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The Emperor's Clothes: Evaluating Head of State Immunity Under International Law

Mary Margaret Penrose¹

How are they to settle with the leaders of old? Some settlement there must be, to terminate, if that is possible, the ongoing struggle between the two [regimes] and to establish the legitimacy of the victors. But in what sense can this be, in what sense (if any) ought it to be, a legal settlement? The [leader] is brought to trial in violation of the laws of the old regime, the only laws he acknowledges; he is judged in the name of political or legal principles to which he never consented. He is judged, moreover, by a court whose authority he does not recognize (or which he only recognizes under duress), a court composed in large part, if not entirely, of his political opponents. How can this be justice done?²

1. Professor Penrose graduated from Pepperdine Law School, J.D. and the University of Notre Dame Law School, LL.M, in 1993 and 1999, respectively. She teaches Federal Civil Procedure, Criminal Procedure Constitutional Law and International Human Rights. She has two text books in circulation, both co-authored, one on Education Law and one on Federal Civil Procedure, both published in 2009. In addition, she remains an active member of the Texas Bar and is currently serving as counsel to seven Texas death row inmates during their final habeas corpus appeals. Professor Penrose believes strongly in "Equal Justice Under Law" and hopes to one day see a true functioning international legal system where justice triumphs over power and influence. She is grateful to all her students over the years that have taught her every bit as much as she has tried to teach them. This next generation of lawyers has the ability to solve many of the shortcomings noted in this and similar articles.
2. MICHAEL WALZER, REGICIDE AND REVOLUTION: SPEECHES AT THE TRIAL OF LOUIS XVI, 70 (1974).

I. The Shadow of its Threat³

*Vox et praeterea nihil*⁴

Saddam Hussein, the former President of Iraq, sat in the dock of an Iraqi courtroom as a criminal defendant. Though many celebrated his trial as a long-awaited legal reckoning, the truth is that this domestic trial follows two noteworthy events: first, a rejected offer of exile by the United States, and, second, a military takeover of Iraq by other nations. In neither instance is the prosecution of Saddam Hussein a traditional invocation of the legal power of indictment and arrest. Rather, exile – and, one would assume, immunity from prosecution – was proffered in an attempt to avert the international military operation that continues to plague Iraq. Prosecution only occurred because the overtures of exile were rebuffed and Saddam Hussein was ultimately defeated, overthrown, and captured by U.S. military forces.⁵

Yet, even as thousands heralded the placement of Saddam in the dock, thousands more challenged the propriety and legality of trial as Saddam was granted constitutional immunity under the domestic Iraqi constitution purportedly governing these proceedings. While international tribunals and third-state prosecutions, like Spain's attempt to prosecute General Augusto Pinochet and Belgium's attempt to prosecute Ariel Sharon, may ignore domestic amnesties, Iraq's former leader may have had a valid *legal* challenge to his prosecution. Thus continues the tumultuous effort to bring former heads of state to justice for acts of torture, disappearances, rapes, murder and even genocide.

To date, most attempts at prosecuting heads of state have fallen short. At best,

3. Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 837 (2005) (brilliantly articulating the head of state situation, "Slobodan Milosevic, Saddam Hussein, Hissene Habre, Augusto Pinochet, Charles Taylor. There have never been more political leaders in the dock, or, under the shadow of its threat").
4. THE MERRIAM-WEBSTER DICTIONARY 828 (1974) ("voice and nothing more"). While this author desires the state of law to permit prosecutions against heads of state, available proof and legal precedent reminds we are not there yet. Rather than succumb to the pressure to cheer on each legal "victory," it is hoped that this article will truly pave the way for establishing a legal structure that transparently empowers prosecution under proper legal precedent and principle.
5. This is not the only historical instance of offers of exile to leaders. The same was proffered to, and twice accepted, by Napoleon Bonaparte. Eventually, Napoleon died in his exile at St. Helena Island. Likewise, King Louis XVI was offered exile and, in fact, some during his trial argued for his exile in the nascent America.

such attempts, even the modern attempts stretching from Iraq to Yugoslavia to Sierra Leone, have occurred under less than ideal circumstances, often far, far away from the actual place of alleged crime, or so distant in time to have lost some of its meaning. While academics, international lawyers and human rights advocates all praise the “Pinochet precedent” as paving the way for prosecuting deposed despots and ending the luxurious exiles of former dictators, in the end Pinochet was released from custody and returned home to Chile where he was embroiled in legal challenges for his alleged crimes until his death at age 91 in 2006. The Pinochet precedent never resulted in a conviction.

Following a clear and developing pattern, the ultimate transfer of Slobodan Milošević to the International Criminal Tribunal for Yugoslavia (“ICTY”) followed political defeat, loss of support at home and a viable threat of economic sanctions. In the truest sense, a price was placed on the head of Milošević that many in the Yugoslavian government were not prepared to ignore.⁶ The Serbian Prime Minister, Zoran Djindjić, against the wishes of his President and political rival Vojislav Koštunica, capitulated to the demands for Milošević’s extradition and delivered Milosevic to an American airbase in Bosnia.⁷ As a result, Djindjić was shortly thereafter assassinated. Yugoslavia, though a reluctant participant in the extradition process, received over \$1.25 billion dollars from NATO allies for the surrender of The Hague’s most renowned indictee.⁸ Much like Pinochet before him, Milošević, who traveled freely to the United States and was instrumental in the Dayton Peace Accords process, finally lost sufficient favor and power to find himself vulnerable to prosecution.

So, too, was the fate of Milošević’s contemporary, Radovan Karadžić, who was finally apprehended and transferred to the ICTY thirteen years after his purported crimes. Karadžić, the former Bosnian Serb leader, apparently lived openly in Belgrade under an assumed identity, Dragan Dabić, as a faith healer. He is charged with genocide for the massacre of nearly 8,000 Muslim boys and men during the siege at Srebrenica in July, 1995. Though Karadžić now sits in the same dock where Milošević spent his last days and months, Karadžić’s trial begins with many

6. Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 364 (2003) (indicating that President George W. Bush released an initial \$50 million dollars in aid to Serbia conditioned upon the arrest and detention of Slobodan Milosevic).

7. *Id.*

8. *Id.* at 365 (noting that several members of the newly elected Yugoslavian government resigned over the extradition – an act, regardless of the financial ramifications, many national politicians disagreed with).

of the dilatory practices engaged in by his predecessor Milošević. At his initial appearance, Karadžić refused to enter a plea and informed the court he would be representing himself. Karadžić's trial is expected to last many months, possibly even years. And the trial begins as the ICTY is winding down its operations in the Netherlands under the ICTY's mandate. Karadžić's trial may become the most enduring symbol of both the ICTY's existence and its legacy.

Simply placing a former head of state in the dock does not assure justice. In fact, both Milošević and Hussein – and more recently, Taylor, Karadžić and Al Bashir—used their status as criminal defendants to challenge the legality of the proceedings against them; to juxtapose the alleged international crimes of NATO and the United States against their own atrocities; and to attempt to use their respective stages to transform the legal proceedings into a mockery of justice. While the *tu quoque* argument has not succeeded in the legal sense, the respective “you did it as well” arguments furthered by these leaders brings perverse attention to the political nature of their prosecutions. Ultimately, Milošević died of a heart attack in his prison cell at The Hague without any legal resolution of the claims levied against him. To some he is a martyr, to others a monster. But despite the best efforts of the international community, neither he nor Pinochet will ever be a convict. In contrast, Saddam Hussein was quickly convicted and ceremoniously executed by hanging after a swift appeal. As the world continues to be embroiled in wars and genocides, one can only surmise the fate of other former leaders like Karadžić and others placed under arrest or currently in trial, such as Charles Taylor, Omar Hassam Ahmad Al Bashir and Alberto Fujimori.

These few examples only begin to explore the shortcomings of prosecuting heads of state. In every case herein chronicled, the leader is only “brought to justice” once he has lost political power and international clout. Other world leaders, whose crimes appear equally gruesome and legion, remain living their lives without fear of prosecution. While the cause of prosecuting heads of state is undoubtedly noble, the legal pedigree for such prosecutions is vulnerable. Despite the growing mandate of a few international treaties, state practice continues to weigh heavily in favor of according former heads of state complete immunity from prosecution for torture and other alleged international crimes. This article explores existing state practice relating to the prosecution of heads of state. Regardless of the burgeoning legal opinions proclaiming, *ipse dixit*, that customary law empowers countries to arrest and prosecute former heads of state for alleged acts of torture, disappearances, rape and murder, history – both recent and past – provide limited support for these aspirational pronouncements.

This article will further expose the limits of prosecuting heads of state by first addressing the historical Westphalian approach to sovereignty and head of state prosecution. Because the nation-state was historically deemed impenetrable and the United Nations Charter protects the sovereign equality of all nation states, heads of state have routinely avoided prosecution for alleged international crimes through either inertia (the many in exile), comity (Saudi protection of Amin via their welcome), political compromise (Emperor Hirohito of Japan during World War II) or deference to the head of state as the state itself. This article challenges that the usual precursor to prosecuting a former head of state is military or political defeat and a radical change in support at home. The transfers of Milošević, Karadžić and Charles Taylor provide three obvious examples. The future status of Omar Al-Bashir, whose arrest warrant was issued by the International Criminal Court ("ICC") in March, 2009, will provide an important benchmark for this theory.

Next, this article will evaluate the historical instances of head of state prosecution, with particular emphasis placed on the inconsistent approach of the Allies following World War II. While great efforts were made to prosecute the leaders of the Nazi regime, General Douglass MacArthur expressly secured immunity for Emperor Hirohito of Japan in exchange for the Emperor's participation in securing peace in Japan. Following the unconditional surrender of Japan, the Allied forces determined that the political calculus of immunity was more important than securing the prosecution of the Emperor, the acting head of state. Most surprising is the absolute silence in the post-World War II legal decisions discussing head of state immunity regarding Emperor Hirohito's express provision of immunity and the clear distinction between the statute governing the Nuremberg Tribunal and the statute governing the International Military Tribunal for the Far East (IMTFE), commonly referred to as the Tokyo Tribunal. While the former tribunal statute expressly permitted prosecution against heads of state, the IMTFE conspicuously omitted this provision. Thus, during World War II, one tribunal consciously chose to grant head of state immunity.

This article will trace the legal developments relating to head of state immunity from World War I, World War II and continuing to the Rwandan, Yugoslavian, Sierra Leonean and Sudanese conflicts that have spurred some form of international tribunal or attempt at prosecution. International treaties and case decisions will be presented and analyzed. Likewise, observations and commentary from scholars will be evaluated. While only one international treaty, the Genocide Convention, speaks directly to the relevancy of head of state status for prosecution,

most of the wartime peace treaties and their attendant international tribunal statutes more clearly elucidate a lack of head of state immunity. Nevertheless, the source of many of these prosecutions continues to be military force or political downfall that presents a defeated defendant. From these few tribunal statutes and this lone treaty, modern courts have strained to find a consistent practice regarding head of state immunity. Rather than relying on actions, however, these modern courts dogmatically overemphasize the hollow written words relating to head of state immunity and ignore the empty actions or actual practice. Even as Pinochet flew home to Chile without succumbing to any criminal prosecution, overzealous advocates were praising the legal precedent established. The precedent, we must admit, includes Pinochet's *de facto* immunity. The recent examples of Hussein, Milošević, Karadžić and Taylor may, however, finally be signaling a sea change of action, not simply rhetoric.

Finally, this article will inquire whether the exchange of amnesty via offers of exile are not, perhaps, a preferable option to the unfulfilled attempts at prosecuting former heads of state. If the question is peace *or* justice – assuming a choice must be made between the two – amnesty and exile may be a small price to pay to avert military action and expensive, dilatory prosecutions that may not, in the end, deliver justice. The question is not simply one of economic costs, but one also assessing the lost opportunity costs sacrificed in vain attempts to prove a disempowered dictator face “justice.” While I, too, am all for the ideal of prosecuting individuals for atrocities committed against civilians, right now heads of state largely still sit only in the shadow of its threat.

II. Revisionist History

*Vae Victis*⁹

The prosecution of heads of state is, historically speaking, anomalous. There have been sparse domestic prosecutions and intermittent international prosecutions but nothing regular, nothing systematic and nothing that suggests a normative practice. Rather, the names of heads of state etched in history as having suffered prosecution, and occasionally punishment, are rare enough that one can count them on a single hand: King Charles of England, Louis XIV of France, and Napoleon –

9. THE MERRIAM-WEBSTER DICTIONARY 828 (1974) (“woe to the vanquished”).

the first two “tried” by domestic courts, the third dealt with in an extra-legal fashion.¹⁰ Peter von Hagenbach is frequently named as the first individual to be condemned by an international tribunal for war crimes, but he was merely a commander and not really a head of state.¹¹ Much more common when a former leader or dictator is dethroned is the act of exile or ostracizing – an act oft repeated in our modern times.

The seeds of punitive exile were sown very early on with the case of Napoleon Bonaparte. In fact, exile was unsuccessfully offered to King Charles I and unsuccessfully argued as an appropriate sanction for Louis XVI. In the end, neither king received banishment, and executions took the place of exile. Curiously, the trials of both royal men are absent from modern discussion of head of state immunity. As the king literally *was* the state, this omission is rather remarkable.

A. The Inviolability of Kings – Regicide¹² or Justice

Le roi est mort, vive le roi¹³

Before Hussein, before Pinochet, there were the royal defendants: King Charles I of England and King Louis XVI of France. While kings had previously abdicated or been murdered, none had previously been placed on trial, due to the assumption that the king was not subject to the jurisdiction of ordinary courts. These trials presented the first clear assertion, by heads of state, of the defense of

10. Jordan J. Paust, *ILSA Panel Oct, 18, 2003, at Loyola University New Orleans-Panel on History of International Tribunals Prior to Nuremberg: Selective History of International Tribunals and Efforts Prior to Nuremberg*, 10 ILSA J. INT'L & COMP. L. 207, 208 (2003) (“One of the early recognitions of criminal responsibility of a head of state occurred at the Congress at Aix-La-Chappelle in 1818 when the Congress, without formal trial, found Napoleon guilty of waging wars against peace. After his capture in 1815, he had been banished to the Island of St. Helena where he died some six years later.”).
11. *Id.* at 207 (“Peter von Hagenbach, who served as Governor of territory under Duke Charles of Burgundy, was tried before what can be termed an international tribunal for the oppression of persons under his charge and for actions against the ‘laws of God and man,’ including responsibility for murder, rape and pillage.”).
12. THE MERRIAM-WEBSTER DICTIONARY 587 (1974) (Literally translated, “regicide” means simply “one who murders a king” or “the murder of a king”). The executions of both Charles I and Louis XVI are considered by many to be “regicide” despite each execution following a trial and judgment.
13. THE MERRIAM-WEBSTER DICTIONARY 824 (1974) (Literally translated is “the king is dead, long live the king”).

sovereign immunity. Much like those sustained by Hussein, Milošević, Taylor, Karadžić and, in a much more limited fashion, Pinochet, the defense of immunity raised by both regal defendants fell flat upon their respective “judges.” However, other observers were not as mollified or sure of these prosecutions. The problem, as one scholar notes, was trying the king “in some legitimate court of law.”¹⁴ As one officer purportedly declared during the trial of King Charles I, “putting the king on trial was ‘a just thing yet I know not how it may be justly done.’”¹⁵

In order to bring these kings to trial:

[T]he substance of the law or, more simply, the position of the king *vis-à-vis* the law had to be changed. For Charles and Louis lived within a seemingly impregnable legal fortress. Though there were major differences between English and French kings with regard to their legislative powers, there were none at all with regard to their standing before their own courts. They may or may not have been above the law when it came to making law, but they were clearly beyond its (worldly) reach. It was a legal maxim in both England and France that the king could do no wrong: *le roi ne peut pas faire mal*. This principle the revolutionaries were committed to deny, and their denial was a large part of the revolution they made.

To be a king was to be inviolable. That meant that no action of a reigning monarch, whatever its character, could possibly be construed as a crime. The status was, strictly speaking, a legal one only; it followed logically from the king’s position as the source of law and justice.¹⁶

Yet, despite these legal barriers, both Charles and Louis were brought to trial domestically. Both were accused of being tyrants and committing acts of treason.

“There can be no doubt that Charles’ principal sin was the levying of war. The other allegations of murder, rape and the destruction of property were ancillary to this. Charles was tried largely for bringing war and its attendant destruction on the land.”¹⁷ The literal language of the “indictment” spoke of the cruel and unnatural wars that spilt “much innocent blood,” wasting the public treasury and obstructing and decaying trade among nations.¹⁸ But, at issue, much like the trials of modern leaders today, was the waging of a costly and damaging war and its attendant atrocities.¹⁹

14. CHARLES CARLTON, CHARLES I: THE PERSONAL MONARCH 348 (1995).

15. *Id.*

16. WALZER, *supra* note 2, at 35.

17. THE REGICIDES AND THE EXECUTION OF CHARLES I 128 (Jason Peacey ed., 2001).

18. *Id.*

19. *Id.* at 127-128. The actual language of the charge read in pertinent part as follows:

That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and

Hoping to avert a crisis, negotiations continued with King Charles to avoid prosecution. One option that was readily dismissed by the King was exile.²⁰ In order to protect against any claim that he had abdicated the throne, Charles I constantly refused exile but entertained thoughts of fleeing to either France or Holland.²¹ Even in his limited captivity merely awaiting trial, the dour attitude of the dethroned monarch emphasizes the punitive nature of incapacitation and, in longer periods, exile.²²

Whether the machinations that resulted in these unique proceedings were legally proper no longer seems to matter. Rather, the fact that two monarchies were subjected to common forms of justice, trial and execution, revolutionized European history and has resulted in martyrdom for both kings. Charles I and Louis XVI were both “tried” domestically for taking their countries to war and bringing untold atrocities upon their subjects. These trials subverted the existing legal framework, and serve as the first *legal* displacement of the notion of sovereign immunity for a head of state.

Thomas Paine, in presenting a speech on November 21, 1792, proclaimed:

by his trust, oath, and office, being obliged to use the power committed to him for the good and benefit of the people, and for the preservation of their rights and liberties; yet, nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, yea, to take away and make void the foundations thereof, and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive Parliaments, or national meetings in Council; he the said Charles Stuart, for accomplishment of such his designs, and for the protecting of himself and his adherents in his and their wicked practices, to the same ends has traitorously and maliciously levied war against the present Parliament and the people therein represented.

Id. at 128 (The author explains that “[t]he king was simply a magistrate who had committed treason against the parliament and people by raising an unlawful and unnatural war in the land to the destruction of the commonwealth.”).

20. CARLTON, *supra* note 14, at 295.

21. *Id.* at 308 (In explaining the difficult issue facing the king, Carlton writes:

Escape therefore seemed the only way out of an intolerable situation. Charles first raised the idea of fleeing to the Continent in early June, less than a month after he had joined the Scots. By July he was convinced, “I am lost if I go not unto France by the end of August,” and implored his wife to make the necessary arrangements. In August, he admitted to Ormonde that he was an “honorable prisoner.” The following month he asked his daughter, Mary, to have her husband, William or Orange, send a Dutch ship to Newcastle, ostensibly to carry messages, but in fact to stand by to spirit him to Holland.)

22. *Id.* at 325 (explaining that Charles spoke of his days at Carisbrooke at “these damnable times”). Much like Napoleon in exile on St. Helena, Charles would try to occupy his time by walking, reading and eating.

As to “inviolability,” I would not have such a word mentioned. If, seeing in Louis XVI only a weak and narrow-minded man, badly reared, like all his kind, given, as it is said, to frequent excesses of drunkenness a man whom the National Assembly imprudently raised again on a throne for which he was not made – he is shown hereafter some compassion, it shall be the result of the national magnanimity, and not the burlesque notions of a pretended “inviolability.”²³

Thus, much like today, the question of sovereign immunity was directly considered by the tribunals. However, perhaps due to the impure appearances of these rudimentary attempts at judging heads of state – or, equally likely, due to the martyred legacy of the regal convicts – later courts have not relied on these early precedents to embolden their claims that even monarchical leaders can be tried for inflicting war-torn horrors upon their countries.²⁴

Another issue born out of these proceedings was the distinction between immunity covering the position of sovereign and immunity covering the acts alleged to be committed. The rudimentary demarcations appear throughout the French proceedings trying Louis XVI but, in the end, they were not deemed decisive. The delineation between the two forms of immunity did, however, embolden Louis’ adversaries and judges to discard an otherwise unequivocal promise of immunity in the French constitution. As courts look ahead toward

23. WALZER, *supra* note 2, at 130.

24. SUSAN DUNN, *THE DEATHS OF LOUIS XVI: REGICIDE AND THE FRENCH POLITICAL IMAGINATION* 73 (David Bromwich, et al. eds., 1944). As Dunn observes the work of another Louis XVI scholar:

Unfortunately, as Walzer suggests, the king’s trial confused a political trial (not dissimilar to an impeachment trial conducted by the American Senate), which does not need to conform to accepted judicial procedure, with a criminal trial, which should conform to judicial procedure, if only because the outcome may be (and was) death rather than just impeachment or abdication. Walzer, however, also makes the reasonable argument that “the point [of the trial] was to make a point – that the king was, like any other citizen, liable to the law. How could that be done without a trial? And how could the trial of the king be anything but an imperfect (which is not to say a ‘sham’) trial? Walzer, goes on to make an interesting comparison between the trial of Louis XVI and the Nuremberg trials: not unlike the king’s trial, the Nuremberg trials were instruments of collective education; they were political as well as criminal, and, on the grounds of pure procedural justice, they were imperfect, but “necessarily imperfect.” But perhaps there is a distinction to be drawn between an international trial (based on principles of international law, which itself may be a contradiction in terms), and a national trial that can be expected to follow a nation’s set of rules of procedural justice. The Nuremberg trials, moreover, might be viewed as an act of closure, whereas the trial of Louis XVI constituted not only the judicial closure of monarchical rule, but also the founding act of a new political order, one that people hoped would be based on a constitution, on the rule of law, republican institutions, and humanitarian ideals.

suitably developing a legal basis for eradicating head of state immunity, these early references should not so easily be discarded. For not only does history seem to repeat itself – the sight of Milošević, Karadžić, Taylor and Hussein arrogantly challenging by what authority they are brought before these bodies – the wise learn much from the legal and historical failings of their predecessors.

B. Exiling the Offender – From Elba to St. Helena

*C'est magnifique, mais ce n'est pas la guerre*²⁵

To the shattering dismay of Europe, Elba had proved all too soon, a wholly unsuitable and insecure place for the exile of Napoleon after his defeat by the allies in 1814. The island was but a few miles sail from the Italian coast, or indeed from Corsica his birthplace. For a year the Emperor had lived in mock imperial splendour [sic] there with a small army of his own and in considerable freedom. It was of course a lilliputian court both in influence and in magnificence compared with the grandeur of his former days in France. He was however able to communicate without real difficulty with his supporters in Paris and on 26th February 1815 he escaped from Elba and returned to France.

The allies were still squabbling among themselves at the Congress of Vienna over the terms of settlement of their respective claims and their relative frontiers following their overthrow of Napoleon's supremacy. When news of his escape reached Vienna the allies recognized with shattering reality that they were now faced with the task of tackling all over again their exhausting efforts to subjugate the man who had held them in terror for so many years of war.

*Within a hundred days from the time of his escape, Napoleon had assembled a new army in France and stood ready to launch a fresh bid for the domination of Europe . . . [then] came Waterloo . . .*²⁶

The life and exile of Napoleon Bonaparte still garners vast attention today, though usually not legal attention. Whether this notoriety is due to Bonaparte's escape from his initial exile in Elba or due to his later exile on the island of St. Helena is less relevant than the precedent set by his actual banishment. Twice expelled, Bonaparte remains a heroic, if not tragic, figure that was relegated to spending his last six years on the island of Saint Helena in the middle of the Atlantic Ocean. In exile, Bonaparte was removed from all usual freedoms and was

25. THE MERRIAM-WEBSTER DICTIONARY 820 (1974) ("it's magnificent, but it isn't war").

26. JAMES KEMBLE, ST. HELENA DURING NAPOLEON'S EXILE: GORREQUER'S DIARY 6 (1969).

at once both discontent and emasculated. This was considered the ultimate penalty to be imposed upon one whose former power wielded many great privileges. On St. Helena, the simple privilege of reading and receiving mail or walking freely along the coastline was strictly controlled by his captors.²⁷

Bonaparte despaired greatly in his exile. His departure from continental Europe reminded all of his staggering defeat and his resulting displacement from civilized society. Although he was given moderately impressive living quarters,²⁸ Bonaparte was not free to walk amidst the grounds and was, eventually, subjected to bars placed around the house to provide additional security.²⁹

The matters that enraged Napoleon and the regulations that he regarded as insulting were connected with the granting of passes to Longwood [his living quarters] and permission to see Napoleon, the refusal of Lowe to allow attempts to initiate secret correspondence between those at Longwood and people outside, and more particularly the refusal to permit

27. DESMOND GREGORY, *NAPOLEON'S JAILER: LT. GEN. SIR HUDSON LOWE* 133 (1996). While Bonaparte referenced the pleasure with which his captor, Sir Hudson Lowe, mistreated him, in truth, there were strict regulations placed upon Bonaparte's captivity by governmental instructions:

Most of Napoleon's complaints were outside Lowe's control, bound as he was by Bathurst's instructions. This went for Napoleon being treated as a prisoner of war and all that entailed; for his having to be seen by a British officer every morning and every evening; for his being denied the title of "Emperor"; for some of his followers being deported . . . for the censorship of correspondence in and out of Longwood [Napoleon's home]; for being accommodated at Longwood (a house about which he had many complaints); and for the climate of St. Helena as experienced on the exposed Longwood plateau, where there was little shelter from the sun and none whatever from the constant wind, and which could be very damp at times and moreover was rat infested).

28. *Id.* at 135. Bonaparte complained vehemently about his living quarters as they were, no doubt, a far cry from his Emperor's quarters. However, as one author notes, Bonaparte refused offers to improve his housing:

As regards alternative accommodation, Napoleon refused to reply to Lowe's queries about the planning of a new house at Longwood and refused to have additional rooms built onto the existing structure, which was undoubtedly far too cramped and very far from waterproof; he could not endure the noise the workmen were bound to make. As Norwood Young writes, Napoleon always imagined that before the new house could be completed he would be dead or out of the island.

29. *Id.* at 136 ("Napoleon chose to make a great deal of fuss about the installation of iron railings around the precincts of the new house at Longwood. Lowe had insisted on this because it would mean posting fewer sentries, but perhaps he was being insensitive to the objection voiced by Napoleon that the railings served to emphasize his detested status as a prisoner of war.").

the use of the imperial title.³⁰

As one author notes:

Absolute power spoils a man, and Napoleon, whose profoundly human qualities still astonish us, must have suffered more at St. Helena from having to adapt himself to ordinary life even than from remoteness, isolation and illness: his long battle with Hudson Lowe was centred [sic] entirely round his view that sovereignty was essentially permanent, and the anointing of a king had incontestable validity.³¹

Bonaparte's mail was read, books and other gifts withheld,³² his movements severely curtailed and scrutinized, and his impact in Europe largely evaporated. In effect, he had lost all aspects of sovereignty: his title, his honor, his influence and his freedom. Exile was a merciful, though effective, punishment. And, in accepting exile, any claim of sovereignty was forever lost.

To be in exile is to be a stranger in a foreign land. The place of exile will never be "home" in the traditional or truest sense and the consequent inability to freely travel serves as a continual reminder of one's defeat or surrender. A person in exile remains always a visitor and must rely on the benevolence of their guardians for a secure existence. The recent extradition of Charles Taylor underscores how fleeting the peace of one in exile can be. Caught at the border trying to escape, Taylor was taken into international custody and extradited to face trial. How light must one sleep who remains a visitor dependent upon the hospitality of his keepers?

The romanticized descriptions of those currently or recently in exile occasionally, though usually wrongfully, portray carefree living and luxurious peace. Instead, many that have chosen exile realize that the "choice" was necessitated by defeat and its attendant loss of privileges. These individuals are condemned to die a slow, isolated death. When the family of Idi Amin, the former President of Uganda, sought to return his remains to his native land, the overtures were refused and Amin was buried in Saudi Arabia. A similar indignation was placed upon Bonaparte who, though given a funeral reserved for those of the highest rank, was not permitted to have his name inscribed upon his tomb.³³ Because Sir Hudson Lowe refused the name "Napoleon" to be set upon the tomb without also adding the term "Bonaparte," the tomb remained without

30. *Id.* at 132.

31. GILBERT MARTINEAU, *NAPOLEON'S ST. HELENA* 9 (Frances Partridge trans., John Murray Ltd. 1968) (1966).

32. GREGORY, *supra* note 27, at 135.

33. *Id.* at 163.

identification.³⁴ It is the slight indignations such as these that serve to remind those in exile that their power is gone, infinitely gone. Rather than die a martyr as Charles I and Louis XVI, Napoleon's tomb at his place of death reveals he died as an ordinary, if not common, emasculated man.

Beyond the punitive features of exile, there is a secondary feature inquiring into the process through which exile is achieved. Modernly, many dictators and former leaders *voluntarily* chose exile, recognizing that remaining a deposed leader in their current country could make them physically or legally vulnerable. Further, some choose exile as a means of escaping justice – in essence, as a “choice” favoring a form of freedom over prosecution in return for stepping down from a particular regime or position. Bonaparte did not *choose* exile in the modern sense; exile was thrust upon him as a surrendered prisoner of war.

One historian notes that the exile option was actually the third choice deemed appropriate for the fallen Emperor.³⁵ While the Prussians desired that Bonaparte simply be shot, the British favored some form of trial process – to occur in France.³⁶ Only upon realization that a trial was not currently feasible did the British resort to banishment.³⁷ As Jonathan Bass observes, “[w]hat was largely missing was legalism. To this day, ‘the Napoleonic precedent’ means the use of extralegal means to get rid of an enemy.”³⁸

Unlike the proceedings involving Charles I and Louis XVI, Bonaparte was accused on not only committing treason against his own citizens, but also committing war crimes by executing Prussian prisoners.³⁹ The question of amnesties from prosecution was clearly discussed for soldiers and military officers. Much like the succeeding efforts at Leipzig and Nuremberg to follow, the Allies initially sought the prosecution of some one hundred men.⁴⁰ But, as was later true following World Wars I and II, the initial list was severely curtailed and only a few, representative prosecutions actually took place.⁴¹ The most notable trial

34. *Id.*

35. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 38 (2000).

36. *Id.*

37. *Id.*

38. *Id.* at 38-39 (Bass continues that, however, “there were weak stirrings of some kind of British legalism, an embryonic preference for postwar trials rather than arbitrary methods.”).

39. *Id.* at 41.

40. *Id.* at 46.

41. BASS, *supra* note 35, at 46. (“For the most part, the Bonapartists [sic] were seen as traitors, usurpers, and enemies – but not as war criminals.”).

involved Michel Ney, a man Bonaparte considered “the bravest of the brave” for refusing orders to capture Bonaparte following his escape from Elba.⁴² In time, Ney was tried by the Chamber of Peers “on behalf of Europe” in Luxembourg rather than at home before an ordinary tribunal.⁴³ He was adjudged guilty and put to death before a firing squad.⁴⁴

Yet, this awful fate would not befall either Bonaparte or the Kaiser a mere hundred years later. Instead, Napoleon fell upon the mercies of the British and, without any semblance of trial or prosecution, was banished to St. Helena to spend the remainder of his days in isolated exile. And despite assurances following World War I that the Kaiser would be prosecuted, he was spared trial and permitted to exist in exile peacefully in Holland. Although a domestic trial was considered in each instance, the French made it quite clear that they were incapable of trying Bonaparte and the Allies feared he might again, if given over to French custody, escape.⁴⁵ And, the Dutch believed that maintaining the peace by permitting the Kaiser to remain in exile was more important than fulfilling the prosecution promise in the Treaty of Versailles. Thus, the solution of exile succeeded as the lowest common denominator among the Allies. Twice. No execution. No trial. Exile.

One hundred and four years after the end of the Napoleonic Wars, in 1919, the British government found itself thinking through the fate of Wilhelm II by reconsidering what it had done to Napoleon Bonaparte. . . . In meetings of the Imperial War Cabinet and in inter-Allied conferences, the fate of Napoleon came up repeatedly.

What had changed since 1815? In most regards, the way the Allies had dealt with the Bonapartists [sic] was in line with realism. Enemies were treated as enemies, no more and no less. Wellington did not see his opponents as war criminals. Nor was he much concerned with legal niceties like trials. British leaders did not even discuss putting Napoleon before an international tribunal before whisking him off to Elba and to St. Helena.

This is a far cry from Nuremberg. The great powers knew they wanted to dispose of Napoleon, and they were willing to use extralegal methods to do so. Napoleon did not have the benefit of anything like the stern insistence of George Clemenceau or Henry Stimson or (maybe) Madeline Albright that enemy leaders were also war criminals who had to be put on trial, not merely gotten rid of as undesirables. In short, 1815 largely saw the exercise of naked state power. In that sense, the aftermath of the Hundred Days makes the aftermaths of the Armenian genocide, World War I and World War II all the more

42. *Id.* at 47.

43. *Id.* at 48.

44. *Id.*

45. *Id.* at 52-53.

*striking. They did not both with a trial for Napoleon in 1815; and yet they were obsessed with trials a century later.*⁴⁶

In truth, as the following section reveals, these later obsessions are not actually with trials themselves as much with the ideals that trials promote. Peace and stability, it is perceived, is best solved through prosecution and punishment. Yet, given the first opportunity to turn to an international tribunal in 1919, the Allied governments promised a justice they were unwilling to deliver.⁴⁷

The Allies, in the Treaty of Versailles, unequivocally asserted they would prosecute Kaiser Wilhelm II. However, the Kaiser fled to neighboring Holland and was protected by the Dutch government. The end of World War I resulted in a peace treaty explicitly promising to prosecute the defeated head of state. Yet, the prosecution never happened. At this point, the idea of prosecution still did not triumph over the cleaner option of exile. The promise was for prosecution. The reality was continued exile. Claims that the treatment of Napoleon led modern humanity directly to a process of prosecution ignore all too readily the truth of Leipzig and the legacy of abandoned prosecutions.

46. *Id.* at 37 (emphasis added). While Bass asserts that the Allied forces did not resort to an international tribunal for Bonaparte, a French trial was considered and proposed by the British. But, as set forth above, the French, themselves, did not think a domestic trial provided a feasible undertaking under the nascent regime.

47. Paust, *supra* note 10, at 208-09 (Professor Paust explains that the issue of head of state immunity was deliberated and decided in the 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the Paris Peace conference:

Importantly, the Report stated a “desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental.

....

In view of the grave charges which may be preferred against – to take one case – the ex-Kaiser – the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished.)

C. Empty Promises of Prosecution – From Leipzig to Leipzig

*C'est plus qu'un crime, c'est une faute*⁴⁸

Napoleon's defeat during the battle of Leipzig led to his initial exile off the coast of Tuscany on a small island, Elba.⁴⁹ Because Napoleon easily escaped his limited captivity on Elba, many view this attempted exile as a failure. It is quite fitting then, to recognize that the next noteworthy failure in international criminal justice also took place at Leipzig.

The empty promises of prosecution began with the Treaty of Versailles where in Article 227 the international community was assured:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence [sic]. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

Yet, the Emperor was never surrendered and the pledge set forth in Article 227 never fulfilled. Accordingly, one of the main provisions of the peace treaty ending World War I rang hollow and no justice was attempted. Perhaps this is the first evidence of a political compromise where peace was valued over justice. However, as becomes quite obvious years later, peace was not sustained.

In the mid-1940s, the world witnessed horrific acts of warfare aimed not only at military enemies but also at civilian populations. World War II ushered in many remarkable events: Pearl Harbor, the Bataan death march, the rape of Nanking, the concentration camps of Germany and Poland, the fire-bombing of London and the

48. THE MERRIAM-WEBSTER DICTIONARY 820 (1974) ("it's worse than a crime, it is a blunder").

49. The Battle of Leipzig, also known as the Battle of Nations, ended in October 1813.

atomic bombing of Hiroshima and Nagasaki. All of these tragedies resulted in humanitarian cries of “never again.” To secure this vow, the Allied forces established two separate and distinguishable war crimes tribunal. The first tribunal, the International Military Tribunal at Nuremberg, was established in Germany by the Allied forces of the United States, Great Britain, the Soviet Republic and France.⁵⁰ Each of these four countries provided a judge and an alternate for the tribunal, none of which could be challenged by the defendants.⁵¹

The Nuremberg Tribunal had jurisdiction over the “crime against peace”⁵² (i.e., waging a war of aggression), “war crimes,”⁵³ and “crimes against humanity.”⁵⁴ In

50. Charter of the International Military Tribunal art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Statute] (Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of the major war criminals of the European Axis. The Constitution of the International Military Tribunal provided in Article 1 as follows:

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis).

51. *Id.* at art. 2 (Article 2 of the Nuremberg Statute provided that “[t]he Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories.”); *Id.* at art. 3 (Article 3 of the Nuremberg Statute provided that “[n]either the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel.”).
52. *Id.* at art. 6(a) (announcing that crimes against peace included “namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”).
53. *Id.* at art. 6 (b) (Article 6(b) defined war crimes as follows:

[N]amely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deporation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity).

54. *Id.* at art. 6(c) (Article 6(c) provided that crimes against humanity included:

[N]amely, murder, extermination, enslavement, deportation, and other inhumane acts

addition, Article 6 provided a catch-all conspiracy charge holding that “leaders, organizers, instigators and accomplices participating” in planning or executing of any of the foregoing crimes could likewise be held individually responsible.⁵⁵ The most notable provision, however, was the clear language permitting prosecution against any individual regardless of their official position.⁵⁶ Article 7 admonished that “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”⁵⁷ This one provision apparently established the template for modern decisions involving Hussein, Milošević, Karadžić and Charles Taylor. Article 7 is believed by many to be the beginning of the end of head of state immunity. However, this belief is neither logically tenable nor historically supportable. In truth, no head of state was prosecuted at Nuremberg. And on the other side of the world, in Asia, the opportunity to actually prosecute the vanquished Emperor of Japan was deliberately sacrificed by the Allies.

Nuremberg’s Article 7, and its historical significance, must be tempered by its incongruity with the Charter of the International Military Tribunal for the Far East (IMTFE) governing the Tokyo Tribunal – a contemporary World War II tribunal. General Douglass MacArthur was placed in charge of creating a sister court for East Asia to account for the many atrocities committed by Japan during the war.⁵⁸ While the crimes encompassed by the IMTFE Charter are essentially identical to those covered by the Nuremberg statute,⁵⁹ the main deviation appears in Article 6

committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated).

55. Nuremberg Statute art. 6.

56. *Id.* at art. 7.

57. *Id.*

58. Special Proclamation, Establishment of an International Military Tribunal for the Far East, Charter of the International Military Tribunal for the Far East at art. 2, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter IMTFE Charter] (Article 2 of the IMTFE Charter provides that “[t]he Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India and the Commonwealth of the Philippines.”).

59. IMTFE Charter, at art. 5 (Article 5 of the IMTFE Charter provides the tribunal with the power to try and punish Far Eastern war criminals who are charged with offenses including crimes against peace, conventional war crimes and crimes against humanity. In addition, conspiracy to commit any of the three listed crimes was punishable.).

discussing the role of a defendant's position in evaluating guilt and punishment. In stark contrast to Article 7 of the Nuremberg statute, Article 6 of the IMTFE Charter establishes that "[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."⁶⁰

One cannot ignore the extraction of the phrase "whether as Heads of State" by General MacArthur in the construction of the Tokyo tribunal. Unlike the situation in Germany where Hitler has committed suicide and Mussolini had been hung in Italy, Emperor Hirohito was in full control of Japan and, in fact, delivered a radio address informing his nation of surrender on August 14, 1945. Historical evidence now reveals that the excise of head of state language was deliberate and intended to shield Emperor Hirohito of Japan not only from prosecution, but also from any involvement in the IMTFE. Thus, the only real opportunity to address head of state immunity during World War II was intentionally avoided and diminished the true power of either tribunal to establish legal precedent for prosecuting heads of state.

D. The Case of the Emperor

*J'y suis, j'y reste*⁶¹

Little is mentioned regarding the conspicuous choice by the Allied forces to protect the Japanese Emperor from facing justice.⁶² Rather, scholars and lawyers

60. IMTFE Charter, at art. 6.

61. THE MERRIAM-WEBSTER DICTIONARY 823 (1974) (Literally translated is "here I am, here I remain").

62. THE OTHER NUREMBERG. ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987) at 19 (chronicling much of the Tokyo Tribunal, little is mentioned in contemporary writings about the Tokyo Tribunal, this excellent book is openly "puzzled [by] the fact that hardly anyone today remembers [the Tokyo Tribunal] or attaches much importance to it. The names of the war criminals are for the most part forgotten. So are their deeds."); *Id.* (In further underscoring the paucity of contemporary reference made to the Tokyo Tribunal, Brackman continues:

Some people dimly recall a handful of Japan's atrocities during World War II: the Rape of Nanking, the Bataan Death March, the POWs and other slave laborers building the Siam-Burma Death Railway, including the bridge over the River Kwai. But who

speak confidently of customary international law and the Nuremberg precedent without even so much as casually observing that, much like Kaiser Wilhelm before him, the duty to prosecute the architect of Japan's war was intentionally avoided. And although the early trials of Charles I and Louis XVI challenged and purportedly defiled the divinity of their respective monarchies, no justification was given – neither implicitly nor explicitly – for choosing to forego prosecution of the Emperor.⁶³ In fact, the Allies hoped that by forcing the Emperor to accept an unconditional surrender, the humanity of the Emperor would be revealed and his perceived divine powers minimized.

Herbert Bix has provided the most thorough account of Emperor Hirohito and the Allied decision to grant him immunity before the IMTFE.⁶⁴ Initially, the Soviets made clear their plan to prosecute the Emperor as a war criminal.⁶⁵ Australia alone joined the Soviets in this design, but neither the United States nor the British were prepared to indict the Emperor.⁶⁶ Instead, in preparing a short list of thirty suspects to be tried for crimes against the peace, the United States failed to name Hirohito.⁶⁷ Likewise, the British, who named only a scant eleven suspects, conspicuously omitted Hirohito's name from consideration.⁶⁸

Only the Australians followed the language of the Charter's mandate by including Hirohito among a "provisional list of 100" desired indictees.⁶⁹

The Australians also furnished a detailed memorandum supporting the charges against the Emperor. Never "at any time," it stressed, was Hirohito "forced by duress to give his written approval" to any aggressive military action. The memorandum asked rhetorically, "[I]s his crime not greater because he approved of something in which he did not

remembers the mass murder of 18,000 Filipino men, women, and children in the town of Lipa? Or the murder of 450 French and Vietnamese POWs at Langson, Vietnam, where the Japanese first machine-gunned them in the legs and then dispatched the squirming targets in a bayonet drill? At the trial we heard so many horrifying statistics that after a while they became meaningless).

63. *Id.* at 86 (While the lead IMTFE prosecutor, Keenan, argued at the time of the Tokyo Tribunal that the Emperor was but "a figurehead," later comments belie this position – and, even the belief); *Id.* (In fact, following the trial, Keenan admitted that the Allies "gave a good deal of thought" to indicting the Emperor because "strictly legally Emperor Hirohito could have been tried and convicted because under the Constitution of Japan he did have the power to make war and to stop it"); *Id.* (As Brackman points out, "[t]hat, of course, was the Australian argument when it demanded that the [Allies] indict Hirohito").

64. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* (2000).

65. *Id.* at 584.

66. *Id.* at 592.

67. *Id.*

68. *Id.*

69. *Id.*

believe?”⁷⁰

In critiquing the deliberate decision to immunize the Emperor, Bix contends:

A serious distorting effect on the selection of the Tokyo defendants, and later on the trial itself, arose from the overwhelming U.S. military and economic domination of the Asia-Pacific region, and from MacArthur's excessive power. But above all, distortions stemmed from the subordination of international law to *realpolitik* by all the Allied governments. Those governments tended to rank their national interests first, law and morality second. So did Hirohito and his advisors, working covertly behind the unfolding legal drama.

Thus the Soviet delegation, on instructions from Stalin, chose to follow the leader and call for Hirohito's indictment only if the Americans did. The representatives of the only three Asian countries that participated in the tribunal – China, the Philippines, and India – also sought to avoid conflict with American policy as much as possible and to pursue their own lines of inquiry.⁷¹

These decisions made by the Allied nations mirrored the political decision to afford Kaiser Wilhelm *de facto* immunity following World War I. One of the first policy documents forwarded to MacArthur from Washington instructed MacArthur to “take no action against the Emperor as a war criminal.”⁷² General MacArthur's maneuverings in affording Emperor Hirohito immunity from prosecution included denying the prosecution any right to interrogate the Emperor and granting full assurance that Hirohito would neither be required to give testimony before the Tribunal nor be asked to surrender his personal papers.⁷³

While the Allied commanders and prosecutors shielded the Emperor from criminal accountability, the IMTFE judges were more circumspect. Judge Webb,

70. BIX, *supra* note 64, at 592.

71. *Id.* at 593 (emphasis in original).

72. *Id.* at 587 (The policy document – SWNCC 57/3 – gave numerous restrictions upon what the prosecutors could do, reserved for MacArthur alone the power to alter and reduce punishments, and specifically relegated decisions regarding the Emperor to Washington); *Id.* (As Bix astutely notes:

The supreme commander was to operate under orders from Washington and at the same time be an international civil servant, the representative of those Allied Powers who had signed the instrument of surrender and would now be asked to send judges and prosecutors. MacArthur's dual role and the way he played it added to the complexity of the ensuing trial. It blurred the nature of the tribunal's authority, and made it inevitable that the defense would claim that the Tokyo trial was, *de facto*, an American proceeding).

73. *Id.* at 596 (indicating that Keenan, the lead prosecutor, “denied the prosecution the right to interrogate Hirohito; he also determined that Hirohito would neither give testimony as a witness nor be asked to provide his diary or other private papers”).

in a separate concurring opinion, openly criticized the Allies' failure to indict and prosecute Hirohito.⁷⁴ "Webb observed that the prosecution's evidence had proved 'beyond question' the authority of the emperor when he had done what the atomic bombs could not: stop the war. Webb also believed the emperor had a hand in starting the war."⁷⁵ In explicitly referencing the immunity Webb believed had been expressly granted to the emperor, he noted Hirohito's immunity "was, no doubt, decided upon in the best interests of all the Allied Powers."⁷⁶ While exclaiming that the decision to shield Hirohito from prosecution was "beyond his province," Judge Webb labeled the Emperor "the leader in the crime."⁷⁷

The French judge, Henri Bernard, also wrote a dissenting opinion challenging the Allies' partiality in protecting the Emperor from appearing as a criminal defendant to answer for his alleged war crimes.⁷⁸ In contrast, Judge Rolig of the Netherlands and Judge Pal of India both embraced the favorable bias shown toward Hirohito.⁷⁹

In the end, despite the clarity in language and the intrinsic promise that no individual would be immune from prosecution, Emperor Hirohito was granted full and express immunity before the IMTFE.⁸⁰ Thus, the spotlight continues to shine myopically on Nuremberg as the starting point for the eradication of head of state immunity. Yet, the contemporaneous tribunal – where the only head of state was available for prosecution – opted for immunity over justice, peace over prosecution.

Intellectual honesty demands that scholars and judges confess that neither the Nuremberg Tribunal nor the Tokyo Tribunal provided any evidence that head of state immunity had been legally eviscerated. In Japan, the Allies saw nothing advanced by the prosecution of the Emperor. While local papers challenged that "the emperor . . . cannot continue to conceal his responsibility for war crimes" and called for his abdication, the Allies were content with having him securely in place to help pursue the peace.⁸¹ Accordingly, head of state immunity remains a

74. *Id.* at 610.

75. BRACKMAN, *supra* note 62 at 387.

76. *Id.*

77. *Id.*

78. BIX, *supra* note 64 at 610.

79. *Id.* at 610-11.

80. Ruth Wedgewood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (1999). (explaining how "General Douglas MacArthur said that he would need another million soldiers for the occupation of Japan if he tried to displace Emperor Hirohito.")

81. BRACKMAN, *supra* note 62 at 395, 111 (revealing a secret agreement between President Truman and General MacArthur to "keep the emperor clear of any personal involvement in

politically infused issue and may still be available to those seeking refuge in a friendly nation or accepting the proffer of exile to avert military occupation. The case of Hirohito supports the claim of immunity in exchange for peace and stability, perhaps at the cost of justice.

III. The Legal Tautology

*Post hoc, ergo propter hoc*⁸²

In defending its own Charter and the power to try war criminals, the Nuremberg Tribunal relied on the Kellogg-Briand Pact of 1928 as outlawing aggressive war. In addition, in creating a legal house of cards that has intriguingly withstood the test of time, the Tribunal came to the determination that the Tribunal was lawful by relying on the Hague Convention of 1907, which it claimed prohibited certain methods of waging war; relying on the League of Nations Protocol for the Pacific Settlement of International Disputes, a document the court immediately confesses was never ratified; relying on Article 227 of the Treaty of Versailles, the article that indicted the Kaiser, without securing his prosecution, and called for the creation of a special tribunal, which was never carried out; relying on Article 228 of the Treaty of Versailles which allegedly created the right of Allies to try German war criminals, a provision that was not enforced with any vigor or consistency; and, “the customs and practices of states.”

Much like modern reliance on Nuremberg for formulation of the right to prosecute heads of state, the Nuremberg Tribunal’s reliance on the varied sources for establishing proof of its right to proceed is logically flawed. This tautology has spurred the greater tautology that because “it happened at Nuremberg,” we have precedent that we can resort to today. The “it” that many modern courts erroneously contend “happened” is the abolition of head of state immunity due to the literal language of Article 7 of the Nuremberg Charter. Yet, there is an obvious disconnect between the literal language of the Nuremberg Charter and the actual practices of the Tribunal. As was developed more fully above, the Allied practices did not match the language, and the only available head of state, Emperor Hirohito, was intentionally granted full immunity by the Allied forces. The barren words that are carelessly credited to Nuremberg as establishing guiding principles for

the trial”). (Move footnote to the end of the sentence).

82. THE MERRIAM-WEBSTER DICTIONARY 826 (1974) (“after this, therefore on account of it”).

modern assessments of head of state immunity are ignored with equal equanimity by those who forget that what Nuremberg established, Tokyo took away – both in words and action.

What remains disturbing is not so much that undue and improper reliance is placed upon Article 7 of the Nuremberg Charter, but that the error has yet to be rectified by later treaties and conventions. In all the international documents embraced by the world community, only the Genocide Convention unambiguously erases head of state immunity for the crime of genocide. Article IV of the Genocide Convention explicitly states 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.”⁸³ The Torture Convention that was heavily consulted during the Pinochet proceedings and, ultimately, provided the limited framework for the legal opinion regarding immunity does not plainly apply to heads of state. Rather, much like the Nuremberg Tribunal’s opinion defending its powers, the House of Lords patched together a quilt of legal concepts and treaties that permitted the sum total to justify the disconnected parts. And, even following the Pinochet decision, no treaty or convention has been authored that squarely addresses the issue of head of state immunity.

Instead, we await the vanquished and the “cedant armatage.”⁸⁴ The three clearest statements regarding head of state immunity that currently exist are found in the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the nascent International Criminal Court (ICC). Each of these United Nations-supported juridical institutions prohibits a person’s status as a head of state from serving as a basis of immunity. The identical language of ICTY and ICTR statute proclaim: “[t]he 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.”⁸⁵

83. Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, December 9, 1948, 78 U.N.T.S. 277 available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm (Article III, referenced in Article IV, outlaws genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide).

84. THE MERRIAM-WEBSTER DICTIONARY 820 (1974) (“let arms yield to the toga”). This phrase is often used to admonish that we must let military power give way to civil power.

85. Statute of the International Criminal Tribunal for the Former Yugoslavia, The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council*

Likewise, the Rome Statute governing the nascent ICC provides in Article 27(1):

This 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.⁸⁶

While the language of Article 27 explicitly mentions “Head of State” capacity, Article 28 provides further clarity by informing that any *domestic* immunity or special procedural rules that might otherwise exempt an individual from prosecution have no bearing on jurisdiction before the ICC.⁸⁷

Still, these tribunals were not formed during times of quiet reflection or peaceful transitions. While the ICC can be loosely claimed as being established by the will of the international community during a time of peace, the ICC was undoubtedly a by-product of the civil wars raging in Sierra Leone, the Congo, Mozambique and the genocide in the Sudan. In contrast, the ICTY was formed during the on-going war in the former Yugoslavia as an intended deterrent to further illegal conduct. The deterrent failed. Lastly, the controversial ICTR, which was opposed by Rwanda, was established after the ICTY and after the international community refused to act to avert the containable genocide that eventually engulfed and decimated Rwanda. These ad hoc tribunals were born of war and, yet, have thus far failed to beget peace in their respective regions.

Despite the criticism occasionally levied against the ICTY and the ICTR, these are the only two international bodies that have successfully indicted *and* prosecuted heads of state. The ICTR was the first international tribunal to indict, prosecute and punish a former head of state, Jean Kambanda of Rwanda, for genocide. Kambanda pled guilty to the charges and is currently serving a life sentence in a Mali prison. The ICTY actually indicted Milošević while he was still a sitting head of state, but was unable to secure his arrest until after he was

Resolution 808 (1993), art.7, U.N. Doc. S/25704, Annex at 36 (1993) and S/25704/Add.1 (1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), 32 I.L.M. 1192 available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf [hereinafter ICTY Statute] and Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6 para. 2, Annex, U.N. Doc. S/RES/955 (November 8, 1994) available at <http://unictr.org/ENGLISH/basicdocs/statute/2007.pdf> [hereinafter ICTR Statute].

86. Rome Statute of the International Criminal Court art. 27 §1, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

87. *Id.* at art. 27 para. 2.

politically defeated and threats of cutting off monetary aid motivated his countrymen to surrender him to The Hague. Unfortunately for humanity, Milošević died during his trial and, thus, there is no legal determination of his guilt and no satisfaction of a legal punishment. But with the recent arrest of Radovan Karadžić and his transfer to The Hague the ICTY still provides hope that a head of state will be successfully prosecuted by the ICTY.

It is upon this parchment, Article 7 of the Nuremberg Charter, Article 6 of the IMTFE Charter, Article 7 of the ICTY, Article 8 of ICTR and Article 27 of the ICC, respectively, that we must continue to engrave norms. The words of the United Nations' first two ad hoc tribunals are barely dry as we encounter a burgeoning of additional ad hoc tribunals: an international tribunal for Cambodia, the Special Court for Sierra Leone⁸⁸ and the Iraqi Special Tribunal. Many of these recent undertakings emulate the predecessors, including the provisions relating to head of state immunity.⁸⁹ If the words are to have more meaning than those proffered following World War I and World War II, state practice must match our lofty pronouncements.⁹⁰ We prosecuted Kambanda. We tried Milošević. We executed Hussein. We are trying Taylor, Karadžić and maybe even Al-Bashir. Has the tide finally begun to turn?

88. Statute for the Special Court of Sierra Leone, The Secretary General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (2000) art. 6, U.N. Doc S/2000/915, Annex, (October 4, 2000) available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/661/77/pdf/N0066177.pdf?OpenElement> [hereinafter Sierra Leone Statute]. Article 6 of the Sierra Leone Statute provides that:

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

This proscription is a verbatim copy, in all pertinent parts, of Article 7 of the ICTY Statute. In fact, the Sierra Leone statute is a near duplicate of the ICTY statute – with a few distinctions based largely on the distinctive hybrid nature of the Sierra Leone effort.

89. *See generally, id.*
90. *See* The Principles of International Law Recognized in the Charter and the Judgment of the Nurnberg Tribunal, Texts and Comments, [1950] 2 Y.B. Int'l L. Comm'n 181, 191- 192, U.N. Doc. A/CN.4/22 [hereinafter The Nuremberg Principles] (The Nuremberg Principles, which were prepared by the International Law Commission following the Nuremberg Tribunal and the IMTFE at Tokyo include a principle relating to head of state immunity. The third Nuremberg Principle states as follows: "The 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.").

IV. Lack of Custom, Lack of Consistency

*Exitus acta probat*⁹¹

On May 1, 2006, the Washington Post's lead article was titled, "*Beyond the Axis of Evil, a World of Bad Guys*." One of the stories discussing numerous "rogue leaders," challenged that "[t]here are many more Charles Taylors."⁹² One of the leaders targeted in the article as one of the "sub-Saharan Africa, rapacious despots with bloody hands [that] traditionally die in office or retire to luxurious exile," was Robert Mugabe of Zimbabwe.⁹³ While the article speaks of Mugabe's "despotic rule," nothing is said regarding the United States' express granting of immunity to Mugabe when he was sued in United States federal court.⁹⁴

Mugabe is not the first and, undoubtedly not the last, head of state to be graciously protected by the United States – despite the principles of universal jurisdiction and other treaty obligations.⁹⁵ In fact, all former heads of state that have come before American courts have been granted immunity by the Executive Branch in every case where the United States recognized the individual as the legitimate leader of the country. Two exceptions are the cases of Manuel Noriega and Radovan Karadžić, neither of whom was granted immunity because neither was considered by the U.S. State Department to be a legitimate head of state.⁹⁶ And, equally noteworthy, Noriega was tried on drug charges and *not* on charges of murder or other human rights violations.⁹⁷ Thus, the anomalous decisions involving Noriega and Karadžić can be easily discarded as cases where the United States did not embrace either as a legitimate head of state. Noriega's case *does not* support the position that the court in his case found that head of state immunity is generally inapplicable or inaccessible. Rather, the Noriega precedent stands for

91. THE MERRIAM-WEBSTER DICTIONARY 821 (1974) ("the event justifies the deed").

92. Douglas Farah, *African Pillagers*, WASH. POST, April 23, 2006, at B1. (see source for fn 107).

93. *Id.*

94. *Tachiona v. United States*, 386 F.3d 205 (2nd Cir. 2004).

95. *See Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

96. *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

97. *Id.* at 1511 (As the court noted, Noriega was "the first time that a leader or de facto leader of a sovereign nation has been forcibly brought to the United States to face criminal charges." *Id.* Recounting the circumstances of arrest, the court explained that Noriega "was flown by helicopter to Howard Air Force Base, where he was ushered into a plane bound for Florida and formally arrested by agents of the Drug Enforcement Agency").

the much more narrow position that while the United States *does*, in fact, recognize head of state immunity, the United States *chose* not to recognize the applicability of the doctrine in *this* case.

In explaining its ruling, the court simply noted:

In order to assert head of state immunity, a government official must be recognized [by the United States] as a head of state. Noriega has never been recognized as Panama's Head of State either under the Panamanian Constitution or by the United States.

... More importantly, the United States government has never accorded Noriega head of state status, but rather continued to recognize President Eric Arturo Delvalle as the legitimate leader of Panama while Noriega was in power.⁹⁸

The court refused Noriega's invitation to grant him head of state immunity based on his *de facto* status as Panama's head of state.⁹⁹ Fearing that such decision could "allow illegitimate dictators the benefit of their unscrupulous and possibly brutal seizure of power," the court continued to rely solely upon the Executive Branch's decision regarding immunity.¹⁰⁰ The issue, the court underscored, was solely one of recognition – not one affected or otherwise constrained by the broader principles of international law.¹⁰¹ In short, the court easily summarized its position: "since the United States has never recognized General Noriega as Panama's head of state, he has no claim to head of state immunity."¹⁰² At least domestically in the United States, the issue of head of state immunity is driven by a single indicator: recognition by the Executive Branch.¹⁰³

Why, then, do so many herald the Noriega decision as one eradicating head of state immunity? Noriega is clearly not a case where the head of state issue was properly at issue because an Executive decision took this option away.¹⁰⁴ The issue *was not* whether head of state immunity, as a general matter, was available, but rather, whether in *this particular case* where the United States did not *recognize* Noriega as the legitimate head of state such defense was available to him. The most striking feature of Noriega's case should be not that Noriega was eventually tried in the United States for drug crimes, but rather, that the United

98. *Id.* at 1519.

99. *Id.* at 1520.

100. *Id.* at 1520-21.

101. *Id.* at 1520 (emphasis added) ("Indeed, deference to the Executive branch in matters concerning relations with foreign nations is the *primary* rationale supporting immunity for heads of state.").

102. Noriega, 746 F.Supp. at 1521.

103. Tachiona, 386 F.3d at 213.

104. Noriega, 746 F. Supp. at 1521.

States—in cases involving the United States—does not relegate such decisions to international treaties or customary international law. Instead, as recognized in *Tachiona*, the decision of the Executive, often controlled by political calculations, will be *legally* determinative.¹⁰⁵ If recognized as a head of state, head of state immunity applies.

V. Explaining the Exceptions – Recent Cases

*Exceptio probat regulam de rebus non exceptis*¹⁰⁶

Charles Taylor “fell where others have not because he picked a fight with the international community. And still it took years to bring him to justice, as he benefited from the indifference of world leaders obsessed with other threats.”¹⁰⁷ These same words can be used to describe the falls of Milošević, Karadžić and Saddam – two of whom required military action and its attendant civilian casualties to bring them, ultimately, into the dock. The arrest and transfer of Radovan Karadžić took nearly thirteen years following his initial indictment. Most recently, an arrest warrant was issued by the International Criminal Court for Omar Al-Bashir, the Sudanese leader. Whether Al-Bashir will ever be apprehended or prosecuted is uncertain, at best. Unlike Milošević, Karadžić, Taylor and Hussein, Al-Bashir remains a very popular and powerful leader. More than those preceding him, an actual arrest and prosecution of a sitting head of state such as Al-Bashir could signal, truly, a sea change in the prosecution of heads of state.

For as many dictators as remain comfortably constrained in their respective exiles, there are the sporadic prosecutions of but a few. In truth, prosecution is the exception and by no means the rule. And to the extent prosecution occurs it is nearly always *after* the leader has been ousted or stepped down.

A. *The United States*

The United States displays one of the most schizophrenic approaches toward head of state immunity. While the United States supports, both financially and in principle, the ICTY and ICTR approach and, at least in the abstract, third-state

105. *Id.*

106. THE MERRIAM-WEBSTER DICTIONARY 821 (1974) (“an exception establishes the rule as to things not excepted”).

107. Farah, *supra* note 93, at B1.

prosecutions like the case against General Pinochet, and Saddam Hussein before the Iraqi Special Tribunal, the United States does not defer to *any* international treaty to resolve its internal decisions regarding immunity.¹⁰⁸ And, unlike many peer nations, the United States is not motivated by the Rome Statute. Instead, in the United States, the issue of head of state immunity is *wholly* relegated to the Executive Branch of government and determinations made by the Executive will not be reconsidered or otherwise evaluated by the judiciary.¹⁰⁹

Thus, were Augusto Pinochet to have been arrested in the United States, the two determinative factors regarding his claim of immunity would have been whether: (1) the Executive wanted to bestow Pinochet the privileged status immunity affords and (2) whether Chile wanted to preserve his “immunity for life” status. The recent case of Robert Mugabe, the Zimbabwean President – decided in the United States nearly five years *after* the Pinochet decisions – seemed entirely unaffected by the international praise accorded Britain and its House of Lords for their empty efforts in seeking to prosecute Pinochet.¹¹⁰ The civil case against Mugabe, filed under the Alien Tort Claims Act and the Torture Victim Protection Act, was based on claims of torture, assault, execution and other acts of violence.¹¹¹ The district court dismissed the case against Mugabe based on head of state immunity.¹¹²

On appeal before the Court of Appeals, the Second Circuit avoided the question of head of state immunity by relying on the more narrow decision of the district court that Mugabe received diplomatic immunity.¹¹³ Expressing “some doubt as to whether the [Foreign Sovereign Immunity Act] was meant to supplant the ‘common law’ of head-of-state immunity, which generally entail[s] deference to

108. *Aristide*, 844 F. Supp. 128, at 131-132 (The court explains the state of United States’ law in this area as follows:

A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States);

See also Noriega, 746 F. Supp. at 1519 (observing that “recognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch and thus *conclusive upon the courts*”) (emphasis added).

109. *Noriega*, 746 F. Supp. At 1519-20 (citations omitted).

110. *See generally Tachiona*, 386 F.3d 205.

111. *Id.* at 209

112. *Id.* at 210 (“The [district] court concluded that the executive branch’s suggestion of immunity, not the [Foreign Sovereign Immunity Act], governed immunity for heads of state, and that the suggestion [by the Executive in favor of immunity] mandated dismissal of the claims against Mugabe.”).

113. *Id.* at 220-21.

the executive branch's suggestion of immunity," the Circuit Court carefully avoided a definitive response to the question.¹¹⁴ By refusing to address the head of state issue, we must rely on prior precedents that unequivocally hold – including the district court opinion in this case – that a suggestion by the Executive Branch regarding immunity is dispositive.¹¹⁵ The only exceptions appear to be instances where the Executive does not recognize the individual as the legitimate head of state.

Head of state immunity is secured by the United States government on behalf on an individual simply by filing a "suggestion of immunity" – an obvious misnomer since the suggestion is non-assailable and non-justiciable.¹¹⁶ Title 28 U.S.C. § 517 empowers the Executive, acting through the Department of Justice, to file "suggestion of immunity" letters that will be binding upon the court.¹¹⁷ An example of such letter was filed on behalf of Jean-Bertrand Aristide in a civil action based on an alleged extrajudicial killing. The suggestion of immunity letter explains:

The United States has an interest and concern in this action against President Aristide insofar as the action involves the question of immunity from the Court's jurisdiction of the head-of-state of a friendly foreign state. The United States' interest arises from a determination by the Executive Branch of the Government of the United States, in the implementation of its foreign policy and in the conduct of its international relations, that permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests.¹¹⁸

The United States was apparently not governed, nor motivated, in the *Aristide* case by its obligations under the Torture Convention or other international treaty. Neither was the American government persuaded by any nascent state practice or customary international law. Further, President Aristide's home government, Haiti, had attempted to waive the grant of immunity on his behalf and had issued an arrest warrant against him that the United States court ignored.¹¹⁹ Ignoring

114. *Id.*

115. *Id.* at 220 ("The district court held that Mugabe . . . was also entitled to immunity from suit as head of state[] because the Government had filed a suggestion of head-of-state immunity on [his] behalf, which, in the court's view, was dispositive.").

116. See generally *Noriega*, 746 F. Supp. at 1519-1520 (and applicable cases cited therein); See also *Aristide*, 844 F. Supp. at 131.

117. 28 U.S.C.S § 517 (LexisNexis 2008) (provides in pertinent part: any officer of the Department of Justice may be sent by the Attorney General to . . . any district in the United States to attend to the interests of the United States in a suit pending in a court in the United States).

118. *Aristide*, 844 F. Supp. at 131.

119. *Id.* at 133-34.

Haiti's claims of waiver, the court explained that such determinations by Haiti "cannot affect the court's treatment of the suggestion of immunity. The court must rely on the Executive's determination of who is a lawful head-of-state."¹²⁰ The decisive fact in Aristide's case, as in both the cases of Noriega and Mugabe, was that the United States government did not recognize the new military rulers of Haiti and continued to act as though Aristide was the President of a country that he had fled.¹²¹ Thus, in the United States, the question of whether head of state immunity will provide a defense in a particular case is wholly relegated to the political decision of the Executive Branch. The United States does not demonstrate any willingness, at this point, to be influenced by principles of international law.

B. The Pinochet Precedent

The Pinochet case decided by the English House of Lords, eagerly received as a legal awakening regarding head of state immunity, unfortunately, does not provide the legal epiphany many desired.¹²² The Pinochet case is *not* a case about universal jurisdiction. It *did not* abrogate head of state immunity generally or even in most cases. Rather, the Pinochet case is properly considered *sui generis* and might never bring the world any closer to the promise of "never again" than Nuremberg did. To rely on the Pinochet precedent as a complete transformation of sovereign immunity either ignores the decisions handed down by the House of Lords or approaches the subject with an expectation that the legal basis of the decision is less relevant than the conclusion reached.

120. *Id.* at 134.

121. *Id.* at 134 (The decision for immunity is summarized by the court as follows:

The United States . . . does not recognize the *de facto* military rulers of Haiti. It has repeatedly condemned their regime Because the United States does not recognize the *de facto* government, that government does not have the power to waive President Aristide's immunity).

122. See, e.g., Adam Isaac Hasson, Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law, 25 B.C. INT'L COMP. L. REV. 125, 154 (2002) (In sanguine fashion, Mr. Hasson writes that, "[t]he Noriega and Pinochet cases, along with the indictment levied against Milosevic, have limited dramatically the immunity that former heads of state can claim for criminal activity, and also illustrate the international community's willingness to maintain jurisdiction over criminal acts conducted abroad by such state officials.").

But the truth regarding the Pinochet decision is that the case provides a very limited precedent for future cases.¹²³ And if other countries and courts wanted to rely upon the decision to spur a new direction, more consistent state practice would be necessary. The Pinochet decision – as set forth by the English courts – requires dual criminality as a basis for eradicating head of state immunity. Further, the basis of the decision was *not* whether head of state immunity existed, but whether head of state immunity had been abrogated via waiver by Chile’s ratification of the Torture Convention. The House of Lords decision relied on the statutory construction of the Torture Convention and *not* on notions of customary international law. Thus, while the cacophony of voices proclaims “victory” over head of state immunity, this author feels compelled to admonish, “not so fast, my friend.”¹²⁴ Let us not be blinded by our noble aspirations – that a single, unique case has completely transformed the legal landscape. Instead, we should honestly evaluate the current doctrine and patiently attempt to build upon a tangible and sound legal foundation.

In approaching the Pinochet case, this author is admittedly a “proceduralist.”¹²⁵ “[P]roceduralists’ consider justice to be a system of legal decision-making that, while adjudicating cases individually, fits within a greater framework of systematic accountability that is non-discriminatory in its reach, sustainable in its force, and ultimately successful in deterring future criminal behavior.”¹²⁶

Until we have a more consistent and non-discriminatory state practice *and* a more secure doctrine regarding head of state immunity, victory should be

123. See Shahram Seyedin-Noor, *The Spanish Prisoner: Understanding the Prosecution of Senator Augusto Pinochet Ugarte*, 6 U.C. Davis J. Int’l L. & Pol’y 41, 101 (2000) (With more guarded optimism than most, the author exclaims:

The House of Lords’ decision denying Senator Pinochet immunity *ratione materiae* for allegations relating to the crime of torture is a monumental step towards the recognition of fundamental human rights, and their enforcement, within domestic systems. It fulfills the “absolutists” desire to see the guilty punished and to witness the application of the myriad human rights treaties and customs established within the past half-century. *Yet, this new regime of domestic enforcement is unstable, selective, and, in the end, unsuccessful in furthering the goals of criminal law*) (emphasis added).

124. This phrasing has been made familiar by the former Navy football coach, Lee Corso. Nearly every Saturday morning during college football season, Coach Corso can be heard exclaiming “not so fast, my friend” to his co-host, Kirk Herbstreit.

125. Seyedin-Noor, *supra* note 123, at 43.

126. *Id.*

proclaimed cautiously. The International Court of Justice's decision discussed *infra* in the Congo case suggests that the Pinochet precedent may, in fact, be limited to its unique facts.

C. Slobodan Milošević

As one author notes, the \$1.28 *billion dollars* in international aid offered to Yugoslavia in exchange for extraditing Slobodan Milošević to The Hague “put the world on notice regarding the amount of money that would be necessary to bring [a] former leader to trial.”¹²⁷ Unfortunately, this amount only considers the funds required for arrest and transfer. This does *not* even begin to cover the expenses for detaining and trying a deposed President. Thus, the billion dollar price tag only began to scratch the surface of the price of justice.

And, in the case of Milošević, we now know that justice – in the form of a criminal conviction – ultimately eluded us. History will undoubtedly emphasize that Milošević was arrested, indicted, and subjected to prosecution. As a result, Milošević's health faded, yet his determination never withered. Milošević was resolute to prove that he was but a pawn in the international game of *realpolitik*.¹²⁸ His defense was as much aimed at proving the illegitimacy of the ICTY and other international attempts at prosecuting the emasculated as it was defending against his indictment.¹²⁹ Milošević's antics before the ICTY were little more than a remonstrance that “the current trend in the doctrine of immunity allows international public opinion (or the opinion in the powerful countries) to decide who should be granted immunity” and who should be brought to justice.¹³⁰

This article is not about the prosecution of Milošević; innumerable articles and books have thoughtfully covered the trial itself. Instead, this article seeks to evaluate the processes by which leaders, such as Milošević and Karadžić, are finally transformed into criminal defendants. The status remains that former leaders falling into political disfavor, being militarily defeated and having a bounty successfully placed upon them is a rare situation. It is much more common to

127. Grosscup, *supra* note 6 at 365.

128. Michael Scharf, *The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. INT'L & COMP. L. 389, 389 (2001) (reporting that Milosevic chastised his ICTY panel of judges by proclaiming, “[y]ou are not a judicial institution; you are a political tool.”).

129. *Id.* (“Milosevic's initial trial strategy was to attempt to discredit the Yugoslavia[n] Tribunal's legitimacy and impartiality.”).

130. Grosscup, *supra* note 6 at 367-68.

displace a leader and move toward peace without legal reckoning. Or, in the alternative, to delay the reckoning until such time as the defendant/former head of state has so fallen out of political favor that their country's will to protect them has dissipated or is surpassed by current political needs. It is this latter scenario that led to the arrests and transfers of Milošević and, more recently, Karadžić to The Hague.

Professor Michael Scharf noted the irony in Milošević's belated objections to the legitimacy of the ICTY. "[I]t is a bit late in the day for Milošević to be challenging the Tribunal . . . given that he recognized the legitimacy of the Tribunal when he signed the Dayton Accords in 1995, which require the parties to cooperate with the Tribunal."¹³¹ Further, "[a]ny doubt [regarding the ICTY's legitimacy] should have been erased when Milošević authorized the transfer of Dražen Erdemović for prosecution before the Tribunal for [Erdemović's alleged crimes] in the massacres at Srebrenica."¹³² Yet, Milošević continued to protest the behavior of NATO and others in the international community who remain free from criminal scrutiny.

D. Democratic Republic of the Congo v. Belgium

The International Court of Justice ("ICJ") is the nearest configuration to an international court that exists. Much like its criminal counterpart, the ICC, the ICJ relies on the voluntary submission of nation-states to its jurisdiction and their continued cooperation for enforcement of decisions. Approximately two years *after* the House of Lords' decisions in Pinochet, the ICJ was faced with a similar question of whether diplomatic immunity precluded one nation-state (Belgium) from issuing an international arrest warrant against the Minister for Foreign Affairs of another nation-state (Congo).¹³³ The importance of this decision lies not in the literal issue submitted—whether the Minister for Foreign Affairs of the Congo was immune for alleged crimes against humanity – but more in the assessment of state practice encapsulated in the ICJ's decision.¹³⁴ Speaking generally to the issue of immunities, the Court noted that "in international law it is firmly established

131. Scharf, *supra* note 128 at 394.

132. *Id.*

133. Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14)

134. *Id.* at para. 52 (Finding the governing international treaties non-dispositive, the court explained that "[i]t is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.").

that . . . certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, *both civil and criminal*.”¹³⁵

Factually, Belgium simultaneously transmitted an international arrest warrant for Mr. Abjulaye Yerodia Ndombasi, the former Congolese Minister for Foreign Affairs, to both the Congo and to INTERPOL on June 7, 2000.¹³⁶ INTERPOL, the International Criminal Police Organization, is responsible for “enhanc[ing] and facilitat[ing] cross-border criminal police co-operation worldwide.”¹³⁷ The Court refused to accede to Belgium’s procedural arguments regarding mootness and justiciability and accepted the case for decision.¹³⁸

The essence of the ICJ decision is that *incumbent* Foreign Ministers – and, by analogy, Heads of State – are entirely immune from arrest or prosecution for any alleged crime by another state.¹³⁹ As the Court held,

the functions of a Minister of Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad *enjoys full immunity from criminal jurisdiction and inviolability*. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.¹⁴⁰

The important delineation drawn by the ICJ is the circumscribed power of domestic prosecutions, those undertaken by another state, versus prosecution before an international tribunal.¹⁴¹ Finding that international customary law did not empower Belgium to prosecute a sitting Foreign Minister for even the most heinous crimes, the ICJ explained:

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.¹⁴²

135. *Id.* at para. 51 (emphasis added).

136. *Id.* at para. 14.

137. *Id.*

138. *See id.* at para. 13 (One of Belgium’s arguments addressed the fact that Mr. Yerodia was no longer serving as the Minister for Foreign Affairs, although he was the Minister when the arrest warrant was issued).

139. *See generally* Arrest Warrant of 11 April 2000, 2002 I.C.J. 3, *supra* note 133.

140. *Id.* at para. 54 (emphasis added).

141. *Id.* at para. 58.

142. *Id.*

Thus, the ICJ ruled that Belgium had acted improperly and inconsistent with customary international law in seeking to arrest and prosecute the Congolese Minister for alleged crimes against humanity. This decision seemingly undermines the Pinochet precedent and other cases where domestic courts seek to enforce international treaties and protect against the culture of impunity. In trying to justify this retreating position, the ICJ hollowly proclaimed that:

The Court emphasizes, however that *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While 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 [sic], it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁴³

Thus, there are three main extractable points from the ICJ decision. First, and perhaps foremost, is the fact that customary international law does not yet support a third state in prosecuting a sitting Foreign Minister or Head of State. Second, there is a temporal limitation to the procedural immunity enjoyed by such individuals. Once the position is relinquished, the immunity evaporates. Third, and most confusing, the ICJ would permit “certain international courts” to try even incumbent Foreign Ministers or Heads of State. Which “certain criminal courts” qualify is not entirely made clear by the decision. The three examples proffered in the decision were the ICTY, ICTR and ICC. What the court intended by “certain international courts” remains otherwise undefined and will likely require additional elucidation.

While some may decry the narrow reading of the ICJ’s decision as improperly delimiting customary international law, fidelity to legal decision making mandates a narrow interpretation. Most courts, both national and international, seek to proscribe only narrow legal solutions based on tapered readings of the questions presented. Further, most lawyers recognize the difficulty in analogizing narrow situations to broaden scarcely established principles of law. In truth, the ICJ surveyed the immunity landscape and found a very constricted view regarding evisceration of immunity. If the individual is an incumbent, immunity applies . . . except in “certain” cases like the ICTY, ICTR and ICC. If the prosecution is

143. *Id.* at para. 60.

domestic, the sitting Minister or Head of State enjoy absolute inviolability and cannot be prosecuted, regardless of the gravity of the crime. Finally, the ICJ echoed the belief of the Congo that “immunity does not mean impunity.”¹⁴⁴

The main question remaining after the ICJ’s decision was not whether the Pinochet precedent had been curtailed. Rather, the main question is what courts and tribunals will perceive constitute “certain international courts.” The Special Court for Sierra Leone (“SCSL”) provided an answer in 2004.

E. Charles Taylor – A Certain International Court

In May, 2004, the SCSL directly addressed the issue of head of state immunity and what precisely qualified as an “international court” under the ICJ decision. Prior to Charles Taylor physically appearing before the Court, the SCSL permitted Taylor to move to quash the 17-count indictment against him based on immunity.¹⁴⁵

The SCSL indicted Taylor while he was still the Head of State of Liberia.¹⁴⁶ Shortly after the indictment was issued, however, Taylor stepped down as Liberia’s president and “was permitted to take up residence in Nigeria.”¹⁴⁷ This phrasing suggests an initial offer, and acceptance, of exile – one of the historical approaches to dealing with disempowered rulers. Not deterred by Taylor’s presence in Nigeria or Taylor’s new status as a *former* head of state, the SCSL assessed Taylor’s challenge based on the initial indictment and addressed the head of state immunity directly. The question presented was “whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving Head of State.”¹⁴⁸

In denying the prosecution’s objection to Taylor’s pre-appearance motion to quash, the SCSL observed that “this case is not in the normal course.”¹⁴⁹ “To insist that an incumbent Head of State must first submit to incarceration before he can raise the question of his immunity . . . runs counter, in a substantial manner, to the

144. *Id.* at para. 48.

145. Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, 128 I.L.R. 239, 246 (Special Court of Sierra Leone 2004).

146. *Id.*

147. *Id.*

148. *Id.* at 254.

149. *Id.* at 256. See also, *id.* at 257 (wherein the SCSL states that “[t]he application with which this decision is concerned was made when the Applicant was a Head of State. The Appeals Chamber exercises its inherent power and discretion to permit the Applicant to make this application notwithstanding the fact that he has not made an initial appearance.”).

whole purpose of the concept of sovereign immunity.”¹⁵⁰ Of course, as previously mentioned, by the time the decision was issued, Taylor was not longer serving as head of state. This change provided the SCSL an opportunity to also address, or only address, the implications of arresting a *former* head of state.

While the legal authority and state practice are growing consistently in favor of prosecuting *former* heads of state, the idea of prosecuting a sitting head of state has not received universal approval and, in many respects, is a more contentious issue. The Taylor case remains one of only a few decisions where the court considered whether sovereign immunity, under the Westphalian design, protects an individual ruler from prosecution as long as he or she remains in power.

Before addressing the immunity issue, the SCSL assessed its power and origin. As the court readily found, the SCSL is legally distinct from the ICTY, ICTR and ICC. Unlike the ICTY and ICTR which were developed pursuant to the United Nations Security Council Chapter VII powers,¹⁵¹ the SCSL was

established by the Agreement between the United Nations and Sierra Leone which was entered into pursuant to Resolution 1315 (2000) of the Security Council for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone.¹⁵²

In this regard, the SCSL is not simply an international tribunal; but rather, the SCSL is a nuanced hybrid tribunal with both domestic and international qualities.

Unfortunately, the SCSL’s opinion demonstrates little appreciation between its legal origin and that of the ICTY, ICTR and ICC. As the court explains,

it was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations in both regard to the general purposes of the United Nations as expressed in Article I of the Charter and the specific powers of the Security Council in Articles 39 and 41.¹⁵³

This author, however, sees a meaningful distinction between the genesis of the SCSL and the Yugoslavian and Rwandan tribunals that mandates a certain level of cooperation from the international community. Also, the composition of the ICTY and ICTR judges and prosecutors are entirely international. In contrast, the SCSL intentionally maintains a domestic character, including its location, which is not the case with either the ICTY or ICTR – both of which are located in countries

150. *Id.*

151. See ICTY Statute, *supra* note 85.

152. Taylor, 128 I.L.R. at 258.

153. *Id.* at 259.

outside the area of original conflict.¹⁵⁴

Despite these distinctions, the SCSL evaluated Taylor's immunity challenge as if the SCSL possessed all the attributes of an international tribunal. Finding the Agreement between the United Nations and Sierra Leone sufficiently international in character, the SCSL reasoned that its originating Agreement "is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international."¹⁵⁵ This conclusion is vulnerable to challenge and may ultimately undermine the immunity decision rendered. Regardless of the court's self-assessment that the SCSL is "part of the machinery of international justice," its origin is patently distinct from other, more purely, international tribunals, like the ICTY, ICTR and ICC.¹⁵⁶ This distinction, following the ICJ's decision in the Democratic Republic of Congo v. Belgium may prove to be a distinction with a legally relevant difference.

Once the SCSL determined it qualified as one of the "certain international tribunals" excused from recognizing sovereign immunity, the predicate was established for finding that Taylor – even as a sitting head of state – was not entitled to relief from prosecution based on immunity. This author takes issue with some of the SCSL's reasoning justifying the divestiture of Taylor's head of state immunity.

First, the SCSL suggested that since December 12, 1950, when the United Nations' General Assembly adopted the Nuremberg Principles, "the fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under law" "became firmly established" international law.¹⁵⁷ This finding remarkably ignores the inertia or, perhaps until recently, even apathy within the international community relating to head of state immunity. Not only did the international community accept the Netherlands refusal to hand over Wilhelm following World War I despite a clear violation of Article 27 of the Treaty of Versailles, the international community also allowed the Allies' *de facto* immunity for Emperor Hirohito following World War II. In neither of the great world wars was a head of state actually prosecuted.

Thus, while the legal notion that head of state and official status does not, in the

154. The ICTY is located in the Hague, Netherlands. The ICTR is located in Arusha, Tanzania.

155. Taylor, 128 I.L.R. at 260 (emphasis in original).

156. *Id.* at 260.

157. *Id.* at 262-63 (citations omitted).

abstract, shield one against prosecution may be “firmly established,” actual state practice has not entirely embraced, and certainly has not often followed, this normative value. The SCSL opinion acknowledges the ICJ’s assessment that no clear state practice for prosecuting heads of state exists in customary international law even in relation to war crimes and crimes against humanity.¹⁵⁸ Only in those international courts established under the United Nations’ Chapter VII powers have claims of immunity been consistently denied. Finding, thereafter, that the SCSL is not a national court, the court held that “the official position of [Taylor] as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. [Taylor] was and is subject to criminal proceedings before the Special Court for Sierra Leone.”¹⁵⁹

The legacy of this decision is not yet discernable. What has become clear, however, is that Charles Taylor now shares a legacy with Slobodan Milošević, Radovan Karadžić, and Saddam Hussein. The important legal distinction between these cases remains that the SCSL found that Taylor was not exempt from prosecution during the time he was a *sitting* head of state. Milošević, Karadžić and Hussein were all subjected to prosecution only after they had been forced from power.

Charles Taylor now sits in the dock as a criminal defendant. And, much like Milošević and Karadžić, Taylor sits in a criminal court far, far away from the alleged crimes he has committed. While the SCSL is housed in Freetown, the trial of Taylor was moved to The Hague in the Netherlands for security reasons. Taylor sits detained in the same facility that once housed Slobodan Milošević and currently houses Radovan Karadžić. The distant prosecution has added enormous cost to the prosecution of Taylor. As recently as March 2009, there were concerns that the SCSL was running out of money and might have to release Taylor because it can no longer afford to prosecute him.

The prosecutor of the international criminal court trying former Liberian leader Charles Taylor said he may go free if international donors do not cover a \$5 million shortfall in the court’s budget. There have been mixed reactions to the news in the Liberian capital, Monrovia. Unlike the international criminal courts for Rwanda and the former Yugoslavia, the special court for Sierra Leone is not funded by mandatory dues. It is supported by voluntary contributions.

Some of those contributions have slowed as the global economic crisis forced many developed economies to reconsider spending in the face of growing budget deficits. That

158. *Id.* at 263.

159. *Id.* at 265.

has left the special court's budget \$5 million short at a time when it has only one case left to decide - the 11-count war crimes indictment against Mr. Taylor.

If the money runs out, Prosecutor Stephen Rapp expects defense lawyers to ask for Mr. Taylor's release.¹⁶⁰

The undertaking of prosecuting heads of state is indeed a costly endeavor. The defense fees alone for Mr. Taylor, who was ultimately deemed indigent by the SCSL, exceed \$100,000 per month. The UN-backed tribunal has agreed to provide approximately \$2 million in defense fees on behalf of Taylor.¹⁶¹ And as the trial moves into its second year there are estimates that it will cost a total of \$89 million dollars.¹⁶² Justice at this price challenges society during the best of economic times. Now, in the midst of a worldwide economic crisis, our shared dedication to eradicating impunity faces perhaps its most critical test. Not can, but will, the international community continue to seek justice in far away places for crimes that have gone without prosecution for much of history?

F. Saddam Hussein

*Victor's justice is a common term in war crimes trials, not because the justice is partial, but because victory on the battlefield is its common prerequisite.*¹⁶³

In 1998, less than a decade before Saddam Hussein was toppled by military force, captured by American military personnel, and tried before an Iraqi tribunal, the United States Senate voted 93-0 to adopt a resolution urging the United States President to formally endorse an international war crimes tribunal to, among other things, try Saddam Hussein for his alleged crimes against humanity and genocide.¹⁶⁴ The Senate's strongly worded resolution should have served as a harbinger of America's resolution to see this dictator, ultimately, face a judicial

160. Scott Stearns, *Former Liberian Leader Charles Taylor Could Go Free*, VOICE OF AMERICA NEWS, Mar. 4, 2009, <http://www.voanews.com/english/2009-03-04-voa32.cfm>.

161. Times Online & David Charter, *Charles Taylor Boycotts War Crimes Trial*, TIMES ONLINE, June 4, 2007, <http://www.timesonline.co.uk/tol/news/world/africa/article1880969.ece>.

162. *Id.*

163. Ruth Wedgewood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829, 834 (2000).

164. S. Con. Res. 78, 105th Cong. (1998) (The title of the Resolution was "Relating to the indictment and prosecution of Saddam Hussein for war crimes and other crimes against humanity. The Resolution was reported without any Amendment).

reckoning.¹⁶⁵ Ironically, the United States has *never* provided its own official support for the International Criminal Court, limiting its participation to policy development as a non-state party. Still, as early as 1997, the legislative branch of the United States' government began issuing resolutions regarding prosecuting dictators and former heads of state, including Hussein, Pol Pot and Hun Sen.¹⁶⁶

Thus, when Saddam Hussein was found hiding in a "spider hole" near his hometown of Tikrit, it should have come as no surprise that the capturing American forces would want to see him tried.¹⁶⁷ The place of trial, however, and the composition of Hussein's tribunal, bore little similarity to the Senate Resolution passed just 8 years earlier. The calls for an international tribunal, or even a hybrid tribunal, were not heeded. Rather, despite a burgeoning variety of international approaches to prosecuting alleged war criminals, the Allied Forces and nascent Iraqi government opted to try Hussein before a domestic Iraqi tribunal, the Iraqi Special Tribunal ("IST").¹⁶⁸ Hussein was charged by the IST through an Accusation Document, which alleged that Hussein committed crimes against humanity involving the deaths of 148 individuals from the town of Dujail after a failed assassination attempt against Hussein.¹⁶⁹

165. The Senate Resolution followed a similarly worded resolution that was submitted to the Committee on Foreign Relations Committee, S. Res. 179, 105th Cong. (1998), just one month earlier on February 23, 1998.

166. H.R. Con. Res. 205, 105th Cong. (1997) (calling for the prosecution of Pol Pot for crimes against humanity in Cambodia); H.R. Res. 533, 105th Cong. (1998) (expressing the House of Representatives' belief that Hun Sen committed war crimes, crimes against humanity and genocide in Cambodia).

167. *How Saddam Hussein Was Captured*, BBC NEWS (December 15, 2003), http://news.bbc.co.uk/2/hi/middle_east/3317881.stm. The BBC reported that Hussein was hiding in a hole across the Tigris river where he had previously built grand palaces. The "spider hole" was an "underground chamber" between six to eight feet deep, "with enough space for a person to lie down, and an air vent and extractor fan." *Id.* The BBC also reported that when American soldiers looked inside the hole, Hussein clearly appeared like he wanted to surrender. Hussein reportedly stated in English "[m]y name is Saddam Hussein. I am the president of Iraq and I want to negotiate." *Id.* The arresting special American forces purportedly replied "Regards from President Bush." *Id.*

168. Law No. 10 (2005), Law of the Supreme Iraqi Tribunal, 47 Al-Waqa'i Al-Iraqiya (Oct. 2005), available at <http://www.loc.gov/law/help/hussein/present.html>; See also Leslie Scheuermann, *Victor's Justice? The Lessons of Nuremberg Applied to the Trial of Saddam Hussein*, 15 TUL. J. INT'L & COMP. L. 291, 293 (2006) (The Iraqi Special Tribunal was established in December, 2003. (citation needed). (A translation is needed to check the substance of this citation, as well as the appropriate way to cite the document, although from the website it does not provide support for the assertion that the tribunal was established instead of an international tribunal).

169. Accusation Document, Republic of Iraq v. Saddam Hussein Al-Makid, et al. (Iraqi High Tribunal, May 15, 2006) available at

Officially, the interim Iraqi government is credited with the IST's establishment.¹⁷⁰ One of the most troubling aspects of the IST was the selection and composition of judges.¹⁷¹ For example, former Ba'ath Party members were prohibited from participating as judges, leaving only low-level and inexperienced judges as the arbiters of Hussein's purported crimes.¹⁷² Similarly, individuals who were personally persecuted under the Hussein regime were not precluded from sitting as judges.¹⁷³

As one commenter observed, "[t]he exclusion of former Ba'athists and the presence of Ba'ath victims as IST judges created a politically polarized tribunal" which many observers could challenge as partial, biased and assured of a conviction.¹⁷⁴ Such approach to "justice" is neither just, nor wise. With all the evidence against Hussein, there really was no need to create a court that would assuredly convict him. Rather, the interim Iraqi government should have sought to emulate past and current war crime tribunal models. Because the IST was structured to secure convictions, rather than render justice, it is unlikely that future courts or countries will rely on IST decisions for precedential value.

Security was also a major concern before the IST. In 2005, two of Hussein's defense attorneys were killed, one after being abducted in his office and another in a drive-by shooting.¹⁷⁵ On June 21, 2006, a third attorney representing Saddam Hussein before the IST was murdered.¹⁷⁶ Security in Iraq continues to be a major source of concern with the majority of participants at the IST being forced to live inside walled compounds protected by United States forces.¹⁷⁷ The killings and

http://www.law.case.edu/saddamtrial/documents/20060515_indictment_trans_saddam_hussein.pdf.

170. *Id.*

171. Heidi M. Spallholz, Note, *Saddam Hussein and the IST on Trial: The Case for the ICC*, 13 BUFF. HUM RTS. L. REV. 255, 283 (2007).

172. *Id.*

173. *Id.* at 284.

174. *Id.* at 285.

175. *Abducted Saddam Trial Lawyer Found Dead*, ASSOCIATED PRESS, October 21, 2005, available at <http://www.msnbc.msn.com/id/9764852/>; James Rupert, *Second Saddam Trial Lawyer Killed*, LOS ANGELES TIMES, November 9, 2005 available at <http://www.latimes.com/news/nationworld/nation/wire/ny-woiraq094505015nov09,0,5678809.story>.

176. John F. Burns & Christine Hauser, *Third Saddam Lawyer is Killed in Baghdad*, N.Y. TIMES, June 21, 2006 available at <http://www.nytimes.com/2006/06/21/world/middleeast/21cnd-lawyer.html?scp=3&sq=3rd%20Saddam%20Lawyer%20is%20Killed%20in%20Baghdad&st=cse>.

177. *Id.*

security concerns “renewed doubts about whether it is possible to hold a fair trial in the midst of a conflict that has spurred revenge killings.”¹⁷⁸

Despite the murder of three of Hussein’s defense lawyers, neither a mistrial nor transfer of the proceedings to a neutral and secure country was ever seriously considered. The third defense attorney who was killed had previously remarked that “[w]e think that it’s impossible to hold a trial in Baghdad under these security conditions, and that the court should be transferred to a location outside Iraq.”¹⁷⁹ His requests for transfer went unanswered. Yet, the modern *international* approach, including the prosecution of Prime Minister Kambanda before the International Criminal Tribunal for Rwanda, the prosecutions of Slobodan Milošević, Milan Milutinović, Radovan Karadžić before the International Criminal Tribunal for Yugoslavia, and the prosecution of Charles Taylor before the Special Court for Sierra Leone, which, solely for Taylor’s individual prosecution, was transferred for security reasons to The Hague, appreciates the need for fairness and security over proximity to the victims. Unlike the international practice supporting trials in an unbiased and physically secure environment, Saddam Hussein was permitted to be tried in an atmosphere of revenge, insecurity and thirst for “justice,” however formulated and delivered. Thus, Hussein’s conviction and execution will not likely become a viable precedent regarding head of state prosecution. Rarely will the international community permit such an emotionally-infused “trial” to be conducted before judges that were personally persecuted by the accused’s policies in a physically insecure environment.

Military defeat and military occupation in Iraq was similar to the circumstances facing the World War II tribunals.¹⁸⁰ Security, however, was not nearly as menacing a factor at Nuremberg or Tokyo as it was in Iraq. Further, both World War II tribunals had an international composition, ensuring that those who had actually been victimized by the defendants were not the sole judges of the alleged crimes. In Iraq, the IST contains judges who were all negatively affected by the actions of Saddam Hussein and, yet, they judge. Were this trial to take place

178. *Id.*

179. *Id.*

180. Paust, *supra* note 10, at 208 (Professor Paust notes that head of state trials often follow military defeat:

During the U.S. Revolutionary War, there were suggestions that the King of England and others be prosecuted for their “War against the natural rights of all Mankind,” but there had been no capture of the King of England by the Americans and no such trials took place).

elsewhere and were the United States not such a visible, albeit silent, partner to the proceedings, one can be sure that the IST would be condemned as a mere “show trial.” Instead, the trial proceeded amidst a backdrop of civil insurgencies and physical safety threats.

In the end, Hussein’s guilty verdict will be less historically relevant than the procedural aspects of his conviction and the composition of the IST. Did Hussein receive “due process,” a nebulous, but commonly accepted term relating to criminal trials? Was the IST simply an arm of the American occupation? Was the war dethroning Saddam illegal, thereby achieving “justice” in literal violation of international law? Are some goals – prosecution of criminal dictators, for example – more worthy than securing the sovereign status of independent nation states? Does might simply make right . . . or, does its presence merely silence opposition?

In contrast to the *international* and hybrid tribunals wherein the trials of former heads of state have taken years to pursue, with many witnesses and exhibits being laboriously considered, barely three years expired between the *caputre* and *execution* of Hussein. Hussein was captured by American Special Forces in December 2003 and executed in December 2006.¹⁸¹ A verdict of guilty for crimes against humanity based on the killing of 148 persons in the town of Dujail was handed down by the IST on November 5, 2006.¹⁸² Hussein’s lawyers filed an appeal. The IST’s appellate chamber began reviewing the case on December 5, 2006.¹⁸³ Approximately three weeks later Hussein was executed.¹⁸⁴

Such abbreviated appellate review followed what some believed to be an unfair trial. Human Rights Watch (“HRW”), a preeminent international human rights organization, called the Hussein trial “fundamentally unfair” and his death sentence “indefensible.”¹⁸⁵ In a ninety-seven page report reviewing Hussein’s IST trial, “Human Rights Watch said Hussein’s trial ‘was marred by so many procedural and substantive flaws that the verdict is unsound.’”¹⁸⁶ The HRW report

181. Aneesh Raman, et. al., *Hussein Executed with “Fear in his Face,”* CNN.COM, Dec. 30, 2006, <http://www.cnn.com/2006/WORLD/meast/12/29/hussein/index.html>.

182. *Id.*

183. Sam Dagher & Jomana Karadsheh, *Iraqi Appeals Court Upholds Hussein Death Sentence*, CNN.COM Dec. 26, 2006, <http://www.cnn.com/2006/WORLD/meast/12/26/iraq.main/index.html>.

184. *Id.* (In response to the appellate ruling, the White House issued a statement: “Today marks a milestone for the Iraqi people’s efforts to replace the rule of a tyrant with the rule of law.”).

185. *Hussein Trial ‘Fundamentally Unfair’*, CNN.COM, Nov. 20, 2006, <http://www.cnn.com/2006/WORLD/meast/11/20/saddam.trial.unfair/index.html>.

186. *Id.*

further challenged that the IST allowed the prosecution to undermine several guarantees inherent in fair trials under international law, including the presumption of innocence, trial before an impartial court, trial before an independent court and the right to prepare a defense and cross-examine witnesses.¹⁸⁷ In contrast to the HRW report, the White House issued a statement immediately following Hussein's execution praising the Iraqi people for giving Hussein a fair trial.¹⁸⁸

What will be remembered of Hussein's guilty verdict and swift execution is unclear at this point. What will not likely be achieved, however, is a valid legal precedent applicable in future trials. In this case, justice may be fleeting. And, to many, a conviction was worth any price. Sadly, the opportunity to have a transparent, internationally fair trial as once envisioned by Senate Resolution was not what occurred. Instead, the Hussein precedent is vulnerable to international criticism. The ultimate fate of Saddam Hussein was that he was tried and executed by his enemies – both literally and figuratively.

G. Milan Milutinović

The International Criminal Tribunal for Yugoslavia ("ICTY") has undoubtedly been the most aggressive and most consistent prosecutor of former heads of state. To date, three separate former heads of state have faced trial before the ICTY.¹⁸⁹ At that date this article went to press, the trial of two of the defendant heads of state had been completed. Of course, as a previous section of this article makes clear, the trial of Slobodan Milošević was prematurely terminated due to his death while in custody at The Hague. His colleague, Milan Milutinović, however, lived to see his trial completed and his name cleared.

On February 26, 2009, in one of the most un-heralded international prosecutions against a former head of state, the former President of Serbia was acquitted of all charges of war crimes for his activities occurring in Kosovo.¹⁹⁰ The Trial

187. *Id.*

188. Raman et. al., President Bush's statement read as follows: "Fair trials were unimaginable under Saddam Hussein's tyrannical rule. It is a testament to the Iraqi people's resolve to move forward after decades of oppression that, despite his terrible crimes against his own people, Saddam Hussein received a fair trial." *Id.*

189. See generally the ICTY website, www.icty.org for fuller information about each case and each defendant (Slobodan Milošević was the first former head of state to be subject to trial. He died in custody before a verdict was rendered against him. Milan Milutinović was the second former head of state to be tried. And, following the capture and transfer of Radovan Karadzic to the ICTY in 2009, after 13 years in hiding, a third former head of state will face justice).

190. Prosecutor v. Milutinović, et al, Case No. IT-05-87-T, Judgment Volume 3, para. 1207

Chamber's decision marked the first time that the ICTY had ruled on crimes perpetrated by the Federal Republic of Yugoslavia and Serbian forces against Kosovo Albanians during the 1999 Kosovo conflict.¹⁹¹ While President Milutinović was originally named in the indictment with his colleague Slobodan Milošević in May, 1999, a decision was made to try Milošević individually.¹⁹² Thus, Milutinović was tried with five other Serbian officials for displacing, deporting, murdering and persecuting Kosovo Albanians.¹⁹³

The indictment against Milutinović and his five co-defendants alleged a joint criminal enterprise responsible for the deportation of 800,000 Albanians during the 1999 Kosovo conflict.¹⁹⁴ In addition, the indictment charged that the defendants were culpable for internal displacements, the burning of homes, sexual assaults and the destruction of Albanian cultural and religious sites.¹⁹⁵ Finally, the indictment charged that the defendants sought to "modi[fy]... the ethnic balance in Kosovo... to ensure... Serbian control..." by using threats of force, actual force and acts of violence and the deliberate destruction of property such that those Albanians who were not literally displaced chose to flee to avoid these crimes.¹⁹⁶

Milutinović served as the President of Serbia from December, 1997 through December, 2002.¹⁹⁷ Thus, Milutinović was the second former Head of State subjected to trial before the ICTY. After leaving the Presidency, Milutinović voluntarily surrendered to the ICTY in 2003.¹⁹⁸ After a 285 day trial, 113 prosecution witnesses, 1,455 prosecution exhibits, 118 defense witnesses and 2896 defense exhibits, the Trial Chamber found that Milutinović lacked the necessary criminal intent and that he had not made any significant contribution to the

(Feb. 26 2009).

191. *Id.*

192. Prosecutor v. Milosevic, et al., Case No. IT-99-37, Indictment, (May 24, 1999) *available at* <http://www.icty.org/x/cases/milutinovic/ind/en/mil-ii990524e.pdf>; Prosecutor v. Mulutinovic, et. al., Case No. IT-99-37-PT, Third Amended Indictment, (Jul. 19, 2002) *available at* <http://www.icty.org/x/cases/milutinovic/ind/en/milu-3ai020905e.pdf>.

193. Prosecutor v. Multunovic, et. al., Case No. IT-05-87-PT, Third Amended Joinder Indictment, para. para. 72, 73, 75, 77 (Jun. 06, 2006) *available at* <http://www.icty.org/x/cases/milutinovic/ind/en/milu-3aji060621e.pdf>. Mulutinović's co-defendants were Nikola Sainovic; Dragoljub Ojdanic; Nebojsa Pavkovic; Vladimir Lazarevic; and, Sreten Lukic.

194. *Id.* at para. 72.

195. *Id.*

196. *Id.* at para. para. 19, 25-27.

197. *Id.* at para. 1.

198. *Id.*

criminal enterprise.¹⁹⁹ In fact, the Trial Chamber held that Milutinović did not have any actual control or command over the military forces that engaged in forcible expulsions and internal displacements of Kosovo Albanians.²⁰⁰ Instead, the Trial Chamber indicated that the late Slobodan Milošević, rather than Milutinović, actually exercised control over the VJ, or Yugoslavian Army.²⁰¹ This is the closest the ICTY or any other international tribunal may come to laying guilt at the feet of the now deceased Slobodan Milošević. While his trial was never completed, the Trial Chamber's commentary in dicta confirms, at least from a historical perspective, what the ICTY was unable to accomplish in a direct criminal proceeding against Milošević: that Milošević was indeed responsible for crimes committed against Kosovo Albanians.

The Trial Chamber's treatment of Milutinović's five co-defendants was not so gracious. The five named co-defendants were all found guilty of at least some of the crimes alleged and received sentences ranging from fifteen to twenty-two years.²⁰² This case confirms what many in the international community believe – namely that even former heads of state will receive a fair trial and fair verdict. The ICTY did pursue and try Milutinović. His acquittal merely serves to remind all that justice, when sought for victims, still will ultimately be resolved only after receiving witness testimony and evidence. And, the risk of prosecution always entails the potential for a non-guilty verdict.

H. Radovan Karadžić

Radovan Karadžić was initially indicted by the ICTY regarding his alleged crimes in Bosnia and Herzegovina in July 1995. A few months later, in November 1995, Karadžić was indicted again for his alleged crimes in Srebrenica. In both instances, Karadžić was a sitting head of state and the President of the Serbian Democratic Party. Shortly after his indictment, Karadžić continued to direct the police and politics in the Serbian controlled part of Bosnia.²⁰³ However, Karadžić

199. Multunovic, et. al., Case No. IT-05-87-T, Judgment at para. 276.

200. *Id.* at para. 279.

201. *Id.* at para. 274.

202. *Id.* at para. para. 1208-12. Three of the criminal defendants received twenty-two year sentences: Sainovic, Pavkovic and Lukic. The remaining two defendants received sentences of fifteen years: Ojdanic and Lazarevic.

203. Raymond Bonner, *Bosnia Election Campaign Postponed Over Karadzic Issue*, N.Y. TIMES, Jul. 16, 1996, at A3 available at <http://www.nytimes.com/1996/07/16/world/bosnia-election-campaign-postponed-over-karadzic-issue.html?n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FI%2FInternational>

was prohibited from running for national elections based on an agreement in the Dayton Peace Accords.²⁰⁴

Diplomatic and NATO police efforts failed during the next thirteen years to capture Karadžić. In mid-1996, it became clear that a diplomatic solution was not attainable.²⁰⁵ And, in one of the most telling examples of how realpolitik controls international attempts at prosecution, the New York times reported that as an American presidential election was quickly approaching, then President Bill Clinton feared “American casualties or a wholesale unraveling of the Bosnian peace effort – clear risks of military action.”²⁰⁶ Without military intervention and without diplomatic intercession, Karadžić enjoyed freedom from arrest in his home country for many, many years.

As the world seemed paralyzed by inertia, Karadžić began a new life hiding in plain sight. For thirteen years, Karadžić managed to avoid NATO forces and avoid capture until such time as the political will of his country caught up to that of the international community and the ICTY. As one commentator observed:

He was nabbed not by NATO, whose forces had spent 12 years in a vain and sometimes desultory search for him, but by the security forces of Serbia – the country whose designs for grandeur he had so ardently tried to further. In the end, it seems, political will rather than operational cunning is the force that will bring Karadzic, 63, to a court in The Hague to face charges of genocide and crimes against humanity in Bosnia from 1992 to 1995.²⁰⁷

Karadžić had been “hiding” in Serbia as a poet and natural healer.²⁰⁸ He took on a new name, a new identity and successfully avoided arrest for well over a decade. However, when newly-elected President Boris Tadić took office, he vowed to work with the European Union to secure Serbia’s admission into the regional body.²⁰⁹ The price? Cooperate in bringing Karadžić and Mladić to justice.²¹⁰

While Mladić continues to avoid capture, Karadžić was arrested in the Serbian

%20Relations&scp=2&sq=Bosnia%20Campaign%20Postponed,%20Giving%20Serbs%20More%20Time%20to%20Oust%20Karadzic&st=cse.

204. *Id.* (The Dayton Peace Accords ended the Bosnia war); see Dejan Anastasjevic, *Karadzic Called to Reckoning*, TIME.COM, Jul. 23, 2008, <http://www.time.com/time/magazine/article/0,9171,1825873,00.html>.

205. Bonner, *supra* note 203.

206. *Id.*

207. Anastasjevic, *supra* note 204.

208. *Id.* (Vladimir Vukcevic, Serbia’s special war crimes prosecutor, remarked that “[h]e was very convincing.” Goran Kojic, editor of Healthy Life magazine in Belgrade, stated that “[h]e looked like a cross between Sigmund Freud and a beat poet.”).

209. *Id.*

210. *Id.*

capital of Belgrade and transferred to The Hague. He now sits in the prison where his colleague, Slobodan Milošević, spent his last years.²¹¹ Since his first indictment, the ICTY has issued two amended indictments against Karadžić and, most recently, following his capture, a Third Amended Indictment.²¹²

The Third Amended Indictment charges Karadžić in eleven counts with two counts of genocide, and several counts of war crimes and crimes against humanity.²¹³ The genocide counts allege a joint criminal enterprise that sought to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory and a joint criminal enterprise to eliminate Bosnian Muslims in Srebrenica by killing men and boys and removing women.²¹⁴ The remaining nine counts asserts charges that Karadžić engaged in persecutions and exterminations based on political, racial and religious grounds, including killings, tortures, beatings, rape and other acts of sexual violence, forcible transfers and deportations, forced labor and plunder of property.²¹⁵

Because the trial proceedings were in the early stages when this article went to print, one can only speculate that his trial will follow some of the same obstructionist strategies employed by Slobodan Milošević. Much like his predecessor in the criminal dock, Karadžić refused to enter a plea in his case and challenges the legitimacy of the tribunal.²¹⁶ As the BBC reported, Karadžić reiterated that Richard Holbrooke had negotiated Karadžić's immunity from prosecution during the Dayton Peace Accord negotiations.²¹⁷

During his initial hearing Karadžić proclaimed:

I am challenging the jurisdiction of this tribunal on the basis of my agreement with the

211. Mike Corder, *Karadzic Arrives at The Hague*, THE N.Y. SUN, Jul. 30, 2008, <http://www.nysun.com/foreign/karadzic-extradited-to-the-hague/82898/>.

212. See Prosecutor v. Karadzic & Mladic, Case No. IT-95-5-I, Indictment (Jul. 24, 1995); Prosecutor v. Karadzic & Mladic, Case No. IT-95-18-I, Indictment (Nov. 14, 1995); Prosecutor v. Karadzic, Amended Indictment (Apr. 28, 2000); Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Second Amended Indictment (Feb. 18, 2009); Prosecutor v. Karadzic, Case Nos. IT-95-5/18-PT, D13085- D12971, Third Amended Indictment (Feb. 27, 2009) (The first Amended Indictment was issued on April 28, 2000. Then, nine years later and following Karadzic's arrest, the ICTY issued a Prosecutor's Second Amended Indictment on February 18, 2009 and, on February 27, 2009, issued a Third Amended Indictment).

213. Karadzic, Case Nos. IT-95-5/18-PT, D13085- D12971, Third Amended Indictment, at para. 36-87.

214. *Id.* at para. 42.

215. *Id.* at para. 48-87.

216. *Defiant Karadzic Refuses to Plead*, BBC NEWS, Mar. 3, 2009, <http://news.bbc.co.uk/2/hi/europe/7920594.stm> [hereinafter *Defiant Karadzic*].

217. *Id.*

international community whose representative at that point in time was Mr Richard Holbrooke I am defending a principle here; that wars cannot be concluded and peace agreements cannot be signed by deceit.²¹⁸

The Trial Chamber assured Karadžić that his claim of a negotiated immunity would be assessed in due time. Still, it appears that in the next few years, a historical record will be made of Karadžić's alleged crimes and, absent any unexpected circumstances, a verdict rendered. Because of the international acceptance of the legitimacy of the ICTY, the Karadžić case, unlike the Hussein case, will undoubtedly build upon the prosecuting heads of state precedent.

The crimes Karadžić is accused of committing are hauntingly reminiscent of World War II and the promises of "never again." Labor camps and massive deportations remind all why individuals should be held accountable for crimes regardless of official position. Yet, the gravity of the crimes did not result in Karadžić's arrest and transfer until some other marker was placed on the table – not simply justice, but inclusion in world governance via the European Union. While one can only celebrate the legal rejoinder that Karadžić now faces, the international community must face its own complicity in the delay in bringing Karadžić to justice.

I. Omar Al-Bashir

On March 4, 2009, the International Criminal Court issued an arrest warrant for the current Sudanese Head of State, Omar Hassan Ahmad Al Bashir.²¹⁹ This warrant is notable because it marks the first time the ICC has charged a sitting head of state. By doing so, the ICC has potentially endangered a fragile peace in the Darfur region – a region where many believe genocide concerns remain.

The arrest warrant, however, does not charge Al Bashir with genocide. Despite the Prosecutor's request that Al Bashir be charged with genocide, war crimes and crimes against humanity, the arrest warrant, covering a five year period in Sudan, alleges that Al Bashir committed only war crimes and crimes against humanity.²²⁰ The charging instrument accuses Al Bashir of committing pillage as a war crime and "directing attacks against a civil population as such or against individual

218. *Id.*

219. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC -02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (Mar, 4, 2009) available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

220. *Id.* at 3,7-8.

civilians not taking direct part in hostilities as a war crime”²²¹ Additionally, the arrest warrant accuses Al Bashir of murder, extermination, forcible transfers, torture and rape as crimes against humanity.²²²

The essence of the arrest warrant seeks to place responsibility on Al Bashir for his participation as “an indirect perpetrator, or as an indirect co-perpetrator” for the governmental policy of unlawful attacks against the civilian population in Darfur.²²³ Al Bashir is considered by the ICC to be both the “*de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces” for the five year period in question – March 2003 through July 2008.²²⁴ In this role, the arrest warrant declares, Al Bashir “played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned [government] counter-insurgency campaign.”²²⁵

Al Bashir was openly defiant in his criticism of the Court. Al Bashir told supporters that the ICC could “eat” the arrest warrant.²²⁶ He further commented that the warrant will “not be worth the ink it is written on” as he danced for thousands of cheering supporters while an effigy of the ICC prosecutor was burned.²²⁷ In the capital city of Khartoum, thousands of government supporters reportedly gathered to show their continuing support of Al Bashir by chanting “We love you President Bashir.”²²⁸ Sudan, which is not a state party to the ICC,²²⁹ is still encouraged through its United Nations membership to comply with the court’s directives, including arrest warrants.

The Associated Press reported that Sudanese state radio has been beginning each morning broadcast with the proclamation: “Long live Sudan, free and defiant.”²³⁰ There is no immediate plan to arrest or capture Al-Bashir. Instead, Al-

221. *Id.* at 7.

222. *Id.* at 7-8.

223. *Id.* at 3, 8.

224. *Id.* at 6-7.

225. Bashir, *supra* note 219, at 7.

226. *Warrant Issued for Sudan’s leader*, BBC NEWS, Mar.4, 2009, <http://news.bbc.co.uk/2/hi/africa/7923102.stm> [hereinafter *Warrant for Sudan’s Leader*].

227. *Id.*

228. *Id.*

229. International Criminal Court website, www.icc-cpi.int (listing the States Parties to the Rome Statute) (last visited March 11, 2009).

230. Associated Press, *Standoff over Sudan President Could Drag On*, HINDUSTAN TIMES, Mar. 12, 2009, <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?sectionName=RSSFeed-World&id=24c95f9e-17a6-454c-be69->

Bashir intends to travel to friendly Arab and African countries, such as Qatar, where he knows he will be protected from transfer to the ICC.²³¹ Western countries are struggling to devise a method for arresting Al-Bashir as his popularity at home remains relatively strong.²³² The Associated Press reported that “[t]he prosecutor at [the ICC] has suggested forcing down Al-Bashir’s plane if he travels abroad, but Western governments are likely to be deterred by the sure backlash from Arab countries to any such move.”²³³

Not all countries support the ICC’s action. Egypt indicated that it was “greatly disturbed” by the issuance of an arrest warrant and sought a meeting of the United Nations Security Council.²³⁴ Likewise, Russia characterized the arrest warrant as “dangerous precedent.”²³⁵ Both Russia and China, two members of the United Nations Security Council, oppose any sanctions against Sudan.²³⁶ While the United Nations Secretary General implored Sudan to fully cooperate with the ICC, a Sudanese expert, Alex de Waal expressed opinion that the warrant, at least at this juncture, was “pretty toothless.”²³⁷ The two previous ICC arrest warrants issued against Sudanese officials, Humanitarian Affairs Minister Ahmed Haroun and Janjaweed militia leader Ali Abdul Rahman, have not yet resulted in any arrest or prosecution.²³⁸ Not surprisingly, Sudan has refused to turn the accused over.²³⁹ One can only wonder why the ICC and its prosecutor seem to think that the warrant against a seemingly popular head of state will be any different.

Thus, without having any current method to secure the arrest of Al Bashir, the ICC, nonetheless, issued the arrest warrant and will move forward with an attempted prosecution. But, *in absentia* prosecutions are not permitted under the Rome Statute that established the ICC. The international community must therefore wait until Al Bashir either voluntarily relinquishes power or is otherwise removed from power. Any hope of exile has vanished and the situation in Sudan remains volatile.²⁴⁰ Proof of this volatility can be found in the Sudan’s immediate

08db4f2b2a69&Headline=Standoff+over+Sudan+president+could+drag+on.

231. *Id.*

232. *Id.*

233. *Id.*

234. Warrant for Sudan’s Leader, *supra* note 226.

235. *Id.*

236. Associated Press, *supra* note 230.

237. Warrant for Sudan’s Leader, *supra* note 226.

238. *Id.*

239. *Id.*

240. Associated Press, *supra* note 230. The Associated Press reported that “[m]any observers fear the small hopes for a compromise have grown even smaller.”

reaction to the arrest warrant: numerous aid agencies were asked to leave the country. And, within the first few days following the arrest warrant, five aid workers were kidnapped.²⁴¹ While some suggest that ordering aid agencies out of Sudan itself qualifies as an additional war crime, the suggestion is of little help in the moment where thousands of residents literally rely on this aid for survival.²⁴² Some may assert that the statement being made by the ICC, even if Al Bashir is never arrested or prosecuted, is worth the risk of aid leaving the country. Yet a quiet exile may have provided both a more immediate and lasting solution. As the international community welcomes the news of an arrest warrant – from a normative perspective – it is difficult to ignore the reality on the ground in Sudan that this arrest warrant may only exacerbate the suffering of any already vulnerable civilian population.²⁴³

VI. The Undressing of the Emperor – Living in Reality

*Essequam videri*²⁴⁴

There often seems little difference between the kings called tyrants and those free from such reproach – except perhaps with regard to their political fortunes. By and large, in the chronicles and history books, only deposed kings are called tyrants, though we have no reason to believe and there would be no way of demonstrating that only those kings (or all those kings) who overrode the fundamental laws of their kingdoms were deposed.²⁴⁵

While many profess the new age of prosecution has arrived, the evidence belies such optimistic cheers. The modern trials of Hussein, Milošević, Karadžić and Taylor, pale in comparison to the many instances of former rulers living in exile – many of whom are there with the inconspicuous support, if not approval, of the international community. For every Milošević, there are three to five dictators that have successfully averted a legal reckoning. Either no bounty has been leveled upon them or their host state is immune to such economic threats or the risk of military action is not worth the slight reward.

The sporadic legal precedent that exists in this area is so unique to each

241. *Id.*

242. *Id.*

243. *Id.* (“The first international attempt to prosecute a sitting head of state is likely to turn into a long standoff, with the people of Darfur suffering the most.”).

244. THE MERRIAM-WEBSTER DICTIONARY 821 (1974) (“to be rather than to seem”).

245. WALZER, *supra* note 2 at 38.

individual that it is difficult to find any current case where the issue will be decisively settled. Yes, Pinochet saw his immunity evaporate internationally and his immunity erased at home. Still, he was never *actually* prosecuted. Likewise, the Saudi government's refusal to rescind the "welcome" for Idi Amin meant he died in relative peace without any threat of prosecution. Charles Taylor was given express immunity from prosecution in the Lomé Peace Accords only to witness a court's refusal to embrace the political solution that helped end his reign of terror. Slobodan Milošević was protected by his President only to have his Prime Minister assist the United States in surreptitiously "extraditing" him to The Hague under cover of darkness. Hussein was arrested under the auspices of a war to rid the world of weapons of mass destruction – a basis which has been proven to be either false or falsified. Radovan Karadžić was finally captured some thirteen years after living incognito within the comfortable borders of his homeland. And, the perpetual inertia in relation to the Cambodian genocide meant that Pol Pot died without ever seriously facing a threat of criminal prosecution.

The issue of head of state immunity is far from settled.²⁴⁶ What is needed is a clear and unambiguous approach taken by the international community. The existing framework has not secured equal justice and does little to promise consistency in the future. While this author wishes things were different, they simply are not. The current *modus operandi* seems to involve two consistent variables: military defeat and/or economic sanctions that motivate extradition. In cases where the constellation of variables does not perfectly align, the offers of exile trump any claim that head of state immunity is dead. And, in the end, is removal from power and ostracizing such a poor solution?

If peace is the goal, then any removal of a criminal dictator and restoration of democracy yields some measure of success. Because so many nation states continue to accept, or shield already accepted former dictators, and protect them against extradition, does this not demonstrate a sufficient incapacitation? Exile equates to "house arrest" within a particular nation and precludes international travel and influence from a deposed "has-been." This disempowerment is a punishment unto itself but does not, admittedly, offer the benefits received under a judicial punishment scheme.

What exile offers that recent prosecutions cannot is protection to civilians from senseless military conflict within their nation. Thousands upon thousands of Iraqis

246. See Kerry Creque O'Neill, Note, A New Customary Law of Head of State Immunity?: Hirohito and Pinochet, 38 STAN. J. INT'L L. 289 (2002).

have paid with their lives to secure the prosecution of a single individual. And, no individual is worth such a hefty price. Instead, had Saddam only taken the initial offer of exile – one the international community was willing to accept – Iraq would likely be a much freer and safer nation.

Without assurance that peace treaties generating immunity deals will actually protect individuals, many dictators may not see an advantage in stepping down. In order to secure peace – a necessary predicate to justice – the political calculus has to present an attractive enough offer to peacefully remove dictators from power. With the Special Court in Sierra Leone rejecting the Lomé Peace Accords and Karadzic claiming that he was granted immunity during the Dayton Peace Accord process, modern heads of state, like Omar Al-Bashir, may be increasingly reticent to enter into a peace accord or, more importantly, to step down from power.

Why, then, not focus on the viability of exile as an alternative to military occupation? Why not use military forces only to secure exile and assist countries in moving toward democracy without sacrificing any more lives. Why not simply let Nigeria “welcome” Charles Taylor without putting up billions of dollars for a court that, ultimately, may not render a verdict in his case and has drawn financial contributions away from resurrecting Sierra Leone. Is the prosecution of a single individual worth the billions of dollars that could otherwise have been invested in rebuilding a worn-torn nation? Why not encourage aid agencies to remain in Darfur, a nation where genocide is feared to be ongoing, and offer Al-Bashir an attractive alternative to an ICC arrest warrant?

Peace does not always require prosecution.²⁴⁷ In fact, many societies have progressed into peaceful democracies without any legal prosecutions and criminal punishments. As the head of state immunity issue continues to occupy the international legal landscape, a less myopic vision may be necessary to secure peace. Following the divestiture of the Lomé Peace Accords by a subsequently constructed hybrid tribunal, what leader will, in the future, voluntarily agree to step down and release power? And, regardless of the decision of whether to prosecute, fidelity to legal principles should remain above all others. For, if we prosecute only by circumventing the law or by crafting new legal principles onto aged parchment used for other purposes, we, too, have become complicit in the eradication of human rights. How we treat those least deserving of justice will be

247. Colloquium, *Pinochet Revisited*, 95 AM. SOC’Y INT’L L. PROC. 139, 141 (2001) (“There are times when reconciliation and forgiveness are more helpful to a society than retribution and punishment, and it is for the legitimate government to decide which path to follow.”).

the measure of the justness of our international society.

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