

**GENOCIDE IN RWANDA, STATE
RESPONSIBILITY TO PROSECUTE OR
EXTRADITE, AND NONIMMUNITY FOR
HEADS OF STATE AND OTHER PUBLIC
OFFICIALS**

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I. INTRODUCTION

Crimes against humanity, including genocide, were committed on a vast scale in Rwanda in 1994 and have led to prosecutions within Rwanda and in an International Criminal Tribunal for Rwanda (ICTR) created by the United Nations Security Council in November 1994.¹ By August 2011, there had been eighty-two cases before the ICTR that resulted in fifty-seven convictions or cases pending appeal, one case awaiting trial, ten cases in progress, eight acquittals, two detainees released, two detainees deceased before judgment, and two cases

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1. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

transferred to national jurisdiction in France.²

Formal prosecutions in regular Rwandan domestic courts are less detailed but apparently number in the thousands.³ Prosecutions in regular domestic courts were initially especially problematic, because there were few lawyers and judges after the 1994 genocidal campaign and it became known that there were more than 100,000 accused.⁴ Far more frequently, the Rwandan government used village or community tribunals where some truth-telling and witnessing had been publicly proclaimed.⁵ These are known as the Gacaca tribunals,⁶ and their use led to numerous convictions and formal sanctions against those who were found to have perpetrated or aided and abetted crimes that could amount to genocide, including sentences of a period of years or life in prison.⁷ However, the Gacaca normally involved quite informal proceedings, a lack of detailed attention to international or domestic criminal law, a lack of legal representation for the accused, spontaneous admissions of guilt, and (with respect to some types of criminal

2. See *Status of Cases*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictt.org/Cases/tabid/204/Default.aspx> (last visited Aug. 30, 2011).

3. See Mark A. Drumbl, *Prosecution of Genocide v. The Fair Trial Principle: Comments on Brown and Others v. The Government of Rwanda and the UK Secretary of State for the Home Department*, 8 J. INT'L CRIM. JUST. 289, 303 (2010) (specialized chambers in the Rwandan national courts "prosecuted about 10,000 people [for 'genocide-related offences'] before being superseded by the gacaca courts and the new High Court of Rwanda"); Megan M. Westberg, *Rwanda's Use of Transnational Justice After Genocide: The Gacaca Courts and the ICTR*, 59 U. KAN. L. REV. 331, 332 (2011) ("[B]y 1999, courts had only tried some 5000 of 120,000 suspects."); *id.* at 335–36 ("[T]he justice system had comprised about 700 judges and magistrates, less than fifty of whom had any formal legal training."); *Rwanda: Gacaca Tribunals Must Conform With International Fair Trial Standards*, AMNESTY INT'L U.K., Dec. 17, 2002, http://www.amnesty.org.uk/news_details_p.asp?NewsID=14258 [hereinafter AI News] (noting that "special genocide chambers have tried less than six percent of those detained for suspected genocide" and some 110,000 were awaiting trial in 2002).

4. See Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 41, 42–43 (2007); Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 44–45 (2005); Westberg, *supra* note 3, at 331–32, 337–41.

5. Westberg, *supra* note 3, at 337–41.

6. See Westberg, *supra* note 3, at 332; AI News, *supra* note 3.

7. Westberg, *supra* note 3, at 337–41.

conduct) relatively light sanctions for those who admitted guilt.⁸

Rwanda's significant dilemma primarily involved a lack of adequate time and resources to prosecute numerous persons who had been reasonably accused in competent and regularly constituted judicial tribunals affording due process guarantees required by international law⁹ and to provide effective penalties

8. See U.S. DEP'T OF STATE, 2004 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: RWANDA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41621.htm>; Westberg, *supra* note 3, at 340–41, 346; Toran Hansen, *The Gacaca Tribunals in Post-Genocide Rwanda*, UNIV. OF MINN. CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, Nov. 27, 2005, available at http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Dialogue%20Approaches/Gacaca_Tribunals.pdf; Jeff Freeland, *Rwanda Genocide Conviction Nets Nun 30 Years*, THE NATIONAL LEDGER Nov. 11, 2006, at 31, available at <http://www.nationaledger.com/cgi-bin/artman/exec/view.cgi?archive=6&num=9756>; Elizabeth Hopkirk, *Grass-Roots Justice Begins to Take Hold in Rwanda*, THE TELEGRAPH, Nov. 12, 2006, at 31, available at <http://www.telegraph.co.uk/news/worldnews/1533967/Grass-roots-justice-begins-to-take-hold-in-Rwanda.html>; *Rwanda: 100 Genocide Convictions*, CBS NEWS (Aug. 4, 2003), <http://www.cbsnews.com/stories/2003/08/04/world/main566613.shtm> (stating that a mass trial of 139 defendants before “[a] tribunal [in Mugusa, Butare province] has convicted 100 people of rape, torture, murder and crimes against humanity in the largest trials so far”).

9. Customary human rights to due process include those reflected in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. See e.g., JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 474–76 (3d ed. 2007) [hereinafter ICL] (discussing the right to a legal defense under international law); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 141–43 (2009); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 352–71 (2005); 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 420, 430–31 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–33 & n.66 (2006) (recognizing that Article 75 of Geneva Protocol I, which sets forth most of the same due process guarantees, describes many of the “trial protections that have been recognized by customary international law”); *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 45–48 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); William J. Aceves, Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 94 AM. J. INT'L L. 555, 559 (2000); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 106, 116, Annex art. 20–22, 25, U.N. Doc. S/25704 (May 3, 1993) (noting that “the right of appeal . . . is a fundamental element of individual civil and political rights”); Jordan J. Paust et al., *Report of the Mission of the International Commission of Jurists, Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1, *passim* (1990)

for all of those who had been found guilty,¹⁰ but a lack of time and resources is not a recognizable limitation of Rwanda's international responsibility. With respect to the informal Gacaca, they failed to adequately guarantee customary human rights to be tried in a competent, independent, and impartial tribunal established by law; to be informed promptly and in detail of any charges; to have adequate time and facilities for the preparation of one's defense; to communicate with counsel of one's own choosing (and, therefore impliedly, to have legal counsel); to examine or have examined witnesses against an accused; to not be compelled to testify against oneself or to confess guilt; and to have one's conviction and sentence reviewed by a higher tribunal according to law.¹¹ The sheer number of proceedings, ultimately reported at more than 1,100,000 cases,¹² underscores the problem.

Criticism of the Gacaca process has focused primarily on the lack of formal evidence in many cases, the lack of defense counsel, pressure to confess guilt, coercion through serious threats posed to witnesses, false witnessing, general lack of due process, lack of adequate time to prepare for a defense, poor training of "judges," the fact that many judges in early proceedings were accused of having committed genocide, general

(reprinted original). See also Human Rights Comm., *General Comment on Article 4*, 72d Sess., July 24, 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) ("As certain elements of the right to fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence."); Human Rights Comm., *General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, 52d Sess., Nov. 2, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (noting "a general reservation to the right to a fair trial would not be" permissible because of the customary, non-derogable, and peremptory character *jus cogens* of the human right to a fair trial).

10. See Westberg, *supra* note 3, at 339–41.

11. See ICCPR, *supra* note 9, art. 14(1), (3), (5); AMNESTY INT'L, RWANDA: GACACA: A QUESTION OF JUSTICE 34–40 (2002), available at <http://www.amnesty.org/en/library/info/AFR47/007/2002/en>.

12. See Westberg, *supra* note 3, at 341 (adding: "the vast majority . . . were completed" between 2005 and 2009).

lack of prosecutions of Tutsi victors or government personnel who are accused, interference and misuse of the proceedings by the government, and even the autocratic nature of the government.¹³ There has also been criticism that a primary goal

13. See Karol C. Boudreaux & Puja Ahluwalia, *Cautiously Optimistic: Economic Liberalization and Reconciliation in Rwanda's Coffee Sector*, 37 DENV. J. INT'L L. & POL'Y 147, 164, 169 (2009); Carter, *supra* note 4, at 48–52; Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 382 (2002); Drumbl, *Prosecution of Genocide*, *supra* note 3, at 293, 295–301, 307 (addressing the U.K. High Court of Justice decision in 2009 to not extradite suspects to Rwanda because of “a real risk that the appellants would suffer a flagrant denial of justice,” especially with regard to availability of defense witnesses and denial of an independent and impartial judicial proceeding, and noting that the ICTR and Finish, French, and German courts have similarly denied extradition requests and that Canada is reluctant to actually effectuate a deportation order); Drumbl, *Law and Atrocity*, *supra* note 4, at 49; Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 93 n.59 (2009) (“When the ICTR showed interest in indicting some Tutsi military leaders, Rwanda threatened to suspend cooperation with the ICTR and forced it to replace its Prosecutor.”); *id.* at 130–31 (“[T]ension between the ICTR and Rwanda is so acute that the ICTR has refused to send certain lower-level suspects back to Rwanda for trial on the grounds that they will not receive fair trials.”); Maya Goldstein-Bolcan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 385–89 (2004); Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 50–59 (2011) (there have been few prosecutions of Tutsis and Rwandan Patriotic Front (RPF) fighters regarding reported 1994 atrocities and Rwanda refused to cooperate with the ICTR concerning prosecution of such accused persons and has claimed that “Special Investigations into RPF crimes were politically motivated”); *id.* at 60–61, 61 n.71 (ICTR, U.K., France, Germany, and Finland refused to transfer or extradite persons to Rwanda because of the lack of fair trials and adequate protection of witnesses); *id.* at 81–82 (identifying such problems but noting new legislation in 2009 that might help to protect witnesses); Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 51–54 (2002); Lars Waldorf, “A Mere Pretense of Justice”: *Complimentarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 FORDHAM INT'L L.J. 1221, 1224–28 (2010) [hereinafter Waldorf, *Pretense*] (few prosecutions of RPF accused); Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 45–46, 59–60, 63–68, 71–73, 78–81 (2006) [hereinafter Waldorf, *Mass Justice*]; Westberg, *supra* note 3, at 353–56; *Law and Reality: Progress in Judicial Reform in Rwanda*, HUMAN RIGHTS WATCH (July 2008), <http://www.hrw.org/node/62098>; U.S. DEPT OF STATE, 2008 HUMAN RIGHTS REPORT: RWANDA (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119019.htm> (“[G]overnment officials sometimes attempted to influence individual cases, primarily in gacaca cases.”); *but see* William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 889 (2005) (“[J]udgments show that the confession and guilty plea scheme that underpinned the 1996 legislation works . . . reported judgments in which an accused has confessed,

of truth and reconciliation has not been adequately met and that underlying tensions may result in social violence in the future,¹⁴ a circumstance that arises too often where there is a noticeable lack of accountability and justice and a concomitant deflation of respect for law.¹⁵

Other countries have also prosecuted persons accused of engaging in genocidal conduct in Rwanda,¹⁶ but the number of persons convicted in other countries is not extensive due primarily to the fact that few persons in other countries are known to be reasonably accused.¹⁷ In the United States, there is no federal statute that will allow prosecution of crimes against humanity as such (of which genocide is a special type),¹⁸ although a new statute could be enacted and apply retroactively

pleaded guilty, apologized to the victims and denounced accomplices.”).

14. See Haskell & Waldorf, *supra* note 13, at 75 (“[O]ne-sided or victor’s justice does nothing to advance reconciliation efforts within Rwanda or deter future violence in Rwanda and the Democratic Republic of the Congo . . . [and] may prevent an accurate historic record.”); *id.* at 76–78 (“[T]olerance of impunity can also lead to renewed cycles of violence ‘by implicitly permitting unlawful acts and by creating an atmosphere of distrust and revenge.’ . . . In a similar vein, the failure to bring certain RPF soldiers to justice for crimes committed in 1994 has encouraged serious human rights violations . . . [and] impunity for these crimes remains a divisive issue.”); Waldorf, *Mass Justice*, *supra* note 13, at 68–81, 85; Drumbl, *Law and Atrocity*, *supra* note 4, at 50–51.

15. See e.g., ICL, *supra* note 9, at 25–26, 138.

16. See *id.* at 174, 780–81 (convictions in Belgian courts of two nuns in 2001 and two other accused in 2005); Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927, 932–33 (2009) (four convicted in Belgium); *id.* at 935 (Belgian conviction of Rwandan Major); *id.* at 938 (French cases); *id.* at 939 (Swiss conviction and some cases transferred to the ICTR); *id.* at 944 (case in the Netherlands); *id.* at 946–47 (in Denmark, case against former official dropped because of insufficient evidence); *id.* at 948 (investigations in Norway); *id.* at 957 (investigations in Spain); Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 8–9, 13–14 (2011) (current proceedings in Germany); *id.* at 22–23 (pending cases in France); *id.* at 28; *id.* at 32 (convictions in Belgium); *id.* at 42 (trials in Belgium, Canada, the Netherlands, and Switzerland); *Rwandan Genocide Conviction*, BBC (May 23, 2009), http://www.bbc.co.uk/worldservice/africa/2009/05/090523_rwanda-canada.shtml (conviction in Canada); Edmund Kagire, *Another Genocide Fugitive Arrested in Belgium*, THE NEW TIMES (Rwanda), Apr. 21, 2011, available at <http://www.newtimes.co.rw/print.php?issue=14602&print&article=40404>; Matti Huuhtanen, *Ex-Pastor Jailed for Life in Finland Genocide Conviction*, THE STAR, June 11, 2010, available at <http://www.thestar.com/printarticle/822213>.

17. Kaleck, *supra* note 16, at 960.

18. ICL, *supra* note 9, at 709–10, 714–15, 717, 722, 730.

to reach crimes against humanity committed prior to its enactment without running afoul of *ex post facto* prohibitions or the principle of *nullum crimen sine lege*.¹⁹ Moreover, the present federal statute addressing genocide is seriously inadequate and must be revised to comply with U.S. treaty obligations and to allow effective prosecution of genocide.²⁰

Do countries like Rwanda and the United States have a duty under international law to bring those who are reasonably accused of genocide and other crimes against humanity into custody and to either initiate prosecution or extradite such persons to another country or to an international criminal tribunal for prosecution? Do all countries have a competence under international law to initiate prosecution of those who are reasonably accused and are present in their territory or territory under their effective control? Is there any immunity under international law for a perpetrator or complicitor who presently is or had been a head of state or other government official at the time of an alleged offense?

II. THE DUTY TO INITIATE PROSECUTION OR TO EXTRADITE

The 1948 Genocide Convention,²¹ which is known to mirror universally obligatory customary international law,²² sets forth relevant state obligations in a manifestly mandatory fashion. Article I of the Convention affirms that genocide “is a crime under international law which . . . [the parties to the treaty] undertake to prevent and to punish.”²³ Article IV adds that

19. See e.g., Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 727 (2009) [hereinafter Paust, *New U.S. Legislation*]; see also ICL, *supra* note 9, at 233–37 (noting that *ex post facto* and *nullum crimen sine lege* principles are not violated when new statute applies retroactively to punish what was already a violation of generally accepted principles of international law).

20. Paust, *New U.S. Legislation*, *supra* note 19, at 723–26.

21. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Rwanda has been a party to the Convention since 1975. *Id.*

22. See e.g., ICL, *supra* note 9, at 14–15, 786 n.1, 800–02; Paust, *New U.S. Legislation*, *supra* note 19, at 723 n.22.

23. Genocide Convention, *supra* note 21, art. I. Of course, punishment must not

“[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²⁴ Article V recognizes the duty to enact “necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.”²⁵ In language relevant to Rwanda’s use of community courts, Article VI of the Convention requires “[p]ersons charged . . . shall be tried by a competent tribunal.”²⁶ Obviously, there is no room for political refusals to initiate prosecution or to extradite any person who is reasonably accused of having committed or aided and abetted genocide.

In 2009, the United Nations Security Council affirmed:

its strong opposition to impunity for serious violations of international humanitarian law and human rights law and emphasize[d] in this context the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation . . . [and recalled] that accountability for such serious crimes must be ensured by taking measures at the national level.²⁷

In 2006, the Security Council had also stressed “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious

take place without a fair trial and conviction. *Id.* art. VI.

24. *Id.* art. IV. Article III declares that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are acts that “shall be punishable.” *Id.* art. III(a)–(e).

25. *Id.* art. V. The United States is in clear violation of this duty and needs to amend relevant legislation. *See Paust, New U.S. Legislation, supra* note 19, at 719, 723–26.

26. Genocide Convention, *supra* note 21, art. VI.

27. S.C. Res. 1894, ¶¶ 10–11 (2009), U.N. Doc. S/RES/1894 (Nov. 11, 2009).

violations of international humanitarian law,”²⁸ thereby leaving out any limitations based on political concerns, lack of resources, or other putative limits on state responsibility to enforce international criminal law. Moreover, when the ICTR was created in 1994, the Security Council expressed its grave concern with respect to “systematic, widespread and flagrant violations of international humanitarian law” in Rwanda; determined “that this situation continues to constitute a threat to international peace and security;” expressed its determination “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them;” and was convinced “that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”²⁹

When one hundred and sixty states met in Rome in 1998 to create the International Criminal Court (ICC), they emphasized their determination “to end impunity” and to prosecute alleged perpetrators of genocide, certain other crimes against humanity, and certain war crimes.³⁰ For example, the preamble to the Statute of the ICC declares emphatically “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level.”³¹ Additionally, the preamble affirms the widely shared expectation “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international

28. S.C. Res. 1674, ¶ 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

29. S.C. Res. 955, *supra* note 1, pmb.

30. Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Statute of the ICC]. Not all customary crimes against humanity and war crimes are within the jurisdiction of the ICC. See Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes*, 43 J. MARSHALL L. REV. 681, 691–712 (2010).

31. Statute of the ICC, *supra* note 30, pmb. (labeling all of the crimes prosecutable before the ICC as “most serious”).

crimes.”³²

More specifically, it is widely known that under customary international law all states have an unavoidable duty *aut dedere aut judicare* to either hand over or to initiate prosecution of persons who are reasonably accused of having committed crimes under customary international law such as genocide and other crimes against humanity.³³ This mandatory but alternative duty

32. *Id.* With respect to this recognized duty to engage in “effective prosecution” and to “exercise” national “criminal jurisdiction,” no exceptions exist for heads of state or other officials; *see also id.* art. 27(1) (stating that officials are not exempt from criminal responsibility).

33. *See e.g.*, ICL, *supra* note 9, at 10, 12, 17–19, 131–32, 134–35, 138–41, 143–44, 155; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5–6 (3d ed. 1996); M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW* (1995) (arguing that “the principle of *aut dedere aut judicare* can be regarded as a rule of customary international law”); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 796 (1920) (duty to punish war crimes); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2552 (1991); Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT’L L. 337, 337–40 (1989); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 87 (1993) (state insists on “treaty and customary right *aut dedere aut judicare*”); Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Legal Obligations*, 39 VA. J. INT’L L. 425 (1999); Rudiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in DIETER FLECK (ED.), THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 683–84 (2d ed. 2008); U.S. DEPT OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, at 119 (1956) (regarding the customary responsibility concerning all war crimes, including violations of the Geneva Conventions: “The principles quoted [from the Geneva Civilian Contention, art. 146] . . . are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons . . .”); 3 MANUAL OF MILITARY LAW, THE LAW OF WAR ON LAND 95 n.2 (British War Office, 1958) (no refuge for war crimes is possible in any state bound by the Geneva Conventions); *United States v. Arjona*, 120 U.S. 479, 488 (1887) (duty to prosecute international crime of counterfeiting foreign currency); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 147–48 (1820) (piracy “is an offense against all. It is punishable in the Courts of all . . . [and our courts] are authorized and bound to punish” such offenses.); *Ex parte Dos Santos*, 7 F. Cas. 949, 953 (C.C.D. Va. 1835) (No. 4,016) (quoting Emerich de Vattel: “duty to punish or surrender”); *Territorial Rights – Florida*, 1 Op. Att’y Gen. 68, 69 (1797) (quoting the “duty of every government to punish”); *Respublica v. De Longchamps*, 1 U.S. 111, 117 (Pa. O. & T. 1784) (“it is now the interest as well as duty of the government, to animadvert upon . . . conduct [in violation of the law of nations] with becoming severity”); *see also United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (Piracy “is against all and punished by all . . . within this

under customary international law is also reflected in United Nations Security Council and General Assembly resolutions,³⁴ opinions of Judges of the International Court of Justice,³⁵ as well as in resolutions of the Human Rights Commission³⁶ and private legal associations.³⁷ Moreover, a significant number of

universal jurisdiction.”).

34. See S.C. Res. 1894 (2009), *supra* note 27, ¶¶ 5–6; U.N. S.C. Res. 1674, *supra* note 28, ¶¶ 6, 8–10; S.C. Res. 1296, ¶ 17, U.N. Doc. S/RES/1296 (Apr. 19, 2000) (reaffirming “the need to bring to justice individuals who incite or otherwise cause” violence against civilians); S.C. Res. 1261, ¶ 3, U.N. Doc. S/RES/1261 (Aug. 25, 1999) (Security Council “stresses the responsibility of all States to bring an end to impunity and their obligations to prosecute those responsible for grave breaches of the Geneva Conventions. . . .”); Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, G.A. Res. 62/148, ¶¶ 5, 7, U.N. Doc. A/62/148 (Mar. 4, 2008); Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, G.A. Res. 61/153, ¶¶ 5–6, U.N. Doc. A/61/153 (Feb. 14, 2007); G.A. Res. 60/147, G.A. Res. 60/147, ¶ 4, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (stating that there is a “duty to investigate and, if there is sufficient evidence, a duty to submit to prosecution”); G.A. Res. 49/60, ¶ 5(b), U.N. Doc. A/49/60 (Dec. 9, 1994); G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 8, 1992); G.A. Res. 46/51, ¶ 4(b), U.N. Doc. A/46/654 (Dec. 9, 1991); E.S.C. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989); G.A. Res. 3074 (XXVIII), 28 U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 78 (Dec. 3, 1973); G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 at 88, (Dec. 18, 1971); G.A. Res. 96, U.N. GAOR, 1st Sess., U.N. Doc. A/64, at 189 (Dec. 11, 1946) (duty to prosecute genocide); see also S.C. Res. 579, ¶ 5, U.N. Doc. S/RES/579 (Dec. 18, 1985) (“Urges the further development of international cooperation among States in devising and adopting effective measures . . . to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction”); 2005 World Summit Outcome, U.N. G.A. Res. 60/1, ¶¶ 58(f) (“ending impunity”), 118 (“accountability”), U.N. Doc. A/60/1 (Oct. 24, 2005). This sentence and the next were borrowed from Paust, *New U.S. Legislation*, *supra* note 19, at 719–20.

35. See *e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan v. U.S.), Provisional Measure, 1992 I.C.J. 114, 115–16, 180 (Apr. 14); see also Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Request for the Indication of Provisional Measures, Order (declaration of Van den Wyngaert, J.), paras. 4, 6, 10 & n.15 (addressing ICTY decisions in *Tadic* and *Furundzija* and ICTR decisions in *Akayesu* and *Kayishema and Ruzindana*).

36. See *e.g.*, Human Rights Commission, Res. 1999/32, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/RES/1999/32 (Apr. 26, 1999); Human Rights Commission, Res. 1999/1, Situation of Human Rights in Sierra Leone, U.N. Doc. E/CN.4/RES/1999/1 (Apr. 6, 1999); Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses, INT’L LAW ASS’N, REPORT OF THE SIXTY-NINTH CONFERENCE HELD IN LONDON, 2000, at 4–5, 7, 10, 20–21 [hereinafter I.L.A. H.R. REPORT].

37. A 1985 resolution of the International Law Association affirms: “States must

international criminal law treaties over the last few decades expressly include such an obligation and stress that it is without exception whatsoever and shall apply when an accused is present in territory under jurisdiction of a party whether or not an offense is committed within the state's territory,³⁸ thereby reflecting the mandatory duty's continual affirmation and its interconnection with universal jurisdiction with respect to international crime, mirroring consistent patterns of *opinio juris* (or legal expectation) relevant to the formation and continuation of customary international legal obligations. Quite clearly, both Rwanda and the United States have obligations to bring those

try or extradite (*aut judicare aut dedere*) persons accused of acts of international terrorism. No State may refuse to try or extradite a person accused of an act of terrorism, war crime . . . or a crime against humanity" INT'L LAW ASS'N, *International Terrorism Res. No. 7*, in REPORT OF THE SIXTY-FIRST CONFERENCE HELD AT PARIS, 6, 6-7 (1985); see also I.L.A. H.R. REPORT, *supra* note 36, at 4, 7, 10, 20.

38. See International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177, Annex, U.N. GAOR, 61st Sess. Supp. No. 53, U.N. Doc. A/61/53, pmb. ¶ 5 (Dec. 20, 2006) ("Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance"); *Id.* art. 9(2), 11(1); International Convention for the Suppression of the Financing of Terrorism art. 7(4), 9, 10 Dec. 9, 1999, 2178 U.N.T.S. 197; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/164, Annex, U.N. GAOR, 52nd Sess. Supp. No. 37, U.N. Doc. A/52/37, art. 6(4), 7(2), 8(1) (Dec. 15, 1997); Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. Doc. A/RES/49/59, Annex, U.N. GAOR, 49th Sess. Supp. No. 22, U.N. Doc. A/49/22, arts 10(4), 14 (Dec. 9, 1994); Inter-American Convention on the Forced Disappearance of Persons art. IV, VI, June 9, 1994, 33 I.L.M. 1529; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 9(2), 10(1), 12, Dec. 4, 1989, 2163 U.N.T.S. 75; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 6(4), 7(1), 10(1), Mar. 10, 1988, 1678 U.N.T.S. 222; Inter-American Convention to Prevent and Punish Torture art. 14, Dec. 9, 1985, 25 I.L.M. 519; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), 7(1), Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention Against the Taking of Hostages art. 5(2), 8(2), Dec. 17, 1979, 1316 U.N.T.S. 206; European Convention on the Suppression of Terrorism art. 7, Jan. 27, 1977, E.T.S. No. 90; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 3(2), 6(1), 7, Dec. 14, 1973, 1036 U.N.T.S. 167; Convention for the Suppressions of Unlawful Acts Against the Safety of Civil Aviation art. 5(2), 6(1), 7, Sept. 23, 1971, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft art. 4(2), 6(1), 7, Dec. 16, 1970, 860 U.N.T.S. 106; Genocide Convention, *supra* note 21, art. I, V. The fact that this duty is without exception underscores the requirement of nonimmunity for heads of state and other officials.

who are reasonably accused of genocide and other crimes against humanity before their courts or to extradite such persons for trial in another country or relevant international criminal tribunal if they choose not to or are unable to prosecute.

III. UNIVERSAL JURISDICTION

It is wellknown that all states have a competence under customary international law termed universal jurisdiction. Universal jurisdiction allows a state to prosecute any person reasonably accused of having committed a crime under customary international law even when the accused has no contacts or connections with the prosecuting state.³⁹ Newer international criminal law treaties also provide a similar competence that is applicable among the parties to the treaty, can reach the nationals of any party, and shall be exercised whenever an accused is found within territory under the jurisdiction of a party.⁴⁰ Actual enforcement by a state or sub-state entity occurs when the accused is present in the state's territory, some other territory under its control, or the equivalent of its territory under international law.⁴¹ Since genocide and other crimes against humanity are crimes under customary international law,⁴² all states have universal

39. See ICL, *supra* note 9, at 131–32, 139–41, 155–174, 210–11; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, cmts. (a)–(b) (1987); Kaleck, *supra* note 16, at 928 n.3 (quoting Council Secretariat, The AU-EU Expert Report on the Principle of Universal Jurisdiction, ¶¶ 8–9, delivered to the Council of the European Union and the Delegations, U.N. Doc. 8672/1/09 (Apr. 16, 2009)); U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, U.N. Doc. A/65/181 (July 29, 2010).

40. See ICL, *supra* note 9, at 155, 164, 855. Such a competence and enforcement duty is termed universal by treaty or universal by consent. *Id.* They are clearly directly connected to treaty-based duties *aut dedere aut judicare*. See *supra* text accompanying note 34. Once a treaty-based crime also becomes one under customary international law, customary universal jurisdiction pertains and reaches all states and all accused. See ICL, *supra* note 9, at 155–156.

41. See *id.* at 17, 156, 175–76, 449; JORDAN J. PAUST ET. AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 658–669 (3d ed. 2009) (law enforcement officers may exercise their functions in the territory of another state only with consent of the other state and if duly authorized by their state and in compliance with the laws of both their state and of the other state).

42. See ICL, *supra* note 9, at 702–18 (crimes against humanity); Paust, *New U.S.*

jurisdiction over such offenses.

Therefore, whenever such an accused is present within the United States, the U.S. can exercise its competence under international law to prosecute and can comply with its obligation *aut dedere aut judicare* (to extradite or prosecute). There are no statutes of limitation under customary international law⁴³ and there is no double jeopardy with respect to prosecutions by different sovereigns.⁴⁴ Therefore, if an accused has already appeared before a Gacaca tribunal in Rwanda and either has or has not suffered some local sanction, the United States (and any other country) can prosecute such person before its courts, extradite such person to another country, or render such person to the ICTR upon its request. Additionally, if a country requests extradition of an accused from Rwanda, the request should not be denied if there has not been a good faith effort at initiation of actual prosecution of an accused by Rwanda, since its duty *aut dedere aut judicare* is either to hand over or to initiate prosecution in good faith.⁴⁵ Moreover, no Rwandan statute of limitation, pardon, grant of amnesty, immunity, or asylum would be binding in another state or before an international criminal tribunal.⁴⁶

Legislation, *supra* note 19, at 723 n.22.

43. See ICL, *supra* note 9, at 134, 788 (a statute of limitation must be based in a treaty).

44. *Id.* at 130, 350. Freedom from double jeopardy in the ICCPR is applicable only with respect to the same sovereign. See ICCPR, *supra* note 9, art. 14(7) (within “each country”).

45. See ICL, *supra* note 9, at 17, 134, 144, 452; see also Genocide Convention, *supra* note 21, art. I, IV–V, VII (“The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force”).

46. See ICL, *supra* note 9, at 27, 30; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 422, 437–38 n.71 (2d ed. 2003); see also *Chumbipuma Aguirre v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001) (“all amnesty provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance”); *Right of Expatriation*, 9 Op. Att’y Gen. 356, 362–63 (1859) (“A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision in his own municipal code.”).

IV. NONIMMUNITY FOR GENOCIDE AND OTHER CRIMES AGAINST HUMANITY

The Genocide Convention expressly recognizes in clear and unavoidable language that “[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁴⁷ Such an absolute prohibition of immunity for genocide and other crimes against humanity had been recognized prior to the creation of the Genocide Convention and has often been affirmed ever since.⁴⁸

More generally, nearly every international criminal treaty applies to any person who commits a relevant crime,⁴⁹ no treaty excludes heads of state or other public actors, and in absolutely no international criminal law instrument is there any form of immunity for any person, including a sitting or former head of state or other public official.⁵⁰ Moreover, like the Genocide Convention, many international criminal law instruments expressly recognize nonimmunity for public officials,⁵¹ including the Charter of the International Military Tribunal at Nuremberg,⁵² the Charter of the International Military Tribunal for the Far East,⁵³ Allied Control Council Law No. 10,⁵⁴ the U.N.

47. Genocide Convention, *supra* note 21, art. IV.

48. *See* ICL, *supra* note 9, at 29–34, *passim*.

49. *But see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (State parties shall ensure that all acts of torture “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” are offences under its criminal law). Clearly, Article 1 expressly reaches “a public official or other person acting in an official capacity,” but it does not reach all private actors.

50. *See* PAUST, *supra* note 46, at 422, 435–37 n.69. It should also be noted that in absolutely no international criminal law treaty is there any Latinized nonsense about a so-called immunity *ratione materiae* or immunity *ratione personae* for international criminal conduct. *See infra* note 78.

51. *See infra* note 78.

52. Charter of the International Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 279.

53. Charter of the International Military Tribunal for the Far East art. 6, Jan. 19, 1946, T.I.A.S. 1589, *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 8 (Neil Boister & Robert Cryer eds., 2008).

Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, Korea,⁵⁵ the Statute of the ICTY,⁵⁶ the Statute of the ICTR,⁵⁷ the Statute of the Special Court for Sierra Leone,⁵⁸ and the Statute of the ICC.⁵⁹ Certain notable domestic instruments created after widespread atrocities have also recognized nonimmunity for heads of state and other officials.⁶⁰

Among other important instruments reflecting the customary international law of nonimmunity, Principle III of the Principles of the Nuremberg Charter and Judgment⁶¹ expressly

54. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(4), Dec. 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55(1946).

55. U.N. Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command Korea, Rule 48, Mar. 17, 1953, *reprinted in* INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 171, 176 (Jordan J. Paust et al. eds., 2006) [hereinafter ICL DOCS.].

56. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827, Annex, art. 7(2) (May 25, 1993).

57. Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955, Annex, art. 6(2) (Nov. 8, 1994).

58. *Statute of the Special Court for Sierra Leone*, art. 6(2), THE SPECIAL COURT FOR SIERRA LEONE: DOCUMENTS, <http://www.scs-l.org/LinkClick.aspx?fileticket=uClnd1MjeEw3d&tabid=70> (last visited Sept. 5, 2011). The Court was established by an Agreement Between the United Nations and the Government of Sierra Leone. *See* S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

59. Statute of the ICC, *supra* note 30, art. 27(1) (“This Statute shall apply equally to all persons without distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”).

60. *See e.g., Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: LAW ON ECCC, http://www.eccc.gov.kh/sites/default/files/legal_documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited Sept. 5, 2011) (“[t]he purpose of this law is to bring to trial senior leaders ... and those who were responsible”); *Id.* art. 2 (“Senior leaders ... and those who were most responsible”); Iraqi High Criminal Court Law, art. 15(third), Al-Waqaeah al-Iraqia [Iraqi Official Gazette] 4006 of Oct. 18, 2005, *reprinted in* ICL Docs., *supra* note 55, at 184, 195; Bangladesh International Criminal (Tribunals) Act of July 19, 1973, art. 5(1), Act No. XIX of 1973, Dacca, Jul. 20, 1973, *reprinted in* ICL DOCS., *supra* note 55, at 177, 179.

61. Principles of International Law Recognized in the Charter of the Nürnberg

affirms that “[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”⁶² While ruling that there is no immunity for international crimes, the International Military Tribunal at Nuremberg emphasized that acts in violation of international criminal law are *ultra vires* or beyond the lawful authority of any state:

the doctrine of sovereignty of the State . . . cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.⁶³

Tribunal and in the Judgment of the Tribunal, G.A. Res. 177(II), U.N. GAOR Supp No. 12 at 11, U.N. Doc. A/1316 (July 29, 1950).

62. *Id.* princ. III.

63. Judgment and Opinion, International Military Tribunal at Nuremberg (Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172, 220–21 (1947). Importantly, since no state has authority to participate in international crimes and state sovereignty is not relevant when international crimes have been committed, “foreign policy” should also be irrelevant, states are on notice that international criminal conduct is without authority, and no state can rightly be embarrassed by inquiry into its international criminal activity or *acta contra omnes*. See also Prosecutor v. Furundzija, Case No. IC-95-17/1-T, ¶¶ 153–55 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) (The prohibition of torture is “a peremptory norm of *jus cogens*” and as such, “it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture” and “would not be accorded international legal recognition.”); Prosecutor v. Blaskic, Case No. IC-95-14-T, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 29, 1997) (international criminal accused “cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.”); Prefecture of Voiotia v. Federal Republic of Germany Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997) (“The acts of a state that violate *jus cogens* norms do not have the character of sovereign acts. In such cases it is considered that the accused state did not act within the ambit of its capacity as a sovereign. Acts contrary to *jus cogens* norms are null and void, and cannot constitute a source of legal rights or privileges, such as the claim to immunity”). This case was affirmed in Areios Pagos [A.P.] [Supreme Court] 11/2000 (Greece) (also noting that crimes against humanity are an abuse of sovereign power that are not protectable under customary international law, nor are acts “in breach of rules of peremptory international law (Article 46 of the [1907 Hague Convention No. IV, Annex Regulations], and they were not acts *jure imperii*.”).

A striking array of relevant judicial recognitions and other precedent in addition to the ruling of the I.M.T. at Nuremberg has been remarkably pervasive. Among earlier convictions of heads of state and officials were the conviction of Duke Conradin von Hofenstafen at Naples in 1268 for an offense against peace⁶⁴ and the conviction of Peter von Hagenbach before an international tribunal at Breisach in 1474.⁶⁵ In 1758, Vattel expressed the expectation that “[t]he Prince . . . who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous enemy;”⁶⁶ and in 1818 the Congress at Aix-La-Chapelle found that Emperor Napoleon had waged wars against peace.⁶⁷ After World War I, the 1919 Treaty of Versailles publicly arraigned Kaiser William of Germany for crimes against peace that were to be tried in an international tribunal,⁶⁸ but he fled to the Netherlands and was not

See also Bernard H. Oxman et al., *Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law*, 95 AM. J. INT’L L. 198 (2001); Regina v. Bartle and the Comm’r of Police for the Metropolis and Others (*Ex parte Pinochet*), [1999] UKHL 17, [2000] 1 A.C. (H.L.) [147] (Browne-Wilkinson, L.J., sep. op.), *excerpts reprinted in* ICL, *supra* note 9, at 39–42; Prinz v. Federal Republic of Germany, 26 F.3d 1166, 1182, 1184 (D.C. Cir. 1994) (Wald, J., dissenting) (“[A] state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated . . . the state cannot be performing a sovereign act entitled to immunity” and “Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States.”); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862–63 (E.D.N.Y. 1984) (“[T]here is no . . . justifiable offense to” a foreign state when jurisdiction is exercised over torture and domestic “immunities for government personnel or other such exemptions or limitations” cannot be used to obviate suits for violations of international law under the Alien Tort Claims Act.); Inter-American Convention on the Forced Disappearance of Persons, *supra* note 38, art. IX (“The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties [and p]rivileges, immunities, or special dispensations shall not be admitted.”).

64. ICL, *supra* note 9, at 455.

65. *See id.* at 455–56.

66. EMERICH DE VATTEL, THE LAW OF NATIONS 80 (S & E Butler 1805) (1758).

67. ICL, *supra* note 9, at 561.

68. *See id.* at 584–85.

prosecuted.⁶⁹ Also in 1919, an international Commission on Responsibility recognized that individual responsibility for war crimes and offenses against the laws of humanity that could be tried before a properly constituted tribunal can reach heads of state and any other official.⁷⁰

Numerous high level officials were prosecuted after World War II,⁷¹ and in 1950 the United States Supreme Court affirmed the customary norm that no form of immunity exists for war crimes in violation of the Geneva Conventions.⁷² Also near that time, a court in France rightly recognized, as had other tribunals, that a diplomat is not immune with respect to crimes under international law and that the court cannot “subordinate the prosecution [of war crimes] to the authorization of the country where the guilty person belongs.”⁷³ In 1961, top Nazi official Adolph Eichmann was convicted in Israel for international crimes over which there was universal jurisdiction.⁷⁴ In 1974, Greece convicted two former heads of

69. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW* 74 (2010).

70. ICL, *supra* note 9, at 582–83 (reproducing Part III of the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (March 29, 1919)) (recognizing that domestic immunity of a head of state in some countries “is not fundamental . . . [and] from an international point of view is quite different . . . [and, moreover, if it was thought to pertain with respect to such international crimes, it] would shock the conscience of civilized mankind”). Members of the Commission were the U.S., U.K., France, Italy, Japan, Belgium, Greece, Poland, Roumania, and Serbia. ICL, *supra* note 9, at 35.

71. *See e.g.*, ICL, *supra* note 9, at 53, 58, 310–14, 464–65; Trial of Hans Albin Rauter, 14 L. REP. TRIALS WAR CRIM, 89 (1949) (highest SS officer in the Netherlands, convicted in a Dutch tribunal of crimes against humanity); *In re Kappler*, 1948 Ann. Dig. 471, 472 (Military Trib. of Rome 1948) (head of German Police and Security in Rome).

72. *Johnson v. Eisentrager*, 339 U.S. 763, 765, 789 (1950).

73. *In re Abetz* (Fr.), *in* 46 AM. J. INT’L L. 161, 162 (1952). A Subsequent Nuremberg case prosecuted by the U.S. also recognized that diplomatic immunity applies only to legitimate acts of state and not to violations of international law. *In re Weizsacker* (The Ministries Case), 16 ANN. DIG. 344, 361 (1949).

74. *See e.g.*, Attorney General v. Eichmann, 36 INT’L L. REP. 277, 310 (Isr. S. Ct. 1962) (his criminal acts “in point of international law . . . are completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission”) *reprinted in* ICL, *supra* note 9, at 158, 233–26.

state for bloody attacks and torture that were in violation of human rights.⁷⁵ In 1985, Argentina convicted former President Lambruschini for conduct in violation of human rights.⁷⁶ In the 1980s and 90s, civil suits against former Philippine head of state Ferdinand Marcos were allowed for violations of international law after denial of claims to immunity;⁷⁷ and in 1990 Panamanian leader Manuel Noriega was convicted in a U.S. court for international drug trafficking, among other crimes despite claims to immunity.⁷⁸ In 1993, Bolivia, Germany, and Mali convicted former heads of state for conduct violating human rights.⁷⁹ In 1995, another former head of state of Germany was convicted;⁸⁰ and in 1996, South Korea convicted two former heads of state for conduct violating human rights.⁸¹ In 1998, the ICTR convicted former Rwanda President Jean Kambanda of genocide, incitement to genocide, and complicity in genocide.⁸² In 1999, the U.K. House of Lords found former

75. ELLEN L. LUTZ & CAITLIN REIGER, PROSECUTING HEADS OF STATE 15 (2009); Ellen L. Lutz, *Prosecutions of Heads of State in Europe*, in ELLEN L. LUTZ & CAITLIN REIGER, PROSECUTING HEADS OF STATE 25, 28–29 (2009).

76. See LUTZ & REIGER, *supra* note 75, 295. Argentina would convict two other former presidents in 2010. See *infra* note 96.

77. See e.g., Hilao v. Estate of Marcos, 103 F.3d 767, 787 (9th Cir. 1996); *In re Estate of Ferdinand E. Marcos*, Human Rights Litigation, 25 F.3d 1467, 1470–71 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); *In re Estate of Ferdinand Marcos*, 910 F. Supp. 1460, 1469 (D. Haw. 1995); Republic of Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987).

78. United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1212 (11th Cir. 1997), *reh'g and reh'g en banc denied*, 128 F.3d 734 (1997), *cert. denied*, 523 U.S. 1060 (1998). In 2009, he was also found to be extraditable to France. Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010), *reh'g denied*, 130 S. Ct. 1949 (2010). More recently, former Guatemalan President Alfonso Portillo was charged in the U.S. with international money laundering, a judge in Guatemala found him to be extraditable, and he is now on trial. See e.g., William Booth & Nick Miroff, *A New Fight, A Familiar Battlefield*, WASH. POST, Feb. 10, 2011, at A1; *Ex-President Indicted*, L.A. TIMES, Jan. 26, 2010, at 15.

79. LUTZ & REIGER, *supra* note 75, at 296 (former head of state of Bolivia Luis García Meza); *id.* at 300 (former head of state of East Germany Erich Honecker); *id.* at 302 (former President of Mali Moussa Traore); Lutz, *supra* note 75, at 30–31.

80. LUTZ & REIGER, *supra* note 75, at 300 (former head of state of East Germany Egon Krenz); Lutz, *supra* note 75, at 31.

81. LUTZ & REIGER, *supra* note 75, at 304 (former Presidents Chum Doo Hwan and Roh Tae Woo).

82. Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S (Sept. 4, 1998).

dictator of Chile Augusto Pinochet Ugarte to be extraditable and nonimmune for torture.⁸³ In 2001, the ICTY famously ruled that the lack of head of state immunity for alleged international

83. See *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others (Ex parte Pinochet)*, [1999] UKHL 17, [2000] 1 A.C. (H.L.) [147] (Browne-Wilkinson, L.J., sep. op.) excerpts reprinted in ICL, *supra* note 9, at 39–42. The majority of judges understandably recognized that torture violated the Convention Against Torture, was non-immune, and international criminal acts of torture are *ultra vires* and, therefore, are not lawful state or head of state functions. See e.g., ICL, *supra* note 9, at 39–42. Quite surprisingly, however, some stated in *dicta* that sitting heads of state have immunity *ratione personae* and after leaving office might have immunity *ratione materiae*, but only for lawful conduct and not for the international crime of torture. See *id.* at 39–42 (opinion of Judges Lords, Browne-Wilkinson, Hope, Millet, and Phillips). Nonetheless, no international criminal law treaty or instrument had used such Latinized nonsense, it is completely inconsistent with the overwhelming trends in decision and the instruments noted herein. See *id.* at 41–42 (points of Lords, Millet, and Phillips). Further, there were no citations to anything in support of such alleged *ratione. Id.*; Naomi Roht-Arriaza, *The Multiple Prosecutions of Augusto Pinochet*, in LUTZ & REIGER, *supra* note 75, at 77–92 (outlining background of indictments and prosecutions of Pinochet in Spain and Chile). Later, the I.C.J. issued an extremely controversial decision using such phrases and little else to conclude that Belgium did not have jurisdiction over a sitting official, instead stating an international criminal tribunal can prosecute such a person. See Case Concerning Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium), 2002 I.C.J. 3, ¶¶ 60–61 (Feb. 14); but see *id.* ¶¶ 1, 6–7, 11 (Al-Khasawneh, J., dissenting) (there is a “total absence of precedents with regard to the immunities of Foreign Ministers from criminal process”); *id.* ¶¶ 11, 13, 31–32, 36, (Van den Wyngaert, J., dissenting); Adam Day, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong*, 22 BERK. J. INT’L L. 489, 491 (2004); Micaela Frulli, *The ICJ Judgment on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, 3 GERMAN L. J. (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=138>; David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 AM. U. INT’L L. REV. 7, 15 (2004); Abdul Tejan-Cole, *A Big Man in a Small Cell: Charles Taylor and the Special Court for Sierra Leone*, in LUTZ & REIGER, *supra* note 75, at 205, 222–24; Alberto Luis Zuppi, *Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice*, 63 LA. L. REV. 309, 309–10 (2003). The majority opinion stated that the immunity afforded was not a substantive immunity, and did not imply impunity for acts that are criminal under international law. Specifically, the majority stated that “[w]hile jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all [criminal] responsibility.” Case Concerning Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium), 2002 I.C.J. 3, ¶ 60. Moreover, there is no immunity in an international criminal tribunal. *Id.* ¶ 61.

crimes reflected in the Statute of the ICTY is “a rule of customary international law.”⁸⁴

Also in 2001, the Republic of the Congo convicted former President Lissouba in absentia for conduct violating human rights.⁸⁵ In 2004, a Rwandan court convicted former President Pasteur Bizimungu, although the trial was highly criticized as being politically motivated and he was later pardoned.⁸⁶ In 2005, Spain’s Constitutional Tribunal allowed a criminal complaint against Guatemalan police chiefs, generals, and others to proceed on the basis of universal jurisdiction over international crimes;⁸⁷ and in 2006 arrest warrants were issued and extradition was sought for two former Presidents and a former Minister of Defense of Guatemala.⁸⁸ Iraqi leader Saddam Hussein was convicted by an Iraqi Special Tribunal for Crimes Against Humanity in 2006 and was subsequently hanged.⁸⁹ In 2007, France convicted a former diplomat from Tunisia for torture;⁹⁰ and the Netherlands, Suriname, and Uruguay began trials of former heads of state.⁹¹ In 2008, the son of the former

84. Prosecutor v. Milosevic, Case No. IC-99-37-PT, Amended Indictment, ¶¶ 26–34 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001); see also Prosecutor v. Plavsic, Case No. IC-00-39&40/1-S, Sentencing Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003) (Bosnian Serb group’s President plead guilty to one count of a persecution-type of crime against humanity).

85. See LUTZ & REIGER, *supra* note 75, at 302.

86. Drumbl, *Law and Atrocity*, *supra* note 4, at 298; Haskell & Waldorf, *supra* note 13, at 69 n.111.

87. See ICL, *supra* note 9, at 174.

88. See LUTZ & REIGER, *supra* note 75, at 298; Kaleck, *supra* note 16, at 956–57 (noting they were arrested by Guatemala but charges were later dropped by the Guatemalan Constitutional Court); Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT’L L. 79 (2008).

89. Christopher Torchia, *Saddam Says Farewell Online*, HOUS. CHRON., Dec. 28, 2006, at A1; James Glanz, *Hussein Ruling Sets Execution Within 30 Days*, N.Y. TIMES, Dec. 27, 2006, at A1; see also ICL, *supra* note 9, at 486–90 (regarding the tribunal and his prosecution).

90. Kaleck, *supra* note 16, at 937; see also Abetz, *supra* note 68, at 162 (concerning France’s non-recognition of diplomatic immunity for international crimes).

91. Naomi Roht-Arriaza, *Prosecuting Heads of State in Latin America*, in LUTZ & REIGER, *supra* note 75, at 60–61; see LUTZ & REIGER, *supra* note 75, at 299 (Noting the trial in Suriname of former President Bouterse for conduct violative of human rights and smuggling. Bouterse was convicted in a Dutch court in 1999 on cocaine smuggling

President of Liberia, himself an official, was convicted of torture in a U.S. federal court;⁹² Hissène Habré, the former leader of Chad, was sentenced in absentia by a court in Chad and Senegal is presently in the process of prosecuting him;⁹³ and a high court in Ethiopia affirmed the conviction in absentia of a former head of state for conduct violating human rights.⁹⁴ In April 2009, former head of state of Peru Alberto Fujimori was found guilty of human rights violations, including torture, kidnappings, and forced disappearance.⁹⁵ In April and December 2010, two former presidents of Argentina were sentenced by Argentinean courts for the kidnapping and torturing persons that occurred during Argentina's "dirty war."⁹⁶ Earlier, Germany had sought extradition of one of the former Argentine presidents for terroristic crimes against humanity.⁹⁷ In June 2010, the U.S.

charges, and was subsequently investigated for torture charges. Bouterse became President of Suriname again in 2010. Also noting Uruguay's pre-trial arrest of former President Bordaberry for conduct violative of human rights, and he was sentenced to 30 years in 2010.); see Simon Romero, *Returned to Power, A Leader Celebrates a Checkered Past*, N.Y. TIMES, May 3, 2011, at A4 (discussing Bouterse's re-election); see Alexei Barrionuevo, *Juan Bordaberry, 83: Led Uruguay in Dark Era*, N.Y. TIMES, July 18, 2011, at A17 (discussing Bordaberry's sentence).

92. Yolanne Almanzar, *Son of Ex-President of Liberia Convicted of Torture*, N.Y. TIMES, Oct. 31, 2008, at A16 (Charles ("Chuckie") McArthur Emmanuel convicted in a federal court in Miami). The defendant was subsequently sentenced to 97 years in prison. Carmen Gentile, *Son of Ex-President of Liberia Gets 97 Years*, N.Y. TIMES, Jan. 9, 2009, at A14.

93. See Kaleck, *supra* note 16, at 935–36; *Chad: Ex-President Sentenced to Death*, N.Y. TIMES, Aug. 16, 2008, at A9; *African Union: Press Senegal on Habré Trial*, HUMAN RIGHTS WATCH (Jan. 28, 2009), <http://www.hrw.org/en/news/2009/01/08/african-union-press-senegal-habr-trial>.

94. See LUTZ & REIGER, *supra* note 75, at 301 (former head of state Mengistu Haile Mariam).

95. See Editorial, *Fujimori's Instructive Fall*, N.Y. TIMES, Apr. 14, 2009, at A22; Maria McFarland Sanchez-Moreno, *Our Own Strongman*, N.Y. TIMES, Apr. 11, 2009, at A17; Joshua Partlow, *Peru's Fujimori Gets 25 Years*, HOUS. CHRON., Apr. 8, 2009, at A10. See also Kaleck, *supra* note 16, at 968–70 (regarding the role of regional institutions and Chile's 2007 decision to extradite Fujimori to Peru).

96. See Alexi Barrionuevo, *Argentina: Ex-Dictator Sentenced in Murders*, N.Y. TIMES, Dec. 23, 2010, at A16 (discussing life sentence given to former President Jorge Rafael Videla); Charles Newbery & Alexei Barrionuevo, *Argentine Ex-President Gets 25 Years for Role in "Dirty War"*, N.Y. TIMES, Apr. 21, 2010, at A8 (discussing twenty-five year sentence given to former President Reynaldo Benito Bignone).

97. See *e.g.*, Kaleck, *supra* note 16, at 950–51 (discussing Germany's demand for

Supreme Court ruled that a suit against former Somali defense minister and Prime Minister Mohamed Ali Samantar was not barred by U.S. legislation concerning foreign state immunity.⁹⁸

Presently, Omar al-Bashir, the head of state of the Sudan, is under an arrest warrant issued by the ICC in connection with a case that was referred to the ICC by the U.N. Security Council.⁹⁹ Additionally, in February 2011 the Security Council referred the case of possible crimes against humanity committed in Libya by head of state Muammar Gaddafi and others to the ICC for investigation.¹⁰⁰ The Special Court for Sierra Leone appears to be nearly finished with the trial of the former President of Liberia Charles Taylor for war crimes, which has proceeded since his indictment in 2003 and his arrest in 2006.¹⁰¹ In Spain, investigations of former members of the Bush Administration continued with respect to their manifest involvement in torture, crimes against humanity and the war crime involving secret detention known as forced disappearance,¹⁰² but investigations

the extradition of ex-President Videla).

98. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010) (denying Samantar immunity under 28 U.S.C. §§ 1330, 1602, *et seq.*).

99. See Ariel Zirulnick, *From Libya's Qaddafi to Sudan's Bashir*, CHRISTIAN SCI. MON. (Mar. 3, 2011), [http://www.csmonitor.com/World/Middle-East/2011/0303/From-Libya-s-Qaddafi-to-Sudan-s-Bashir-Key-International-Criminal-Court-inquiries/Slobodan-Milosevic-Serbia](http://www.csmonitor.com/World/Middle-East/2011/0303/From-Libya-s-Qaddafi-to-Sudan-s-Bashir-Key-International-Criminal-Court-inquiries/Slobodan-Milosevic-Serbia; Marlise Simons, Sudan's Leader May Be Accused of Genocide); Marlise Simons, *Sudan's Leader May Be Accused of Genocide*, N.Y. TIMES, Feb. 4, 2010, at A10; Lisa Bryant, *Appeals Court Says ICC Could Charge Sudan President With Genocide*, VOICE OF AM. (Feb. 3, 2010), <http://www.voanews.com/english/news/Appeals-Court-says-ICC-Could-Charge-Sudan-President-with-Genocide-83454517.html>; ICL, *supra* note 9, at 553.

100. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (“[deciding] to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court”); Edward Wyatt, *Security Council Refers Libya to Criminal Court*, N.Y. TIMES, Feb. 27, 2011, at A14; Sarah Paulsworth, *ICC: No Immunity for Perpetrators of Crimes Against Humanity in Libya*, JURIST (Feb. 28, 2011), <http://jurist.org/paperchase/2011/02/icc-no-immunity-for-perpetrators-of-crimes-against-humanity.php>. Later, the Security Council stressed “that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account.” S.C. Res. 1973, prmb., U.N. Doc. S/RES/1973 (Mar. 17 2011).

101. See ICL, *supra* note 9, at 492, 494 (also noting the unanimous decision of the Appeals Chamber in 2004 that Taylor did not have immunity as head of state at the time criminal proceedings were initiated); *Charles Taylor's Team Rests Case in War Crimes Trial*, CNN, Nov. 12, 2010, <http://edition.cnn.com/2010/WORLD/africa/11/12/liberia.taylor.trial/?hpt=T2>.

102. See Maureen Cosgrove, *Spain Court Allows Guantanamo Torture*

Investigation to Continue, JURIST (Feb. 26, 2011), <http://jurist.org/paperchase/2011/02/spain-court-allows-guantanamo-torture-investigation-to-continue.php>; Marjorie Miller, *Torture Trials – Why a Spanish Court Might Prosecute Bush Administration Officials*, L.A. TIMES, May 6, 2009, at A27; Craig Whitlock, *European Nations May Investigate Bush Officials Over Prisoner Treatment*, WASH. POST, Apr. 22, 2009, at A4; Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6; Kaleck, *supra* note 16, at 954, 965–66. Former President Bush, former Vice President Cheney, former Secretary of Defense Rumsfeld, former head of the National Security Council and Secretary of State Rice, former White House Counsel Gonzales, and several others are clearly reasonably accused of having authorized, ordered, or aided and abetted such international crimes. See THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 1–16, 281–99, *passim* (Marjorie Cohn ed., 2011); M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION 110–15 (2010); CHRISTOPHER L. BLAKESLEY, TERRORISM AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT (2006); GEORGE W. BUSH, DECISION POINTS 170 (2010) (Bush admitted authorizing waterboarding); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 1, 12–20, 26–30 (2007); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES 2–6, 34–36 (2008); JOHN YOO, WAR BY OTHER MEANS ix, 30, 35, 39–40, 43, 171–72, 177, 187, 190–91, 200, 231 (2006) (discussing the denial of Geneva protections and noting that coercive interrogation “policies were part of a common, unifying approach” adopted by an inner circle of the Bush Administration); Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L. 359, 359 & n.1 (2009); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1554–57 (2009); Michael P. Scharf, *The T-Team*, 19 MICH. ST. J. INT’L L. 130, 130–31, 134–35 (2010); R. Jeffrey Smith, *Bush Says in Memoir He Approved Waterboarding*, WASH. POST, Nov. 4, 2010, at A2 (noting that Cheney had also said that he “was a big supporter of waterboarding”); *Bush Unrepentant*, N.Z. HERALD (June 4, 2010), http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10649610; *Jonathan Karl Hosts ABC’s This Week* (ABC television broadcast Feb. 14, 2010) (transcript available at 2010 WLNR 3128836) (Cheney: “I was a big supporter of waterboarding. I was a big supporter of the enhanced interrogation techniques.”); Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6 (noting possible indictments of Bush administration officials Gonzales, Yoo, Addington, Feith, Bybee, and Haynes); *All Things Considered*, NPR (May 20, 2009) (Ari Shapiro remarks) (transcript available at 2009 WLNR 9628215) (noting Gonzales “signed off” several times on the use of a number of harsh tactics several months prior to the August 2002 torture memo). Even after the Supreme Court affirmed in *Hamdan v. Rumsfeld* that at a minimum common Article 3 of the Geneva Conventions applies, President Bush admitted in September 2006 that his “program” involved secret detention and “tough” treatment and that it would continue. PAUST, BEYOND THE LAW, *supra* note 102, at 29–30, 32, 35. In 2011, former President Bush cancelled a trip to Switzerland to avoid possible prosecution for international crimes. Catherine Philp, *Fears For Bush’s Fate Abroad*, THE AUSTRALIAN, Feb. 8, 2011, at 9; Peter Finn, *Bush*

were halted in April 2011 when the U.S. Department of Justice assured a Spanish judge that the U.S. is investigating mistreatment of detainees and that former Bush Administration officials would not be prosecuted.¹⁰³

Like the I.M.T. at Nuremberg, a significant number of U.S. cases have also recognized the fact that violations of international criminal law and human rights law simply cannot be lawful “official” or “public” acts of state and are not entitled to any form of immunity.¹⁰⁴ As materials addressed herein

Cancels Swiss Trip as Foes Call for Protests, Torture Prosecution, WASH. POST, Feb. 6, 2011, at A10. Investigations of alleged criminal conduct of former Secretary Rumsfeld occurred in Germany, but they were dropped under pressure from the Bush Administration. Kaleck, *supra* note 16, at 952–53; Langer, *supra* note 13, at 14–15; Mark Landler, *Rumsfeld Faces Suit in Germany Over Alleged War Crimes*, INT’L HERALD TRIB., Nov. 15, 2006, at 8. Crimes committed in Afghanistan or in the territory of any other party to the ICC can be brought before the ICC. Statute of the ICC, *supra* note 30, art. 12(2)(a), 13(a), (c), 14(1), 15(1); Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1 (2000). The Prosecutor of the ICC should take up these cases.

103. Sarah Posner, *Spain Court Turns Over Guantanamo Torture Investigation to US*, JURIST (Apr. 13, 2011, 1:00 PM), <http://jurist.org/paperchase/2011/04/spain-court-turns-over-guantanamo-torture-investigation-to-US.php>.

104. See e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) (“acts of racial discrimination cannot constitute official sovereign acts”) (also quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (“[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act”)); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) (“officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)”); *Doe I v. Unocal Corp.*, 395 F.3d 932, 958–59 (9th Cir. 2002); *Altmann v. Republic of Austria*, 317 F.3d 954, 967 (9th Cir. 2002) (“violations of international law are not ‘sovereign’ acts,” (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987))); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1471 (9th Cir. 1994) (human rights violations, including torture, are not lawful public acts of state); *Liu v. Republic of China*, 892 F.2d 1419, 1432–33 (9th Cir. 1989) (act of state doctrine not applied to assassination, which is not in the “public interest” and a strong international consensus exists that it is illegal), *cert. dismissed*, 497 U.S. 1058 (1990); *Bowoto v. Chevron Corp.*, C 99-02506 2007 WL 2349345 (N.D. Cal. Aug. 14, 2007) (quoting *Siderman*, quoted in *Sarei*); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 344–35 (S.D.N.Y. 2003) (adjudication of genocide, war crimes, enslavement, and torture is not barred by the act of state doctrine); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (defendant could not argue that torture fell within the scope of his authority); *Xuncax v. Gramajo*, 886 F. Supp 162, 176 (D. Mass. 1995) (“these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo’s official authority.”) (quoting *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980)

(assassination is “clearly contrary to precepts of humanity as recognized in both national and international law” and “there is no discretion to commit, or to have one’s officers or agents commit, an illegal act;” therefore, assassination cannot be part of official’s “discretionary” authority)), *cert. denied*, 471 U.S. 1125 (1985); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (defendant’s argument regarding “the act of state and political question doctrines is completely devoid of merit. The acts ... [of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law] hardly qualify as official public acts” and regarding the political question doctrine, the claims present “clearly justiciable legal issues”); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (torture, arbitrary detention, and summary execution “are not public official acts”); *see also* *Berg v. British and African Steam Navigation Co.*, 243 U.S. 124, 153–56 (1917) (jurisdiction recognized regarding German government’s violation of the law of nations and relevant treaties and nonimmunity existed because “an illegal capture would be invested with the character of a tort” and jurisdiction is not obviated despite the intervention of the German ambassador and a claim that since proceedings had been instituted in Germany that the U.S. court should decline.); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 350–55 (1822) (property taken by a foreign ship of war in violation of the law of nations is not immune and “is liable to the jurisdiction of our Courts” and if “a foreign sovereign ... comes personally within our limits ... he may become liable to judicial process in the same way”); *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808) (acts violative of the law of nations are not entitled to recognition); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276–77 (1808) (same); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (regarding the political question doctrine, “[i]n *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992), we held that the political question doctrine did not bar a tort action instituted against Nicaraguan Contra leaders [for war crimes in violation of common Article 3 of the Geneva Conventions]. Consequently, we reject Negewo’s contention in light of *Linder*.”); *Jimenez v. Aristeguieta*, 311 F.2d 547, 557–58 (5th Cir. 1962) (ordinary crimes by head of state “were not acts of ... sovereignty,” public acts of state, or acts “in an official capacity” entitled to any sort of immunity), *cert. denied sub nom.*, *Jimenez v. Hixon*, 373 U.S. 914, *reh’g denied*, 374 U.S. 858 (1963); *Daventree, Ltd. v. Republic of Azerbaijan*, 349 F. Supp.2d 736, 755 n.4 (S.D.N.Y. 2004) (“the Act of State doctrine only applies to valid acts of state”); *Daliberti v. Republic of Iraq*, 97 F. Supp.2d 38, 52–54 (D.D.C. 2000) (“nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit”); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998) (“bus bombings and other acts of international terrorism are not valid acts of state”); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892–95, 898–99 (C.D. Cal. 1997) (“Because nations do not, and cannot under international law, claim a right to torture..., a finding that a nation committed such acts ... should have no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the Court need not apply the act of state doctrine in this case”); *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846–51 (C.C.D. Mass. 1821) (No. 15,551) (the law of nations “may be enforced by a court of justice, whenever it arises in judgment” and, with respect to “an offence against the universal law of society,” “no nation can rightly permit its subjects to carry in on, or exempt them ... [and] no nation can privilege itself to commit a crime against the law of nations”); Human Rights Committee, *General Comment No. 20, Article 7 (Forty-fourth session, 1992)*, *Compilation of General Comments and General Recommendations*

demonstrate, state authority or sovereignty is conditioned on obedience to international law. It is the law upon which sovereignty rests.¹⁰⁵

V. CONCLUSION

Although Rwanda's effort to prosecute international criminal conduct has been partly flawed, it has been demonstrably more in line with state responsibility under international law to initiate prosecution of or to extradite all persons within a state's territory who are reasonably accused than the effort by the Obama Administration to do the same, which clearly has been basically nonexistent. President Obama is presently acting on the wrong side of history. He has made no effort to adhere to his constitutionally-based duty faithfully to execute the laws¹⁰⁶ with respect to manifest criminal conduct authorized, ordered, and/or abetted by various members of the

Adopted by Human Rights Treaty Bodies, ¶¶ 2, 13, 15 [U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1954)](victims have a "right to an effective remedy, including compensation" whether violators of Article 7 were "public officials or other persons acting on behalf of the State ... or private persons" "acting in their official capacity, outside their official capacity or in a private capacity"); Judgment and Opinion, International Military Tribunal at Nuremberg (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 221 (1947); but see Tachiona V. Mugabe, 386 F.3d 205, 210 (2d Cir. 2004) (court followed State Dep't suggestion of immunity for a sitting head of state); Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (so-called "common law" or domestic head of state immunity for a sitting head of state); Kaleck, supra note 16, at 937 (French prosecutor found Mugabe immune as sitting head of state), 942 (cases against Mugabe and Bush dismissed in U.K. in view of domestic law); Langer, supra note 13, at 25 (regarding Mugabe).

105. See e.g., *United States v. Von Leeb and Others (The High Command Case)* (1948), 15 INT'L L. REPTS. 376, 396 (1949); 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 489 (1950) (recognizing that "[i]nternational law operates as a restriction and limitation on the sovereignty of nations;" that Hitlerian directives might have had the force of domestic law, to recognize such directives as a defense to international crime "would be to recognize an absurdity;" that international law "must be superior to and where it conflicts with, takes precedence over National Law or directives issued by any governmental authority;" and that a "directive to violate international Criminal Law is therefore void and can afford no protection.").

106. U.S. CONST., art. II, § 3. See also Jordan J. Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TULANE J. INT'L & COMP. L. 151, 160-62 (2010) (addressing the constitutional duty to faithfully execute relevant international law and to end impunity).

Bush Administration.¹⁰⁷

In view of a partly shocking recent revelation, it is evident also that the United States has long been a safe haven state for various Nazi war criminals.¹⁰⁸ When the United States made the decision to go after some Nazi accused who resided in the U.S., the Executive has never prosecuted them under relevant U.S. law,¹⁰⁹ has only extradited a few,¹¹⁰ and has violated its duty *aut dedere aut judicare* by simply denaturalizing and deporting the majority of such accused.¹¹¹ President Obama may cower in the face of certain unknown political consequences if Attorney General Holder prosecutes a former President and former Vice President (which, of course, would be constitutionally and legally irrelevant), but he would have nothing to fear if the Attorney General actually prosecutes alleged Nazi war criminals.

“We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to law.”¹¹²

107. See e.g., Paust, , *supra* note 106; *supra* note 102 and accompanying text.

108. See e.g., Eric Lichtblau, *Nazis Were Given ‘Safe Haven’ in U.S., Report Says*, N.Y. TIMES, Nov. 14, 2010, at 1; *Leaked DOJ Report Reveals Nazi “Safe Havens” in US*, JURIST (Nov. 16, 2010), <http://jurist.org/paperchase/2010/11/leaked-doj-report-reveals-nazi-safe-havens-in-us.php>; Jordan J. Paust, *US Inaction: Aiding and Abetting Nazis After the Fact*, JURIST (Nov. 19, 2010), <http://jurist.org/forum/2010/11/us-inaction-aiding-and-abetting-nazis-after-the-fact.php>.

109. See e.g., ICL, *supra* note 9, at 152–53, 247. Relevant federal law includes 10 U.S.C. § 818 (which incorporates all of the laws of war as offenses against the laws of the United States), coupled with 18 U.S.C. § 3231 (which provides federal district court jurisdiction over all offenses against the laws of the United States); and the War Crimes Act, 18 U.S.C. § 2441; Posner, *supra* note 103, at 1.

110. See e.g., *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

111. See e.g., ICL, *supra* note 9, at 152–53; Paust, *No U.S. Sanctuary for Alleged Nazi War Criminals*, *supra* note 33.

112. Justice Robert H. Jackson, remarks as Chief Prosecutor at the I.M.T. at Nuremberg (1946), *reprinted in* ICL, *supra* note 9, at 459; TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, PROCEEDINGS 49–50 (1947).