

IS IT TIME FOR GLOBAL JUSTICE?  
INTERNATIONAL HUMAN RIGHTS AND WRONGS IN  
THE 21<sup>ST</sup> CENTURY

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Human rights are controversial,<sup>1</sup> yet the question posed in this Article – “is it time for Global Justice?” – begs several, critical, questions which must be addressed first. If humans *disagree* on which rights should be universal;<sup>2</sup> if human rights are “little more than thistledown, springing up at random and blowing away as time’s whirligig spins,”<sup>3</sup> then how on earth can there be *international* human rights?

Take the death penalty for example: is *it* a violation of human rights?<sup>4</sup> The answer varies from country to country and from time to time.<sup>5</sup> 46 of the 47 Council of Europe member states have now abolished the death penalty, affirming Protocol 6 of the European Convention on Human Rights, Russia being the lone exception.<sup>6</sup> Meanwhile, 30 American states retain the death

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<sup>1</sup> See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 22 (3rd ed. 2013) (“virtually everything encompassed by the notion of ‘human rights’ is the subject of controversy . . . .”) (quoting Chris Brown).

<sup>2</sup> See generally WILLIAM J. TALBOTT, *WHICH RIGHTS SHOULD BE UNIVERSAL?* at 3, 8, 9 (2005).

<sup>3</sup> STEPHEN SEDLEY, *LAW AND THE WHIRLIGIG OF TIME* 33 (2018).

<sup>4</sup> RON GLEASON, *THE DEATH PENALTY ON TRIAL: TAKING A LIFE FOR A LIFE TAKEN* 1, 6 (2009) (Gleason postulates whether the death penalty from a Christian perspective is justified); Shiv Malik & Mona Mahmood, *Mother of Saudi Man Sentenced to Crucifixion Begs Obama to Intervene*, *THE GUARDIAN* (Oct. 14, 2015, 7:35 AM) (“The application of Sharia law as far as human rights is concerned is the highest form of human rights. . . . [W]e are holding ourselves to the highest standards.”).

<sup>5</sup> William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 *Wash. & Lee L. Rev.* 797, 797, 799 (1998) (explaining that the “abolition of the death penalty stands as one of the sharpest examples of . . . the evolution of human rights norms . . .”).

<sup>6</sup> See Peter Hodgkinson et al., *Capital Punishment: A Review and Critique of Abolition Strategies*, in *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* 254 (Jon Yorke ed., 2016) (“Protocol No. 6 of the European Convention on Human Rights places restrictions on the use of the death penalty in peace time, an

penalty<sup>7</sup> and there are nearly three thousand inmates on death row.<sup>8</sup> Somalia also has the death penalty,<sup>9</sup> and so thirty American states and Somalia agree that the death penalty is not a violation of human rights.<sup>10</sup> Somalia and many of the American states also agree on what actions should be treated as crimes. Adultery is a crime in eighteen American states, as it is in Somalia (and many other countries).<sup>11</sup> In Michigan<sup>12</sup> and Wisconsin<sup>13</sup> it is classified as a serious crime – a felony (a perpetrator could be sentenced a year in prison).<sup>14</sup> Adultery is treated seriously in Somalia as well, especially if committed by a woman. For an unmarried woman, the sentence could be

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undertaking ratified thus far by 46 of the 47 member states of the Council of Europe, with Russia being the exception. The only . . . international human rights treat[y] which outlaws the death penalty in all circumstances is *Protocol No. 13 to the European Convention on Human Rights*. . . . 40 member states of the Council have ratified it.”)

<sup>7</sup> Some States have the death penalty on their books, but they have instituted a moratorium. See National Conference of State Legislatures, States and Capital Punishment (2019), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> (“Capital punishment is currently authorized in 29 states, by federal government and the U.S. military. . . . States across the country will continue to debate its fairness, reliability and cost of implementation.”).

<sup>8</sup> See Death Row, Death Penalty Information Center, [www.deathpenalty.info.org/death-row/overview](http://www.deathpenalty.info.org/death-row/overview) (counting 2,673 as of April 1, 2019).

<sup>9</sup> See Corporate Report Somalia, Foreign and Commonwealth Office (2015) (“Somalia’s use of the death penalty continued to be of concern. 13 executions were reported to have been carried out in Mogadishu between January and August, with several reports of public executions carried out in the presence of children.”)

<https://www.gov.uk/government/publications/somalia-country-of-concern--2/somalia-country-of-concern#freedom-of-expression-and-assembly>.

<sup>10</sup> National Conference of State Legislatures, *supra*, note 7; see also Corporate Report Somalia, *supra* note 10.

<sup>11</sup> Joanne Sweeny, *Adultery and Fornication: Why are States Rushing to Get These Outdated Laws Off the Books?*, SALON (May 6, 2019, 10:00 AM), <https://www.salon.com/2019/05/06/adultery-and-fornication-why-are-states-rushing-to-get-these-outdated-laws-off-the-books/>.

<sup>12</sup> See Mich. Comp. Laws Serv. § 750.30 (LexisNexis, Lexis Advance through Public Act 47 from the 2019 Legislative Session) (“Punishment—Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment.”).

<sup>13</sup> See Wis. Stat. Ann. § 944.16 (LexisNexis, Lexis Advance through Acts 1-8 and 10-18 of the 2019-2020 Legislative Session) (“Adultery. Whoever does either of the following is guilty of a Class I felony. . . .”).

<sup>14</sup> In Massachusetts, until recently, the sentence could be three years in prison. See Mass. Ann. Laws ch. 272, § 14 (LexisNexis, Lexis Advance through Chapter 70 of the 2019 Legislative Session with the exception of Chapter 47). The law was repealed by St. 2018, c.155 §2.

one hundred lashes. If a woman is married the sentence could be death<sup>15</sup> -- even death by stoning.<sup>16</sup> Is that a violation of human rights?<sup>17</sup> If so, is it because the punishment does not ‘fit the crime,’ or is it because this method of execution – death by stoning – is by itself a violation of human rights?<sup>18</sup> Maybe some would prefer the guillotine,<sup>19</sup> which was used in public executions in France until 1939 and in private executions until 1977.<sup>20</sup> In the US, of course, there are several available methods of execution.<sup>21</sup>

Two critical questions are raised by this example. Why is it anyone’s business what American States or Somalians do with their people? Should

<sup>15</sup> See *Somali woman stoned for adultery*, BBC (Nov. 18, 2009) <http://news.bbc.co.uk/2/hi/africa/8366197.stm> (An unmarried person who has sex before marriage is liable to be given 100 lashes).

<sup>16</sup> See *id.* (“Under al-Shabab’s interpretation of Sharia law, anyone who has ever been married - even a divorcee - who has an affair is liable to be found guilty of adultery, punishable by stoning to death.”).

<sup>17</sup> See *The World’s Muslims: Religion, Politics and Society*, Pew Research Center (2013). (Based on 38,000 face-to-face interviews, 89% of Pakistanis favoured stoning for adulterers and 76% supported the death penalty for those found guilty of apostasy.) <https://assets.pewresearch.org/wp-content/uploads/sites/11/2013/04/worlds-muslims-religion-politics-society-full-report.pdf>.

<sup>18</sup> See Kathryn Seifert, *Death By Stoning: Why is this Sickening Punishment Legal*, PSYCHOLOGY TODAY (Feb. 18 2014) <https://www.psychologytoday.com/blog/stop-the-cycle/201402/death-stoning-why-is-sickening-punishment-legal> (In Afghanistan, “[s]toning was the official punishment for many crimes under the Taliban rule, but the U.S.-led occupation helped end it as an official court ruling.”).

<sup>19</sup> See *Wood v. Ryan*, 759 F.3d 1076, 1102–1103 (9th Cir. 2014) (Kozinski, J. dissenting) (“Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful — like something any one of us might experience in our final moments... But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it...The guillotine is probably best but seems inconsistent with our national ethos.”).

<sup>20</sup> See Evan Andrews, *8 Things You May Not Know About the Guillotine*, HISTORY (Sept. 15, 2014) <http://www.history.com/news/history-lists/8-things-you-may-not-know-about-the-guillotine> (“[P]ublic beheadings continued in France until 1939.”); see also Peter Allen, *Off with their heads! France brings back the guillotine - but just in a museum as it's put on display for the first time*, DAILYMAIL (Mar. 17, 2010)

<http://www.dailymail.co.uk/news/article-1258613/Off-heads-France-brings-guillotine-just-museum-piece.html> (“The last guillotining in France took place as recently as 1977 when Hamida Djandoubi, a convicted murderer who had tortured and raped his victims, was beheaded at Baumettes prison in Marseille.”).

<sup>21</sup> See *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited Mar. 26, 2017) (explaining that 33 U.S. states allow death by lethal injection, 8 by electrocution, 3 by hanging and 2 by firing squad).

they not be able to choose their own rules – and rights? That is the first problem many people have with the very concept of *international* human rights. Not only that, but human rights themselves are controversial. There is a lack of consensus.<sup>22</sup> They are difficult to define;<sup>23</sup> there are honest differences of opinion as to what they should be;<sup>24</sup> they do not exist in a vacuum but reflect social and political choices. So, people wonder: if domestic human rights are problematic, if they are difficult to agree on and identify, how can there be universal, or fundamental, human rights? I will address these questions by exploring the genesis of international human rights.

The next question addressed is this: even if there can be international human rights, how can they be enforced? After all, many serious crimes – even felonies – are not investigated, let alone prosecuted (the adultery laws in the United States being a good example).<sup>25</sup> When it comes to ‘Global Justice’, however, there has been an additional barrier: the impunity claimed, widely acknowledged and, consequently, enjoyed by the leaders of sovereign states. How can dictators and demagogues, who behave as if they were

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<sup>22</sup> See Eric Posner, *The Case Against Human Rights*, *The Guardian* (Dec. 4 2014) <https://www.theguardian.com/news/2014/dec/04/sp-case-against-human-rights> (“In truly international human rights institutions, such as the UN human rights council, there is a drastic lack of consensus between nations.”).

<sup>23</sup> See *id.* (“[T]he existence of a huge number of vaguely defined rights ends up giving governments enormous discretion . . . . The failure of the international human rights legal regime is, then, rooted in the difficulty of reducing the ideal of ‘good governance’ to a set of clearly defined rules that can be interpreted and applied by trusted institutions. People throughout the world have different moral convictions.”). See also Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 *HUM. RTS. Q.* 1 (2010) (“Natural scholars believe human rights are founded in nature. However, they are aware that founding human rights on something akin to nature is unlikely to be universally compelling.”).

<sup>24</sup> See Daniel Jacobsen, *Freedom of Speech under Assault on Campus*, *CATO INSTITUTE* (Aug. 30, 2016) <https://www.cato.org/publications/policy-analysis/freedom-speech-under-assault-campus> (“The point is that sincere disagreement over rights claims makes less plausible the idea that they are self-evident truths.”).

<sup>25</sup> See Ethan Bronner, *Mass. among 23 states where adultery is a crime, but rarely prosecuted*, *BOSTON GLOBE* (Nov. 15 2012) <https://www.bostonglobe.com/news/nation/2012/11/15/adultery-still-crime-states-including-mass/KilPGRcFnAcT4CGmenFTKM/story.html> (“In most of those states, including New York, adultery is a misdemeanor. But in others — Massachusetts, Idaho, Michigan, Oklahoma, and Wisconsin — it is a felony, though rarely prosecuted.”).

'little gods on earth,' be held to account? This question is addressed by presenting a brief survey of Global Justice since the precedent of the Nuremberg Military Tribunal in 1945.

This paper then asks whether Global Justice should be supported or not? What are some of the pros and cons, particularly of the International Criminal Court (ICC)? Following on from this survey, this paper asks whether the United States can and should join the ICC system? This section reviews American hostility to the ICC, but it also sets out three reasons why that hostility might be misplaced. The final section, before a conclusion, considers the growing role of domestic courts exercising a so-called 'universal jurisdiction.'

## I THE GENESIS OF INTERNATIONAL HUMAN RIGHTS.

Honest differences of opinion on what rights, if any, should be regarded as 'fundamental' suggests that a search for an external principle to support human rights is ultimately fruitless and doomed to fail. And if it is impossible to give human rights "a self-evident and therefore impregnable foundation," then the list of human rights become, sooner or later, "victims of time and tide," or as Sir Stephen Sedley put it, quoting Shakespeare, a "whirligig of time."<sup>26</sup> In the end, Sedley argued that fundamental rights depend "not upon some external principle but upon consensus; and consensus shifts both with time and with place."<sup>27</sup>

If there can never be a permanent consensus on what constitutes a human *right*, it does not mean there cannot be a consensus on what constitutes a human *wrong*. Consider the Holocaust:<sup>28</sup> when Hungarian Jews were taken by force to Auschwitz-Birkenau in 1944, some were ordered to turn right (to the Labour Camp) others

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<sup>26</sup> Sedley, *supra* note 3, at 48 (referring to *Twelfth Night*).

<sup>27</sup> Sedley, *supra* note 3, at 42.

<sup>28</sup> Daniel Levy and Natan Sznaider, *The Institutionalization of Cosmopolitan Morality: the Holocaust and Human Rights*, 3:2 J. HUM. RTS. 143, 143–44, 149–50 (2004).

were ordered to turn left (to the Gas Chamber).<sup>29</sup> More than one million died after that fateful left turn.<sup>30</sup> In the Holocaust, two out of every three European Jews were exterminated – about six million.<sup>31</sup> The total number of all Holocaust victims numbered between twelve and eighteen million.<sup>32</sup>

Of course, human atrocities like the Holocaust were not new. The first modern genocide, occurring before the Holocaust, was ‘probably’ the Armenian genocide.<sup>33</sup> Between 1 and 1.5 million Armenians were massacred during the First World War.<sup>34</sup> ‘Probably’ is in quotation marks because the events in question are controversial: in Turkey it is a crime to allege it was genocide,<sup>35</sup> but in Switzerland it is a crime to deny it was genocide.<sup>36</sup> What is certain is that the word – genocide – was invented in the 1940s specifically with the Armenian massacre in mind.<sup>37</sup> Genocide has also become

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<sup>29</sup> See DEBORAH DWORK & ROBERT JAN VAN PELT, *AUSCHWITZ, 1270 TO THE PRESENT* 352 (1996) (Sarah Grossman, describing the 1944 arrival at Auschwitz, “My mother-in-law took the little one and went to the left. Regina, Esther, and I went to the right. To the left were all the people who were led to the gas chambers, crematorium, however you call it.”); see also RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 971 (Homes & Meier 1985) (“The victims were paraded in front of the physician who would then make spot decisions by pointing to the right for work or to the left for the gas chamber.”).

<sup>30</sup> *Id.* at 17, 254.

<sup>31</sup> See SEYMOUR ROSSEL, *THE HOLOCAUST: THE WORLD AND THE JEWS, 1933-1945* 16 (1992).

<sup>32</sup> See DAVID H. JONES, *MORAL RESPONSIBILITY IN THE HOLOCAUST: A STUDY IN THE ETHICS OF CHARACTER* 173 (1999) (“In addition to the 5 to 6 million Jews, the Nazis were also directly responsible for the death by starvation, shooting, and overwork of probably another 9 to 10 million human beings.”).

<sup>33</sup> See, *MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION, VOLUME 1: ARMENIAN GENOCIDE, BOSNIAN GENOCIDE, AND CAMBODIAN GENOCIDE* 135 (ed. Paul R. Bartrop & Steven Leonard Jacobs) (2015) (“The Armenian Genocide is one of the first modern genocides and represents the second-most studied genocidal massacre after the Holocaust.”).

<sup>34</sup> See VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* xxiv (1995).

<sup>35</sup> See LUDOVIC HENNEBEL & THOMAS HOCHMANN, *GENOCIDE DENIALS AND THE LAW* 24 (2011) (“The denial of the Armenian genocide is government policy in Turkey and part of the essential duties of its diplomatic missions...the criminalization of denial.”).

<sup>36</sup> See *id.* at 261 (Section 261b of the Swiss Criminal Code “[P]rohibits the denial, coarse minimization, and justification of genocides or other crimes against humanity...Swiss courts have interpreted the statutes in many occasions and extended its scope to the Armenian genocide.”).

<sup>37</sup> See Brian Hardzinski, *Why 'Genocide' Is Such A Disputed Term When Describing What Happened In Armenia*, NPR (April 24, 2015) <http://kgou.org/post/why-genocide-such-disputed-term-when-describing-what-happened-armenia> (describing Raphael Lemkin's

known, in international law, as the “crime of crimes.”<sup>38</sup> But what made the Holocaust unique in the history of human atrocities was the industrial scale of it--the mechanical extermination of an entire people.

After World War II the objective of “never again” led to many developments, including the creation of the United Nations.<sup>39</sup> One of its first tasks was to set up a Human Rights Commission, chaired by President Roosevelt’s widow, Eleanor,<sup>40</sup> to draft a Universal Declaration of Human Rights (UDHR).<sup>41</sup> It was a huge challenge. Could its members, with their very different cultural, religious, and philosophical traditions,<sup>42</sup> agree on a common language of human rights and identify rights which should be universal? Would the UN accept it? The amazing answer is that, over a period of two

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coining of the word ‘genocide,’ “He had in mind, of course, the Holocaust, which he was witnessing. But he also specifically mentioned the Armenian genocide. So from the very construction of the word, the Armenian situation was in mind.”). *See also*, PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* at 4, 109, 364 (2016).

<sup>38</sup> WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 11, 15 (Cambridge University Press, 2009) (“The 1948 Genocide Convention has become a vital legal tool in . . . [preventing] the ‘crime of crimes’ . . .”).

<sup>39</sup> *See* Meetings Coverage, Lessons of Second World War Must Continue to Guide United Nations Work, General Assembly Told During Meeting Marking Seventieth Anniversary, UN GA/11641 (May 5, 2015), <https://www.un.org/press/en/2015/ga11641.doc.htm> (“Having survived the catastrophe of the Second World War, humankind sought to embrace new means to prevent the recurrence of such tragic events. To that end, he said, the Organization was established to ensure unity and harmony among nations.”).

<sup>40</sup> *See* John F. Sears, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, FDR LIBRARY (2008) <https://fdrlibrary.org/documents/356632/390886/sears.pdf> (“Many people contributed to this remarkable achievement, but most observers believe that the UN Commission on Human Rights, which drafted the Declaration, would not have succeeded in reaching agreement without the leadership of the Commission’s chair: Eleanor Roosevelt.”).

<sup>41</sup> *Id.* at 4 (“She possessed not only a passionate commitment to human rights, but a hard-earned knowledge of the political and cultural obstacles to securing them in a divided world.”).

<sup>42</sup> *Id.* at 5 (“The commission included Eleanor Roosevelt (United States), M. Paul Berg (Norway), René Cassin (France), Fernand Dehousse (Belgium), Victor Raul de la Torre (Peru), C.L. Hsia (China), K.C. Neogi (India), Dusan Brkish (Yugoslavia), and Nicolai Kiukov, later replaced by Alexander Borisov (USSR).”).

years,<sup>43</sup> they could agree, and, on December 10, 1948, their draft was adopted by the UN General Assembly.<sup>44</sup>

There were eight abstentions in the vote.<sup>45</sup> South Africa – which was about to launch Apartheid – could not sign up to equality.<sup>46</sup> Saudi Arabia rejected the freedom to choose religion, required by ratification.<sup>47</sup> The Soviet Union and its five puppet states rejected, among other things, the requirement that they protect their citizen’s freedom to leave the country.<sup>48</sup> Joseph Stalin’s representative, Andrey Vyshinsky, walked out of the Assembly claiming that the Declaration was nothing but “pious phrases.”<sup>49</sup> Eleanor Roosevelt, however, was more optimistic. She predicted: “This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.”<sup>50</sup> Her hope was for a ‘trickle-down’ effect (the idea that the Declaration would trickle down from the international level to the national level).

The reference to the Magna Carta was a reference to the great English Charter of 1215 which came to symbolise the fundamental principles of liberty and freedom that spread around the English-speaking world.<sup>51</sup> Historically, the Magna Carta’s “function” has been precisely that: “the nourishment of a deep-lying and long-term consensus that no power stands outside law and that

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<sup>43</sup> *Id.* at 10 (“The Commission on Human Rights had spent nearly two years crafting the Declaration.”).

<sup>44</sup> *Id.* at 4 (“The United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948 in the midst of an especially bitter phase of the Cold War.”).

<sup>45</sup> See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 21 (1999) (describing the choice by these eight, not to vote against the Declaration, but to abstain for various reasons).

<sup>46</sup> *Id.* at 27.

<sup>47</sup> *Id.* at 24 (describing the Saudi Arabian delegation’s objection to the Commission’s consideration of only Western values).

<sup>48</sup> *Id.* at 21, 74–75.

<sup>49</sup> See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 36 (2002) (quoting Vyshinsky as saying the Declaration was “[J]ust a collection of pious phrases.”).

<sup>50</sup> Jill LePorte, *The Rule of History: Magna Carta, the Bill of Rights, and the hold of time*, *THE NEW YORKER* (2015).

<sup>51</sup> See PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* at 13, 22, 39, 135, 136, 139, 154, 187, 188, 266 (2008).



there exist fundamental rights which no government, whether monarchical or elective, has power to deny.”<sup>52</sup>

The UDHR, though ground-breaking, was not the only human rights breakthrough in the aftermath of the Second World War. On December 9<sup>th</sup> 1948, the UN agreed in the Convention on the Prevention and Punishment of the Crime of Genocide not only to make genocide a crime under International Law but also to put Member States – now 149 – under a binding obligation to intervene, were another Holocaust to occur.<sup>53</sup> Additionally, the third Geneva Convention was adopted eight months after the UDHR with the aim of protecting the human rights of prisoners of war.<sup>54</sup>

These three: the Genocide Convention, the Geneva Convention and the UDHR formed the great post-war hope of ‘never again’, a strong position against certain ‘human wrongs.’<sup>55</sup> Arguably, it was this hope that led to the launching not only of the international human rights movement, but many of the domestic human rights movements we now see all over the world.<sup>56</sup> Today, it does not take long for almost any issue affecting people generally to be redefined as a human rights issue.

Of course, the UN did not ‘invent’ human rights. There has been a long history of the fight for human rights all around the world. In France and the United States, for example, the 18<sup>th</sup> century revolutions both talked about human rights (seen most prominently in the French Declaration of the Rights of Man

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<sup>52</sup> Sedley, *supra* note 3, at 4.

<sup>53</sup> See G.A. Res. 1021, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9 1948); See also Mark A. Drumbl, *Genocide: The Choppy Journey to Codification*, in PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL LAW: CORRELATING THINKERS (Morten Bergsmo & Emiliano J. Buis ed., Torkel Opsahl Academic Epubliser 2018).

<sup>54</sup> See G.A. Res. 972, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, (Aug. 12, 1949).

<sup>55</sup> See History of the Document, UNITED NATIONS, <https://un.org/en/sections/universal-declaration/index.html> (last visited Nov. 13, 2019) (explaining that “[t]he Universal Declaration of Human Rights . . . was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again.”).

<sup>56</sup> Levy and Sznajder, *supra* note 28, at 143, 154–155 (“Nothing legitimizes human rights work more than the slogan ‘Never Again!’”).

and Citizen and in the American Declaration of Independence).<sup>57</sup> However, these French and American ‘human rights’ are very different from the UDHR insofar as each attempts to describe the source of human rights. Both the French and the American versions make the same assumption: that human rights are in some way ‘natural – or God-given – rights.’<sup>58</sup>

Natural law envisions that human rights attach naturally to a person, in the same way that their shadow stays with them--they are inseparable.<sup>59</sup> That is why the French Declaration refers to the “natural, inalienable and sacred rights of man”<sup>60</sup> and the American Declaration of Independence (U.S. 1776) refers to “self-evident” truths that all men “are endowed by their Creator with certain unalienable [r]ights.”<sup>61</sup> In simple terms, the idea is that human rights are handed down by a god.

Whether or not this ‘natural human rights’ approach is appropriate in cultures such as France and the United States is debatable. Upon closer inspection, “[t]he grand sweep of self-evident truths begins to look time-warped and self-serving . . . what is perceived as a human right is itself determined, in large part, by a historical contest between self-interest and compassion.”<sup>62</sup> Jeremy Bentham’s critique of the ideology of the French Revolution is well-known: “natural rights is . . . nonsense upon stilts.”<sup>63</sup>

What is not debatable is that

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<sup>57</sup> See THOMAS PAINE, *RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH* 120 (Floating Press 2010) (1791) (“[T]he declaration of American independence . . . recognized the natural right of man, and justified resistance to oppression.”); see also LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 15–16 (The French Declaration of the Rights of Man and Citizen declared, the ‘natural, inalienable and sacred rights of man’ to be the foundation of any and all government.’).

<sup>58</sup> *Id.* at 15–16.

<sup>59</sup> See *id.* at 20–21, 23, 25–27.

<sup>60</sup> Declaration of the Rights of Man and of the Citizens Art. 4 (1789) (Fr.).

<sup>61</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>62</sup> Sedley, *supra* note 3, at 43, 47.

<sup>63</sup> Jeremy Bentham, *Anarchical Fallacies* (1796), in *THE WORKS OF JEREMY BENTHAM*, vol. 2 501 (John Bowring ed., 1843). Karl Marx also ridiculed ‘natural rights,’ arguing they were ‘bourgeois rights’ – a way to protect the wealthy and control the poor. So the opposition to ‘natural rights’ came from both sides of the political spectrum.

the approach was not of much use to the Armenians, nor was it capable of preventing the Holocaust. And, so it was, with war clouds gathering over Europe in the late 1930s, that a group of middle-class writers in England, who believed that human rights were still worth fighting for, realised that a new approach was needed. The main author of what would come to be called the Sankey Declaration<sup>64</sup> would be H.G. Wells, but other contributors would include Norman Angell, Viscount Sankey, J B Priestley, and A.A. Milne.<sup>65</sup> Their approach was straightforward. The fact was, as they put it, a person comes into the world through no fault of their own. And so, they claimed, justice requires that a person is entitled to what is needed to realise their full possibilities and potential of physical and mental development.<sup>66</sup> In a way, they sought to distinguish between natural law and natural rights. The latter are not ‘endowed,’ but are the consequence of a natural occurrence--being born. Therefore, as a matter of justice, a person should have access to food, shelter, clothing, education, and information.<sup>67</sup>

Together, they produced a Charter called the Sankey Declaration – in effect -- the first draft of what was to become the UDHR.<sup>68</sup> It is believed the British Royal Air Force dropped this Declaration in leaflets onto German tanks as they crossed into France in 1940.<sup>69</sup> It seems that the tank

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<sup>64</sup> Declaration of the Rights of Man and of the Citizens (1789) (Fr.).

<sup>65</sup> See David Boucher, THE LIMITS OF ETHICS IN INTERNATIONAL RELATIONS, NATURAL RIGHTS, AND HUMAN RIGHTS IN TRANSITION 247 (2009) (describing the document called Sankey Declaration that inspired much in the Universal Declaration of Human Rights); see also Karina Weller, Karina Weller, *What Is The Universal Declaration Of Human Rights?* RIGHTSINFO (Sept. 28, 2016) <https://rightsinfo.org/universal-declaration-human-rights/>.

<sup>66</sup> See *id.* at 247; see also ALASTAIR DAVIDSON, THE IMMUTABLE LAWS OF MANKIND: THE STRUGGLE FOR UNIVERSAL HUMAN RIGHTS at 428 (2012) (The Sankey Declaration “ended mainly as a reaffirmation of the British traditions going back to Magna Carta . . .”).

<sup>67</sup> See Boucher *id.*

<sup>68</sup> See WILLIAM A SCHABAS, THE TRIAL OF THE KAISER 100–01 (2018) (As Schabas points out: “International criminal justice . . . took its first hesitant steps at the Paris Peace Conference” at the end of World War I. It was the “crucible for what became, decades later, the international human right legal framework.” Article 1 of the Treaty of Versailles “is the ancestor of provisions of the Universal Declaration of Human Rights.” He emphasises, however, that these developments were “still quite embryonic.”).

<sup>69</sup> Geoffrey Robertson QC, ‘Ending Impunity: The Struggle for Global Justice,’ Lecture delivered at the School of Oriental and African Studies, University of London, (December

commanders did not stop to read it, as they continued their invasion. But one person who did read it, a friend of HG Wells, was the American President, Franklin Delano Roosevelt.<sup>70</sup> The Sankey Declaration likely inspired his famous Four Freedoms speech in January 1941.<sup>71</sup> This was his State of The Union address when he announced he wished to end America's isolationism and be prepared to support allies fighting in Europe.<sup>72</sup> The speech helped to justify bringing America into the Second World War, which he did after the Pearl Harbor attack in December 1941.<sup>73</sup>

He argued that America should be prepared to fight for four freedoms: (1) freedom of speech, (2) freedom of worship, (3) freedom from want, and (4) freedom from fear.<sup>74</sup> He added that this was a fight for four freedoms everywhere in the world, not just in America.<sup>75</sup> This meant that, for the first time in history, America should fight for international human rights.

After the War ended, Eleanor Roosevelt's Commission came up with the UDHR.<sup>76</sup> It was based not on natural law ideas, but on the notion of on human dignity; not on a political ideology, but on the idea of universal duties shared by all of humanity.<sup>77</sup> The belief was that these ideas of dignity and respect transcend political and religious divisions.<sup>78</sup> The claim was also that human rights

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2012), available at [youtube.com/watch?v=kROj5QM0i2Y](https://www.youtube.com/watch?v=kROj5QM0i2Y); See RICHARD G. DAVIS, BOMBING THE EUROPEAN AXIS POWERS: A HISTORICAL DIGEST OF THE COMBINED BOMBER OFFENSIVE, 1939–1945, at 10–12 (2006); See also *A Survey of Leaflet Propaganda, 1939-1945*, PSYWAR (Apr. 10, 2016), <https://www.psywar.org/content/aSurveyOfLeafletPropaganda>.

<sup>70</sup> See Boucher, *supra* note 66, at 247.

<sup>71</sup> See ROBERT FRANKEL, OBSERVING AMERICA: THE COMMENTARY OF BRITISH VISITORS TO THE UNITED STATES, 1890-1950 at 222–223 (2007) (“[T]he declaration was also forward-looking and anticipated Roosevelt’s Four Freedoms.”).

<sup>72</sup> See generally THE FOUR FREEDOMS, [fdrfourfreedomspark.org/fdr-the-four-freedoms](https://www.fdrfourfreedomspark.org/fdr-the-four-freedoms) (last visited Oct. 6, 2019).

<sup>73</sup> Frankel, *supra* note 72, at 219.

<sup>74</sup> The Four Freedoms, *supra* note 73.

<sup>75</sup> *Id.*

<sup>76</sup> See Sears, *supra* note 41.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

based on these ideas are mutual in character.<sup>79</sup> That is to say: while a person's claim of respect is an individual claim, and an individual human right, that claim to respect only works if the person also respects others; that is an individual responsibility.<sup>80</sup> In other words, these human rights are mutual--a right and a responsibility.<sup>81</sup> They are based on the fundamental idea that all members of humanity share an "inherent dignity."<sup>82</sup> Article 1 of the UDHR spells it out: "All human beings are born free and equal in dignity and rights."<sup>83</sup> It is Article 1 that essentially answers the question: why have human rights at all? It is because of the dignity and worth of every single human being.

But, there is a second answer that emerges after considering this background to the UDHR. If human rights are *not* protected or if there is contempt for human rights, not only will it lead to atrocities (like the Holocaust), but people will fight back.<sup>84</sup> As Cherif Bassiouni, the lawyer instrumental in setting up the International Criminal Court, put it: "when people feel aggrieved, they cannot reconcile."<sup>85</sup> In other words, human rights abuses lead, sooner or later – and inevitably – to

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<sup>79</sup> See Mia Giacomazzi, *Human Rights and Human Responsibilities: A Necessary Balance* 3 SANTA CLARA J. INT'L L. 164, 165, 172–74 (2005).

<sup>80</sup> *Id.* ("In 1999, The UN General Assembly adopted resolution 53/144, entitled 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.'").

<sup>81</sup> See *id.* ("The Declaration of Human Rights and Responsibility presents affirmative duties on states to take measures to promote understanding of civil, political, economic, social and cultural rights."); see also Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 565-566, 568, 578, 595 (2001) (expressing frustration regarding the lack of attention paid to the responsibilities that accompany rights).

<sup>82</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). As Nelson Mandela put it: "To deny people their human rights is to challenge their very humanity." Nelson Mandela, Address to the Joint Sess. of the House of Cong., D.C. (June 26, 1990).

<sup>83</sup> *Id.* art 1.

<sup>84</sup> See George K. Foster, *Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights: Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 n. 191 (2013) (citing Arthur N. Holcombe, Human Rights in the Modern World 1 (1948) (suggesting that violations of human rights are an "underlying cause of war").

<sup>85</sup> R.C. Longworth, *Peace vs. Justice*, CHICAGO TRIBUNE (Sept. 2, 1994), <https://www.chicagotribune.com/news/ct-xpm-1994-09-02-9409020220-story.html>.

conflict and war.<sup>86</sup> Respect for human rights therefore is important not only for those who need protection now, but for everyone--anyone might need protection in the future.<sup>87</sup> That, in short, is the point of international human rights. As Martin Luther King famously put it: “Injustice anywhere is a threat to justice everywhere,”<sup>88</sup> which is why everyone needs global justice and why there seems to be a decision to make--do we want global justice or global revenge?<sup>89</sup>

## II. CAN INTERNATIONAL HUMAN RIGHTS BE ENFORCED?

It is, of course, one thing to identify a ‘need’ for Global Justice, it is quite another to deliver it. Historically, in international law, it has been very difficult to hold leaders accountable for human rights abuses<sup>90</sup> because of the doctrine of Sovereign Immunity and the idea that States are Sovereign.<sup>91</sup> What this means in practice is that the leader of a Sovereign State is immune from legal action.<sup>92</sup> The issue remains alive today and we await an opinion of the International Court of Justice.<sup>93</sup>

Impunity means that a leader need not care or pay

<sup>86</sup> See Foster, *supra* note 85, n. 191.

<sup>87</sup> CHANDRA LEKHA SRIRAM ET AL., *WAR, CONFLICT AND HUMAN RIGHTS: THEORY AND PRACTICE* 7, 8 (Revised & Updated 3rd ed. 2018) (examining the importance of addressing human rights’ protections).

<sup>88</sup> DR. MARTIN LUTHER KING, *LETTER FROM BIRMINGHAM JAIL*, 1 (1963).

<sup>89</sup> DR. HANS KÖCHLER, *GLOBAL JUSTICE OR GLOBAL REVENGE: INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS* 1, 2, 5 (Springer, 2003).

<sup>90</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 224 (2005) (“[I]t has failed to transcend the problem of enforcement . . .”).

<sup>91</sup> HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 537, 576 (Sir Frank Berman ed., Oxford University Press 3rd ed. 2013).

<sup>92</sup> See European Convention on State Immunity, E.T.S. No. 074 (1972); see also Allan Pellet, *Responsibility of States in Cases of Human-rights or Humanitarian-law Violations*, in *THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES* 242 (James Crawford et al eds., 2017) (“the fundamental principle guaranteeing immunity of leaders – including Heads of State . . .”).

<sup>93</sup> Permanent Rep. of Kenya to the U>N., Letter dated July 9, 2018 from the Permanent Rep. of Kenya to the United Nations addressed to the Secretary-General, U.N. Doc. A/73/144 (July 9, 2018).

attention to consequences.<sup>94</sup> Impunity is a very dangerous concept. The Nazis, for example, may have been encouraged by fact that the Kaiser (after World War I) was not prosecuted for invading Belgium, or for ordering his submarines to attack civilian ships.<sup>95</sup> The Treaty of Versailles<sup>96</sup> did call for an international criminal trial to be held, but it never took place.<sup>97</sup> No action was taken after the Armenian massacres either.<sup>98</sup> Impunity may have encouraged Hitler to pursue the Holocaust and to encourage his troops, as they crossed the Polish border, to show no mercy to the Poles.<sup>99</sup> He famously – or infamously – specifically said to them: ‘Who, after all, speaks today of the extermination of the Armenians?’<sup>100</sup> After World War II, impunity was discussed by the victorious Allies. In fact, there was a furious debate, especially between

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<sup>94</sup> See also NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 22 (1995) (quoting Jeremy Bentham’s description of the effect of impunity, “[F]rom impunity to delinquency in all shapes [and from] impunity to maleficence in all shapes . . .”).

<sup>95</sup> Albert Shaw, *The Trial of the Former Kaiser* 61 *THE AMER. REV. OF REVS* 85 (1920) (“[I]n the end it was unanimously decided that a report could not be made charging the Kaiser with legal criminality for beginning the war or for invading Belgium and Luxemburg.”).

<sup>96</sup> Treaty of Versailles, 28 June 1919.

<sup>97</sup> See *THE TRIAL OF THE KAISER*, *supra* note 69, at 110, 158, 293, 311, 315 (After France, Britain and Italy agreed to try the Kaiser, there was initial American opposition: “The Americans didn’t want to try the Kaiser at all . . . were also opposed to the creation of an international tribunal.” “The Americans were strenuously opposed to the proposed international criminal court.” In the end, however, President Woodrow Wilson eventually compromised and agreed to the trial of the Kaiser. Article 227 of the Treaty of Versailles provided for the creation of a special tribunal (and the decision was made to hold the trial of the Kaiser in England). The US Senate refused to ratify the Treaty, although “the reasons for its disagreements had nothing to do with article 227, which it accepted.” In the end, the Dutch (neutral in World War I) refused to hand over the Kaiser, who spent his remaining days in Doorn – somewhat ironic given The Hague’s modern role as the centre of international criminal justice. The Kaiser died in 1941. Schabas’s conclusion is that “Inept diplomacy, misunderstanding, and royalist meddling all contributed to the failure to bring Kaiser Wilhelm II to justice.”).

<sup>98</sup> See Susan L. Karamanian, *The International Court of Justice and the Armenian Genocide*, in *THE ARMENIAN GENOCIDE LEGACY* 87 (Alexis Demirdjian, ed., 2016) (“The international community’s failure to hold Turkey accountable for the Armenian Genocide and for its steadfast silence and ultimate denial of the genocide challenges the relevance of international law.”).

<sup>99</sup> See Congressional Record-Senate, pp. S4713-S4715, by Senator Carl Levin (D-Mich.) (April 24, 1984).

<sup>100</sup> See *id.* (Hovannisian’s 1983 speech quoting Hitler was read into the Congressional Record-Senate as part of his remarks entitled. “69th anniversary of Armenian Martyrs’ Day”).

President Roosevelt's successor, President Truman and British Prime Minister Winston Churchill: what to do with the Nazi leaders?<sup>101</sup> Churchill wanted to use the medieval concept of outlawry.<sup>102</sup> This would mean that the top 75 Nazi leaders would be declared 'outlaws,' meaning they lost all legal protection.<sup>103</sup> This, after all, was what the Nazis themselves had done when they persecuted the Jews and others.<sup>104</sup> The Nazis would have 6 hours to say their prayers, and then they would be put before a firing squad.<sup>105</sup>

President Truman was not comfortable with this idea.<sup>106</sup> He argued that they must be given the fairest trial possible.<sup>107</sup> There was deadlock and it took none other than the Russian – Joseph Stalin to break the deadlock.<sup>108</sup> Of course, Stalin supported show trials, even fair trials – as long as everyone got shot at the end of the trial!<sup>109</sup> Thus it was Stalin's vote that led to the establishment of the

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<sup>101</sup> See also CHRISTOPHER H. PYLE, *GETTING AWAY WITH TORTURE: SECRET GOVERNMENT, WAR CRIMES, AND THE RULE OF LAW* 23-24 (2009).

<sup>102</sup> See *Outlaws and Outlawry in Medieval and Early Modern England*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/outlaws-outlawry-medieval-early-modern-england> (last visited Oct. 31, 2019); See Pyle *id.* at 23–24. (“[S]o that Nazi war criminals could be shot without trials . . . favor[ing] summary executions . . .”).

<sup>103</sup> See *Outlaws and Outlawry*, *id.* at 1; see also Jamie Doward, Hitler must die without trial – Churchill, THE GUARDIAN (Dec. 31, 2005) <https://www.theguardian.com/uk/2006/jan/01/secondworldwar.politics> (“The wartime leader argued passionately in cabinet meetings that Hitler was 'the mainspring of evil' and 'an outlaw', and said trials of top Nazis would simply be a 'farce'.”).

<sup>104</sup> See generally Facing History and Ourselves, *The Nuremberg Laws*, <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-6/nuremberg-laws> (last visited Nov. 20, 2019).

<sup>105</sup> See *id.* See also, Pyle *supra* note 102. See also, William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany*, pp. 233, 439 (2011).

<sup>106</sup> See generally Doward, *supra* note 104 (“Viscount Swinton, then Minister for Civil Aviation, was noted as telling the same meeting: 'However much we may favour summary execution, don't believe you will get Allied agreement. US won't and I gather Stalin won't. We must therefore compromise or proceed unilaterally.'”).

<sup>107</sup> See *id.* (“[T]he cabinet swung collectively against executions without trial . . .”).

<sup>108</sup> See *id.*; Robertson, *supra* note 70.

<sup>109</sup> See Harry M. Rhea, *The United States and International Criminal Tribunals: An Historical Analysis*, 16 ILSA J INT'L & COMP L 19, 22 (At the meeting of the International Conference on Military Trials in June 1945, the Soviet Union “. . .insisted that all defendants be found guilty at the end.”).



Nuremberg Military Tribunal in 1945,<sup>110</sup> and the idea that no one is immune from justice.<sup>111</sup> At

Nuremberg, twenty-two Germans were charged.<sup>112</sup> The Chief Prosecutor, the American Supreme Court Justice Robert Jackson, “brought the Holocaust into the courtroom.”<sup>113</sup> But, the evidence he presented was mostly the German’s own documents and photos, as well as the eyewitness evidence of survivors.<sup>114</sup> Some of the Defendants gave evidence as well, talking openly and frankly about the persecution of German Jews in 1930s, the killing of Jews in southern Ukraine in 1941, and the gassing of Jews at Auschwitz-Birkenau.<sup>115</sup> Judgment was given on October 1, 1946: twelve were sentenced to death, three received a life sentence, four were given ten to twenty years, three were acquitted.<sup>116</sup> One of them, the highest ranking, Hermann Goering, committed suicide by swallowing cyanide the night before judgment.<sup>117</sup>

There were three charges levelled against the Nazis.<sup>118</sup> Two of them were violations of the international laws of war, in other words, war crimes.<sup>119</sup> But it is the third charge that

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<sup>110</sup> London Agreements; Charter of the International Military Tribunal, Aug. 8, 1945: 59 Stat. 1544, 82 U.N.T.S. 279

<sup>111</sup> See Pyle, *supra* note 102, at 23–24.

<sup>112</sup> See *The Nuremberg Trials*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials> (last visited Sept. 14, 2019).

<sup>113</sup> See “We Will Show You Their Own Films”: *Film at the Nuremberg Trial*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/we-will-show-you-their-own-films-at-the-nuremberg-trial> (“As U.S. Chief Prosecutor Robert Jackson stated in his opening statement to the IMT, ‘We will show you their own films.’”) (last visited May 1, 2018).

<sup>114</sup> See *id.*

<sup>115</sup> *Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg*, THE HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/combating-holocaust-denial-evidence-of-the-holocaust-presented-at-nuremberg> (last visited Nov. 1, 2019).

<sup>116</sup> United States Holocaust Memorial Museum, *Nuremberg Trial Verdicts*, <https://www.ushmm.org/learn/timeline-of-events/after-1945/verdicts-international-military-tribunal> (last visited Nov. 11, 2019).

<sup>117</sup> *High-ranking Nazi leader Hermann Goering Dies*, History, <https://www.history.com/this-day-in-history/hermann-goering-dies> (last visited Nov. 20, 2019).

<sup>118</sup> See *The Nuremberg Trials: What were the Crimes?*, UCSB DEPT OF HISTORY, <http://www.history.ucsb.edu/faculty/marcuse/classes/33d/projects/nurembg/NurembergCrimes.htm> (last visited Oct. 31, 2019).

<sup>119</sup> See *id.*

links us to the UDHR today: ‘crimes against humanity.’ The phrase was “the inspired last-minute contribution” of Sir Hersch Lauterpacht QC, a British-Polish lawyer who helped in the prosecution.<sup>120</sup> However, the notion of ‘laws of humanity’ had been mentioned in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties which reported in 1919 after World War I.<sup>121</sup> This notion was viewed as “a direct ancestor of the ‘crimes against humanity’ charge codified at Nuremberg.”<sup>122</sup> There had also been several references during and after WWI to crimes against humanity, including in 1915, in the context of the Armenian massacre.<sup>123</sup>

The idea of an enemy of humanity had a couple of other historical precedents. The first arose in connection with the 17<sup>th</sup> and 18<sup>th</sup> century pirates.<sup>124</sup> Pirates at this time operated beyond the reach of individual nations, but they threatened all nations. Therefore, any nation, if they captured any pirate – even a foreign pirate – could administer a kind of international justice,<sup>125</sup> or universal jurisdiction.<sup>126</sup> Any and all pirates were, in a sense, enemies of any and all humanity.<sup>127</sup>

The second precedent was the human response to the Kings who claimed they had a

<sup>120</sup> See THE TRIAL OF THE KAISER, *supra* note 69, at 152; See Philippe Sands, *East West Street*, Weidenfeld & Nicolson at p. 111 (2016).

<sup>121</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference American Journal of International Law, 14 Am. J. Int’l L. 95 (1920).

<sup>122</sup> See THE TRIAL OF THE KAISER, *supra* note 69, at 153.

<sup>123</sup> *Id.* at 154-155.

<sup>124</sup> See Robertson, *supra* note 50 at 336-338.

<sup>125</sup> See *id.*

<sup>126</sup> Ziv Bohrer, *The ‘Jolly Roger’ (Pirate Flag)*, in OBJECTS IN INTERNATIONAL LAW (Jessie Hohmann & Daniel Joyce eds., OUP, forthcoming) (For an interesting analysis which exposes “misconceptions regarding criminal justice in international law” and concludes that it is domestic law and not international law which is “novel” in historical terms); INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, 441 (Jeffrey Dunoff et al. eds., 2nd ed. 2006) (“[T]here was no sharp distinction between international law and national law.”).

<sup>127</sup> Hostis Humani Generis Law and Legal Definition, USLEGAL, INC., <https://definitions.uslegal.com/h/hostis-humani-generis/> (last visited Nov. 1, 2019) (“Hostis Humani Generis is a Latin term which means the enemy of mankind. Pirates are often portrayed as hostis humani generis.”).

divine right to rule.<sup>128</sup> The Kings called themselves “little gods” on earth.<sup>129</sup> How could these “little gods” be held to account? The English and the French had the answer: ‘off with their heads!’<sup>130</sup> In 17<sup>th</sup> Century England, King Charles I lost not only the Civil War but his head as well when he was executed.<sup>131</sup> He asked the court “by what power you try me,” but the judges found him to be a “Tyrant, Traitor, Murderer and Public Enemy to the good people of this Nation.”<sup>132</sup> The same happened to King Louis XVI in 18<sup>th</sup> Century France.<sup>133</sup> He was found guilty of treason after allegedly conspiring with a foreign nation.<sup>134</sup> In other words, these Kings were enemies of the people,<sup>135</sup> and so they were not immune from justice by the people.

The charge of ‘crimes against humanity’<sup>136</sup> against the Nazis was the latest version of these historical precedents, justifying the Nuremberg Tribunal’s jurisdiction. But it is important to understand that crimes against humanity are not merely serious crimes or violations of abstract human rights. Serious crimes only become crimes against humanity when they are committed as part of a “widespread or systematic attack directed against

<sup>128</sup> James I, King of England, *The True Law of Free Monarchies: And, Basilikon Doron*, in JAMES I 51–52 (Daniel Fischin et al eds., Centre for Reformation and Renaissance Studies, 1996) (1598).

<sup>129</sup> See JERZY LIMON, THE MASQUE OF STUART CULTURE 151 (King James I, “literally calls kings ‘little gods’ on earth.”).

<sup>130</sup> Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* 49 (2005).

<sup>131</sup> See John Adamson, *How Charles I lost his head*, THE TELEGRAPH (May 3, 2007, 12:01 AM BST) <https://www.telegraph.co.uk/culture/books/3664846/How-Charles-I-lost-his-head.html>.

<sup>132</sup> Why Was King Charles I Executed?, Explore Royal Museums Greenwich, <https://www.rmg.co.uk/discover/explore/why-was-king-charles-i-executed> (last visited Nov. 1, 2019). The judges paid a heavy price when the monarchy was restored a few years later. They were themselves convicted of treason and hanged, drawn, and quartered.

<sup>133</sup> See Jeremy David Popkin & Andrew Goodwin, *Louis XVI*, ENCYCLOPAEDIA BRITANNICA (last updated Sept. 5, 2019), <https://www.britannica.com/biography/Louis-XVI>.

<sup>134</sup> King Louis XVI Executed, HISTORY (last updated July 28, 2019), <https://history.com/this-day-in-history/king-louis-xvi-executed>.

<sup>135</sup> Geoffrey Robertson, *supra* note 131, at 149. (“Cooke’s conclusion was that the defendant [Charles I] was guilty as ‘tyrant, traitor, murderer, and a public and implacable enemy to the Commonwealth of England’ by virtue of his command responsibility. . .”).

<sup>136</sup> See *The Nuremberg Trials: What were the Crimes?*, U.C.S.B. DEP’T OF HISTORY, <http://www.history.ucsb.edu/faculty/marcuse/classes/33d/projects/nurembg/NurembergCrimes.htm> (last visited Nov. 23, 2019).

any civilian population.”<sup>137</sup> In other words, there has to be something akin to an official policy of extermination.<sup>138</sup> Isolated or random atrocities do not fall into the category of crimes against humanity.<sup>139</sup> That was the precedent created at Nuremberg and followed the following year at the Tokyo War Crimes Tribunal.<sup>140</sup> It was, however, a precedent that was not followed thereafter – at least not for nearly half a century – attempts by the United Nations to establish a permanent court having failed.<sup>141</sup> During that same period, however, atrocities continued. In the late 1950s, for example in Mao’s China, the number of peasants killed in his four-year-long ‘Great Leap Forward’ was at least 45 million, and maybe as many as 70 million.<sup>142</sup> Many became aware of ‘The Killing Fields’ of Cambodia from the book and movie of the same name.<sup>143</sup> Pol Pot and the Khmer Rouge took over Cambodia in 1975 and tried to establish “a socially and ethnically homogenous Cambodia,” what Pol Pot called a “clean social system.”<sup>144</sup> The urban population was forced to live as peasants in the countryside and by 1979 – in just four

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<sup>137</sup> Rome Statute of the International Criminal Court, Article 7 (as corrected by the process-verbaux of 10 Nov. 1998 and 12 July 1999), [http://legal.un.org/icc/statute/99\\_corr/2.htm](http://legal.un.org/icc/statute/99_corr/2.htm) (last visited Nov. 4, 2019).

<sup>138</sup> Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 A.J.I.L. 334, 335 (2013). (Indeed, in the context of the International Criminal Court, to be discussed later, the need for crimes against humanity to be committed pursuant to a ‘state or organisational policy’ has been criticised for the way it limits the scope of this international crime).

<sup>139</sup> COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 34, 115, 119 (Mark Klamberg ed., 2017).

<sup>140</sup> See *The Nuremberg Trial and the Tokyo War Crimes Trial*, US Dep’t of State, Office of the Historian (last visited May 3, 2018) <https://history.state.gov/milestones/1945-1952/nuremberg>. See also YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* at 1, 7 (2008).

<sup>141</sup> Rome Statute of the International Criminal Court: Some Questions and Answers, UNITED NATIONS (October 1998), <https://legal.un.org/icc/statute/iccq&a.htm>.

<sup>142</sup> See Ilya Somin, *Remembering the biggest mass murder in the history of the world*, THE WASHINGTON POST (Aug. 3, 2016, 11:05 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/giving-historys-greatest-mass-murderer-his-due/>.

<sup>143</sup> The Killing Fields (1984) description available at <https://www.imdb.com/title/tt0087553/>.

<sup>144</sup> Julia Hoffman & Amaka Okany, *Taking Prevention of Genocide Seriously: Media Incitement to Genocide Viewed in the Light of the Responsibility to Protect*, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 319 (Julia Hoffman & André Nollkaemper eds., 2012).

years – one third of the seven million Cambodian population had been killed.<sup>145</sup> In one prison – Tuol Sleng – it is estimated that no more than 19 of the fifteen thousand tortured there came out alive.<sup>146</sup> In the 1990s, in Yugoslavia, Europe witnessed the first genocide in Europe since the Nazis when thousands of Bosnian Muslim men and boys were slaughtered in the town of Srebrenica.<sup>147</sup> Also in the 1990s, in Rwanda, there was genocide on a monumental scale. In just 100 days, three quarters of the Tutsi ethnic population in Rwanda – around 800,000 in total – were slaughtered.<sup>148</sup> The majority were killed not by bombs or bullets, but one-by-one, by machete.<sup>149</sup> The revival of the search for Global Justice, however, began with these atrocities in Yugoslavia and Rwanda.<sup>150</sup> The explanation is straightforward. The Cold War had ended and the United Nations Security Council was suddenly liberated from ‘Superpower’ politics.<sup>151</sup> Two new International Criminal Tribunals were created and they have been followed by many others.<sup>152</sup> The time for Global Justice seemed to have arrived. Here is a brief review of some of the ‘firsts.’

The first International Tribunal since Nuremberg and Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY), was created in 1993 and

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<sup>145</sup> JAMES A. TYNER, *THE KILLING OF CAMBODIA: GEOGRAPHY, GENOCIDE AND THE UNMAKING OF SPACE* 169 (2008).

<sup>146</sup> See Pivoine Beang, *List of Toul Sleng (S-21) Prisoners Who Survived In 1979* (Mar. 6, 2007), [http://www.genocidewatch.org/images/Cambodia\\_6\\_Mar\\_07\\_List\\_of\\_Toul\\_Sleng\\_S-21\\_Prisoners\\_Who\\_Survived\\_in\\_1979.pdf](http://www.genocidewatch.org/images/Cambodia_6_Mar_07_List_of_Toul_Sleng_S-21_Prisoners_Who_Survived_in_1979.pdf) (last visited Nov. 4, 2019). The prison is now a genocide museum.

<sup>147</sup> See R. Jeffery Smith, *Srebrenica massacre* (Nov. 22, 2017), <https://www.britannica.com/event/Srebrenica-massacre>.

<sup>148</sup> See *id.*

<sup>149</sup> See Jean Hatzfeld, *Machete Season the Killers in Rwanda Speak* (2006).

<sup>150</sup> Peter Malcontent, *Human rights and peace: Two sides of the same coin*, in *FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES* 1, 9 (Ramesh Thakur & Peter Malcontent eds., 2004), <https://collections.unu.edu/eserv/UNU:2447/pdf9789280811001.pdf>.

<sup>151</sup> See Richard Saull, *THE COLD WAR AND AFTER: CAPITALISM, REVOLUTION AND SUPERPOWER POLITICS* 1–2 (2007).

<sup>152</sup> See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW*, Oxford Scholarship Online at 121 (Jan. 2009).

held in The Hague.<sup>153</sup> It indicted 161 people, including Slobodan Milosevic, President of Serbia from 1989 to 1997 and President of the Federal Republic of Yugoslavia from 1997 to 2000.<sup>154</sup> Of great historical significance, this was the first International Court ever to prosecute genocide.<sup>155</sup> It was also the first time a sitting Head of State had been indicted by an international court.<sup>156</sup> Milosevic died in custody before a verdict could be reached.<sup>157</sup>

Ninety were convicted, including Radislav Krstic, who co-led the assault on Srebrenica.<sup>158</sup> He was the first European ever convicted of genocide,<sup>159</sup> and was sentenced to 46 years.<sup>160</sup> Three Bosnian Serbs have been convicted of genocide in connection with Srebrenica, the latest being Radovan Karadzic (who went from genocide, to hiding, to arrest and, in March 2016, to a 40

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<sup>153</sup> “Since its establishment in 1993, it has irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced.” *About the ICTY*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Aug. 30, 2019).

<sup>154</sup> *See Key Figures of the Cases*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last updated Aug. 2019).

<sup>155</sup> *See ICBY Remembers: The Srebrenica Genocide 1995-2015*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/specials/srebrenica20/index.html> (last visited Aug. 30, 2019).

<sup>156</sup> “On 24 May 1999, when the Tribunal indicted Slobodan Milošević, at the time the former President of the Federal Republic of Yugoslavia, for crimes in Kosovo he was the first sitting head of state to be charged with war crimes by an international tribunal.” *Slobodan Milošević Trial - the Prosecution's case*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case> (last visited Sept. 3, 2019).

<sup>157</sup> “The trial formally ended on 14 March 2006, following Slobodan Milošević’s death in the Tribunal’s Detention Unit on 11 March 2006, just weeks shy of the trial’s scheduled conclusion. A thorough inquiry performed by Dutch and Tribunal authorities determined conclusively that Milošević’s death was from natural causes.” *Id.*

<sup>158</sup> *See ICTY Facts and Figures*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, [http://www.icty.org/sites/icty.org/files/images/content/Infographic\\_facts\\_figures\\_en.pdf](http://www.icty.org/sites/icty.org/files/images/content/Infographic_facts_figures_en.pdf) (last updated Nov. 2017).

<sup>159</sup> *See* Press Release, U.N. Int’l Crim. Trib. for the former Yugoslavia, Radislav Krstic becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment, U.N. Press Release OF/P.I.S/609e (Aug. 2, 2001).

<sup>160</sup> *See id.* (“In July 1995, General Krstic, you agreed to evil. This is why the Trial Chamber convicts you today and sentences you to 46 years in prison.”).

year sentence),<sup>161</sup> a sentence that was increased to life March 2019.<sup>162</sup> The Security Council created the International Criminal Tribunal for Rwanda (ICTR) in 1994, in Arusha, Tanzania.<sup>163</sup> In 1998, it became the first international tribunal, since Nuremberg, to try a former Prime Minister, Jean Kambanda.<sup>164</sup> He also became the first ever Head of Government to plead guilty to Genocide.<sup>165</sup> He got a life sentence.<sup>166</sup> A total of 93 were indicted in the Rwandan Tribunal, including the first woman ever to be convicted of genocide.<sup>167</sup> The Rwanda Tribunal was thus the

<sup>161</sup> See Julian Borger, *Radovan Karadzic war crimes sentence increased to life in prison*, GUARDIAN (Mar. 20, 2019), <https://www.theguardian.com/law/2019/mar/20/radovan-karadzic-faces-final-verdict-in-bosnia-war-crimes-case>; See also *Trial Judgement Summary for Radovan Karadžić*, U.N. I.C.T.Y., (Mar. 24, 2016), [http://www.icty.org/x/cases/karadzic/tjug/en/160324\\_judgement\\_summary.pdf](http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf).

<sup>162</sup> *Id.* at 2, 4–5. One of the three, Ratko Mladic, began an appeal against conviction in August 2020.

<sup>163</sup> S.C. Res. 977, ¶ 2, 3 (Feb. 22, 1995), [https://www.irmct.org/specials/ict-remembers/docs/res977-1995\\_en.pdf](https://www.irmct.org/specials/ict-remembers/docs/res977-1995_en.pdf) (the ICTR was set up in Arusha, Tanzania in 1995 after being established in 1994).

<sup>164</sup> See Bill Berkeley, *Judgment Day*, The Washington Post (Oct. 11, 2019), <https://www.washingtonpost.com/archive/lifestyle/magazine/1998/10/11/judgment-day/3ae2490b-c3c7-4c17-b43c-e96bbfc064e5/?noredirect=on>.

<sup>165</sup> Press Release, U.N. I.R.M.C.T., Ex-Rwandan Prime Minister Jean Kambanda pleads guilty to genocide, (May 1, 1998), <http://unictr.irmct.org/en/news/ex-rwandan-prime-minister-jean-kambanda-pleads-guilty-genocide> (“He emphasised that he admitted his guilt ‘freely and voluntarily’, with a full understanding of all the charges and the consequences of his pleading guilty.”) <http://unictr.irmct.org/en/news/ex-rwandan-prime-minister-jean-kambanda-pleads-guilty-genocide>.

<sup>166</sup> See Press Release, U.N. Meetings Coverage & Press Releases, Rwanda Tribunal Hands Down Life Sentence for Crimes of Genocide Committed by Former Rwandan Prime Minister, U.N. Press Release AFR/95 (Sept. 4, 2019) (“The Deputy Prosecutor, Bernard Muna (Cameroon), requested a life sentence for Kambanda, although he acknowledged the latter's cooperation and the significance of the former Rwandan leader's acceptance of responsibility by pleading guilty.”).

<sup>167</sup> Pauline Nyiramasuhuko was Rwandan Minister for Family Welfare and the Advancement of Women. Despite the title of her Ministry, she was convicted not only of genocide, but incitement to rape. Troops and militia raped thousands of women during the Genocide – some estimates claim between 250,000 and 500,000. She was sentenced to life imprisonment. See *Key Figures of Cases*, U.N. I.C.T.R., <https://unictr.irmct.org/en/cases/key-figures-cases> (last updated Oct. 2019); Associated Press, *Rwandan ex-minister becomes first woman convicted of genocide*, GUARDIAN (June 24, 2011), <https://www.theguardian.com/world/2011/jun/24/rwanda-first-woman-genocide-conviction>; Marlise Simons, *Life Sentences in Rwanda Genocide Case*, N.Y. TIMES (June 24, 2011), <https://www.nytimes.com/2011/06/25/world/africa/25rwanda.html>; Danielle Paquette, *Rwanda's children of rape are coming of age – against the odds*, WASH. POST (June 11, 2017), <https://www.washingtonpost.com/sf/world/2017/06/11/rwandas-children-of-rape-are-coming-of-age-against-the-odds/>.

first to hold members of the media responsible for intentionally inflaming genocide.<sup>168</sup> Indeed this Tribunal saw the first ever case brought under the 1948 Genocide Convention: *Jeal-Paul Akayesu*.<sup>169</sup>

Several other international tribunals have extended this list of firsts. Following the end of the 10-year long civil war in 2001,<sup>170</sup> the Special Court in Sierra Leone, was set up in 2002 jointly by the UN and the Sierra Leone government.<sup>171</sup> It was the first since King Charles I to indict a Head of State while still in office.<sup>172</sup> Its aim was ambitious: “a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the

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<sup>168</sup> The only non-Rwandan convicted was Georges Ruggiu. See Ian Black & Ewen MacAskill, *Broadcaster jailed for inciting genocide*, GUARDIAN (June 1, 2019), <https://www.theguardian.com/world/2000/jun/02/ewenmacaskill.ianblack>.

Ruggio was born in Belgium and was an Italian citizen. He told his radio audience of Hutus: ‘the graves of Tutsis are only half full- we must fill them up’: Richard Dowden, *The graves of the Tutsi are only half full - we must complete the task*, INDEPENDENT (May 24, 1994) <https://www.independent.co.uk/news/the-graves-of-the-tutsi-are-only-half-full-we-must-complete-the-task-richard-dowden-africa-editor-1438050.html>.

<sup>169</sup> *Id.*

<sup>170</sup> The war claimed 150,000 lives; 200,000 women were rape; thousands of limbs were amputated; children were forced to kill their own parents; some were forced into sexual slavery or into the battlefields; over two and half million were displaced. See *Sierra Leone*, GLOBAL ISSUES, <http://www.globalissues.org/article/88/sierra-leone> (last visited Nov. 8, 2019); Physicians for Human Rights, *WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE A POPULATION -BASED ASSESSMENT 3-4* (2002).

<sup>171</sup> During the war, it is estimated that 200,000 women were raped; thousands of limbs amputated; and countless children were forced to kill their own parents, to become sexual slaves and to become soldiers. 2.6 million people were displaced. The war ended following military intervention by Britain, which is why many children born around that time were named Tony Blair, after the British Prime Minister who ordered the intervention. See Physicians for Human Rights, *WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE A POPULATION -BASED ASSESSMENT 3-4* (2002); Peter Rothpletz, *Killing Children: Reflections on Sierra Leone’s Civil War*, THE POLITIC (Feb. 4, 2019), <https://thepolitic.org/killing-children-reflections-on-sierra-leones-civil-war/>; Mary Kaldor & James Vincent, *CASE STUDY SIERRA LEONE EVALUATION OF UNDP ASSISTANCE TO CONFLICT-AFFECTED COUNTRIES 4* (2006).

<sup>172</sup> “The Special Court was the first modern international tribunal (and the first court since Nuremberg) to indict, try and convict a sitting head of state (Taylor trial).” *The Special Court for Sierra Leone Its History and Jurisprudence*, Special Court for Sierra Leone Residual Special Court for Sierra Leone (last visited Sept. 11, 2019), <http://www.rscl.org/>.



restoration and maintenance of peace.”<sup>173</sup> The ICTY and ICTR both significantly developed the jurisprudence concerning accusations of genocide and rape.<sup>174</sup>

The trial of the Liberian President, Charles Taylor, was expansively covered in the media.<sup>175</sup> He was convicted of aiding and abetting war crimes and crimes against humanity by receiving so-called blood diamonds,<sup>176</sup> pumped out of Sierra Leone’s mines and used by him to provide arms, ammunition and money.<sup>177</sup> He was even supposed to have provided the herbs that child soldiers were told to rub on their bodies to ‘protect’ them from bullets.<sup>178</sup> Child soldiers as young as 8 years old were fed drugs to desensitize them.<sup>179</sup> Taylor was convicted and sentenced to 50 years in prison.<sup>180</sup>

In 2009, the first International Court to deal with *terrorism* as an international

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<sup>173</sup> See Press Release, Security Council, Council Asks Secretary-General, Sierra Leone to Negotiate Agreement for Creation of Independent Special Court, U.N. Press Release SC/6910 (Aug. 14, 2000).

<sup>174</sup> UNITED NATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820 3 (2010), [https://www.icty.org/x/file/Outreach/sv\\_files/DPKO\\_report\\_sexual\\_violence.pdf](https://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf).

<sup>175</sup> See Marlise Simmons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES (May 30, 2012), <https://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html>.

<sup>176</sup> Mike Corder, *Charles Taylor’s 50-year sentence for ‘blood diamond’ war crimes upheld*, THE STAR (Sept. 26, 2013), [https://www.thestar.com/news/world/2013/09/26/charles\\_taylors\\_50year\\_sentence\\_for\\_blood\\_diamond\\_war\\_crimes\\_upheld.html](https://www.thestar.com/news/world/2013/09/26/charles_taylors_50year_sentence_for_blood_diamond_war_crimes_upheld.html); *Ex-Liberian President Who Brought “Blood Diamonds” Into the Public Consciousness, Found Guilty of War Crimes*, AMNESTY INTERNATIONAL, <https://www.amnestyusa.org/ex-liberian-president-who-brought-blood-diamonds-into-the-public-consciousness-found-guilty-of-war-crimes/> (last visited Nov. 8, 2019).

<sup>177</sup> See *id.*

<sup>178</sup> “Taylor supplied arms, ammunition and money to the rebels (and even the herbs that child soldiers were told to rub on their bodies to protect them from bullets) in return for a share of their spoils.” Geoffrey Robertson, *War crimes: Charles Taylor now, Bashar al-Assad next*, THE GUARDIAN (May 30, 2012, 3:19 PM), <https://www.theguardian.com/commentisfree/2012/may/30/war-crimes-taylor-now-assad-next>.

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

crime, the Special Tribunal for Lebanon, was created.<sup>181</sup> Several members of Hezbollah have been indicted, and in August 2020, Salim Ayyash was convicted in absentia; three others were acquitted.<sup>182</sup> The court heard from 297 witnesses over 415 days of hearings.

Other tribunals are expected to start work relatively soon. The Kosovo Specialist Chambers were set up in 2015 and will explore alleged crimes committed by the Kosovo Liberation Army (KLA) at the end of the Yugoslav war. In July 2020, President Hashim Thaci, a former leader of the KLA, pledged to give evidence to prosecutors investigating war crimes and crimes against humanity charges against him.<sup>183</sup> He is accused along with Kadri Veseli, former Speaker of Parliament.<sup>184</sup> President Thaci said he would resign if the charges were confirmed by a judge, a decision expected in October 2020.<sup>185</sup> The United Nations has urged Sri Lanka to set up a war crimes tribunal to investigate allegations arising out of the Sri Lankan civil war.<sup>186</sup> However, in February 2020, President Rajapaksa made clear he would not honor earlier commitments to establish a hybrid special court.<sup>187</sup>

All the Courts and Tribunals mentioned so far

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<sup>181</sup> See Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, American Society of International Law (Mar. 4, 2011), <https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and>.

<sup>182</sup> See Richard Spencer, *Hezbollah Chief Guilty of PM's murder*, THE TIMES, (August 19, 2020).

<sup>183</sup> In July 2019, the Kosovo Prime Minister, Ramush Haradinaj, resigned before facing questions about alleged war crimes committed while he was a commander of the Kosovo Liberation Army. See Reuters, *War Crimes Court to Question Kosovo's Veseli Over 1998-99 Role*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/reuters/2019/11/07/world/europe/07reuters-kosovo-justice.html>.

<sup>184</sup> THE TIMES (July 10, 2020).

<sup>185</sup> THE TIMES (June 30, 2020).

<sup>186</sup> See Gordon Fairclough & Uditha Jayasinghe, *U.N. Report Urges Sri Lanka to Set Up War Crimes Tribunal*, WSJ (Sept. 16, 2015), <https://www.wsj.com/articles/u-n-report-urges-sri-lanka-to-set-up-war-crimes-tribunal-1442410248>; *Permanent People's Tribunal*, PTRSRI LANKA, <http://www.ptsrilanka.org/permanent-peoples-tribunal/> (last visited Nov. 8, 2019).

<sup>187</sup> INTERNATIONAL JUSTICE RESOURCE CENTER, *Sri Lanka Pardons War Criminal, Rejects Human Rights Council Commitments* (April 2, 2020) *available at*: <https://ijrcenter.org/2020/04/02/sri-lanka-pardons-war-criminal-rejects-human-rights-council-commitments/>.

have, like Nuremberg and Tokyo, been ad hoc: that is to say, set up specially to deal with crimes already committed. This explains in part why the creation of the new International Criminal Court – the ICC – is potentially momentous and the most significant precedent of all. For the first time in the history of Global Justice – and International Law – a court has been given a permanent, worldwide, jurisdiction to deal with future atrocities such as genocide, war crimes and crimes against humanity.<sup>188</sup>

### *International Criminal Court*

The ICC was not created by the UN, but by an International Treaty in 1998.<sup>189</sup> It began work in 2002 after the sixtieth country ratified it.<sup>190</sup> Only seven countries in the world voted against the Treaty: Iraq, Libya, Qatar, Yemen, China, Israel and the United States.<sup>191</sup> Today, a total of 123 countries have ratified it, but still not the US,<sup>192</sup> and several other large countries.<sup>193</sup>

The ICC's goals are ambitious: Justice, Peace and Accountability.<sup>194</sup> The aim is to “put an end to

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<sup>188</sup> See “For the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force of the Rome Statute on 1 July 2002.” *Understanding the International Criminal Court*, I.C.C., <https://www.icc-epi.int/iccdocs/PIDS/publications/UICCEng.pdf>. (last visited Sept. 12, 2019). A helpful list of resources relating to the creation of the ICC is available at the University of Chicago: <https://www2.lib.uchicago.edu/~lhow/icc.html>.

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> CNN Editorial Research, *International Criminal Court Fast Facts*, CNN (Nov. 11, 2019), <https://www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html>..

<sup>192</sup> See *id.*

<sup>193</sup> Jane Onyanga-Omara, *What's the International Criminal Court and why are countries bailing?*, USA TODAY (Nov. 17, 2016), <https://www.usatoday.com/story/news/world/2016/11/17/whats-international-criminal-court-and-why-countries-bailing/94017990/>.

<sup>194</sup> “Working together, we can ensure that the Court makes lasting and sustainable contributions to justice, peace and accountability around the world.” *International Criminal Court Heading Towards*, GLOBAL POL. F., <https://www.globalpolicy.org/component/content/article/164-icc/28561.html> (last visited Oct. 2, 2019)..

impunity” for the “crimes [that] threaten the peace, security and well-being of the world.”<sup>195</sup> By fighting impunity, the ICC hopes not only to punish but to deter. According to the former UN Secretary-General Kofi Annan, its purpose is “to ensure that no ruler, no state, no junta and no army anywhere can abuse human rights with impunity.”<sup>196</sup> These goals mirror the rationale for respect for human rights set out earlier in this article. That is why the UN Security Council was given authority, under the ICC’s Statute, to refer a situation to the ICC.<sup>197</sup> Global Justice and accountability – protecting human rights – are viewed as critical in achieving lasting peace and security – and the prevention of armed conflict, revenge and the recurrence of abuses.<sup>198</sup>

Currently, the ICC is dealing with cases in thirteen countries.<sup>199</sup> The first conviction was the Congolese warlord, Thomas Lubanga, sentenced to 14 years for using child soldiers during conflicts in which an estimated 5 million died.<sup>200</sup> Other ICC cases have involved two Heads of State: Omar Al-Bashir, until recently President of Sudan,<sup>201</sup> accused of atrocities in Darfur; and Laurent Gbagbo, former President of the Ivory Coast.<sup>202</sup>

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<sup>195</sup> Rome Statute of the International Criminal Court, art. 15(3), 43(6), July 17, 1998, U.N.T.S. vol. 2187, No. 38544 [hereinafter Rome Statute].

<sup>196</sup> Press Release, Secretary-General, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association, U.N. Press Release SG/SM/6257 (June 12, 1997).

<sup>197</sup> Rome Statute, *supra* note 196, at art. 13(b).

<sup>198</sup> Rome Statute, *id.* at Preamble.

<sup>199</sup> See ICC, <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf> (last visited 23 August 2020).

<sup>200</sup> See *Statement: Office of the Prosecutor on Lubanga sentence*, ICC (Oct. 7, 2012), <https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement100712>. Lubanga was released in March of 2020 after serving eight years. In 2019, another warlord, Bosco Ntaganda, known as the Terminator, was convicted, the fourth and most recent ICC conviction. He had surrendered, possibly to escape assassination. Anemona Hartocollis, *Congo Warlord Called ‘the Terminator’ Is Convicted of War Crimes by I.C.C.*, THE N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/world/africa/bosco-ntaganda-the-terminator-war-crimes.html>.

<sup>201</sup> See *Al Bashir Case*, ICC, <https://www.icc-cpi.int/darfur/albashir> (last visited Sept. 18, 2019); Kenneth Ingham, *Omar al-Bashir President of Sudan*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Omar-Hassan-Ahmad-al-Bashir> (last visited Sept. 18, 2019).

<sup>202</sup> See *Ivory Coast ex-president Gbagbo released to Belgium*, THE GUARDIAN (Feb. 5, 2019), <https://www.theguardian.com/world/2019/feb/05/former-ivory-coast-president>.

Gbagbo lost the Presidential election in 2010, and could have taken up a post at Boston University.<sup>203</sup> He said his wife persuaded him not to step down and he was accused at the ICC of systematic attacks on civilians.<sup>204</sup> He was acquitted in January 2019.<sup>205</sup>

The ICC is arguably the first international court to recognise rape as a war crime.<sup>206</sup> It is also treats intentional cultural destruction as a war crime.<sup>207</sup> In 2018, an Islamic scholar, Ahmad al-Faqi al-Mahdi, pleaded guilty for the war crime of attacking religious and historical buildings in the Malian city of Timbuktu.<sup>208</sup> He was sentenced to nine years and ordered to pay \$3.2 million in damages.<sup>209</sup> The trial of another Malian, also charged with demolishing tombs in

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<sup>203</sup> See Oumar Ba, *Who is Laurent Gbagbo, and why is he on trial at the ICC?*, WASH. POST (Feb. 3, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/03/who-is-laurent-gbagbo-and-why-is-he-on-trial-at-the-icc/>; Elizabeth Haggarty, *Ivory Coast's deposed leader was offered position at Boston University*, THE STAR (May 5, 2011), [https://www.thestar.com/news/world/2011/05/05/ivory\\_coasts\\_deposed\\_leader\\_was\\_offered\\_position\\_at\\_boston\\_university.html](https://www.thestar.com/news/world/2011/05/05/ivory_coasts_deposed_leader_was_offered_position_at_boston_university.html).

<sup>204</sup> See CHIKU MALUNGA, ANIMAL FARM PROPHECY FULFILLED IN AFRICA 46 (2014).

<sup>205</sup> *ICC Trial Chamber I acquits Laurent Gbagbo and Charles Ble Goude from all charges*, ICC (Jan. 15, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1427>.

<sup>206</sup> That said, the crime of rape has long existed in customary international law. In addition, rape, and sexual violence, was specifically codified for the first time as a recognizable and independent crime within the statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. *Crimes of Sexual Violence*, UN ICTY, <https://www.icty.org/en/features/crimes-sexual-violence> (last visited Nov. 16, 2019). In 2016, Jean-Pierre Bemba was convicted not of raping victims himself, but of having 'command responsibility'. He was sentenced to 18 years. This ground of culpability was also a first but in 2018 he was acquitted on appeal. Bemba was fined 300,000 Euros for witness tampering and sentenced to one year in jail. The prison sentence was suspended because of the time he had already served in custody awaiting trial. Owen Bowcott, *Jean-Pierre Bemba's war crimes conviction overturned*, THE GUARDIAN (June 8, 2018), <https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court>; Wairagala Wakabi, *ICC Judges Hand Bemba €300,000 Fine, Defense Lawyers Get Suspended Sentences*, INT'L JUST. MONITOR (Mar. 22, 2017), <https://www.ijmonitor.org/2017/03/icc-judges-hand-bemba-e300000-fine-defense-lawyers-get-suspended-sentences/>.

<sup>207</sup> The Nuremberg Tribunal and the ICTY also prosecuted individuals responsible for the destruction and wilful damage of cultural property. Mark A. Drumbl, *From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property*, 17 J. of Int'l Crim. Just. 77, 79 (2019).

<sup>208</sup> Marlise Simons, *Jihadist Is Liable for \$3.2 Million for Damages to Shrines in Mali*, NY TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/world/africa/mali-timbuktu-international-criminal-court-shrines-mosque.html>.

<sup>209</sup> See *id.*

Timbuktu, as well as crimes against humanity, rape and sexual slavery, began in July 2020.<sup>210</sup>

### III. GLOBAL JUSTICE: THE PROS AND CONS

In this section the critical question: ‘Should Global Justice be supported or not?’ will be considered by looking at some of the main pros and cons. Six arguments against will be presented first and then just one argument in favour.

#### A. *Against Global Justice*

##### (i) *Cost*

It is well known that ‘Justice’ can be expensive, but ‘Global Justice’ is extremely expensive. The Rwandan Tribunal cost around \$2 Billion,<sup>211</sup> a huge amount, some would say, for just sixty-one convictions.<sup>212</sup> The Khmer Rouge trials cost \$300 million over twelve years, for just three convictions.<sup>213</sup> Over ten years, the Sierra Leone court cost an estimated \$250 million; just nine men were sentenced. By the time the ICC got its first two convictions, it had already spent close to \$1 billion.<sup>214</sup> In 16 years at the ICC there have been only four major convictions in six cases. In addition, there have been five convictions for defendants found not guilty (after an appeal) of the crimes they were charged with. The five were found guilty of “offences against the administration

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<sup>210</sup> Al Hassan Ag Abdul Aziz Ag Mohamed Ag Mahmoud, *see supra* note 200.

<sup>211</sup> *See* Alastair Leithead, *Rwanda genocide: International Criminal Tribunal closes*, BBC (Dec. 14, 2015), <https://www.bbc.com/news/world-africa-35070220>.

<sup>212</sup> *See id.*

<sup>213</sup> Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

<sup>214</sup> *See* Daniel Abebe, *I.C.C.’s Dismal Record Comes at Too High a Price*, NYT, <https://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/iccs-dismal-record-comes-at-too-high-a-price> (last updated Dec. 12, 2014); David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (May 12, 2014), <https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#354a9f6b2405>.

of justice.”<sup>215</sup> The ICC costs around \$150 million every year and the rapid increase in annual funding has led to criticism.<sup>216</sup> In 2004, its opening budget was €53 million.<sup>217</sup> In 2016, the ICC requested €153.3 million and ultimately received €139.9 million.<sup>218</sup>

There may be good reasons for the high cost on Global Justice. International criminal courts deal with highly complex cases, sometimes when conflicts are ongoing and other times when the alleged crimes took place many years earlier. In short, the collection of reliable evidence is highly problematic. In addition, the ICC has an obligation to seriously vet each of the requests for an investigation, no matter what the requesting party’s motivations are.<sup>219</sup> In 2016, the ICC received over 11,500 requests for investigation and referrals.<sup>220</sup> Some of these may have been politically motivated or an attempt to garner international attention.<sup>221</sup> Either way, they create an administrative costs for the ICC. That said, the question has been raised: could these large sums of money be better or more usefully spent in other ways?

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<sup>215</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, ICC, <https://www.icc-cpi.int/CaseInformationSheets/Bemba-et-alEng.pdf> (last visited Nov. 16, 2019).

<sup>216</sup> Cluskey also reports that the ICC has suffered from unpaid contributions. Peter Cluskey *Funding cut may curb International Criminal Court*, IRISH TIMES (Feb. 9, 2017), <https://www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407>; Jessica Hatcher-Moore, *Is the world’s highest court fit for purpose?*, THE GUARDIAN (Apr. 5, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose>.

<sup>217</sup> Peter Cluskey, *Funding cut may curb International Criminal Court*, IRISH TIMES (Feb. 9, 2017), <https://www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407>.

<sup>218</sup> Peter Cluskey, *Funding cut may curb International Criminal Court*, Irish Times (Feb. 9, 2017), <https://www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407>. It should be noted too that the ICC consistently underspend its budget. Excess budgets are used to pay state party costs. Jonathan O’Donohue, *Financing the International Criminal Court*, 13 Int’l Crim. L. Rev. 269, 277-78 (2013).

<sup>219</sup> See Rome Statute, *supra* note 196, at art. 15.

<sup>220</sup> Megan A. Fairlie, *The Hidden Costs of Strategic Communications for the International Criminal Court*, 51 Tex. Int’l L. J. 281, 283 (2016).

<sup>221</sup> *Id.*

*(ii) Delay*

It is also well known that ‘Justice’ can be slow but ‘Global Justice’ is extremely slow. It took so long to deal with Slobodan Milosevic in the ICTY that he died before his trial could be concluded.<sup>222</sup> It was nearly ten years after the ICC began work that there was the first conviction.<sup>223</sup> It took six years to convict Thomas Lubanga of a straightforward and simple charge: the use of child soldiers.<sup>224</sup> Schabas noted at the time that “The prosecutor is woefully behind schedule.”<sup>225</sup> At least two of those indicted by the ICC have also died before trial.<sup>226</sup> By the time Laurent Gbagbo was acquitted in 2019, he had been in ICC detention since 2011, on trial since 2016 and it was three more years before his release.<sup>227</sup> ICC judges were not convinced the evidence was sufficient to warrant

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<sup>222</sup> *Slobodan Milosevic Trial - the Prosecution’s case*, ICTY, <http://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case> (last visited Sept. 19, 2019) (“The trial formally ended on 14 March 2006, following Slobodan Milošević’s death in the Tribunal’s Detention Unit on 11 March 2006, just weeks shy of the trial’s scheduled conclusion.”).

<sup>223</sup> Mark Tran, *International criminal court delivers landmark first ruling*, THE GUARDIAN (Mar. 12, 2012), <https://www.theguardian.com/global-development/2012/mar/15/international-criminal-court-first-ruling-lubanga> (“The international criminal court (ICC) has delivered the first verdict in its 10-year history, finding Thomas Lubanga, a Congolese warlord, guilty of recruiting child soldiers.”).

<sup>224</sup> Alison Cole & Kelly Askin, *Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court*, AMERICAN SOC’Y OF INT’L L. (March 27, 2012), <https://www.asil.org/insights/volume/16/issue/12/thomas-lubanga-war-crimes-conviction-first-case-international-criminal>.

<sup>225</sup> David Smith, *International criminal court to deliver its first judgment*, THE GUARDIAN (Mar. 13, 2019), <https://www.theguardian.com/law/2012/mar/13/international-criminal-court-first-judgment>.

<sup>226</sup> Raska Lukwiya and Okot Odhiambo. It is also believed Vincent Otti was killed by Joseph Kony, who is discussed in the text that follows. *ICC terminates proceedings against Okot Odiahambo following forensic confirmation of his passing*, ICC (Sept. 10, 2015), <https://www.icc-cpi.int/pages/item.aspx?name=PR1147>; Tom Maliti, *Acholi Chief Talks About Reprimanding LRA Leader Joseph Kony for Killing Otti*, INT’L JUST. MONITOR (Oct. 3, 2018), <https://www.ijmonitor.org/2018/10/acholi-chief-talks-about-reprimanding-lra-leader-joseph-kony-for-killing-otti/>.

<sup>227</sup> *The Prosecutor v. Laurent Gbagbo and Charles Ble Goude*, ICC, <https://www.icc-cpi.int/CaseInformationSheets/gbagbo-goudeEng.pdf>. (last updated Aug. 6, 2019).



continuing the trial.<sup>228</sup>

There may be reasons to explain the relative lack of speed. International criminal courts face particular problems challenges such as witness tampering,<sup>229</sup> and obstruction of investigations, including a failure by states to cooperate.<sup>230</sup> The ICC has no army or police of its own and therefore it has to rely on states themselves.<sup>231</sup> That said, there is a general view that ‘justice delayed is justice denied’.

*(iii) Few caught and tried*

The third criticism is that very few get caught and the ICC Statute does not permit trial in absentia.<sup>232</sup> There are currently around twelve fugitives, none of whom appear likely to be tried.<sup>233</sup> One who was on the wanted list but who successfully evaded capture was Joseph Kony, leader of the

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<sup>228</sup> Mark Kersten, *Some Quick Reflections on the Gbagbo Acquittal at the ICC*, JUST. IN CONFLICT (Jan. 18, 2019), <https://justiceinconflict.org/2019/01/18/some-quick-reflections-on-the-gbagbo-acquittal-at-the-icc/>.

<sup>229</sup> It is ironic that Jean Pierre Bemba, convicted in 2016 but acquitted on appeal in 2018 did not escape ‘scot free’. He was found guilty of witness tampering, fined 300,000 Euros and sentenced to one year in prison. He did not serve that sentence because of time spent in custody awaiting trial. But this conviction led to him be excluded from running for President of the Democratic Republic of Congo in 2018. *ICC sentences Congo’s Bemba for witness tampering, says time served*, FRANCE 24 (Sept. 9, 2018), <https://www.france24.com/en/20180917-icc-sentences-congo-bemba-witness-tampering-time-served#targetText=The%20International%20Criminal%20Court%20on,zero%20due%20to%20time%20served.>

<sup>230</sup> *Support Needed to Tackle ICC Shortcomings*, HUM. RTS. WATCH (July 16, 2019), <https://www.hrw.org/news/2019/07/16/support-needed-tackle-icc-shortcomings>; Iain Macleod & Shehzad Charania, *Three Challenges for the International Criminal Court*, OUPBLOG (Nov. 16, 2015), <https://blog.oup.com/2015/11/three-challenges-international-criminal-court/>.

<sup>231</sup> *What does the International Criminal Court do?*, BBC (June 25, 2015), <https://www.bbc.com/news/world-11809908>.

<sup>232</sup> This limitation also adds to potential delays. Ewolina U. Ochab, *A Second Look At The International Criminal Court*, FORBES (July 16, 2017), <https://www.forbes.com/sites/ewelinaochab/2017/07/16/a-second-look-at-the-international-criminal-court/#c780d5d2c7ea>; Alexander Schwartz, *The Legacy of the Kenyatta Case: Trials in Absentia at the International Criminal Court and Their Compatibility with Human Rights*, 16 AFR. HUM. RTS. L.J. 99, 110 (2016).

<sup>233</sup> Richard Dicker & Elizabeth Evenson, *ICC Suspects Can Hide – and That Is the Problem*, HUM. RTS. WATCH (Jan. 24, 2013), <https://www.hrw.org/news/2013/01/24/icc-suspects-can-hide-and-problem>.

so-called Lords Resistance Army.<sup>234</sup> The LRA has been engaged in a twenty six year guerrilla campaign against the Ugandan Government.<sup>235</sup> The UN says it has slaughtered more than 100,000 people.<sup>236</sup> It has also abducted not only adults, but an almost unbelievable 70,000 children.<sup>237</sup> Since 2005, Kony has defied all attempts to catch him, despite a \$5,000,000 reward and the deployment of American Special Forces by Presidents Bush and Obama.<sup>238</sup>

The ICC faces additional procedural and technical challenges with absentee defendants like Kony.<sup>239</sup> They may not be able to give instructions to the lawyers representing them at the ICC. The question arises therefore, what is the proper and effective legal representation of such an accused person?<sup>240</sup> Another on the wanted list is the Sudanese President, Omar Al-Bashir.<sup>241</sup> He was indicted in 2009.<sup>242</sup> But, not only did he remain President of Sudan – he was very popular if one believes the 2015

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<sup>234</sup> *Id.*

<sup>235</sup> See Josh Kron & J. David Goodman, *Online, a Distant Conflict Soars to Topic No. 1*, NYT (Mar. 8, 2012), <https://www.nytimes.com/2012/03/09/world/africa/online-joseph-kony-and-a-ugandan-conflict-soar-to-topic-no-1.html>.

<sup>236</sup> Press Release, Security Council, Demanding that Lord's Resistance Army End All Attacks, Security Council Calls for Full Implementation of Regional Strategy in Central Africa, U.N. Press Release SC/11018 (May 29, 2013).htm

<sup>237</sup> "Since its foundation, the LRA is said to have abducted up to 70,000 children." Hilke Fischer & Coletta Wanjohi, *The Lord's Resistance Army: violence in the name of God*, DW (Dec. 17, 2014), <https://www.dw.com/en/the-lords-resistance-army-violence-in-the-name-of-god/a-18136620>.

<sup>238</sup> Zack Baddorf, *Uganda ends hunt for warlord Joseph Kony empty-handed*, SEATTLE TIMES (April 20, 2017), <https://www.seattletimes.com/nation-world/nation-politics/uganda-ends-hunt-for-warlord-joseph-kony-empty-handed/>. See also Mac William Bishop, *Inside the Green Berets' Hunt for Wanted Warlord Joseph Kony*, NBC (Mar. 6, 2017), <https://www.nbcnews.com/news/world/inside-green-berets-hunt-warlord-joseph-kony-n726076>; Helene Cooper, *More U.S. Troops to Aid Uganda Search for Kony*, NYT (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html>.

<sup>239</sup> See *Situation in the Case of: The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05 OA 3, at 5, 6, 9 (Sept. 2009), [https://www.icc-cpi.int/CourtRecords/CR2015\\_01631.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_01631.PDF).

<sup>240</sup> Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT'L & COMP. L. 235, 317 (2013).

<sup>241</sup> See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, <https://www.icc-cpi.int/darfur/albashir>.

<sup>242</sup> See *id.*

election result: he got 94.5% of the vote<sup>243</sup> – but he escaped arrest, despite travelling to as many as 33 ICC countries,<sup>244</sup> including South Africa in 2015, and despite the arrest warrant against him. As a result, in 2014, the frustrated ICC prosecutor suspended Al-Bashir's case.<sup>245</sup>

(iv) *Arbitrary*

The ICC's rhetoric may be tough, but it has no enforcement agency of its own; it depends upon enforcement by individual countries. That has led to a fourth criticism: 'Global Justice' may not only be 'hit or miss', it may even be arbitrary.<sup>246</sup> Charles Taylor was convicted but Prince Y Johnson is not only free but is enjoying life as a Senator, despite killing the President, Samuel K Doe – something that can be watched on YouTube.<sup>247</sup>

<sup>243</sup>See David Smith, *Sudan's Omar al-Bashir extends 26-year presidency with 94.5% of the vote*, THE GUARDIAN (Apr. 27, 2015),

<https://www.theguardian.com/world/2015/apr/27/sudan-bashir-elected-majority-vote>.

<sup>244</sup>In 2019, Al Bashir was deposed by the army, which declared a state of emergency and established a 'military council' to take over. Al Bashir was convicted in Sudan of corruption and imprisoned in December 2019 for two years. Investigators later discovered that he had a secret bank account into which \$20 million a month was being paid. The ICC has renewed its call that he be handed over and in February 2020 the Sovereign Council that replaced Bashir indicated that they would do so. THE TIMES (February 2020); In July 2020 however, he was charged with plotting the 1989 coup that took him to the presidency. THE TIMES (July 24, 2020); Muhammed Osman & Max Bearak, *Sudan's Omar Hassan al-Bashir is ousted by military after 30 years in power*, WASH. POST (Apr. 11, 2019), [https://www.washingtonpost.com/world/africa/sudans-military-expected-to-announce-overthrow-of-president-following-months-of-popular-protests/2019/04/11/bedcc28e-5c2b-11e9-842d-7d3ed7eb3957\\_story.html](https://www.washingtonpost.com/world/africa/sudans-military-expected-to-announce-overthrow-of-president-following-months-of-popular-protests/2019/04/11/bedcc28e-5c2b-11e9-842d-7d3ed7eb3957_story.html); Tom White, *States' failing to seize Sudan's dictator despite genocide charge* THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>.

<sup>245</sup>The position of the African Union is that incumbent heads of non-party states are entitled to immunity from arrest in international law and that immunity has not been affected by the Rome Statute of the ICC. Eki Yemisi Omorogbe, *The African Union and the International Criminal Court: What to Do with non-Party Heads of State?*, Univ. of Leicester Sch. L. Research Paper No. 17-09 1, 3, 8 (2017), Kerstin Carlson, *Al-Bashir and the ICC: is it worth getting your man, if you jeopardise your mission*, THE CONVERSATION (June 25, 2019), <https://theconversation.com/al-bashir-and-the-icc-is-it-worth-getting-your-man-if-you-jeopardise-your-mission-119317>.

<sup>246</sup>*Justice Belied the Unbalanced Scales of International Criminal Justice* 118 (Sebastien Chartrand & John Philpot eds., 2014).

<sup>247</sup>See *The Execution of former Liberian President Samuel K Doe*, YOUTUBE (June 14, 2015), [https://www.youtube.com/watch?reload=9&v=c5xJpj7EmQM&has\\_verified=1](https://www.youtube.com/watch?reload=9&v=c5xJpj7EmQM&has_verified=1).

The court created to deal with Khmer Rouge crimes, although not technically an international court,<sup>248</sup> but a court having similar characteristics, also illustrates how arbitrary this kind of justice can be. The court was never supported by Cambodia's prime minister, Hun Sen. He ruled out further trials, yet he was himself a Khmer Rouge commander!

Some accuse the ICC of an anti-African bias. The Gambian Information Minister referred to the ICC acronym as the International Caucasian Court. Three African countries have hinted at their withdrawal from the ICC and in 2017, Burundi did withdraw.

Others have questioned how cases are selected for investigation and action.<sup>249</sup> There is also concern about the lack of prescriptive standards and normative guidance.<sup>250</sup> International criminal courts do not feel bound by the jurisprudence of other courts; they are treated as 'subsidiary means' for determining rules of law.<sup>251</sup> The result, it is claimed, is that there are "multiple, incoherent and, in some cases, contradictory approaches to the use of external judicial decisions."<sup>252</sup> Finally, there has been concern that the ICC targets rebel groups rather than government actors. There has been no arrest warrant issued for a government actor since 2011.<sup>253</sup> This raises questions about the credibility of the ICC and whether it can successfully challenge impunity. In 2012, Schabas noted that "the big legal judgments, of the kind we had at the Yugoslavia, Rwanda, and Sierra Leone tribunals, we are still waiting for from the ICC."<sup>254</sup> The failure to prosecute President Al-Bashir, the collapse of the case against President Uhuru Kenyatta of Kenya, and the

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<sup>248</sup> *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/introduction-eccc> (last visited Sept. 26, 2019).

<sup>249</sup> William A. Schabas, *Victor's Justice: Selecting Situations at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 547 (2010).

<sup>250</sup> Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 CAMBRIDGE J. INT'L & COMP. L. 287, 289 (2013).

<sup>251</sup> *Id.* at 290, 293.

<sup>252</sup> *Id.* at 293.

<sup>253</sup> Kersten, *supra* note 228.

<sup>254</sup> Quoted in Smith, *supra* note 225.

acquittal of former President Laurent Gbagbo also reinforces this concern.

(v) *Lack of Deterrence*

One of the primary objectives of those working to establish the ICC was creating “effective deterrence” through a “culture of accountability.”<sup>255</sup> The Preamble to the ICC Statute links the ending of impunity with the prevention of crimes.<sup>256</sup> The first prosecutor, Luis Moreno-Ocampo, even predicted in 2006 that “in seven or ten years . . . We can stop genocide, prevent crimes against humanity, and prevent massive crimes.”<sup>257</sup> The ICC’s second President, Sang-Hyan Song, also claimed the long-term significance of the ICC framework: “wh[at] makes this new system fundamentally different from earlier efforts is its potential for the prevention of future crimes.”<sup>258</sup>

However, it does not appear that the ICC and Global Justice have deterred atrocity.<sup>259</sup> Darfur illustrates this point vividly. The “catastrophic cycle of violence”<sup>260</sup> which began in 2004 – scorched earth, mass rapes, more than 300,000 killings, not to mention the use of chemical weapons – has continued for 15 years, despite Sudanese President Omar al-Bashir being wanted by the ICC. In 2016, it was reported that 171 villages had been razed or partially destroyed.<sup>261</sup> Bashir

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<sup>255</sup> Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 *FORDHAM INT’L L.J.* 292, 294, 305 (2005).

<sup>256</sup> Rome Statute, *supra* note 195, at Preamble.

<sup>257</sup> Luis Moreno-Ocampo, *Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives*, 21 *AM. U. INT’L L. REV.* 497, 503 (2006).

<sup>258</sup> Sang-Hyun Song, *Preventive Potential of the International Criminal Court*, 3 *ASIAN J. INT’L L.* 203, 206 (2013).

<sup>259</sup> See Geoff Dancy & Florencia Montal, *From Law versus Politics to Law in Politics: A Pragmatist Assessment of the ICC’s Impact*, 32 *AM. U. INT’L L. REV.* 645, 654-55 (2017).

<sup>260</sup> Tirana Hassan, *Scorched Earth, Poisoned Air*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/news/2016/09/chemical-weapons-attacks-darfur/> (last visited Sept. 27, 2019).

<sup>261</sup> Adam Withnall, *Sudanese government ‘killing hundreds of civilians with chemical weapons attacks’ in Darfur - Amnesty*, *Independent* (Sept. 29, 2016), <https://www.independent.co.uk/news/world/africa/sudanese-government-killing-hundreds-of-civilians-with-chemical-weapons-attacks-in-darfur-a7335881.html>.

has been accused of trying to wipe out the Fur, Zaghawa and Masalit ethnic communities.<sup>262</sup>

There are several other recent examples as well. In Syria, where war crimes have been committed,<sup>263</sup> President Bashar al-Assad was quoted in 2017 as saying he did not care about the war crimes accusations being made against him and his regime.<sup>264</sup> Syria has not joined the ICC and so an ICC investigation can only be requested by the UN Security Council, where Russia has vetoed Resolutions 12 times on Syria, including one in May 2014 to refer Syrian crimes to the ICC. In Burma/Myanmar, a UN Report accuses the civilian government of “atrocities crimes”: at least 10,000 Rohingya civilians have been murdered; 725,000 driven out of their homes; there has been systematic torture and gang rape of women as part of a deliberate strategy to intimidate, terrorise and punish the population.<sup>265</sup> In short, there has been “genocidal intent” and “crimes against humanity.”<sup>266</sup> In the Yemeni civil war, 2018 saw the world’s worst humanitarian crisis, the worst cholera outbreak in recorded history and among the highest rates of child malnutrition; over half the population – 16 million – face starvation.<sup>267</sup> No wonder the

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<sup>262</sup> *Why former Sudan president Omar al-Bashir must not escape justice*, AMNESTY INT’L (Apr. 17, 2019), <https://www.amnesty.org/en/latest/news/2019/04/why-former-sudan-president-omar-al-bashir-must-not-escape-justice/>.

<sup>263</sup> See Stephanie Nebehay, *War crimes evidence in Syria ‘overwhelming’, not all can be pursued: U.N.*, REUTERS (Mar. 26, 2018), <https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/war-crimes-evidence-in-syria-overwhelming-not-all-can-be-pursued-u-n-idUSKBN1H22GN>, (“War crimes investigators and activists have amassed an ‘overwhelming volume’ of testimony, images and videos documenting atrocities committed by all sides during Syria’s war, a U.N. quasi-prosecutorial body said in its first report.”).

<sup>264</sup> Bel Trew, *War crimes don’t matter, says Syria’s Bashar al-Assad*, THE WEEKEND AUSTRALIAN (February 9, 2017), <https://www.theaustralian.com.au/world/the-times/war-crimes-dont-matter-says-syrias-bashar-alassad/news-story/57fb983a1e5c65a2aa8eb252bb096ce8>.

<sup>265</sup> Editorial Board, *What is happening in Myanmar is genocide. Call it by its name.*, THE WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/opinions/global-opinions/what-is-happening-in-myanmar-is-genocide-call-it-by-its-name/2018/08/29/611a1090-aafe-11e8-a8d7-0f63ab8b1370\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/what-is-happening-in-myanmar-is-genocide-call-it-by-its-name/2018/08/29/611a1090-aafe-11e8-a8d7-0f63ab8b1370_story.html).

<sup>266</sup> *Myanmar: UN Fact-Finding Mission releases its full account of massive violations by military in Rakhine, Kachin and Shan States*, OHCHR (Sept. 18, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23575>.

<sup>267</sup> Robert F. Worth, *Yemen Under Siege*, THE N.Y. REVIEW OF BOOKS (Feb. 21, 2019), <https://www.nybooks.com/articles/2019/02/21/yemen-under-siege/>.

aim of ‘prevention’ as a justification for global justice has been questioned.<sup>268</sup> Indeed, the question has even been raised that international criminal tribunals might actually exacerbate humanitarian atrocities.<sup>269</sup> As the UN chief expert on human rights in Burma, Yanghee Lee, put it, “We repeat the phrase ‘Never Again.’ It goes on and on.”<sup>270</sup>

(vi) *Better Alternatives*

The final major criticism is that there are better alternatives, such as the Truth and Reconciliation Commissions that have been set up all over the world.<sup>271</sup> Their aim is to help the transition from the past to the future, to provide a basis for reconciliation: healing the past and looking to the future. This is certainly the preferred solution of the African Union to intra-state armed conflicts. The African Union argues that, during ongoing conflicts, political solutions and power-sharing agreements are preferable since judicial intervention can destabilise and complicate peace efforts.<sup>272</sup> The African Union also fears that where conflicts have ended, judicial intervention might “reignite violence.”<sup>273</sup>

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<sup>268</sup> Sarah M.H. Nouwen, *THE INTERNATIONAL CRIMINAL COURT AND CONFLICT PREVENTION IN AFRICA* 2, 3 (2017) (available for download at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2951237&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951237&download=yes)). A contrary position on deterrence has been put by several scholars. Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, 62 *J. OF CONFLICT RESOL.* 3 (2016). He finds “strong support for [his] theoretical expectations: leaders from state that have ratified the Rome Statute commit lower levels of human rights abuses than nonratified leaders. *See also* Hyeran Jo & Beth A. Simmons, *CAN THE INTERNATIONAL CRIMINAL COURT DETER ATROCITY?* 3 (2016), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2687&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2687&context=faculty_scholarship).

<sup>269</sup> Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 *WASH. U. L. REV.* 777, 780 (2006).

<sup>270</sup> *THE TIMES* (May 6, 2020).

<sup>271</sup> *See Can We Handle the Truth? International Day for the Right to the Truth*, ICTJ, <https://www.ictj.org/gallery-items/truth-commissions> (last visited Oct. 18, 2019); Bonny Ibhawoh, *Do truth and reconciliation commissions heal divided nations?* *THE CONVERSATION* (Jan. 23, 2019), <https://theconversation.com/do-truth-and-reconciliation-commissions-heal-divided-nations-109925>.

<sup>272</sup> *Eight Priorities for the African Union in 2019*, CRISIS GROUP (Feb. 6, 2019), <https://www.crisisgroup.org/africa/eight-priorities-african-union-2019>.

<sup>273</sup> Omorogbe, *supra* note 245.

Another alternative is to offer amnesty instead of punishment. Amnesty laws are not uncommon.<sup>274</sup> Some amnesties may be questionable, but others can claim to be justified. After falling out with Joseph Kony, Dominic Ongwen handed himself in and is now facing 70 charges at the ICC.<sup>275</sup> Arguably, however, he should have benefitted from the Government's amnesty for former LRA members.<sup>276</sup> After all, he had been abducted as a child and forced to become a child soldier.<sup>277</sup> Moreover, fear of prosecution and the threat of punishment may actually prolong the conflict, if other LRA members are scared to hand themselves in.<sup>278</sup>

Finally, there is the so-called 'Napoleonic solution':<sup>279</sup> exile in a remote place instead of trial and judgment. That said, of course, the exile conditions for many leaders are luxurious and the equivalent in some minds of impunity.

In short, the arguments against Global Justice, at least in the guise of the ICC, can be

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<sup>274</sup> Leigh A. Payne et al., *Overcoming Barriers to Justice in the Age of Human Rights Accountability* 37 HUM. RIGHTS Q. 728, 728-29 (2015). While her husband was being tried by the ICC, Simone Gbagbo was granted amnesty by the Ivory Coast President. The President said he wanted to bring about "peace and reconciliation." A few months later, Laurent Gbagbo was acquitted at the ICC. *Ivory Coast ex-first lady Simone Gbagbo granted amnesty*, BBC (Aug. 7, 2019), <https://www.bbc.com/news/world-africa-45095830>; Observateur Citoyen, *Gbagbo Trial: Written Acquittal Decision Announced for September*, INT'L JUST. MONITOR (May 10, 2019), <https://www.ijmonitor.org/2019/05/gbagbo-trial-written-acquittal-decision-announced-for-september/>.

<sup>275</sup> See *ICC Judges Confirm Charges Against LRA's Dominic Ongwen*, HUM. RTS. WATCH (Mar. 23, 2016), <https://www.hrw.org/news/2016/03/23/icc-judges-confirm-charges-against-lras-dominic-ongwen>.

<sup>276</sup> See Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SEC. L. 405, 421, 419-34 (2005).

<sup>277</sup> See Human Rights Watch, *supra* note 276; See also *Uganda Warlord 'was child victim' of Lord's Resistance Army*, FRANCE 24 (Sept. 18, 2018), <https://www.france24.com/en/20180918-uganda-warlord-was-child-victim-lords-resistance-army>.

<sup>278</sup> See *id.* Alyssa K. Prorok argues that active ICC involvement in a conflict increases the threat of punishment which, under certain conditions, generates incentives to continue the conflict as a way to avoid capture, transfer to The Hague, and prosecution. By contrast, she argues that the conflict-prolonging effects of ICC involvement diminishes the risk of domestic punishment increases. Alyssa K. Prorok, *The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination* 71 INT'L ORG. 213 (2017).

<sup>279</sup> Schabas, *supra* note 69, at 9.



summed up in a single charge. International criminal justice, it is said, is ‘Rough Justice.’<sup>280</sup>

### *B. For Global Justice*

The single argument for Global Justice can be simply put: who can be against finding justice for victims and ending impunity for perpetrators? Certainly not the witness at Charles Taylor’s trial. He had lost two limbs in a machete attack but then asked the attacker to cut off another limb rather than see the machete used on his son’s arm.<sup>281</sup> For many of the thousands of victims<sup>282</sup> and witnesses<sup>283</sup> who have presented evidence, their day in court may be critically important to them: they want the world to hear their story; some want to confront their oppressors; others feel a duty to family members, or neighbours, that their suffering is recorded and acknowledged. One victim, Souleymane Guengueng put it like this: “Justice guarantees human dignity and liberty.”<sup>284</sup>

But justice can do more than restore a sense of dignity, it also empowers victims after their time of powerlessness. Many Bosnians Muslims said that the finding by the Yugoslav Tribunal that the killing at Srebrenica was genocide not only vindicated their suffering but was a kind of international apology for not preventing it.<sup>285</sup>

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<sup>280</sup> See generally David Bosco, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014).

<sup>281</sup> Afua Hirsch, *Charles Taylor is guilty – but what’s the verdict on international justice?*, THE GUARDIAN (April 26, 2012).

<sup>282</sup> STEPHEN SMITH CODY ET AL., *The Victims’ Court: A Study of 622 Victim Participants at the International Criminal Court*, UC BERKELEY SCHOOL OF LAW 1 (2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf>.

<sup>283</sup> SYLVIA NTUBE NGANE, *THE POSITION OF WITNESSES BEFORE THE INTERNATIONAL CRIMINAL COURT* 52 (2015).

<sup>284</sup> See Aida Grovestins, *Hissene Habre guilty: “Justice guarantees human dignity and liberty”*, JUST. HUB (May 29, 2019), <https://justicehub.org/article/hissene-habre-guilty-justice-guarantees-human-dignity-and-liberty/>.

<sup>285</sup> “But the fall of Srebrenica was the ‘responsibility of the international community as a whole,’ he said, and not of the United States alone.” David Rhode, *World Leaders Apologize for Massacre*, N.Y. TIMES (July 12, 2005),

In addition, there is the possibility of some financial compensation. The Islamist who led militants to destroy ancient monuments in Timbuktu was found liable for \$3.2 million in damages, payable to the local Mali community.<sup>286</sup> Since he cannot pay – Ahmad al Faqi was jailed for nine years – the money will come from the ICC trust fund for victims.<sup>287</sup>

Justice is also needed because people do not forget. That is why the Armenians continue to remember and commemorate their ‘genocide’ even after more than one hundred years.<sup>288</sup> All over the world, bitter memories of the past play out, over and over again. Some argue that some kind of punishment is essential before reconciliation can be attempted; it is viewed as a prerequisite to closure.<sup>289</sup> When ad hoc Tribunals complete their mission, as both the Former Yugoslavia and Rwandan Tribunals have done, the desire for revenge may have been reduced.<sup>290</sup> If it has, then ‘Global Justice’ may be worth waiting for, even for a long time.

In 2003, nearly 25 years after the end of the ‘Killing Fields of Cambodia’, there was some justice for the victims.<sup>291</sup> The trials of the Khmer Rouge began in an

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<https://www.nytimes.com/2005/07/12/world/europe/in-bosnia-world-leaders-apologize-for-massacre.html>.

<sup>286</sup> Marlise Simons, *Jihadist Is Liable for \$3.2 Million for Damage to the Shrines in Mali*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/world/africa/mali-timbuktu-international-criminal-court-shrines-mosque.html>.

<sup>287</sup> *Id.*

<sup>288</sup> See Mariama Diallo, *Armenians Mark Genocide Anniversary as Recognition Debate Continues*, VOA (Apr. 24, 2017), <https://www.voanews.com/europe/armenians-mark-genocide-anniversary-recognition-debate-continues>.

<sup>289</sup> See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW, 173 (2007).

<sup>290</sup> See Chuck Sudetic, *Justice Is Better Than Revenge*, N.Y. TIMES (Oct. 29, 2000), <https://www.nytimes.com/2000/10/29/books/justice-is-better-than-revenge.html?searchResultPosition=1> (“Watchdog organizations and advocates like Human Rights Watch, Amnesty International, George Soros’s Open Society Institute and others have come up with facts and funds to goad governments to do justice in situations in which revenge was once the only “remedy” available.”).

<sup>291</sup> “The ECCC may be considered a —failure if judged from a human rights perspective. However, the tribunal has met with success in other areas, laying the groundwork for lasting social change in Cambodia and its judicial system through such means as the creation of a common history, capacity building, ending impunity, building faith in the local judicial system, outreach, and allowing victims to participate as civil parties. From

International Criminal Court in Cambodia.<sup>292</sup> By 2010, one of those sentenced to life imprisonment was the man in charge of Tuol Sleng prison<sup>293</sup> and although Pol Pot himself escaped justice – he died in 1998 – his second in command, Khieu Samphan, did not. He got a life sentence in 2014 for crimes against humanity which, at age 83, probably will mean he has probably been sentenced to die in prison.<sup>294</sup> In 2018, he was also found guilty of genocide.<sup>295</sup>

Finally, and perhaps surprisingly, a delegation of ‘warlords’, including two who were tried at the ICC, have been recruited as peace envoys in the Democratic Republic of Congo.<sup>296</sup> Germain Katanga, convicted in 2014 of war crimes and one crime against humanity, and Matthieu Ngudjolo Chui, acquitted in 2012 – both involved in the same incident – have, with Floribert Njabu Ngabu, a former rebel group leader who gave evidence at the ICC in Katanga’s defence, been sent by DRC President Tshisekedi to try to persuade militiamen involved in violence between ethnic groups to lay down their weapons. The violence has resulted in hundreds of deaths and thousands of people fleeing from villages. Ngabu said they were all aware of the “immensity of their task” but they will “go to mobilise people so that the province can regain peace.”<sup>297</sup>

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the author’s perspective, these social goods are more valuable than procedural perfection, and the ECCC should be considered a success notwithstanding its flaws.” Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia* 13:1 *ASIAN-PACIFIC L. & POL’Y J.* 300 (2013) at 349.

<sup>292</sup> Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was Khmer Rouge Tribunal Worth it?*, *N.Y. TIMES* (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

<sup>293</sup> *Id.* Kaing Guek Eav, known as Comrade Duch; he died in September 2020. Others convicted included the Khmer Rouge chief ideologist, known as Brother No 2: Nuon Chea was convicted of genocide and sentenced to life in prison. He died there in 2019, aged 92.

<sup>294</sup> *Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment for Crimes against Humanity*, ECCC, <https://www.eccc.gov.kh/en/articles/nuon-chea-and-khieu-samphan-sentenced-life-imprisonment-crimes-against-humanity> (last visited Oct. 18, 2019).

<sup>295</sup> *Khmer Rouge leaders found guilty of Cambodia genocide*, *BBC* (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-46217896>.

<sup>296</sup> *THE TIMES* (July 9, 2020).

<sup>297</sup> *Id.*

### C. Conclusion

On the one hand, there is no doubt: a system of accountability has been created under the auspices of the ICC where no one – potentially – is above the law. On the other hand, it is a vulnerable and fragile system. In 2016, three African countries announced they will withdraw from the ICC, saying that it is biased against Africa.<sup>298</sup> The acronym ICC, according to the Gambian Information Minister,<sup>299</sup> stands for ‘International Caucasian Court.’<sup>300</sup> In 2017, Burundi withdrew, the first Member State to do so. Other African countries, and even the African Union, may also withdraw in due course. In March 2019, the Philippines also withdrew.<sup>301</sup> Other African countries, and even the African Union, may also withdraw in due course. In March 2019, the Philippines also withdrew. President Duterte points to the possibility of an ICC investigation during his ‘war on drugs’ in which an estimated 13,000 dealers and bystanders have been killed. He said the court was being used as a “political tool.”<sup>302</sup>

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<sup>298</sup> See Somini Sengupta, *As 3 African Nations Vow to Exit International Court Faces Its Own Trial*, N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html>; See Also Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, *International Criminal Court Cases in Africa Status and Policy Issues*, CONGRESSIONAL RES. SERV. (July 22, 2011), <https://fas.org/sgp/crs/row/RL34665.pdf>; Charles Chemor Jalloh, *Regionalizing International Criminal Law*, 9 INT’L CRIM. L. REV. 445, 451 (2009)..

<sup>299</sup> Sheriff Bojang, *Gambian minister ‘quits in protest’ amid political impasse*, BBC (Jan. 10, 2017), <https://www.bbc.com/news/world-africa-38565502>.

<sup>300</sup> See Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal From International Criminal Court*, NPR (Feb. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court>; Siobhan O’Grady, *Gambia: The ICC Should Be Called the International Caucasian Court*, FOREIGN POL’Y (Oct. 26, 2016), <https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>..

<sup>301</sup> The ICC had been investigating whether President Duterte committed crimes against humanity in his drug crackdown. Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html>.

<sup>302</sup> Karen Lema & Neil Jerome Morales, *Duterte to withdraw Philippines from ICC after ‘outrageous attacks’*, REUTERS (Mar. 14, 2018), <https://www.reuters.com/article/us->

#### IV. SHOULD THE US JOIN THE ICC?

There is no doubt that the United States will not be joining the ICC anytime soon. President Trump told the United Nations in 2018: “as far as the United States is concerned, the ICC has no jurisdiction, no legitimacy and no authority.”<sup>303</sup> The President’s former National Security Adviser, John Bolton, was the US Ambassador to the United Nations when the ICC was created. His view then was that he hoped the ICC would “wither and collapse, it is a fundamentally bad idea.”<sup>304</sup> The Clinton administration signed the Rome Statute but “with the aim of insulating the United States from the effects of the treaty.”<sup>305</sup> The George W Bush administration was also initially hostile to the ICC.<sup>306</sup> Indeed, one of the first U.S. responses to the ICC coming into effect in 2002 was the passing of a law which critics claimed authorised the invasion of the Netherlands.<sup>307</sup> More accurately, the law authorised the freeing of American soldiers held at the ICC in The Hague for war crimes.<sup>308</sup> The Bush Administration also signed a number of bilateral immunity agreements with other states in which they agree not to surrender each other’s nationals to the ICC.<sup>309</sup> The US

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philippines-duterte-icc/duterte-to-withdraw-philippines-from-icc-after-outrageous-attacks-idUSKCN1GQ0MA.

<sup>303</sup> *Remarks by President Trump to the 73rd Session of the United Nations General Assembly* | New York, NY, WHITE HOUSE (Sept 25, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-United-Nations-General-Assembly-New-York-NY/>.

<sup>304</sup> *Is a U.N. International Criminal Court in the U.S. National Interest?, Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations U.S.S., 105th Cong.* (1998), <https://www.govinfo.gov/content/pkg/CHRG-105shrg50976/html/CHRG-105shrg50976.htm>).

<sup>305</sup> Diane Amann, *The United States of America and the International Criminal Court*, 50 AM. J OF COMPARATIVE L. SUPPLEMENT 381, 383 (2002).

<sup>306</sup> Jean Galbraith, *The Bush Administration’s Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 693, 698 (2003).

<sup>307</sup> See U.S.: ‘Hague Invasion Act’ Becomes Law, HUM. RTS. WATCH, (August 3, 2002), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>.

<sup>308</sup> *See id.*

<sup>309</sup> *See generally Treaties in Force A list of Treaties and Other International Agreements of the United States in Force on January 1, 2019*, U.S. DEPT OF ST., <https://www.state.gov/wp-content/uploads/2019/05/2019-TIF-Bilaterals-web-version.pdf> (last visited Nov. 16, 2019).

believes US citizens cannot be transferred to the ICC by any state with which it has such an agreement due to Article 98 of the Rome Statute.<sup>310</sup> This states that the ICC cannot make a request if to do so would require a state to act “inconsistently” with its international law obligations.<sup>311</sup>

The Trump Administration’s hostility to the ICC took another step in 2018. John Bolton, hearing that an ICC investigation into alleged American war crimes in Afghanistan might be formally proceeded with, made direct threats to the ICC and its judges in particular. Claiming that the ICC “unacceptably threatens American sovereignty and U.S. national security interests”, he threatened to “ban [ICC] judges and prosecutors from entering the United States.<sup>312</sup> We will sanction their funds in the U.S. financial system, and, we will prosecute them in the U.S. criminal system.”<sup>313</sup> He said the same with regard to a Palestine Liberation Organization call for an ICC inquiry into Israel. “We will let the ICC die on its own,” he is reported as saying.<sup>314</sup> The threat to ban was reinforced in 2019 when the United States revoked the visa of Fatou Bensouda, the ICC prosecutor.<sup>315</sup> More recently, Mike Pompeo, U.S. Secretary of State, called the ICC a “kangaroo court.”<sup>316</sup>

American hostility is arguably one of the biggest

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<sup>310</sup> *United States Efforts to Undermine the International Criminal Court*, HUM. RTS. WATCH (July 9, 2002), [https://www.hrw.org/legacy/campaigns/icc/icc\\_article98.pdf](https://www.hrw.org/legacy/campaigns/icc/icc_article98.pdf). See also Terrence Chapman & Stephen Chaudoin, *John Bolton attacked the ICC. Cooperating with it might be a better way to protect U.S. interests*, WASHINGTON POST, (Sept. 14, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/14/john-bolton-attacked-the-icc-cooperating-with-it-might-be-a-better-way-to-protect-u-s-interests/>.

<sup>311</sup> Rome Statute *supra* note 195, at art. 98.

<sup>312</sup> Oona Hathaway, *The International Criminal Courts is No Threat to America, but John Bolton Is*, NEWSWEEK, (Sept. 12, 2018), <https://www.newsweek.com/international-criminal-court-no-threat-america-john-bolton-opinion-1115820>. The Trump Administration repeated the threat in June 2020.

<sup>313</sup> *Id.*

<sup>314</sup> Owen Bowcott, et. al., *John Bolton threatens war crimes court with sanctions in virulent attack*, THE GUARDIAN (Sept. 10, 2018), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

<sup>315</sup> Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N. Y. TIMES, (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>.

<sup>316</sup> The Times (June 12, 2020).

problems for the ICC.<sup>317</sup> But is it justified? Or might it be a mistake, not only for the ICC, but for the US itself? There are three main reasons why it might be a mistake.

### A. *Evading Justice?*

There is no doubt that American hostility to the ICC has inhibited Global Justice,<sup>318</sup> but it also undermines any US claim to global moral leadership.<sup>319</sup> More particularly, it “undermines the legitimacy of the ICC and of other global justice actors.”<sup>320</sup> Indeed, in his speech, Bolton was explicit in his view: the International Criminal Court, he said, was “illegitimate.”<sup>321</sup> However, it is arguable that the legitimacy of the ICC depends on the level of support by the global community. The Rome Treaty became ‘valid’ and ‘effective’ when 60 countries ratified it.<sup>322</sup> Is that legitimate? Now there are 123 countries.<sup>323</sup> Is that ‘more’ legitimate? Or does it need the ‘big players’ – the US, Russia and China – to be involved to render the ICC fully legitimate, so that the ICC can claim to act on behalf of the entire global community?

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<sup>317</sup> See Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AMERICAN SOCIETY OF INTERNATIONAL LAW (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>. (“On May 6, 2002, the Bush Administration announced that the United States does not intend to become a party to the Rome Statute of the International Criminal Court.”). See also SARAH B. SEWALL ET AL., *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: AN OVERVIEW*, IN *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, 1,9 (Sarah B. Sewall & Carl Kaysen ed., 2000).

<sup>318</sup> See M. Rafiqul Islam, *The International Criminal Court without the United States: the indefensible position of an indispensable state*, 2002 AUSTL. INT’L. L. J. 220, 232 (2002). “[I]t would have been ideal if [the US] ratified [the ICC] since its political, military, intelligence and financial support would be indispensable in relation to the successful indictment and prosecution of criminals worldwide. . . Until the US provided crucial evidence. . . Slobodan Milosevic could not be found and brought to trial.” *Id.*

<sup>319</sup> Margaret M. deGuzman, *Inter-National Justice for them or Global Justice for Us?: The U.S. as a Supranational Justice Donor*, 48 CASE W. RES. J. INT’L L. 177, 179 (2016).

<sup>320</sup> *Id.*

<sup>321</sup> Mythili Sampathkumar, *Trump Official John Bolton declares International Criminal Court ‘dangerous’ and ‘dead to’ America*, THE INDEPENDENT, (Sept. 10, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/icc-us-john-bolton-international-criminal-court-national-security-advisor-donald-trump-a8531701.html>.

<sup>322</sup> Rome Statute, *supra* note 196, at art. 126.

<sup>323</sup> Rome Statute of The International Criminal Court, Penal Matters.

The US, China and Russia have all failed to ratify the ICC Statute. In November 2016 Russia announced that it would withdraw its signature as well.<sup>324</sup> What this means is that Russia will end all cooperation with the ICC.<sup>325</sup> How will less powerful nations regard these failures? They may well ask themselves: why should we not evade justice too?

The non-inclusion of these ‘big’ countries reinforces the criticism that Global Justice is a “tool of the powerful against the less powerful.”<sup>326</sup> This view becomes harder to refute when the US advocates the creation of international criminal courts in some contexts but not in its own. It has been described as turning ‘American exceptionalism’ into “legal exceptionalism.”<sup>327</sup>

No wonder the ICC has been attacked, especially in Africa, as an example of Western imperialism and domination, as “nothing less than a neo-colonial instrument of manipulation.”<sup>328</sup> And that charge has a lot of merit. After all, the US has declared the ICC to be a “kangaroo court” and stated that it will prevent Americans coming before it, even, as we have seen, to the extent of invading the Netherlands.<sup>329</sup> Meanwhile, the African Union’s Resolution that no sitting African Head of State should be tried at the ICC has been ignored by the ICC, which has pursued Al Bashir, President of Sudan.<sup>330</sup>

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<sup>324</sup> Shaun Walker, *Russia withdraws signature from international criminal court statute*, THE GUARDIAN, (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>. China is a non-member as well. *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> DeGuzman, *supra* note 320, at 184.

<sup>327</sup> David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q., 840, 843 (2012). THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW 496 (William Schabas, et al. 2013). Rhea argues that the United States’ position on international criminal tribunals has been consistent: it only favors tribunals where there is no substantial risk of US nationals being indicted. Rhea, *supra* note 110, at 19-20. Thus, US support for the creation of an ICC in the early 1990s was premised on the UN Security Council – in which, of course, the US has a veto – having a key role: S.J. Res. 32, 33 103rd Cong. (1993). Rhea argues that the US would ratify the ICC if the UN Security Council had exclusive referral power. *Id.* at 37-38.

<sup>328</sup> See DeGuzman, *supra* note 320, at n.27.

<sup>329</sup> DeGuzman, *id.* at 185 n. 28.

<sup>330</sup> Ben Batros, *Preview of the International Criminal Court Appeals Judgment on Al-Bashir and Head of State Immunity*, JUST SECURITY, (May 3, 2019),



The refusal by Bolton to rule out any ICC investigation of American citizens makes a mockery of Eleanor Roosevelt's hope of an 'international Magna Carta'. It is hard for the US to criticise Russia's withdrawal of its signature – the ICC opened investigations in Georgia which had a war with Russia in 2008 – when it fears an investigation into the conduct of international forces in Afghanistan. When Russia vetoed the 2014 Security Council Resolution to refer Syrian crimes to the ICC, it accused the US (and Britain) of hypocrisy in not wanting war crimes in Iraq referred to the ICC.<sup>331</sup>

Of course, the announcement in 2016 that the ICC might explore conduct by the US in Afghanistan can also be seen as an attempt “to keep Africa sweet,”<sup>332</sup> especially as several African countries at the time were threatening to quit the ICC. Similarly, Robert Mugabe, former President of Zimbabwe, had called for “an African ICC” to try George W Bush and Tony Blair for “colonial crimes galore.”<sup>333</sup>

The criticism of evading justice links to the second reason why non-ratification is a mistake: it looks like a double standard. As Schabas notes, when the ICC was being created, “the United States favoured a great enlargement of the historic definitions both of war crimes and crimes against humanity.”<sup>334</sup> Nevertheless, although prepared to see others prosecuted for such crimes, the United States has remained nervous about the potential international

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<https://www.justsecurity.org/63879/preview-of-the-international-criminal-court-appeals-judgment-on-al-bashir-and-head-of-state-immunity/>. Of course, the African charge can also be challenged. After all, global justice has been dispensed in ad hoc courts affecting non-African countries prior to the creation of the ICC. Furthermore, many of the African cases pursued by the ICC were referred to it by African countries themselves. As Fatou Bensouda has also commented: “the victims are African.” *The International Criminal Court on Trial: A Conversation with Fatou Bensouda*, FOREIGN AFFAIRS, (Jan./Feb. 2017), <https://www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial>.

<sup>331</sup> *Russia's 12 UN vetoes on Syria*, RTE, (Apr. 11, 2018),

<https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/>.

<sup>332</sup> Jerome Starkey Nairobi, War crimes court targets US to keep Africa sweet, THE TIMES (Nov. 16, 2016), <https://www.thetimes.co.uk/article/war-crimes-court-targets-us-to-keep-africa-sweet-pd0qsmgctc>.

<sup>333</sup> *Id.*

<sup>334</sup> Schabas, *supra* note 69 at 155.

mechanisms of accountability that may apply to its own conduct.”<sup>335</sup> The idea that Global Justice might “rebound” on the US seems to be a perennial concern.<sup>336</sup>

### *B. Double Standard?*

The relationship between the US and the ICC has been “complicated, uneasy, yet at times engaging.”<sup>337</sup> Alongside the hostile American rhetoric presented above, there has been another reality: strong and vital American support for Global Justice. After all, the US has long played a key role in the international criminal justice movement.<sup>338</sup> It played the major role in creating an International Criminal Justice system at Nuremberg. It plays a key role now: supporting and funding ad hoc Tribunals,<sup>339</sup> and providing some of the best judges and lawyers,<sup>340</sup> such as Pierre-Richard Prosper, who was lead lawyer in the genocide trial of Jean-Paul Akayesu.

A good example is the United States role in trying to capture the “world’s most wanted war criminal.”<sup>341</sup> Felicien Kabuga was suspected of financing the genocide in Rwanda, helping to instigate war in the Congo, and being complicit in the murder of American, British and New Zealand

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<sup>335</sup> Schabas, *id.* at 155-56.

<sup>336</sup> Schabas, *id.* at 15.

<sup>337</sup> Leila Nadya Sadat & Mark A. Drumbl, *The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship*, WASHINGTON UNIVERSITY IN ST. LOUIS SCHOOL OF LAW, A Legal Studies Research Paper Series, No. 16-07-02 (2016).

<sup>338</sup> See Sewall, *supra* note 317, at 1.

<sup>339</sup> See Sandra L. Hodgkinson, Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases? 24 *Emory Int’l L. Rev.* 515 (2010). The US called on the UN Security Council to establish an international criminal tribunal for Iraq as it had done previously for Yugoslavia and Rwanda; China and Russia rejected it. According to Rhea, referencing Richard Goldstone, the (South African) Chief Prosecutor at the ICTY, “The ICTY would have failed in the early years if not for the contribution of the United States.” *Supra* note 112, at 33.

<sup>340</sup> See Hodgkinson *id.*

<sup>341</sup> Adam Ciralsky, *A Dead Informant, An Untrustworthy Ally: How A U.S. Operation to Snare Rwandan Genocide Fugitive Felicien Kabuga Went Awry* (June 12, 2020) available at [vanityfair.com/news/2020/06/how-a-us-operation-to-snare-felicien-kabuga-went-awry](http://vanityfair.com/news/2020/06/how-a-us-operation-to-snare-felicien-kabuga-went-awry).

citizens. He is to be charged with five counts of genocide and two crimes against humanity (persecution and extermination). President George W Bush appointed Prosper to be his ambassador-at-large and responsible for the President's "war crimes portfolio."<sup>342</sup> Prosper said: "Everyone was on board. The NSC, the FBI, the CIA. And we had the full backing of President Bush, Condi [Rice] and Colin [Powell]." Even the work of ICC has been supported. Indeed, the US was an "initial supporter of the creation of the ICC and played a major role at the international conference that negotiated and finalized the Rome Statute in 1998."<sup>343</sup> It provided aid in the drafting of the ICC Statute and it has offered rewards to bring in people like Joseph Kony.<sup>344</sup>

In the early 2000s, the CIA was telling Bolton that they and the US could use the ICC, and in 2005, the Bush administration did not veto a UN Security Council Resolution to refer the Darfur case to the ICC prosecutor.<sup>345</sup> In 2011, the Obama administration did the same with Syria.<sup>346</sup> The US began attending a meeting of the ICC Assembly of State Parties as an observer in 2009, and participated in the ICC Review Conference in 2010. In 2014, the US along with 12 other members of the UN Security

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<sup>342</sup> *Id.*

<sup>343</sup> CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE, 2010 Review Conference, 1 (2011).

<sup>344</sup> See *U.S. offers \$5M bounty for warlord Kony*, U.S.A. TODAY, (Apr. 3, 2013), <https://www.usatoday.com/story/news/nation/2013/04/03/us-bounty-kony/2049735/>; Helene Cooper, *More U.S. Troops to Aid Uganda Search for Kony*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/world/africa/obama-is-sending-more-resources-for-joseph-kony-search.html?register=google&auth=register-google>. The US Rewards for Justice Program also offered up to \$5 million for information leading to the capture of Felicien Kabuga. See *supra* note 342.

<sup>345</sup> LEE FEINSTEIN & TOD LINDBERG, MEANS TO AN END: US INTEREST IN THE INTERNATIONAL CRIMINAL COURT 54 (Brooking Institution 2011); ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY 310 (Princeton University Press 2012); S.C. Res. 1593 (Mar. 31, 2005).

<sup>346</sup> Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, FOREIGN POLICY, (May 7, 2014) <https://foreignpolicy.com/2014/05/07/exclusive-u-s-to-support-icc-war-crimes-prosecution-in-syria/>. For a review of US Engagement with the ICC, see EMILY C. BARBOUR & MATTHEW C. WEED, CON. RESEARCH SERV., THE INTERNATIONAL CRIMINAL COURT (ICC): JURISDICTION, EXTRADITION, AND U.S. POLICY 20-24 (2010).

Council backed a proposal to refer Syrian crimes to the ICC.<sup>347</sup> Russia and China vetoed it.<sup>348</sup> In 2015, Congress – both the House of Representatives and the Senate – called for an International Criminal Tribunal to be created to punish so-called Islamic State for their crimes.<sup>349</sup> In 2016, the House urged other nations to deliver persons indicted for these crimes to a Syrian war crimes tribunal.<sup>350</sup> No wonder the rhetoric changed: in 2016, the US State Department’s view was that the ICC had made “valuable contributions in the service of accountability in a number of situations.”<sup>351</sup> It invited other governments to “share this analysis”; it even expressed “concern” about the 3 African countries’ announcements of their decision to withdraw.<sup>352</sup>

And while the Trump administration’s rhetoric has been hostile, the US State Department in 2018, after welcoming the conviction of Khieu Samphan by the Cambodian Court stated the following:

The United States is proud to have supported the efforts to hold these perpetrators of atrocity crimes to account. Let this be a message to other perpetrators of mass atrocities, even those at the highest levels, including former heads of state, that such actions will not be tolerated and they will ultimately be brought to justice.<sup>353</sup>

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<sup>347</sup> Ian Black, *Russia and China veto UN move to refer Syria to international criminal court*, THE GUARDIAN, (May 22, 2014), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>.

<sup>348</sup> *Id.*

<sup>349</sup> S. Res. 340, 114<sup>th</sup> Cong. (2016) (enacted).

<sup>350</sup> H.R. Con. Res. 121, 114<sup>th</sup> Cong. (2016).

<sup>351</sup> Ofeibea Quist-Arcton, *South Africa Withdraws From International Court; Others Follow*, NPR (Oct. 26, 2016), <https://www.npr.org/2016/10/26/499409044/south-africa-withdraws-from-international-criminal-court-others-follow> (“We do think that the ICC has made valuable contributions in the service of accountability in a number of situations. And we hope that other governments would share that analysis.”).

<sup>352</sup> *Id.*

<sup>353</sup> Press Statement, Conviction of Khmer Rouge Leaders Noun Chea and Khieu Samphan (Nov. 16, 2018) (on file at <https://www.state.gov/conviction-of-khmer-rouge-leaders-noun-chea-and-khieu-samphan/>).

Also in 2018, the House of Representatives passed a bipartisan resolution calling for the establishment of an “Extraordinary Criminal Tribunal for Liberia.”<sup>354</sup> Similarly, in 2020, the US Embassy in Kosovo “endorsed the indictment of President Thaci,” former leader of the Kosovo Liberation Army.<sup>355</sup> It is easy to understand therefore why David Scheffer, who established the ICC on behalf of the US,<sup>356</sup> characterised John Bolton’s speech in 2018 as setting forth a ‘double standard’. The US, while it is a supranational ‘donor,’ it is not a member of the “global justice community committed to enforcing shared values.”<sup>357</sup> The US is a friend and a foe of Global Justice. It is an enthusiastic contributor but a reluctant member. It preaches accountability to others but claims impunity for itself. It does feel like a double standard. No wonder the ICC recently commented, “An attack on the ICC also represents an attack against the interests of victims of atrocity crimes, for many of whom the Court represents the last hope for justice.”<sup>358</sup>

### *C. Errors, Concerns and Misconceptions?*

#### *(i) Errors*

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<sup>354</sup> H.R. Res. 1055, 115th Cong. (2018). The sponsor of the Resolution, Republican Dan Donovan, said: “We support efforts to hold perpetrators of war crimes accountable.” Press Release, Rep Johnson’s Bipartisan Resolution Affirming Strong U.S.-Liberian Ties Passes House, (Nov. 13, 2018). He encouraged James Mattis, then Secretary of Defence, and Mike Pompeo, Secretary of State, to encourage Liberia to establish the tribunal.

<sup>355</sup> Hannah Lucinda Smith, *Trump embarrassed as president of Kosovo indicted for war crimes*, SUNDAY TIMES (June 26 2020).

<sup>356</sup> See DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS*, introduction (Princeton Univ. Press, 2012). David Scheffer was the US Ambassador at Large for War Crimes Issues, U.S. Dept. of State.

<sup>357</sup> DeGuzman, *supra* note 320, at 177.

<sup>358</sup> AFP, *International Criminal Court Slams US Sanctions Move*, NEW STRAITS TIMES (June 12, 2020) *available at* [nst.com/my/world/world/2020/06/599936/international-criminal-court-slams-us-sanctions-move](https://www.nst.com/my/world/world/2020/06/599936/international-criminal-court-slams-us-sanctions-move).

Bolton's critique of the ICC repeats many errors and misperceptions which make discussions about the ICC distorted and political, rather than practical and pragmatic. For example, Bolton has said that the ICC claims "unfettered discretion to investigate, charge and prosecute individuals."<sup>359</sup> He implies that American citizens – and military – could be at risk of politically-motivated prosecutions at the ICC. Article 12 of the Rome Statute does allow jurisdiction over an accused individual – an American perhaps – who committed a crime in a State Party's territory. Reading Article 12 alone, this might support Bolton's view.<sup>360</sup>

However, a full reading of the Rome statute shows that a claim that the ICC has "unfettered discretion" is simply wrong. The ICC does not override national jurisdictions. It is hard to imagine any country would sign up to the ICC if it did. The ICC in fact hears cases only when domestic legal systems cannot or will not exercise their jurisdiction.<sup>361</sup> Not only that, the Rome Statute provides that a case is inadmissible if it is not of 'sufficient gravity'.<sup>362</sup> In 2006, the ICC Prosecutor declined to open an investigation into alleged crimes committed by British troops in Iraq, claiming that the situation did not have the requisite gravity to place it under ICC jurisdiction.<sup>363</sup> He explained that the Statute required incidents alleged to be war crimes be part of a plan, policy, or large-scale commission of crimes.<sup>364</sup> He also pointed to the number of victims as a key factor.<sup>365</sup> In the Iraq case, there were said to be between four and twenty victims. By contrast, other ICC

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<sup>359</sup> Hathaway, *supra* note 313.

<sup>360</sup> See generally Lovisa Badagard & Mark Klamberg, *THE GATEKEEPER OF THE ICC: PROSECUTORIAL STRATEGIES FOR SELECTING SITUATIONS AND CASES AT THE INTERNATIONAL CRIMINAL COURT*, 48, *Geo. J. Int'l L.* 639, 642 (2017).

<sup>361</sup> *Id.* at 666-67.

<sup>362</sup> *Id.* at 712-13.

<sup>363</sup> *Id.* at 713.

<sup>364</sup> *Id.*

<sup>365</sup> OTP RESPONSE TO COMMUNICATION RECEIVED CONCERNING IRAQ, OFFICE OF THE PROSECUTOR, 8 (2006) [https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

investigations at the time involved thousands of murders as well as large-scale sexual violence and abductions.<sup>366</sup> In the same year, the Pre-Trial Chamber 1 has set out a three-part test; To satisfy the ‘sufficient gravity’ threshold, the Court must consider whether the relevant conduct is systematic or large-scale; whether social alarm has been caused in the international community; and whether the perpetrator of the relevant conduct is among those who bear the greatest responsibility for the alleged crimes.<sup>367</sup>

In addition, the ICC Treaty Articles 1 and 7 make clear that *national* courts are designated as the main enforcers of the Treaty.<sup>368</sup> Furthermore, Article 17 states explicitly that a case before the ICC is inadmissible if it is “being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>369</sup> In other words, the Rome Statute explicitly allows a State to assert the primacy of its own national judicial system. The US could therefore avoid any case proceeding before the ICC by carrying out an investigation of its own; the ICC must, in those circumstances, defer to American justice.<sup>370</sup>

The Prosecutor reopened the preliminary investigation involving British troops in 2014, after receiving fresh information from a single source: a law firm in the UK.<sup>371</sup> However, British officials expressed their confidence that the investigation would not “move to the next

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<sup>366</sup> *Id.* at 9.

<sup>367</sup> Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, ¶ 46 (Feb. 10, 2006).

<sup>368</sup> Rome Statute, *id.* at art. 1, 7.

<sup>369</sup> Rome Statute, *id.* at art. 17.

<sup>370</sup> JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE NATIONAL JURISDICTION* 470 (Mrtinus Nijhoff Publishers, 2008)..

<sup>371</sup> Ian Cobain, *ICC to examine claims that British troops carried out war crimes in Iraq*, THE GUARDIAN (May 12, 2014), <https://www.theguardian.com/law/2014/may/13/icc-to-investigate-alleged-british-war-crimes-iraq>. The law firm later closed down and one of its lawyers, Phil Shiner, was disbarred over allegations he made on behalf of other alleged Iraqi victims: Owen Bowcott, *Phil Shiner. Iraq human rights lawyer struck off over misconduct*, THE GUARDIAN (FEB. 2, 2017), <https://www.theguardian.com/law/2017/feb/02/iraq-human-rights-lawyer-phil-shiner-disqualified-for-professional-misconduct>.

stage” because the UK itself “had the capacity to investigate the allegations itself.”<sup>372</sup> Indeed, the British undertook an independent investigation of thousands of allegations from the Iraq invasion of 2003, and in 2013 one soldier was convicted of murdering an injured prisoner in Afghanistan. In addition, following an investigation by the ‘Iraq historic allegations team’ and ‘Operation Northmoor’ which investigated alleged war crimes in Afghanistan, £100,000,000 plus was also paid out to those who were credibly claimed to have been abused by British soldiers in Afghanistan and Iraq. Not only did the UK government believe it had a legal responsibility to investigate credible allegations of wrongdoing by UK forces but, as far as the ICC was concerned, was “confident that our existing efforts to investigate allegations precludes the need for any investigation by the ICC.”<sup>373</sup>

In a similar way, U.S. sovereignty is not threatened since the US has jurisdiction over armed personnel serving overseas. Allegations of war crimes or crimes against humanity committed by Americans could (and arguably should) be investigated domestically, in which case ICC jurisdiction is effectively pre-empted. In other words, ICC jurisdiction is ‘last resort’ – it hears cases only when states cannot or will not exercise jurisdiction.<sup>374</sup> That is why the ICC Statute says it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.<sup>375</sup> It is called

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<sup>372</sup> Owen Bowcott, *The Hague says claims of war crimes by UK troops have ‘reasonable basis,’* THE GUARDIAN (Dec. 4, 2017), <https://www.theguardian.com/law/2017/dec/04/icc-to-continue-investigation-into-claims-of-war-crimes-by-british-troops>.

<sup>373</sup> *Id.* A Bill aimed at curbing ‘vexatious claims against troops,’ the Overseas Operations (Service Personnel and Veterans) Bill, is being considered in the UK. It creates a ‘presumption against prosecution’ five years after an incident involving service personnel overseas. Ironically, as Britain’s former chief of the defence staff, Field Marshall Lord Guthrie of Craigiebank, put it, to the extent that it creates any ‘de facto impunity,’ it also for that reason, leaves British troops *more* likely to face prosecution at the ICC. THE TIMES (Sept. 18-19, 2020). No wonder some believe it puts Britain in danger of being criticized as setting double standards. DAILY TELEGRAPH (Sept. 18, 2020).

<sup>374</sup> Neier, *supra* note 345, at 280–81; Feinstein & Lindberg, *supra* note 345, at 97.

<sup>375</sup> Rome Statute, *supra* note 196, at art. 1.



complementarity.<sup>376</sup> The ICC may not obtain personal jurisdiction if a Member State has its own genuine investigation, has decided not to prosecute, or the prosecution has already taken place.<sup>377</sup> All States, including the US, concerned about politically-motivated prosecutions, could therefore avoid ICC jurisdiction. Indeed, Secretary Pompeo's concerns about the ICC ordering an investigation into Israeli troops in the West Bank and Gaza Strip illustrate this error: "Given Israel's robust civilian and military legal system and strong track record of investigating and prosecuting wrongdoing by military personnel, it is clear the ICC is only putting Israel in its crosshairs for nakedly political purposes."<sup>378</sup> He therefore said ICC officials and their families would not be allowed to "shop and travel and otherwise enjoy American freedoms as these same officials seek to prosecute the defender of those very freedoms."<sup>379</sup> If Israel investigates, the ICC cannot prosecute.

Similarly, the American response to the announcement in March 2020 that the ICC will investigate war crimes in Afghanistan, including those committed by American forces as well as Afghan and Taliban forces, was equally misguided. Secretary Pompeo called the ICC "this renegade so-called court."<sup>380</sup> Yet the administration itself pointed out it has its own procedures to investigate. In other words, the ICC will proceed with the investigation only if the US fails to do anything about the allegations. If that were the case – and, indeed, President Trump has pardoned two servicemen

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<sup>376</sup> *What is Complementarity – National courts, the ICC, and the Struggle Against Impunity*, ICTJ, <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/> (last visited Oct. 3, 2019). See also Mohamed M. El Zeidy, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT, AND PRACTICE*, 157-58 (Martinus Nijhoff Publishers, 2008); Luis Moreno-Ocampo, *A Positive Approach to complementarity: the impact of the Office of the Prosecutor*, in *The International Criminal Court And Complementarity* 21, 23–24 (Carsten Stahn & Mohamed M. El Zeidy ed., 2011).

<sup>377</sup> Rome Statute, *supra* note 196, at art. 17(1), 20(3).

<sup>378</sup> THE TIMES (June 12, 2020).

<sup>379</sup> *Id.*

<sup>380</sup> THE TIMES (March 6, 2020).

convicted of war crimes<sup>381</sup> – then the US would be in danger of joining those other countries who claim impunity rather than promote justice – the very countries, dictators and demagogues for whom the ICC and Global Justice was designed. President Trump apparently argued that the pardons will give troops “the confidence to fight” without worrying about potential legal overreach.<sup>382</sup> But does it also imply there is impunity in all circumstances? That is certainly the implication of the decision by Sri Lankan President Gotabaya Rajapaksa, to pardon an army sergeant, Sunil Ratnayake, convicted in 2015 of the murder of eight Tamil civilians, including a five-year old child, in 2000. The President, himself an accused war criminal, promised to release “war heroes” jailed on “baseless offenses.”<sup>383</sup>

It is interesting to note that a UN investigation into atrocities committed in Syria accused Russia of direct involvement in war crimes for indiscriminate bombing of civilians.<sup>384</sup> One of the three expert members of the UN Commission was an American, Karen Koning Abuzayd. It is rare for the UN to attribute responsibility in this way.

*(ii) Constitutional Concerns?*

Even if it is acknowledged that US sovereignty is not in fact threatened by the ICC, some have argued that US participation in the ICC treaty regime would not be constitutional under American law, and ratification would require a constitutional amendment.<sup>385</sup> Indeed, if the US

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<sup>381</sup> Leo Shane III, Meghan Myers and Carl Prine, Trump grants clemency to troops in three controversial war crimes cases, *MILITARY TIMES* (November 15, 2019) available at <https://www.militarytimes.com/news/pentagon-congress/2019/11/16/trump-grants-clemency-to-troops-in-three-controversial-war-crimes-cases/>.

<sup>382</sup> *Id.*

<sup>383</sup> *Supra* note 187.

<sup>384</sup> UN Human Rights Council, UN Commission of Inquiry on Syria: Unprecedented levels of displacement and dire conditions in The Syrian Arab Republic (March 2, 2020).

<sup>385</sup> Brett W. Johnson, *The Future Constitutional Battle if the United States Ratifies the International Criminal Court Treaty*, 3, *CHICAGO-KENT J. INT'L & COMP. L.* 1, 68 (2003); David Rivkin & Lee Casey, *The International Criminal Court vs. The American People*,

purported to ratify in those circumstances, there might well be a constitutional challenge. Therefore, as has been noted, “constitutional compatibility must be addressed before the United States considers joining the ICC.”<sup>386</sup> This Article is not the place to go into detail on this issue; it would require a much more thorough analysis than space here would permit. However, it is possible to present an overview.

There appears to be two main constitutional concerns: constitutional institutional concerns and constitutional protections concerns.<sup>387</sup> The argument is that, generally, a US citizen could not be prosecuted for offenses that would be cognizable under the judicial power of the US. Specifically, the ICC’s failure to recognise certain fundamental rights guaranteed by the US Constitution – especially the right to jury trial – make participation impermissible. In addition, Article III of the Constitution vests judicial power in the US in one supreme court and all other courts are inferior.<sup>388</sup> Because the ICC is not subject to Supreme Court appellate review, despite having authority over US citizens by congressional action, the ICC would operate in violation of Article III.<sup>389</sup>

These concerns largely evaporate if it is accepted that the ICC is not an instrumentality of the U.S.<sup>390</sup> The issue, it is argued, boils down to a single question: is the ICC separate, or is it an extension of the US domestic jurisdiction? The only scenario where the latter can be plausibly claimed is if the ICC is prosecuting in place of or on behalf of the United States.<sup>391</sup> If that were the case, then the ICC would clearly be an extension of the US judicial system; it would be acting

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THE HERITAGE FOUND., (Feb. 5, 1999), <https://www.heritage.org/report/the-international-criminal-court-vs-the-american-people>.

<sup>386</sup> Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT’L L., 5, 38 (2001).

<sup>387</sup> Johnson, *supra* note 386 at 28.

<sup>388</sup> *Id.* at 29, 42.

<sup>389</sup> *Id.* at 42.

<sup>390</sup> See Paul D. Marquardt, *Law without Borders: The Constitutionality of the International Criminal Court*, 33 J. TRANSNAT’L L. & POLY, 73, 104-05 (1995).

<sup>391</sup> Johnson, *supra* note 385, at 34–35.

on behalf of the US. The ICC does not prosecute in place of or on behalf of the US, but the Assembly of State Parties. ICC member states in the Assembly “accept the jurisdiction”<sup>392</sup> of the ICC not instead of or in place of national courts: “The ICC is *not* a substitute for national courts.”<sup>393</sup> It intervenes only where a State is “unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators.”<sup>394</sup> This is the antithesis of acting “in place of or on behalf of” a State. Ratification would entail the US retaining within its own power whether to accept ICC jurisdiction or not. The ICC is instead part of the intergovernmental global justice system in which global jurisdiction is exercised on behalf of no State in particular.<sup>395</sup>

In other words, the principle of complementarity does not mean there are “parallel jurisdictions”, but alternative jurisdictions. Indeed, as has been emphasised, the ICC has *no* jurisdiction where a State exercises *its* jurisdiction. So, the ICC’s jurisdiction is, in those circumstances, entirely separate from domestic jurisdictions.

That said, some might argue that Article II of the US Constitution prevents Congress delegating criminal jurisdiction to the ICC. In fact, the US Supreme Court has set out a test for judging whether various forms of judicial power are essential and must be reserved to federal courts, or whether they may be safely delegated to another tribunal.<sup>396</sup> Ultimately, no one knows for sure how the Supreme Court would apply that test to America’s relationship to the ICC.<sup>397</sup>

As for the other constitutional concerns, it should be noted that the due process protections at the ICC are similar to those enjoyed by

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<sup>392</sup> Rome Statute, *supra* note 195, at 8.

<sup>393</sup> *Understanding the International Criminal Court*, ICC, pmb., <https://www.icc-cpi.int/iccdocs/PIDS/docs/UICCGeneralENG.pdf> (last visited Nov. 23, 2019).

<sup>394</sup> *Id.*

<sup>395</sup> *See Id.*

<sup>396</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

<sup>397</sup> ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 254 (Aspen Publishers, 3rd ed. 1999).

military personnel under the US Constitution. The ICC procedures mirror the Bill of Rights.<sup>398</sup> Indeed, a US State Department legal advisor addressed Congress and recommend they “not regard it ... with suspicion, [but] rather with pride ... since ... it cannot be denied that the Treaty of Rome contains the most comprehensive list of due process requirements which so far has been promulgated.”<sup>399</sup> In addition, the absence of a right to jury trial has to be viewed more as a matter of practicality than principle in the context of ICC cases. Empanelling a jury, in The Hague, over an extended period, in cases where jury intimidation would be an ever-present threat is simply unrealistic.

(iii) *Extradition v. Surrender?*

A further constitutional concern relates to the Rome Statute’s requirement that State Parties “surrender” citizens at the request of the ICC Prosecutor. Does ‘surrender’ have the same meaning as ‘extradition’? If so, then ratification of the Rome Statute would be no different from the US ratifying extradition treaties. Interestingly, the Supreme Court has used the word surrender when defining extradition.<sup>400</sup> Extradition, it states, is “the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of another, which, being competent to try and punish him, demands the surrender.”<sup>401</sup> However, some, such as Johnson, argue that ‘surrender’ is different and distinct from ‘extradition’.<sup>402</sup> Others, such as Marquardt, argue that the terms are essentially interchangeable.<sup>403</sup> It is this variation in interpretation that worries some constitutional

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<sup>398</sup> David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1055 (2008).

<sup>399</sup> Laura Fielder Redman, *United States Implementation of the International Criminal Court Towards the Federalism of Free Nations*, 17 J. TRANSNAT’L & POL’Y. 35, 50 (2007).

<sup>400</sup> *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

<sup>401</sup> *Id.*

<sup>402</sup> Johnson, *supra* note 385, at 36.

<sup>403</sup> Marquardt, *supra* note 390, at 107.

scholars. The United States has a long history of extradition. Extradition is an executive power: the authority to extradite under a treaty is vested in the executive branch as part of its power to regulate foreign affairs.<sup>404</sup> Arguably, Article III does not apply to extradition proceedings as they are not criminal in nature. The State Department, answerable to the President, is charged with overseeing extradition.<sup>405</sup> There is also a doctrine of non-inquiry in extradition proceedings. In general, federal courts are instructed not to consider what due process the individual will face when extradited.<sup>406</sup> There are exceptions, but the doctrine is well established, despite the serious consequences for the persons extradited. In 2005, the Supreme Court refused to deny extradition of an American citizen facing nonviolent drug charges in Thailand.<sup>407</sup> Under American law, the maximum sentence was eight years; in Thailand, he faced the death penalty.<sup>408</sup> Extradition law does require that each country deal with the offence a criminal act,<sup>409</sup> but if an American citizen's constitutional rights can be ignored as part of the doctrine of non-inquiry, they can be ignored in an ICC surrender – as long as the United States recognises the offense as a crime in the US. In case the US does not recognise some of the atrocity crimes punishable by the ICC, it may be necessary for domestic legislation to satisfy dual criminality.<sup>410</sup>

Furthermore, the US has willingly ratified extradition treaties with civil law countries such as France, Germany and Italy.<sup>411</sup> The US has not even objected to American citizens

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<sup>404</sup> Redman, *supra* note 399, at 51–52, (citing Chief Justice Marshall).

<sup>405</sup> 18 U.S.C. § 3184 (1996).

<sup>406</sup> RONALD J. HEDGES, INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES, 19 (Fed. Jud. Ctr., 2014).

<sup>407</sup> *Prasopat v. Benov*, 421 F.3d 1009, 1011–12, 1016–17 (9th Cir. 2005), *cert. denied*, 546 U.S. 1171 (2006).

<sup>408</sup> *Id.* at 1013.

<sup>409</sup> *Sacirbey v. Guccione*, No. 05 Cv. 2949, 2006 WL 2585564 at \*10 (S.D.N.Y. Sept. 7, 2006).

<sup>410</sup> Redman, *supra* note 399, at 60–61. For a list of US statutory laws that are analogous to ICC crimes, *see also* Sadat and Drumbly, *supra* note 337.

<sup>411</sup> 18 U.S.C. § 3181 (2002).

being tried in these courts whose criminal justice systems not only hold trials without juries but have no rule against ‘double jeopardy’.<sup>412</sup> The lack of an appeal process from the ICC to the US Supreme Court is thus no different from any criminal trial held outside the US.

In addition, the Genocide Convention requires the United States “to grant extradition in accordance with their laws and treaties in force.”<sup>413</sup> The Geneva Conventions requires States to investigate and prosecute serious war crimes or, alternatively, to “hand over such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”<sup>414</sup> There are similar ‘prosecute or extradite’ provisions in other treaties which the US has ratified such as the Convention Against Torture<sup>415</sup> and the Convention Against Enforced Disappearance.<sup>416</sup>

In conclusion, the ICC treaty does create a judicial system outside the framework of the US system, but it does not purport to be either ‘superior’ or ‘inferior’ in US Constitutional terms. It is not an extension of the US system. Rather, a more accurate position is to state that the US delegates jurisdictional power to the ICC in the event the US itself decides not to exercise jurisdiction. In this sense, the constitutional protections are retained. The critical

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<sup>412</sup> See Mike Semanchick, *Amanda Knox, Double Jeopardy, and Innocence*, CAL. INNOCENCE PROJECT, (Mar. 28, 2013), <https://californiainnocenceproject.org/2013/03/amanda-knox-double-jeopardy-and-innocence/>.

<sup>413</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. 7, *adopted by the Gen. Assemb. Of the U.N.* Dec. 9, 1948, 1021 U.N.T.S.

<sup>414</sup> Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of civilian Persons in Times of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>415</sup> Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment art. 5, *adopted by the Gen. Assemb. Of the U.N.* Dec. 10, 1984, 1465 U.N.T.S. 113.

<sup>416</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, Dec. 20, 2006, *registered in* Dec. 2010 2716 U.N.T.S. 48088. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4).

point is this: the US retains exclusive power unless it itself sanctions ICC jurisdiction by its own behaviour. As Duffy put it: “complementarity provides an escape clause from potential constitutional difficulties, provided the state itself investigates or prosecutes.”<sup>417</sup> And the US has the power to do this, not only in its ‘regular’ criminal laws,<sup>418</sup> but in the War Crimes Act 1996 which applies to both American perpetrators and victims.<sup>419</sup> The US is fully able to investigate and prosecute ICC crimes domestically. However, in order to remove uncertainty about this, the American Bar Association and some senators have urged the adoption of federal legislation that addresses crimes against humanity.<sup>420</sup>

The US has not – as mentioned earlier – objected to US citizens being tried in other countries for crimes committed there, despite different criminal justice systems which lack a right to jury trial and do not have a rule against double jeopardy. Indeed, the ICC’s due process provisions exceed the due process provisions in many countries to which the US extradites its own citizens.<sup>421</sup> And American citizens have been prosecuted for such crimes, it being recognized in international law – and, indeed, in American law – that sovereign countries have the right to try foreigners who commit crimes within their territory. If sovereign countries wish to invoke ICC jurisdiction rather than use their own courts to try certain crimes, that can be viewed as an extension of sovereignty, not a threat to it.

In addition to these substantive points, it should be noted that the US did not ratify the 1948 Genocide Convention until 1988.<sup>422</sup> When it did so, it had to consider whether US nationals could be the subject of an international penal tribunal set up under Article VI of the

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<sup>417</sup> Duffy, *supra* note 386, at 19.

<sup>418</sup> Sadat and Drumbl, *supra* note 337, at 1–2.

<sup>419</sup> H.R. REP. NO. 104-698, at 1–2, 13, 15 (1996).

<sup>420</sup> Deborah Enix-Ross, *ABA Center for Human Rights*, Res. 300 (2014).

<sup>421</sup> *Myths and Facts About the International Criminal Court*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/campaigns/iccfacts.htm> (last visited Sept. 19, 2019).

<sup>422</sup> Rhea, *supra* note 109, at 28.



Convention. The US declared that participation in any such tribunal would occur “only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.”<sup>423</sup> There does not appear to have been any question raised then about the compatibility of ratification with the US Constitution.

In short, although final analysis of the constitutional compatibility rests with the US Supreme Court, the claim that the US cannot ratify the Rome Statute is certainly not conclusive. In the final analysis, the constitutional arguments could go either way, perhaps depending on the propensities of the Supreme Court Justices of the day.

*(iv) Misconceptions?*

Misconceptions about the relationship between the US and the ICC, including perceived threats to US sovereignty, have been reinforced by misconceptions about the fundamental aim of the ICC. Far from claiming “unfettered discretion” over the US, as Bolton claims, the ICC aims for exactly the opposite: to inspire national courts – all over the world – to lead the struggle against impunity for crimes against humanity, and it has. Many legal systems have responded positively.<sup>424</sup> Some ‘atrocities’ treaties place a duty on member states to adopt laws to prosecute offences under domestic criminal law.<sup>425</sup> While the ICC Treaty does not impose this obligation, by 2016, 80 States had voluntarily adopted some domestic laws against crimes against humanity.<sup>426</sup> In addition, at least 55 countries have changed

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<sup>423</sup> *Id.*

<sup>424</sup> See Tatiana E. Sainati, *Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts*, VAND. J. TRANSNAT'L L., 191, 199-200 (2016).

<sup>425</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 414, at 280; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 416, at 114.

<sup>426</sup> Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 L. & SOC'Y REV. 533, 540-41 (2017).

their laws in line with the ICC's definitions.<sup>427</sup> For example, Germany, as soon as the ICC began work in 2002, adopted its own 'Code of Crimes Against International Law'.<sup>428</sup> These domestic legal provisions which define and criminalize acts of genocide and crimes against humanity have been referred to collectively as "atrocities laws".<sup>429</sup>

In other words, international laws against human rights atrocities are "designed to be enforced primarily through domestic courts applying domestic criminal law."<sup>430</sup> The Rwandan Tribunal dealt with fewer than 100 cases, but the Rwandan domestic courts have dealt with thousands.<sup>431</sup> Similarly, President Gbagbo's ICC trial began in 2016, but by 2015, after Ivory Coast refused to hand over his wife Simone

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<sup>427</sup> *Id.* In the UK for example, the International Criminal Court Act 2001 allows for the prosecution of genocide, crimes against humanity or war crimes.

<sup>428</sup> See German Delegation to the ICC-PrepCom, *International Criminal Law in Germany*, ICC NOW (2002),

<http://www.iccnw.org/documents/Comments%20on%20ICCode%20and%20E41.pdf> (last visited Nov. 23, 2019); See also *Rwanda: Ignace Murwanashyaka and Straton Musoni Tried*, BBC (May 4, 2011), <https://www.bbc.com/news/world-africa-13275795>. (The first trial under the Völkerstrafgesetzbuch was held in May, 2011. Two members of the 'Democratic Forces for the Liberation of Rwanda', an ethnic Hutu group, Ignace Murwanashyaka and Straton Musoni, were accused of 26 counts of crimes against humanity and 39 counts of war crimes).

<sup>429</sup> Berlin and Dancy, *supra* note 426, at 534. See also Drumbl, *supra* note 289, at 4.

<sup>430</sup> Berlin and Dancy, *id.* at 534; see also KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 19 (W.W. Norton & Company, Inc., 2011).

<sup>431</sup> *Rwanda: Justice After Genocide—20 Years On*, HUM. RTS. WATCH, (Mar. 28, 2014), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years>. ("The majority have been tried in Rwandan courts."). Among those prosecuted in Rwanda were two women. Marie-Claire Mukeshimana was complicit in killing several children who sought refuge in a convent. She was convicted in her absence in 2009 but subsequently she was found in Detroit and extradited back to Rwanda. See *Marie Claire Mukeshimana*, TRIAL INT'L (Jun. 14, 2016) <https://trialinternational.org/latest-post/marie-claire-mukeshimana/>. Valerie Bemeriki was jailed for life in 2009. She is quoted as saying: "Do not kill those cockroaches with a bullet, cut them to pieces with a machete." BBC News, *Rwanda Jails Journalist Valerie Bemeriki for Genocide*, <http://news.bbc.co.uk/2/hi/africa/8412014.stm> (last visited Nov. 16, 2019). The government gave out thousands of machetes to the Hutus. Hundreds of Rwandans were sentenced to death. The irony is that a person sent to the ICC for, presumably, a most serious offence, would not get the death penalty; by contrast, a lesser offense tried in Rwanda could have resulted in execution – until Rwanda abolished the death penalty in 2007. See Melynda J. Price, *Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide (Lessons from Rwanda)*, 21 *Emory Int'l L. Rev.* 563, 575–576, 586 (2007).

to the ICC, an Ivory Coast domestic court convicted her of crimes against humanity and sentenced her to 20 years.<sup>432</sup>

This international influence on domestic systems of justice therefore is not an accident.<sup>433</sup> Nor is it ineffective. It has led to an amazing rise in human rights prosecution in domestic courts all over the world,<sup>434</sup> including perhaps surprisingly, the United States.<sup>435</sup> US federal Courts have referred to the ICC on at least 60 occasions.<sup>436</sup> No wonder there has been a surge in international human rights prosecutions around the world – a justice cascade.<sup>437</sup> Thus the future of Global Justice depends not so much on an international court as on those domestic courts around the world that now exercise what is called universal jurisdiction.<sup>438</sup>

## V. UNIVERSAL JURISDICTION

The success of Global Justice does not depend exclusively, or even predominantly, on the performance of the

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<sup>432</sup> Marilia Brocchetto, *Ivory Coast's Simone Gbagbo sentenced to 20 years in prison*, CNN, Mar. 10, 2015, <https://www.cnn.com/2015/03/10/africa/ivory-coast-first-lady/index.html>. Simone Gbagbo served 3 years before an amnesty was granted. *See Ivory Coast ex-first lady Simone Gbagbo granted amnesty*, BBC, (Aug. 7, 2018), <https://www.bbc.com/news/world-africa-45095830>.

<sup>433</sup> *See* UNIV. OF OXFORD, INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK 107 (Andre Nollkaemper et al. eds., 2018); *See also* UNIV. OF OXFORD, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION, 1–2 (Dinah Shelton ed., 2011).

<sup>434</sup> Berlin and Dancy, *supra* note 426 (Other initiatives include the UN-backed 'International Commission against Impunity in Guatemala', which since 2006 has been supporting the Guatemala Public Prosecutor's office in investigations of crimes affecting the fundamental rights of citizens. The Commission has assisted with investigations of government officials including former presidents. In January, 2019, however, the Commission was ordered to leave the country "within 24 hours.") Elisabeth Malkin, *Guatemala Expels U.N.- Backed Anti-Corruption Panel, Claiming Overreach*, N.Y. TIMES (January 7, 2019), <https://www.nytimes.com/2019/01/07/world/americas/guatemala-corruption-commission-united-nations.html>.

<sup>435</sup> *See infra* note 470.

<sup>436</sup> *See* Sadat and Drumbl, *supra* note 337, at 11. ("Searching Westlaw's electronic database, we found 60 U.S. federal judicial cases from 1999 to 2016 that cite to the Rome Statute as an authoritative statement of customary international law. 52 are civil cases and 8 involve criminal matters (although not prosecutions for ICC crimes.") *Id.*

<sup>437</sup> Sikink, *supra* note 430, at 5.

<sup>438</sup> *See* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 1–4, 21 (Steven Macedo ed., 2004).

ICC, but on the response of domestic courts and legal systems around the world, and their willingness to deliver Justice.<sup>439</sup> In other words, it would be a mistake to believe that, by not signing up to the ICC, the US can escape Global Justice. Indeed, what threatens US impunity is not the International Criminal Court, but the growing number of domestic courts that now exercise what is called 'Universal Jurisdiction.'<sup>440</sup> This is why, in recent years, France, Germany and the Netherlands, none of which has experienced genocide, have all held genocide trials.<sup>441</sup> Domestic courts in these cases ask just one question: what was the crime? And if it was a crime against humanity, then the perpetrator is an enemy of humanity and can be dealt with by humanity – anywhere.<sup>442</sup> The perpetrator is a “universal outlaw, so that there would be no land on which he could set foot.”<sup>443</sup>

All this is reminiscent of the precedent created when the pirates of old threatened all nations.<sup>444</sup> In fact, a similar response has been adopted to tackle the pirate problems of today.<sup>445</sup> Between 2005 and 2013, ransoms averaged \$53 million each year,<sup>446</sup> which is why, in 2010, modern piracy

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<sup>439</sup> See Katherine Gallagher, *The ICC must hold the US accountable for crimes in Afghanistan*, THE GUARDIAN (Feb. 16, 2018), <https://www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan>.

<sup>440</sup> See *Id.* (“It also follows longstanding efforts by the Center for Constitutional Rights (CCR) to hold high-level Bush administration officials accountable, through the principle of universal jurisdiction, for many of the human rights violations that the imminent ICC prosecution would encompass.”) *Id.*

<sup>441</sup> See Stephanie van den Burg, *Court Confirms Dutch U.N. Peacekeepers Partly Liable for Srebrenica Massacre*, REUTERS (June 27, 2017 9:22 AM), <https://www.reuters.com/article/us-warcrimes-bosnia-srebrenica-idUSKBN1910XZ..>

<sup>442</sup> See *id.*

<sup>443</sup> Schabas, *supra* note 68, at 20.

<sup>444</sup> Jodi Horowitz, Comment, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*, 23 FORDHAM INT'L L. J. 489, 496–97 (1999).

<sup>445</sup> See *infra* note 447.

<sup>446</sup> See Teo Kermeliotis, *Somali pirates cost global economy '\$18 billion a year'*, CNN (April 12, 2013), <https://www.cnn.com/2013/04/12/business/piracy-economy-world-bank/index.html>. See also *Piracy Ransoms Amount to More than \$339 million over Seven-Year Period – UN Report*, UN NEWS (Nov. 1, 2013), <https://news.un.org/en/story/2013/11/454472-piracy-ransoms-amount-more-339-million-over-seven-year-period-un-report>. In a similar way, after a Lebanese national hijacked a

trials began in Kenya and then in the Seychelles.<sup>447</sup>

Currently, there are around 1,200 suspected or convicted pirates in twenty-one countries including the US where, in November 2016 in Richmond, Virginia, two Somali pirates were sentenced to life for their attack on the USS Ashland in 2010.<sup>448</sup> Enforcement of atrocity laws in domestic courts is generally much easier than in the ICC.<sup>449</sup> The barriers to prosecution, the potential role played by activists, and the costs of trial all make access to justice ‘at home’ much more attainable and potentially effective both as a punishment and as a deterrent than in The Hague. In short, it is domestic justice that is the key to defeating impunity. This may be one reason why the International Law Commission recently proposed a duty for states to establish jurisdiction for conduct amounting to a crime against humanity.<sup>450</sup> Recent research reinforces this conclusion by highlighting “the importance of domestic legislation for the enforcement of international law.”<sup>451</sup>

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Jordanian plane, with two US passengers on board, the FBI apprehended the man in international waters. He was eventually sentenced to 30 years in prison by an American federal court. PHILIPP MEISSNER, *THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: AN ANALYSIS OF THE UNITED STATES MAJOR OBJECTIONS AGAINST THE ROME STATUTE* (2005).

<sup>447</sup> *Seychelles to Launch UN-backed courts to combat piracy*, UN NEWS (May 5, 2010), <https://news.un.org/en/story/2010/05/337632-seychelles-launch-un-backed-courts-combat-piracy>.

<sup>448</sup> *As Somali piracy falls, questions over what to do with captured pirates*, THE NEW HUMANITARIAN (Nov. 20, 2013), <http://www.thenewhumanitarian.org/news/2013/11/20/somali-piracy-falls-questions-over-what-do-captured-pirates>; *See also 2 Somali Pirates Get Life in Prison; 3rd gets 33 years*, NAVY TIMES (Nov. 8, 2016), <https://www.navytimes.com/news/your-navy/2016/11/08/2-somali-pirates-get-life-in-prison-3rd-gets-33-years/>.

<sup>449</sup> *See* Berlin & Dancy, *supra* note 426.

<sup>450</sup> General Assembly, *Report of the International Law Commission*, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017) U.N. DOC. A/72/10, at Article 7 (holding that jurisdiction would arise based on the fact that the relevant conduct took place in a territory under the state’s jurisdiction, or on the fact that the conduct was performed by a state’s national). The proposal also permits a state to base jurisdiction on the fact that the victim was a state’s national, or that the person suspected is present on any territory under the state’s jurisdiction. *Id.* *See* Antonio Coco, *The Universal Duty to Establish Jurisdiction over and Investigate Crimes against Humanity: Preliminary Remarks on draft Articles 7, 8, 9 and 11 by the International Law Commission*, 16 J. OF INT’L CRIM. JUST., 751 (2018).

<sup>451</sup> Berlin & Dancy, *supra* note 426, at 561.

The exercise of universal jurisdiction is why three Heads of State were all caught and tried in recent years.<sup>452</sup> European judges exercised universal jurisdiction for the first time in 1998.<sup>453</sup> A few days after former Chilean dictator, Augusto Pinochet, was indicted by a Spanish judge for alleged human rights violations committed in Chile; he was arrested in London where he was having medical treatment.<sup>454</sup> Significantly, Pinochet's claim of 'immunity' failed in his attempt to challenge extradition to Spain.<sup>455</sup> The UK Judicial Committee of the House of Lords<sup>456</sup> ruled that immunity could not apply to international crimes if the crime he was charged with – torture – was a crime in both the UK and Spain,<sup>457</sup> which it was.<sup>458</sup>

In 2000, Alberto Fujimori, the President of Peru, hoping to escape Justice when he fled to Japan, made the mistake of visiting Chile in 2005.<sup>459</sup> He was arrested and for the first time ever, an elected Head of State was extradited back to his own country.<sup>460</sup> He was convicted of human rights violations in 2009 and given the maximum sentence allowed under Peruvian law – 25 years.<sup>461</sup> In 2015, Hissene Habre,

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<sup>452</sup> See *infra* notes 454, 459, and 462.

<sup>453</sup> See *Universal Jurisdiction in Europe: The State of the Art*, HUM. RTS. WATCH, <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art> (last visited Oct. 14, 2019).

<sup>454</sup> David Connett, John Hooper & Peter Beaumont, *Pinochet Arrested in London*, THE GUARDIAN (Oct. 17, 1998), <https://www.theguardian.com/world/1998/oct/18/pinochet.chile>.

<sup>455</sup> See *id.*

<sup>456</sup> The UK Supreme Court replaced the UK Judicial Committee of the House of Lords as the final court of appeals in October of 2009. THE SUP. CT., <https://www.supremecourt.uk/about/the-supreme-court.html> (last visited Oct. 15, 2019).

<sup>457</sup> Regina v. Bow St. Metro. Stipendiary Magis., *Ex parte Pinochete Ugarte* (No.3), [1999] UKHL 147, [2000] 1 AC 148–159.

<sup>458</sup> Pinochet, however, was allowed on health grounds to return to Chile. See Mark Tran, *Pinochet Opponents Demand Access to Medical Reports*, THE GUARDIAN (Jan. 12, 2000), <https://www.theguardian.com/world/2000/jan/12/pinochet.chile11>.

<sup>459</sup> Fiona Ortiz & Robin Emmott, *Peru's Fujimori makes surprise visit to Chile*, WASH. POST (Nov. 6, 2005), <http://www.washingtonpost.com/wpdyn/content/article/2005/11/06/AR2005110600780.html>.

<sup>460</sup> Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 INT'L J. TRANSNAT'L JUST. 384, 387 (2009).

<sup>461</sup> *Id.* In 2017, Fujimori received a controversial pardon on health grounds. See Dan Collins, *Peru's jailed ex-president Alberto Fujimori pardoned, sparking protests*, THE

the former dictator of Chad was put on trial in Senegal, where he was in exile.<sup>462</sup> This was the first trial in the world in which one country has prosecuted the former ruler of another country for alleged human rights crimes.<sup>463</sup> It was also the first universal case in Africa.<sup>464</sup> In May 2016, the man known as “Africa’s Pinochet” got life in prison.<sup>465</sup> And that’s when one of his victims – Souleymane Guengueng – who had been tortured – said: “Today I feel 10 times bigger than Hissene Habre.”<sup>466</sup>

Universal jurisdiction can potentially affect Americans when they travel abroad. Indeed, there is speculation that President George W. Bush cancelled a speech in Switzerland in February 2011, because two alleged torture victims were ready to file a complaint against him as soon as he landed.<sup>467</sup> Swiss law allows an investigation to begin when a person is on Swiss soil.<sup>468</sup> This reinforces the conclusion not only that the success or the failure of Global Justice depends on States, but that the ICC is not the court Americans should be

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GUARDIAN (Dec. 24, 2017), <https://www.theguardian.com/world/2017/dec/25/perus-jailed-ex-president-alberto-fujimori-pardoned-sparking-protests>.

<sup>462</sup> Human Rights Watch, *Senegal: Trial of Chad Ex-Dictator Begins* (July 17, 2015, 1:50 AM), <https://www.hrw.org/news/2015/07/17/senegal-trial-chad-ex-dictator-begins>. “On May 30, 2016, former Chadian dictator Hissène Habré was convicted of crimes against humanity, war crimes, and torture, including sexual violence and rape, by the Extraordinary African Chambers in the Senegalese court system and sentenced to life in prison.” Hissène Habré, HUM. RTS. WATCH (last visited Sept. 30, 2019), <https://www.hrw.org/tag/hissene-habre>.

<sup>463</sup> *Senegal: Trial of Chad Ex-Dictator Begins*, *id.*

<sup>464</sup> Oumar Bar, *Hissène Habré, Chad’s former dictator, just got a life sentence for crimes he committed in the 1980s*, WASH. POST (June 1, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/01/hissene-habre-chads-former-dictator-just-got-a-life-sentence-for-crimes-he-committed-in-the-1980s/>.

<sup>465</sup> *Id.*

<sup>466</sup> Adam Lusher, *Hissène Habré, Africa’s Pinochet, Found Guilty of Crimes Against Humanity*, THE INDEP. (May 30, 2016), <https://www.independent.co.uk/news/world/hissene-habre-chad-former-president-africa-pinochet-found-guilty-of-crimes-against-humanity-a7056186.html>.

<sup>467</sup> Stephanie Nebehay, *Bush’s Swiss Visit off after Complaints on Torture*, REUTERS.COM (Feb. 5, 2011), <https://www.reuters.com/article/us-bush-torture/bushs-swiss-visit-off-after-complaints-on-torture-idUSTRE7141CU20110205>. In 2011, the Kuala Lumpur War Crimes Commission found Bush and British Prime Minister Tony Blair guilty of crimes against peace, crimes against humanity and genocide as a result of their roles in the Iraq War: Richard Falk, Kuala Lumpur tribunal: Bush and Blair guilty, *available at* [Aljazeera.com/indepth/opinion/2011/11/201111281057121092.html](http://Aljazeera.com/indepth/opinion/2011/11/201111281057121092.html).

<sup>468</sup> *See id.*

worrying about most.<sup>469</sup>

Universal jurisdiction can affect Americans at home, because American courts exercise it as well.<sup>470</sup> Chuckie Taylor – Charles Taylor’s American-born son, was the first American citizen prosecuted under a 1994 law that prohibits people present in the United States from participating in torture outside the United States.<sup>471</sup> He was convicted in 2008 for his acts of torture in Liberia,<sup>472</sup> and sentenced in 2009 to 97 years in an American prison.<sup>473</sup> In June 2020, a second indictment under this federal extraterritorial torture statute was made in Colorado. Michael Sang Correa is charged with torturing at least six Gambian victims in 2006. He is implicated in other crimes revealed by the Gambian Truth, Reconciliation and Reparations Commission. As the mother of a victim in whose murder Correa is implicated said: “Using the US torture statute to protect one of (then-President Yayha) Jammeh’s key henchmen is an important moment for

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<sup>469</sup> Or anyone else for that matter. Anyone arriving in Argentina might fall foul of its constitutional provision that allows universal jurisdiction in cases of crimes against humanity, war crimes, genocide and torture. The country has used this power to pursue cases against former ministers in the cabinet of General Franco who were accused of torture and unlawful killings during the Spanish civil war. In November 2018, Human Rights Watch submitted a writ to a federal judge in Buenos Aires for Mohammed bin Salman, the Saudi Arabian Crown Prince, to be tried over the murder of the journalist, Jamal Khashoggi and the war in Yemen. The writ was passed to a federal prosecutor for decision. Daniel Politi & David Kirkpatrick, *Argentine Prosecutors Consider Charges Against Saudi Crown Prince Ahead of G-20*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/world/americas/argentina-crown-prince-mohammed-saudi-arabia.html>.

<sup>470</sup> See McClatchy Newspapers, *Taylor’s son sentenced in US for Torture in Liberia*, THE GUARDIAN (Jan. 9, 2009), <https://www.theguardian.com/world/2009/jan/09/charles-taylor-jr-torture-liberia>. Under the 1789 Alien Tort Claims Act, foreign victims of torture can sue for civil redress in the United States when the defendant is in the dominion of the American courts (*Filartiga v Pena*, 620 F. 2d 876 (1980)) as long as the abuse abroad has a substantial connection to the United States (*Kiobel v Royal Dutch Petroleum*, 569 U.S. 108, 133 S. Ct. 1659 (2013)).

<sup>471</sup> See *id.* See also the U.S. Torture Act, 18 U.S.C. 2340A (2001).

<sup>472</sup> McClatchy, *supra* note 470.

<sup>473</sup> See *Ex-Liberian dictator Charles Taylor’s Son Sentenced to 97 years in US Jail*, THE TELEGRAPH (Jan. 9, 2009), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/4210623/Ex-Liberian-dictator-Charles-Taylors-son-sentenced-to-97-years-in-US-jail.html>.



justice in Gambia.”<sup>474</sup> Gambia’s Justice Minister, Abubarcarr Tambadou, described the indictment of Correa “an extraordinary legal milestone. It demonstrates that no matter where crimes are committed, and wherever the culprits may be hiding, *global accountability* mechanisms will reach them, and that there is *no hiding place* for those who commit such crimes in today’s world.”<sup>475</sup>

Charles Taylor’s ex-wife, Agnes Reeves Taylor, has also been ensnared by universal jurisdiction.<sup>476</sup> In the fourth case based on universal jurisdiction in the UK, she was arrested in June 2017 in London by the Metropolitan Police War Crimes Unit.<sup>477</sup> She has been charged with torture and conspiracy to torture, and the trial is due to start in October 2018.<sup>478</sup> In other words, ‘Global Justice’, in all its guises, has led to several members of one family – the Taylor family – being unable to escape justice and rely on impunity.

So, along with many other countries, the US has bought into the idea of Global Justice – or at least a lot of it – perhaps without most Americans knowing it. Of course, Global Justice is unacceptable if it is not legitimate procedurally as well. It is essential that the trials are fair, with a proper defence, and proper procedures.<sup>479</sup> As President Truman said all those years ago: we must give them the fairest trial possible.<sup>480</sup> At

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<sup>474</sup> Human Rights Watch, ‘Gambia: US Charges Alleged ‘Death Squad’ Member with Torture, available at [hrw.org/2020/06/12/gambia-us-charges-alleged-death-squad-member-torture](https://www.hrw.org/2020/06/12/gambia-us-charges-alleged-death-squad-member-torture).

<sup>475</sup> Mustapha K. Darboe, ‘Correa, A “Jungler” Charged in the US: What Gambia’s Truth Commission has heard,’ (June 16, 2020) available at: [justiceinfo.net/en/truth-commissions/44594-correa-jungler-charged-in-the-us-what-gambia-truth-commission-heard.html](https://www.justiceinfo.net/en/truth-commissions/44594-correa-jungler-charged-in-the-us-what-gambia-truth-commission-heard.html).

<sup>476</sup> See Agnes Reeves Taylor, TRIAL INT’L, <https://trialinternational.org/latest-post/agnes-reeves-taylor/> (last visited Oct. 28, 2019).

<sup>477</sup> *Id.*

<sup>478</sup> See *id.*

<sup>479</sup> See Johnson, *supra* note 386, at 18. (“If an international criminal rule of law is to gain acceptance throughout the world, it will not be sufficient that the trials of the criminals are just, but they must be widely recognized as just. Therefore, perceptions of fairness and due process are paramount in any international criminal justice system.”)

<sup>480</sup> See Caroline Redmond, *The Nuremberg Trials: When The World Tried To Bring The Nazis To Justice—And Failed*, ATI (Feb. 7, 2019), <https://allthatsinteresting.com/nuremberg-trials>.

Nuremberg, three of the accused were acquitted.<sup>481</sup> In 2019, Laurent Gbagbo was acquitted at the ICC, and he is not the only one.<sup>482</sup> While these acquittals have raised questions about the effectiveness of the ICC,<sup>483</sup> they have also demonstrated the judges' independence and impartiality.<sup>484</sup>

It is questionable whether, on this basis, the trial of Saddam Hussein by the Iraqi Special Tribunal met that standard.<sup>485</sup> The charge against Saddam was not for his most serious alleged crimes such as attacks on the Kurds, but for his 'crime against humanity' involving 148 Shiites in Dujaid following an assassination attempt.<sup>486</sup> That was at a time when the Reagan Administration was supporting Saddam against Iran.<sup>487</sup> The trial began in December 2003,

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<sup>481</sup> *Three acquitted in Nazi war crimes trials seek rest*, UNITED PRESS INT'L (Oct 1, 1946), <https://www.upi.com/Archives/1946/10/01/Three-acquitted-in-Nazi-war-crimes-trials-see-rest/9091176881134/>.

<sup>482</sup> As of August, 2019, there have been four acquittals (and nine convictions). It should be noted that Gbagbo's acquittal, and the acquittal of Jean-Pierre Bemba, has led to criticism of the effectiveness of the ICC. Gbagbo's acquittal was described as "rattling ICC foundations", following so shortly after the acquittal of Bemba. See Anna Holligan, *Laurent Gbagbo case: Ivory Coast leader's acquittal rattles ICC foundations*, BBC NEWS (Jan. 15, 2019), <https://www.bbc.com/news/world-africa-46874517>. In Gbagbo's case, the Trial Chamber determined that there was unlikely to be sufficient evidence presented to convict beyond a reasonable doubt. In Bemba's case, the ICC Appeals Court found Bemba had been convicted on crimes outside the scope of the prosecution's case and that the lower court had erred in assessing what steps Bemba could have taken (in his 'command responsibility') to stop the crimes committed by the military. Press Release, International Criminal Court, ICC Appeals Chamber Acquits Mr. Bemba from Charges of War Crimes and Crimes Against Humanity, ICC Press Release (June 8, 2018) (on file with author). See also Fritz Streiff, *The Bemba Acquittal: Checks and Balances at the International Criminal Court*, INT'L JUST. MONITOR (July 18, 2018), <https://www.ijmonitor.org/2018/07/the-bemba-acquittal-checks-and-balances-at-the-international-criminal-court/>.

<sup>483</sup> See *Rome Statute at 20: An Assessment*, <https://www.international-criminal-justice-today.org/events/rome-statute-at-20-an-assessment/> (last visited Oct. 29, 2019); Owen Bowcott, *Jean-Pierre Bemba's War Crimes Conviction Overturned*, THE GUARDIAN (June 8, 2018), <https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court>.

<sup>484</sup> Yvonne McDermott, *Gbagbo's Acquittal Isn't Bad for ICC. But Problems Around Evidence Remain*, THE CONVERSATION (Jan 24, 2019), <http://theconversation.com/gbagbos-acquittal-isnt-bad-for-the-icc-but-problems-around-evidence-remain-110364>.

<sup>485</sup> See Peter Beaumont, *Saddam's Trial Farce Stumbles to Climax*, THE GUARDIAN (Oct. 28, 2006), <https://www.theguardian.com/world/2006/oct/29/iraq.peterbeaumont>.

<sup>486</sup> See *id.*

<sup>487</sup> See Seymour Hersh, *U.S. Secretly Gave Aid to Iraq Early in Its War Against Iran*, N.Y. TIMES (Jan. 26, 1992), <https://www.nytimes.com/1992/01/26/world/us-secretly-gave-aid-to-iraq-early-in-its-war-against-iran.html>.

five days before Saddam was captured.<sup>488</sup> There were allegations of political interference;<sup>489</sup> three defence lawyers were assassinated;<sup>490</sup> the Presiding Judge resigned;<sup>491</sup> and the defence team boycotted the proceedings.<sup>492</sup> Other criticism include claims that one 'lenient' judge was replaced by a more strict one and both were Kurds, who had suffered because of Saddam.<sup>493</sup> Sometimes judges barred the defendants from attending; other times, he forced them to attend.<sup>494</sup> Even the defence lawyers were ejected as well. When Saddam began his defence, the press were barred from the proceedings. Some witnesses claimed they were bribed to give false evidence.<sup>495</sup> It turned out also that some of the 148 dead were found to be alive.<sup>496</sup> Saddam, of course, was found guilty, and just one month later received the Death Penalty.<sup>497</sup> Amnesty International's conclusion was that the trial was deeply flawed and unfair.<sup>498</sup> The contrast with the ICC could not be more apparent.

## CONCLUSION

This Article began by asking whether the death penalty was a violation of human rights and noting that the answer depends who you ask; there are honest differences of opinion. This suggests that if there is to be Global Justice,

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<sup>488</sup> See Kirk Semple, *Ex-Leader, Found Hiding in Hole, Is Detained Without a Fight*, N.Y. TIMES (Dec. 14, 2003),

<https://www.nytimes.com/2003/12/14/international/middleeast/exleader-found-hiding-in-hole-is-detained-without-a.html>; "Murdered lawyers and witnesses, political meddling, judges dismissed, lies in evidence: the prosecution of the Iraqi dictator has been flawed from the start. With the first verdict due next week, his eventual execution seems almost certain—but will that bring justice for his victims." Beaumont, *supra* note 485.

<sup>489</sup> Beaumont, *supra* note 485.

<sup>490</sup> *See id.*

<sup>491</sup> *See id.*

<sup>492</sup> *See id.*

<sup>493</sup> *See id.*

<sup>494</sup> Beaumont, *see id.*

<sup>495</sup> *See id.*

<sup>496</sup> *See id.*

<sup>497</sup> Kirk Semple, *Saddam Hussein is Sentenced to Death*, N.Y. TIMES (Nov. 5, 2006), <https://www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html>.

<sup>498</sup> Beaumont, *supra* note 485.

there must also be a Global Consensus. That is why the Article also began by focussing not on International Human Rights, but on International Human Wrongs. Does that approach not bring the world closest to such a consensus of the need for ‘Global Justice’? The case for International Human Rights and Global Justice can be further evidenced by the randomness of birth. An individual human being could be born anywhere, anytime to any parent. What kind of Justice System would that individual choose?<sup>499</sup> Would that person like to risk being born a Jew in the Holocaust; a Tutsi during the Rwandan Genocide; a *peasant* in Mao’s China; or *professional* in Pol Pot’s Cambodia? Or would that individual prefer to be able to fight impunity through an effective system of Global Justice?

Realistically, a person born today in Syria might view any kind of justice as elusive and remote, to say the least. For nearly 10 years, the conflict has caused a humanitarian crisis not seen since the Second World War. The civilian population has been subjected to crimes against humanity: widespread and systematic attacks on civilian targets, use of prohibited chemical weapons, over half a million tortured, summary executions and about 12 million internally or externally displaced.<sup>500</sup>

And yet, right now, in Syria, the evidence is being collected. The western-funded Commission for International Justice and Accountability has secured over 750,000 documents from the Syrian regime. The evidence they contain implicates high-level regime officials in violation of international law.<sup>501</sup> The group has prepared eight detailed case briefs against ranking Syrian security and intelligence officials, seven of them directly implicate President Bashar

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<sup>499</sup> This question is posed not to support John Rawls’ theories as such, but I do acknowledge the overlap presented here with his idea of a “veil of ignorance.” JOHN A. RAWLS, *A THEORY OF JUSTICE* 136–142 (Harv. Univ. Press 1971).

<sup>500</sup> See Anne Barnard, Ben Hubbard & Ian Fisher, *As Atrocities Mount in Syria, Justice Seems Out of Reach*, N.Y. TIMES (April 15, 2017), <https://www.nytimes.com/2017/04/15/world/middleeast/syria-bashar-al-assad-evidence.html>.

<sup>501</sup> See *id.*

al-Assad.<sup>502</sup> The evidence collected for Syria “could be nearly as strong as that used in the Nuremberg trials.”<sup>503</sup>

And while Syria can escape ICC justice, Syrian officials may face domestic justice. In 2017, a Spanish judge opened an investigation into alleged Syrian State terrorism, accusing nine security and intelligence officials of using government institutions to commit mass crimes against civilians. The defendants include Vice-President Farouk al-Sharaa, Ali Mamlouk, Head of the National Security Bureau and General Jamil Hassan, Head of Air Force Intelligence.<sup>504</sup> The case was filed by Guernica 37 International Justice Chambers, an organization specialising in transnational litigation enforcing human rights and international criminal norms in national courts. Judges and prosecutors in France and Germany were also reported to be investigating war crimes against Syrian officials for possible prosecution in domestic courts.

Indeed, in April 2020, a German court in Koblenz began hearing a case against Anwar Raslan, a colonel in the Syrian regime’s intelligence service.<sup>505</sup> He is charged with crimes against humanity involving the murder of fifty-eight demonstrators in 2011 (the Arab Spring), rape and the torturing of four thousand others at the Al Khatib detention centre in Damascus.<sup>506</sup> This is the first case directly linked to President Assad’s regime. It is unlikely to be the last. It also reinforces the point that ‘Universal Jurisdiction’, and not the ICC, is a more fruitful and potent route to Global Justice. Syria is not an ICC signatory, and Russia and/or China can veto a referral to the ICC or an attempt to set up a special UN ad hoc tribunal. Other investigations into Syrian torturers are under way in France, Austria, Sweden, and Norway. In short, one day, perhaps,

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<sup>502</sup> *Id.*

<sup>503</sup> *Id.* (quoting Kevin Jon Heller, Law Professor at SOAS).

<sup>504</sup> *Id.*

<sup>505</sup> Jamie Prentis, *Syrian lawyer gives evidence in German trial against ‘monster’ who jailed him*, THE NATIONAL (June 4, 2020).

<sup>506</sup> THE TIMES (April 25, 2020).

some of the war crimes will be paid for, whether in an international court or a domestic court. The ICC alone cannot deliver justice, but in partnership with domestic courts, global justice can survive and evolve. And with that prospect in mind, the thoughts of one of the Nuremberg prosecutors, the American lawyer Benjamin B. Ferencz, are instructive. He said:

There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance. The process of codification, adjudication and enforcement is as vital to a tranquil international community as it is to any independent national state.<sup>507</sup>

If he is correct, then the world needs an International Criminal Court because this is precisely what the ICC seeks to achieve: Peace through Justice. As British Prime Minister Lloyd George put it: “all we can claim is that international law should be based on justice.”<sup>508</sup> Of course, neither Peace nor Justice is easy to achieve. But that is what the dictators and the demagogues hope will never change. So, the fundamental challenge for the world is to decide whether or not it is (about) time we did our best to turn these ‘little Gods’ back into humans.

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<sup>507</sup> Melissa Gordon, *Justice On Trial: The Efficacy Of The International Criminal Tribunal For Rwanda*, 1 ILSA J. INT’L & COMP. L. 217, 218 (1995).

<sup>508</sup> Schabas, *supra* note 68, at 20.