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## It's Good to Be the King: Prosecuting Heads of State and Former Heads of State under International Law

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# It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law

MARY MARGARET PENROSE\*

*This Article criticizes historical practices regarding the prosecution of sitting and former heads of state. It argues that such persons should stand trial for their alleged crimes. However, as the Article illustrates, state practice and international law as they currently exist offer only limited help toward advancing this goal. Although the Pinochet precedent offers evidence that states may be shifting toward a willingness to prosecute heads of state, Professor Penrose advocates the enactment of prosecutorial rules and regulations and urges countries to take the necessary steps to create an international criminal court so that criminal defendants may be tried in a consistent manner in a judicial forum existing specifically for these purposes.*

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## I. INTRODUCTION

“Herald, read the accusation!” said the King.

On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment-scroll, and read as follows:

*“The Queen of Hearts, she made some tarts,  
All on a summer day:  
The Knave of Hearts, he stole those tarts  
And took them quite away!”*

“Consider your verdict,” the King said to the jury.

“Not yet, not yet!” the Rabbit hastily interrupted. “There’s a great deal to come before that!”<sup>1</sup>

When Adolf Hitler and Benito Mussolini died prior to capture at the end of World War II, a grave travesty occurred. The international community was denied the long-awaited opportunity of bringing these alleged perpetrators of heinous crimes to justice.<sup>2</sup> If either had survived, we can only project that they would have stood trial with the other Nuremberg defendants under the clear language of the Charter of the International Military Tribunal at Nuremberg.<sup>3</sup> On an intellectual level we *know* that each of the other twenty-two Nuremberg defendants saw his day in court and suffered the penalties pronounced against him.<sup>4</sup> Yet, not one of these individuals was

1. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS* 85 (Bantam Books 1981).

2. See BLACK’S LAW DICTIONARY 1671 (7th ed. 1999) (defining the phrase “Omnis indemnatus pro innoxio legibus habetur” to mean that “[e]very uncondemned person is held by the law as innocent”). The use of the term “alleged” in relation to Hitler and Mussolini is simply indicative of this author’s firm grounding in U.S. jurisprudence that all are deemed innocent until proven guilty in a court of law. And, as this Article challenges our ability to bring such individuals before a tribunal or court, the word “alleged” emphasizes such individuals’ ability to truly escape what many deem to be “justice”—their day in court. Use of this phrase, however, does not suggest any condonation of the acts or accounts attributed by many—and, indeed, much evidence—that these individuals were two of the major architects of the horrific events that define World War II.

3. *Charter of the International Military Tribunal*, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10 (14 Nov. 1945–1 Oct. 1946). Specifically, Article 7 of the Charter provided that “[t]he official position of the defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered in freeing them from responsibility or mitigating punishment.” *Id.* at 12.

4. *Id.* at 366–367. Of the twenty-two Nuremberg defendants, only three were adjudged not guilty. *Id.* The nineteen remaining received sentences ranging from death by

considered a sitting or former head of state. And, despite the recent Pinochet ruling suggesting that *former* heads of state are not immune from punishment for gross violations of human rights committed while serving as head of state (the “Pinochet precedent”), we must on some level admit that the international community has been reluctant to bring to trial—not merely indict—any sitting or former head of state.<sup>5</sup>

The most recent events in Yugoslavia have thus far merely confirmed this trend. While the international community understandably welcomes the transition to democracy in Yugoslavia, little has been said regarding the arrest and *prosecution* of the now former President, Slobodan Milosevic. Due to the delicate maneuvering that typically follows a transition to democracy, most countries focus more on the gain achieved by deposing Milosevic and far less on the negative implications for the rule of law if Milosevic ultimately escapes trial.<sup>6</sup> Even before Milosevic was removed, a United Nations human rights representative indicated that perhaps the granting of an amnesty or immunity from prosecution would be a worthy exchange were Milosevic to leave office.<sup>7</sup> Fortunately, the situation never required the “brokering” of immunity.<sup>8</sup>

Even without consideration of Milosevic, the list of potential defendants is long, current and demands an accounting. For example,

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hanging (12 defendants) to life imprisonment (3 defendants) to prison terms between twenty and ten years imprisonment (4 defendants). *Id.*

5. The indictment of Slobodan Milosevic has not yet led to his arrest.

6. See, e.g., Slobodan Lekic, *EU Leaders to Welcome Kostunica Despite Lingering War Crimes Doubts*, ASSOCIATED PRESS, Oct. 13, 2000. The European leaders are currently focusing on democratic stabilization in the region and leaving the war crimes issue on the table—for now.

Pressing Kostunica to deliver Milosevic and other indicted war criminals to the U.N. war crimes tribunal in The Hague—a move deeply unpopular even with Kostunica’s own supporters—could only undermine the stability of the new administration. “The political transition in Serbia is very tender, it is just several days old, so we must all be helpful to show some patience,” Christina Galach, spokeswoman for the EU’s foreign affairs chief, said Friday. *Id.* Ms. Galach continued, “[w]hile war crimes and crimes against humanity cannot be ignored, there can be no question that we need to distinguish between [war crimes] and the most urgent needs of the new and vulnerable Serbia of today . . . namely the consideration of a fragile democracy which requires domestic peace and consensus.” *Id.*

7. *U.N. Prosecutor Rejects Immunity Deal for Milosevic*, WASH. POST, Oct. 5, 2000, at A26. Jiri Dienstbier, the U.N. Special Rapporteur on human rights in the former Yugoslavian republics, reportedly suggested that Milosevic should be granted immunity from prosecution before the ICTY in exchange for leaving power.

8. *Id.* Reacting to the comment reportedly made by Jiri Dienstbier, Carla Del Ponte, the Chief Prosecutor for the ICTY, responded clearly that there would be no immunity deal for Milosevic emanating from the Prosecutor’s office.

previously, there was Pol Pot,<sup>9</sup> and now all but two prominent Khmer Rouge figures remain free in Cambodia.<sup>10</sup> In addition, there are Idi Amin,<sup>11</sup> Mengistu Haile Mariam,<sup>12</sup> Jean Claude (Baby Doc) Duvalier,<sup>13</sup> Moammar Gadhafi and Alfredo Stroessner.<sup>14</sup> Reliable information indicates the present residence of each of these individuals,<sup>15</sup> yet, only Hissene Habre,<sup>16</sup> the former Chadian dictator, and most recently Indonesia's Suharto,<sup>17</sup> have seemingly been affected by the Pinochet precedent.<sup>18</sup> Thus, while the words exist that

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9. Pol Pot was Head of State during the period known as the Cambodian Killing Fields. But, as one scholar recounts, "[w]hen Cambodia's Pol Pot unexpectedly became available for prosecution in 1997 . . . no state was willing to seek his extradition for crimes committed during his savage leadership. His death one year later forever denied Cambodians the justice of hearing him answer for his depredations." Diane F. Orentlicher, *Putting Limits on Lawlessness: From Nuremberg to Pinochet*, WASH. POST, Oct. 25, 1998, at C01.

10. Seth Mydans, *Cambodia Agrees to Tribunal Setup for Khmer Rouge Trials*, N.Y. TIMES, Apr. 30, 2000.

11. Reliable information indicates that Idi Amin lives—with the consent of the local government—in Saudi Arabia. See Karl Vick, *Former Chad Dictator Faces Pinochet Test*, WASH. POST, Jan. 27, 2000, at A22 (reporting that "Idi Amin, as self-proclaimed emperor of Uganda in the 1970s oversaw an estimated 300,000 political killings before finding refuge in Saudi Arabia"); see also *An African Pinochet*, Editorial, N.Y. TIMES, Feb. 11, 2000, at A30 (stating that Amin's "less notorious but no less wanton successor, Milton Obote, is in Zambia").

12. Vick, *supra* note 11 (indicating that "former Ethiopian dictator Mengistu Haile Mariam remains ensconced in Hill, a suburb of Harare, Zimbabwe, where he has lived since fleeing Addis Ababa in 1991. The deaths of as many as 1 million Ethiopians were attributed to his Marxist government."). Vick suggests, however, that Mengistu's travels have been affected by the Pinochet precedent. "When Mengistu traveled to Johannesburg late last year for medical treatment, human rights groups urged South Africa to arrest him on war crimes charges, and Ethiopia requested his extradition. However, South Africa moved slowly, and Mengistu returned to Zimbabwe." *Id.*

13. *An African Pinochet*, *supra* note 11 (reporting that Duvalier, former Head of State of Haiti, is currently enjoying refuge in France).

14. The former Paraguayan dictator is residing in Brazil. *Id.*

15. See *supra* notes 11–14.

16. *Pinochet's Peril: Limbo—Consensus Grows to Punish Crimes of Tyranny, With No Agreement on How*, Editorial, BALTIMORE SUN, Mar. 4, 2000, at 10A (stating that based on the Pinochet precedent, "the former dictator of Chad, Hissene Habre, is under house arrest in Senegal, awaiting trial for violations of human rights in Chad"); Cesar Chelala, Op-Ed, *Thanks to Pinochet*, BOSTON GLOBE, Mar. 6, 2000, at A13 (emphasizing the implications of the Pinochet case for "the exiled dictator of Chad, Hissene Habre, who was recently indicted in Senegal on charges of torture and 'barbarity.' It was the first time a former head of state had been charged in Africa for human rights violations by the court of another country.").

17. *Pinochet's Model Urged for Suharto*, WASH. TIMES, Sept. 6, 2000, at A14.

18. A second African Head of State, Jean Kambanda, former Prime Minister of Rwanda, recently pled guilty to crimes of genocide and was sentenced to life in prison by the ICTR. See *The Prosecutor v. Jean Kambanda, Judgment and Sentence of Sept. 4 1998*, ICTR 97-23-S, available at <http://www.ictor.org> (last visited Nov. 13, 2000). The distinction between Habre and Kambanda is that the statutory authority provided by the ICTR overrides any Pinochet-type defense of domestic immunity. Further, both Pinochet and Habre have

permit—and, at times demand—former and sitting heads of state be prosecuted and possibly punished for their atrocities, the actions of the world community have fallen short of these proclamations.<sup>19</sup>

Perhaps this failure is a testament to the unique nature of international “law.” International law is a limited system constrained on one end by voluntary compliance of consenting sovereign states and on the other by the political deadlock of the moment.<sup>20</sup> Until some radical change occurs in international law or the politics of the moment, it is still good to be the king!

## II. LEGAL REQUIREMENTS TO PUNISH

When she got back to the Cheshire-Cat, she was surprised to find quite a large crowd collected round it; there was a dispute going on between the executioner, the King, and the Queen, who were all talking at once, while all the rest were quite silent, and looked very uncomfortable.

The moment Alice appeared, she was appealed to by all three to settle the question, and they repeated their arguments to her, though, as they all spoke at once, she found it very hard to make out exactly what they said. The executioner’s argument was, that you couldn’t cut off a head unless there was a body to cut it off from;

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been subjected to *state* prosecution in countries outside the area where their alleged crimes were committed. While the ICTR is located in Arusha, Tanzania and, therefore, outside the area of where the crimes of Kambanda were committed, the tribunal is an international creation operating under the Chapter VII powers of the United Nations Security Council and does not represent state prosecution of a foreign defendant.

19. Orentlicher wrote:

Since Nuremberg, international law has affirmed that serious war crimes, genocide and other crimes against humanity are subject to universal jurisdiction. They transcend the province of the state where the crimes occurred and may be punished by any state—just as, before Nuremberg, international law allowed any state to punish piracy. More recently, various treaties have established similar jurisdiction over terrorism.

But while international law allows—and even encourages—states to prosecute, few have been willing to do so, however appalling the offense.

*Supra* note 9.

20. For a good explanation of how the International Criminal Court has the potential to change this balance, see Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000).

that he had never had to do such a thing before, and he wasn't going to begin at *this* time of life.

The King's argument was that anything that had a head could be beheaded, and that you weren't to talk nonsense. The Queen's argument was that, if something wasn't done about it in less than no time, she'd have everybody executed, all round. (It was this last remark that had made the whole party look so grave and anxious.)<sup>21</sup>

Despite the clarity of language in the Nuremberg Charter and the strengthening of these principles via conventions,<sup>22</sup> regional treaties,<sup>23</sup> and the most recent declarations in the Statutes of the International Criminal Tribunal for the former Yugoslavia<sup>24</sup>

21. CARROLL, *supra* note 1, at 66.

22. See Universal Declaration of Human Rights, adopted by the U.N. General Assembly Dec. 10, 1948, G.A. Res. 217 A (III), 3rd Sess., U.N. Doc. A/810, at 71 (1948), available at <http://www.unhcr.ch/udhr/lang/eng.htm> (posted July 20, 1998) (proclaiming that "[e]veryone has the right to life, liberty and security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights, adopted by the U. N. General Assembly Dec. 16, 1966, 999 U.N.T.S. 171, available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (last visited Nov. 7, 2000) (codifying many of the guarantees set forth in the Universal Declaration of Human Rights).

23. E.g., Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, available at <http://www.coe.fr/eng/legaltxt/5e.htm> (last visited Nov. 7, 2000) (the European Convention on Human Rights); American Convention on Human Rights, 22 Nov. 1969, available at <http://www.oas.org/juridico/english/treaties/b-32.htm> (last visited Nov. 7, 2000).

24. The full title of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. The ICTY was the first international war crimes tribunal established since World War II. The United Nations' Security Council, operating under its Title VII powers, created the ICTY on May 25, 1993, by adopting Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993). The Statute governing the ICTY was attached as an addendum to Resolution 827, and is available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited Nov. 7, 2000) [hereinafter "ICTY Statute"]. In particular, Article 7 declares in pertinent part as follows:

Article 7 Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

*Id.* at art. 7.

("ICTY"), the International Criminal Tribunal for Rwanda<sup>25</sup> ("ICTR") and the forthcoming International Criminal Court ("ICC"),<sup>26</sup> the actual obligation of prosecuting either former or sitting heads of state remains a formidable task.<sup>27</sup> Historically, there have been few heads of state who have suffered punishment or even prosecution for their numerous crimes and offenses.<sup>28</sup> In modern

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25. The full title of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994. The ICTR was established in 1994 by United Nations' Security Council Resolution. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994). The Statute governing the ICTR was attached as an addendum to Resolution 955, and is available in the "basic texts" menu at <http://www.ictor.org> (last visited Nov. 7, 2000) [hereinafter "ICTR Statute"]. In particular, Article 6 declares in pertinent part as follows:

Article 6 Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually liable for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

*Id.* at art. 6.

26. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF/183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter "Rome Statute"]. The Rome Statute unequivocally ensures in Article 25 that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." *Id.* at art. 25. Article 27 further proclaims that the Statute

shall apply equally to all persons without any 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.

*Id.* at art. 27.

27. Both the Pinochet trial and coverage of the Habre trials have centered around the issue of whether the receiving state (i.e., the United Kingdom regarding Pinochet and Senegal regarding Habre) has ratified the 1984 United Nations Convention Against Torture and/or incorporated its provisions into domestic law. T.R. Reid, *Issue Changed Rules for World's Dictators, Pinochet Heads Home to Uncertain Future*, TORONTO STAR, Mar. 3, 2000.

28. As one author notes, "[i]n January 1793, the French parliament spent three agonizing days debating how to punish King Louis XVI before deciding to send him to the guillotine. Two hundred years later, similar debates continue to rage in many places." Jamal Benomar, *Justice After Transitions*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 32 (Neil J. Kritz ed., 1995) [hereinafter TRANSITIONAL JUSTICE]. One example of how the "debate continues" was Romania's response to the end of communism. In December 1989, Romania permitted the summary execution of its dictator Nicolae Ceasescu and his wife Elena. *Id.* at 34.



times, heads of state arrogantly continue to flaunt their hold on power and their ability to avoid criminal liability.<sup>29</sup>

To date, no sitting head of state has been criminally prosecuted or punished by another state for crimes against humanity, genocide or state-sponsored torture.<sup>30</sup> Not for crimes occurring in Argentina.<sup>31</sup> Not for crimes in Uruguay.<sup>32</sup> Not for crimes in Cambodia.<sup>33</sup> Not for crimes in Ethiopia. Not for crimes in China. Not for crimes in Paraguay. Not for crimes in Sierra Leone.<sup>34</sup> Not for crimes in Indonesia.<sup>35</sup> Not for crimes committed in Kosovo or

29. *Supra* notes 11–14. But see *supra* note 18 discussing the ICTR’s prosecution and punishment of former Rwandan Prime Minister, Jean Kambanda.

30. In fact, the only international prosecution of a head of state this author found remains the case involving Jean Kambanda, *supra* note 18.

31. For a thoughtful treatment of the Argentine choices following the well-known “dirty war,” see Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in TRANSITIONAL JUSTICE, *supra* note 28, at 3, 20.

32. *Id.* at 27.

33. One reporter suggests that “[t]he 3,000 or so victims for which Pinochet is held responsible during his 1973 to 1990 dictatorship pale in comparison with an estimated 1,700,000 killed by the Khmer Rouge in Cambodia’s killing field and where so far not a single person has been brought to justice.” Joe L. Spartz, *Pinochet Case, a Human Rights Victory?*, JAKARTA POST, Jan. 29, 2000.

See also R. Jeffrey Smith, *Secretive Leader Presided Over Regime of Torture and Death*, WASH. POST, June 22, 1997, at A01, reporting that:

In the annals of modern war crimes, the Khmer Rouge crimes are probably second only to those committed by the Nazis in World War II, which led to the deaths of as many as 11 million Jews and others over a 12-year period. Nothing in recent history—neither the atrocities in Rwanda nor in the Balkans—compares with the scale of social terror wrought by the Khmer Rouge in Cambodia. According to various estimates, as many as one-fifth to one-quarter of all Cambodians alive at the outset of the party’s rule had, by 1978, been killed by its forces or perished from famine, disease or starvation provoked by misbegotten economic and social policies.

34. But see U.N. Security Resolution 1315, adopted on Aug. 14, 2000, recommending that an *ad hoc* war crimes tribunal be established to deal with the atrocities committed in Sierra Leone. S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc. S/RES/1315 (2000). In particular, Resolution 1315 recommends “that the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2, including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.” *Id.* The proposed Sierra Leone tribunal would have jurisdiction over “crimes against humanity, war crimes and other serious violation of international humanitarian law.” Resolution 1315 also suggests that the eventual creation of such Sierra Leone tribunal might benefit from simply sharing the appeals tribunal currently in place for the two predecessors *ad hoc* institutions—the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. *Id.*

35. Former President Suharto has, however, been arrested and may yet stand trial for alleged financial crimes. Suharto is accused of misappropriating nearly U.S.\$600 million in Indonesian funds in addition to various allegations of torture and human rights violations. The current trial is limited merely to allegations of financial wrongdoing—another indication

Yugoslavia.<sup>36</sup> Not for crimes in Uganda. Not for crimes of apartheid committed in South Africa,<sup>37</sup> or the still unresolved issue of crimes

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that dictators can flout their power with continuing impunity as human rights violations go largely unpunished. Mark Landler, *Doubts That Suharto Will Ever Go to Court*, N.Y. TIMES, Sept. 6, 2000, at A12.

36. Although Slobodan Milosevic was indicted by the ICTY on May 27, 1999, his arrest and ultimate prosecution remains less than certain. See generally ICTY website at <http://www.un.org/icty> for information relating to the ICTY, the ICTY Statute and any of the ICTY defendants—including the indictment and international arrest warrant issued against President Milosevic.

37. This remains true despite the presence of an International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243, *available at* <http://www.unhchr.ch/html/menu3/b/11.htm> (last visited Nov. 7, 2000). Much like the clarity of language presented in the Genocide Convention, the Convention on the Punishment of Apartheid declares in pertinent part as follows:

#### Article I

1. The State Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The State Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

#### Article II

For the purposes of the present Convention, the term “the crime of apartheid,” which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms . . .

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the

committed in Chile,<sup>38</sup> and, not for, most recently, the recognition of Milosevic's alleged crimes against humanity. But, just possibly, with the arrest and much-heralded prosecution of Hissene Hambre, Indonesia's Suharto, and the potential indictment of former

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expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

#### Article III

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(b) Directly abet, encourage or cooperate in the commission of the crime of apartheid.

#### Article IV

The States Parties to the present Convention undertake:

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

#### Article V

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.

*Id.* Despite the clarity of the Convention on Apartheid, confirming that Apartheid is a crime against humanity and unequivocally making individuals liable for their criminal acts, South Africa has been permitted to address its past via a Truth and Reconciliation Commission, which provides amnesties to those whose full and complete disclosure warrants merciful treatment. See the official Truth and Reconciliation Commission website at <http://www.truth.org/za> (updated Nov. 3, 2000) for a full accounting of amnesties, the Truth and Reconciliation Act, and testimony provided to the Commission.

38. At the time of this writing, the domestic treatment of Pinochet remains to be seen. Now that Pinochet has returned to Chile, some expect—or, at a minimum, hope—that his immunity will be lifted domestically and that he will finally have to account in a judicial forum for the 3197 individuals known to have perished under his rule. See Hoge, *infra* note 42.

Paraguayan dictator Alfredo Stroessner,<sup>39</sup> a new pattern may be emerging.<sup>40</sup>

The recent decision by the British House of Lords holding that former Chilean General, Senator, and former Head of State Augusto Pinochet was not immune *as a former head of state* from prosecution for crimes of alleged torture during the 1980s sparks hope that the jurisprudential and political tide may truly be turning. The clearest evidence of such change is Chile's response to Pinochet's release from British custody on "medical" grounds. On Tuesday, August 8, 2000, the Chilean Supreme Court strengthened the Pinochet precedent by voting fourteen to six that Pinochet's self-serving "immunity for life" designation did not protect him from prosecution for human rights violations in Chile.<sup>41</sup> Currently, there are approximately 154 civil suits pending against the eighty-four year old Pinochet based on his alleged involvement in numerous killings, cases of torture, and disappearances.

Many human rights activists and scholars have openly proclaimed that the Pinochet precedent is one of the most important advances since the Nuremberg Trials.<sup>42</sup> Could we be approaching an

39. A congressional commission in Brazil has purportedly filed a petition to secure the indictment of former Paraguayan dictator, Alfredo Stroessner, who currently resides in Brasilia. Jonathan Power, *Global Court Closing in on Tyrants at Large*, TORONTO STAR, Aug. 18, 2000, at ED01.

40. Habre, the former Head of State of Chad, pleaded "not guilty" to charges of 97 alleged political killings, 142 cases of alleged torture and 100 cases of "disappearances" (i.e. cases where the bodies have still not been recovered). See Karl Vick, *African Eyes Opened by Ex-Leader's Indictment: Where Impunity Prevails, Chadian's Case Is a First*, WASH. POST, Feb. 5, 2000, at A13.

41. *Pinochet Loses Immunity in Chile Ruling*, REUTERS, Aug. 8, 2000. The Chilean Supreme Court's finding galvanized the movement in Chile for accountability. Previously, a Santiago court had ruled that Pinochet's immunity did not protect him against prosecution for the crimes alleged. *Id.*

42. Warren Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at A6 (reporting that Amnesty International issued a statement proclaiming that "the case represented the greatest advancement for international law since the Nuremberg trials"). Demonstrating a much broader understanding of international law (i.e. the development of two ad hoc tribunals to adjudicate war crimes emanating from the former Yugoslavia and Rwanda prior to the Pinochet precedent), Professor Diane Orentlicher suggests that "the Law Lords' ruling [in the Pinochet case] is part of a larger trend emerging in the past few years: the beginning of the end of impunity." Diane F. Orentlicher, *Crimes Against Humanity, Nuremberg Comes Back to Haunt Pinochet*, L.A. TIMES, Dec. 20, 1998, at M1; see also David Adams, *'Pinochet Precedent' Ends Era of Impunity for Leaders*, St. Petersburg Times, Mar. 5, 2000, at 2A (reporting that Reed Brody, Advocacy Director of Human Rights Watch, considers the Pinochet precedent as marking "the end of an era of impunity for world leaders"); *Ex-Chad Ruler Is Charged by Senegal with Torture*, N.Y. TIMES, Feb. 4, 2000, at A3 (quoting Reed Brody's reaction to the arrest of Habre as follows: "[t]oday's indictment [of Habre] is a wake-up call to dictators in Africa and elsewhere that if

era where kings might be subject to the same laws and regulations that govern their subjects? Could we actually be nearing a time when the Genocide Convention and the Torture Convention will deliver the protection and relief they promise?<sup>43</sup> Are we reaching that point—long strived for by proponents of human rights—where law, in the form of criminal culpability, will triumph over politics?<sup>44</sup>

### III. STATE PRACTICE

At this moment the King, who had been for some time busily writing in his note-book, called out "Silence!" and read out from his book "Rule Forty-two. *All persons more than a mile high to leave the court.*"

Everybody looked at Alice.

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.<sup>45</sup>

International law places a unique emphasis on state practice—not only on what states proclaim their belief of the law to be, but also on what states *actually do*.<sup>46</sup> State practice for prosecution of international crimes based on torture, genocide, and other similarly heinous crimes is practically non-existent.<sup>47</sup> Honest scholarship

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they commit similar atrocities they could also be brought to justice one day.") [hereinafter *Ex-Chad Ruler*].

43. See *infra* notes 72, 73.

44. The recent arrest of Habre was welcomed by the U.N. High Commissioner for Human Rights, Mary Robinson, who declared that the decision of the Senegalese court to prosecute Habre is "further confirmation that torture is an international crime subject to universal jurisdiction." *UN Backing for Habre Charges*, BBC NEWS ONLINE, available at <http://www.bbc.co.uk> (Feb. 5, 2000).

45. CARROLL, *supra* note 1, at 92.

46. See generally Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 141–42 (1998); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 726–27 (1999) (describing the importance of state practice in dealing with abuses of the past).

47. See *supra* notes 9–19. Nearly fifty years expired between Nuremberg and the Tokyo War Crimes Tribunal, and the next attempt to prosecute and punish war criminals at

requires an admission that the Pinochet precedent cuts against existing state practice.<sup>48</sup> This may explain why the second case involving Hissene Habre was initially celebrated with such acclaim,<sup>49</sup> and why his ultimate immunity from prosecution causes new concern. Just as it seems there may be a shift such that might triumphs over right, another former dictator is under house arrest pending prosecution,<sup>50</sup> and a second deposed dictator faces the threat of indictment in his chosen sanctuary.<sup>51</sup> Then, Yugoslavian citizens surprise the world and oust their former dictator and make him vulnerable to prosecution.<sup>52</sup> Currently the international community

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the Hague under the ICTY Statute. The ICTR appeared nearly one year later and has been only the second structured attempt at prosecutions since Nuremberg and Tokyo. These two ad hoc tribunals appeared long after the genocide in Cambodia, the Franco regime in Spain, the “dirty war” in Argentina, the Marcos’ regime in the Philippines, the knowledge of “Comfort Women” in Japan and many similar instances of known violations of international law as set forth in numerous treaties. The state practice—despite the clarity of language in the Genocide and Torture Conventions—continues to be that political responses are much more likely to occur than prosecutorial response. *See generally* Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 577 (1997).

State practice has permitted full scale amnesties, pardons and resort to truth commissions on a local level with occasional rhetoric that such practices fall short of the international guarantees to personal security. *See generally* Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 INT’L L. STUDENTS ASS’N J. INT’L & COMP. L. 705, 705–06 (1997). *See also supra* note 37, comparing the commands of the Convention on Apartheid with the actual practices of South Africa. In this fashion, state practice belies the result reached in the Pinochet case. Although words to the effect that position, power, and influence will not immunize an individual from prosecution appear in numerous treaties, few—if any—countries have ever put their judicial force behind these previously empty promises to try another country’s head of state.

48. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 18 (1992) (maintaining that since the Treaty of Lausanne in 1923, the political price for cessation of hostilities in war and civil strife is the award of amnesties—like the one granted Pinochet and his associates—for the defeated forces in exchange for peace); Aryeh Neier, *What Should Be Done About the Guilty?*, in *TRANSITIONAL JUSTICE*, *supra* note 28, at 172, 177–78 (describing the amnesties awarded in Guatemala, El Salvador, Honduras, Nicaragua, and Chile in the 1980s. These amnesties would cover many of the same acts that Pinochet was accused of committing yet there is not the same clamoring for the renunciation of amnesties anywhere outside Chile.); *see also* Zalaquett, *supra* note 31 (describing generally the distinction between the Argentinean response to the “dirty war” that resulted in sparse prosecutions and the Uruguayan response that resulted in a full-scale award of amnesty).

49. *Ex-Chad Ruler*, *supra* note 42 (stating that the Habre case marks “the first time that a former African head of state has been charged with human rights violations by the court of another country”).

50. *See supra* note 35 (describing the pending proceedings against former Indonesian President Suharto).

51. *See supra* note 39 (describing the ongoing movement in the Brazilian Congress to indict Alfredo Stroessner).

52. *When the Party’s Over: Can Vojislav Kostunica Reassure Both His Well-Wishers and Those Who Mistrust Him?*, *ECONOMIST*, Oct. 14, 2000 (noting that Milosevic is likely to be prosecuted at least for electoral fraud and corruption) [hereinafter *When the Party’s Over*].

may only watch and wait to learn whether Suharto, Stroessner, or Milosevic will be held accountable for their alleged crimes.<sup>53</sup>

Following the Chilean Supreme Court's decision upholding the House of Lords' determination that sovereign immunity will not preclude prosecution for crimes against humanity and torture, we can begin to establish with increasing credibility that those dictators who have previously committed unspeakable acts are vulnerable to prosecution.<sup>54</sup> As one reporter suggests, "[t]he sum of all this [prosecutorial] activity . . . is to effectively lock up former dictators in their places of refuge. They dare not venture far from where they think they are secure."<sup>55</sup>

But, based on the concept of state practice and the well-established concepts of *nullum crimen sine lege*<sup>56</sup> and *nulla poena sine lege*,<sup>57</sup> the Pinochet precedent may ultimately be referred to with the same uneasiness that Nuremberg is.<sup>58</sup> Nuremberg is an exemplary testament to "victor's justice;"<sup>59</sup> i.e., that the spoils of war

53. See Landler, *supra* note 35 (forecasting that "it is far from clear that the 79 year-old former president [Suharto] will ever stand in the dock").

54. See also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991) (asserting that the trials at Nuremberg, whereby a court comprised of international jurists passed judgment on German nationals for conduct largely committed within the confines of Germany, "broadened the scope of international law" because prior to that time international law had never addressed a state's treatment of its own citizens—much less imposed criminal sanctions for such conduct).

55. Power, *supra* note 39.

56. Any trepidation regarding *nullum crimen sine lege* ("no crime without law," a concept similar to the prohibition in the U.S. Constitution of *ex post facto* application of law) has been envisioned and remedied by the Rome Statute at Article 22. See *supra* note 26, at art. 22 (assuring that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court").

57. Any fear regarding *nulla poena sine lege* ("no punishment without law," also similar to the United States' *ex post facto* doctrine) has likewise been considered and nullified by the Rome Statute at Article 23. See *supra* note 26, at art. 23 (indicating that "[a] person convicted by the Court may be punished only in accordance with this Statute").

58. FARHAD MALEKIAN, *THE MONOPOLIZATION OF INTERNATIONAL CRIMINAL LAW* 37 (1995) (contending that the basis of international criminal law stems from customary international standards, i.e. state practice).

59. See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 332 (1994) (stating that "[a] primary criticism of Nuremberg was that it amounted to victor's justice since the tribunal was composed exclusively of prosecutors and judges from the victorious countries and the defendants were limited to Germans, even though the Allied personnel also committed serious violations of humanitarian law during the war."); see also M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 29 (1997) (criticizing the fact that

(up to and including criminal punishments) will be meted out by the victors of war.<sup>60</sup> Likewise, although the Pinochet case may be hailed as a moral victory, its legal grounding was neither indisputable nor certain.<sup>61</sup> Despite the history of torture, genocide, and numerous war crimes committed by dictators and oppressive rulers, Pinochet was indeed the first former head of state hauled into the court of law *of another state* on charges of torture, disappearances and murder.<sup>62</sup> Suharto, a former dictator facing domestic prosecution, may provide further momentum. However, the recent release and cessation of prosecution against Hissene Habre undermines the Pinochet precedent. In fact, one criticism of Senegal's decision to drop the charges against Habre—based on the court chamber's finding that Senegal has no jurisdiction to prosecute torture committed abroad—is that “Senegal enjoys one of Africa's most independent judiciaries.”<sup>63</sup> A second, perhaps more forceful challenge to this action, is that Senegal was *the* first country to ratify the Rome Statute of the International Criminal Court.<sup>64</sup> There can surely be no greater act of hypocrisy or demonstration of impotence in one's own country than to sign on to the forthcoming “world court” and then proclaim that one's country does not have the power or authority to prosecute torture. This action runs contrary to both the spirit of the Convention Against Torture and the spirit of the Rome Statute, and arguably undermines the Pinochet precedent.

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all of the Nuremberg defendants were Germans, thereby resulting in a one-sided prosecution for war crimes).

60. *But see* BENJAMIN FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 88–89 (1980) (arguing that neither the validity of the judgments of the Nuremberg and Tokyo tribunals, nor the fairness of the trials, were diminished by the fact that the judges hailed from the victors' states); JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 440 (excusing Nuremberg's application of victor's justice on the moral ground that justice was satisfied).

61. *Cf.* Helena Cobban, *Human Rights Prosecution: Whose Job Should It Be?*, CHRISTIAN SCI. MONITOR, Feb. 10, 2000, at 11 (observing that “[i]n recent years, democracy activists worldwide have pursued several ways to deal with gross rights abuses, such as torture. These include the International Criminal Tribunals for Rwanda and Former Yugoslavia, South Africa's Truth and Reconciliation Commission, blanket amnesties in some Latin American countries, and the campaign for a permanent International Criminal Court.”).

62. This reality conflicts with the prediction of Sir Harley Shawcross, the United Kingdom's Chief Prosecutor at Nuremberg, who proclaimed that:

[t]he charter of this tribunal gives warning for the future—I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a state, that if . . . they debase the sanctity of man in their own countries, they act at their peril, for they affront the international law of mankind.

Orentlicher, *supra* note 42.

63. *Justice Denied in Senegal*, Editorial, N.Y. TIMES, July 21, 2000, at A18.

64. *Id.*



Perhaps the greatest difficulty this author has experienced in accepting the Pinochet precedent is that those countries arguing most strongly for prosecution—Spain, Belgium, Switzerland, France and the United Kingdom—disingenuously relied on the force of international law (via resort to frequently *unenforced* treaties), morality, and the need to end impunity as reasons for acting against Pinochet.<sup>65</sup> Moral authority does not provide a sufficient basis, standing alone, to support criminal prosecutions.<sup>66</sup> Rather, as a world bound by legal precedents, procedures, and treaties that restrain state action, it would have been more prudent to recognize that the issue of prosecuting former and sitting heads of state is opaque at best.

State practice surely did not—and, arguably does not—support the Pinochet precedent.<sup>67</sup> In fact, not even the state practice of the most ardent supporters of his prosecution has demonstrated a past willingness to prosecute heads of state.<sup>68</sup> France continues to provide refuge to Duvalier.<sup>69</sup> Senegal has determined that, despite its position as the first state to ratify the Rome Statute and despite the force of the Pinochet rulings, it does not have authority to prosecute

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65. See PERSICO, *supra* note 60, at 442 (asserting that “[b]etween 1945 and 1992, the world experienced twenty-four wars between nations, costing 6,623,000 civilian and military lives. Ninety-three civil wars, wars of independence, and insurgencies have cost 15,513,000 additional lives. Until 1993 [when the ICTY was created], no international instrument had been convened to try any aggressor or any perpetrator of war crimes in any of these 117 conflicts.”).

66. See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 256 (1998), observing that the decision whether to prosecute individuals for gross violations of human rights continues to remain in the power of a few elite nation states. This system, Professor Ratner argues, will likely perpetuate the notion of “victor’s justice” that criminal prosecution for violations of international law will only be meted out by the powerful states against other countries and their citizens.

67. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 508–12 (1999).

68. Cf. Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 82 (1996) (explaining that truth commissions—and not resort to criminal prosecutions or international war crimes tribunals—have dominated the treatment of Pinochet-type regimes for the past twenty-one years). The resort to Truth Commissions is not aberrational. Furthermore, the utilization of a Truth Commission and broad amnesties has apparently been deemed acceptable to the international community for the handling of South Africa’s apartheid criminals. See *supra* note 37. Although certain individuals will not be granted amnesties, the state practice regarding amnesties in South Africa will undoubtedly be referenced by later alleged criminals.

Regardless of whether South Africa is considered merely an anomaly, the failure to bring many of these confessed murders and torturers to justice for the horrible crimes of apartheid devalues the principles that all individuals will be subject to criminal prosecutions for crimes of an international magnitude. See *supra* note 37. Once again, we are moving away from the clarity that Nuremberg purportedly offered.

69. See *An African Pinochet*, *supra* note 11.

acts of torture committed abroad. And now, with the unexpected transition to democracy in Yugoslavia, the European Union has agreed to lift economic sanctions against Yugoslavia without mandating that action be taken on the outstanding Milosevic indictment.<sup>70</sup> Yugoslavia's projected re-admittance to the International Monetary Fund before the year's end indicates a clear delineation between economic sanctions as punishment and individual criminal prosecutions as a means of confirming and upholding human rights norms.<sup>71</sup>

The best evidence of this moral paradox can be discerned in the "state practice" of the five European states initiating the Pinochet proceedings that falls well short of the behavior *required* under international law. While states *may* prosecute individuals under the Torture Convention when such alleged torturers are found on state soil, the United Nations has never *required* prosecution.<sup>72</sup> Likewise,

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70. Quickly following suit was the United States. On October 12, 2000, President Clinton lifted various oil, trade and flight sanctions that had been imposed against Yugoslavia. Lawrence L. Knutson, *U.S. Lifts Yugoslavia Sanctions*, ASSOCIATED PRESS, Oct. 12, 2000, available at WL 27905642. Recognizing the importance of the Yugoslavian transition to democracy, President Clinton asserted that "[t]he victory of freedom in Serbia is one of the most hopeful developments in Europe since the fall of the Berlin Wall." *Id.* Continuing, President Clinton affirmed that this transition "ended a dictatorship and it can liberate an entire region from the nagging fear that ethnic differences can again be exploited to start wars and shift borders." *Id.*

71. See *When the Party's Over*, *supra* note 52.

72. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by the U.N. General Assembly* Dec. 10, 1984, 1465 U.N.T.S. 85. The relevant language of the Torture Convention is as follows:

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. . . .

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an

although the Genocide Convention requires prosecution or extradition, the Convention also envisions the creation of an international criminal court that has not yet come into being.<sup>73</sup> In

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act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.

#### Article 5

1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

#### Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

*Id.* This language, though seemingly clear, has never been determined by the United Nations to require prosecution of another state's nationals—particularly not another country's head of state.

73. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by the U. N. General Assembly Dec. 9, 1948, 78 U.N.T.S. 277*. The relevant language of the Genocide Convention is as follows:

#### Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

#### Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

#### Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;

contrast to these two treaty-based scenarios, the United Nations has required and mandated state cooperation under the statutes of both the ICTY and ICTR in the area of criminal prosecution.<sup>74</sup>

Cooperation has been lacking in the important area of state enforcement of criminal sentences.<sup>75</sup> There is no exception provided in the ICTY Statute to countries trying to assist in nation-building. The duty to prosecute heads of state is unequivocal. Yet, the realities of international law suggest that the arrest and detainment of Milosevic, if they occur, will come only when the political climate, both within Yugoslavia<sup>76</sup> and throughout Europe, becomes capable of

(e) Complicity in genocide.

Article IV

Persons 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.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

*Id.*

74. Security Council Resolution 827, which established the ICTY, mandates that all States shall “cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal.” S.C. Res. 827, *supra* note 24, at 2. Resolution 827 further requires that states “take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute.” *Id.* Security Council Resolution 955, *supra* note 25, provides a nearly identical provision.

75. Article 29 of the ICTY Statute *requires* that nation states fully cooperate in the enforcement of criminal sentences. The statutory language provides in pertinent part that:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

....

(d) the arrest or detention of persons.

ICTY Statute, *supra* note 24, at art. 29. Article 28 of the ICTR Statute provides a nearly identical requirement that states comply with requests for cooperation from the tribunal. ICTR Statute, *supra* note 25, at art. 28.

76. Mark Egan, *Yugoslavia Could Rejoin IMF in Months*, REUTERS, Oct. 12, 2000. Kostunica has indicated that bringing Milosevic to justice is not an immediate concern. When pressed on the issue, the newly-elected President declared that “[i]n the Serbia and

withstanding this action.<sup>77</sup> Currently, the period of transition in Yugoslavia is far too fragile to exercise the rule of law from outside the country.<sup>78</sup> But even beyond the immediate quandary posed by Milosevic, the European countries have fallen short of their duties under the ICTY Statute.<sup>79</sup>

Unlike the Pinochet precedent, which was observed loosely at best, the authority of the two U.N. ad hoc tribunals has been firmly established by Security Council Resolution<sup>80</sup> and subsequent jurisprudence.<sup>81</sup> Further, both tribunal statutes mandate individual state cooperation in the enforcement of criminal sentences.<sup>82</sup> The former President of the ICTY, the Honorable Gabrielle Kirk McDonald, openly called for increased cooperation by nation-states in a speech at American University in 1998.<sup>83</sup> Judge McDonald explained that "the nature of the modern State and its place in the international community means that it is they [the individual states] who are expected, in fact required, to provide the structural and systematic support necessary to sustain the Tribunal."<sup>84</sup>

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Yugoslavia of today such an issue is not the most urgent . . . . And because I think that, if some made [a request to extradite Milosevic] I would say no." *Id.*

77. See *When the Party's Over*, *supra* note 52.

78. *Id.*

79. David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 483-85 (1999).

80. See *supra* notes 24-25, citing the two Security Council resolutions that established these tribunals.

81. The Prosecutor v. Dusko Tadic, Judgment of May 7, 1997 and Sentencing Judgment of July 14, 1997, IT-94-1, available at <http://www.un.org/icty/judgement.htm> (last visited Nov. 13, 2000); The Prosecutor v. Jean-Paul Akayesu, Judgment of Sept. 2, 1998 and Sentence of Oct. 2, 1998, ICTR-96-4-T, available at <http://www.ictr.org> (last visited Nov. 13, 2000).

82. Article 27 of the ICTY Statute, *supra* note 24, provides in pertinent part as follows:

Imprisonment shall be served in a State designated by the International Tribunal from a list of States, which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 26 of the ICTR Statute is nearly identical, although it explicitly envisions possible incarceration of ICTR convicts in Rwandan prisons. ICTR Statute, *supra* note 25, at art. 26.

83. Judge McDonald joined many other notable international scholars and jurists at a conference entitled *War Crimes Tribunals: The Record and the Prospects*, which took place at American University's Washington College of Law from March 31-April 1, 1998. The conference papers are collected and reprinted in Vol. 13, Number 6 of the *American University International Law Review* (1998).

84. The Honorable Gabrielle Kirk McDonald, *Conference on War Crimes Tribunals: The International Criminal Tribunal for the Former Yugoslavia*, 13 *AM. U. INT'L L. REV.* 1422, 1426 (1998).

Despite the clarity of the statutory language and the continued acknowledgment that states *are not* adequately assisting with enforcement, only seven European States have agreed to render prison space to the ICTY.<sup>85</sup> Only two African states have offered their assistance in receiving ICTR prisoners.<sup>86</sup> Where, one must ask, are Belgium, Switzerland, France and the United Kingdom with respect to this international legal conundrum?<sup>87</sup> And, where is the United States? Where is the force of moral authority that these countries so vehemently displayed when faced with the arrest and possible prosecution of Pinochet?<sup>88</sup> Why is there not an equally supportive attitude displayed toward the prosecution of the war crimes committed in Yugoslavia and Rwanda?<sup>89</sup>

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85. Interestingly, Spain became the seventh cooperating state when it penned its agreement with the ICTY on March 28, 2000. *Spain to Become the Seventh State to Sign an Agreement on the Enforcement of Sentences*, Press Release No. 482-E, Mar. 28, 2000, available at <http://www.un.org/icty/pressreal/p482-e.htm> (last visited Nov. 7, 2000) [hereinafter *Spain Enforcement Press Release*]. This agreement follows the numerous activities surrounding Pinochet and demonstrates, perhaps, a newfound awareness by Spain that participation in international criminal law cannot be sporadic. Spain follows Italy, the first state to have agreed to accept ICTY prisoners on February 6, 1997, Finland, which gave its consent on May 7, 1997, Norway (Apr. 24, 1998), Sweden (Feb. 23, 1999), Austria (July 23, 1999), and France (Feb. 25, 2000). See various press releases available at <http://www.un.org/icty/press.htm> (last visited Nov. 7, 2000). Spain still has not agreed, however, to accept ICTR prisoners pursuant to its obligation under Security Resolution 955. See *supra* note 25.

86. It is disconcerting, at best, to note that no European nation has agreed to accept any of the Rwandan prisoners. Only the African nations of Mali and Benin have agreed to accept ICTR prisoners. See *Agreement on Enforcement of Tribunal Sentences Signed in Benin*, Press Release No. ICTR/INFO-9-2-200, Aug. 26, 1999, available at <http://www.icty.org> (last visited Nov. 7, 2000). This Press Release indicates that "certain European States have indicated their willingness to accommodate ICTR convicts," but as yet none have entered into the requisite agreement (emphasis added). *Id.*

87. See Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 388 n.243 (2000). The U.N. Secretary-General sent a letter to all member states regarding the enforcement of sentences and invited each to acknowledge whether they were capable of providing assistance to the ICTR. *Id.* Of the five European states pursuing the Pinochet case, only Belgium and Switzerland have indicated a "willingness" to receive ICTR prisoners. *Id.* This "willingness," however, has not been accompanied by the requisite formal agreement enabling the ICTR to transport prisoners to these states. *Id.*

88. See Spartz, *supra* note 33 (asserting that "[w]ith some justification, the question may be asked whether Western nations are only willing or prepared to prosecute human rights cases involving their own citizens and whether or not their vigorous attempt at bringing Pinochet to justice is truly unbiased and free of prosecutorial discrimination"). A second reporter questions whether "other former heads of state might face arrest outside their countries less because of what they are accused of having done, than because of who they are." *Doubts That Linger*, TIMES (LONDON), Mar. 3, 2000.

89. See generally Penrose, *supra* note 87 (discussing the numerous instances where lack of support from the international community and individual states has hampered the success of the ICTY and ICTR).

The difficulty of moral authority is that it falters when the true “morality” of the position being asserted is unveiled. None of the Pinochet countries has fully met the requirements under either the ICTY or ICTR Statutes.<sup>90</sup> Spain alone has agreed to accept ICTY prisoners (and only as recently as March 28, 2000, *after* proceedings against Pinochet were initiated).<sup>91</sup> Is moral authority only an acceptable answer when the state pursuing the prosecution has been harmed, or has had citizens harmed, by the acts of the individuals being punished? And if so, do we not return immediately to “victor’s justice,” which permeated Nuremberg and the Tokyo Tribunal?

As we continue to seek a truly international solution to torture, genocide, and crimes against humanity, perhaps we should pause to consider state practice. State practice is a legitimate and well-established principle of international law. Current state practice indicates an increasing trend toward eradicating immunity. This trend is only just beginning to gain ground and still does not demonstrate with sufficient forcefulness that dictators—e.g., Pol Pot, Idi Amin, Mengistu Haile Mariam, “Baby Doc” Duvalier, Moammar Gadhafi, Alfredo Stroessner and Slobodan Milosevic—will be subject to prosecution. In fact, state practice currently weighs more heavily on the side of Truth Commissions and Amnesties than on the side of criminal prosecutions.<sup>92</sup>

The Pinochet and Habre precedents, to the extent that they evince state practice, confirm that only those dictators who have lost support at home, in their place of refuge, and abroad will find themselves seated in the dock, finally facing the possibility of punishment. And what are we to make of Milosevic? He has been ousted from power and yet takes refuge in his homeland, despite his indictment for his role as the architect of ethnic cleansing in Yugoslavia.<sup>93</sup> While Pinochet appears to be vulnerable to some type of proceeding in Chile, Senegal has dropped the charges against Habre. And we remain uncertain about the prospects of actually prosecuting Milosevic. This makes the current state practice scorecard one-to-one, with the international community and ICTY

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90. See *supra* notes 85–87.

91. See *Spain Enforcement Press Release*, *supra* note 85.

92. *Supra* notes 47–48.

93. There are indications that although an international trial might not occur or be sanctioned by the new Serbian government, proceedings under domestic law may be brought against Milosevic for corruption and election fraud. See *When the Party’s Over*, *supra* note 52. The suggestion is that once Milosevic is behind bars domestically, it will be more plausible that he could be held accountable for the international atrocities alleged in the ICTY indictment. *Id.*

practice still undecided. We know what the *law* requires. We know what the words *say*. But for now, we have only one incidence of state practice operating in favor of prosecution, and one incidence of state practice disclaiming an ability to prosecute. The case of Milosevic is the perfect example to demonstrate precisely how the international community weighs in. Now, with the arrest and indictment of Suharto we must again wait to see which way Indonesia will lean.

The one variable that remains somewhat consistent in all the recent cases, *except the case of Milosevic*, is the advanced age and failing health of many of these deposed dictators. In both the Pinochet case and the Suharto matter, extrajudicial investigations have been necessary to determine whether the accused is physically capable of standing trial.<sup>94</sup> The long span of time that often separates the fall of the dictator and the rise of sentiment against him or her results all too often in a question of whether trial may be held against someone in such poor health. The recent momentum in Brazil against the former Paraguayan dictator is no exception. Stroessner, the longest reigning dictator in South America, with a reign of thirty-five years, is now eighty-seven years old and believed to be in failing health.<sup>95</sup>

The factors of initiating criminal proceedings against an incapable or incapacitated defendant complicates the human rights issues involved. One must additionally question what cathartic effect, if any, the prosecution of a defendant legally unfit to defend him or herself would provide to those still living with the scars of torture and human rights violations. Thus, while the Pinochet precedent may remain limited to those few deposed dictators living abroad in exile,<sup>96</sup> the international community has an opportunity to look forward by creating and maintaining an international criminal court. An even greater opportunity exists in relation to former President Milosevic. While Hitler and Mussolini avoided prosecution, Milosevic remains

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94. See Landler, *supra* note 35; see also UN: *Deal with Suharto Like Pinochet*, ASSOCIATED PRESS ONLINE, Sept. 5, 2000 (indicating that a senior United Nations official advises that Indonesia utilize a procedure similar to that used by the United Kingdom to determine whether Suharto is "fit" to stand trial).

95. Anthony Faiola, "Pinochet Effect" Spreading: Case Opens Way to Other Prosecutions, WASH. POST, Aug. 5, 2000, at A01.

96. *Id.* Mr. Faiola explains that not only is Uganda's Idi Amin living in exile in Saudi Arabia, he is also benefitting from the provision of a government stipend there. Further, the complication of governmental involvement in the escape and subsequent exile of a former dictator may preclude countries such as France from ever relinquishing their hold on individuals like Duvalier.



within our reach. The fate of this single defendant may determine the legacy of an entire tribunal.<sup>97</sup>

#### IV. THE NEED FOR CONSISTENCY AND AN INTERNATIONAL COURT

“Let the jury consider their verdict,” the King said, for about the twentieth time that day.

“No, no!” said the Queen. “Sentence first—verdict afterwards.”

“Stuff and nonsense!” said Alice loudly. “The idea of having the sentence first!”

“Hold your tongue!” said the Queen, turning purple.

“I won’t!” said Alice.

“Off with her head!” the Queen shouted at the top of her voice. Nobody moved.<sup>98</sup>

There are at least 3197 victims believed to have been tortured, killed, or to have “disappeared” under the Pinochet regime,<sup>99</sup> which means three thousand one hundred and ninety-seven violations of international law and three thousand one hundred ninety-seven reasons to prosecute Pinochet and many of those acting under his leadership.

The impetus for this Article is a firm belief in the importance of establishing prosecutorial rules and regulations for the consistent treatment of criminal defendants, most notably heads of state. The

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97. See *Statement by Carla Del Ponte*, Chief Prosecutor for the ICTY, Press Release No. 532-e, Oct. 6, 2000, available at <http://www.un.org/icty/pressreal/p532-e.htm> (last visited Nov. 6, 2000). While praising the transition to democracy, Ms. Del Ponte was quick to add the following:

Regarding Milosevic, I take this occasion to send the message to President Elect, Mr. Kostunica, that I am prepared to receive Milosevic in The Hague at any time. It is my hope and expectation that the people of the Federal Republic of Yugoslavia, in their legitimate aspiration to justice, shall express their will to see Milosevic brought to trial in The Hague. I truly believe that this is the only solution if there is to be a true and lasting peace in the Balkans and if the people of Yugoslavia are to enjoy a democratic existence and to be fully accepted back into the international community.

*Id.*

98. CARROLL, *supra* note 1, at 95.

99. Hoge, *supra* note 42.

This number fails to represent those victimized by the loss of a mother, father, son, daughter, aunt, uncle, brother, or sister at the hands of their own government: a distinct issue from that addressed in this Article, but one which deserves attention.

Nuremberg Principles undoubtedly proffer clarity. What they lack, however, is the authoritative history of state practice.<sup>100</sup> As discussed above, this oversight is not due to lack of opportunity or potential defendants.<sup>101</sup>

Likewise, the Torture Convention and Genocide Convention provide solid and unequivocal language affirming the right to prosecute.<sup>102</sup> But again, the practice of states—including the United States, Spain, Belgium, Switzerland, France,<sup>103</sup> the United Kingdom and, now, Senegal—suggests that despite the clear language, compliance is rare. The “legal requirement” that an individual accused of torture or genocide be either punished or prosecuted has not assisted the many victims of Cambodia, Argentina,<sup>104</sup> Sierra Leone, the Philippines, Vietnam, Indonesia, Yugoslavia, Brazil, Uganda, Ethiopia, Indonesia,<sup>105</sup> the Congo,<sup>106</sup> Chile,<sup>107</sup> and most recently Chad.

With the arrest of Pinochet, his subsequent release by the United Kingdom, and now the apparent forthcoming domestic proceedings, the international community has clearly indicated that perhaps kings are losing their claim to immunity from prosecution for criminal acts.<sup>108</sup> However, the arrest and failed prosecution of

100. See *supra* notes 9–14 and accompanying text.

101. See generally *supra* notes 11–14.

102. See *supra* notes 72–73 and accompanying text.

103. Indeed, it is France that continues to protect and provide refuge to “Baby Doc” Duvalier, the former head of state of Haiti. See *supra* note 13.

104. See generally Scharf, *supra* note 67.

105. Seth Mydans, *Ancient Hatreds, New Battles*, N.Y. TIMES MAGAZINE, Mar. 14, 1999, at 50 (detailing the scores of deaths that have occurred in the war between Christians and Muslims in Indonesia).

106. See ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 145 (1998).

107. But see Adams, *supra* note 42. Adams indicates that the Chilean Supreme Court issued a ruling declaring that the amnesty decree entered by the Pinochet regime does not apply in cases where individuals are considered “disappeared”—those cases where the bodies remain missing. He reports that “the Court argues that these cases could be considered unresolved kidnappings, a crime not covered by the amnesty.” This case, Adams asserts,

has opened the way for the arrests of more than 50 retired military and police officers, once thought untouchable. This provides at least some comfort to the families of the more than 2,000 people executed without trial under Pinochet’s reign of terror, as well as tens of thousands of torture cases.

*Id.*

108. Jack Straw, the Home Secretary of the United Kingdom, assured the British Parliament that the case of Pinochet “has established beyond question the principle that those who commit human rights abuses in one country cannot assume they are safe elsewhere.” Hoge, *supra* note 42.

Hissene Habre undermined this principle.<sup>109</sup> Will future state practice strengthen the Pinochet precedent? Or will it revert back to the former state practice that implicitly condones such behavior or conveniently turns a blind political eye to it? Will we realize that inertia and the passage of time simply preclude prosecution due to medical determinations that many of these deposed and exiled dictators are simply too aged to stand trial?

International law is at a perilous crossroads. Many scholars believe that the presence of an international criminal court will assist in unraveling head-of-state immunity. However, we cannot continue to wait for the creation of such a world court. States must either be willing to elevate the many principles seemingly codified in the post-World War II documents to the force of law *now* or admit states' reluctance to become involved in the "domestic affairs" of neighboring countries. If we are truly dealing with an issue of politics, then the continued resort to legal vernacular will remain futile.

The response—to be legitimate—cannot be tied to issues of politics and state relations. Legal norms of this magnitude represent a concept that transcends borders.<sup>110</sup> Now we must wait and see how the arrest and prosecution of Suharto and, eventually, the fate of Milosevic, weigh in: prosecution or pardon; prosecution or the continued ability of deposed dictators to avoid the rule of law? To establish state practice, the rhetoric must become reality. Law must not fall casualty to the politics of the moment, or law will simply become a spurious and reactionary attempt to deal with politically sensitive issues. The time for disingenuous attempts at noteworthy prosecutions has long passed. It is time to come together as a world community and decide whether international prosecutions are a viable means to deal with others' "domestic affairs."<sup>111</sup> Will international

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109. Previously, a Truth Commission established by Habre's successor, Idriss Deby, found that Habre's regime was responsible for approximately 40,000 political killings and another 200,000 cases of torture. Norimitsu Onishi, *An African Dictator Faces Trial in His Place of Refuge*, N.Y. TIMES, Mar. 1, 2000, at A3.

110. Orentlicher, *supra* note 9.

111. *Cf.* Orentlicher, *supra* note 42. Professor Orentlicher credits Nuremberg with establishing three important principles. *Id.* "First, the Nuremberg International Military Tribunal in 1945 affirmed that international law makes individuals directly accountable for crimes against humanity: in essence, atrocities committed as part of a widespread or systematic attack against civilian populations. Second, Nuremberg established that sovereign and head-of-state immunities fall away before the court of humanity." *Id.* "A third principle derived from Nuremberg is that the law of humanity can be enforced by any state, no matter where the crimes occurred." *Id.*

law, as embodied by the ICTY Statute and enforced by the Hague Tribunal, finally live up to its potential? Will Milosevic finally be subjected to a legal review of his actions?

In late July, 1998, numerous state representatives, scholars, dignitaries, and non-governmental organizations worked together to create a permanent international criminal court. Their efforts were eventually codified in a document referred to as the "Rome Statute."<sup>112</sup> To date, only twenty-two states<sup>113</sup> have ratified the Rome Statute. This is thirty-eight states shy of the requisite number for ratification.<sup>114</sup> Conspicuously absent in this short list are two of those states that clamored for the prosecution of Pinochet: Switzerland and the United Kingdom.

The slow pace in ratifying this crucial international document raises concern.<sup>115</sup> Either the international community is fully committed to prosecuting those individuals accused of the most heinous crimes affecting all of us, such as genocide and torture, or it is not. Our priorities must go beyond the rare instances when the politics of the moment have permitted prosecution.<sup>116</sup> The ratification of the Rome Statute and the subsequent creation of a truly International Criminal Court will provide the best precedent for prosecuting Heads of State. The Rome Statute provides: "[a] person who commits a crime within the jurisdiction of the Court *shall be* individually responsible for punishment in accordance with this

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Professor Orentlicher continues by observing that:

Nuremberg's claims had great moral power, but the law itself seemed largely spent force once the postwar machinery of victors' justice was dismantled. The reasons are not hard to fathom. Governments usually lack sufficient will to enforce the basic code of humanity against other states and their officials. For one thing, a state's attempt to bring foreign officials to account cannot help but destabilize diplomatic relations. Governments also fear the precedent could one day be invoked against their own officials, which helps explain why Washington has declined to express support for the proceedings against Pinochet.

*Id.*

112. Rome Statute, *supra* note 26.

113. *Rome Statute of the International Criminal Court: Ratification Status*, available at <http://www.un.org/law/icc/statute/status.htm> (updated Oct. 24, 2000) [hereinafter *Rome Statute Status*].

114. Sadat & Carden, *supra* note 20, at 387 (explaining that sixty states must ratify the Rome Statute for the ICC to come into force).

115. *Id.* (reminding that "classic ideas about sovereignty die hard, and if the road to Rome was long and difficult, the journey to the seat of the Court at the Hague may be even more arduous").

116. Two of the more significant examples can be found in the ICTY and ICTR. *See* Penrose, *supra* note 87 (describing the various instances where international law has reacted to a situation by creating an international tribunal).

Statute.”<sup>117</sup> In addition, there is an explicit admonishment that with respect to, “[i]n particular, [their] official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government *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.”<sup>118</sup>

This caveat—when issued with the full force and consent of a majority of the states in the international community—will avoid the *ex post facto* and *nullum crimen sine lege* challenges that plague the Pinochet and Nuremberg precedents. There will be no defense that such procedures are aberrational, are not provided for in international law, or are at variance with state practice. The warning will be clear, unambiguous, and enforceable.

Until that time, however, there remain the continuing cases involving Pinochet, Habre, Suharto, Stroessner, and perhaps most importantly, Milosevic. But before assuming that the full range of human rights have been confirmed, we must cautiously assess the remaining dictators and evaluate the reasons why France, Zimbabwe, Brazil, and Saudi Arabia are providing refuge. Excepting Saudi Arabia, each of these states has signed the Rome Statute.<sup>119</sup> Their respective signatures indicate a willingness to be bound by the force of law and to assist in prosecuting those individuals currently finding safe haven in their country. We must appraise the need for an international court given the current reality that many states are still unwilling to interfere in the “domestic affairs” of neighboring states. Until we have a mandate *requiring* the surrender and subsequent prosecution or extradition of deposed dictators, it’s still good to be the king!

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117. *Supra* note 26, at art. 25 (emphasis added).

118. *Supra* note 26, at art. 27 (emphasis added).

119. *See generally Rome Statute Status, supra* note 113. Brazil signed the Rome Statute on February 7, 2000, France on July 18, 1998, and Zimbabwe on July 17, 1998. Yet the actions of each of these three countries in harboring a former Pinochet-type dictator belies their belief in the precepts of the ICC.