Changing Trend in the Prosecution of International Crimes

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Introduction

The prosecution of former heads of state or representatives of sovereign countries for acts committed in the course of their official duties has often been the subject of the immunity debates in international law.\(^1\) A blanket grant of immunity to ex-heads of state and other state representatives (immunity ratione materiae) prevents the execution of justice against public officials who commit human right violations and crimes against humanity, even where such acts are contrary to the interest of the state.\(^2\)

A world plagued with the proliferation of war, atrocities, terrorism and heinous criminal activities requires that international judicial bodies apply leading international norm violation doctrines with extreme caution to promote the protection of human dignity without violating the sovereign immunity of states.\(^3\) Most crimes against humanity are war crimes, or atrocities orchestrated by states or state like entities.\(^4\) War crimes constitute a major humanitarian concern and elicit widespread international condemnation.\(^5\) Negative judgments are exacerbated when the war creating unjust results does not fall within the”act of state” province.\(^6\)

International law has provisions for the institution of war---\textit{jus ad bellum}, and the conduct of war---\textit{jus in bello}.\(^7\) First, the \textit{jus ad bellum} defines the appropriate circumstances under which a state’s intentional use of armed force is legitimate.\(^8\) Second,
a state whose warfare is justified under *jus ad bellum* is not immune from the rules governing the proper conduct of war under international law. \(^9\) Therefore, a just war fought in an unjust manner, in derogation of *jus in bello*, receives international condemnations much as would an unjust war fought within these limits. \(^10\) The bottom line in both cases is to forestall the commission of heinous crimes against humanity and civilization. \(^11\)

The method of war is more worrisome when the war is unconventional, such as a civil war or the invasion by a dissident group from another country. \(^12\) The latter is a recipe for the commission of unlawful, mass killings, torture and other horrific acts against innocent and unarmed civilians or other crimes against humanity. \(^13\) This is because such a fighting force is not governed by a command structure disciplined according to a military code of ethics. The absence of this structure coupled with low educational levels of most commanders supplemented by their belief in the use of terrors to coerce popular support and achieve their criminal objectives explain the unusual risks. \(^14\) The leader of an invasionary force that perpetrates such crimes must be held answerable to the rest of the world. \(^15\) This accountability is necessary to

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\(^8\) Dunoff, *Id.*, at 561

\(^9\) *Id.*


\(^11\) *Id.*

\(^12\) See *Prosecution v. Charles Ghankay Taylor*, Case No. SCSL – 03 – 1, pp. 5-7. Charles Taylor of Liberia allegedly organized a group of Sierra Leoneans, provided them with military training, arms, ammunitions, financial supports and instructed them to invade Sierra Leone, destabilize the government and terrorize the civilian population to coerce them for support. Widespread crimes were the result.

\(^13\) See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 Colum. J. Transnat’l L. 1, 2004, at 23 (observing that “the maintenance of the legal construction of war requires that we distinguish between combatants and criminal gangs, between people ‘captured in combat’ and people ‘arrested after a shootout with police,’”).

\(^14\) *Id.*

\(^15\) *Id.*
deter those who would exploit war situations to foster criminal schemes.

This study is intended to answer the questions of whether or not an international court can indict the incumbent president of any state for crimes against humanity; or if the indictment was not successfully served, may it be served on the president after his term of office? Also examined will be the question of whether an international court in the complaining state has trial jurisdiction over a case involving an accursed former president of another country for crimes against humanity?

These issues are discussed separately in four chapters. Chapter I identifies the types of international crimes and the law governing them; Chapter II investigates a foreign court’s jurisdiction over the president of another state for crimes against humanity; Chapter III focuses on the question of personal criminal liability for presidents for crimes against humanity committed during and prior to their presidential terms; Chapter IV contains an analysis of the use of force and the responsibility of state actors; and Chapter V states the conclusion and recommendations.
Chapter I: International Crimes and the Law

A. Crimes Against Humanity:

Article 6© of the Charter of the International Military Tribunal, the “Nuremberg Charter,” defines crimes against humanity as “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecution on political, racial and religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”\(^{16}\) Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.\(^{17}\) Crimes against humanity can be committed both in times of war and of peace.\(^{18}\) These crimes were first clearly defined and prosecuted in 1948 when the Allies at the Nuremberg trials charged Nazi leaders with crimes against humanity under Article 6© of the Nuremberg Charter.\(^{19}\)

The word “humanity” means mankind, humankind or the aggregate of human culture. Hence, crimes against humanity are a breach of a human cultural norm, against which all humanity stands as a party in interest.\(^{20}\) In law, the commission of a crime creates two parties in opposition to the perpetrator\(^{21}\). The first is the injured party, and

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\(^{17}\) Id.

\(^{18}\) Id. at. 321.


\(^{20}\) David Luban, *Id.*, at. 3.

\(^{21}\) Id
second, the interested party, or the state. When the state’s law is breached, it seeks to enforce it independent of the victim. This suggests that whenever crimes against humanity are committed against any group of people anywhere, the interested party is the collection of all human beings, regardless of nationality, race, sex, religion, government, etc. Their perpetrators may thus be prosecuted anywhere, by any people, whether directly or indirectly affected.

What justifies the collective universal prosecution of crimes against humanity is that these crimes offend human values. They “aggrieve not only the victims and their own communities, but all human beings, regardless of their community.” They cause injuries to all human beings by degrading mankind and civilization.

B. Elements and Classification of Factors

Crimes are punishable under the laws that proscribe them. A just law provides for the punishment of crime in proportion to its weight. The sanction and prosecution of crimes under international law is commensurate with the gravity of the offense. Grave breaches of international humanitarian law not only generate international sanctions and outcry, but determine the severity of punishment of the accused criminal actor.

Crimes against humanity are distinguished from ordinary crimes by the requirement that crimes against humanity must be committed in a widespread or systematic attack.

22 Luban, Id
23 Luban, Supra. at p. 4 (arguing that “humanity has an interest in repressing the various misdeeds that fall under the rubric ‘crimes against humanity.’”)
24 Id., at p. 2
25 Id.
27 Mattraux, Id., at. 347.
against a civilian population. As confirmed by Article 6© of the Nuremberg Charter, 1945, these requirements show that such crimes are committed in military conflicts. The implication of these requirements result in dividing crimes against humanity into sub-elements such as: (i) an attack, (ii) a link between the acts of the accused and the attack; (iii) an attack is directed against civilian population; (iv) an attack that is widespread and systematic; and, (v) a perpetrator has the appropriate mens rea.

Regarding the “attack” element, crimes committed as a result of a specific attack vary in gravity and nature, as well as the type of sanctions and sentencing they receive. To convict an accused of an attack, it must first be shown that his/her act resulted or partly resulted in the attack. Secondly, he/she must be found to have had knowledge of the presence of a civilian population in the target area and that his/her act is part of the attack. A third element requires that the civilian population be the primary object of the attack, not just its incidental victim.

Under customary international law, the overall attack of civilian populations is uniformly imputed to every member of the scheme. This imputation is confirmed by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic Appeals, stating that “it may be inferred from the words ‘directed against any population’ in Article 5 of the statute that it is the attack-- a pattern of widespread or
systematic crimes—which need be directed against a civilian population not the act of the accused”.

Attack against a civilian population is criminal if it is widespread. An attack to be widespread depends on the number of its victims. It is also determined by multiple criminal acts and pattern, coupled with its inescapability, “the logistic and financial resources involved; the foreseeability of the criminal occurrences, etc.”

The widespread nature of an attack is assessed to establish the mens rea of the accused. Besides proving intent to commit the underlying offense, it must also be shown that the perpetrator knew of the “attack on the civilian population and that his acts comprise part of the attack; or he must at least take the risk that his acts are part of the attack.”

This shows that with or without his consent, he assumed the risk of implementing the attack that caused grievous harmed to humanity. He need not know the specific details of the attack; neither is knowing that his acts are directed against the targeted population relevant.

Where such knowledge of the accused that a civilian population has been targeted is established beyond a reasonable doubt, his/her motive for participating in the attack is, in principal, irrelevant to the question of his/her guilt. A crime against humanity may be

36Mattraux, Id.
37Id.
38Id. at 171.
39Id., at 172
40Id.
41Id.
42Id, See also E. Van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, 2003 at 95 (naming one of the “perquisites for imputing criminal responsibility” as the accused’s voluntary participation in one aspect of a common plan.)
committed regardless of reason(s),\textsuperscript{43} and the accused may be convicted even if his personal motive differs from the purposes underscoring the attack.\textsuperscript{44} Indeed, the perpetrator need not even approve of the attack, or its associated criminal acts.\textsuperscript{45}

\textsuperscript{43}Mattraux, \textit{Id.} at 174, See also \textit{Rome Statute of the International Criminal Court}, Article 32(1) (stating that “A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime”).

\textsuperscript{44}Mattraux, \textit{Id}, at 174

\textsuperscript{45}\textit{Id.}
Chapter II: International Court’s Jurisdiction Over Presidents of Sovereign Nations

The International Court of Justice, commonly called world court or ICJ and the International Criminal Court (ICC) have global jurisdictions.46 These two courts are located in the Hague, Netherlands.47 The ICJ was established in 1945 by the Charter of the United Nations and the court began work in 1946 as the predecessor to the Permanent Court of International Justice.48 Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions submitted to it by duly authorized international organs and agencies.49 Fifteen permanent judges are elected by the UN General Assembly and the Security Council to serve on the ICJ. Article 93 of the UN Charter binds all 191 members of the United Nations as parties to the court’s statute.50

The ICJ not only produces binding rulings between states that submit to its jurisdiction, it also permits proceedings for non-state interest.51 A state may, for instance, bring a case on behalf of one of its members for diplomatic protection.52 Also Article 3(1) of the United Nations Charter gives the court jurisdiction over “matters specifically provided for…in treaties and conventions in force.”53 This suggests that the court may exercise jurisdiction over states parties to the UN Charter as well as parties to all the conventions and treaties prohibiting international criminal, social and economic offenses.

47 Id.
48 Id.
49 Id.
50 Id. at 3
51 Id.
52 Id.
53 Id. at 4
Article 94 also establishes the duty of all UN members to comply with decisions of the court involving them.54 If a party does not comply, the issue may be taken before the Security Council for enforcement action.55 Article 103 provides that obligations under the charter take precedent over treaty obligations.56 By signing the UN Charter, a state member of the UN is bound to comply with any decision of the ICJ in case to which it is a party.57 There are many cases involving states and individuals which have been decided using the ICJ’s compulsory jurisdiction.58

In much the same way as the ICJ, the International Criminal Court (ICC) also has compulsory jurisdiction.59 Article I of the Rome Statute (2002) forming the ICC establishes that it is a “permanent institution” with “power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute, and shall be complementary to national criminal jurisdictions.”60 In addition, Article 3(3) states “The court may sit elsewhere, whenever it considers it desirable, as provided in this statute.”61 Also Article 4(2) provides that the court may exercise its power “on the territory of any state party and, by special agreement.”

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54 Article 94(1) & (2) of the UN Charter provides that “each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.
55 Id.
56 Wikipedia.org., p. 5
57 E.g. In Nicaragua V. United States, 1986 ICJ 14 (June 27), the United States of America had previously accepted the court’s compulsory jurisdiction upon its creation in 1946, but withdrew its acceptance following the court’s judgment in 1984 that called on the United States to “cease and to refrain” from the “unlawful use of force” against the government of Nicaragua. In a split decision, the majority of the court ruled the United States was “in breach of its obligation under customary international law not to use force against another state” and ordered the US pay reparations, although it never did.
58 See e.g. Hurst Hannum and David Hawk, The Case Against the Standing Committee of the Communist Party of Kampuchea, Draft ICJ Memorial at 133-150 (1986)
59 See Article 4 of the ICC: Legal Status and Powers of the Court
61 Id.
Concerning subject matter jurisdiction, Article 5(1) of the Rome Statute provides that “The court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” It also identifies crimes against humanity committed both in conventional and unconventional armed conflicts as one of the groups of offenses under its trial jurisdiction. This means that the ICC has jurisdiction over state parties to the statute, as clearly stated in Article 12(1). Article 12(2) also requires that one of the parties in conflict need be a signatory to the statute in order for the court to exert jurisdiction over issues arising from the commission of crimes by one against the other.

A president is servant of the state, and is not exempted from the jurisdiction that binds the state. Moreover, if a president commits crimes alleged under the ICC in his private capacity, Article 12(1) of the Rome Statute provides that he/she may be brought under the court’s jurisdiction for prosecution as long as either his/her country or the state against which the act was committed signed the UN Charter, in the case of the ICJ, or the Rome Statute, in the case of the ICC.

A. Indicting an Incumbent President of a Country for Personal Prosecution

A person who commits crimes in the name of his state stands to bear personal responsibility for his acts, in spite of the state’s alleged implication. An incumbent

62 Rome Statute of the International Criminal Court, Id.
63 Id., at 1
64 Id., Article 12(1) provides that “[a] state which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”
65 Article 12(2), Id.
66 See Tunks, Id., at p. 6 (giving the reason for Augustin Pinochet’s conviction for torture by the House of Lords in England as falling out of the scope of a head of state’s legitimate function.)
67 Id.
president is no exception to this, especially when it comes to war crimes, whether committed in his official or private capacities. The president may commit some wrongful acts under the pretext of pursuing his official duty, or may directly pursue his personal criminal agenda with impunity. In such cases where the president’s acts are non-presidential, he/she must be held liable during and after his/her presidential term as the case may be.

However, if the crimes were committed in the legitimate interest of his/her country while exercising his/her presidential duty, provided there is no indication of personal criminal interest, he/she may be required to submit to the international court through his/her state, which stands as a principal party to the complaint against its government. The state will then answer all allegations against the president, because the act of the president in the exercise of his duty is in effect the act of the state.

Independent of the state, the president may derive personal benefits or gratitude from his/her private acts, whether positive or negative. This independence of the president precludes the state from intruding into his/her private affairs, as long as they do not transgress public good, neither will the state protect the president against the consequence of his/her unwholesome acts.

International law governs all states, their presidents/leaders and subjects. Those states that signed the UN Charter and/or the statute of the ICC are amenable to the

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68See supra note 67 (observing that “the United Nations Secretary General Kofi Annan echoed that the goal of the International Criminal Court is to ensure that no ruler, no state, no army and no junta anywhere can abuse human rights with impunity.”)
69Id.
70See for example, Nicaragua V. USA, 1986 I.C.J. 14 (June 27).
71Id.
72Tunks, Id., at 6-7.
73Id., at 5 (explaining that “international customary law consists of two basic elements: objective state practice and states’ subjective belief that their behavior is obligatory under international law, an element known as opinion juris.”)
The Security Council established two criminal tribunals, the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These Tribunals were intended to “end the prevailing culture of impunity in the international legal order, and on the premise that in a fully-fledged, modern international community, the individual had to be viewed as a more autonomous player”. These Tribunals are regarded as the beginning of the “criminalization of international law”.

These courts were also the continuation of the efforts of the UN Security Council to address international crimes. They followed in time the Nuremberg and Tokyo Tribunals in early nineteenth century, which had the mandate to prosecute those still engaged in the slave trade, and the Rhine Navigation Chamber of Appeal, which has criminal jurisdiction over traffic offenses committed on the Rhine. The Permanent International Criminal Court (ICC) established in 1998 is an example of a successor institution. Furthermore, the Special International Criminal Courts in Sierra Leone and the East Timor were set up, building on the experiences of both tribunals.

“All of the above-mentioned international courts had their own specific characteristics, as each was addressing a unique situation and was faced with distinct legal questions at different times in history. Given these differences, each court should be assessed separately.

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74 Tunks, Id.
75 Mattaux, Id., chs. 1-4.
76 L.J. Van Den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law, October, 12, 2005, P. 1
77 Id.
78 Id., at p. 3
79 Id.
80 Id.
to allow the particular intricacies of its operation to be analyzed. This analysis may be
made from different perspectives, based on historical, political or legal research.\textsuperscript{81} Hence, given the proliferation of international crimes committed by presidents prior to and
during their presidential terms, international courts should be empowered to indict them
anytime during and after their presidential terms.

B. The Trial of a Former Foreign President in International Court Established in the
Complaining State

It has been said that any person committing genocide, torture and other crimes
against humanity may be prosecuted in any court that obtains jurisdiction over him/her.\textsuperscript{82} If a former president engaged in unilateral acts in abrogation of the constitution of his/her
country, and thereby committed crimes while serving as president, he/she assumed the risk
of having done so, in theory, as an individual and not as president.\textsuperscript{83} If the crimes so
committed fall within the category of crimes against humanity, courts in the state(s) where
the effects were felt may properly exercise jurisdiction over the culprit.\textsuperscript{84} This includes the
home state of the accused.

Crimes against humanity are a crime against the whole world, and not just a part of
the world.\textsuperscript{85} The world is a party to a course of action arising from such crimes; it is
elementary to say that every state is a competent party, including the home state of the

\textsuperscript{81} Van Den Herik, \textit{Id.}
\textsuperscript{82} \textit{Id}
\textsuperscript{83} \textit{Id}
L. Rev. 2129, 1999, at 102-103
\textsuperscript{85} \textit{Id.}, at p.105
accused.\textsuperscript{86} Also the fact that every state is a party gives the perpetrator of such crimes no neutral venue for prosecution.\textsuperscript{87} The court must be established somewhere, regardless of the forum state’s interest or connection with the case.

The proper courts with competent jurisdiction over cases of international character are those established by the UN Charter, the UN Security Council, or other agreements which are acceded to by the states concerned.\textsuperscript{88} The International Court of Justice (ICJ) and the International Criminal Court (ICC) are located in the Hague, the Netherlands.\textsuperscript{89} These have jurisdiction over any state that is a party, or having case with another state which is a party to the agreement or statute.\textsuperscript{90} For instance, former presidents who committed acts against Netherlands may still be tried in these courts, even though the courts happen to have been established in Netherlands. Also, the ICTY and ICTR were established in Belgrade, the former Yugoslavia, and Kigali, Rwanda, to try those who committed crimes against those countries respectively, so was the International Court for the East Timor.\textsuperscript{91}

A court of this nature is usually established in a country with the purpose of prosecuting crimes suffered by the people of that country.\textsuperscript{92} Regardless of whom the perpetrator was when he/she committed the crimes, the court must obtain jurisdiction over him/her.\textsuperscript{93}

\textbf{Chapter III: The Effect of Immunity on Personal Liabilities of Presidents}

\textsuperscript{86} See \textit{supra} note 282 (discussing the element of opinion juris respecting obligations ofl states under customary international law)  
\textsuperscript{87} See \textit{supra} note 46 (naming the ICJ and ICC as having general jurisdiction and criminal jurisdiction worldwide respectively, and both being established in the Hague, does not alone prevent the Netherlands from becoming a party the litigation of matters in the jurisdictions of the courts).  
\textsuperscript{88} \textit{Id}  
\textsuperscript{89} \textit{Id}  
\textsuperscript{90} \textit{Id}.  
\textsuperscript{91} See \textit{supra} note 76  
\textsuperscript{92} \textit{Id}.  
\textsuperscript{93} \textit{Id}.  
It is a well acknowledged practice in international law to grant heads of state immunity from prosecution for criminal and civil offenses.\textsuperscript{94} Heads of state obtain this privilege as the political representatives of sovereign states, which are immune from adjudication by other states for their conduct.\textsuperscript{95} Such immunity is said to be granted \textit{ratione personae}.\textsuperscript{96}

State immunity also extends to former ambassadors and former heads of state to a limited extent.\textsuperscript{97} This type of immunity, called \textit{ratione materiae}, is intended to “preserve the activities of the foreign state” during the tenure of the ambassador and covering all official acts of the former ambassador.\textsuperscript{98} Similarly, \textit{ratione materiae} is, in principle, applicable to former heads of state only for their official acts.\textsuperscript{99} Indeed, former heads of state represent the sovereign immunity of the state even more than former ambassadors.\textsuperscript{100}

\textsuperscript{94}See Davis, \textit{supra} note 1, at 567 (pointing out that states extend immunities to one another in compliance with comity, mutual respects and the principle of equality of states, which prevent them from stumbling over one another’s legal systems. He further observes that a state will reciprocate the action of any one or group of states in prosecuting its former or current leader for crimes against humanity).

\textsuperscript{95}See Dunoff, \textit{Id.} at 617 (arguing that the international law principle that states’ immunities prevent them from adjudicating on the conduct of one another in criminal and civil issues also extends to the head of state as the state itself. This immunity enjoyed by a head of state and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him/her immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. It is in compliance with the basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state…[T]he head of state is entitled to the same immunity as the state itself).

\textsuperscript{96}Id. at 617 (defining \textit{ratione personae} as state immunity enjoyed by heads of state in power and ambassadors in post, a complete immunity rendering them immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state). In compliance with the basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state…[T]he head of state is entitled to the same immunity as the state itself).

\textsuperscript{97}Andrew Dickerson, Rae Lindsay and James P. Loonam, \textit{State Immunity, Selected Materials and Commentary}, at 215 (2004). See also Dunoff, \textit{Id.} at 618 (pointing out that “in order to preserve the integrity of the activities of the foreign state during the period when he was ambassador, it is necessary to provide that immunity is afforded to his official acts during his tenure in post. If this were not done the sovereign immunity of the state could be evaded by calling in question acts done during the previous ambassador’s time. At common law former heads of state enjoy the same immunity (ratione materiae) once they cease to be head of state”).

\textsuperscript{98}Id. at 618, See also Dickinson, et. al. at 286 (concluding that all official acts of former ambassadors are immune from prosecution, because such acts constitute acts of the state).

\textsuperscript{99}Dunoff, \textit{Id.}, at 618.

\textsuperscript{100}See Peter Evan Bass, \textit{Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy}, 97 Yale L.J. 299 at 300 (arguing that “president is at the height of his constitutional power, because his action derives from a specific congressional delegation”).
However, leading international norm violation doctrines require careful application commensurate with the changing trend of international crimes in order to effectively protect human dignity without violating the sovereign immunity of states. This chapter follows such doctrines to determine the state immunity applicable to certain acts of presidents and former presidents.

A. Crimes Preceding Presidential Term

The doctrine of immunity is necessary to preserve the sovereignty of states. It is not concerned with the sovereignty or dignity of individuals. For instance, “a state may claim immunity from the jurisdiction of courts of another state,” and a person enjoys the immunity that belongs to the state only by virtue of his/her position in the service of the state at the highest political and diplomatic hierarchy. This has been a subject of frequent controversies in international law.

The Institute of International Law, addressed the issue of state immunity in its 46th (1954) and 65th (1991) sessions. The Institute’s sessions attempted to dispel uncertainties encountered in contemporary practice regarding the inviolability and immunity of heads of state from jurisdiction of another state, and to identify the kind of defense heads of state may invoke before another state’s authority. The Institute would grant special treatment

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101 David, Id. at 1375
102 See Davis, supra Note 1.
104 Tuniks, supra note 3, at 540.
105 See e.g. Jonathan Black-Branch, Sovereign Immunity Under International Law: The Case of Pinochet, 93-113 (2000). See also supra note 104 at 651 (answering the “murky and unsettled” question of when a country’s highest leaders may be held before foreign courts to answer to criminal and civil actions, by making reference to the International Court of Justice (ICJ) and a U.S. federal district court’s recognition of immunities for Congo’s Foreign Minister Abdulaye Yerodia Ndombasi and Zimbabwe’s President Robert Mugabe.
106 Dickinson, et. al., supra note 98 at 212-213
“to a head of state or head of government as a representative of the state,” in support of his/her services to the state and the international community.107

Also, the Institute’s decision to grant special treatment to heads of state supports states’ requirements under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of the Universal Declaration of Human Rights. 108 The ICESCR obliges every member state to effectively provide to its citizens “the right to work; to social security; to an adequate standard of living, including food, clothing and housing; to the highest attainable standard of health; the right to education, the right to take part in cultural life”.109 To effectively perform its obligation under the Covenant, a state needs an effective government. The effectiveness of the government dominantly rests upon the president.110 Prosecuting a president limits his/her ability to perform, which in turn impedes the capacity of the state to perform its duties to protect the human rights of its citizens under the ICESCR.111

Furthermore, all states are equal under international law. The court of one state cannot exercise jurisdiction over another.112 The head of state represents the state. Prosecuting him/her in the court of another state is prosecuting his/her state in the court of another state.113 Therefore, the person of the head of state is inviolable once he is under the functional immunity of the state.114 However, the Institute recognized the obligation of the

107 Id., at 212
109 See Dickinson, supra note 107.
110 See Bass, supra note 100
111 Id.
112 See e.g. Andrew B. Pittman, Ambassadors Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts, 58 Wash. & Lee L. Rev. 645 at 646 (confirming that because all states are equal, the exercise of authority by one sovereign over another would be regarded as act of hostility).
113 See Bass, supra note 110.
114 Id.
head of state or government “to respect the law in force on the territory of the forum state.”115

Details of the inviolable rights of heads of state and the limits of their immunities are also provided by Articles 2.123(1) (2) and (3) of the European Convention on State Immunity. Article 1 states: “When in the territory of a foreign state, the person of the head of state is inviolable. While there, he or she may not be placed under any form of arrest or detention. The head of state shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity.”116

This is important, because one of the things that qualifies a state as a sovereign is the recognition it receives from other states.117 Such recognition promotes comity (friendship among states). There can be no comity without recognition.118 The chief product of comity is mutual respect for sovereignties, which further promotes global peace and technical and economic cooperation among states.119 Also, there can be no mutuality of respect among states without due regards for each other’s governmental representatives and jurisdictions.120

Article 2 also states that “In criminal matters, the head of state shall enjoy immunity from jurisdiction before the courts of a foreign state for any crime he or she may have

115 Id.
116 Id., at 213.
117 Joel R. Paul, Comity in International Law, 32 Harv. Int’l L.J. 1, 1999 at 2 (asserting that “under the rubric of comity, U.S. Courts have justified this deference as a sign of respect for foreign sovereignty”).
118 Bass, Id.
120 Paul, Id. at 11-18.
committed, regardless of its gravity.” This does not mean that no court actions can be brought against a state for offenses committed by its government against another state. It means that the courts of the complaining state are not the proper forums for such action.

The European Convention of State Immunity not only addressed the immunity of heads of state, but also of former heads of state. Article 13 of its resolution provides that “a former head of state may be prosecuted and tried for his personal acts against international law.” This supports the established rule that a head of state may be covered by _ratione personae_ (state immunity) only for his acts during the tenure of his/her presidency, especially where he/she represents state interest, or where his/her personal acts cannot be properly addressed without interfering with state duty. Clearly, all other acts including those committed before and after his/her tenure of office would not be covered by state immunity, the former head of state represented no state interest at the time the acts were committed.

> **Also regarding _ratione materiae_, the former head of state is immune from prosecution only for acts he/she committed during his presidency which were essential to the exercise of official duties.** This means that the law has the authority to pierce the veil of immunity and search out those criminal acts of the former head of state that had

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121 _Id._
122 _Id._
123 _See Tunks, Id at 656-57_ (stating that “[t]he abrogation of immunity for the private acts of former heads of state, including international crimes in any context, is in harmony with the twin purposes of the head-of-state immunity doctrine: respecting state sovereign equality and promoting diplomatic functions. Because crimes against humanity, torture and other international crimes are outside the scope of what can be considered a state’s official public function, seeking accountability for these acts does not infringe on a state’s sovereignty, or at least so much as to outweigh the benefits of stranger human right enforcement”) r
124 _Id._
125 _Tunks, Id._
no public implication, but were committed in pursuit of personal interest. Such acts may be prosecuted in accordance with their magnitude and the jurisdiction which they create.

B. Contribution of Customary Law to the Immunity Doctrine

Customary international law also exempts ambassadors and former ambassadors in much the same manner as it does heads of state. Governments in the nineteenth century mutually recognized the exemption from criminal jurisdiction. As a remedy, a state could only request the envoy who committed criminal misconduct(s) be recalled or it could expel him.

Diplomatic immunity is a product of the theory of extraterritoriality of ambassadors. In the host state, diplomats serve as representatives of the state that sent them. Their mission is the extension of the territory and authority of their home states. They are not subject to arrest and prosecution by the court of a foreign state that hosts them. For example, in 1926, a court in Geneva declined to exert jurisdiction over a

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126 See Gary B. Born, Head of State Immunity-Waiver by Foreign State-Conflict of Laws-Self-Incrimination Laws. 83 A.M. J. Int’l L. 371, at 373, (explaining the reasoning of the court in In Re Doe, 860 F. 2d 40 (1988), states “… the principles of international comity, which it saw as the policy underlying other international immunity doctrines, were best served by treating head-of-state immunity as a national attribute, rather than a personal one”).

127 Born, Id. at 371, See also Curtis A. Brandley and Jack L. Goldsmith, Pinochet and International Human Rights Litigation, 97 Mich. L. Rev. 2129 (1999),at 2133-34. (observing that international law recognizes the concept of “universal jurisdiction”, pursuant to which certain categories of conduct can be regulated by any nation. The theory is that those who engage in this conduct are hostis humani generic, or “enemies of all mankind,” and that all nations therefore have an interest in punishing them).

128 See Frey and Frey, at 352; See also Tunks, supra note 11, at 656 (identifying the two basic elements of international customary law as “objective state practice, and states’ subjective belief that their behavior is obligatory under international law, an element know as opinio juris. Therefore, to monitor the development of the customary law of head-of-state immunity, one should analyze how national and international courts have addressed immunity questions, how states have reacted to these decisions, what actions political branches have taken with respect to immunity issues, and any general statements nations have made about the degree of immunity enjoyed by heads of state.”

129 Id., at.353.

130 See Born, supra note 126.

131 Id., See also Tunks, at. 653-654.

132 Tunks, Id.
paternity suit against the delegate of Yugoslavia to the League of Nations, because “by virtue of his extraterritoriality” the defendant was not regarded as legally domiciled in Geneva. The court thus lacked jurisdiction to try a person, even though present or resident in the forum state, also is deemed to be under the authority of his home state.

Jurists’ debates, however, cast doubt on the level of development in customary law dealing with international immunities. In 1931, the theorist Lawrence Preuss argued that “customary law appeared to be in the process of information.” In 1954, the Supreme Court of Mexico declared that “the Economic Commission for Latin America (ECLA) could enjoy immunities recognized by international law.” That argument implicitly recognized the existence of a customary international law, as did the agreement concluded between Egypt and the World Health Organization (WHO) when it provided that the organization shall have the “independence and freedom of action belonging to an international organization according to international practice.”

Consistent with the development of customary law of immunity from mere information or rules to practice, Laurel B. Francis, a legal expert, emphasized at the meeting of the International Law Commission in 1977 that a “wide range of customary rules had emerged” and that “a large body of such rules was applicable to international organizations and to their accredited officials.” Others had different views. In 1949 John Kerry King argued that “the law regulating international officials had not yet met the tests of customary

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133 Frey and Frey, at 353. The authors suggest that by virtue of his diplomatic status, the defendant was regarded to be legally domiciled in Yugoslavia, his home and sending state, rather than his host country, Switzerland.
134 Id.
135 Id., at 540.
136 Id.
137 Id.
138 Id.
139 Frey and Frey, Id., at 541
law, namely, universal acceptance, practice, and effectiveness.”

Many jurists continued to support that position. In 1971 a Swiss lawyer acerbically noted that “customary rules were rare, if not non-existent.”

Nevertheless, some jurists agreed with Maximiliano Bernady Alvarez de Eulate, of the University of Saragoss, who, in 1980, pointed out that “international custom may develop from repeated and concordant treaty provisions.”

To these, I shall add that customary law’s provision for immunity must evolve with the peculiarity of the situations which they ought to govern. Customary law is formed by long term practices of nations, which have been accepted as the rule of engagement or legal obligation. Rules formed by such practices are called opinio juris. A practice must be carried out consistently by all states, or by meaningful majority of the world’s states to culminate into opinion juris. Thus customary law is limited. New developments, which require immediate adjustment to the law of immunity, emerge over time. Knowledge is acquired by research guided by informed awareness. International treaties on immunities could also be developed among states to keep pace with emerging issues which are at variance with those formally addressed by customary international law. International courts also have a role in modifying the law of immunity to specifically address new issues rather than limiting courts to the blanket application of the traditional immunity doctrine.

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140 Id.
141 Id.
142 Id.
143 See Tunk, supra note 132 at 656-57 (arguing that those accused of torture and other crimes against humanity are enemies of the whole world and can be prosecuted anywhere they are found. Therefore given the proliferation of war crimes, the law should consider the immunity of an accused criminal in light of the gravity of the offense he/she commits).
144 Dunoff, Id at 75.
145 Id.
146 See Bass. Id. at 301.
C. Rationale for Distinguishing between Crimes Committed During Presidency and the Application of Immunity

As observed in Section A above, the prosecution of criminal acts of the president falls within three categories. First, there are acts that, even though wrongful under international law, were essential to the execution of his presidential duty. Such acts will at all times be immune from personal prosecution against the president, even after his/her presidency expires. This is because states enjoy sovereign equalities, and no matter how big or small, a state is not required to submit to the jurisdiction of another state.

Second, there are acts that the president committed prior to his/her official term. Such acts would not be said to have been committed on behalf of the state, even if they were geared toward public benefits. State immunity only covers an incumbent president, Immunity will be abused if extended to the level of a private individual anticipating becoming president one day so as to be immune from prosecution for his/her previous criminal activities. Such a privilege, if granted, would constitute a “blank check” for those who are able to commit atrocities with impunity. This will also be counterproductive for the prevention and prosecution of the most serious crimes against the human race.

However, an incumbent president cannot be personally prosecuted by a court for his/her prior crimes without a UN Security Council resolution empowering that court to take

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147 See, e.g. Dickinson, et. al. at 217
148 Bass, Id., at 300-301
149 Id. at 301-302
150 Id.
151 Tunks, Id., at 657.
action in fulfillment of Chapter VII Article 39 of the Charter of the United Nations.\textsuperscript{152} As provided by the UN Charter, it can be inferred that the Security Council may authorize a court to prosecute a head of state if such a head of state commits a breach of the peace which the Council reasonably considers to be a threat to international security, and if the Council determines that prosecuting the head of state is a necessary and sufficient remedy.

Third, there are the crimes committed by a former president in pursuit of his/her personal interest during the tenure of his/her presidency. However difficult it may be to prosecute the individual during his/her tenure of office, he/she may be prosecuted for these personal offenses when no longer serving as president.\textsuperscript{153} The personal prosecution of a former president is justified because in as much as the state could not intrude into his/her private affairs as president without limitations, so it cannot protect him/her indefinitely from the consequence of such private affairs.\textsuperscript{154}

\textbf{CHAPTER IV: The Use of Force and Act of State}

Under international law, the use of force may be defined as cross-border armed hostilities, conflicts, terrors or insurgencies to overthrow the government of an affected state.\textsuperscript{155} Contemporary international law attributes the use of force to the act of states from

\textsuperscript{152} See Chapter VII, Article 39 of the UN Charter (mandating the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and recommend adequate measures, excluding the use of force, to maintain or restore international peace and security).

\textsuperscript{153} Diana Woodhouse, The Pinochet Case, A Legal and Constitutional Analysis, at 97 (2000) (equating the immunity to former heads of state to that of former ambassadors with respect to their official acts, and implying that their private conducts are similarly not immune from prosecution).

\textsuperscript{154} See Leonard V.B. Sutton Award, The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor’s Justice, 32 Denv. J. Int’l L. & Pol’y 355 (2001), at 364-365(arguing that United States courts see head of state immunity not as “a matter of right” but rather “a matter of grace and comity” where immunity is granted to those friendly with the nation).

\textsuperscript{155} See United Nations General Assembly Resolution 3314 (XXIX) Definition of Aggression
the standpoint of the United Nations Charter’s prohibition on the use of force by states.\textsuperscript{156} According to Thomas Frank and others, “The law governing the use of force is based on the United Nations Charter, adopted in 1945 at the close of the second world war.”\textsuperscript{157} Article 2(4) of the United Nations Charter states “All members shall refrain from their international relations the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”\textsuperscript{158} The referent purposes of the United Nations for which use of force may be allowed are self-defense, collective self-defense or a use of counter force authorized by the United Nations Security Counsel.\textsuperscript{159}

\section*{A. The Use of Force by State Actors and State’s Responsibility}

States continue to be regarded as the dominant personalities/participants of international law.\textsuperscript{160} Their status defines their obligations regarding the use of force under the United Nations Charter.\textsuperscript{161} States are obligated not only to refrain from the use of force, but to prevent any group from using their territories to launch armed attacks against the territory of another state.\textsuperscript{162}

The responsibility to safeguard against the use of force carries with it the consequences of the breach of such duty.\textsuperscript{163} A state may be subject to the retaliatory actions of the offended state or group of affected states.\textsuperscript{164} In other instances, a state may

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\textsuperscript{156} See Article 2(4) of \textit{the United Nations Charter}, 1945.  \\
\textsuperscript{157} Mary Ellen O’Connell, \textit{International Law and the Use of Force}, 2005, at 2  \\
\textsuperscript{158} Nicole Deller and John Borroughs, \textit{jus ad bellum: Law Regulating Resort to Force}, at 1  \\
\textsuperscript{159} Danoff, \textit{Id.}, 889  \\
\textsuperscript{160} \textit{Id.}, at 105  \\
\textsuperscript{161} \textit{Id.} at 205  \\
\textsuperscript{162} See supra note 159  \\
\textsuperscript{163} Mike Andrews, \textit{The Rainbow Warrior Affair}, See also Dunoff, \textit{Id.} 15-18.  \\
\textsuperscript{164} See \textit{Supra} note 161
\end{flushleft}
be compelled to make restitution or pay for losses sustained by states affected by its use of force.\textsuperscript{165} In that case, the perpetrator(s) of the attack are state agents executing the state’s specific military objectives.\textsuperscript{166} These agents may also be held criminally liable for their parts in the attack when apprehended.\textsuperscript{167}

State liability is subject to consideration of its breach of international law governing armed attack.\textsuperscript{168} Again, international law governs the institution of war by two systems of rules—\textit{jus ad bellum} and \textit{jus in bello}.\textsuperscript{169} The \textit{jus ad bellum} is a Latin expression referring to the just or unjust nature of the armed attack.\textsuperscript{170} No country or individual has the right to attack the territory of another sovereign state without just reason, and the only reason that is just is self-defense or collective self-defense.\textsuperscript{171} The \textit{jus in bello} signifies humanitarian consideration of the methods of wars.\textsuperscript{172} One has to follow the laws of war and not kill massively and indiscriminately, or commit crimes against innocent people.\textsuperscript{173} \textit{Jus in bello} defines the observable rules of engagement in the course of war and identifies acts which constitute war crimes.\textsuperscript{174}

Besides states and their actors, other individuals violating international criminal law bear the liabilities for their crimes.\textsuperscript{175} This is a departure from contemporary international law which provided that states were the only actors in international law, as they are the

\textsuperscript{165} Charter of the United Nations Article 41
\textsuperscript{166} Andrews, \textit{Id}
\textsuperscript{167} \textit{Id}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} Dunoff, \textit{Id} 501
\textsuperscript{170} \textit{Id}
\textsuperscript{171} \textit{Id}
\textsuperscript{172} Dunoff, \textit{Id}
\textsuperscript{173} Dunoff, \textit{Id}
\textsuperscript{174} \textit{Id}
\textsuperscript{175} Andrews, \textit{Id}
only parties to treaties and other international agreements. However, the advancement of international human rights law has made international non-governmental organizations (NGOs), social and religious organizations, as well as individual persons, actors of international law. Therefore, international law protects individual rights by sanctioning those who breach the law.

The transition from recognizing states as the only international law actors has had positive impacts on international criminal law. Although the United Nations General Assembly resolution 2625 (XXV) prohibits states from direct initiation of armed attacks, enforcement of the law on states alone approaches the limit of impossibility. This is because the state which may be responsible for an attack is often unreachable, except through the individuals who actually planned and launched the attack. Indeed, such individual state agents must be held accountable for initiation of the armed attacks, whether done under “act of state” or not.

B. The Use of Force by Non-State Actors

Criminal responsibility for a non-state use of force against a sovereign state falls squarely on the actors and their accomplices. International humanitarian law applies to any armed conflict, be it between states or governmental authorities and armed groups.

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176 Id
177 Id
178 See Nicaragua v. USA, 1986 I.C.J. 14, 101-03 (June 27), found that the United States had violated international law by supporting Contra guerrillas in their war against the Nicaraguan government and by mining Nicaragua’s harbors.
179 Prosecutor v. Tadic, supra
executing cross-border attacks or operating within a state.\textsuperscript{180} The belligerent force has the
duty to observe humanitarian law during the execution of the war to avoid the commission of
war crimes such as torture, genocide and other crimes against humanity.\textsuperscript{181} Because armed
gangs or rebel and terrorist groups are not legally recognized entities under international law,
they are not subject to collective prosecution as would a state.\textsuperscript{182} Indeed, the leaders and
members of such groups are individually responsible for their part, and for the aggregate of
the crimes committed by them.\textsuperscript{183}

\textbf{C. Remedies Against the Use of Force}

Under international law, self-defense is authorized by the United Nations Security
Counsel as one of the primary remedies against the use of force.\textsuperscript{184} The offended state may
also choose to prosecute the perpetrating individuals, or the aggressor state in the
International Court of Justice for acts of war against its people and territory.\textsuperscript{185} Other states,
on the request of the victim state, and pursuant to treaty obligation, may exercise collective
self defense against the offending state.\textsuperscript{186}

International humanitarian law also has rules for the employment of self-defense.
For self-defense to apply, there must be an armed attack of a magnitude sufficient to
engender a national emergency. When such an attach necessitates a prompt and immediate
counter attack to prevent serious injury to or destruction of the state, the use of force in self

\textsuperscript{180}Nathaniel Berman, Privileging Combat? Contemporary Public and the Legal Construction of War, 43
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} See Supra note159
\textsuperscript{185} See Supra note 168.
\textsuperscript{186} Berman, Id.
defense is justified. The acts of self defense must be proportional to the attack, or be sufficient to repel the attack. Generally this allows a forceful response sufficient to repel the attack, but the response must not be so excessive as to extinguish the entire community of insurgents, the attacking unit, or the army of the attacking state.\textsuperscript{187}

As observed earlier, one of the remedies against the use of force is authorization by the United Nations Security Counsel for the use of counter force by the affected state or by other states on behalf of the affected state.\textsuperscript{188} This remedy, as well as prosecution of perpetrators, is not necessarily as prompt or as effective as self-defense and collective self-defense.\textsuperscript{189}

\textsuperscript{187} See War in Afghanistan, Dunoff, \textit{Id.}, at 942-946.
\textsuperscript{188} \textit{Id.} at 105
\textsuperscript{189} Article 41 of Charter of the United Nations
Chapter V: Conclusion and Recommendations

Conclusion

International law is evolving with the creation of new remedies for international crimes and offenses. Traditionally, the punishment of international crimes was grossly impaired or prevented by the operation of immunity for those perpetrators appearing to be acting in the interests of their states\(^\text{190}\). In part, this was because only states, and not individuals, were considered as international law subjects, and as such, a person functioning under the authority of the state could not be held personally liable for crimes committed, even when such acts were not promoting the objectives of the state\(^\text{191}\).

However, the Nuremberg Proceedings initiated a change to this rule making it possible to hold individuals criminally responsible for international wrongs committed by them\(^\text{192}\). The prosecution of the Nazi officials personally for genocide and crimes against humanity in 1945 marked the beginning of a process of recognizing the individual person as a key player in international law\(^\text{193}\). Not only that, the Trial Council at Nuremberg initiated the refusal to grant immunity for state actors who in obedience of their national

\(^{190}\) See Andrew B. Pittman, *Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts*, 58 Wash. & Lee L. Rev. 645, at 646 (advancing the United States Chief Justice Marshall’s reasoning that “nations that sent their official representatives abroad did not intend to subject them to the authority of the receiving state”, because then the representatives “would owe their temporary allegiance to the receiving state and lack the requisite independence to represent their own country’s national interests adequately.”)


\(^{193}\) See Guenael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal tribunals for the Former Yugoslavia and for Rwanda, 43 Harv. Int’l L.J. 237, at 237 (maintaining that “the Nuremberg Tribunal and the courts subsequently operating under Control Council Law No. 10 refused to allow immunity for state actors, thus playing an invaluable role in the development of individual responsibility; the ICTY and the ICTR maintain this same doctrine”). See also Fletcher, Supra note 305.
obligations breach the moral law of humanity. To date, international criminal courts continue to “take innovative step[s]” to ensure that all international crimes are appropriately determined under the law of nations.

Among others, the trial of General Augusto Pinochet, former President of Chile, in London, Great Britain, in 1998, for acts of torture and genocide committed in Chile, and the trials of war crimes by the International Criminal Tribunals of the Former Yugoslavia (ICTY) 1991 and Rwanda (ICTR) in 1993 respectively, attest to advanced intolerance for breaches of international norms by state actors.

Also on March 29, 2006, President Charles Ghankay Taylor of Liberia was indicted and arrested by the United Nations Special Court in Sierra Leone for allegedly committing torture and other crimes against humanity in Sierra Leone between 1991 to 2001. His trial has been transferred to the Hague facilities of the International Criminal Court (ICC). President Taylor will be the first African leader to face trial for crimes against humanity.

**Recommendations**

Crimes are tried and punished in consonance with the degree of intent generating them. Regardless of the benefits which society may derive from some acts, they are still

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194 Mettraux, *Supra* note 193, at 377
195 Id.
196 Id., See also Bradley, Id., at 102 – 106.
197 See *supra* note 12
198 Theodore T. Hodge, *Charles Goes to the Hague – London Awaits*, www.theperspective.org June 24, 2006 (explaining that because of the security risk the trial of Charles Taylor poses to the West African sub-region, the trial was moved to the Hague under the condition that Great Britain agreed to provide prison facilities for Taylor if convicted.)
199 Id.
punishable if the motives for committing them are criminal. Meanwhile, it takes a strong criminal justice system to determine and deter prohibited behaviors committed in disguise. The justice system becomes strong by transparently applying the law. In such a legal system, no one should be above the law, and there should be no justification for committing an act with intent to break the law.

Even where the law cannot reach a president who commits international crimes he/she could still be indicted at the end of his/her term of office. The United Nations General Assembly should also adopt a convention to sanction, isolate and refuse to recognize any government that comes to power by the force of arms.

However, when countries are sanctioned innocent people suffer. It is therefore necessary to limit the freedom of those responsible for the world’s sanction on a state. To effectively do this, the United Nations should give the courts of its member states the jurisdiction over officials of governments who commit genocide or crimes against humanity to gain power. Prosecuting their officials will impair the operations and survivals of such governments.

There should be no excuse for the commission of crimes against humanity. Forces that intervene in a war should observe the law of warfare (jus in bello). Therefore, when it is properly established that an intervention force committed atrocities rising to the level of crimes against humanity or human rights abuses, their leaders and agents should be prosecuted.

201 Christopher L. Blakesley, Ruminations on Terrorism and Anti-terrorism Law and Literature, 57 U. Miami L. Rev. 1041, July, 2003
203 Id.
204 See also supra note 174
A crime is punishable, because of its mens rea, not according to its expressed purpose\textsuperscript{205}. The mens rea is established by the manner and effect of the commission.\textsuperscript{206} If the intervention force attacked civilians systematically and killed indiscriminately as the occupying force did, then both groups had similar mens rea or criminal intent, and should thus be punished equally.\textsuperscript{207}

The prosecution of international crimes is an important means of promoting world peace and respect for human dignity.\textsuperscript{208} When crimes are prosecuted, other persons are deterred from the pursuit of similar enterprises, while the prosecuted actor is constrained from perpetrating the recurrence of the wrongful act.\textsuperscript{209}

Two methods by which criminal perpetrators are corrected are punishment and rehabilitation.\textsuperscript{210} Punishment is by far the best remedy for international justice, because it not only constrains and restrains the guilty perpetrator, but also rehabilitates him/her and deters others from emulating him.\textsuperscript{211} Punishment serves the ultimate goal of suppressing the rising wave of crimes against humanity, gross human rights abuses and terrorism that threaten the peaceful existence of the human race.

\textsuperscript{205} Supra note 40.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Robinson, Supra note 203
\textsuperscript{209} Id.
\textsuperscript{211} Id.