A PROPOSAL FOR RESOLVING THE
JUSTICE VERSUS PEACE DILEMMA

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I. INTRODUCTION

The civil war in Syria has created a dilemma for the international community. Over 70,000 Syrians have been killed during the civil war, many as the result of human rights violations committed by both government forces and anti-government armed groups. According to the United Nations Human Rights Council, government forces have committed the crimes against humanity of murder, rape, torture, enforced disappearance and other inhumane acts. Government forces have also committed war crimes and gross violations of international human rights and humanitarian law including arbitrary arrest and detention, unlawful attack, attacking protected objects, and pillaging and destruction of property. The Human Rights Council found that anti-government armed groups have committed war crimes, including murder, torture, hostage-taking and attacking protected objects. These groups have endangered civilians by positioning military objectives inside civilian areas and have carried out bombings in predominately civilian areas. The Human Rights Council further found that both


3 See February 2013 report.

4 Id.

5 Id.
government forces and anti-government armed groups violated international law by involving children in the armed conflict. The Human Rights Council also found that there are reasonable grounds to believe that chemical agents have been used as weapons” which would constitute a war crime.

As a result of these egregious human rights violations, the Human Rights Council naturally concluded that “[e]nsuring the accountability of all parties for crimes committed is imperative.” The Human Rights Council, therefore, recommended that the Security Council take appropriate action to ensure that those responsible for these crimes be brought to justice. The dilemma for the Security Council is that if it were to accept the Human Rights Council’s recommendation and refer the situation to the International Criminal Court (“ICC”), doing so may impair the prospects for peace. Neither the government forces nor the anti-government armed groups will have any incentive to end the civil war if the situation is referred to the ICC since they know that they are likely to be prosecuted for the crimes that they have committed. The international community has previously faced this dilemma and will certainly have to wrestle with this question.

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6 Id.

7 See June 2013 report

8 Id.

9 The Council recommended that the Security Council, ”. . .In the light of the gravity of the violations and crimes perpetrated by Government forces and anti-Government groups, take appropriate action and commit to human rights and the rule of law by means of referral to justice, possibly to the International Criminal Court, bearing in mind that, in the context of the Syrian Arab Republic, only the Security Council is competent to refer the situation to the Court . . .” February 2013 report at 26.

10 In Uganda, The Lords Resistance Army resists negotiations to end that country’s civil war in part because of the threat of trial before the ICC. In Kenya, ICC indictees have successfully used their arrest warrants to rally public sympathy, strengthen the loyalty of compatriots, and secure a victory at the ballot box. After the ICC indicted Sudan’s President Bashir, he has been successfully re-elected, traveled extensively, and has received support from his African Union allies. Bashir has forced several leading international humanitarian nongovernmental organizations out of the country for allegedly cooperating with the ICC. See Leslie Vinjamuri, Peace May Require Forgoing Justice, NY Times, March 5, 2013.
This paper will address the question of how the international community should respond when the pursuit of justice and the attainment of peace may be incompatible. This paper begins with an overview of the international human rights movement prior to World War II. During this period, there was almost no effort to hold human rights violators accountable. The paper then discusses how Nuremberg transformed international human rights law and created the framework for holding individuals accountable for committing egregious human rights violations. In the next section of the paper, there is a discussion of how, despite Nuremberg, there was an era of impunity as a result of the cold war. The cold war permitted many of the twentieth century’s worse human rights violators to escape any accountability for their actions. Next, there is a discussion of how the end of the cold war ushered in a new era of accountability and in this new era many human rights violators have been brought to justice. This paper takes the position that although this new era is welcome, a one size fits all approach should not be adopted. Rather, this paper takes the position that whether human rights violators should be prosecuted is a decision that should be made on a case-by-case basis. It may very well be that in particular situations, an attempt to prosecute may make it more difficult to attain peace and that other approaches may be necessary. The approach taken by South Africa, creating a Truth and Reconciliation Commission and granting amnesty to many perpetrators is examined and supports the position that flexibility is needed when dealing with human rights violators. Finally, the paper recommends that when faced with a justice versus peace dilemma, the Security Council
should be given the authority to suspend criminal proceedings if it determines that the threat of criminal prosecution presents a threat to international peace and security.

II. INDIVIDUAL ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

A. Before 1945

Despite several documents asserting individual rights, including the Magna Carta (1215), the Petition of Right (1628), the English Bill of Rights (1689), the French Declaration of the Rights of Man and Citizen (1789), and the United States Constitution and Bill of Rights, there was virtually no international human rights movement prior to World War II. That is because, prior to World War II, how a state treated its own nationals and those under its jurisdiction was considered an internal matter and not a matter of international concern. As a result, there was generally no individual accountability under international law for violations of human dignity. There were, however, two human rights issues that aroused international concern: slavery and the manner in which war was conducted. First, abolitionists used both domestic law and treaties to abolish slavery and the slave trade. These treaties prohibited slavery, trading in slaves and permitted the searching of ships suspected of transporting individuals to be sold into slavery and established mixed tribunals in ports around the world to condemn slave ships.11 In addition to prohibiting slavery and the slave trade, some of these treaties required signatories to criminalize slave trading and to prosecute offenders. For instance, the Slavery Convention requires domestic criminalization and prosecution. Article 6 provides that “those of the high Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and

regulations enacted with a view to giving effect to the purposes of the present
Convention undertake to adopt the necessary measures in order that severe penalties
may be imposed in respect of such infractions.”

The other human rights issue which received attention from the international
community prior to World War II was the effort beginning in ancient times to limit the
horrors of war:

Recorded history confirms that the ancient Israelites, Greeks, and Romans, for
example, distinguished between combatants and civilians and made only the
former the lawful object of attack. There are African and Islamic traditions
dictating that captured combatants and civilians should be humanely treated.
Likewise, in ancient combat, certain weapons or tactics were prohibited if they
caused excessive damage. The codes of chivalry developed in Medieval Europe
set forth rules of combat that applied within the knighthood. In 1139, for
example, the Second Lateran Council condemned the use of weapons viewed as
unnecessarily cruel or inhumane.

The movement to codify these principles began with the Hague Conventions of
1899 and 1907. The Hague Conventions codified the fundamental principle that “[t]he
right of belligerents to adopt means of injuring the enemy is not unlimited.” The
Conventions specifically prohibited the use of poisoned weapons; the killing or
wounding of those belligerents who have laid down their weapons and no longer
present a threat; means of warfare “calculated to cause unnecessary suffering”; the
destruction or seizure of enemy property unless “imperatively demanded by the


13 Van Schaack and Slye, A Concise History of International Criminal Law: Chapter 1 of Understanding
Annex, art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 2301-02 (”It is especially forbidden . . . [t]o kill or wound
treacherously individuals belonging to the hostile nation or army . . . “).

14 ld. at 16.
necessities of war”; and the attack of undefended towns, villages, dwellings, or buildings.\textsuperscript{15}

Individuals have been held accountable for violating the laws of war since the prosecution by an English court in 1305 of Scottish national Sir William Wallace. Sir Wallace was convicted and ultimately executed for waging a war against the English “sparing neither age nor sex, monk nor nun.”\textsuperscript{16} The first treaty provision requiring individual accountability for war crimes was contained in the Brussels Conference of 1874, which produced a final protocol that was signed by 15 European states but never ratified. Paragraph III stated:

The laws and customs of war not only forbid unnecessary cruelty and acts of barbarism committed against the enemy; they demand also, on the part of the appropriate authorities, the immediate punishment of these persons who are guilty of these acts, if they are not caused by an absolute necessity.\textsuperscript{17}

During the American Civil War, Henry Wirz, a Confederate Captain was accused of mistreating and murdering Union soldiers detained in prison in violation of the laws and customs of war.\textsuperscript{18} He was convicted and ultimately executed for his actions during the war. During an insurrection in the Philippines launched in opposition to U.S. annexation of the territory following the Spanish American War, the United States convened a number of military commissions to prosecute Filipino insurgents and courts martial to prosecute U.S. service members for abuses committed against Filipino

\begin{flushright}
\textsuperscript{15} Id.
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\textsuperscript{16} Id. at 18.
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\textsuperscript{17} Id.
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\textsuperscript{18} Id.
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victims who had been accused of collaborating with the American occupiers or opposing the guerillas.\footnote{Id. at 20.}

After World War I, a failed effort was made to prosecute both the perpetrators of genocide on the Armenian population and Germans for crimes committed during the war. The League of Nations was established after the war in an attempt to avert future wars. An advisory commission convened in connection with the League of Nations recommended the creation of a permanent criminal court to have jurisdiction over “crimes constituting a breach of international public order against the universal law of nations.”\footnote{Id. at 27.} The proposal was rejected as premature.

B. Nuremberg

As a result of the atrocities committed by the Nazis during World War II, the international community rejected the notion that how a nation treats its own citizens is solely a matter of domestic jurisdiction. The Nazis committed numerous human rights violations during the war, including the killing of six million jews, the killing and mistreatment of prisoners of war and the wanton destruction of towns and communities.\footnote{See Trial of the Major War Criminals, Judgment and Sentences (Int’l Mil. Trib Oct. 1, 1946), reprinted in 41 Am. J. Int’l L. 172, 186 (1947).} The four Allied Powers\footnote{The Four Allied Powers were the United States, the United Kingdom, France, and the Soviet Union.} decided that those responsible for these crimes had to be punished. The perpetrators could not be tried domestically since German was in ruins following the war. As a result, in 1945, the Allied Powers created the International Military Tribunal “for the just and prompt trial and punishment of the
major war criminals of the European Axis.\textsuperscript{23} The Allied Powers also created the International Military Tribunal for the Far East in order to try major Japanese war criminals.\textsuperscript{24} The two International Military Tribunals were the first internationally created courts, composed of judges from different countries, established to try defendants for internationally created crimes. The two tribunals were provided jurisdiction over three crimes: war crimes, crimes against humanity, and crimes against peace.

The Nuremberg and Japanese Tribunals resulted in the prosecution and convictions of numerous high ranking leaders. The tribunals, however, were criticized on two grounds. First, they were criticized for prosecuting crimes that were not at the time clearly established in international law. Second, the tribunals were open to the charge of “victor’s justice” since only the losers were put on trial by the winners. Although these are both legitimate criticisms, the tribunals fundamentally altered international law. After Nuremberg, states can no longer claim that what happens within its own borders is its own business. The Nuremberg tribunal has also made it clear that individuals are not excused from liability for the crimes that they committed because they were following orders. Thus, Nuremberg gave birth to the entire paradigm of individual criminal responsibility under international law. The United Nations’ International Law Commission (ILC) has described the principle of individual responsibility and punishment for crimes under international law recognized at

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\textsuperscript{23} Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, § 1, art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

\textsuperscript{24} This tribunal was similar to Nuremberg and was based largely on the Charter of the Nuremberg Tribunal. See Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Charter dated January 9, 1946, amended April 26, 1946, T.I.A.S. 1589, 4 Bevans 20.
\end{footnotesize}
Nuremberg as the “cornerstone of international criminal law” and the “enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.”

The horrors of World War II also led to the creation of the United Nations. The UN charter contains several references to human rights. The Preamble to the Charter states the determination of the peoples of the United Nations “to reaffirm faith in fundamental human rights.” Article 55 provides that UN members “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.” Article 56 requires members to cooperate in the promotion of human rights.

Article 68 of the UN Charter contemplated the establishment of a human rights commission to conduct research on human rights and to draft treaties and other instruments for the articulation and promotion of human rights.

C. Post Nuremberg

i. International crimes

The three international crimes created by the tribunals, crimes against the peace, war crimes and crimes against humanity, quickly ripened into customary international

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26 U.N. Charter, preamble.

27 U.N. Charter art. 55.

28 U.N. Charter art. 56.

29 U.N. Charter art. 68.
Since World War II, these crimes have been supplemented and new international crimes have been created. International criminal law continued to develop through a series of United Nations sponsored multilateral treaties and declarations.

Immediately after Nuremberg, in response to the Nazi extermination of Jews, the international community made genocide a crime. The UN members agreed upon the Convention on the Prevention and Punishment of the Crime of Genocide. Although the crimes against humanity created by the Nuremberg charter overlaps with genocide, the Genocide Convention broadens the conduct that is punishable. Article I provides that genocide could occur either during times of peace or during war. Article II defines genocide as the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group” by killing or causing serious injury to the group, inflicting conditions on the group likely to bring about its physical destruction, imposing measures to prevent

30 The U.N. General Assembly adopted the following resolution by unanimous vote:

The General Assembly,
Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;
Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;
Therefore,
Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;
Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

births within the group and forcibly transferring children of the group to another group.\textsuperscript{32} Most importantly, Article V requires parties “to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide.”\textsuperscript{33} Article VI requires that individuals accused of genocide be tried either in the territory in which the acts of genocide occurred or in any international tribunal.\textsuperscript{34}

The Universal Declaration of Human Rights (“UDHR”)\textsuperscript{35} and the International Covenant on Civil and Political Rights (“ICCPR”) established several important norms. Both the UDHR and the ICCPR provide that “[n]o one shall be arbitrarily deprived of his life.”\textsuperscript{36} Both also prohibit torture and cruel, inhuman or degrading treatment or punishment.\textsuperscript{37} They also prohibit slavery and the slave trade.\textsuperscript{38} These norms have been widely adopted in regional treaties such as the American Convention on Human Rights,\textsuperscript{39} the European Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{40} the African Charter on Human and Peoples’ Rights,\textsuperscript{41} and the

\textsuperscript{32} Id. art. II.

\textsuperscript{33} Id. art. V.

\textsuperscript{34} Id. art. VI.


\textsuperscript{36} International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1996, S. Treaty Do. 95-20, 999 U.N.T.S. 171

\textsuperscript{37} Id. art. 7.

\textsuperscript{38} Id. art. 8.

\textsuperscript{39} O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (July 18, 1978).

\textsuperscript{40} 213 U.N.T.S. 221 (Nov. 4, 1950).

Arab Charter on Human Rights. Following up on these principles, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment not only prohibits parties from engaging in torture or cruel, inhuman, degrading treatment or punishment but also declares that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” The Convention further requires parties to “take effective, legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” State parties are required to make torture a violation of its domestic laws and Article 7 of the Convention requires state parties either to prosecute individuals who have been accused of torture or to extradite them for prosecution. Several international treaties outlaw slavery and the slave trade and require state parties to prosecute individuals engaged in these practices. Finally, through a series of General Assembly and Security Council resolutions and as a result

42 available at http://www.unhchr.org/refworld/docid/3ae6b38540.html.


44 Id. art. 2, par. 1.

45 Id. art. 4.

46 Id. art. 7, para. 1.

47 For instance, article 6(1) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery provides that:

The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

available at http://www1.umn.edu/humanrts/instree/f3scas.htm
of the Convention on the Suppression and Punishment of the Crime of Apartheid, apartheid also became an international crime.48

At Nuremberg, individuals were prosecuted for engaging in aggressive war. Since Nuremberg, the international community has reaffirmed and elaborated on the principle that it is a crime to engage in war in violation of international law. The United Nations Charter contains a general prohibition against war.49 Although engaging in war in violation of international law has been a crime since Nuremberg, no one has been prosecuted for doing so since 1946. Contemporary international criminal tribunals have not prosecuted anyone for aggression.50

Since the Hague Conventions of 1899 and 1907 an extensive body of treaty law has been created which regulate the manner in which war is to be conducted. Most notable are the Geneva Conventions. The aim of the Geneva Conventions is to protect the victims of war: the wounded and the sick in the field; the wounded, sick, and shipwrecked at sea; prisoners of war; civilians under control of an enemy power.51


49 U.N. Charter art. 2, para. 4 provides: “All Members shall refrain in their international relations from 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.” The Charter does contain two exceptions: the inherent right of individual or collective self-defense and collective security measures authorized by the Security Council. U.N. Charter arts, 39-51.

50 Michael P. Scharf, Universal Jurisdiction and the Crime of Aggression, 53 Harv. Int'l L.J. 358, 360-61 (2012). (“Nevertheless, the modern international tribunals established by the Security Council were not provided jurisdiction over this crime; rather, the Council confined their jurisdiction to war crimes, crimes against humanity, and genocide.”)

addition, the principle of distinction requires combatants to distinguish between military and non-military targets. Thus, attacks on civilian targets are prohibited.52

ii. universal jurisdiction

The events of World War II and Nuremberg also helped to establish the principle of universal jurisdiction. Under international law, states need jurisdiction to prescribe and enforce its laws. International law recognizes five bases upon which states may exercise jurisdiction: 1) territorial, for acts that occur within a state’s boundaries or for acts which occur elsewhere but which have an effect on the state; 2) nationality, for acts committed by its citizens; 3) passive personality, for harm done to its citizens; 4) protective, for acts which threaten its essential security interests; and 5) universal. Universal jurisdiction provides states with jurisdiction over acts that are so heinous that they offend the interest of all humanity and as a result, any state may punish its offenders.53 A state can exercise universal jurisdiction regardless of where the heinous acts occurred and even though the acts had no connection with the state or its

52 Jimmy Gurule & Geoffrey S. Corn, Principles of Counter-Terrorism Law, 71 (Thomson Reuters 2011) (“The principle of distinction establishes a presumptive protection for civilians so long as they refrain from taking direct part in hostilities they may not be made the deliberate object of attack.”)

53 See Antonio Cassese, International Criminal Law 285 (2003) (“The crimes over which . . . universal jurisdiction may be exercised are of such gravity and magnitude that they warrant their universal prosecution and repression.”); Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 826 (1988) (“Because of the global concern with certain heinous offenses, the world community permits every state to define and punish those offenses.”); Council of the European Union, AU-EU Expert Report on the Principle of Universal Jurisdiction, P 9, Doc. 8672/1/09/REV1 (Apr. 16, 2009) (“States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy.”)
citizens. The ability of states to exercise universal jurisdiction is important because it denies safe havens for perpetrators of heinous offenses and ensures that their crimes do not go unpunished. It is often the case that when egregious crimes are committed, the state where these crimes occurred are not able to prosecute the perpetrators, either because the perpetrators are state authorities or agents of the state or because there has been a breakdown in the state’s judicial system, as was the case in Germany after World War II and in Rwanda after the 1994 genocide. Universal jurisdiction, therefore, fills the void. The authority to prosecute World War II criminals at the Nuremberg and Tokyo international tribunals was based on universal jurisdiction. States have also initiated prosecutions based on the universality principle. In 1961, Israel tried Adolph

54 See United States v. Yunis, 681 F. Supp. 896, 900 (D.D.C. 1988) (“Jurisdiction is conferred in any forum that obtains physical custody of the perpetrator of certain offenses considered particularly heinous and harmful to humanity.”); In re Extradition of Demjanjuk, 612 F.Supp. 544, 556 (N.D. Ohio 1985) (“International law provides that certain offenses may be punished by any state because the offenders are ‘common enemies of mankind and all nations have an equal interest in their apprehension and punishment.’”); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n. 7 (D.C. Cir. 1984) (“The premise of universal jurisdiction is that a state ‘may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern . . . even where no other recognized basis of jurisdiction is present.’”); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2nd Cir. 1980) (holding that it had jurisdiction over torture committed in Paraguay because “the torturer has become - like the pirate and slave trader before him - hostis humani generis, an enemy of all mankind”).

55 See International Military Tribunal (Nuremberg), Judgments and Sentences (Oct. 1, 1946), reprinted in 41 Am. J. Int’l L. 172, 216 (1947) (“. . . the Signatory Powers created this Tribunal, defined the law it is to administer, and made regulations for the proper conduct of the Trial. In doing so, the have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law.”)
Eichmann and in 1988, John Demjanjuk for Nazi atrocities committed before Israel was even a state. The absence of protest against the invocation of universal jurisdiction in the Eichmann case signaled the international community’s acceptance.

To summarize, since World War II and Nuremberg, an impressive body of law has developed which makes individuals accountable under international law for several human rights violations, including crimes against humanity, crimes against peace, war crimes, torture, genocide, apartheid, and engaging in slavery and the slave trade. Furthermore, as a result of the international community’s acceptance of the principle of universal jurisdiction, human rights violators can be brought to justice either in domestic

56 See Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (1962). Eichmann was tried in Israel, convicted and sentenced to death. In upholding his conviction and death sentence, the Supreme Court of Israel stated:

[T]here is full jurisdiction for applying here the principle of universal jurisdiction since the international character of “crimes against humanity” . . . dealt with in this case is no longer in doubt . . . [T]he basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences . . . applies with even greater force to the above-mentioned crimes . . . Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

Id. at 299, 304.

57 The United States granted Israel’s request to extradite John Demjanjuk so that he could be tried in Israel. U.S. courts held that Israel had the right to try him under universal jurisdiction for crimes committed at the Treblinka concentration camp. See Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985).

58 While the international community did condemn Israel for violating Argentina’s territorial sovereignty by kidnapping Eichmann in Argentina, it has clearly accepted Israel’s exercise of universal jurisdiction in the Eichmann case. In fact, since World War II, there have been prosecutions or investigations for crimes under international law based on universal jurisdiction in seventeen states (Argentina, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States). See Amnesty Int’l, Universal Jurisdiction: UN General Assembly Should Support the Essential International Justice Tool, at 29, IOR 53/015/2010 (Oct. 5, 2010), available at http://www.amnesty.org/fr/library/info/IOR53/015/2010/en
courts or in international tribunals. However, because of cold war politics, most individuals who perpetrated human rights violations during the cold war were not held accountable for their actions.

III. THE ERA OF IMPUNITY

Although the Nuremberg precedent was well established and the principle of universality provided a forum, there were almost no prosecutions for human rights violations which occurred after World War II until the end of the cold war. This was due largely to the fact that the international criminal justice system had been paralyzed by cold war politics. Surprisingly, this era of impunity began shortly after World War II when the allies decided not to prosecute Japanese Emperor Hirohito. The era of impunity allowed some notorious human rights abusers to not only avoid any accountability for their abuses but also to fleece millions from their countries and to live the remainder of their lives in luxurious exile. The situations in post-World War II Japan, Uganda, Haiti and the Philippines provide prime examples of the era of impunity and are discussed in this section.

A. Emperor Hirohito

Japan committed numerous international crimes during World War II. Japan was a party to the Kellogg-Briand Peace Pact of 1928 that “condemned recourse to war for the solution of international controversies” and “renounced it as an instrument of national policy.” Although Japan was a party to this international treaty, Japan still


committed crimes against peace during World War II. Crimes against peace were committed as a result of Japan’s 1931 invasion of Manchuria and its expansion of the war throughout China.\textsuperscript{61} Furthermore, in 1941 and 1942, Japan attacked the United States, Malaya, Burma, Singapore, Borneo, Thailand, the Philippines, the Dutch East Indies, New Guinea, and numerous islands throughout the Pacific Ocean.\textsuperscript{62}

War crimes were also committed despite the fact that Japan was a party to several treaties that governed its wartime conduct.\textsuperscript{63} During the “Rape of Nanking” in December 1937, after capturing Nanking, Japanese forces began a barbaric campaign of terror against the Chinese soldiers and civilians.\textsuperscript{64} Military orders directed that Chinese POWs be executed.\textsuperscript{65} During a single mass execution, Japanese forces murdered over 57,000 POWs and civilians.\textsuperscript{66} Japanese soldiers engaged in competitions to determine who could kill the most Chinese POWs in the shortest period of time.\textsuperscript{67} Altogether, Japanese forces killed an estimated 260,000 Chinese victims in

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\textsuperscript{63} Japan was a party to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex of Regulations Respecting the Laws and Customs of War on Land. Article 4 of the Regulations requires that prisoners of war “be humanely treated. Article 46 Provides: “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.” Japan was also a party to the 1899 Hague Declarations and a series of 1907 Conventions that addressed the rights on non-combatants and different aspects of naval warfare. Japan also signed the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare on June 17, 1925. See \textit{id.} at 63.
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During its military campaign against China, Japan also conducted scientific nonconsensual experiments on Chinese POWs and civilians. Throughout the war, the Japanese murdered POWs, maltreated them through lethal labor and tortured them. Japanese forces forcibly put POWs to work on Japanese military projects such as the Burma-Thailand Railroad. Twenty-seven percent of Allied POWs held in Japan died (35,756 out of 132,134), including a death rate of thirty-six percent for Australian POWs. By contrast, only four percent (9348 out of 235,473) of Allied POWs held in POW camps in Germany and Italy died. One study suggests that had World War II extended into one more winter, “very few or none” of the POWs in Japan would have survived.

Japanese forces were also responsible for crimes against humanity. During the “Rape of Nanking” Chinese non-combatants were raped and killed by Japanese forces. It is estimated that somewhere between 20,000 and 80,000 Chinese women were raped. Chinese civilians were murdered by gruesome methods including burying people alive, extirpating body parts, freezing people to death, using attack dogs and

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68 Id.
69 Id. at 65-66.
70 Id. at 68-69.
71 Id. at 69.
72 Id. at 68.
73 Id.
74 Id.
75 Id. at 64.
bayoneting babies.\textsuperscript{76} Scientific experiments were also performed on civilians.\textsuperscript{77} Finally, Japan committed crimes against humanity through the adoption of its comfort women system. Japan adopted the comfort women system to avoid the mass rapes of civilians that occurred in Nanking.\textsuperscript{78} The comfort women system involved procuring women to serve as sex slaves for the Japanese military. Women were obtained through deception, coercion or outright forcible abduction.\textsuperscript{79} They were kept in facilities “surrounded by a barbed wire fence, well guarded and patrolled.”\textsuperscript{80} These women, therefore, were unable to leave. The “comfort women” were repeatedly raped on a daily basis often for a total of at least nine hours a day.\textsuperscript{81} At the end of the war, many of these women were murdered.\textsuperscript{82} Those who were not murdered were simply left behind to fend for themselves.\textsuperscript{83} The comfort women system was not a rogue operation established by lower level Japanese soldiers. Rather it was part of the Japanese war planning. As one commentator explains:

The system was as much of a military operation as the more conventional aspects of Japan’s war efforts. Japanese military documents literally described the women as ‘war supplies.’ Numerous Japanese military regulations detailed the procedures involved in setting up and operating a ‘comfort women’ facility. The military constructed buildings for ‘comfort women’ in the same manner as a barracks or dining facility. “Comfort women” were sent to consolidated staging areas before being shipped via military transport to nearly all the outposts of the

\textsuperscript{76} Id.
\textsuperscript{77} Id. at 65-66.
\textsuperscript{78} Id. at 66.
\textsuperscript{79} Id. at 67.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 68.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
vast Japanese military empire. The women were also subjected to the dangers of being stationed at the military front, and many died from air raids against Japanese military positions.\textsuperscript{84}

Emperor Hirohito played a major role in Japan’s wartime decisions:

\ldots Hirohito guided and authorized most military decisions. He sanctioned Japan’s intervention in China’s civil war in 1927; he ‘silently endorsed’ the army’s excursion into Manchuria, even though it had begun the operation without notifying him; he ex ante sanctioned the war with China in 1937, ordering his army to ‘destroy the enemy’s will to fight’ and ‘wipe out resistance’; he approved the decision to move his troops southward, accepting the risk of war with the United States and the United Kingdom, and was thus eventually forced to accept the United States’ imposition of economic sanctions; he prematurely resolved to begin the war with the West and ignored the warnings of his advisors that Japan would not defeat the United States; he knew of the full plan for the attack on Pearl Harbor, removed any language about respect for international law from the war rescript for the attack, and throughout the day of the attack ‘wore his naval uniform and seemed to be in a splendid mood’; he ‘endorsed the decision to remove the constraints of international law on the treatment of Chinese prisoners of war’; he was responsible for the use of poison gas against Chinese and Mongolians beginning in 1937, and in 1940 he authorized the use of bacteriological weapons in China; finally, Hirohito delayed in the face of imminent defeat and protracted the surrender process.\textsuperscript{85}

Nine days after Japan’s surrender, the United Nations War Crimes Commission “published a white paper recommending that Japanese war crimes suspects” be “apprehended by the United Nations for trial before an international military tribunal and that the accused include those in authority in the governmental, military, financial, and economic affairs of Japan.”\textsuperscript{86} The Charter of the International Military Tribunal for the Far East was explicit in denying immunity for any persons responsible for war crimes

\textsuperscript{84} Id. at 67.


\textsuperscript{86} Arnold C. Brackman, \textit{The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial}, 45 (1987).
during the Pacific War.\textsuperscript{87} Despite Hirohito’s involvement in the major war decisions and the directives of the commission and the charter, General Douglas MacArthur, Supreme Commander of the Allied Forces’s 1945-1952 occupation of Japan made a decision not to indict, prosecute or even call Hirohito as a witness despite the fact that many in the U.S. wanted him to be prosecuted.\textsuperscript{88} In fact, “there is no evidence that MacArthur ever investigated the strength of the evidence against the Emperor for war crimes.”\textsuperscript{89} U.S. prosecutors were even instructed not to mention his name during the Tokyo Tribunal trials. MacArthur’s reasons for his decision not to prosecute were varied.\textsuperscript{90} The predominant reason was MacArthur’s belief that Hirohito would assist the occupation and rebuilding of Japan. MacArthur believed that, given the Japanese public support of Hirohito, prosecuting him would result in “a condition of underground chaos and guerilla

\textsuperscript{87} Article VI of the Charter states that “neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Charter of the International Military Tribunal for the Far East, available at http://www.unhcr.org/refworld/docid/3ae6b39614.html.


\textsuperscript{89} \textit{Id.} at 302.

\textsuperscript{90} One factor that cannot be overlooked in determining why Emperor Hirohito was not indicted is the effectiveness of high-ranking Japanese officials and Japanese propaganda machines in presenting to Westerners and Japanese alike an image of the Emperor as an apolitical constitutional monarch who bore no responsibility for the war . . . General MacArthur constituted a second determining factor in the decision not to indict Emperor Hirohito . . . [T]he third factor was race.

warfare in mountainous and outlying regions,” thus necessitating an additional one million soldiers for occupational duty in a more hostile Japan.91

Hirohito remained the monarch of Japan until his death in 1989. The failure to prosecute Hirohito or to otherwise create a public record of his crimes denied justice to his many victims and reduced “any sense of national shame or guilt over the atrocities committed by Japanese forces.”92 Because their emperor was never held accountable for the war, many Japanese citizens believed that neither were they:

The main reason why Japanese war crimes were so quickly forgotten had to do with Hirohito himself. The legitimacy of Japan’s war of aggression - the belief that it had invaded various Asian and Pacific countries in order to liberate them - could not be fully discredited unless he was subjected to trial and interrogation in some forum for his role in the wars, especially his inability or disinclination to hold Japan’s armed forces to any standard of behavior morally higher than loyalty and success. Many Japanese, after all, had been complicit with him in waging war, and the nation as a whole came to feel that because the emperor had not been held responsible, neither should they.93

B. Idi Amin

On January 25, 1971, Idi Amin became the leader of Uganda as a result of a coup which he led.94 Amin’s seizure of power was initially celebrated inside Uganda and was also supported by the international community: “[t]hey ranged from the British and Israelis in the early years to the Kenyans, Americans, Soviets, French, Libyans,


Saudi Arabians, Pakistanis and East Germans in subsequent years.” Amin believed that in order to survive in power, he needed to destroy any opposition. He began by eliminating the staff of the previous prime minister by firing squad. He saw intellectuals as a threat because he believed that they could see through his actions so he therefore eliminated the educated, which included lawyers, clergymen, students, teachers, and doctors. Amin’s victims included cabinet ministers, Supreme Court judges, diplomats, university rectors, educators, prominent Catholic and Anglican churchmen, hospital directors, surgeons, bankers, tribal leaders and business executives.

Most of those killed were ordinary people. Members of the Acholi and Langi tribes were killed because they had been the power base of the ousted prime minister. On the first anniversary of Amin’s coup, 503 prisoners at Mutakula Prison were killed. His police forces were allowed to kill to obtain the victims’ money, houses, or women, or because the tribal groups the victims belonged to were marked for humiliation. Amin’s private army, the State Research Bureau, was instructed to find and kill any dissidents.

Amin prohibited Ugandans from praying openly to God because he said he was the only man with open communication to God. Amin used Catholics, Asians and Jews


96 *Id.*

97 *Id.*


100 *Id.*
as scapegoats. He killed many Catholics because he saw them as prohibiting Uganda from becoming a Muslim nation.\textsuperscript{101} His soldiers were allowed to kill Christians as they wished. Asians, mostly Indians and Pakistanis, were his prime scapegoats. Most of the Asians were third-generation descendants of workers brought by the British to Uganda. Many were merchants and shopkeepers in Uganda. Amin accused them of economic sabotage and on August 5, 1972, he ordered the Asian population of Uganda, about 40,000 at the time, to leave the country within three months.\textsuperscript{102} They were only allowed to take what they could carry. Their property was confiscated and given to army officers in payment for their loyalty.

Human rights groups and exiles estimate that approximately 300,000 Ugandan’s were killed during Amin’s reign.\textsuperscript{103} Amin’s human rights violations did not receive the international attention they should have at the time because the world’s attention was focused on other events such as “Vietnam, Lebanon, Northern Ireland, kidnappings, the Munich Olympic Games killings, student riots, the Arab-Israeli tensions, hijackings, and the rest.”\textsuperscript{104} When Amin was confronted with allegations of human rights violations he simply lied. He blamed the deaths on border clashes or accidents\textsuperscript{105}. When people disappeared, he claimed that their absences were being investigated by the government

\begin{footnotesize}
\begin{enumerate}
\item Id.\textsuperscript{101}
\item See Michael T. Kaufman, \textit{Idi Amin, Murderous and Erratic Ruler of Uganda in the 70’s, Dies in Exile}, N.Y. Times, Aug. 17, 2003.\textsuperscript{102}
\item Id.\textsuperscript{103}
\item June Stephenson, \textit{Tyrants in Our Time; Lives of Fourteen Dictators}, chap. 1, (Diemer, Smith Publishing Company, Inc., 2011), Kindle edition.\textsuperscript{104}
\item Id.\textsuperscript{105}
\end{enumerate}
\end{footnotesize}
but nothing was ever discovered. Amin’s regime ended as a result of a war he initiated against Tanzania. During this war, Amin’s army seized Tanzanian soldiers and took them back to slave labor camps. His soldiers raped, killed and looted Tanzanian citizens. On April 10, 1979, Kampala, the capitol of Uganda, fell to Tanzania. Tanzanian soldiers raided Amin’s home but Amin had already fled. Amin, along with his wives, children and an entourage, had already been flown to Libya in a Libyan plane. Amin eventually found refuge in Saudi Arabia, where he lived in luxury. He tried to return to Uganda in 1989 but was prevented from doing so. Amin died in 2003 without ever having to face justice. As one human rights organization describes it, “[i]t’s too bad that death caught up with Idi Amin before justice did. Amin was responsible for widespread murder and the expulsion of his country’s Asian community, and yet he was able to escape reckoning.”

C. Jean-Claude Duvalier

Haiti was ruled by Francois “Papa Doc” Duvalier between 1957-1971. Although Papa Doc was initially democratically elected, Papa Doc subsequently

106 Id.
107 Id.
108 Id.
109 Id.
111 Id.
became a ruthless dictator. He did whatever he had to do to maintain power. He created his own personal militia, the Tonton Macoutes and empowered them to locate anyone who spoke out against him. Many were murdered, especially those who plotted coups to remove him from office. Many more were tortured. There were forced disappearances. He shut down newspapers. According to the International Commission of Jurists, who evaluated his government after he had been in office for 10 years:

The systematic violation of every single article and paragraph of the Universal Declaration of Human Rights seems to be the only policy which is respected and assiduously pursued in the Caribbean Republic. The rule of law was long ago displaced by a reign of terror and the personal will of its dictator, who has awarded himself the title of President of the Republic, and appears to be more concerned with the suppression of real or imaginary attempts against his life than with governing the country.

It is estimated that over forty thousand Haitians lost their lives during Papa Doc’s presidency. Papa Doc made himself president for life. After suffering a stroke, he made his eighteen year old son, Jean-Claude “Baby Doc” Duvalier, his successor. One year later, Papa Doc died and his hand picked successor, his son, succeeded him. Both Papa Doc and Baby Doc had the support of the United States during their tenures because they were strongly anti-communist and the U.S. did not want another Cuba so close to its border.

Baby Doc continued his father’s repressive regime. The Inter-American Commission on Human Rights conducted an observation visit of Haiti from August 16

114 Id.
115 Id.
thru August 25, 1978. The Commission found numerous instances of human rights violations during Baby Doc’s regime. The Commission found instances of individuals who had disappeared after being detained by the police or the Tonton Macoutes and who had never been seen or heard from again. The Commission also listed the names of 151 individuals who were either executed in prison or who died in prison because of a lack of medical care. The principal causes of death of those who died from lack of medical care were tuberculosis and diarrhea. The Commission also found that Haitian citizens were summarily executed. Summary executions took place at the notorious Fort Dimanche prison. The Commission report described the executions as follows:

The form of execution is barbarous. In recent years, they haven’t been wasting bullets on executing prisoners. They make prisoners walk forward one by one in the night towards the sea. And they club them on the back of the neck, like dogs. The soft thud of the clubs can be heard in the cells.

The Commission found the conditions at Fort Dimanche, where political prisoners were housed, to be especially brutal. According to the Commission, “once there, prisoners are always savagely tortured.” “They are undressed and examined like beasts of burden, not for medical purposes, but in order to humiliate them.”

119 Id. at 3-10.
120 Id. at 9.
121 Id. at 10-11.
122 Id. at 10.
123 Id. at 11.
124 Id. at 12.
were overcrowded (“piled up like sardines”) and as a result the prisoners slept in relays.\textsuperscript{125} They were forced to sleep on cement floors for the first three months of their detention.\textsuperscript{126} The cells were too hot in the summer and too cold in the winter.\textsuperscript{127} The sanitary conditions in the cells were horrendous. The inmates were “eaten up by vermin (body lice, head lice, bed bugs) and by mosquitoes that come up from the swamps surrounding the prison and carry malaria and other illnesses.”\textsuperscript{128} The prisoners were not given toilet paper or soap or allowed to bathe.\textsuperscript{129} Since there were no toilets, the prisoners were forced to use buckets filled with feces as latrines.\textsuperscript{130} They were also provided with inadequate food and medical care.\textsuperscript{131} Not surprisingly, given these horrible conditions, the mortality rate in the prison was high. Inmates rarely survived for more than a year.\textsuperscript{132} When prisoners died, the body was not immediately removed: “Sometimes the body stays in the cell for some hours after the death, until the jail officer deigns to authorize its removal. Sometimes the prisoners are obliged to eat their meager meals over the corpse of a prison companion who has just died . . . It has sometime happened that dogs eat the corpse.”\textsuperscript{133}

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 12-13.
\textsuperscript{132} Id. at 13.
\textsuperscript{133} Id.
The Commission also found that Haitian citizens were subjected to arbitrary arrest and detention. The accused often languished in prison for minor infractions as well as for serious crimes without being brought to justice.\(^{134}\) Some inmates had been condemned to between three and six months imprisonment without the benefit of due process.\(^{135}\) One of the Commission’s final recommendations was “[t]hat it [Haiti] investigate and punish those responsible for the numerous violations of the right to life and physical security.”\(^{136}\) By 1986, Haiti had become ungovernable as a result of political corruption and economic problems and Baby Doc fled for exile in France.\(^{137}\) Baby Doc has never been prosecuted for the human rights violations that occurred during his presidency. After living 25 years in exile, Baby Doc returned to Haiti.\(^{138}\) The Inter-American Commission on Human Rights has renewed its earlier recommendation that he be investigated and punished for the “torture, extrajudicial executions and forced disappearances committed during the regime of Jean-Claude Duvalier [which] are crimes against humanity that, as such are subject neither to a statute of limitations nor to amnesty laws.”\(^{139}\)

\(^{134}\) See *Haiti 1979 - Chapter III*, at 3, available at [http://www.cidh.oas.org/countryrep/Haiti79eng/chap.3.htm](http://www.cidh.oas.org/countryrep/Haiti79eng/chap.3.htm)

\(^{135}\) *Id.* at 4.

\(^{136}\) See *Haiti 1979 - Recommendations*, available at [http://www.cidh.oas.org/countryrep/Haiti79eng/recommendations.htm](http://www.cidh.oas.org/countryrep/Haiti79eng/recommendations.htm)


\(^{139}\) *Id.* Despite the Commission’s statement, a Haitian court held that the statute of limitations for these human rights violations had expired. The Haitian court’s decision is on appeal. See Isabeau Doucet and Randal C. Archibold, *Haitian Ex-Dictator Is Questioned in Court Over Reign*, N.Y. Times, February 28, 2013.
D. Ferdinand Marcos

Ferdinand Marcos was elected President of the Philippines in 1965 and was reelected in 1969. \(^{140}\) The Philippine Constitution limited him to two four year terms so that he was required to leave office in 1973. \(^{141}\) On September 21, 1972, Marcos declared martial law. \(^{142}\) He justified the declaration of martial law on the need to put down communist insurrections, including bombings of government officials and buildings. However, these were not communist insurrections:

> It was government sponsored terrorism. All these bombings in the weeks before martial law . . . of the department stores, private companies, government buildings, waterworks . . . weren't part of the communists' plot to take over the country. They were the work of the Marcos government, part of the plan to justify seizing control of the nation. \(^{143}\)

The declaration of martial law immediately halted a Constitutional Convention, elected by the people, which had been meeting at the time and was near completion of proposed revisions to the Constitution. \(^{144}\) Some of the delegates to the Convention were arrested and placed under detention while others went into hiding and left the country. \(^{145}\) The termination of the Constitutional Convention allowed Marcos to revise the Constitution to permit him to remain in power and expand his authority. \(^{146}\)

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\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) June Stephenson *Tyrants in Our Time; Lives of Fourteen Dictators*, chap. 11 (Diemer, Smith Publishing Company, Inc. 2011), Kindle edition


\(^{145}\) *Id.*

\(^{146}\) *Id.* at 1462-63
The martial law declaration set the stage for acts of torture, summary execution, disappearances, arbitrary detention and numerous other atrocities. Marcos authorized the arrests of a long list of dissidents. Those arrested included Congressmen, activists in student movements, labor leaders, reporters, publishers, aspiring politicians who could someday defeat Marcos and anyone else who threatened Marcos’s regime. Those arrested were subjected to “tactical interrogation” in an attempt to elicit information from them regarding opposition to the Marcos government. A federal district court described the following methods that were used on those arrested:

1) Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;
2) The ‘telephone’ where a detainee’s ears were clapped simultaneously, producing a ringing sound in the head;
3) Insertion of bullets between the fingers of a detainee and squeezing the hand;
4) The ‘wet submarine’, where a detainee’s head was submerged in a toilet bowl full of excrement;
5) The ‘water cure’, where a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation;
6) The ‘dry submarine’, where a plastic bag was placed over the detainee’s head producing suffocation;
7) Use of a detainee’s hands for putting out lighted cigarettes;
8) Use of flat-irons on the soles of detainee’s feet;
9) Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;
10) Injection of a clear substance into the body of a detainee believed to be truth serum;
11) Stripping, sexually molesting and raping female detainees; one male plaintiff testified he was threatened with rape;
12) Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;
13) Russian roulette; and

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147 Id. at 1462.

14) Solitary confinement while hand-cuffed or tied to a bed.\textsuperscript{149}

As Marcos feared his power was slipping away, repression became more brutal. In 1984, eight journalists were killed in the Philippines and six more were killed in 1985.\textsuperscript{150} Human rights lawyers were also targeted, which led the president of the American Bar Association to send a letter to Marcos.\textsuperscript{151} During his visit to the Philippines, the Pope criticized Marcos.\textsuperscript{152} As resistance to Marcos grew, the United States, which had supported Marcos during his regime, pressured him to leave office because of fear of a communist takeover. After twenty years in office, Marcos and his family fled to Hawaii along with the enormous wealth they amassed over the years. When he was first elected Marcos was worth approximately $30,000; when he left office in 1986 his net worth was $15 billion.\textsuperscript{153} No criminal investigation of Marcos or his human rights abuses ever occurred either in the Philippines or elsewhere before his death in 1989. Because of his enormous wealth and connections to the United States, Marcos and his estate were sued in the United States by those whose human rights had been abused by Marcos and his regime. A federal district court in Hawaii found Marcos’s estate liable for atrocities and torture committed during his twenty year reign and a total of $1.2 billion in damages were awarded to his victims.\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{149} Id.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} See Belinda A. Aquino, \textit{Justice Finally Achieved for Victims of Marcos}, Honolulu Advertiser, Feb. 1, 2011.
\end{itemize}
IV. ERA OF ACCOUNTABILITY

Hirohito, Amin, Duvalier, Marcos and others were never held accountable largely because of cold war politics. Since the end of the cold war, the movement for individual criminal accountability has gained considerable momentum and individuals have increasingly been prosecuted for human rights violations. United Nations Secretary General Ban Ki-moon has described this era as the “new age of accountability” replacing an “old era of impunity.”155 There are still transgressors who go unpunished156 but that is becoming the exception and not the rule, as it was during the cold war. There are now demands for accountability wherever systemic human rights violations are occurring. There were two crucial developments which have made this new era of accountability possible: 1) the greater use of universal jurisdiction by individual nations, and 2) the creation of international criminal tribunals.

i. greater use of universal jurisdiction

The principle of universal jurisdiction has made many of these prosecutions possible. One of the most important cases concerned Spain’s attempt to prosecute former President of Chile, Augusto Pinochet. Between 1974 and 1990 Pinochet was President of Chile. During his tenure, harsh techniques including torture, executions

156 For instance, an arrest warrant charging the Sudanese President, Omar al-Bashir with genocide, crimes against humanity and war crimes has been issued by the International Criminal Court but he has not been arrested and in fact has traveled freely to several friendly nations since he was indicted. Furthermore, no investigation of United States officials for authorizing torture which occurred at Guantanamo Bay, Cuba, Iraq and Afghanistan has commenced. Finally, the perpetrators of human rights violations in Brazil during its military dictatorship, which lasted from 1964-1985, were granted amnesty and have not been brought to justice. Brazil’s decision to grant amnesty to the perpetrators of arbitrary detention, torture and enforced disappearance was criticized by the Inter-American Court of Human Rights. See Paulo Abrao and Marcelo D. Torelly, Resistance to Change; Brazil’s Persistent Amnesty and its Alternatives for Truth and Justice, in Amnesty in the Age of Human Rights Accountability, 164-166 (Cambridge University Press 2012).
and disappearances were used against his political opponents. Before Pinochet left office he attempted to shield himself from any accountability for his actions by making himself a senator for life and granting himself amnesty from prosecution. After Pinochet settled in England, Spain initiated a prosecution for torture committed during his presidency and sought his extradition. Pinochet claimed that he could not be prosecuted because of his former status as head of state. A majority of the House of Lords held that under the Convention Against Torture, a former head of state (Pinochet) could be extradited to a third state (Spain), for alleged torture committed in another state (Chile) against nationals and non-nationals of the third state while the accused held office.

There have been other recent prosecutions based on universal jurisdiction.157 The courts of Denmark and Germany relied on universal jurisdiction in trying Croatian and Bosnian Serbs for war crimes committed in Bosnia.158 Courts in Belgium and Canada have invoked universal jurisdiction as a basis for prosecuting individuals involved in the Rwandan genocide.159 Finally, the United States used universal

157 See Michael P. Scharf, *Universal Jurisdiction and the Crimes of Aggression*, 53 Harv. Int’l L.J. 358, 368 n. 58 (2012) (“Since World War II, there have been prosecutions or investigations for crimes under international law based on universal jurisdiction in seventeen states (Argentina, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and the United States).”)


159 In Belgium, charges were brought against a Rwandan responsible for massacres of other Rwandans in Rwanda. See Theodore Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int’l L. 554, 577 (1995). In Canada, Desire Munyaneza was tried and convicted of seven counts of genocide, crimes against humanity, and war crimes committed in Rwanda and was sentenced to life in prison. See R. c. Munyaneza [2009] R.J.Q. 1432 (Can.).
jurisdiction to justify the prosecution of Charles Taylor, Jr. for torture committed in Sierra Leone in the 1990s.\textsuperscript{160}

iii. creation of international tribunals

Despite the increased willingness of domestic courts to prosecute individuals for human rights violations, there are still occasions when international tribunals are needed. This is especially the case when widespread and systemic human rights violations have occurred, such as in Rwanda and the former Yugoslavia. The breadth of these atrocities were simply too much for any judicial system to handle. Furthermore, domestic prosecutions are sometimes blocked because of amnesties and immunities. Once the cold war ended, the United Nations was able to create ad-hoc tribunals to prosecute the perpetrators of genocide, crimes against humanity and war crimes in the former Yugoslavia and Rwanda. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international criminal tribunal created since the Nuremberg and Tokyo tribunals. The ICTY was established by the United Nations Security Council to try “persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991.”\textsuperscript{161} A year later, the Security Council established the International Criminal Tribunal for Rwanda (ICTR) in order to try “persons responsible for genocide and other serious

\textsuperscript{160} See \textit{United States v. Belfast}, 611 F.3d 783 (11th Cir. 2010) (Taylor’s conviction and sentence for acts of torture committed against Liberians and refugees from Sierra Leone in Liberia upheld).

\textsuperscript{161} Statute of the ICTY, adopted by UNSC Resolution 827 (1993), 25 May 1993. As of March 2013, the ICTY has charged more than 160 people, resulting in more than 60 convictions. Another 30 cases are in various stages of proceedings. See Abby Seiff, \textit{Seeking Justice in the Killing Fields}, 99 A.B.A. J. 50, 54 (March 2013).
violations of international humanitarian law in the territory of Rwanda between 1 January 1994 and 31 December 1994.”

The most significant development during the “new age of accountability” has been the creation of the International Criminal Court (“ICC”). The ICC is the culmination of a long effort to ensure individual criminal accountability for human rights violations. The ICC was created by a significant number of states in the Treaty of Rome. The treaty was finalized in 1998 and went into effect in 2002. The Treaty of Rome contains a 128-article statute which creates a permanent court, the ICC, with compulsory jurisdiction and an independent prosecutor. The ICC has jurisdiction over four crimes: genocide, crimes against humanity, war crimes and crimes of aggression. In order for the ICC to assert jurisdiction, the case must have been referred by the UN Security Council or the crimes must have occurred in the territory of a state party or the perpetrator must be a national of a state party willing to permit the ICC to assert jurisdiction.

The ICC can receive cases from any state party, the UN Security Council or the prosecutor can initiate an investigation. The Rome statute is clear in that the fact that an individual’s status as head of state or government official “shall in no case exempt a person from criminal responsibility” nor lead to a reduction in sentence.


164 Rome statute, art. 5.

165 Rome statute, art. 12.

166 Rome statute, art. 13.

167 Rome statute, art. 27.
The Rome statute, however, does contain provisions which will make it difficult to bring some individuals to justice. First and foremost, the Rome statute is a treaty and not a resolution of the Security Council. As a result, it is only binding on states which have signed and ratified the treaty. Although the treaty has been widely adopted, some important states have not yet signed and ratified it, including the United States, Russia and China. These three states have engaged in activities which could amount to cognizable crimes under the statute - China’s activities in Tibet, Russia’s military action in Chechnya and those of the United States in Iraq, Afghanistan and Guantanamo Bay. Yet these states are under no obligation to cooperate with the ICC and the perpetrators of these possible crimes cannot be brought to justice since their nations have not yet signed and ratified the treaty. Second, the ICC has no police force to enforce its orders. Rather, it has to rely on state parties to enforce its orders.\textsuperscript{168} The ICC has already experienced difficulty in having its orders enforced by state parties. For instance, it has issued an arrest warrant for President Omar Hassan Ahmad Al-Bashir of Sudan yet Al-Bashir travels freely in African through the territory of various state parties and has not been arrested. Finally, the statute provides the court with “complimentary” jurisdiction. As a result, the ICC is required to defer to domestic courts as long as they are both genuinely willing and able to act.\textsuperscript{169}

Despite these limitations, the creation of the ICC is arguably the most important development in international law since the creation of the United Nations. The fact that the ICC is a permanent tribunal addresses the Nuremberg problem of “victor’s justice.”

\textsuperscript{168} Rome statute, art. 59(1) (“A state party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws . . .”)

\textsuperscript{169} Rome statute, art. 17.
Most importantly, the ICC is an assurance that those who violate human rights can ultimately be brought to justice. Therefore, the modern era of accountability, even with all its flaws, is preferable to the cold war “era of impunity.”

IV. ALTERNATIVES TO CRIMINAL PROSECUTION

“The only way to bring true healing to a divided society is to face up to the wrongs that were committed, to prosecute those who violated fundamental human rights of others, and to provide compensation to the victims.”  

The drive to investigate, prosecute and provide compensation to victims of human rights abuses has gained considerable momentum since the end of the cold war. This is a remarkable achievement. There are those who believe that individuals who commit human rights violations must always be prosecuted in order to provide justice for the victims and to deter others from committing similar atrocities. While I certainly agree that there should always be an acknowledgement of wrongdoing and in many cases criminal prosecution should be the preferred method of holding individuals accountable for their crimes, there are instances in which the threat of prosecution can actually prolong wars and inhibit the attainment of peace. Therefore, international law should recognize and accept that no one approach works for every historical event. As one scholar has stated:

Just as prosecutors exercise discretion to refrain from prosecuting in certain situations, and to accept plea agreements for reduced charges in many other situations, some historical episodes seem to justify a merciful approach with reduced penalties or simply a full description of what actually happened. In some situations pardons appear to be justified after part of the sentence has been served to foster reconciliation. But in each situation, a full investigation and

disclosure of what occurred seems essential to ensure that the culprits’ deeds are known by all and to prevent them from ever exercising power again.\textsuperscript{171}

Examples of the different approaches that are possible to address egregious human rights violations that also allow a society to end civil strife and hostilities and to transition to peace are provided by Sierra Leone and South Africa, both of which are examined in more detail below.

A. Sierra Leone

A civil war in the West African nation of Sierra Leone began in 1991 and ended in 2002. The fighting initially began as a struggle between factions but was later focused against the government. The war against the government was led by rebels of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). During the civil war, systemic human rights atrocities were committed by both the RUF and AFRC as well as by the forces supporting the government, the Civilian Defense Forces (CDF).\textsuperscript{172} The conflict in Sierra Leone became widely known around the world for the practice of amputating limbs of civilians. Machetes were used to amputate one or both hands, arms, feet, legs, ears, or buttocks and one or more fingers.\textsuperscript{173} The victims would often have to finish the amputation or would be forced to select which body part they wanted to be amputated.\textsuperscript{174} They were told to take their amputated limbs to the President.\textsuperscript{175} Civilians also had one of both of their eyes gouged out, suffered

\textsuperscript{171} Id. at 94.
\textsuperscript{172} Id. at 78-79.
\textsuperscript{173} Id. at 78.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
gunshot wounds to the head, torso and limbs, burns from explosives and other devices and were injected with acid. Women and children especially suffered during the civil war. Many children were forced into fighting. They were also murdered, beaten, mutilated, tortured, raped and sexually enslaved. Women and girls were victims of gang rapes at gunpoint or knifepoint. Some rapes occurred in front of the victims’ family members or in some cases, rebels forced a family member to rape a sister, mother or daughter. Witnesses reported seeing the mutilated bodies of pregnant women whose fetuses were cut out of the wombs or shot to death in their abdomen.

On July 7, 1999 a peace accord was signed by all the warring factions. The rebels were given key posts in the government in exchange for a cease fire. A key provision of the agreement provided a blanket amnesty to all groups for war crimes and

\[\text{\textsuperscript{176} Id.} \]
\[\text{\textsuperscript{177} Id.} \]
\[\text{\textsuperscript{178} Id.} \]
\[\text{\textsuperscript{179} Id.} \]
\[\text{\textsuperscript{180} Id. at 79.} \]
\[\text{\textsuperscript{181} Id.} \]
\[\text{\textsuperscript{183} Id. at 21.} \]
crimes against humanity that occurred during the civil war.\textsuperscript{184} Although the grant of blanket amnesty for such egregious crimes was opposed by the United Nations\textsuperscript{185} and international human rights groups,\textsuperscript{186} nearly everyone involved in the talks or who closely observed them, agreed that the amnesty was necessary for a peace agreement to be reached.\textsuperscript{187} The agreement did provide for the creation of a Truth and Reconciliation Commission (TRC) “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story [and] get a clear picture of the past in order to facilitate genuine healing and

\textsuperscript{184} \textit{Id.} at 14. Article IX of the agreement provided as follows:

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in the pursuit of their objectives, up to the time of the signing of the present Agreement.
3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA [Sierra Leone Army] or CDF [Civil Defence Force] in respect of anything done by in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles, and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

\textsuperscript{185} Although the United Nations signed the peace agreement, the following notation was made on its behalf next to its signature: “The United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.” \textit{Id.} at 5.

\textsuperscript{186} The grant of blanket amnesty was opposed by Amnesty International and Human Rights Watch. \textit{Id.} at 23.

\textsuperscript{187} See e.g., \textit{Id.} at 6 (‘almost none of those present, including the human rights advocates, now believe that a peace agreement would have been possible without some provision of amnesty for past crimes.’); \textit{Id.} at 17 (“One UN official who observed many of the discussions around the amnesty recalls his sense that the options of the UN were limited: ‘Were we going to say that because of that amnesty, the whole document was to be scrapped? If we didn’t sign, then the agreement couldn’t be implemented. We wouldn’t have a mandate for a UN mission, for example. It was a big dilemma.’ He concluded the urgency to end the war to be the most important. ‘It was about strategy and tactics. The strategy was to pursue peace. The tactics included: don’t let justice get in the way. It was the price to pay for peace.’); \textit{Id.} at 24 (“Refusing to sign the accord because it included an amnesty (which was not, in fact, an approach even considered by the government) would have scrapped the chance for a negotiated peace altogether, according to virtually all participants.”).
reconciliation.” The agreement also provided for a Special Fund for War Victims to make reparation to the victims.

Ten months after the peace accord was signed, violence resumed. As a result the government made a formal request to the United Nations for the establishment of a special court to try the head of the RUF, Foday Sankoh and others for clearly and flagrantly violating the peace accords. A Special Court for Sierra Leone was founded in 2002 through an agreement between the Government of Sierra Leone and the United Nations. The Special Court was a “hybrid” court consisting of both national and international judges, prosecutors, defense counsel and other personnel. In 2003, the Court indicted thirteen individuals, including Foday Sankoh. Those convicted include 3 former members of the AFRC, 2 former members of the CDF and 3 former members of the RUF. In addition, Charles Taylor, the former Liberian president, was indicted for planning, aiding and abetting the atrocities that were committed during the Sierra Leone civil war. He was subsequently convicted, the first former head of state convicted by an international tribunal since Nuremberg, and sentenced to 50 years.

188 Id.
189 Id. at 20.
190 Id. at 23.
191 Id. at 25.
192 Id. at 26.
193 Id. Sankoh died in 2003 of natural causes while in custody and therefore he was never tried.
194 Information about these cases are available at the Special Court’s website, at http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx
The combination of a Truth and Reconciliation Commission, prosecutions and reparations has brought peace to Sierra Leone.

B. South Africa

Apartheid was the official policy of the white minority South African government from 1948 to 1993. The policy of apartheid required the black majority and other non-Europeans\textsuperscript{196} to live and develop separately from whites. The white minority resided in the most desirable areas of the country. Black South Africans were not allowed to live in the cities. In order to maintain its superiority, the white minority enacted hundreds of laws to control and disadvantage the Black majority and other non-whites. One of the most egregious was the pass laws, which required blacks to carry a pass whenever they were outside their home areas. Failure to carry a pass would result in either a fine or imprisonment. Black South Africans were not allowed to vote. Certain jobs were reserved for whites only. The education of blacks was controlled by the government and was designed to produce a subservient and obedient labor force. Blacks were not allowed to use public facilities like restrooms. In short:

Apartheid was a grim daily reality for every black South African. For at least 3.5 million black South Africans it meant collective expulsion, forced migration, bulldozing, gutting or seizure of homes, the mandatory carrying of passes, forced removals into rural ghettos and increased poverty and desperation.\textsuperscript{197}

In countries that experienced similar repression, such as the United States, it is typically the majority that suppresses the minority. South Africa was unique in that the white minority suppressed the majority. In order to maintain white domination, the

\textsuperscript{196} The other major racial groups were coloreds and Indians.

government had to commit egregious human rights violations, including torture, murder, beatings, disappearances, detentions and imprisonment. The government banned the leading black anti-apartheid opposition group, the African National Congress (“ANC”). The leader of the ANC, Nelson Mandela, was imprisoned for twenty-seven years. Blacks also were not allowed any form of freedom of expression.

The international community sought to put pressure on the South African government to dismantle its system of apartheid by imposing economic sanctions. Eventually the sanctions and the international isolation forced many South African whites to the realization that it could not maintain the system of apartheid and that to attempt to do so would only lead to civil war and political instability. The white minority, afterall, controlled much of the nation’s wealth and therefore had a major interest in averting chaos. Negotiations over a four year period ultimately lead to a peaceful transition from apartheid to black majority rule. A key issue in the negotiations was what to do about those who had committed human rights violations during the apartheid era. South Africans had to decide whether it should conduct Nuremberg type trials or whether to do nothing, as was the case in Angola, Namibia and Zimbabwe when those nations transitioned to majority rule. They chose a middle ground by granting conditional amnesty and by establishing a Truth and Reconciliation Commission (“TRC”).

The TRC was created by the Promotion of National Unity and Reconciliation Act of 1995 “as part of [the] bridge-building process . . . to lead the nation away from a deeply divided past to a future founded on the recognition of human rights and
The TRC was charged with investigating politically motivated human rights abuses committed by whichever side of the political conflict, between March 1, 1960 and May 10, 1994. The goal of the TRC in investigating these crimes was to promote national unity and reconciliation “in a spirit of understanding which transcends the conflicts and divisions of the past.” The perpetrators who testified before the TRC were provided amnesty from prosecution.

According to all reliable accounts, the transition to democracy would not have occurred without a grant of amnesty. There was a further concern that any attempt to prosecute all the perpetrators of atrocities during the apartheid era would overwhelm the judiciary:

There would be too many accused and adequate punishment would be too costly in human, political, as well as financial terms. Even if we had the human and financial resources, it would not be a sensible or practical route to follow. Criminal trials are unpleasant both for the accused and accuser. The technicalities and time necessary to ensure a fair trial are themselves a source of tremendous frustration.

However, there was also a recognition that in order for the nation to move forward there had to be some accounting for the atrocities and that the pain of the victims had to be recognized:

While seeking to establish responsibility for many of the devastating wrongs suffered, the TRC sought the whole truth and, in so doing, to reconcile victims and perpetrators, and to help establish a just society, It was the firm belief of the

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199 Id.

200 Id. at 34. (According to Minister of Justice Dullah Omar “without an amnesty agreement there would have been no elections.”)

201 Id. at 36.(quoting South African Justice Richard Goldstone)
TRC that unless a society exposed itself to the truth, it could harbor no possibility of reconciliation, reunification, and trust.\textsuperscript{202}

Not every perpetrator was granted amnesty.\textsuperscript{203} In order to receive amnesty, three essential criteria had to be satisfied: 1) amnesty applicants had to submit individual applications, 2) the acts for which they applied had to have had a political objective, and 3) they were required to give full disclosure of the relevant facts of the incidents for which they applied.\textsuperscript{204} Amnesty applicants who failed to satisfy these requirements would be liable to criminal prosecution. The amnesty applicant did not have to make a formal apology or otherwise indicate that they were remorseful for their actions.

The TRC began its work in 1996 and concluded in 1998. The TRC conducted hearings in town halls, civic centers and churches across the country. These hearings were televised to the entire nation. The TRC heard from over 21,000 victims\textsuperscript{205} and from those perpetrators who were granted amnesty. Many studies done after the TRC concluded its work found that the TRC was a success.\textsuperscript{206} As a result, South Africa today is free of political violence.


\textsuperscript{203} The TRC received a total of 7112 amnesty applications of which 849 were granted amnesty. See the Truth and Reconciliation Commission website at http://www.justice.gov.za/trc/amtrans/index.htm


\textsuperscript{206} See e.g., Jay A. Vora and Erika Vora, \textit{The Effectiveness of South Africa’s Truth and Reconciliation Commission; Perceptions of Xhosa, Afrikaner, and English South Africans}, 34 Journal of Black Studies 301, 307-321 (2004). (Finding that black South Africans and whites believed that the TRC was effective in bringing out the truth.); James L. Gibson, \textit{Case Studies: Overcoming Apartheid: Can Truth Reconcile a Divided Nation?},” 603 Annals 82 (2006) (Finding that South Africa did achieve “some degree of reconciliation” as a result of the TRC.)
Between 1974 and 1994, at least 15 truth commissions were established in other nations with varying success.\textsuperscript{207} The success of the TRC in South African and other nations demonstrates that a rigid approach requiring criminal prosecutions in each and every instance in which human rights atrocities have occurred may not fit a particular situation and that more flexibility is required. South Africa never would have had a peaceful transition to democracy had the victims and the international community insisted on criminal prosecution of those responsible for apartheid era atrocities. The South African experience demonstrates that a flexible approach is needed, which I will propose in the next section.

V. PROPOSAL

As this article has demonstrated, it is not always in a nation’s best interest to prosecute human rights violators. The threat of prosecution can be a major impediment to achieving peace. Therefore, the statute of the International Criminal Court should be amended. Article 16 of the statute allows the United Nations Security Council to delay investigations and prosecutions for 12 months. Article 16 should be amended to permit the Security Council to permanently suspend an investigation or prosecution if it determines that doing so would best serve the interest of international peace and security. In the event that the Security Council takes such action, the prosecutor should only be allowed to commence and investigation and prosecution if the human rights abusers seek to return or actually return to power or interfere in the internal affairs of that nation.

\textsuperscript{207} See Jay A. Vora and Erika Vora, \textit{The Effectiveness of South Africa’s Truth and Reconciliation Commission; Perceptions of Xhosa, Afrikaner, and English South Africans}, 34 Journal of Black Studies 301, 303 (2004). (Truth Commissions were established in various countries such as Argentina, Bolivia, Chile, Uruguay, El Salvador, Rwanda, Ethiopia, Chad, Zimbabwe, Germany, the Philippines, and others.)
Some will have a legitimate concern that if the statute is so amended, it will allow the permanent members of the Security Council\textsuperscript{208} to control the ICC. The permanent veto is resented by many nations and to allow the Security Council to permanently terminate criminal proceedings will only add to this resentment. A further concern will be that extending the veto privilege to ICC investigations and prosecutions would compromise the principle of a uniform global standard of justice. That was one of the primary rationales for creating the ICC. When the Rome statute was being negotiated, the United States sought a provision requiring prior authorization of the Security Council for all ICC prosecutions and this proposal was rejected by the negotiators.\textsuperscript{209} Why then would the international community be receptive to my proposal?

The answer is that my proposal differs from the United States’ proposal. The United States proposal would not have permitted the prosecutor to commence an investigation and prosecution without prior Security Council authorization. The proposal I have put forth does not place any such limitation on the prosecutor. No Security Council authorization would be needed to commence an investigation and prosecution. The prosecutor would be permitted to independently commence an investigation and prosecution if she believes it to be warranted. The Security Council would only be able to terminate the proceedings. In this regard the veto would actually be beneficial. Any one of the permanent members of the Security Council could veto a resolution requiring termination of the ICC proceedings. If so, the ICC proceedings against the human rights violator would continue. Thus, the ICC prosecutor would be able to continue as

\textsuperscript{208}The permanent members of the Security Council are the United States, France, the United Kingdom, Russia and China.

\textsuperscript{209}See David Scheffer, \textit{The United States and the International Criminal Court}, 43 The American Journal of International Law 12, 12-13 (1999).
long as she convinces at least one of the five permanent members of the Council that the investigation and prosecution is warranted. To better understand my proposal, consider this factual scenario: suppose that the ICC were to commence an investigation into the allegations of crimes against humanity and war crimes in Syria. A deal has been worked out with Assad permitting him to go into exile. He will agree to the deal only if he has an assurance that he will not be prosecuted. The Security Council could then pass a resolution permanently suspending criminal proceedings against Assad as long as he does not attempt to or returns to power and as long as he does not interfere in the internal affairs of Syria. If any one of the five permanent members believes that there are compelling reasons for holding Assad accountable for his crimes, that nation could veto the resolution and the ICC proceedings against Assad would continue.

My proposal might have the added benefit of encouraging the United States to ratify the Rome statute, which is crucial to the ICC’s ultimate success. The United States has not ratified the treaty because it had several concerns. The primary concern was the possible assertion of jurisdiction over U.S. soldiers and civilian policymakers charged with war crimes resulting from legitimate use of force. An additional concern was that because the United States plays such a prominent role in world affairs, U.S. citizens may have greater exposure to charges than citizens of other nations. A related concern was that U.S. citizens may become the target of political prosecutions by an unaccountable prosecutor. Since my proposal does involve the Security Council in a limited manner, it may help to alleviate these concerns and make the ICC more palatable to the U.S.

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VI. CONCLUSION

The prosecution of human rights violators at Nuremberg and Tokyo, the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the creation of the International Criminal Court are laudable and remarkable accomplishments. However, just as a prosecutor has discretion not to prosecute, the transformation of South Africa from apartheid to a peaceful, majority rule democracy demonstrates that the international community should have discretion to forgo prosecutions if doing so is necessary to achieve peace.