

September 2014

Justice or Peace? A Proposal for Resolving the Dilemma

Kenneth Williams

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>



Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Kenneth Williams, *Justice or Peace? A Proposal for Resolving the Dilemma*, 26 Pace Int'l L. Rev. 132 (2014)

DOI: <https://doi.org/10.58948/2331-3536.1343>

Available at: <https://digitalcommons.pace.edu/pilr/vol26/iss2/5>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

JUSTICE OR PEACE? A PROPOSAL FOR RESOLVING THE DILEMMA

Kenneth Williams

I. INTRODUCTION

The civil war in Syria has created a dilemma for the international community. Over 100,000 Syrians have been killed during the civil war.¹ Many of these deaths were the result of human rights violations committed by both government forces and anti-government armed groups. According to the United Nations Human Rights Council,² government forces have “committed the crimes against humanity of murder, torture, rape, enforced disappearance and other inhumane acts.”³ 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.”⁴ The Human Rights Council found that “anti-government armed groups have committed war crimes, including murder, torture, hostage-taking and attacking protected ob-

¹ *UN Human Rights Council Calls for end to Syria fighting, condemns foreign fighters*, UN NEWS CENTRE (May 29, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45033&Cr=Syria&CR1=UajjBuBpBD0>.

² UNITED NATIONS HUMAN RIGHTS COUNSEL, <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx> (last visited Mar. 18, 2014) (The Human Rights Council is a body within the United Nations. It is made up of 47 rotating United Nations Member States and is responsible for promoting and protecting human rights. It addresses situations of systemic human rights violations and makes recommendations on them.).

³ Rep. of the Indep. Int Nat'l Comm'n. of Inquiry on the Syrian Arab Republic, Human Rights Council, Rep. on its 22nd Sess., Feb. 5, 2013, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) at 1, *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/22/59 [hereinafter February 2013 Report]. The Council also concluded that “war crimes and crimes against humanity have become a daily reality in Syria where the harrowing accounts of victims have seared themselves on our conscience.” Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Human Rights Council, U.N. Doc. A/HRC/23/58 (Jul. 18, 2013) at 2, *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/23/58 [hereinafter July 2013 Report].

⁴ February 2013 Report, *supra* note 3 at 1.

2014]

JUSTICE OR PEACE?

133

jects.”⁵ These groups have endangered civilians, “by positioning military objectives inside civilian areas . . . [and have] carried out bombings in predominately civilian areas . . .”⁶ The Human Rights Council further found that both government forces and anti-government armed groups violated international law by involving children in the armed conflict.⁷ The Human Rights Council also found that “[t]here are reasonable grounds to believe that chemical agents have been used as weapons,” which would constitute a war crime.⁸

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.”⁹ Therefore, the Human Rights Council recommended that the Security Council¹⁰ take appropriate action to ensure that those responsible for these crimes be brought to justice.¹¹ The dilemma for the Security Council is that if it were to accept the Human Rights Council’s recommendation, it would have to refer the situation to the International Criminal Court (“ICC”),¹² and doing so may impair the prospects for peace. If the situation is referred to the ICC, neither the government forces in Syria, nor the anti-government armed groups, will have any incentive to end the civil war since they know that

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2.

⁸ July 2013 report, *supra* note 3 at 2.

⁹ February 2013 Report, *supra* note 3 at 2.

¹⁰ The Security Council consists of fifteen members of the United Nations. Article 41 of the United Nations Charter provides the Council with the authority to take any measures it deems appropriate whenever there has been a threat to international peace and security. Its resolutions require the unanimous consent of its 5 permanent members: the United States, China, Russia, the United Kingdom and France. Its resolutions are binding on the members of the United Nations. See U.N. Charter art. 23, para. 1, art. 27, para. 3, art. 41, *available at* <http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>.

¹¹ The Council recommended that the Security Council “[i]n 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, *supra* note 3 at 26.

¹² *Id.*

they are likely to be prosecuted for the crimes that they have committed.¹³ The international community has previously faced this dilemma,¹⁴ and will certainly have to wrestle with this question in the future, in a nation like Cuba for instance.¹⁵ Cuba has a long history of repression, but is likely to become more democratic in the future.

This article will address the question of how the international community should respond when the pursuit of justice and the attainment of peace are incompatible. It begins with an overview of the international human rights movement prior to World War II, a period when there was almost no effort to hold human rights violators accountable. The article 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 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 worst human rights violators to escape accountability for their actions. Next, there is a discussion of how the end of the Cold War ushered in a new era of accountability; specifically, in this new era many human rights violators have been brought to justice.

This article suggests that although this new era is welcome, a one-size fits all approach should not be adopted. Rather, this paper proposes that whether human rights violators

¹³ See *Id.* The Human Rights Council is recommending that the ICC investigate whether both sides have committed crimes during the civil war.

¹⁴ 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. Leslie Vinjamuri, *Peace May Require Forgoing Justice*, N.Y. TIMES (Mar. 5, 2013), <http://www.nytimes.com/roomfordebate/2013/03/04/can-we-afford-to-forgive-atrocities/peace-may-require-forgoing-justice>.

¹⁵ See Universal Periodic Review: HRW Submission on Cuba, HUMAN RIGHTS WATCH (April 18, 2013), www.hrw.org/news/2013/04/18/universal-periodic-review-hrw-submission-cuba.

2014]

JUSTICE OR PEACE?

135

should be prosecuted needs to be determined 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 article 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 risk 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),¹⁶ the Petition of Right (1628),¹⁷ the English Bill of Rights (1689),¹⁸ the French Declaration of the Rights of Man and Citizen (1789),¹⁹ the United

¹⁶ The Magna Carta established the principle that individuals could not be punished arbitrarily. See Magna Carta, ch. 16-17 (1215), *available at* <http://www.constitution.org/eng/magnacar.htm>.

¹⁷ Initiated by Sir Edward Coke, the Petition of Right asserted four principles: 1) no taxes could be levied without the consent of Parliament; 2) no subject could be imprisoned without cause shown; 3) no soldiers could be quartered upon the citizenry; 4) martial law may not be used in peacetime. See Petition of Rights, 1628, 3 & 4 Car. 1, (Eng.), *available at* <http://www.britannia.com/history/docs/petition.html>.

¹⁸ The English Bill of Rights contained certain basic rights including: prohibitions on excessive bail and cruel and unusual punishments; prohibited taxation without representation; granted the freedom to petition the monarch without fear of retribution; prohibited royal interference in the election of parliament. See English Bill of Rights, 1689, 1 W. & M., (Eng.), *available at* http://www.constitution.org/bor/eng_bor.htm.

¹⁹ The French Declaration proclaimed a number of rights, including the right to be free of arbitrary detention, the right to be presumed innocent until declared guilty, the right to freedom of religion, and the right to speak, write, and print freely. The French Declaration of the Rights of Man and Citizen is available at www.constitution.org/fr/fr_drm.htm.

States Bill of Rights (1789),²⁰ there was virtually no international human rights movement prior to World War II. That is because, prior to World War II, a State's treatment of its own nationals and those under its jurisdiction was considered an internal matter and not a matter of international concern.²¹ 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.

i. The Movement to Abolish Slavery

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.²² 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 of slavery. 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.²³

ii. The Regulation of War

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

²⁰ See generally U.S. Const. amends. 1-10.

²¹ See Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L. L. 783, 783-85 (2006).

²² See Suzanne Miers, *Slavery and the Slave Trade as International Issues 1890-1939*, in 19(2) SLAVERY AND ABOLITION: A JOURNAL OF SLAVE AND POST-SLAVE STUDIES 16-37 (1998).

²³ Slavery Convention art. 6, Sept. 25, 1926, 60 L.N.T.S. 254, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>

2014]

JUSTICE OR PEACE?

137

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.²⁴

The movement to codify these principles began with the Hague Conventions of 1899²⁵ and 1907.²⁶ The Hague Conventions codified the fundamental principle that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”²⁷ 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, and means of warfare “calculated to cause unnecessary suffering.” Also, the destruction or seizure of enemy property was prohibited unless “imperatively demanded by the necessities of war,” and the attack of undefended towns, villages, dwellings, or buildings.²⁸

In addition to regulating the manner in which war is conducted, treaties and laws have been enacted making individuals accountable for violating the laws of war since the prosecution by an English court in 1305 of Scottish national Sir

²⁴ BETH VAN SCHAACK & RONALD C. SLYE, A CONCISE HISTORY OF INTERNATIONAL CRIMINAL LAW, in UNDERSTANDING CRIMINAL LAW 13 (2007), available at <http://ssrn.com/abstract=1016152> See also Hague Convention IV, 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 . . .”).

²⁵ See Hague Convention of 1899, Declaration Concerning Asphyxiating Gases, Jul. 29, 1899, 32 Stat. 1839-40, available at <http://www.icrc.org/aplic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2531E92D282B5436C12563CD00516149>.

²⁶ Hague Convention of 1907, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2301-02, available at <http://www.icrc.org/ihl.nsf/INTRO/195>.

²⁷ *Id.* at 22.

²⁸ *Id.* at 23.

William Wallace.²⁹ Sir Wallace was convicted and ultimately executed for waging a war against the English, “sparing neither age nor sex, monk nor nun.”³⁰ 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.³¹ 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.³²

The United States accepted the principle that war could not be conducted indiscriminately as early as the American Civil War. During the 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.³³ He was convicted and ultimately executed for his actions during the war.³⁴ The United States continued to hold individuals accountable for violating the laws of war during the Spanish American War. Following the war, the United States convened a number of military commissions to prosecute Filipino insurgents for abuses committed against Filipinos during the war.³⁵

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.³⁶ The League of Nations was established after the war along with an advisory commission convened in connection with the League of Nations.³⁷ This advisory commission recommended the creation of a permanent criminal court to have jurisdiction over “crimes constituting a breach of international public order

²⁹ VAN SCHAACK, *supra* note 24 at 19.

³⁰ *Id.*

³¹ *Id.* at 19.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 20.

³⁵ *Id.*

³⁶ *Id.* at 21-26.

³⁷ *Id.* at 27.

2014]

JUSTICE OR PEACE?

139

against the universal law of nations.”³⁸ The League of Nations, however, rejected the proposal as premature.³⁹

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.⁴⁰ 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.⁴¹ Several significant developments occurred as a result of the Nazi atrocities: the establishment of international criminal tribunals to hold those responsible for human rights violations accountable; the development of international human rights laws and international criminal laws; the creation of the United Nations; and acceptance of universal jurisdiction, allowing any nation to prosecute human rights violators.

i. International Military Tribunals

The four Allied Powers⁴² decided that those responsible for these crimes had to be punished. As a result, in 1945, the Allied Powers created the International Military Tribunal “for the just and prompt trial and punishment of major war criminals of the European Axis.”⁴³ The Allied Powers also created the International Military Tribunal for the Far East in order to try major Japanese war criminals.⁴⁴ The two International

³⁸ *Id.* at 27.

³⁹ *Id.*

⁴⁰ See Burco Baytemir, *The International Military Tribunal at Nuremberg: The Ongoing Reflections In International Criminal Law*, 3 USAK YEARBOOK OF INT’L POLITICS AND LAW 77, 82 (2010).

⁴¹ 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).

⁴² The Four Allied Powers were the United States, the United Kingdom, France, and the Soviet Union.

⁴³ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁴⁴ This tribunal was similar to Nuremberg and was based largely on the Charter of the Nuremberg Tribunal. See generally *Charter of the Interna-*

Military Tribunals were the first internationally created courts, composed of judges from different countries, established to try defendants for internationally created crimes.⁴⁵ The two tribunals were provided jurisdiction over three crimes: war crimes, crimes against humanity, and crimes against peace.⁴⁶

The Nuremberg and Japanese Tribunals resulted in the prosecution and conviction of numerous high ranking leaders.⁴⁷ 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.⁴⁸ Second, the tribunals were open to the charge of “victor’s justice” since only the losers were put on trial by the winners.⁴⁹ 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.⁵⁰ 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.⁵¹ 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 Nuremberg as the “cornerstone of international criminal law” and the “enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.”⁵²

tional Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Charter dated Jan. 9, 1946, amended Apr. 26, 1946, T.I.A.S. 1589, 4 Bevans 20.

⁴⁵*Id.* at 83.

⁴⁶*Id.* at 82.

⁴⁷*Id.* at 81.

⁴⁸*Id.* at 85.

⁴⁹*Id.*

⁵⁰*Id.* at 86-89.

⁵¹*Id.* at 83.

⁵² *Report of the International Law Commission on the Work of its Forty-Eighth Session*, May 6-July 26, 1996, Official Records of the General Assembly Fifty-First Session, Supplement No. 10, at p. 19, available at http://legal.un.org/ilc/documentation/english/A_51_10.pdf.

2014]

JUSTICE OR PEACE?

141

ii. The United Nations

The horrors of World War II also led to the creation of the United Nations,⁵³ and the UN Charter contained 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.”⁵⁴ Article 55 provides that UN members “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”⁵⁵ Article 56 requires members to cooperate in the promotion of human rights.⁵⁶ 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.⁵⁷ By inserting these provisions into the Charter, the founders of the United Nations made clear that their intent was to play a major role in protecting and promoting 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 law.⁵⁸

⁵³ See *UN at a Glance*, <http://www.un.org/en/aboutun/index.shtml> (last visited Apr. 1, 2014).

⁵⁴ U.N. CHARTER, preamble.

⁵⁵ *Id.* at art. 55.

⁵⁶ *Id.* at art. 56.

⁵⁷ *Id.* at art. 68.

⁵⁸ The U.N. General Assembly unanimously adopted a resolution affirming the principles established by the International Military Tribunals. The resolution provides in pertinent part: The General Assembly...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. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc A/236 at 1144 (Dec. 11, 1946).

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, by agreeing to the Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁹ Although the crimes against humanity created by the Nuremberg charter overlap 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.⁶⁰ 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 births within the group and forcibly transferring children of the group to another group.⁶¹ Most importantly, Article V requires state 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.”⁶² 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.⁶³

The international community also adopted the Universal Declaration of Human Rights (“UDHR”)⁶⁴ and the International Covenant on Civil and Political Rights (“ICCPR”),⁶⁵ establishing several important norms. Both the UDHR and the ICCPR specify that international law prohibits the arbitrary

⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

⁶⁰ *Id.* at art. I.

⁶¹ *Id.* at art. II.

⁶² *Id.* at art. V.

⁶³ *Id.* at art. VI.

⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

⁶⁵ Int'l Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

deprivation of life, prohibits torture and cruel, inhuman or degrading treatment or punishment,⁶⁶ slavery and the slave trade,⁶⁷ and discrimination based on race and other status.⁶⁸ These international norms have been widely adopted in regional treaties such as the American Convention on Human Rights,⁶⁹ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁰ the African Charter on Human and Peoples' Rights,⁷¹ and the Arab Charter on Human Rights.⁷² The arbitrary deprivation of life, slavery, apartheid and torture has all since become international crimes. Because of the widespread use of torture against political opponents by repressive governments, a treaty was created to specifically address this crime. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment⁷³ not only prohibits state 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."⁷⁴ 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."⁷⁵ State parties are required to make torture a violation of its domestic laws,⁷⁶ and Article 7 of the Convention requires

⁶⁶ *Id.* at art. 7.

⁶⁷ *Id.* at art. 8.

⁶⁸ *Id.* at art. 2, ¶ 1.

⁶⁹ See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.

⁷⁰ See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

⁷¹ African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁷² See League of Arab States, Arab Charter on Human Rights, May 22, 2004 reprinted in 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008), available at <http://www.unhcr.org/refworld/docid/3ae6b38540.html>.

⁷³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. (1988) (entered into force on June 26, 1987).

⁷⁴ *Id.* at art. 2, ¶ 2.

⁷⁵ *Id.* at art. 2, ¶ 1.

⁷⁶ *Id.* at art. 4.

state parties either to prosecute individuals who have been accused of torture or to extradite them for prosecution.⁷⁷

The international community continues to make it a crime for individuals to engage in aggressive war tactics and has reaffirmed this principle.⁷⁸ Although engaging in war in violation of international law has been a crime since Nuremberg, contemporary international criminal tribunals have not prosecuted anyone for aggression.⁷⁹

Finally, it is still an international crime to fight a war indiscriminately. Since the Hague Conventions of 1899 and 1907, an extensive body of treaty law has been created to 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;⁸⁰ the wounded, sick, and shipwrecked at sea;⁸¹ prisoners of war;⁸² civilians under control of an enemy power.⁸³ In addition, the principle of distinction requires combatants to distinguish between military and non-military targets. Thus, attacks on civilian targets are prohibited.⁸⁴ Those individuals

⁷⁷ *Id.* at art. 7, ¶ 1.

⁷⁸ U.N. CHARTER art.2, para. 4 (“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).

⁷⁹ 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.”).

⁸⁰ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).

⁸¹ See Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950).

⁸² See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

⁸³ See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

⁸⁴ JIMMY GURULE & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW, 71 (2011) (“The principle of distinction establishes a pre-

2014]

JUSTICE OR PEACE?

145

who kill, injure, and destroy property in violation of the Geneva Conventions can be held criminally responsible for their actions.

ii. Universal Jurisdiction

The events of World War II and Nuremberg also helped to establish the principle of universal jurisdiction. Universal jurisdiction has made it easier to bring human rights violators to justice. Universal jurisdiction was first asserted at Nuremberg as the basis for prosecuting the perpetrators of the holocaust⁸⁵ and has been used frequently since then. Under international law, states need jurisdiction to prescribe and enforce its laws.⁸⁶ 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.⁸⁷ 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 citizens.⁸⁸ The ability of states to ex-

sumptive protection for civilians so long as they refrain from taking direct part in hostilities they may not be made the deliberate object of attack”).

⁸⁵ See *International Military Tribunal (Nuremberg), Judgments and Sentences*, 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, they 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”).

⁸⁶ See generally *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

⁸⁷ See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 285 (Oxford Univ. Press, 2d ed. 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*, ¶ 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”).

⁸⁸ 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 na-

ercise 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 sometimes the case that when egregious crimes are committed, the state where these crimes occurred are not able to prosecute the perpetrators. Universal jurisdiction remedies the problem of states being unable or unwilling to prosecute the perpetrators where international crimes occurred.

Since Nuremberg, states have frequently initiated prosecutions based on the universality principle. For instance, in 1961, Israel tried Adolph Eichmann, and in 1988⁸⁹ John Demjanjuk⁹⁰ 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 of the principle of universal

tions have an equal interest in their apprehension and punishment"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (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").

⁸⁹ See *CrimA 336/61 Attorney General of Israel v. Eichmann (Eichmann II)*, 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.

⁹⁰ 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).

2014]

JUSTICE OR PEACE?

147

jurisdiction.⁹¹

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 courts or in international tribunals. However, because of cold war politics and the desire in many instances for immediate peace, 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 forums for holding individuals accountable for human rights violations criminal prosecutions for human rights violations after World War II were rare. Between World War II and the cold war, there have been almost no prosecutions for human rights violations which.⁹² This was due largely to the fact that the international criminal justice system had been paralyzed by cold war politics. Another factor was the desire to achieve and maintain peace. The era of impunity allowed some notorious human rights

⁹¹ 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/IO53/015/2010/en>.

⁹² Most of the prosecutions after World War II involved individuals accused of committing war crimes. For instance, the United States prosecuted William Calley for war crimes as a result of his role in the My Lai Massacre. See *Found: The Monster of My Lai Massacre*, (Oct. 6, 2007), <http://www.dailymail.co.uk/news/article-485983/Found-The-Monster-My-Lai-massacre.html>.

abusers to not only avoid any accountability for their abuses, but also to flee with millions of dollars 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..

In each of the cases discussed below, the leaders committed unspeakable atrocities. However, they provide excellent illustrations of the justice or peace dilemma that the international community must often wrestle with. In post-World War II Japan, Emperor Hirohito could have been prosecuted by the International Military Tribunal. The United States was faced with the justice or peace dilemma, and chose to sacrifice justice in order to maintain peace in Japan. The international community did the same in the cases of Idi Amin in Uganda, Jean Claude Duvalier in Haiti and Ferdinand Marcos in the Philippines. In each instance, the decision was made to avoid further unrest and bloodshed by allowing these rulers to go into exile. Had the international community insisted on holding them accountable for what they had done, it is likely that peace would have been more difficult to attain and there would have been even more suffering as a result.

A. Emperor Hirohito of Japan

Japan committed numerous international crimes during World War II. First, 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.”⁹³ Although Japan was a party to this international treaty, Japan still committed crimes against peace during World War II. For instance, crimes against peace were committed as a result of Japan’s 1931 invasion of Manchuria and its expansion of the war throughout China.⁹⁴ Furthermore, in 1941 and 1942, Japan attacked the United States, Malaya, Burma, Singapore, Borneo, Thailand, the Philippines, the Dutch East Indies, New Guinea, and nu-

⁹³ JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW DOCUMENTS 139-40 (1995).

⁹⁴ Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L & COMP. L. 59, 63 (2003).

merous islands throughout the Pacific Ocean in violation of international law.⁹⁵

Second, war crimes were also committed despite the fact that Japan was a party to several treaties that governed its wartime conduct.⁹⁶ During the “Rape of Nanking” in December 1937, Japanese forces captured Nanking and then began a barbaric campaign of terror against the Chinese soldiers and civilians.⁹⁷ Military orders directed that Chinese POWs be executed,⁹⁸ and during a single mass execution, Japanese forces murdered over 57,000 POWs and civilians.⁹⁹ Japanese soldiers engaged in competitions to determine who could kill the most Chinese POWs in the shortest period of time.¹⁰⁰ Altogether, Japanese forces killed an estimated 260,000 Chinese victims in Nanking.¹⁰¹ During its military campaign against China, Japan also conducted scientific nonconsensual experiments on Chinese POWs and civilians.¹⁰² Throughout the war, the Japanese murdered POWs, forced them to do hard labor and tortured them.¹⁰³ Japanese forces forcibly put POWs to work on Japanese military projects such as the Burma-Thailand Railroad.¹⁰⁴ Twenty-seven percent of Allied POWs held in Japan died (35,756 out of 132,134), including a death rate of thirty-six percent (36%) for Australian POWs.¹⁰⁵ By contrast, only four

⁹⁵ *Id.*

⁹⁶ 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 Id.* at 63.

⁹⁷ *Id.* at 63.

⁹⁸ *Id.* at 64.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 65-66.

¹⁰³ *Id.* at 68-69.

¹⁰⁴ *Id.* at 69.

¹⁰⁵ *Id.* at 68.

percent (4%) (9348 out of 235,473) of Allied POWs held in POW camps in Germany and Italy died.¹⁰⁶ 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.¹⁰⁷

Third, 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 between 20,000 and 80,000 Chinese women were raped.¹⁰⁸ Chinese civilians were murdered by gruesome methods including burying people alive, extirpating body parts, freezing people to death, using attack dogs and bayoneting babies.¹⁰⁹ Scientific experiments were also performed on civilians.¹¹⁰ Japan also 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.¹¹¹ 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.¹¹² They were kept in facilities “surrounded by a barbed wire fence, well-guarded and patrolled.”¹¹³ The “comfort women” were repeatedly raped on a daily basis often for a total of at least nine hours a day.¹¹⁴ At the end of the war, many of these women were murdered.¹¹⁵ Those who were not murdered were simply left behind to fend for themselves.¹¹⁶ 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 doc-

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 64.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 65-66.

¹¹¹ *Id.* at 66.

¹¹² *Id.* at 67.

¹¹³ *Id.*

¹¹⁴ *Id.* at 68.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

uments 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 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.¹¹⁷

i. Hirohito’s Role

There is an abundance of evidence that Emperor Hirohito played a major policy role in Japan’s wartime decisions:

. . . 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.¹¹⁸

Nine days after Japan’s surrender, the United Nations War Crimes Commission “published a white paper recommend-

¹¹⁷ *Id.* at 67.

¹¹⁸ Kerry Creque O’Neill, *A New Customary Law of Head of State Immunity?: Hirohito and Pinochet*, 38 STAN. J. INT’L L. 289, 299-300 (2002).

ing 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.”¹¹⁹ The Charter of the International Military Tribunal for the Far East was explicit in denying immunity for any persons responsible for war crimes during the Pacific War.¹²⁰ Hirohito could have been prosecuted for engaging in aggressive war, crimes against humanity and war crimes.

ii. The Decision Not to Prosecute Hirohito

Despite Hirohito’s involvement in the major war decisions, General Douglas MacArthur, Supreme Commander of the Allied Forces’ during the 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.¹²¹ In fact, “there is no evidence that MacArthur ever investigated the strength of the evidence against the Emperor for war crimes.”¹²² U.S. prosecutors were even instructed not to mention his name during the Tokyo Tribunal trials.¹²³ MacArthur’s reasons for his decision not to prosecute were varied,¹²⁴ but the predominant reason was MacArthur’s belief that

¹¹⁹ ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIAL*, 45 (1987).

¹²⁰ 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>.

¹²¹ See O’Neill, *supra* note 118, at 302 n.98 (2002) (“An unpublished Gallup opinion poll conducted in early June 1945 disclosed that 77 percent of the American public wanted the Emperor severely punished.”).

¹²² *Id.* at 302.

¹²³ See Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L & COM. L. 59, 73 (2003).

¹²⁴ “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 mon-

Hirohito would assist the occupation and rebuilding of Japan.¹²⁵ “MacArthur believed that, given the Japanese public support of Hirohito, prosecuting him ‘would result in ‘a condition of underground chaos and guerilla warfare in mountainous and outlying regions,’ thus necessitating an additional one million soldiers for occupational duty in a more hostile Japan.”¹²⁶

Hirohito remained the monarch of Japan until his death in 1989.¹²⁷ 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.”¹²⁸ Because their emperor was never held accountable for the war, many Japanese citizens refused to accept responsibility for Japan’s role in the war.

The main reason why Japanese war crimes were so quickly forgotten had to do with Hirohito himself. The legitimacy of Japan’s wars of aggression, – the belief that it had invaded various Asian and Pacific countries in order to liberate them, – could not be fully discredited unless Hirohito 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.¹²⁹

arch who bore no responsibility for the war.” Kerry Creque O’Neill, *A New Customary Law of Head of State Immunity? Hirohito and Pinochet*, 38 STAN. J. INT’L L. 289, 300 (2002). “General MacArthur constituted a second determining factor in the decision not to indict Emperor Hirohito.” *Id.* at 301. “[T]he third factor was race.” *Id.* at 303.

¹²⁵ *Id.* at 72.

¹²⁶ Galvin, *supra* note 94, at 72.

¹²⁷ MCARTHUR (WGBH Educational Foundation 1999) *available at* <http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX97.html>.

¹²⁸ Galvin, *supra* note 94, at 72 (quoting GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 191 (Penguin Press 1999)).

¹²⁹ Galvin, *supra* note 94, at 72-73 (quoting HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 617-18 (Harper Collins Publishers 2000)).

B. Idi Amin of Uganda

On January 25, 1971, Idi Amin became the leader of Uganda as a result of a coup, which he led.¹³⁰ Amin's seizure of power was initially celebrated by Ugandans 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."¹³¹ Amin believed that in order to survive in power, he needed to destroy any opposition, and he began by executing the staff of the previous prime minister by firing squad.¹³² He saw intellectuals as a threat because he believed that they could see through his actions so he killed the educated, which included lawyers, clergymen, students, teachers, and doctors.¹³³ Amin's victims also included cabinet ministers, Supreme Court judges, diplomats, university rectors, educators, prominent Catholic and Anglican churchmen, hospital directors, surgeons, bankers, tribal leaders and business executives.¹³⁴

Most of those killed were ordinary people. For instance, members of the Acholi and Langi tribes were killed because they had been the power bases of the ousted prime minister,¹³⁵ and on the first anniversary of Amin's coup, 503 prisoners at Mutakula Prison were killed.¹³⁶ Amin's police forces were allowed to kill in order to obtain the victims' money, houses, or women, or because the tribal groups the victims belonged to were marked for humiliation.¹³⁷ Amin's private army, the State Research Bureau,¹³⁸ was instructed to find and kill any

¹³⁰ See *Idi Amin, a Brutal Dictator of Uganda, Is Dead at 80*, N.Y. TIMES, Aug. 16, 2003, available at <http://www.nytimes.com/2003/08/16/world/idi-amin-a-brutal-dictator-of-uganda-is-dead-at-80.html>.

¹³¹ JUNE STEPHENSON, *TYRANTS IN OUR TIME: LIVES OF FOURTEEN DICTATORS* (Diemer, Smith Publ'g Co., Inc., Kindle edition 2011).

¹³² *Id.* at 13.

¹³³ *Id.*

¹³⁴ Michael T. Kaufman, *Idi Amin, Murderous and Erratic Ruler of Uganda in the 70's, Dies in Exile*, N.Y. TIMES, Aug. 17, 2003, available at <http://www.nytimes.com/2003/08/17/world/idi-amin-murderous-and-erratic-ruler-of-uganda-in-the-70-s-dies-in-exile.html?pagewanted=all&src=pm>.

¹³⁵ STEPHENSON, *supra* note 131.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

2014]

JUSTICE OR PEACE?

155

dissidents.¹³⁹

Amin used Catholics, Asians, and Jews as scapegoats. He killed many Catholics because he saw them as prohibiting Uganda from becoming a Muslim nation.¹⁴⁰ His soldiers were allowed to kill Christians as they wished.¹⁴¹ Asians, mostly Indians and Pakistanis, were his prime scapegoats.¹⁴² Most of the Asians were third-generation descendants of workers brought by the British to Uganda.¹⁴³ Many were merchants and shopkeepers in Uganda.¹⁴⁴ 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.¹⁴⁵ They were only allowed to take what they could carry by hand.¹⁴⁶ Their property was confiscated and given to army officers in payment for their loyalty.¹⁴⁷

Human rights groups and exiles estimate that approximately 300,000 Ugandans were killed during Amin's reign.¹⁴⁸ 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."¹⁴⁹ When Amin was confronted with allegations of human rights violations he simply lied: he blamed the deaths on border clashes or accidents.¹⁵⁰ Additionally, when people disappeared, he claimed that the government was investigating their absences but nothing was ever discovered.¹⁵¹

Amin's regime ended as a result of a war he initiated

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

156 *PACE INT'L L. REV. PUBLIC EDITION* [Vol. XXVI::2

against Tanzania. During this war, Amin's army seized Tanzanian soldiers and took them to slave labor camps.¹⁵² His soldiers raped, killed and looted Tanzanian citizens.¹⁵³ On April 10, 1979, Kampala, the capital of Uganda, fell to Tanzania.¹⁵⁴ Tanzanian soldiers raided Amin's home, but Amin had already fled. Amin, along with his wives, children and an entourage, had been flown to Libya in a Libyan plane.¹⁵⁵ Amin eventually found refuge in Saudi Arabia, where he lived in luxury for years.¹⁵⁶ He tried to return to Uganda in 1989, but was prevented from doing so by the Ugandan government.¹⁵⁷ Amin died in 2003 without ever having to face justice. He could have been prosecuted for: initiating an aggressive war against Tanzania; the possible genocide that resulted from his ordering Asians to leave Uganda; crimes against humanity for the indiscriminate killing of his people; and war crimes as a result of the mistreatment of Tanzanians during the war. As one human rights organization summarizes, "[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."¹⁵⁸

C. Jean-Claude Duvalier of Haiti

Haiti was ruled by Francois "Papa Doc" Duvalier from 1957-1971.¹⁵⁹ Although Papa Doc was initially democratically elected, he subsequently became a ruthless dictator who 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.¹⁶⁰ Many citizens were murdered; especially those who plotted coups to remove

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Kaufman, *supra* note 134.

¹⁵⁷ *Id.*

¹⁵⁸ *Uganda: Idi Amin Dies Without Facing Justice*, HUMAN RIGHTS WATCH, (Aug. 13, 2013), <http://www.hrw.org/news/2003/08/18/uganda-idi-amin-dies-without-facing-justice>. (quoting Reed Brody, Director of special prosecutions at Human Rights Watch).

¹⁵⁹ STEPHENSON, *supra* note 131.

¹⁶⁰ *Id.*

2014]

JUSTICE OR PEACE?

157

him from office.¹⁶¹ Many more were tortured.¹⁶² There were forced disappearances.¹⁶³ He shut down newspapers.¹⁶⁴ According to the International Commission of Jurists, who evaluated his government after he had been in office for 10 years,

[t]he 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.¹⁶⁵

It is estimated that over forty thousand Haitians lost their lives during Papa Doc's presidency.¹⁶⁶ After suffering a stroke in 1970, he made his eighteen-year-old son, Jean-Claude "Baby Doc" Duvalier, his successor.¹⁶⁷ One year later, Papa Doc died and his handpicked successor, his nineteen-year-old son, succeeded him.¹⁶⁸ Both Papa Doc and Baby Doc had the support of the United States during their tenures because they were strongly anti-communist,¹⁶⁹ and the U.S. did not want another Cuba so close to its border.¹⁷⁰

Baby Doc continued his father's repressive regime, and the Inter-American Commission on Human Rights conducted an observation visit of Haiti from August 16 through August 25, 1978.¹⁷¹ The Commission found numerous instances of human rights violations during Baby Doc's regime. For instance, the Commission found instances of individuals who had disap-

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI*, 25 (Univ. Of Chicago Press 1997).

¹⁶⁷ STEPHENSON, *supra* note 131.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Haiti 1979 - Introduction*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.46, doc. 66 rev. 1 ¶ A(3) (1979), *available at* <http://www.cidh.oas.org/countryrep/Haiti79eng/intro.htm>.

peared after being detained by the police, or the Tonton Macoutes, and who had never been seen or heard from again.¹⁷² 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.¹⁷³ The lack of medical care resulted in many deaths from tuberculosis and diarrhea.¹⁷⁴ The Commission also found that Haitian citizens were summarily executed.¹⁷⁵ Summary executions took place at the notorious Fort Dimanche prison.¹⁷⁶ The Commission report described the executions as follows:

[t]he 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.¹⁷⁷

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."¹⁷⁸ "They are undressed and examined like beasts of burden, not for medical purposes, but in order to humiliate them."¹⁷⁹ The cells were overcrowded and, as a result, the prisoners slept in relays.¹⁸⁰ Prisoners were forced to sleep on cement floors for the first three months of their detention.¹⁸¹ The cells were too hot in the summer and too cold in the winter.¹⁸² 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."¹⁸³

¹⁷² See *Haiti 1979 - Chapter II*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.46, doc. 66 rev. 1 ¶ 1-2 (1979), available at <http://www.cidh.oas.org/countryrep/Haiti79eng/chap.2.htm>.

¹⁷³ *Id.* at ¶ 3-10.

¹⁷⁴ *Id.* at ¶ 9.

¹⁷⁵ *Id.* at ¶ 10-11.

¹⁷⁶ *Id.* at ¶ 10.

¹⁷⁷ *Id.* at ¶ 10.

¹⁷⁸ *Id.* at ¶ 11.

¹⁷⁹ *Id.* at ¶ 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

2014]

JUSTICE OR PEACE?

159

The prisoners were not given toilet paper or soap or allowed to bathe.¹⁸⁴ Since there were no toilets, the prisoners were forced to use buckets filled with feces as latrines.¹⁸⁵ They were also provided with inadequate food and medical care.¹⁸⁶ Not surprisingly, given these horrible conditions, the mortality rate in the prison was high. Inmates rarely survived for more than a year.¹⁸⁷ When a prisoner died, the body was not immediately removed:

[s]ometimes 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 sometimes happened that dogs eat the corpse.”¹⁸⁸

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.¹⁸⁹ Some inmates had been condemned to between three and six months imprisonment without the benefit of due process.¹⁹⁰ One of the Commission’s final recommendations was “[t]hat [Haiti] investigate and punish those responsible for the numerous violations of the right to life and physical security.”¹⁹¹

By 1986, Haiti became ungovernable as a result of political corruption and economic problems and Baby Doc fled for exile in France.¹⁹² 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.¹⁹³

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at ¶ 12-13.

¹⁸⁷ *Id.* at ¶ 13.

¹⁸⁸ *Id.*

¹⁸⁹ See *Haiti 1979 - Chapter III*, at 2, Inter-Am. Comm’n H.R. OEA/Ser.L/V/II.46 (doc. 66 rev. 1) (Dec. 13, 1979), available at <http://www.cidh.oas.org/countryrep/Haiti79eng/chap.3.htm>.

¹⁹⁰ *Id.* at 3.

¹⁹¹ *Id.* at Recommendations.

¹⁹² IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI* 25 (1997).

¹⁹³ Inter-American Commission on Human Rights, *Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human rights Committed during the Regime of Jean-Claude Duvalier*, available at <http://www.oas.org/en/iachr/docs/other/Haiti2011.asp>.

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.”¹⁹⁴

D. Ferdinand Marcos of the Philippines

Ferdinand Marcos was elected President of the Philippines in 1965 and was reelected in 1969.¹⁹⁵ The Philippine Constitution limited him to two, four year terms, so that he was required to leave office in 1973.¹⁹⁶ On September 21, 1972, Marcos declared martial law.¹⁹⁷ He justified the declaration of martial law on the need to restore law and order.¹⁹⁸ However, these were not communist insurrections as Marcos claimed:

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.¹⁹⁹

The declaration of martial law immediately halted a Constitutional Convention. The Constitutional Convention, elected by the people, had been meeting at the time martial law had been declared and was near completion.²⁰⁰ Some of the delegates to the Convention were arrested and placed under detention while others went into hiding and left the country.²⁰¹ The termination of the Constitutional Convention allowed Marcos

¹⁹⁴ *Id.* See Isabeau Doucet and Randal C. Archibold, *Haitian Ex-Dictator Is Questioned in Court Over Reign*, N.Y. TIMES (Feb. 28, 2013), <http://www.nytimes.com/2013/03/01/world/americas/jean-claude-duvalier-faces-questions-in-court-about-his-reign-in-haiti.html>.

¹⁹⁵ See *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1462 (D. Haw. 1995).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ STEPHENSON, *supra* note 131.

²⁰⁰ See *Marcos*, 910 F. Supp. at 1462.

²⁰¹ *Id.*

to revise the Constitution to permit him to remain in power and expand his authority.²⁰²

The martial law declaration set the stage for acts of torture, summary executions, disappearances, arbitrary detention and numerous other atrocities.²⁰³ Marcos authorized the arrests of a long list of dissidents, which 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.²⁰⁴ Those arrested were subjected to "tactical interrogation" in an attempt to elicit information from them regarding opposition to the Marcos government.²⁰⁵ 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;

²⁰² *Id.* at 1462-63.

²⁰³ *Id.* at 1462.

²⁰⁴ See STEPHENSON, *supra* note 131.

²⁰⁵ See *Marcos*, 910 F. Supp. at 1463.

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

14) Solitary confinement while hand-cuffed or tied to a bed.²⁰⁶

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 1985.²⁰⁷ Human rights lawyers were also targeted, which led the president of the American Bar Association to send a letter to Marcos expressing his concern over the extensive abuse of human rights lawyers.²⁰⁸ During his visit to the Philippines, the Pope criticized Marcos.²⁰⁹ As resistance to Marcos heightened, the United States, which had previously supported Marcos during his regime, pressured him to leave office because of fear of a communist takeover.²¹⁰

After twenty years in office, Marcos and his family fled to Hawaii along with the enormous wealth they amassed over the years.²¹¹ When he was first elected Marcos was worth approximately \$30,000; when he left office in 1986 his net worth was estimated to be \$15 billion.²¹² No criminal investigation of Marcos or his human rights abuses, including torture, arbitrary detention, summary execution, disappearance, ²¹³ever 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

²⁰⁶ *Id.*

²⁰⁷ See STEPHENSON, *supra* note 131.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *Ferdinand*, 910 F. Supp. at 1462.

2014]

JUSTICE OR PEACE?

163

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.²¹⁴

IV. ERA OF ACCOUNTABILITY

Hirohito, Amin, Duvalier, Marcos and others were never held accountable largely because of Cold War politics and the desire to avoid further bloodshed and unrest. 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."²¹⁵ There are still transgressors who go unpunished,²¹⁶ 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. Unlike the era of impunity, the current emphasis is on attaining justice. 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.

²¹⁴ See Belinda A. Aquino, *Justice Finally Achieved for Victims of Marcos*, HONOLULU STAR ADVERTISER, Feb. 1, 2011.

²¹⁵ At ICC Review Conference, Ban Declares End to 'Era of Impunity,' UN NEWS CENTER, UN NEWS SERVICE, available at <http://www.un.org/apps/news/story.asp?NewsID=34866>.

²¹⁶ 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 & 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 (2012).

A. Greater Use Of Universal Jurisdiction

Since the end of the cold war, the principle of universal jurisdiction has been invoked more frequently as the basis for prosecuting human rights violators. 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.²¹⁷ During his tenure, harsh techniques including torture, executions and disappearances were used against his political opponents.²¹⁸ 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.²¹⁹ After Pinochet settled in England, Spain initiated a prosecution for torture committed during his presidency and sought his extradition.²²⁰ Pinochet claimed that he could not be prosecuted because of his former status as head of state.²²¹ 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.²²²

There have been other recent prosecutions based on universal jurisdiction.²²³ The courts of Denmark and Germany relied on universal jurisdiction in trying Croatian and Bosnian Serbs for war crimes committed in Bosnia.²²⁴ Courts in Bel-

²¹⁷ See J. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of State*, 50 CASE W. RES. 127, 131 (1999).

²¹⁸ *Id.* at 131-32.

²¹⁹ *Id.* at 132.

²²⁰ *Id.* at 144-45.

²²¹ *Id.* at 145.

²²² *Id.* at 149.

²²³ 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).").

²²⁴ *In Director of Public Prosecutions v. T* (Danish court tried the defendant for war crimes committed against Bosnians in the territory of the former

gium and Canada have invoked universal jurisdiction as a basis for prosecuting individuals involved in the Rwandan genocide.²²⁵ Finally, the United States used universal jurisdiction to justify the prosecution of Charles Taylor, Jr. for torture committed in Sierra Leone in the 1990s.²²⁶

ii. 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 the atrocities committed in those countries was simply too much for any judicial system to handle.²²⁷ Furthermore, domestic prosecutions are sometimes blocked because of amnesties and immunities.²²⁸ 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 “per-

Yugoslavia). See Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 341 (1999) (The German Federal Supreme Court upheld the conviction of a Bosnian Serb for committing acts of genocide in Bosnia) See William J. Aceves, *United States of America—a safe haven for torturers*, 5 INT’L L. UPDATE 52 (1999) (German Federal Supreme Court Upholds its Jurisdiction to Prosecute Serb National for Genocide Based on his Role in “Ethnic Cleansing” that Occurred in Bosnia and Herzegovina).

²²⁵ 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.).

²²⁶ See *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).

²²⁷ DUNHOFF ET AL., *INTERNATIONAL LAW: NORMS ACTORS PROCESS*, 609-10 (3rd ed. 2010).

²²⁸ See White *supra* note 218.

sons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991.”²²⁹ 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 violations of international humanitarian law in the territory of Rwanda between 1 January 1994 and 31 December 1994.”²³⁰

iii. International Criminal Court

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.²³¹ The treaty was finalized in 1998, and it went into effect in 2002.²³² The Treaty of Rome contains a 128-article statute which creates a permanent court, the ICC, with compulsory jurisdiction and an independent prosecutor.²³³ The ICC has jurisdiction over four crimes: genocide, crimes against humanity, war crimes and crimes of aggression.²³⁴ 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.²³⁵ The ICC can receive cases from either any state party or the UN Security Council or

²²⁹ 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, *Seeking Justice in the Killing Fields*, 99 A.B.A. J. 50, 54 (March 2013).

²³⁰ Statute of the ICTR, adopted by UNSC Resolution 955 (1994), 8 November 1994. As of March 2013, the ICTR has completed 72 cases, including 10 acquittals. See Abby Seiff, *Seeking Justice in the Killing Fields*, 99 A.B.A. J. 50, 54 (March 2013).

²³¹ Information about the ICC’s creation is available on its website: <http://www.icc-cp.int/Pages/default.aspx>.

²³² *Id.*

²³³ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

²³⁴ Rome Statute, art. 5.

²³⁵ Rome Statute, art. 12.

2014]

JUSTICE OR PEACE?

167

the prosecutor can initiate an investigation.²³⁶ 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.²³⁷

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.²³⁸ These three states have engaged in activities that could amount to cognizable crimes under the statute - China's activities in Tibet,²³⁹ Russia's military action in Chechnya,²⁴⁰ and the United States in Iraq, Afghanistan and Guantanamo Bay.²⁴¹ 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.²⁴² 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 Africa through the territory of various state parties and has not been arrested. Finally, the statute provides the court with "complimentary" jurisdiction.²⁴³ As a result, the

²³⁶ Rome Statute, art. 13.

²³⁷ Rome Statute, art. 27.

²³⁸ A list of state parties is available on the ICC's website, *supra* note 230.

²³⁹ See, *Annual Report 2013 - China*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/region/China/report-2013>.

²⁴⁰ See *Annual Report 2013 - Russian Federation*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/Russia/report-2013>.

²⁴¹ See *Annual Report 2013 - United States*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/region/usa/report-2013#section-157-3>.

²⁴² 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 . . .").

²⁴³ Rome Statute, art. 17.

ICC is required to defer to domestic courts as long as they are both genuinely willing and able to act.²⁴⁴

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.” 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.”

V. 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.”²⁴⁵

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 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:

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

²⁴⁴ Rome Statute, art. 17.

²⁴⁵ Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT’L L. & POL’Y 77 (2001).

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.²⁴⁶

Examples of the different approaches addressing 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 2002.²⁴⁷ The fighting initially began as a struggle between factions but was later focused against the government.²⁴⁸ Rebels of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) led the war against the government.²⁴⁹ 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).²⁵⁰ The conflict in Sierra Leone became widely known around the world for the practice of amputating limbs of civilians.²⁵¹ Machetes were used to amputate one or both hands, arms, feet, legs, ears, or buttocks and one or more fingers.²⁵² The victims would often have to finish the amputation or would be forced to select which body part they wanted to be amputated.²⁵³ They were told to take their amputated limbs to the President.²⁵⁴ Civilians also had one or both of their eyes gouged out, suffered gunshot wounds to the head, torso and limbs, burns from explosives and other devices

²⁴⁶ *Id.* at 94.

²⁴⁷ Priscilla Hayner, *Negotiating peace in Sierra Leone: Confronting the Justice Challenge*, HD REPORT, (2007), available at http://www.hdcentre.org/uploads.tx_news/90NegotiatingpeaceinSierraLeone-ConfrontingtheJusticechallenge.pdf.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ VanDyke, *supra* note 244 78-79.

²⁵¹ *Id.*

²⁵² *Id.* at 78.

²⁵³ *Id.*

²⁵⁴ *Id.*

and were injected with acid.²⁵⁵

Women and children especially suffered during the civil war. Many children were forced into fighting.²⁵⁶ They were also murdered, beaten, mutilated, tortured, raped and sexually enslaved.²⁵⁷ Women and girls were victims of gang rapes at gunpoint or knifepoint.²⁵⁸ 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.²⁵⁹ Witnesses reported seeing the mutilated bodies of pregnant women whose fetuses were cut out of the wombs or shot to death in their abdomen.²⁶⁰

On July 7, 1999, all the warring factions signed a peace accord.²⁶¹ The rebels were given key posts in the government in exchange for a cease-fire.²⁶² A key provision of the agreement provided a blanket amnesty to all groups for war crimes and crimes against humanity that occurred during the civil war.²⁶³ Although the grant of blanket amnesty for such egre-

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 79.

²⁶⁰ *Id.*

²⁶¹ Priscilla Hayner, *December 2007 Report, Negotiating peace in Sierra Leone: Confronting the justice challenge*, 5 (Dec. 2007).

²⁶² *Id.* at 21.

²⁶³ *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.).

2014]

JUSTICE OR PEACE?

171

gious crimes was opposed by the United Nations²⁶⁴ and international human rights groups,²⁶⁵ nearly everyone involved in the talks or who closely observed them, agreed that the amnesty was necessary for a peace agreement to be reached:

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 considered the urgency to end the war to be 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.’²⁶⁶

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 to] get a clear picture of the past in order to facilitate genuine healing and reconciliation.”²⁶⁷ The agreement also provided for a Special Fund for War Victims to make reparation to the victims.²⁶⁸

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

²⁶⁴ 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.” *Id.* at 5.

²⁶⁵ The grant of blanket amnesty was opposed by Amnesty International and Human Rights Watch. *Id.* at 23.

²⁶⁶ *Id.* at 17. (. . . “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.”) *Id.* at 6; (“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.”). *Id.* at 24.

²⁶⁷ *Id.* at 19.

²⁶⁸ *Id.* at 20.

and flagrantly violating the peace accords.²⁶⁹ A Special Court for Sierra Leone was founded in 2002 through an agreement between the Government of Sierra Leone and the United Nations.²⁷⁰ The Special Court was a “hybrid” court consisting of both national and international judges, prosecutors, defense counsel and other personnel.²⁷¹ In 2003, the Court indicted thirteen individuals including Foday Sankoh.²⁷² Those convicted include three former members of the AFRC, two former members of the CDF, and three former members of the RUF.²⁷³ 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.²⁷⁴ He was subsequently convicted, the first former head of state convicted by an international tribunal since Nuremberg, and sentenced to 50 years.²⁷⁵ The combination of amnesty, a Truth and Reconciliation Commission, prosecutions and reparations has finally brought peace to Sierra Leone.

B. South Africa

Apartheid was the official policy of the white minority South African government from 1948 to 1993. In order to maintain white supremacy, the white minority enacted hundreds of laws to control and disadvantage the black majority and other non-whites.²⁷⁶ For instance, every South African was classified into one of four racial categories: white, black, colored and oth-

²⁶⁹ *Id.* at 25.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 26.

²⁷² *Id.* Sankoh died in 2003 of natural causes while in custody and therefore he was never tried.

²⁷³ See generally Special Court For Sierra Leone, <http://www.scl.org/ABOUT/tabid/70/Default.aspx> (presenting information about aforementioned cases).

²⁷⁴ Marlise Simons and David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES, May 30, 2012, <http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html>.

²⁷⁵ *Id.*

²⁷⁶ *The Truth and Reconciliation Report of South Africa Volume 1*, The DOJ & CD 448, 97 (Oct. 29, 1998), available at, http://www.justice.gov.za/reportfiles/other/PresFund_ANR_2007-08.pdf (including a full list of all the apartheid laws).

2014]

JUSTICE OR PEACE?

173

ers.²⁷⁷ The white minority resided in the most desirable areas of the country whereas black South Africans were not allowed to live in the cities.²⁷⁸ One of the most egregious apartheid era laws was the pass laws, which required blacks to carry a pass whenever they were outside their home areas, and failure to carry a pass would result in either a fine or imprisonment.²⁷⁹ Black South Africans, additionally, were not allowed to vote,²⁸⁰ and certain jobs were reserved for whites only.²⁸¹ The education of blacks was controlled by the government and was designed to produce a subservient and obedient labor force.²⁸² Blacks were not allowed to use public facilities such as parks, libraries, zoos, beaches and sports grounds.²⁸³ 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.²⁸⁴

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 black majority. In order to maintain white

²⁷⁷ The Population Registration Act defined a white person as “one who is in appearance obviously white – and generally accepted as Coloured – or who is generally accepted as White – and is not obviously Non-White, provided that a personal shall not be classified as a White person if one of his natural parents has been classified as a Coloured person or a Bantu.” *Id.* at 30. Blacks were classified as Bantu defined as “a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.” *Id.* Coloureds were defined as someone “who is not a white person or a Bantu.” *Id.*

²⁷⁸ The 1950 Group Areas Act restricted where blacks could live. *See Id.* at 31.

²⁷⁹ The Black (Native) Laws Amendment Act No. 54 was enacted in 1952. *See Id.* at 454.

²⁸⁰ The 1951 Separate Representation of Voters Act No. 46 and the 1956 South Africa Act Amendment Act No. 9 disenfranchised voters of color. *Id.* at 453, 456.

²⁸¹ For instance, the Black Building Workers Act No. 27 of 1951 prohibited blacks from performing skilled work in the building industry in white urban areas. *Id.* at 453.

²⁸² *Id.* at 32.

²⁸³ *Id.*

²⁸⁴ J. Vora and Erika Vora, *The Effectiveness of South Africa's Truth and Reconciliation Commission; Perceptions of Xhosa, Afrikaner, and English South Africans*, 34 J. OF BLACK STUDIES 301, 304 (2004).

domination, the government had to commit egregious human rights violations, including torture, murder, beatings, disappearances, detentions and imprisonment. In addition, the government outlawed and jailed its political opponents. For instance, the government banned the leading black anti-apartheid opposition group, the African National Congress (“ANC”)²⁸⁵ and the leader of the ANC, Nelson Mandela, was imprisoned for twenty-seven years.²⁸⁶

The international community sought to put pressure on the South African government to dismantle its system of apartheid by imposing economic sanctions.²⁸⁷ Eventually the sanctions and the international isolation forced many South African whites to the realization that they could not maintain the system of apartheid, and that attempting to do so would only lead to civil war and political instability. The white minority, after all, 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.²⁸⁸ A key issue in the negotiations was what to do about those who had committed human rights violations during the apartheid era²⁸⁹. 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”).²⁹⁰

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 de-

²⁸⁵ *Id.* at 302.

²⁸⁶ *Id.*

²⁸⁷ See generally Philip I. Levy, *Sanctions On South Africa: What Did They Do?*, Economic Growth Center (February 1999), available at aida.wss.yale.edu/growth_pdf/cdp796.pdf (reviewing the sanctions imposed on South Africa by the international community).

²⁸⁸ Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Façade?*, 95 AM J. INT’L L. 32, 33 (2001).

²⁸⁹ *Id.* at 34.

²⁹⁰ *Id.* at 36-39.

2014]

JUSTICE OR PEACE?

175

mocracy.”²⁹¹ 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.”²⁹² 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.²⁹³ 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.²⁹⁴

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:

The Commission sought to uncover the truth about past abuses. This was part of ‘the struggle of memory against forgetting’ referred to by Milan Kundera. But it was, at the same time, part of the struggle to overcome the temptation to remember in a partisan, selective way: to recognise that narrow memories of past conflicts can too easily provide the basis for mobilisation. towards further conflicts, as has been the case in the former Yugoslavia and elsewhere. An inclusive remembering of painful truths about the past is crucial to the creation of national unity and transcending the divisions of the past.²⁹⁵

²⁹¹ *Id.* at 32.

²⁹² *Id.*

²⁹³ *Id.* at 34 (According to Minister of Justice Dullah Omar, “without an amnesty agreement there would have been no elections”).

²⁹⁴ *Id.* at 36. *quoting* South African Justice Richard Goldstone.

²⁹⁵ S. Afr. Truth and Reconciliation Comm’n, *Final Report of the Truth and Reconciliation Commission*, vol. 1, chapter 5, p.116 (1998).

Not every perpetrator was granted amnesty.²⁹⁶ 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.²⁹⁷ Amnesty applicants who failed to satisfy these requirements would be liable to criminal prosecution.²⁹⁸ The amnesty applicant did not have to make a formal apology, or indicate that they were remorseful for their actions.²⁹⁹

The TRC began its work in 1996 and concluded in 1998.³⁰⁰ The TRC conducted hearings in town halls, civic centers and churches across South Africa. The proceedings were televised to the entire nation.³⁰¹ The TRC heard from over 21,000 victims³⁰² and from those perpetrators who were granted amnesty.³⁰³ Many studies done after the TRC concluded its work found that the TRC was a success.³⁰⁴ As a result, South Africa today is free of political violence.

Between 1974 and 1994, at least 15 truth commissions were established in other nations with varying success.³⁰⁵ The

²⁹⁶ See generally *Amnesty Hearings & Decisions*, TRUTH AND RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/amtrans/index.htm> (receiving a total of 7112 amnesty applications of which 849 were granted amnesty).

²⁹⁷ See generally Therese Abrahamsen & Hugo van der Merwe, *Reconciliation through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission* (2005) (research report written for the Centre for the Study of Violence and Reconciliation), available at <http://www.csvr.org.za/docs/trc/reconciliationthroughamnesty.pdf>.

²⁹⁸ McGregor *surpa* note 288 at 39.

²⁹⁹ Abrahamsen, *supra* note 297.

³⁰⁰ Vora, *supra* note 284 at 302.

³⁰¹ Abrahamsen, *supra* note 297.

³⁰² Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Japanese War Crimes*, 11 TUL. J. INT'L & COM. L. 59, 99 (2003).

³⁰³ See Vora, *supra* note 284 at 305.

³⁰⁴ *Id.* at 307-21 (finding that black South Africans and whites believed that the TRC was effective in bringing out the truth.); James L. Gibson, *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).

³⁰⁵ See Vora, *supra* note 284 at 303 (Truth Commissions were established in various countries such as Argentina, Bolivia, Chile, Uruguay, El Salvador,

2014]

JUSTICE OR PEACE?

177

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 gross 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.

VI. PROPOSAL

A. Amend ICC statute

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 needs to be amended in order to provide the international community more flexibility in handling these situations. Article 16 of the statute presently allows the United Nations Security Council to delay investigations and prosecutions for 12 months.³⁰⁶ However, perhaps 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 an 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.

The situation in Syria can be used to provide an example of how the proposal would work in practice. Suppose the United States and Russia engage in negotiations with the Syrian government and the opposition aimed at ending the civil war. One major impediment to reaching an agreement might be the prospect of criminal prosecutions. For instance, the United Nations Human Rights Council has already called on the Security

Rwanda, Ethiopia, Chad, Zimbabwe, Germany, the Philippines, and others).

³⁰⁶ Rome Statute, art. 16.

Council to refer the perpetrators of human rights atrocities in Syria to the ICC for prosecution.³⁰⁷ Thus, it is unlikely that either side would agree to a deal ending the war without some assurance that they will not be prosecuted. At present, they could not be given such an assurance. Even in the event of a peace agreement, the ICC would still have the authority to bring criminal charges in the event of a referral from the Security Council.³⁰⁸ There would be a lot of pressure by human rights groups and governments to prosecute given the extent of the atrocities. The most that the Security Council could do under Article 16 is to delay the investigation and prosecution for twelve months.³⁰⁹ The proposal would allow the Security Council to permanently suspend any investigation and prosecution if it determines that doing so would be in the best interest of international peace and security.

It is not hard to imagine that if situations similar to Haiti, Uganda, the Philippines and South African were to occur during the era of accountability, the leaders of those nations would not agree to relinquish power. South Africa, for instance, was only able to avert a civil war because of the amnesty that was provided. Without amnesty, a civil war would have been inevitable, the repression of non-whites would have worsened and the bloodshed, destruction and loss of life would have been devastating. In Haiti, Duvalier agreed to leave a country that was deteriorating into chaos. It is doubtful that he would have departed if by doing so he faced the prospect of spending the remainder of his life in prison. The Ugandan war against Tanzania might have become more protracted and bloody if Amin faced the prospect of being put on trial in the event that he lost the war. It may be the case that leaders such as these should be brought to justice even if doing so prolongs a war or repression. The proposal would not prevent these individuals from being brought to justice; it merely provides the international community some flexibility to consider alternatives to prosecution depending on the situation.

³⁰⁷ February 2013 Report, *supra* at note 3.

³⁰⁸ See Rome Statute, art. 15, para. 1 ("The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.").

³⁰⁹ Rome Statute, art. 16.

2014]

JUSTICE OR PEACE?

179

B. Possible Objections

Some will have a legitimate concern that if Article 16 is amended, it will allow the permanent members of the Security Council³¹⁰ to control the ICC. The permanent veto³¹¹ is already resented by many nations and to allow the Security Council to permanently terminate criminal proceedings will only add to this resentment. Another 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 because of the concern that the veto would permit citizens of the permanent members of the Security Council to escape justice.³¹² Why then would the international community be receptive to a proposal that allows the permanent members of the Council to permanently suspend criminal proceedings?

The answer is that the proposal to amend Article 16 of the ICC statute differs from the United States' proposal. The United States proposal would not have permitted the prosecutor to commence any investigation and prosecution without prior Security Council authorization. The proposal to amend Article 16 does not place any such limitation on the prosecutor. No advance 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

³¹⁰ The permanent members of the Security Council are the United States, France, the United Kingdom, Russia and China. See U.N. CHARTER art. 23, para. 1.

³¹¹ Any one of the permanent members of the Security Council can veto a resolution of the Security Council thereby preventing it from becoming law). See U.N. CHARTER art. 27, para. 3.

³¹² See David Scheffer, *The United States and the International Criminal Court*, 43 AM. J. INT'L L. 12, 12-13 (1999).

180 *PACE INT'L L. REV. PUBLIC EDITION* [Vol. XXVI::2

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 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 the 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 President Assad and anti-government forces permitting them to go into exile. However, they will agree to the deal only if they have some assurance that they will not be prosecuted. The Security Council could then pass a resolution permanently suspending criminal proceedings against them as long as they do not attempt to return to power and as long as they do not interfere in the internal affairs of Syria. If any one of the five permanent members believes that there are compelling reasons for holding either Assad or the anti-government rebels accountable for their crimes, that nation could veto the resolution and the ICC proceedings against the perpetrators of the atrocities would continue.

The 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.³¹³ 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 the 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.

³¹³ See generally Jennifer K. Elsea, Cong. Research Ser., RL 31495, U.S. Policy Regarding The International Criminal Court (2006)), *available at* <http://www.fas.org/sgp/crs/misc/RL31495.pdf>.

VII. CONCLUSION

The international community has come a long way in a relatively short period of time. It wasn't long ago that the international community was unconcerned with how governments treated their own people. World War II significantly altered that view. The world is no longer willing to sit idly by while people are being mistreated by the governments that are supposed to protect them and make their lives better. Since World War II, numerous human rights violators have been prosecuted. Furthermore, an entire body of law and entire machinery exists in order to bring individuals to justice for violating internationally recognized human rights. These are laudable and remarkable accomplishments.

Despite the international laws and institutions that have been created to prevent war and protect human rights, nations and groups still engage in war and egregious human rights violations continue to occur. When wars break out, the warring sides almost always commit human rights violations. The prospect that they could be prosecuted for crimes they commit during war may make the parties reluctant to end the war without achieving total victory. Therefore, the very laws and institutions that were created to protect individuals may actually make it more difficult to attain peace. In those situations the international community is faced with a justice or peace dilemma. During the Cold War, the international community consistently preferred peace to justice. Since the end of the Cold War, the pursuit of justice is preferred. This article has put forth a proposal that permits the international community some flexibility when faced with this dilemma. Just as a prosecutor has discretion not to prosecute, this article puts forth a proposal that permits the international community to forgo prosecution and pursue other forms of justice when necessary, as was done in the transformation of South Africa from a repressive apartheid state, to a peaceful democracy.