rebel movement and launched war against Samuel Doe from Côte d'Ivoire.²⁶⁸ Taylor's group the National Patriotic Front of Liberia (NFPL) waged an aggressive and violent campaign across Liberia that was rife with unrestrained violence, summary executions, rape, and rampant looting.²⁶⁹ Shellings and mortar attacks killed civilians indiscrimi-

264. See, e.g., Jakkie Cilliers, *Security and Transition in South Africa*, 6 J. OF DEMOCRACY 35, 35 (1995) (“[t]he era of independence and decolonization, which began in the early 1960s, was marred by a series of messy wars as various leaders and factions struggled to fill the power vacuum left behind by the retreating colonial powers.”).

265. COLIN M. WAUGH, CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA'S LONE STAR STATE 65 (2011).

266. William Tolbert Jr., the grandson of a former slave in America, assumed power in a peaceful transition, and though governed without violence for years, eventually slipped into autocratic leanings, arresting opposition leaders after a violent protest. Nine years into his rule Samuel Doe, an officer of the Liberian army, staged a *coup d'état* in which Tolbert and most of his cabinet and ministers were executed (with a handful of exceptions, including future President Ellen Johnson Sirleaf). This pattern is emblematic of this era of African governance, in which bad leaders were supplanted by worse ones claiming to fight for liberation, only to be besieged by others with the same motivations.

267. WAUGH, *supra* note 265, at 97–99. Waugh is agnostic on the merits of the criminal complaint against Taylor, noting that while the numbers related to a procurement contract with a New Jersey company do not match up with the accounts investigated, the Liberian government's affairs were hardly in order. See *id.* at 99–101. Arrested by U.S. Marshals on a Liberian warrant, he languished—though reportedly well-treated—in the Plymouth County House of Corrections for over a year. *Id.* at 101–04. Eventually he and two other inmates escaped with the assistance of his wife. *Id.* at 109–12. His co-conspirators were apprehended, but Taylor disappeared. *Id.* at 110. The details of this are mired in a bog of speculation, rumor, and truth: Taylor did evidently work for the CIA during the 1980's and was on their payroll for years. *Id.* at 111–16. The quick capture of Taylor's co-conspirators, while Taylor made his way to Mexico and back to Africa, has led commentators to question how this feat was accomplished. *Id.* Taylor, for his part, denies that he had to escape, saying his release and transit were arranged. *Id.* at 112–13.

268. *Id.* at 120–24. In these Libyan training camps Taylor may have made contacts with the Revolutionary United Front and its leader, Foday Sankoh, who was preparing to wage war in Sierra Leone. *Id.* at 207. As will be mentioned later, however, the Trial Chamber, in its judgment, casts doubt on whether such a face-to-face meeting ever took place in Libya. *Id.*

269. The Liberian Truth and Reconciliation Commission estimated NPF forces were responsible for nearly 64,000 human rights violations, more than any other faction and approximately thirty-nine percent of all violations in the war. See Truth and Reconciliation Commission of Liberia, Consolidated

nately.²⁷⁰ The first Liberian Civil War pitted Taylor's factions against the splinter faction INFPL against the Armed Forces of Liberia, under Doe. Nigerian troops under the Economic Community of West African States' (ECOWAS) Monitoring Group (ECOMOG) constituted a foreign faction.²⁷¹ The INFPL captured Doe while he was visiting the ECOMOG headquarters infiltrating the grounds with concealed weapons.²⁷² With Monrovia in ruins and bodies in the street Doe's capture came at a lull in the conflict. After a fierce firefight between the President, his personal guards, and the INPFL—with ECOMOG soldiers declining to intervene—Doe was captured.²⁷³ His interrogation and torture were captured on video that was disseminated around the world.²⁷⁴ He died from his wounds that night.²⁷⁵ Meanwhile in Gbarnga, in the northern part of Liberia, Taylor's ability to leverage his control over swathes of Liberia allowed him to revive moribund concession businesses providing a critical source of funding for guns.²⁷⁶ Compensation for soldiers, however, came from a more traditional route—armed robbery *en masse* as empty houses were cleaned out by soldiers.²⁷⁷ The NPFL aided rebels of the Revolutionary United Front (RUF) in Sierra Leone pressing the violent revolution that would tear Sierra Leone apart.²⁷⁸ The war in Liberia brought Taylor to power ironically through democratic means as a stalemate between armed factions, the Interim Government of National Unity²⁷⁹ and others pressed for a vote.²⁸⁰ Liberians exhausted from years of brutal bloodshed voted for the candidate most likely to end it: "He killed my Ma, he killed my Pa, but I will vote for him."²⁸¹ In elections proclaimed free and fair by international observers Liberians overwhelmingly elected Taylor but did so with a shrug saying, "He broke Liberia—let

Final Report 336 (2009), available at http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf.

270. See, e.g., *id.* at 168.

271. ECOMOG, comprised of Ghanaians, Nigerians, Senegalese, and other West African forces, was a politically established military force that took an active role in combat, by stepping into the fray in Liberia. WAUGH, *supra* note 265, at 145–46. Supported by the United States government via the private company Pacific Architects & Engineers, ECOMOG effectively restored some order to the areas it controlled and provided a buffer between factions but was popularly derided for acts of looting and corruption as "Every Car Or Movable Object Gone." *Id.* at 5, 191.

272. *Id.* at 150.

273. *Id.*

274. *Id.* at 151–52.

275. Waugh notes that Doe's body was put on display as indigenous beliefs had fed the myth that Doe was invulnerable, immune to bullets thanks to magic amulets and rituals, and that he could possibly fly away if not restrained. *Id.* at 152.

276. According to Waugh, Taylor controlled ninety-five percent of the country including the one international airport and the port facilities of Buchanan and Harper. *Id.* at 154.

277. *Id.* at 7.

278. *Id.* at 202.

279. A civilian group that claimed the mantle of rightful Liberian governance, derided by the people as standing for "Imported Government of No Use." *Id.* at 5, 146.

280. *Id.* at 228–29.

281. Sarah Left, *War in Liberia*, GUARDIAN, Aug. 4, 2003, <http://www.theguardian.com/world/2003/aug/04/westafrica.qanda>.

him fix it.”²⁸² With Liberian power secured Taylor turned his attentions eastward toward Sierra Leone.

Dogged by military coups and numerous, abrupt changes in power Sierra Leone was little better off than Liberia—if at all—but for one important difference, ample deposits of alluvial and kimberlitic pipe diamonds.²⁸³ In Sierra Leone, strongman General Joseph Momoh had taken the reigns of power handed to him by the brutal Siaka Stevens who ruled until 1985 and built an empire of corruption built in part on diamond smuggling.²⁸⁴ Though not as repressive and tyrannical as his predecessor Momoh was incompetent and corrupt, and in 1992 a 25-year-old army captain, Valentine Strasser, staged a successful coup becoming the world’s youngest head of state at the time.²⁸⁵ Strasser’s brief reign was marked by attempts to rearm Sierra Leone Army with better weapons by which to engage the RUF along with fears of plotting against him that lead to executions of men soon after exonerated and the more mundane trappings of power.²⁸⁶ Government soldiers were known to turncoat by night earning the sobriquet “sobel” (a neologism of soldier and rebel)²⁸⁷—thus maximizing opportunities to plunder the wealth of their countrymen.²⁸⁸

The RUF—a band of otherwise unemployed young men allured by the promise of power and women and intoxicated by marijuana, booze and amphetamines—was the main destabilizing force in Sierra Leone in the 1990’s.²⁸⁹ Foday Sankoh another acolyte of Qaddafi’s revolutionary training in Libya lead the RUF having been a Sierra Leone soldier for a

282. WAUGH, *supra* note 265, at 228.

283. See IAN SMILIE, BLOOD ON THE STONE: GREED, CORRUPTION AND WAR IN THE GLOBAL DIAMOND TRADE 32, 95–114 (2010). Taylor stated at trial, after Smilie testified as an expert witness, that “Smilie is lying through his teeth.” *Id.* at 211. Sierra Leone’s rutile (a titanium ore) industry would also figure heavily into the conflict; Viktor Bout, the infamous Russian arms trafficker reportedly made a deal with the RUF to trade weapons and ammunition for access to rutile mines, which Charles Taylor approved of. See DOUGLAS FARAH & STEVEN BRAUN, MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR POSSIBLE 154 (2007). Bout, who would be convicted in a U.S. federal court after a DEA sting operation in Thailand, delivered sizable amounts of abandoned Soviet armaments to Taylor (and other African leaders, both the Taliban and its enemies, and also flew U.S. supplies into Iraq) in exchange for diamonds and cash. See *id.* at 13–28. Conveniently, many of Bout’s air freight companies were registered in Liberia. *Id.* at 151.

284. WAUGH, *supra* note 265, at 203.

285. Simon Akam, *The Vagabond King*, NEW STATESMAN (Feb. 2, 2012), <http://www.newstatesman.com/africa/2012/01/sierra-leone-strasser-war>. Strasser had served with ECOMOG in Liberia, but returned to a country at war with itself. *Id.* Ill-equipped to fight a protracted and violent battle with guerrilla rebels, the officers led by Strasser, stormed executive offices and the presidential lodging finding Momoh hiding in a bathroom. *Id.* Momoh was not killed, however, and was exiled from Freetown to Guinea. *Id.*

286. *Id.* The execution incident is evidently a sore spot with Strasser, who told Simon Akam, his interviewer, “Fuck off, man. In Texas they kill people every day.” *Id.* Strasser, at forty-five years of age reportedly spends his evenings drinking pouches of gin, surviving on a meager stipend from the Sierra Leonean government. *Id.*

287. *Id.*; see also WAUGH, *supra* note 265, at 211–12.

288. Richard Carver, *Sierra Leone: From Cease-Fire to Lasting Peace?*, WRITENET (Jan. 1, 1997), <http://www.refworld.org/docid/3ae6a6b624.html>.

289. See WAUGH, *supra* note 244, at 208–09.

decade and a half before being imprisoned for mutiny in 1971.²⁹⁰ Taylor soon threw his support behind the RUF, and the NPFL conducted joint actions with the RUF in Sierra Leone.²⁹¹ The RUF exploited its early gains and by 1995, had control over strategic diamond, gold, and rutile supplies which were funneled out of the country and exported by Taylor's Liberia—a handy arrangement for all involved.²⁹²

Strasser—employing orphaned youths and teenagers in service of Sierra Leone—attempted to repulse the RUF,²⁹³ but it was not until he contracted with experienced mercenaries that an effective counter-insurgency was mounted.²⁹⁴ Executive Outcomes managed by former South African (white) soldiers and other veterans of combat came to Sierra Leone's aid at a cost of nearly two million dollars per month.²⁹⁵

Strasser, presumably feeling the ever-increasing tenuousness of the situation, called for elections which Sankoh rejected.²⁹⁶ With UN approval elections were set for February 25, 1996. Strasser, however, was deposed a little over a month before and flown by helicopter to Guinea, like his predecessor.²⁹⁷ His deputy, Julius Maada-Bio, attempted to thwart the move toward democracy, but amid public outcry and demonstrations elections went ahead with encouraging success.²⁹⁸ Sidelined by his intransigence Sankoh found himself outside of the political currents and responded with violence that would shock even the most callous and jaded observer. RUF forces armed with machetes hacked off the hands—“long sleeves”—and the forearms and hands—“short sleeves”—of innocent civilians.²⁹⁹ These inhuman acts barbarous in intent and cold-blooded in execution did not discourage the unshakable desire of Sierra Leone people and the second round of voting brought the Sierra Leone People's Party and leader Ahmed Tejan Kabbah to power.³⁰⁰

Talk of peace began to pervade the political climate—military leaders, once put on the defensive, tend to grow weary of warmongering—

290. *Id.* at 206–07.

291. *Id.* at 154. Though Taylor denied meeting Sankoh in Libya, at least one witness—citing statements by Sankoh—supported the allegation. *Id.* at 207. It is uncertain, Waugh concludes, whether the two men did in fact meet in Libya, and Taylor is recounted having traveled to Sierra Leone to enlist Momoh as an ally, only to be rebuffed twice and deported. *Id.* at 208–09.

292. *Id.* at 212.

293. *Id.* at 211.

294. *Id.* at 212–13.

295. *Id.* at 212–13, 216. Akam notes that Executive Outcomes had, cut its teeth fighting for and against UNITA rebels in Angola and came equipped with helicopters, a durable and flexible supply train, and both experience and discipline, which allowed them to make formidable advances against the RUF. See Akam, *supra* note 285.

296. WAUGH, *supra* note 265, at 213.

297. Akam, *supra* 285.

298. WAUGH, *supra* note 265, at 213–14.

299. *Face to Face with Charles Taylor's Victims*, AFRICAN REV. (June 11, 2012), <http://www.africareview.com/Special-Reports/Charles-Taylor-victims/-/979182/1425112/-/mwlr05z/-/index.html>. Operation Stop Election was carried out by the RUF, allegedly with the approval of Taylor who said it was not a bad plan.

300. Agence France-Presse, *Ahmad Tejan Kabbah, Who Guided Sierra Leone to Peace, Dies at 82*, N.Y. TIMES, Mar. 14, 2014, http://www.nytimes.com/2014/03/14/world/africa/ahmad-tejan-kabbah-who-guided-sierra-leone-to-peace-dies-at-82.html?_r=0.

leading to the disastrous Abidjan accords which were negotiated in Côte d'Ivoire in 1996.³⁰¹ The accords provided for, at the RUF's insistence, the withdrawal of foreign forces, including both Executive Outcomes and ECOMOG. Though Sankoh was arrested in Nigeria deputy Sam "Mosquito" Bockarie loyally kept the war machine running.

The demilitarization aspects of the agreement faltered, and with the effective military forces repatriated from Sierra Leone the RUF seized its opportunity when a group of SLA officers staged a *coup d'état* under the banner of the Armed Forces Revolutionary Council (AFRC) in late May 1997.³⁰² Kabbah was deposed fleeing to Guinea, and the AFRC soon joined forces with the RUF consolidating control of Sierra Leone in blood-stained hands. ECOWAS, with the support of Tony Blair's Britain launched a campaign in 1998 that ended with the removal of the AFRC-RUF from power in March of that year. Though the AFRC-RUF coalition had lost control of the capital they were by no means inactive, continuing to pillage, rape, and kill in movements like "Operation Pay Yourself" and "Operation No Living Thing."³⁰³ At the start of 1999, AFRC-RUF forces slipping into Freetown with hidden arms commenced a campaign once again putting the residents of Freetown in the crossfire between the rebels and the government of Sierra Leone aided by the Nigerian ECOWAS force. For over six weeks, Freetown burned.

Eventually, the combatants grew tired of war. On July 7, 1999, the Lomé Agreements were signed, which included amnesty for the RUF, vice presidency for Sankoh, an UN-administered peacekeeping force, and other provisions.³⁰⁴ A Truth and Reconciliation Commission was agreed upon, and crucially, the Sierra Leone government asked the United Nations to help set up a court laying the framework for the Special Court for Sierra Leone (SCSL).

By agreement of the United Nations and the government of Sierra Leone, the SCSL was established.³⁰⁵ Funded voluntarily by governments around the world³⁰⁶ the court completed three trials in Freetown along

301. Carver, *supra* note 288.

302. *Sierra Leone Rebels Assault Capital Districts*, N.Y. TIMES, January 8, 1999.

303. See Prosecutor v. Taylor, No. SCLS-2003-01-T (Jan. 15, 2008); James Rupert, *Diamond Hunters Fuel Africa's Brutal Wars in Sierra Leone, Mining Firms Trade Weapons and Money for Access to Gems*, WASH. POST, Oct. 16, 1999, <http://www.highbeam.com/doc/1P2-631251.html>.

304. *Sierra Leone-UNAMSIL—Background*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html> (last visited June 3, 2014).

305. See S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

306. The SCSL website notes that "The Special Court has so far received contributions in cash and in kind from over 40 states, representing all geographic areas of the world. Canada, the Netherlands, Nigeria, the United Kingdom and the United States have provided strong support. In 2004, 2011, 2012 and 2013, the Special Court has been funded by subventions from the United Nations." *The Special Court Funding Mechanism*, SPECIAL CT. FOR SIERRA LEONE, <http://www.rscsl.org/HOME/tabid/53/Default.aspx> (last visited Feb. 6, 2014).

with the trial of Charles Taylor in The Hague.³⁰⁷ The court's temporal jurisdiction ran from November 1996 to January 2002.³⁰⁸

Taylor's indictment was a broadside against his legal defenses covering the multifarious and bewildering range of human rights abuses that he supported: five counts of crimes against humanity,³⁰⁹ five counts of war crimes,³¹⁰ and one count of a serious violation of international humanitarian law namely conscripting child soldiers.³¹¹ In particular, it is alleged that Taylor assisted, encouraged, acted in concert with, directed, controlled, or ordered the AFRC-RUF forces and/or Liberian (including NPFL) forces to commit these actual acts.³¹² This language makes clear that Taylor is not accused of actually committing the atrocities, but that he materially and substantially supported the RUF by providing arms and materiel, logistical and communications support, personnel, money, and guidance and training to the rebels.³¹³ In return Taylor received, among other things, a significant amount of diamonds.³¹⁴ The prosecution's case focused primarily on the atrocities committed in Kenema, Kono, and Kailahun districts, and in and outside Freetown.³¹⁵

Testimony was adduced from ninety-four prosecution witnesses and twenty-one defense witnesses (including Taylor).³¹⁶ The trial ran for fourteen months with half of the prosecution witnesses called as victims, about a third called to link the perpetrators to Taylor (e.g. RUF commanders), and the rest called as expert witnesses.³¹⁷ The prosecution provided 782 exhibits and the defense provided 740 including documents and prior trial transcripts (subject to witness cross-examination).³¹⁸ The scope of evidence was wide including hearsay and evidence for which the chain of custody was unknown, and the defense objected to payments made to witnesses and relocations provided for certain ones.³¹⁹ As the

307. *Id.*

308. Statute of the Special Court for Sierra Leone, art. 6(1) UN Doc. S/2002/246, appendix II (July 17, 1998). *See also* Jamie A. Williamson, *An Overview of the International Criminal Jurisdictions Operating in Africa*, 88 INT'L REV. OF THE RED CROSS 111 (2006).

309. Prosecutor v. Taylor, Case No. SCSL-03-01-PT Prosecution's Second Amended Indictment *passim*, (May 29, 2007).

310. Violations of Article 3 of the Geneva Conventions: terrorism; violence to life, health, and well-being of persons, in particular, murder and cruel treatment; outrageous upon personal dignity; and pillage. *Id.*

311. *Id.* at 9572-73.

312. *Id.* at 9573

313. *Id.*

314. *See, e.g.*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, at 2171 (May 18, 2012); *see also* Aislinn Laing, 'Blood Diamond' Trial: The Case Against Charles Taylor, TELEGRAPH (June 16, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/8578540/Blood-diamond-trial-the-case-against-Charles-Taylor.html> (suggesting Taylor received "mayonnaise jars" full of diamonds).

315. *See, e.g.*, Prosecutor's Second Amended Complaint, *supra* note 309, at 9570.

316. *See Taylor*, Case No. SCSL-03-01-T at 67.

317. WAUGH, *supra* note 265, at 340.

318. *See Taylor*, Case No. SCSL-03-01-T at 78.

319. *Id.* at 74, 81.

court stated the admissibility of the evidence did not relate to the probative weight accorded to it by the judges.³²⁰

Taylor in his defense admitted to supplying a small amounts of arms to the RUF in 1991 but stressed his role as peacemaker in the region, his government's virtual bankruptcy and the arms embargo placed on it, the "vast amounts of untapped natural resources" available in Liberia, and stated his fear of regional instability to cast doubt on the allegations.³²¹ Going beyond the defenses to the charges Taylor railed against what he perceived as selective prosecution saying he was an elected head of state in Africa put on trial while President George W. Bush and Prime Minister Tony Blair both progenitors of the War in Iraq from 2003 onwards escaped legal scrutiny.³²²

In April 2012 the SCSL judges of the publicly declared Charles Taylor guilty of aiding and abetting the underlying atrocities in Sierra Leone.³²³ Eight years beforehand the Appeals Chamber had cut down Taylor's attorney's motion, made under protest to quash the indictment and nullify the warrant.³²⁴ Relying on a 2002 ICJ case³²⁵ Taylor's defense team argued that the SCSL did not have the power to try an incumbent head of state during the issuance of the indictment and made appeals to absolute immunity doctrines and sovereign state equality (and implicitly noninterference) more generally.³²⁶ Professors Phillippe Sands QC and Diane Orentlicher submitted briefs as *amici curiae* both concluding that the SCSL as an international court constituted pursuant to United Nations action gave Charles Taylor no immunity as a former or active³²⁷ head of state.³²⁸ The African Bar Association submitted an *amicus* brief

320. *Id.* at 79.

321. *Id.* at 8, 83–84.

322. WAUGH, *supra* note 265, at 340.

323. Prosecutor v. Taylor, Case No. SCSL-03-01-T (Special Ct. Sierra Leone, Judgment, Apr. 26, 2012).

324. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I (Appeals Chamber, Summary of Decision on Immunity from Jurisdiction, May 31, 2004).

325. (Dem. Rep. Congo v. Belg.) Judgment 2002 I.C.J. Arrest Warrant of 11 April 2000 3 (Feb. 14). In this case, a Belgian arrest warrant, issued for an incumbent foreign minister of the Congolese government, ruled that heads of state and foreign ministers—the principal and agent of sovereign power—were immune from criminal prosecution in the courts of other nations. *Id.* at 22, 28. The ICJ, however, made clear that this immunity did not extend to international criminal tribunals—making clear that no person enjoys such legal immunities from criminal prosecution for these most grave crimes. *Id.* at 23, 26.

326. Further arguments were made by the prosecution about Taylor's standing to assert jurisdictional defenses, and counter-arguments made about the constitutionality of the Sierra Leonean legislation enacting the SCSL. See *Taylor*, Case No. SCSL-03-01-T at 2485.

327. Charles Taylor was the head of state of Liberia when the indictment was issued and when the motion was filed, but was no longer by the time he came into custody. See *Timeline*, Special Ct. for Sierra Leone, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Feb. 4, 2014). [note to author: this link has gone down, please provide another source.]

328. Professor Sands, of University College London, submitted that a sitting head of state is entitled to immunity in other nations' courts, but in respect to international criminal tribunals, no substantive immunity can be had for international crimes based on state office. Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I, Submission of the Amicus Curiae on Head of State Immunity, Oct. 23, 2009. Professor Orentlicher, of American University, concluded as well that substantive immunity is a principle only in national courts, and concurred in emphasizing the ICJ *Yerodia* distinctions. See

that too concluded no immunity for such grave crimes could be had.³²⁹ The Appeals Chamber in its decision found that head of state immunity, as a doctrine, formed a “serious issue relating to jurisdiction,” rather than an issue of defense as proposed by the prosecution.³³⁰ The Appeals Chamber allowed the motion³³¹ finding that the SCSL was not a national court but an international court and that no principle of customary international law stood in the way of an international court exercising jurisdiction over a head of state for international crimes. The judgment was twenty-six pages long.

In contrast, the Taylor judgment issued by the Trial Chamber spanned 2532 pages annexes included.³³² Throughout the voluminous decision the judges expressly weighed the credibility of witnesses and the content of their stories—including those of many RUF commanders. For example Karmoh Kanneh, an RUF commander known as “Eagle” testified that Sam Bockerie told him that Charles Taylor would link Bockerie to Blaise Compaoré long-time head of state of Burkina Faso in order to purchase military materials. At a later meeting of RUF commanders, Bockerie announced an arms shipment would arrive soon. An RUF radio operator, Dauda Aruna Fournie, was told by Bockerie that he had met with his “Papay”—Taylor’s popular nickname.³³³ Arms shipments were received, and the Trial Chamber was convinced in light of the significant catalog of evidence that Taylor provided the guns and ammunition necessary for the RUF’s deadly campaign along with significant—if sometimes waxing and waning³³⁴—strategic support. The SCSL found, overall, that Taylor was guilty of providing “practical assistance, encouragement, or moral support “which substantially effected the commission

generally Prosecutor v. Taylor, Case No. SCSL–2003–01–I, Decision on Immunity from Jurisdiction at 4, (Appeals Chamber, May 31, 2004).

329. Prosecutor v. Charles Ghankay Taylor, Application to appear as an Amicus Curiae, Nov. 28, 2003.

330. See *supra* note 398.

331. *Id.* The prosecution protested that, until Taylor had made an initial appearance, a preliminary motion was premature under the Rules of Procedure. The form of the motion—made under protest—itsself must submit itself to the court’s jurisdiction as it denies it, and thus embodies internal inconsistency. It is, however, a procedure that is accepted, at least in the American system, where it is known as a “special appearance,” a somewhat-anachronistic but still valid appearance in response to a summons in which the defendant preliminarily and via counsel denies the personal jurisdiction of a court. See also *United States v. Noriega*, 746 F.Supp. 1506, 1541 (S.D. Fla. 1990) (order denying motion to dismiss indictment); *United States v. Noriega*, 683 F.Supp. 1373, 1373 (S.D.Fla. 1988) (grating leave to file special appearance on grounds of international law).

332. Dozens of trial court decisions on technical matters were issued by the Trial Chamber, and seventeen by the Appeals Chamber by this point.

333. Prosecutor v. Taylor, Case No. SCSL-03-01-T at 1050 (Special Ct. Sierra Leone, May 18, 2012). On the subject of Taylor as “Papay”—father to the legions of child soldiers who knew only war, and to a country beaten into submission temporarily—see Owen Bowcott, *Charles Taylor: Showman in White Robes with Blood on His Hands*, *GUARDIAN*, Apr. 26, 2012, <http://www.theguardian.com/world/2012/apr/26/charles-taylor-profile-liberia>.

334. The Trial Chamber did *not* find a joint criminal enterprise (or conspiracy) existed between Taylor and the RUF—casting doubt on the veracity of the Libyan meeting, for example—stating that the relationship was one of converging interests, not of a common plan. See *Taylor*, Case No. SCSL–03–01–T at 2444.

of the crimes”³³⁵ with Taylor’s intent or awareness of the underlying crimes and that he helped plan them. Arms and ammunition—small amounts provided in kind and larger deals facilitated, personnel, and operational support including communications, logistics, and financing—were supplied. Taylor also encouraged and supported the RUF. These resources were used to enslave Sierra Leoneans in diamond fields, in “Operation Pay Yourself” and in attacks on Freetown (to name but a few examples) enabling the war crimes and crimes against humanity. Charles Taylor was sentenced at the end of May 2012 to fifty years in prison for his crimes.³³⁶ The SCSL is the first international court to wind up its affairs doing so in late 2013.

The SCSL was notable not merely for its efficacy in accomplishing its goals but to for its deviations from international criminal law precedent. The Appeals Chamber rejected the recent change of the ICTY requiring specific direction by an accused that aid provided must be specifically directed to crimes. As the Appeals Court noted the *actus reus* and *mens rea* are neither established by the SCSL statute, and thus such matters were settled by the Trial Chamber through referring to international law precedent. The ICTY in the case of a JNA Chief of Staff, Momčilo Perišić—who was in custody for nearly four and a half years before being acquitted—declared that the *actus reus* of aiding and abetting required substantial direction.³³⁷ The SCSL, however, did not agree ruling that a substantial effect on the commission of the crime along with a *mens rea* of intent, knowledge or awareness of substantial likelihood that a crime will be committed.³³⁸ Though some critiqued the SCSL’s decisions to depart from this “specific direction” ruling, and though the Court found Taylor guilty not of masterminding the crimes presented but merely assisting in their commission, the work of the SCSL in examining the historical record of these atrocities and punishing those whose actions made the violence possible is undeniable.³³⁹

IV. PRESENT AND FUTURE

Those who hope to end impunity for the murder and mayhem that have accompanied armed conflict for millennia have much reason to take heart. Since the end of the Second World War there have been greater international efforts to codify legally binding obligations that would end, or at least curtail the suffering that accompanies war. In particular, in-

335. See *id.* at 2446–47.

336. Marlise Simons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all>.

337. Prosecutor v. Perišić, ICTY Case No. IT-04-81-A, at 14 (Appeals Chamber Feb. 28, 2013).

338. Prosecutor v. Taylor, Case. No. SCSL-03-01-A, Appeals Judgment, at 223–24 (Sept. 26, 2013).

339. See, e.g., Kevin Jon Heller, *The SCSL’s Incoherent—and Selective—Analysis of Custom*, OPINIO JURIS (Sept. 27, 2013), <http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/>.

ternational criminal law and international humanitarian law succeed in part by subjecting the leadership of armed groups suspected of atrocities to arrest warrants,³⁴⁰ asset freezes,³⁴¹ economic sanctions on the accused, his regime and support network,³⁴² and other means. Thus international law encourages post-conflict countries and their neighbors into arresting indictees and handing them over to tribunals, providing a number of sticks to complement the wide range of carrots offered to liberalizing nations.

The tension between post-conflict popular demands for justice—often extrajudicial—and ideal trial circumstances—full and fair participation of defense counsel, the calling and cross-examination of witnesses, discovery, and impartial fact-finders—makes trying heads-of-state locally much more difficult. This is true especially given the undermining of state institutions including courts through conflicts, design, or simple poverty. On the other hand, international courts are much more involved requiring quite literally global participation and use sizable amounts of money sometimes with little meaning to those most affected by violence and war. Though they produce voluminous historical records invaluable to future generations for telling many stories of the victims of conflict they do so at a painstaking pace. The sheer number of efforts to hold high officials and heads-of-state accountable for criminal acts around the world, however, is encouraging.

A. Africa

A key example of the modern machinery of international criminal law and its efficacy today is that of President Omar al-Bashir of Sudan. As the first sitting head of state subjected to an arrest warrant by the ICC the case against al-Bashir is a bellweather in terms of the international community's efforts. Al-Bashir, who came to power in a bloodless coup in 1993, stands accused of war crimes, crimes against humanity, and genocide³⁴³ for his alleged role in overseeing a ruthless military campaign against the mostly non-Muslim populations southern and western³⁴⁴ regions of Sudan.³⁴⁵

340. See, e.g., *Interpol Issues First ICC Red Notices*, THE HAGUE: JUST. PORTAL (June 1, 2006), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/Pages/interpol%20issues%20first%20icc%20red%20notices.aspx.

341. See, e.g., *Belgrade to Freeze Assets of War Crimes Suspects*, RADIO FREE EUROPE/RADIO LIBERTY (Apr. 7, 2006), <http://www.rferl.mobi/a/1067484.html>.

342. See, e.g., *Syria crisis: EU sanctions on Asma al-Assad*, BBC NEWS, March 23, 2012.

343. The charge of genocide was originally rejected by the Pre-Trial Chamber, but the Appeals Chamber unanimously reversed this decision, finding that an erroneous standard to confirm charges was used by the Pre-Trial Chamber. The Appeals Chamber directed the Pre-Trial Chamber to reexamine the application. *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 55, 79, 110 (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>.

344. Sudan's southern region broke away in July 2011 from Sudan, forming the Republic of South Sudan with its capital in Juba. This came after ninety-eight percent of its population voted for independence, a vote that Sudan made public statements to respect. Conflict has erupted over control of

Since the arrest warrant was issued al-Bashir's freedom of movement has been curtailed as many of the ICC's Western supporters have pledged to apprehend al-Bashir should he enter their territory.³⁴⁶ The African Union, however, and its membership act agnostically with regard to the merits and validity of the warrant. Both the Republics of Malawi and Chad failed in their duties as states party to the Rome Statute to arrest al-Bashir during publicly announced visits and have been strongly chastened by the ICC for not doing so.³⁴⁷ The Malawian Foreign Ministry in explaining why it did not arrest al-Bashir as required as a member nation of the ICC stated

The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.³⁴⁸

The Court after reciting the evolution of international tribunals from World War I to Nuremberg to the ICTR and ICTY expressly and rather curtly rejected the personal sovereign immunity of al-Bashir.³⁴⁹ Al-Bashir remains at large, still serving as President of Sudan, though his ability to conduct foreign relations—and for Sudan to exercise unhindered economic relations throughout the world—has been curtailed. In-

oil profits in particular, with Sudanese warplanes bombing South Sudanese villages, but as of late, conflict with Sudan has subsided as violent, seemingly-intractable internal conflict between political factions erupted. Nicholas Kulish, *Reports of South Sudan Fighting, Despite Pact, Prompt Worry and Warnings*, N.Y. TIMES, Feb. 12, 2014, <http://www.nytimes.com/2014/02/13/world/africa/fighting-persists-in-south-sudan-despite-pact-and-aid-groups-issue-warnings.html>.

345. This conflict has alternatively raged and smoldered since the onset of the First Sudanese Civil War in 1955, and in particular in the period of the Second Sudanese Civil War, which came after the collapse of the Addis Ababa Accords, in 1983. With the advent of the Sudanese People's Liberation Army, the conflict intensified, and factions and paramilitaries multiplied. *South Sudan Profile: Timeline*, BBC NEWS, <http://www.bbc.com/news/world-africa-14019202> (last updated Apr. 23, 2014).

346. See, e.g., Maryam Jamshidi, *The enforcement gap: How the International Criminal Court Failed in Darfur*, AL JAZEERA (Mar. 25, 2013), <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html>; Ty McCormick, *The World's Most Mobile Accused War Criminal*, FOREIGN POL'Y (Sept. 17, 2012), http://blog.foreignpolicy.com/posts/2012/09/17/the_worlds_most_mobile_war_criminal (detailing al-Bashir's visits to 13 countries, including China but primarily African and Arab nations).

347. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, (Dec. 12, 2011), and its companion case with the Republic of Chad, Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, (Dec. 13, 2011).

348. *Id.* The government of Malawi was, in fact, informed by the Registry division of the ICC of its obligations. Dr. Bingu wa Mutharika, the one-time successful technocrat *cum* president of an growingly illiberal democracy, was hardly one to yield to Dutch demands. Under his leadership, Britain has been insulted and withdrawn its ambassador—and a significant amount of aid money—and the currency was pegged to the dollar, creating large foreign currency shortages. This filing on the part of the Republic of Malawi was made after COMESA summit, after the Registrar had transmitted a *Note Verbale* to the embassy of Malawi in Brussels, to which no reply was evidently made. *Id.*

349. Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply, see *Bashir*, Case No. ICC-02/05-01/09.

deed, following Malawi President Bingu wa Mutharika's unexpected death in March 2012—and the peaceful and reportedly hopeful transition of power to politically estranged Vice President Joyce Banda—the new government under Banda stated that were al-Bashir to attend the African Union summit in Lilongwe, the capital of Malawi, that he would be arrested pursuant to the ICC warrant.³⁵⁰ After arriving in Nigeria for a recent summit on HIV/AIDS and malaria in Africa, al-Bashir left the next day, perhaps due to Nigerian human rights groups pressuring President Goodluck Jonathan to arrest him.³⁵¹

The ICC remains occupied with cases involving conflict in the Democratic Republic of the Congo, Uganda, Mali, the Central African Republic, Kenya, and Côte d'Ivoire the former four arise from rebel and insurgent wars, while the latter two from violence surrounding elections in addition to the situations in Libya and Sudan.³⁵² In Côte d'Ivoire, Laurent Gbagbo's attempts to avoid Côte d'Ivoire's election results—ending his ten year reign which itself arose from a military coup in 1999 overthrown the next year by the coup leader's refusal to allow free and fair elections—has led to his confinement in The Hague before the ICC.³⁵³ Gbagbo's refusal to honor his loss in 2010 to Alassane Ouattara led to the Second Ivorian Civil War which only ended after UN and French peacekeepers allowed Ivorian forces to expand their control and eventually capture Gbagbo, who was transferred to The Hague to stand trial as an indirect co-perpetrator of murder, rape and sexual violence, persecution, and other inhuman acts—four counts altogether of crimes against humanity.³⁵⁴ But in a surprise move, on June 3, 2013 the Pre-Trial Chamber I the judicial branch that handles arrest warrants and confirmation of charges, decided to adjourn the hearing on the confirmation of charges against Gbagbo ruling that there was not enough evidence to confirm the charges at the moment—focusing, in particular, on the prosecution's use of anonymous hearsay in reports compiled by NGOs—but the extant evidence supported a decision not to dismiss the charges.³⁵⁵

350. The support of international donors was at least the public reason given. Following this announcement, the summit was moved to Addis Ababa, in Ethiopia, and Banda declined to attend in person. SAPA-AFP, *Malawi's Banda Snubs AU Summit After Bashir Spat*, MAIL & GUARDIAN (June 17, 2012), mg.co.za/article/2012-06-17-malawis-banda-snubs-au-summit-after-bashir-spat.

351. Chrispin Mwakideu, *Sudan's Al-Bashir Leaves AU Summit in Nigeria*, ALLAFRICA (July 16, 2013), <http://allafrica.com/stories/201307161520.html>.

352. See generally *Situations and Cases*, INT'L CRIM. CT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

353. Mark Doyle, *The Politics of Human Rights in Ivory Coast*, BBC NEWS (May 24, 2011), <http://www.bbc.co.uk/news/world-africa-13528781>.

354. Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Charges http://icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/ICC0211/Pages/situation%20index.aspx (last visited June 3, 2014). A warrant, on the same charges, remains in effect for his wife, Simone Gbagbo. *Prosecutor v. Simone Gbagbo* Case No. ICC 02/11-01/12, Warrant of Arrest (Feb. 29, 2012) http://icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/ICC0211/Pages/situation%20index.aspx (last visited June 3, 2014). Ouattara's forces stand accused of serious human rights breaches too. Doyle, *supra* note 353.

355. *Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute (June 3, 2013).

Most telling, however, will be the results of the proceedings against Uhuru Kenyatta, Kenya's president, with regards to the post-election violence in 2007 in Kenya. The Pre-Trial Chamber II confirmed the charges in January 2012 against several top politicians—including Kenyatta son of the country's founder for crimes against humanity including: murder, rape, forcible transfer, persecution, and other inhuman acts after authorizing an investigation of the situation in March 2010.³⁵⁶ Kenyatta, the first sitting head-of-state to appear before the court, submitted himself to its jurisdiction pursuant to Kenya ratifying the Rome Statute in March 2005.³⁵⁷ In doing so, Pre-Trial Chamber II rejected the government of Kenya's arguments that Kenya's newly adopted constitution created a system of government conducive to justice and thus that Kenya was willing and able to investigate on its own—the complementarity principle.³⁵⁸ Kenya's Parliament voted to leave the ICC,³⁵⁹ and senior government officials have spoken in favor of amending the Rome Statute to immunize sitting executives.³⁶⁰ In December 2013 Prosecutor Fatou Bensouda submitted to the Court notice of the withdrawal of two witnesses and asked for an adjournment of the trial date set for February.³⁶¹ Similar charges were dismissed of one of his co-indictees as concerns over witness intimidation mounted with key witnesses having their identities revealed and recanting their prior testimony.³⁶² Unnamed sources suggest that the Kenyan government stonewalled the investigation where possible.³⁶³ Whether a full and fair justice will ever be rendered remains to be seen, and the implications for the International Criminal Court and

356. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute 11-14 (Jan. 23, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

357. Kenya, COALITION FOR THE INT'L CRIM. CT., <http://www.iccnw.org/?mod=country&iduct=89> (last visited June 3, 2014).

358. Muthaura, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Rome Statute ¶ 66 (May 30, 2011), available at <http://icc-cpi.int/iccdocs/doc/doc1078823.pdf>.

359. Kenya Parliament Votes to Withdraw from ICC, AL JAZEERA, (Sept. 5, 2013), <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>.

360. Kenya Vows to Have ICC Statute Amended, AL JAZEERA (Nov. 21, 2013), <http://www.aljazeera.com/news/africa/2013/11/kenya-vows-icc-statute-amended-2013112119540269406.html>.

361. Muthaura, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, (Dec. 19, 2013), available at <http://www.icc-cpi.int/iccdocs/doc/doc1703998.pdf>.

362. ICC Prosecutors Drop Case Against Kenyan Politician Francis Muthaura, GUARDIAN (Mar. 11, 2013) <http://www.theguardian.com/law/2013/mar/11/icc-prosecutors-kenyan-francis-muthaura>; Helen Vesperini, Anger After Kenyan ICC Trial Witness 'Outed' Online, FOX NEWS (Sept. 18, 2013), <http://www.foxnews.com/world/2013/09/18/anger-after-kenyan-icc-trial-witness-outed-online/>. John Campbell, ICC: Is Witness Intimidation Derailing President Kenyatta's Trial?, CHRISTIAN SCI. MONITOR (Dec. 30, 2013), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2013/1230/ICC-Is-witness-intimidation-derailing-President-Kenyatta-s-trial>; see also Erich Follath, 'Big Mama' and the Massacre: ICC's Reputation at Risk in Kenya, SPIEGEL (July 26, 2013), <http://www.spiegel.de/international/world/reputation-of-icc-on-the-line-in-case-against-kenya-president-kenyatta-a-913090.html>.

363. "There was not a shred of cooperation; they wouldn't give you as much as a weather map," an unnamed attorney familiar with the Kenya ICC investigation stated; access to witnesses, records, and other evidence has been denied. Marlise Simmons & Rick Gladstone, Prosecutor Seeks Delay in Proceedings for a Kenyan, N.Y. TIMES (Dec. 19, 2013), http://www.nytimes.com/2013/12/20/world/africa/trial-of-kenyan-president.html?_r=0 (citation omitted).

its first trial of a sitting head-of-state are enormous. For their part the Kenyan people strongly believed a fairer trial would be had in The Hague.³⁶⁴ But three years into the process—and with several of the accused having since been elected to Kenyan government—support has dropped significantly in the wake of the September 2013 attack on the upscale Westgate Mall in Nairobi.³⁶⁵

Even regardless of the outcome of the Kenyatta trial, however, the reverberations around Africa—the ICC’s most involved continent—are troubling. For a continent in which in 2013 at least three major humanitarian disasters—in Mali, the Central African Republic, and South Sudan—the African Union’s disavowal of ICC efforts is troubling. At an Extraordinary Session of the Assembly of the African Union, it was issued that:

After reaffirming the principles deriving from national law and international customary law, by which sitting heads of state and government and other senior state officials are granted immunities during their tenure of office, the Assembly decided that, “No charges shall be commenced or continued before any international court or tribunal against any serving head of state or Government or anybody acting in such capacity during his/ her term of office. To safeguard the constitutional order, stability and integrity of member states, no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during their term of office.”³⁶⁶

The implications for the head-of-state immunity doctrine (and international criminal law) are deleterious, though the AU member states reaffirmed their commitment to remaining part of the ICC. Regardless, the idea of reviving even temporary head-of-state immunity for international crimes is dangerous as history has long shown the lengths national leaders will go to cling to power—especially in Africa where peaceful democratic transitions have been relatively rare until recently.

B. Asia

The scale of the crimes committed by the United States though wide and multifarious pale in comparison to those committed by even its fellow members of the United Nations Security Council. Joseph Stalin, of course, would never answer for the massive human rights abuses—

364. In Kenya, ninety-one percent of adults polled thought a more fair trial would be had in The Hague than in Arusha, Kenya. *Kenya Votes 2013: Attitudes Toward the Election, Judicial System, and Security*, GALLUP (Oct. 5, 2013), available at <http://www.gallup.com/poll/157898/kenya-votes-2013-attitudes-toward-election-judicial-system-security.aspx>.

365. According to an Ipsos Synovate poll, support for the ICC trials has dropped nearly thirty percentage points from 2010 to 2013. Felix Olick, *Kenyan Support for ICC Trials Falls*, INST. FOR WAR AND PEACE REPORTING (Aug. 25, 2013), <http://iwpr.net/report-news/kenyan-support-icc-trials-falls>.

366. *Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia*, AFRICAN UNION (Oct. 11–12, 2013), <http://www.au.int/en/content/extraordinary-session-assembly-african-union>.

murder, torture, persecution, and the massive losses of life due to forced agricultural collectivization which led to famine—which were endemic in early Soviet Russia.³⁶⁷ Even after his death and Nikita Khrushchev's "secret speech," "On the Cult of Personality and Its Consequences," denouncing the Great Purge, Russian security agencies like the KGB and affiliated satellite organizations like the *Stasi* in East Germany continued to suppress dissident thought by any means necessary.³⁶⁸ Today Russia has one of the highest murder rates for journalists in the world corruption remains endemic, and young people seek employment abroad.³⁶⁹ In March 2014 the Russian Federation annexed Crimea, which had been under an international agreement dating to 1954 and part of Ukraine; despite widespread international condemnation, President Putin did not waver.³⁷⁰

Elsewhere, the vestiges of socialist oligarchies remain. In China the Chinese Communist Party has completed a scripted transition of power to a new President, Li Keqiang, and signs suggest the party is trying to fine tune its level of human rights abuses.³⁷¹ Mao Zedong's legacy still

367. See generally ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELIGO* (1973); *THE BLACK BOOK OF COMMUNISM* (Stéphane Courtois, ed., 1997).

368. *Id.* For a noteworthy elucidation on secret police in Europe and Russia, see also Horst Gemmer et. al., *Accountability for State-Sponsored Human Rights Abuses in Eastern Europe and the Soviet Union*, 12 B.C. THIRD WORLD L.J. 241 (1992), and on the *Stasi* and their activities, see, e.g., Amos Elon, *East Germany: Crime and Punishment*, N.Y. REV. OF BOOKS, May 14, 1992.

369. *Attacks on the Press in 2011: Russia*, CPJ.ORG, <http://cpj.org/2012/02/attacks-on-the-press-in-2011-russia.php> (last visited June 4, 2014). *Russia*, FREEDOM HOUSE, available at <http://www.freedomhouse.org/country/russia> (last visited on June 4, 2014). Human Rights Watch notes an "unprecedented crackdown against civic activism" and "persistent problems with torture and inhuman and degrading treatment by law enforcement officials." Human Rights Watch, *World Report 2013: Events of 2012*, at 460, 469 (2013), available at <http://www.hrw.org/sites/default/files/reports/wr2013.pdf>.

370. Gavin Hewitt, *Ukraine: Putin Signs Crimea Annexation*, BBC NEWS, (Mar. 21, 2014), <http://www.bbc.com/news/world-europe-26686949> See also Adam Taylor, *To understand Crimea, Take a Look Back at Its Complicated History*, WASH. POST, (Feb. 27, 2014) <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/>.

371. Trying to understand the intentions of the new Central Politburo members is like trying to read tea leaves; in the past year, one has seen the dramatic downfall of Chongqing's defiantly neo-Maoist governor Bo Xilai for having been, evidently, deeply involved in organized corruption and the murder of a British national, and the equally dramatic escape of blind activist attorney Chen Guangcheng from house arrest, seeking refuge in the U.S. Embassy in Beijing. *Bo Xilai Scandal: Timeline*, BBC NEWS (Nov. 13, 2013), <http://www.bbc.com/news/world-asia-china-17673505>; Andrew Jacobs & Jonathan Ansfield, *Challenge for U.S. After Escape by Chinese Activist*, N.Y. TIMES, Apr. 27, 2012, http://www.nytimes.com/2012/04/28/world/asia/chen-guangcheng-blind-lawyer-escapes-house-arrest-china.html?pagewanted=all&_r=0. Anyone expecting major changes, however, is bound to be disappointed, as human rights abuses like "black jails" continued to be employed against dissidents, and even historical examinations of past crimes against humanity, such as during the Cultural Revolution, are suppressed. C.S.M., *China and the Mirror of History: Let's Not Forget*, ECONOMIST (Mar. 4, 2013), <http://www.economist.com/blogs/analects/2013/03/china-and-mirror-history>; *Urban Stability: Treating the Symptoms*, ECONOMIST (Mar. 2, 2013), <http://www.economist.com/news/china/21572814-name-social-order-government-turns-blind-eye-black-jails-treating-symptoms>. Perhaps most tellingly, China continues to jail Liu Xiaobo, the democracy activist who received the 2010 Nobel Peace Prize, for "inciting subversion of state power." *Liu Xiabo*, FREEDOM NOW, available at <http://www.freedomnow.org/campaign/liu-xiaobo/>. Perhaps even more galling, Liu's wife has been under house arrest, with no explanation, since her husband won the award—and recent reports suggest house arrest has taken its toll on her health. Debra Xu, *Liu Xia, Wife of Nobel laureate Liu Xiaobo, 'Depressed'*, BBC NEWS (Dec. 3, 2013), <http://www.bbc.com/news/world-asia-china-25206137>. But elsewhere, hopeful

lives on in China admittedly imperfect but roundly supported by the establishment.³⁷² Environmental degradation, inflation, and political oppression affect all Chinese people, but the majority of Chinese citizens are virtually second-class citizens in their own nation, even as the national party makes effort to reform its image of privilege and uncurtailed power.³⁷³

Kim Jong Il who presided over North Korea after his father's death in 1994 until his own death at the end of 2011 was responsible for some of the most grave and enduring crimes against humanity of the late 20th and early 21st centuries. Though the use of labor camps, summary executions, torture, and other brutalities against perceived enemies of the regime have long been recognized, they attracted little official international attention until 2013 when the United Nations convened a Commission of Inquiry on Human Rights in North Korea which has heard what it has labeled "credible allegations" alleging forced abortions, public executions, and abductions of foreigners, among other crimes.³⁷⁴ Yet as the panel noted without the cooperation of North Korea—which called the proceeds "a charade" and a witness who escaped from a labor camp "human scum"³⁷⁵—there is little the Commission can do.

signs exist. The number of individuals executed in China has fallen dramatically, and the long-standing policy of harvesting their organs after execution is being disfavored. *Organs for Transplants: Chopped Livers*, *ECONOMIST* (Aug. 24, 2013), <http://www.economist.com/news/china/21584056-china-seeks-organ-donors-replace-product-capital-punishment-chopped-livers>.

372. Mao, responsible for tens of millions of famine deaths during the Great Leap Forward period from 1958 to 1961, forced collectivization and industrialization which resulted in little more than a lot of useless pig iron, massive human rights abuses, and the destruction of cultural antiquities millennia old during the Cultural Revolution from 1966 to 1976, was of course never held to account for these policies. See, e.g., Stuart R. Schram, *Mao Zedong a Hundred Years On: The Legacy of a Ruler*, 137 *CHINA Q.* 125 (1994). Deng Xiaoping, who survived several purges during Mao's life and eventually rose to power after Mao's death, remarked that Mao was "seven parts good, three parts bad." 350 *Deng Xiaoping*, *NEW WORLD ENCYCLOPEDIA*, http://www.newworldencyclopedia.org/entry/Deng_Xiaoping (last visited Jun. 4, 2014). Deng was happy enough to abandon Maoist thought—"It doesn't matter whether it's a white cat or a black, I think, a cat that catches mice is a good cat," Colin Speakman, *Xi Offers Hope of Clarity*, *CHINA DAILY* (Dec. 4, 2012), http://www.chinadaily.com.cn/opinion/2012-12/04/content_15982559.htm. He said of capitalism and socialism—but while the violent chaos of the Mao era was put behind China with Mao's death, Deng presided over the violent crack-down on peaceful student protesters in Tiananmen Square in 1989. *Reformer with an Iron Fist: Deng Xiaoping*, *CNN*, <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/deng.xiaoping/> (last visited June 4, 2012).

373. Which, of course, makes ethnic minorities and especially Uighurs and Tibetans third-class citizens. See Human Rights Watch, *World Report 2012: Events of 2011*, at 314, 325 (2012) available at <http://www.hrw.org/sites/default/files/reports/wr2012.pdf>. Mao's wife, Jiang Qing, was tried as part of the "Gang of Four" after Mao's death—in part on charges alleging the persecution of over 700,000 Chinese—and committed suicide after several years of imprisonment. Today, trials of corrupt or disfavored are not uncommon, the most foremost being Bo Xilai, see *supra* note 349, but no justice will likely ever be found by those who have suffered in China's black jails and labor camps as political prisoners. Jamie A. FlorCruz, *From Gang of Four to Bo Xilai: Reporting from China's 'Show Trials'*, *CNN*, (Aug. 28, 2013), <http://www.cnn.com/2013/08/28/world/asia/china-gang-of-four-trial-florcruz/>.

374. Jonathan Cheng & Jeyup S. Kwaak, *U.N. Presses North Korea on Rights Violations: Panel Urges Pyongyang to Present Evidence to Rebut Defectors' Claims*, *WALL ST. J.*, (Aug. 27, 2013), <http://online.wsj.com/news/articles/SB10001424127887324591204579038430757238094>.

375. Madison Park, *North Korea: 'We were forced to eat grass and soil'*, *CNN* (Feb. 17, 2014), <http://www.cnn.com/2014/02/16/world/asia/north-korea-un-report/>.

Pol Pot, as leader of the Khmer Rouge died in his jungle redoubt where his forces had taken shelter after the Vietnamese invasion.³⁷⁶ Two of his top officials have come to trial in the past decade before the Extraordinary Chambers of the Courts of Cambodia a hybrid tribunal with significant Cambodian investment and personnel along with U.N. involvement and international participation.³⁷⁷ One of these cases, however, had to be ended as the advanced age brought the mental competency of the defendant into question. In another case, the defendant died before the trial was finished.³⁷⁸ One judge unexpectedly quit the tribunal due to government interference.³⁷⁹ Though commendable, the tribunal's work was certainly hampered in its effectiveness.³⁸⁰

In Kuala Lumpur a quasi-private international tribunal, the Kuala Lumpur War Crimes Tribunal, convened to attack the impunity of Western governments by former Malaysian Prime Minister Mahathir Mohamad in 2011.³⁸¹ The Tribunal heard cases *in absentia* of President George W. Bush and Prime Minister Tony Blair in Britain for their role in the lead-up to the War in Iraq in 2003 as well as a number of administration officials.³⁸² They were found guilty of conspiracy to commit war crimes—torture, in particular—in proceedings which sought to comply with all strictures of due process to establish a historical record, though the defendants, of course, chose not to appear.³⁸³ The tribunal has moved on to consider charges against the State of Israel and Israeli general officials for acts against Palestinians, but a day into the trial allegations of possible bias led to an indefinite adjournment of proceedings.³⁸⁴ Since then, however, it found Amos Yaron, an IDF general and the State of Is-

376. *Pol Pot: Life of a Tyrant*, BBC NEWS, (Apr. 14, 2000), <http://news.bbc.co.uk/2/hi/asia-pacific/78988.stm>.

377. *Overview of the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, CENTER FOR JUST. AND ACCOUNTABILITY, <http://cja.org/article.php?list=type&type=454> (last visited June 4, 2014).

378. Luke Hunt, *Jeng Sary's Death Adds Pressure for ECCC to Find Justice*, DIPLOMAT, (Mar. 14, 2013), <http://thediplomat.com/2013/03/jeng-sarys-death-adds-pressure-for-eccc-to-find-justice/>.

379. Kong Sothanarith, *Surprise Resignation of Judge Adds to Tribunal's Woes*, VOICE AM., (Mar. 22, 2012), <http://www.voacambodia.com/content/surprise-resignation-of-judge-adds-to-tribunal-woes-143831216/1358362.html>.

380. "Hearings into an appalling genocide have seen just five indictments and only one conviction in eight years at a cost of some \$200 million." Charlie Campbell, *Cambodia's Khmer Rouge Trials Are a Shocking Failure*, TIME (Feb. 13, 2014), <http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/>. See also Say Mony, *UN Expert to Khmer Rouge Court Sees Promise Over Problems*, VOICE OF AM., (July 18, 2012), <http://www.voacambodia.com/content/optimistic-un-special-expert-to-eccc-sees-hurdles-as-normal-161786845/1405472.html>. The Vietnamese, who toppled the Khmer Rouge in the late 1970's, conducted their own trials in absentia of the leadership. Though historians disdain the impartiality and work of the tribunals, they remain valuable as a historical record of victims' accounts. See generally GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY (Howard J. De Nike et al., eds., 2000) (documenting the People's Revolutionary Tribunal).

381. Patrick Winn, *Malaysia's Hague Envy*, GLOBAL POST (May 28, 2013), <http://www.globalpost.com/dispatch/news/war/130527/hate-zionists-kuala-lumpur-war-crimes-tribunal>.

382. Richard Falk, *Kuala Lumpur Tribunal: Bush and Blair Guilty*, AL JAZEERA, (Nov. 28, 2011), <http://www.aljazeera.com/indepth/opinion/2011/11/20111128105712109215.html>.

383. Patrick Winn, *Malaysia's Hague Envy*, GLOBAL POST (May 28, 2013), <http://www.globalpost.com/dispatch/news/war/130527/hate-zionists-kuala-lumpur-war-crimes-tribunal>.

384. Press Release, Kuala Lumpur Foundation to Criminalise War, Genocide Trial Adjourned Sine Die (Aug. 22, 2013), available at <http://criminalisewar.org/2013/genocide-trial-adjourned-sine-die/>.

rael guilty of genocide.³⁸⁵ Finally, in Pakistan former dictator, President, and General Perez Musharref made an ill-fated decision to return to Pakistan where he has been apprehended and may yet stand trial for high treason—if his health improves.³⁸⁶

C. Middle East

The human rights situation in the Middle East has long been perilous, and its fruits poisonous. Every country in the Middle East with the exceptions of Israel, Kuwait, Lebanon, and Turkey is considered by the non-governmental organization Freedom House to be “not free.”³⁸⁷ And, of course, the State of Israel has in its fifty years engaged in numerous actions—sometimes defensively, sometimes less so—against its neighbors. Serious questions have arisen with regards to the Israeli incursions into the Gaza Strip in 2008 and 2009³⁸⁸ and into Southern Lebanon in 2006 where unexploded ordinance from cluster bombs still maim and kill.³⁸⁹ The continuing annexation of the Occupied Territories—the nascent State of Palestine—has faced widespread international condemnation, even by Ban Ki-Moon,³⁹⁰ and from the United States, and Europe—but as recently as mid-August 2013 Israel continued to issue more permits for building of settlements in non-Israeli territory.³⁹¹ In some nations attempts to use universal jurisdiction to hold Israeli and

385. Kuala Lumpur War Crimes Tribunal (Kuala Lumpur War Crimes Commission v. Amos Yaron Case No. 3, Chg 2013 & Kuala Lumpur War Crimes Commission v. State of Isr. Case No. 4, Chg. 2013) (Nov. 20–25, 2013), available at <http://criminalisewar.org/files/Judgement%20on%20Genocide.pdf>.

386. J.B., *Trying the General*, ECONOMIST (June 26, 2013), <http://www.economist.com/blogs/banyan/2013/06/pakistan>; see also *General Hypochondria: A Former Dictator Prefers the Hospital to the Law Court*, ECONOMIST (Jan. 25, 2014), <http://www.economist.com/news/asia/21595036-former-dictator-prefers-hospital-law-court-general-hypochondria>. On March 31, 2014, Musharref was formally charged in court. *Pakistan's Musharraf Charged in Treason Case*, BBC NEWS (Mar. 31, 2014), <http://www.bbc.com/news/world-asia-26815518>.

387. *Map of Freedom 2013*, FREEDOM HOUSE, <http://www.freedomhouse.org/sites/default/files/Map%20of%20Freedom%202013%2C%20final.pdf> (last visited June 4, 2014).

388. Operation Cast Lead, as it was called, engendered deep global controversy. It led to the United Nations Fact Finding Mission on the Gaza Conflict (popularly known as the Goldstone Report) which condemned Israeli for use of white phosphorus, cluster munitions, and insufficient regard for civilian life in Gaza. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission* (Sept. 25, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>. Since its publication, author and former ICTY prosecutor Richard Goldstone, of South Africa, has stepped back from the report's conclusions, arguing for a more balanced view of abuses. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1, 2011, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html. The State of Israel's own evaluation cleared it of any serious wrongdoing. See *18 Jan. '12: Three Years Since Operation Cast Lead: Israeli Military Utterly Failed to Investigate Itself*, B'TSELEM, (Jan. 18, 2012), http://www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead.

389. Leena Saidi, “Continuous War”: *Cluster Bombs in South Lebanon*, WASH. POST (2014), <http://www.washingtonpost.com/wp-srv/world/interactives/lebcbomb/>.

390. John Heilprin, *UN Report: Israel's “Creeping Annexation” of Territory is Illegal*, CHRISTIAN SCI. MONITOR (Jan. 31, 2013), <http://www.csmonitor.com/World/Latest-News-Wires/2013/0131/UN-report-Israel-s-creeping-annexation-of-territory-is-illegal>.

391. *New West Bank Settlement Homes Anger Palestinians*, BBC NEWS, (Aug. 11, 2013), <http://www.bbc.co.uk/news/world-middle-east-23656904>.

United States officials accountable for actions in the Middle East have led to international exposure and embarrassment for diplomats and so far failed to achieve any redress other than annoyance and harassment of the accused³⁹²—considered as a victory of a sort. Israel has shown some initiative in holding leaders responsible—but not for its incursions into neighboring land but for corruption as former President Ehud Olmert was finally convicted in 2014 years after leaving office due to these allegations.³⁹³

Throughout the rest of the Middle East the Arab Spring has opened Pandora's Box leading to civil strife as authoritarian governments battle democracy activists and Islamists of varying degrees of fundamentalism. In the vicissitudes of the Egyptian revolution as part of a wider crisis of governments—the Arab Spring—Hosni Mubarak's fortunes have certainly fallen and risen. After his thirty-year reign—rife with reports of human rights abuses³⁹⁴—Mubarak was deposed in the Egyptian Revolution and convicted for his role in the crackdown on protestors and sentenced to life imprisonment in June 2012.³⁹⁵ In August 2013, upon a successful appeal he was released from prison—months after the democratically-elected president, Mohammed Morsi of the Muslim Brotherhood, was ousted by the military after widespread protests of his inept government. His retrial has begun, at a plodding pace.³⁹⁶ Mohammed Morsi in a stunning reversal of fortune, faces trial for the deaths of protesters during his reign, and the Muslim Brotherhood was labeled as a terrorist organization in December 2013.³⁹⁷ After Morsi thundered against his deposition and the court's legitimacy the Egyptian authorities came up with a new innovation in suppressing unruly defendants—a soundproof glass cage which the trial judges threatened to put Morsi's attorney in for arguing.³⁹⁸

The Arab Spring began in Tunisia, and its ruler at the time Zine El Abidine Ben Ali, chose the pragmatic route by fleeing Tunisia with his

392. See, e.g., Anshel Pfeffer, *Fear of Arrest Still Prevents Israeli Officials from Visiting Britain*, HA'ARETZ (May 30, 2012), <http://www.haaretz.com/news/diplomacy-defense/fear-of-arrest-still-prevents-israeli-officials-from-visiting-britain.premium-1.433452>.

393. *Israel's ex-PM Ehud Olmert Convicted of Bribery*, BBC NEWS (Mar. 31, 2014), <http://www.bbc.com/news/world-middle-east-26815849>.

394. See *Profile: Hosni Mubarak*, BBC NEWS (Aug. 22, 2013), <http://www.bbc.co.uk/news/world-middle-east-12301713>.

395. *Id.*

396. *Mubarak Trial Resumes in Cairo Criminal Court*, DAILY NEWS EGYPT, (Mar. 25, 2014), <http://www.dailynewsegypt.com/2014/03/25/mubarak-trial-resumes-cairo-criminal-court/>.

397. Kevin Connolly, *Morsi Trial is Latest Chapter in Egypt's Power Struggle*, BBC NEWS, (Nov. 4, 2013), <http://www.bbc.co.uk/news/world-middle-east-24804211>; Kareem Fahim & Mayy El Sheikh, *Egypt Broadens New Crackdown on Brotherhood*, N.Y. TIMES, Dec. 26, 2013, <http://www.nytimes.com/2013/12/27/world/middleeast/explosion-cairo.html>.

398. Peter Hessler, *Revolution on Trial: The Strange World of the Muslim Brotherhood Court Cases*, NEW YORKER, Mar. 10, 2014, http://www.newyorker.com/reporting/2014/03/10/140310fa_fact_hessler.

wife and children.³⁹⁹ In June 2011 he was sentenced *in absentia* by a Tunisian court to thirty-five years, on theft and unlawful possession charges related to money and valuable assets during his presidential tenure.⁴⁰⁰ Slightly less than a year later a military court sentenced him to life in prison plus twenty years for the crackdown on the protests that led to his ouster.⁴⁰¹ Meanwhile, Ben Ali—who recent reports suggest sat at the top of a system of graft totaling perhaps billions of dollars—lives, presumably quite comfortably, in exile in Saudi Arabia.⁴⁰² Pragmatism can make all the difference for dictators when the choice between fight or flight arises. ICC indictments against Muammar Qaddafi and his son Saif al-Islam were issued in June 2011 for murder and persecution, crimes against humanity.⁴⁰³ Muammar Qaddafi, faced the full wrath and fury of his long-suffering countrymen, while his son faces trial in Libya for “killing, looting, incitement of civil war as well as promotion and distribution of drugs, incitement of rape and kidnapping”—though the ICC has ruled he should be tried in The Hague in a flurry of judgments, notifications, and decisions on non-cooperation.⁴⁰⁴ Such vicissitudes and vagaries bode ill for the cause of justice and accountability and highlight the need for international efforts to hold leaders accountable—in accordance with due process norms—for their actions harming human rights.

In Syria President Bashar al-Assad of the Alawite community has been suppressing a rebellion against his dictatorship by waging all-out war on his own people.⁴⁰⁵ Assad, who inherited power from his father Hafez al-Assad (who himself waged a violent suppression of the Syrian people), has held power since 2000.⁴⁰⁶ Beginning in March 2011, protests against Assad’s rule began, and not long after, the civil unrest became civil war.⁴⁰⁷ The fractious nature of the Syrian opposition has weakened the opposition movement as Syrian moderates injured and killed during

399. Edward Cody & Joby Warrick, *Unrest Continues in Tunisia as President Ben Ali Flees Country*, WASH. POST, Jan. 15, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011401131.html>.

400. Jo Adetunji, *Ben Ali Sentenced to 35 Years in Jail*, GUARDIAN (June 20, 2011), <http://www.theguardian.com/world/2011/jun/20/ben-ali-sentenced-35-years-jail>.

401. *Tunisia’s Ben Ali Sentenced Over Protesters’ Deaths*, BBC NEWS (June 13, 2012), <http://www.bbc.co.uk/news/world-africa-18421519>.

402. Bob Rijkers et al., *Tunisia’s Golden Age of Crony Capitalism*, WASH. POST, Mar. 27, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/27/tunisia-golden-age-of-crony-capitalism/>; *Ben Ali Gets Refuge in Saudi Arabia*, AL JAZEERA, (Jan. 16, 2011), http://article.wn.com/view/2011/01/16/Ben_Ali_gets_refuge_in_Saudi_Arabia/.

403. Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11 (June 27, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1099321.pdf>; Warrant of Arrest for Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11, (June 27, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1101345.pdf>.

404. See, e.g., Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Urgent Notification, p. 1 (Aug. 29, 2013), available at <http://www.icc-cpi.int/iccdocs/doc/doc1637560.pdf> (citation omitted).

405. *Syria profile: Timeline*, BBC NEWS, (Mar. 19, 2014), <http://www.bbc.com/news/world-middle-east-14703995>.

406. *Id.*

407. *Mid-East Unrest: Syrian Protests in Damascus and Aleppo*, BBC NEWS, (Mar. 15, 2011), <http://www.bbc.co.uk/news/world-middle-east-12749674>.

the war have been replaced by foreign *ihadis* some of whom are aligned with al-Qaeda.⁴⁰⁸ Indeed, the gulf between local and foreign and Islamist and secular has become a dominating narrative in recent months as some Syrians sympathetic to the goals of the rebels have turned their back on the uprising.⁴⁰⁹ Several nations, as of December 1, 2012 recognized this Syrian National Coalition as it is informally known as the sole representative of the Syrian people including: France, Turkey, the United Kingdom, Saudi Arabia, and several Gulf states.⁴¹⁰ “Massive evidence” exists for assertions of crimes against humanity and war crimes committed by the Assad regime and the military of the Syrian Arab Republic.⁴¹¹ Airstrikes against rebel positions have killed civilians⁴¹² as has indiscriminate shelling and most galling massacres of civilians at close range producing suspicions of chemical weapons.⁴¹³ The *Shabiha* a secret police force has long operated with impunity under Assad, and serious allegations of torture and murder are long-standing.⁴¹⁴ A photo cache with over 55,000 images cataloguing the Syrian government’s work was given to the Qatari government by a defecting.⁴¹⁵ Yet because Syria has not ratified the Rome Statute of the International criminal court, the ICC has no jurisdiction over it absent a U.N. Security Council referral (or self-referral and *ad hoc* jurisdiction which is extraordinarily unlikely).⁴¹⁶ Security Council referrals—essentially an exercise of universal jurisdiction—are rare, though the situation in Libya and the situation in Sudan were both referred to the ICC by the Security Council.⁴¹⁷ Because Syria is an arms client of Russia, and with Russia feeling stung by the aggressive NATO action in Libya, Security Council action on the conflict in Syria is virtually guaranteed to fail, despite the fact that nearly sixty countries and the U.N. commissioner for human rights, Navi Pillay, have

408. *Where Are the Good Guys?*, ECONOMIST (Dec. 21, 2013), <http://www.economist.com/news/middle-east-and-africa/21591868-rise-jihadists-and-worsening-sectarian-strife-syria-have-put-western>.

409. *Id.*

410. A number of nations including the United States and most of the rest of the G7, have expelled or otherwise made Assad’s ambassadors *persona non grata*. Ian Black & Chris McGreal, *Syrian Diplomats Expelled from Countries Around the World*, GUARDIAN (May 29, 2012), <http://www.theguardian.com/world/2012/may/29/syrian-ambassadors-expelled-britain-france>.

411. *Magnitude of Human Rights Violations in Syria Has Dramatically Increased—UN Panel*, U.N. NEWS CENTRE (Sept. 17, 2012). This conflict echoes the insurrections against Saddam Hussein in Iraq (both were both ruled by Ba’athist regimes filled with tribal kinsfolk).

412. *Syria: Evidence Shows Cluster Bombs Killed Children*, HUMAN RIGHTS WATCH, (Nov. 29, 2012), <http://www.hrw.org/news/2012/11/27/syria-evidence-shows-cluster-bombs-killed-children-0>.

413. Salma Abdelaziz et al., *U.N. Confirms Use of Chemical Weapons in Syria*, CNN (Dec. 12, 2013) <http://www.cnn.com/2013/12/12/world/meast/syria-civil-war/index.html>.

414. Harriet Alexander & Ruth Sherlock, *The Shabiha: Inside Assad’s Death Squads*, TELEGRAPH (June 2, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9307411/The-Shabiha-Inside-Assads-death-squads.html>. The facts in the article are sordid and disturbing, and reports of violence against prisoners of the opposition suspected of being *shabiha* are not uncommon.

415. Ben Hubbard & David D. Kirkpatrick, *Photo Archive is Said to Show Widespread Torture in Syria*, N.Y. TIMES, Jan. 21, 2014, http://www.nytimes.com/2014/01/22/world/middleeast/photo-archive-is-said-to-show-widespread-torture-in-syria.html?_r=0.

416. *Q&A: Syria and the International Criminal Court*, HUMAN RIGHTS WATCH, (Sep. 17, 2013), <http://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court>.

417. Matthias Neuner, *The Security Council and the Icc: Assessing the First Ten Years of Coexistence*, 18 NEW ENG. INT’L & COMP. L.J. 283, 287 (2012).

called for the ICC to investigate the situation.⁴¹⁸ Russia, in fact, continues to supply arms to the Assad regime.⁴¹⁹ Evidence of the use of chemical weapons has been advanced,⁴²⁰ but until recently incontrovertible evidence had not yet surfaced. Though Medecins Sans Frontieres could not scientifically confirm their use President Obama and Secretary of State John Kerry have repeatedly asserted that the evidence pointed to Assad's use of chemical weapons—sarin in particular—in an attack that allegedly killed over 1,400 people. In December 2013, the U.N. alleged “clear and convincing” evidence of such chemical weapon use.⁴²¹

On the other side of the divide in Syria grows the grim tally of human rights abuses committed by the virulent spread of Jabhat al-Nusra and ISIS, groups of mostly foreign *jihadis* aligned with al-Qaeda.⁴²² Summary justice for accused slights to fundamentalist Islamic mores are rife in *al-Nusra*-controlled areas, including executing a fifteen year old.⁴²³

The true test case, thus, will be this—whether in the face of a self-fulfilling prophecy about extremism in the Syrian conflict the world will formally investigate the culpability of Bashar al-Assad, regardless of whether his hold on power in Syria is maintained or not. Overall, the chaotic state of governance in the Middle East significantly hampers efforts to hold leaders responsible for human rights abuses, and though the Arab Spring has brought the desire of the masses for accountable governance the chaos and tumult in leadership threatens the legitimacy of judicial efforts. The principle of complementarity requires that judicial institutions on both a national and local level provide adequate safeguards for the accused. While popular justice certainly provides satisfaction for those who may have suffered under a violent regime without fairness to the accused, any tribunal's work—as a historical record and as a moral judgment—is tainted.

418. Anne Barnard, *As Killings Go On, Syria Reacts Strongly to War-Crimes Petition*, N.Y. TIMES, Jan. 19, 2013, <http://www.nytimes.com/2013/01/20/world/middleeast/syria-war-developments.html>.

419. Simon Shuster, *Russian Realpolitik: Inside the Arms Trade with Syria*, TIME WORLD (July 1, 2012), <http://world.time.com/2012/07/01/russian-realpolitik-inside-the-arms-trade-with-syria/>.

420. See *supra* note 413 and accompanying text.

421. *Id.* See also Matt Spetalnick & Patrick Temple-West, *Building Case for Lawmakers, U.S. Says Sarin Gas Used in Syria Attack*, REUTERS (Sept. 2, 2013), <http://in.reuters.com/article/2013/09/01/syria-crisis-usa-idINDEE98006E20130901>.

422. Al-Qaeda has dissociated itself from ISIS over ideological and perhaps public relations reasons, see Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST, Feb. 3, 2014, http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html.

423. C.J. Chivers, *American Tells of Odyssey as Prisoner of Syrian Rebels*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/world/middleeast/american-tells-of-odyssey-as-prisoner-of-syrian-rebels.html>; Hannah Strange, *15-Year-Old Boy Executed for Blasphemy by Syrian Jihadists*, TELEGRAPH (June 10, 2013), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10111687/15-year-old-boy-executed-for-blasphemy-by-Syria-jihadists.html>; *Syria: Opposition Using Children in Conflict*, HUMAN RIGHTS WATCH (Nov. 29, 2012), <http://www.hrw.org/news/2012/11/29/syria-opposition-using-children-conflict>.

D. The Americas

Latin America has, in many senses, led by example in terms of national and regional action against human rights abuses. Leaders of the Argentinian junta government have been held accountable for their actions during the so-called “dirty war” in the 1970’s which are infamous for the depravity of forced disappearance, involving dumping prisoners from aircraft into the Atlantic Ocean.⁴²⁴ Peru’s Alberto Fujimori, similarly, was held to account.⁴²⁵ Elsewhere in the Western hemisphere Jean-Claude Duvalier also known as “Baby Doc” recently returned to Haiti only to be held—perhaps unexpectedly—to account for his use of the *tonton macoutes* secret police (and death squad), which he inherited—like the mantle of power—from his father, “Papa Doc” François Duvalier.⁴²⁶ Manuel Noriega of Panama was indicted in the United States on drug charges and made to stand trial there after the American invasion in 1989.⁴²⁷ The first effort to hold a head-of-state accountable for genocide in a national court in Guatemala, however, was recently derailed as Rios Montt, the former military dictator in the early 1980’s, had his conviction for genocide reversed.⁴²⁸ Montt was found guilty of overseeing the genocide of indigenous Mayans in Guatemala, and in the charged atmosphere the trial was criticized for undermining the peace process.⁴²⁹ The Constitutional Court annulled the proceedings and under Guatemalan law much if not all of the trial will need to be redone—and this is not scheduled to happen until January 2015.⁴³⁰

The role of the United States, in particular, has been schizophrenic toward these efforts—no doubt in part due to the electoral politics of a

424. In addition to the Pinochet trial mentioned before, trials for other leaders began quite recently. See *Argentina Opens Trial Over ‘Operation Condor,’ The 1970s Plan to Eliminate Leftists*, WANTTOKNOW.INFO (Mar. 5, 2013), <http://www.wanttoknow.info/a-argentina-opens-trial-over-operation-condor-1970s-plan-eliminate-leftists>.

425. *Fujimori Gets Lengthy Jail Term*, BBC NEWS, (Apr. 7, 2009) <http://news.bbc.co.uk/2/hi/americas/7986951.stm>.

426. *Haiti’s ‘Baby Doc’ Answers Questions in First Court Appearance for Rights Abuse Charges*, CAPE BRETON POST (Feb. 28, 2013), <http://www.capebretonpost.com/News/Canada--World/2013-02-28/article-3187594/Haitis-Baby-Doc-answers-questions-in-first-court-appearance-for-rights-abuse-charges/1>.

427. See *United States v. Noriega*, 746 F. Supp. 1506, 1541 (S.D. Fla. 1990) (order denying motion to dismiss indictment).

428. *Guatemala Rios Montt Genocide Trial to Resume in 2015*, BBC NEWS (Nov. 6, 2013), <http://www.bbc.com/news/world-latin-america-24833642>.

429. *Id.*

430. Following the twists and turns of the trial requires deft mental acuity: “First, a higher constitutional court invalidated the exclusion of the defense’s nonexistent evidence. When the presiding trial judge accepted this ruling, a judge from an earlier evidentiary stage of the proceedings mysteriously reached out and annulled the trial—an annulment that was indignantly rejected by the presiding trial judge. This annulment held up proceedings for a week.” Peter Canby, *The Maya Genocide Trial*, NEW YORKER (May 3, 2013), <http://www.newyorker.com/online/blogs/comment/2013/05/the-maya-genocide-trial.html>. To much shock, an ex-soldier accused Guatemala’s current head-of-state of ordering atrocities against the Mayan peoples. *Id.*

relatively conservative populace.⁴³¹ Though the United States pioneered international criminal law as perhaps the main instigator of the Nuremberg Trials and the United Nations, modern popular skepticism toward the United Nations and the International Criminal Court has hampered U.S. involvement with them.⁴³²

The United States in practice has shielded its own leadership from investigation and prosecution of crimes both domestically and internationally.⁴³³ Though plausible arguments exist that former President George W. Bush may have committed crimes under the laws of the United States and beyond, President Obama has made it clear that no members of his administration, much less Bush himself, or former Vice President Dick Cheney would face an investigation or charges for their conduct.⁴³⁴ President Obama himself has been accused of wrongdoing under international covenants with regard to his actions in Pakistan and Yemen where unmanned drone aircraft regularly fire missiles at suspected militants and terrorists.⁴³⁵

Stretching back to at least the time of the Watergate scandal U.S. presidents (and their executive staff) have steadily shed accountability through shrewd uses of pardons and the state secret privilege.⁴³⁶ In part this is a natural outgrowth of the role of Commander-in-Chief in a time of international stresses charged with the defense of the nation⁴³⁷ and in part it too belongs to the polarized, partisan modern nature of Washington, D.C. where the next election is always around the corner. As well the Cold War led to a significantly diversified military-industrial complex which has heralded greater American involvement in clandestine affairs.⁴³⁸ In Richard Nixon's time the power of the presidency proved too irresistible increasing the scale of his improprieties and

431. See, e.g., Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 701, 703 (2005).

432. Marlise Simons, *U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned*, N.Y. TIMES, Apr. 2, 2013, <http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html>.

433. This is a topic long explored by many authors and activists, some serious and some less credible. One interesting suggestion as to the cause of this phenomenon is the production of the atomic bomb. See generally Jack Goldsmith, *The Accountable Presidency*, NEW REPUBLIC (Feb. 1, 2010), <http://www.newrepublic.com/article/books-and-arts/the-accountable-presidency>.

434. Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551 (2013). The Obama administration recently weighed in, in favor of immunity, for the Bush administration in a civil suit against them. Inder Comar, *Obama DOJ Asks Court to Grant Immunity to George W. Bush for Iraq War*, GLOBAL RES. (Aug. 22, 2013), <http://www.globalresearch.ca/obama-doj-asks-court-to-grant-immunity-to-george-w-bush-for-iraq-war/5346637>.

435. See Jonathan L. Entin, *War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations*, 45 CASE W. RES. J. INT'L L. 443, 453 (2012); Peter M. Shane, *The Obama Administration and the Prospects for A Democratic Presidency in A Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 55 (2012); Paul B. Stephan, *The Limits of Change: International Human Rights Under the Obama Administration*, 35 FORDHAM INT'L L.J. 488, 498 (2012).

436. John King, *Bush Calls Saddam 'The Guy Who Tried to Kill My Dad.'* CNN (Sept. 27, 2002), <http://edition.cnn.com/2002/ALLPOLITICS/09/27/bush.war.talk/>.

437. *Id.*

438. See, e.g., Ryan M. Check & Afshin John Radsan, *One Lantern in the Darkest Night: The Cia's Inspector General*, 4 J. NAT'L SECURITY L. & POL'Y 247, 263 (2010).

crimes—such as credible allegations of income tax fraud,⁴³⁹ the secret bombing of Cambodia,⁴⁴⁰ along with conspiring to cover up the bungled burglary at the Watergate Hotel.⁴⁴¹ Nixon was eventually named an unindicted coconspirator in the secret minutes of the grand jury, and in fact, an informal straw poll of the grand jury revealed unanimous consent to the idea of indicting the President.⁴⁴² After Nixon's resignation Gerald Ford gave him a prospective pardon for "all offenses against the United States which he, Richard Nixon, has committed or may have committed."⁴⁴³ Whether or not a corrupt bargain had been reached—the presidency for a pardon—the act certainly made sure that the Office of the President would not be held accountable.⁴⁴⁴

The Iran-Contra affair was another instance in which a virtual immunity was given to those implicated in the complicated and illegal international arms deal.⁴⁴⁵ The true extent of the scandal will certainly never be known. Colonel Oliver North having admitted shredding relevant documents in exchange for use immunity which eventually defeated the attempts to hold him criminally liable.⁴⁴⁶ President Reagan's Secretary of Defense Caspar Weinberger was indicted for making false statements in January 1991, but he and several others involved in Iran-Contra were pardoned by President George H.W. Bush on December 24, 1992.⁴⁴⁷ Bush himself withheld documents from Congress.⁴⁴⁸ Reagan, despite professing ignorance of the arming of Nicaraguan Contras to the congressional Tower Commission directed the NSC to support the Contras, received briefings on efforts to supply them, and met with foreign and domestic donors to raise money for their cause.⁴⁴⁹

439. Nixon paid less than \$2,000 in taxes on over \$400,000 in income for 1970 and 1971. FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 415 (Touchstone 1995) (1994). "People have got to know whether or not their president is a crook. Well, I am not a crook." *Id.*

440. Taylor Owen & Ben Kiernan, *Bombs Over Cambodia*, *THE WALRUS* (2006), available at http://www.yale.edu/cgp/Walrus_CambodiaBombing_OCT06.pdf.

441. Carl Bernstein & Bob Woodward, *Dean Alleges Nixon Knew of Cover-up Plan*, *WASH. POST* (June 3, 1973), <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/060373-1.htm>.

442. EMERY, *supra* note 417, at 439.

443. *Id.* at 482.

444. *Id.*; see also Hon Herbers, *Ford Gives Pardon to Nixon, Who Regrets 'My Mistakes'*, *N.Y. TIMES*, Sept. 8, 1974, at A1.

445. See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 *YALE L. & POL'Y REV.* 361, 398–99 (1993); see also David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial; Prosecutor Assails 'Cover-Up.'* *N.Y. TIMES* (Dec. 24, 1992), <http://www.nytimes.com/learning/general/onthisday/big/1224.html>.

446. *United States v. Poindexter*, 951 F.2d 369, 380 (D.C. Cir. 1991).

447. David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial; Prosecutor Assails 'Cover-Up.'* *N.Y. TIMES* (Dec. 24, 1992), <http://www.nytimes.com/learning/general/onthisday/big/1224.html>.

448. *Id.*; see also PETER KORNBLOH & MALCOLM BYRNE, *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY* (1993).

449. Joel Brinkley, *McFarlane to Say Reagan Ordered Help for Contras*, *N.Y. TIMES*, May 10, 1987, <http://www.nytimes.com/1987/05/10/world/m-farlane-to-say-reagan-ordered-help-for-contras.html>.

Arguably the closest any president has come to facing scrutiny for violating the law of the United States in the past century is President Bill Clinton. The impeachment proceedings instituted against him were by far the most serious investigation of the United States executive office since perhaps the impeachment of Andrew Jackson in the Reconstruction era and yet dealt with allegations of perjury related to personal indiscretions.⁴⁵⁰ By contrast, legal scholarship and ICRC reports (not to mention at least one Marine Corps JAG prosecutor)⁴⁵¹ abound with persuasive assessments of violations of federal law committed by members of the federal government since September 11, 2001.⁴⁵²

With regard to former President George W. Bush it is apparent that the pretenses upon which the War in Iraq was founded were completely wrong.⁴⁵³ Whether this was a fraud perpetrated upon the public by an aggressive Commander-in-Chief for strategic (*i.e.* petroleum reserve-centered) purposes, a “neoconservative” quest to free the people of Iraq from a murderous tyrant⁴⁵⁴ perhaps for larger geopolitical reasons,⁴⁵⁵ or

450. See Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143, 160–61 (1998).

451. U.S. Marine Corps Lt. Col. Stuart Couch’s story, as a prosecutor at Guantanamo Bay, is fascinating. As an evangelical Christian, during a baptism Lt. Col. Couch realized that interrogators “had knowingly set him up for mental suffering in order for him to provide information” and that this was illegal torture. *Torture at Guatánamo: Lt. Col. Stuart Couch on His Refusal to Prosecute Abused Prisoner*, DEMOCRACY NOW! (Feb. 22, 2013), http://www.democracynow.org/2013/2/22/torture_at_guantanamo_lt_col_stuart. Lt. Col. Couch refused to prosecute the detainee. *Id.*

452. See, e.g., Jane Mayer, *The Black Sites*, NEW YORKER (Aug. 13, 2007), http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all (reporting that the International Committee of the Red Cross issued a confidential report that suggesting that the CIA’s extraordinary rendition program may have engendered “grave breaches” of the Geneva Convention and violations of the U.S. Torture Act). See generally Shahid Buttar, *Constitutional Catastrophe: The National Defense Authorization Act vs. the Bill of Rights*, 17 LOY. PUB. INT. L. REP. 242 (2012); Harold Hongju Koh, *A Law Unto Itself?*, 115 YALE L.J. POCKET PART 79 (2006); Blake Covington Norvell, *The Constitution and the NSA Warrantless Wiretapping Program: A Fourth Amendment Violation?*, 11 YALE J. L. & TECH. 228 (2009). The Koh article is particularly ironic, as Koh was President Obama’s Legal Advisor to the State Department and has been emphatic in his support of drone strikes. Tara McKelvey, *Interview with Harold Koh, Obama’s Defender of Drone Strikes*, DAILY BEAST (Apr. 8, 2012), <http://www.thedailybeast.com/articles/2012/04/08/interview-with-harold-koh-obama-s-defender-of-drone-strikes.html>.

453. This paper will not examine the war in Afghanistan and makes no comment on its wisdom or legality.

454. Saddam Hussein was, until the Syrian conflict, the only head of state in the past half-century to use chemical weapons against human beings—horrifyingly, against his own countrymen, Kurdish civilians in the north of Iraq. *Whatever Happened to the Iraqi Kurds?*, HUMAN RIGHTS WATCH (Mar. 11, 1991), available at <http://www.hrw.org/legacy/reports/1991/IRAQ913.htm>. He engaged in other such crimes against humanity like torture and murder. Neil McFarquhar, *Saddam Hussein, Defiant Dictator Who Ruled Iraq with Violence and Fear, Dies*, N.Y. TIMES (Dec. 30, 2006), <http://www.nytimes.com/2006/12/30/world/middleeast/30saddam.html?pagewanted=all&r=0>. His son Uday Hussein’s exploits included most famously murdering a trusted personal servant of the family at a party (held in honor of Egyptian President Hosni Mubarak’s wife), being banished from Switzerland as Ambassador after threatening a restaurant patron with a knife, and heading the Iraqi Olympic Committee (a job which also involved torture). Judith Miller, *For Brutality, Hussein’s Sons Exceeded Even Their Father*, N.Y. TIMES (July 23, 2003), <http://www.nytimes.com/2003/07/23/international/world/special/23SONS.html>. Uday Hussein was killed in a shootout with U.S. forces on a special operation, and Saddam’s ignominious end came after a domestic trial. He was hanged in an unceremonious—and somewhat raucous—environment with cell phone footage being disseminated all over the world. Marc Santora et al., *Dictator Who Ruled Iraq with Violence is Hanged for Crimes Against Humanity*, N.Y.

perhaps merely personal;⁴⁵⁶ the Bush Administration through a deft use of public speeches, the news media, and with the support of various executive departments, made a case for a war based ostensibly on the enforcement of U.N. Security Council resolutions against Iraq,⁴⁵⁷ with evidence purporting to show an ongoing weapons of mass destruction program and links between the Ba'athist regime in Iraq and Al Qaeda of course, was entirely erroneous.⁴⁵⁸ The ensuing war cost thousands of American lives, hundreds of thousands of Iraqi lives,⁴⁵⁹ and at a financial cost of over \$814 billion.⁴⁶⁰

Yet, President Barack Obama has upheld traditional notions of presidential immunity.⁴⁶¹ With one entire term as president completed

TIMES (Dec. 30, 2006), http://www.nytimes.com/2006/12/30/world/middleeast/30hussein.html?pagewanted=1&_r=1.

455. The United States armed and supported Saddam Hussein in his early reign—Donald Rumsfeld publicly met Hussein to discuss military aid in the war against Iran, a mutual foe—and Reagan continued to support him even after reports of chemical weapons were used against Iranians and Kurds in Iraq. Julian Borger, *Rumsfeld 'Offered Help to Saddam,'* GUARDIAN (Dec. 31, 2002), <http://www.theguardian.com/world/2002/dec/31/iraq.politics>. Saddam Hussein certainly fell out of favor with the American government when it invaded Kuwait in 1990 and researched creating nuclear, biological, and chemical weapons in contravention of numerous U.N. Security Council resolutions.

456. “After all, this is the guy who tried to kill my dad,” President George W. Bush once said. King, *supra* note 436.

457. See Raul A. Pedrozo, *Legal Bases for Military Operations in Iraq*, in THE WAR IN IRAQ: A LEGAL ANALYSIS 45, 45 (Raul A. Pedrozo, ed., 2010). But see, e.g., Daniel Iagolnitzer, *International Law Relative to War and the United States: A General Survey*, in INTERNATIONAL JUSTICE AND IMPUNITY: THE CASE OF THE UNITED STATES 127, 140–41 (Nils Andersson et al. eds., 2008) (arguing against the legality of the Iraq War).

458. See 1 COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ'S WMD 64 (2004), available at https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004. The Pentagon's study found no evidence for such links between Al Qaeda and Iraq in 2008. See Karen DeYoung, *Study Discounts Hussein, Al-Qaeda Link*, WASH. POST (Mar. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/11/AR2008031102799.html>. The September 11th Commission, less than a year after the War in Iraq began, said it found no such evidence of a link.

459. Dan Murphy, *The Iraq War Death Toll? At Least 162,000 and Counting*, CHRISTIAN SCI. MONITOR (Jan. 2, 2012), <http://www.csmonitor.com/World/Security-Watch/Backchannels/2012/0102/The-Iraq-war-death-toll-At-least-162-000-and-counting>. An accurate count is exceedingly difficult to ascertain. For example, Gilbert Burnham and others report over 600,000 deaths related to violence from the war. See Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 LANCET 1421, 1426 (OCT. 21, 2006).

460. *Notes and Sources—War Costs to Date*, NAT'L PRIORITIES PROJECT, <http://nationalpriorities.org/cost-of/notes-sources> (last visited June 5, 2014).

461. A 1973 DOJ memorandum that was prepared by the Office of Legal Counsel concluded that the President was immune from indictment, but all inferior officers, including the Vice President, were not. Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office 33, 38 (Sept. 24, 1973), <http://www.fas.org/irp/agency/doj/olc/092473.pdf>. In *United States v. Nixon*, the Court made clear that while “neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances” in cases of national security and foreign policy, courts should be deferential to executive privilege. 418 U.S. 683, 706 (1974). The U.S. Supreme Court, in *Nixon v. Fitzgerald*, held that presidents and former presidents are entitled to absolute immunity for official acts under civil law; the Court stated that there is no absolute immunity from criminal actions. 457 U.S. 731, 749, 753–54 (1982). An October 2000 memorandum from the OLC confirmed the findings of the 1973 DOJ, declaring that while the Constitution does not explicitly bar indictment of a sitting President and “further criminal process,” only the House of Representatives can bring charges against the President. Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel: A Sitting President's Amenability to

no prosecutions have come of the use of extraordinary rendition, enhanced interrogation techniques, warrantless wiretapping, or the war in Iraq.⁴⁶² Perhaps most troublingly, unmanned drone strikes in Yemen and Pakistan on suspected Al Qaeda militants have increased significantly though they skirt legality.⁴⁶³ The Authorization for Use of Military Force authorizes a broad mandate to the President to pursue al-Qaeda and affiliate groups.⁴⁶⁴ While its duration and the “global war on terror” grow more nebulous (perhaps in part due to the success of drone strikes), it still remains a sizable congressional grant of power to the president to use military force. That it is operated by an ostensibly civilian agency makes it a gray area of the law as much as the CIA prefers to act in the shadows. The wisdom or pragmatism militarily, of such a strategy is questionable, but that is a deference Congress has chosen to give to the President. These decisions remain unchallenged for better or worse as federal courts have largely shied away from examining much of the War on Terror though declaring part of National Defense Authorization Act for Fiscal Year 2012 unconstitutional⁴⁶⁵ and the Supreme Court granting Guantanamo detainees certain Geneva Convention Common Article 3 protections in *Hamdan v. Rumsfeld*.⁴⁶⁶

The United States has long been a source of original thought in jurisprudence doubly so in international law where foreign policy has led the way for legal policy—but is refusal to honestly examine the bad acts of executive branch officials, certainly including the President, reinforces the notion of effective immunity for all official (and many unofficial) acts. Finally, if the United States were to ratify the Rome Statute—a du-

Indictment and Criminal Prosecution (Oct. 16, 1993). The State Secret Privilege that has been broadened and, to many, abused by many administrations—including Presidents Bush and Obama alike. See Ahmad A. Chehab, *The Bush and Obama Administrations' Invocation of the State Secret Privilege in National Security Litigation: A Proposal for Robust Judicial Review*, 57 WAYNE L. REV. 335, 337–41 (2011). The State Secret Privilege is an evidentiary privilege, not an immunity doctrine—but the effect is the same: to shield matter from inquiry and exposition. See also Marjorie A. Shields, Annotation, *Invocation and Effect of State Secrets Privilege*, 23 A.L.R. 6TH 521 (2007).

462. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012), http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all&_r=0.

463. For general discussion of drone policy see Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, 10 J. INT'L BUS. & L. 1 (2011); Thomas Michael McDonnell, *Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists*, 44 GEO. WASH. INT'L L. REV. 243 (2012); Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all>; *Drones and the Law*, ECONOMIST (Oct. 6, 2011), <http://www.economist.com/node/21531477>.

464. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

465. Pub. L. No. 112-81, 125 Stat. 1298 (2011). In *Hedges v. Obama*, the plaintiff has sought to have § 1021(b)(2) declared unconstitutional, such section authorizing, in the words of U.S. District Court Judge Katherine Forrest, “indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever.” 890 F. Supp. 2d 424, 427 (S.D.N.Y. 2012). Judge Forrest issued a permanent injunction against enforcement of this section on September 12, 2012, but the Second Circuit has granted a stay on the injunction. 724 F.3d 170 (2d Cir. 2013). The Supreme Court, through Justice Scalia, has declined to vacate the stay. *Hedges v. Obama*, 133 S. Ct. 1307, 185 L. Ed. 2d 173 (2013).

466. 548 U.S. 557 (2006).

bious prospect, to be sure—it would e a great boon not only to the Court’s prestige and influence but for American respectability worldwide as not only cooperative with the goals of international criminal law but as well as being a State Party to it.

V. CONCLUSION

Reconciling these global trends it becomes apparent that global justice exists—but for leaders of the nations in the Security Council there is little precedent of accountability either national or international. Of the permanent five states on the United Nations Security Council only two have ratified and enacted the Rome Statute (France and the UK).⁴⁶⁷ The United States and the Russia Federation are signatories, and the People’s Republic of China has not even signed.⁴⁶⁸ All of these nations have been empires to varying and different degrees and have rarely had to answer to any but their own authority. There are important qualitative differences between the conflicts the United States has become part of since the end of the Second World War—the people of North Korea and Vietnam are not better off for becoming Communist states,⁴⁶⁹ and neither the Taliban nor Saddam Hussein had any respect for human rights. The Soviet and Chinese systems both then and now depend on force to rein in dissent to authoritarianism. But for the individuals whose lives are shattered by war, the difference between a war which has the blessing of the United Nations and one that is not must be negligible. This situation is sadly emblematic of the duality of international law perhaps likened to Dr. Jekyll and Mr. Hyde. The respectable face of international law is that which seeks its development and supports rigorous accountability under law is the work of lawyers, diplomats, and NGO’s. Its ugly alter ego is that of *realpolitik* the work of lawyers, politicians, and soldiers.⁴⁷⁰ When international law flounders it does so on the rocks of expediency and complicity.

The place where the ICC has made the biggest impact is in Africa where the alleged arch-perpetrators of atrocities in eight different nations have had their involvement investigated.⁴⁷¹ Unfortunately, violent conflict still persist as in 2013 and into 2014 conflicts erupted in the Central African Republic, South Sudan,⁴⁷² and even Iraq after years of dor-

467. *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited June 5, 2014).

468. *Id.*

469. Certainly not if GDP per capita is any indication; the Thai make about three times as much as the Vietnamese, and South Koreans make over three times as much as the Chinese. *GDP per Capita (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?display=default> (last visited June 5, 2014).

470. See M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. CL. L. REV. 541 (2006).

471. See *supra* note 236.

472. Nicholas Kulish, *Old Rivalries Reignited a Fuse in South Sudan*, N.Y. TIMES, (Dec. 31, 2013), <http://www.nytimes.com/2014/01/01/world/africa/old-rivalries-reignited-a-fuse-in-south-sudan.html>.

mancy⁴⁷³ and instability from Somalia and Syria spilled over into Kenya and Lebanon⁴⁷⁴ respectively. For many the promise of the Arab Spring has faded and the fire engulfing Syria has threatened to spread throughout the Middle East.⁴⁷⁵ Libya though freed from the rule of Muammar Qaddafi remains internally fractured as does Egypt and few countries fare much better.⁴⁷⁶ The ICC bearing in mind developments in 2013 seems increasingly distant from the civil strife most recently, these ongoing conflicts where there are new victims every day. To its credit the Office of the Prosecutor is investigating a wider range of potential situations from the Israeli raid on the Gaza Freedom Flotilla in 2010 to the Russian incursion into Georgia in 2008 to Afghanistan (with an emphasis on the Taliban), along with post-coup violence in Honduras, Guinea, North Korea's sinking of the *Cheonan* in 2010, Colombia and Nigeria's internal conflicts.⁴⁷⁷

There remains hope at least that where the international system cannot act that citizen and statesmen will both seek justice in local courts. An important principle of international criminal law is complementarity between national governments and international courts.⁴⁷⁸ The Rome Statute is written so that enforcement by a state party takes precedence over the prosecutor's initiative (unless the state is "unwilling or unable genuinely to carry out the investigation or prosecution").⁴⁷⁹ Indeed, in the patchwork quilt that is human rights enforcement, national and hybrid tribunals are just as important as international ones. Bangladesh has recently if controversially completed a war crimes trial related to its bloody secession from Pakistan.⁴⁸⁰ Illuminating is the tale of the leaders of the Greek Junta, which ruled through force of violence.⁴⁸¹ The Junta

473. Peter Baker, *Grim Sequel to Iraq's War*, N.Y. TIMES, Jan. 8, 2014, <http://www.nytimes.com/2014/01/09/world/middleeast/grim-sequel-to-iraqs-war.html>.

474. Anna Barnard, *Lebanon, Worried About Border, Fires on Syrian Helicopters in Its Airspace*, N.Y. TIMES, Dec. 30, 2013, <http://www.nytimes.com/2013/12/31/world/middleeast/lebanon-worried-about-border-fires-on-syrian-helicopters-in-its-airspace.html>; Jeffrey Gettleman & Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack at Kenyan Mall*, N.Y. TIMES (Sept. 21, 2013), <http://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html?pagewanted=all&r=0>.

475. Ben Hubbard et al., *Power Vacuum in Middle East Lifts Militants*, N.Y. TIMES, Jan. 4, 2014, <http://www.nytimes.com/2014/01/05/world/middleeast/power-vacuum-in-middle-east-lifts-militants.html>.

476. See, e.g., *Egyptians Fear Return to Authoritarianism*, BBC NEWS (Dec. 18, 2013), <http://www.bbc.co.uk/news/world-middle-east-25433094>; *Libya and Its Militias: Make or Break*, ECONOMIST (Nov. 23, 2013), <http://www.economist.com/news/middle-east-and-africa/21590581-showdown-militias-may-mark-turning-point-which-way-make-or-break>.

477. Report on Preliminary Examination Activities 2013, INT'L CRIM. CT., available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF.

478. See, e.g., Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the Icc in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205 (2011).

479. Rome Statute of the International Criminal Court, art. 17, July 1, 2002, 2187 U.N.T.S. 90, July 1, 2002.

480. T.J., *Bangladesh's War-Crimes Trials: Bloodletting After the Fact*, ECONOMIST (Mar. 1, 2013), <http://www.economist.com/blogs/banyan/2013/03/bangladeshs-war-crimes-trials>.

481. *Greece: Answering to History*, TIME (Sept. 1, 1975), <http://content.time.com/time/magazine/article/0,9171,947162,00.html>.

members were tried after being removed from power—but only after the torture of thousands of individuals.⁴⁸² The head of the Junta challenged the court: “Disdainfully refusing to enter a plea in his defense, he crowed, ‘I shall answer only to history and the Greek people.’ To which Court President Ioannis Deyannis replied, his small sharp features pinched in anger, ‘Do you think history is absent from this courtroom?’”⁴⁸³

International courts are designed and function best where states’ own justice systems would otherwise fail or where trials held locally would be dangerous or otherwise destabilizing. SCSL Prosecutor Brenda J. Hollis suggests that “trying high level persons in international settings removes them from being able to continue to exert influence, and helps real peace and reconciliation.”⁴⁸⁴ The trial of Saddam Hussein provides another recent example of the difficulties of local tribunals. Although one would be hard pressed to feel any sympathy toward Hussein international observers saw numerous problems with procedural due process standards of which the debacle of his execution was the last symptom.⁴⁸⁵ Human Rights Watch noted issues compromising the impartiality of the judges, disclosure of exculpatory evidence, and even basic standards of criminal prosecutions.⁴⁸⁶ For example, an official charging document was not produced until eight months into the case against Hussein after the prosecution case was presented—perhaps consistent with the spirit of Iraqi law, as the report notes but hardly in keeping with established norms of criminal law.⁴⁸⁷

Novel and influential Rwanda’s *gacaca* system of informal, village-based public adjudications for individuals at the bottom of the criminal hierarchy of the country’s *genocidaires* is an important adjunct to the ICTR.⁴⁸⁸ This could be contrasted with Liberia where many of those re-

482. *Id.*

483. *Id.* History has, to a certain extent, forgotten these tribulations; there is a paucity of scholarly articles on the Greek Junta trials. Yet Greece has not forgotten—plans to pardon the Junta leaders were scrapped after public outcry. *Greece Cancels Plan to Pardon Ex-Junta Members*, N.Y. TIMES (Dec. 31, 1990), <http://www.nytimes.com/1990/12/31/world/greece-cancels-plan-to-pardon-ex-junta-members.html>.

484. Interview with Prosecutor Brenda J. Hollis, Chief Prosecutor, Special Court for Sierra Leone, in The Hague, Netherlands (Aug. 17, 2012).

485. *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, Human Rights Watch 47 (2006) <http://www.hrw.org/reports/2006/11/19/judging-dujail>.

486. *Id.*

487. *Id.* The American Society of International Law summed the trial up as “marred by assassinations of defense counsel, resignation of judges, disruptive outbursts by defendants and their lawyers, hunger strikes, boycotts, and even underwear appearances, making it one of the messier trials in legal history.” Michael P. Scharf & Michael A. Newton, *The Iraqi High Tribunal’s Dujail Trial Opinion*, AM. SOC. INT’L L. INSIGHTS (Dec. 18, 2006), <http://www.asil.org/insights/volume/10/issue/34/iraqi-high-tribunals-dujail-trial-opinion>. The Iraqi viewpoint should not be ignored, however. See Ra’id Juhi Hamadi Al-Sa’edi, *Iraqi High Tribunal: The End of Immunity*, YOUTUBE (Mar. 26, 2008), <https://www.youtube.com/watch?v=kBbeX51YDL8>.

488. See Megan M. Westberg, *Rwanda’s Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR*, 59 U. KAN. L. REV. 331, 331–32 (2011). South Africa’s Truth and Reconciliation Commission, itself a prototype for other post-conflict nations, similarly attempted to find a balance between justice and progress. Paul Lansing & Julie C. King, *South Africa’s Truth and Reconciliation*

sponsible for atrocities in Liberia and Sierra Leone have been incorporated into the government, and low-level perpetrators are similarly unfettered by past misdeeds.⁴⁸⁹ Yet the turmoil in Bangladesh—dozens of individuals killed in a single day in protests against the conviction of an Islamist leader for war crimes in 1971 and the imposition of the death penalty—provide a vivid example of the difficulties of achieving justice in post-conflict societies, even several decades after the alleged crimes. In Sri Lanka the Liberation Tigers of Tamil Eelam (LTTE) separatist movement was crushed in 2009 after years of violence, but the price of peace included the torture and sexual violence of many dozens of individuals.⁴⁹⁰ Human Rights Watch documented seventy-five cases of rape and torture and other human rights abuses, contentions that the government angrily denies.⁴⁹¹ Thus the system of complementarity between the ICC and the national courts suits states parties well (and in particular their citizens and neighboring nations)—but can do little further in the absence of U.N. Security Council action or *ad hoc* submission to ICC jurisdiction. Sometimes post-conflict reconciliation triumphs and reckoning for human rights abuses takes a backseat.⁴⁹²

Both human beings and institutions are fallible, and for the United Nations both the wanton acts of peacekeepers under the UN aegis, and the negligence of the institution have led to questions about international immunity. In the former Yugoslavia, for example, Kathy Bolkovac an American, working for a private corporation on domestic violence and post-conflict justice uncovered numerous serious violations of human rights—in particular trafficking in the sex trade—by peacekeepers.⁴⁹³ Unsurprisingly her attempts to root out illegal and immoral conduct were stymied by peacekeepers.⁴⁹⁴

Similar allegations regarding UN peacekeepers in the Democratic Republic of Congo (DRC) have been raised. In Haiti the UN's efforts to stabilize the country and rebuild the Western Hemisphere's poorest na-

Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age, 15 ARIZ. J. INT'L & COMP. L. 753, 753–54 (1998).

489. *Tired of War*, ECONOMIST (Mar. 2, 2013), <http://www.economist.com/news/special-report/21572378-why-fighting-across-much-continent-has-died-down-recent-years-tired-war>.

490. “*We Will Teach You a Lesson*”: *Sexual Violence Against Tamils by Sri Lankan Security Forces*, HUMAN RIGHTS WATCH, 2 (2013), available at http://www.hrw.org/sites/default/files/reports/srilanka0213webwcover_0.pdf.

491. *Id.*

492. In Nigeria, for example, the slow process of liberalization after the failed Biafran push for independence has found little room for accounting for past wrongdoings under the military junta. See, e.g., Philip C. Aka, *Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo*, 4 SAN DIEGO INT'L L.J. 209, 210 (2003). In one particularly poignant moment of government violence, perhaps one thousand soldiers marched on musician Fela Kuti's house and recording studio, destroyed it, severely beat Kuti and others, and defenestrated his mother leading to her death. The actions were blamed on an “unknown soldier.” See FELA KUTI, COFFIN FOR HEAD OF STATE/UNKNOWN SOLDIER (MCA Records 2000).

493. Nisha Lilia Diu, *What the UN Doesn't Want You to Know*, DAILY TELEGRAPH (Feb. 6, 2012), <http://www.telegraph.co.uk/culture/9041974/What-the-UN-Doesnt-Want-You-to-Know.html>.

494. See Neil MacFarquhar, *Peacekeepers' Sex Scandals Linger, On-Screen and Off*, N.Y. TIMES, Sept. 7, 2011, <http://www.nytimes.com/2011/09/08/world/08nations.html?pagewanted=all>.

tion indirectly led to a cholera outbreak affecting hundreds of thousands of lives.⁴⁹⁵ On the former allegations the UN has promised investigations and reform;⁴⁹⁶ On the latter Secretary-General Ban Ki-Moon has invoked the UN's official immunity in a letter to the U.S. Congress⁴⁹⁷ a move largely but not universally criticized. Though groups have challenged this immunity, it is well established, through the *Convention on the Privileges and Immunities of the United Nations*.⁴⁹⁸

In all the legal foundation for impunity for world leaders facing credible accusations of grave international crimes has eroded over the past century whittled down to nothingness by the proponents and jurists of international law. Clearly customary international law makes no more exceptions for the leaders of nation-states. International humanitarian and international criminal law have eviscerated the notion of impunity. International criminal law is about creating a framework for putting individuals on trial for massively complex crimes ones that have been sadly all too common throughout history. Although states exist conceptually such that perhaps tens of millions of individuals gave their lives (severe penalties for refusing to take up arms notwithstanding) for theirs in the past century. They are in essence nothing but corporate forms by which individuals act. As SCSL Prosecutor Hollis notes the doctrine of head of state immunity is "is only as obsolete as each state and the international community allows." It will take the concerted efforts of the world community—nations and individuals—to put the final stake through the heart of the vampire, to put a final end to his bloodletting forever.

495. P.B., *The UN in Haiti: Damned if You Do*, *ECONOMIST* (Nov. 10, 2011), <http://www.economist.com/blogs/americasview/2011/11/un-haiti>.

496. Colum Lynch, *U.N. Faces More Accusations of Sexual Misconduct*, *WASH. POST*, Mar. 13, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A30286-2005Mar12.html>.

497. Letter from Ban Ki-Moon, U.N. Sec'y Gen. to Maxine Waters, U.S. Rep (July 5, 2013), available at <http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>. Mr. Ban sums up the letter, largely discussing the UN's mission in a larger context of Haiti, by asserting that private compensation claims, seeking redress in US courts, are "not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations of 1946." *Id.*

498. See August Reinisch, *Introductory Note on Convention on the Privileges and Immunities of the United Nations*, UNITED NATIONS AUDIOVISUAL LIB. OF INT'L L. (2013), <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html>.