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**WHY INTERNATIONAL CRIMINAL JUSTICE ISN'T: THE ABJECT
FAILURE OF THE POST-NUREMBERG SYSTEM TO HOLD THE MOST
POWERFUL ACCOUNTABLE**

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The wrongs which we seek to condemn have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. . . . [T]he law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors. . . . Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."¹

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¹ Trial of Major War Criminals, Nuremberg (Nov. 21, 1945) (opening statement of U.S. Chief Prosecutor Justice Robert Jackson).

I. INTRODUCTION

This paper demonstrates—through historical examples—that while international criminal law clearly exists as a legal regime capable of application against any individual responsible for the most serious offenses, it is not applied in accordance with the rule of law.² This works to the detriment of international criminal law by destroying the legitimacy it may otherwise enjoy and, most importantly, deprives millions of victims of violations of international criminal law of justice.

The background section of this paper provides a description of the relevant aspects of the concept of rule of law. It also provides some of the most fundamental norms of international criminal law established or given legal effect after World War II (WWII), as demonstrated in documents such as the United Nations (UN) Charter, the Charters of the International Military Tribunals in Nuremberg and Tokyo, and the Geneva Conventions of 1949. The following section analyzes historical examples of breaches of these fundamental norms by the victors of WWII. Utilizing insight provided by the historical examples, this paper concludes that despite the musings of scholars on the geo-political reasons for impunity for these violations, the actual reason is deceptively simple. By creating the post-WWII global legal order, the governments of the five permanent members of the Security Council granted themselves a nearly unlimited ability to avoid accountability for actions taken in violation of the fundamental norms they had established and for which they tried—and frequently put to death—individuals from the countries that lost WWII.³ While the international criminal justice system still has the potential to provide

² See Jeff Handmaker, *The Legitimacy Crisis within International Criminal Justice and the Importance of Critical, Reflexive Learning*, in *THE PEDAGOGY OF ECONOMIC, POLITICAL AND SOCIAL CRISES: DYNAMICS, CONSTRUCTIONS AND LESSONS* 189, 200 (Bob Jessop & Karim Knio eds., 2018) (“[T]here is some dispute as to whether a system of international criminal justice really exists, from an institutional and/or doctrinal standpoint. I tend to agree with Sands (2003), who indicates that there is such a system of international criminal justice, particularly following the creation of the International Criminal Court in 2002. Indeed, the international criminal justice system is riddled with practical and legal obstacles, and, as I have already suggested, operates on a highly selective basis. The system also lacks a coherent policy framework.”).

³ See ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 118-19 (4th ed. 2019).

justice to victims of the most serious violations of international law, as long as the permanent members of the Security Council maintain the power to veto or authorize military force, to delay ICC proceedings, remain outside the jurisdiction of the ICC, and to generally oppose accountability for their international crimes, such potential remains just that.

II. BACKGROUND

A. *Rule of Law*

International criminal law, like the international collective security regime, had and perhaps still has great potential,⁴ but suffers from a fatal flaw regarding the rule of law. Rule of law means, in part, that no one is above the law.⁵ In the field of international law, this means that no state or its governing officials are immune from the law.⁶ The international criminal law system is supposedly based on the rule

⁴ See Yves Beigbeder, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 233 (2005) (“The Coalition for the ICC has cautiously and rightly recalled that the Rome Statute and the ICC offer the greatest potential advance in international justice in the 20th century. . . . The term ‘potential’ refers to whether governments will actually implement the extraordinary new system of international justice envisioned in the Rome Statute. This term also refers to whether the leaders of the ICC will have the wisdom, courage and leadership to create what must be a new kind of international organization for the 21st century. Of course, ‘potential’ also refers to whether the United States’ political and military efforts to undermine the ICC will succeed in sabotaging the Court’s aim of justice and deterrence; or whether the US will return to its long-standing support for the rule of law.”)

⁵ See U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616 6 (Aug. 23, 2004) (stating that the rule of law “refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”); Tom Bingham, *The Rule of Law* 8 (2010) (“[A]ll persons and authorities within the state, whether public or private, should be bound by . . . laws publicly made, taking effect (generally) in the future and publicly administered by the courts.”); William Neukom, *What is the Rule of Law?* WORLD JUSTICE PROJECT, available at: <https://worldjusticeproject.org/about-us/overview/what-rule-law> (“The government as well as private actors are accountable under the law.”) (last visited May, 6, 2020); see generally Robert A. Stein, THE RULE OF LAW IN THE 21ST CENTURY 11–17 (providing an overview of the history and meaning of the rule of law and citing to the quotations in this footnote). “The law must be superior. All persons are subject to the law whatever their station in life.” *id.* at 13. “The law must be applied equally to all persons in like circumstances.” *Id.*

⁶ See *supra* note 5; *supra* text accompanying note 5.

of law,⁷ which, in theory, confers legitimacy upon it. However, just as in the international collective security regime, some states “are more equal than others.”⁸

B. *Moscow Declaration on Atrocities*

The Moscow Declaration on Atrocities was signed by President Franklin D. Roosevelt, Winston Churchill, and Joseph Stalin on November 1, 1943.⁹ It established, in no uncertain terms, the intent of the Allied Powers to try and punish Germans guilty of atrocities; with no mention of any potential Allied offenses.¹⁰ The Declaration stated: “[l]et those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them . . . and will deliver them to their accusers in order that justice may be done.”¹¹ This document intended to lay the foundation for the subsequent international military tribunals in Nuremberg and Tokyo.¹²

C. *UN Charter*

The UN Charter was signed on June 26, 1945, and went into effect on October 24, 1945.¹³ The underlying basis for the Charter was

⁷ See Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRON., <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (last visited May 6, 2020); Catherine Powell, Opinion, *International Criminal Court Plays Important Role in Global Rule of Law*, THE HILL (Sept. 11, 2018, 4:00 PM) <https://www.cfr.org/article/international-criminal-court-plays-important-role-global-rule-law>.

⁸ George Orwell, *ANIMAL FARM* 126 (1945).

⁹ See generally, Declaration of German Atrocities, Jan. 1, 1943 [hereinafter Moscow Declaration]; *The Moscow Declaration on Atrocities*, JEWISH VIRTUAL LIBRARY, available at <https://www.jewishvirtuallibrary.org/the-moscow-declaration-on-atrocities>.

¹⁰ See *id.* (declaring that “those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished . . .”).

¹¹ *Id.*

¹² See *id.* (clarifying that the Moscow Declaration was made “without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.”).

¹³ United Nations, *Charter of the United Nations*, <https://www.un.org/en/charter-united-nations/> (last visited May, 6, 2020) (“The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations

the presumed desire of the states' parties to avoid war.¹⁴ This principle was given effect through Article 2(4) of the Charter, which states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."¹⁵ This prohibition is central to the Charter and is almost universally considered to be a *jus cogens*¹⁶ norm under customary international law.¹⁷ Additionally, Article 2(4) prohibits the "narrower concept of . . . aggression."¹⁸

There are only two exceptions to the prohibition in Article 2(4).¹⁹ These exceptions include a state's "inherent right to individual or collective self-defense" under Article 51²⁰ or UN Security Council

Conference on International Organization, and came into force on 24 October 1945.").

¹⁴ See Ronald Kramer et al., "The Supreme International Crime: How the U.S. War in Iraq Threatens the Rule of Law, 32 SOC. JUST. 52, 56 (2005) ("At the heart of the U.N. Charter is the prohibition against war."); Boris Kondoch, *Aggression, the Prohibition of the Use of Force, and Northeast Asia*, THE LEGALITY AND LEGITIMACY OF THE USE OF FORCE IN NORTHEAST ASIA 5, 25–26 (Boris Kondoch & Brendan Howe eds.) (2013) ("In order to prevent aggression, breaches of or threats to peace, the United Nations established a new system of collective security The collective security system of the UN Charter rests on four main pillars: (1) the prohibition against the threat or use force between states (see Art. 2(4)); (2) the legal obligation of member states to settle their disputes by peaceful means (see Art. 2(3)) [T]he United Nations undertakes to prevent aggression by eliminating the causes of conflict, by facilitating the peaceful settlement of disputes, and by promoting disarmament measures."); see also Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4 INDIANA J. GLOB. LEGAL STUD. 435, 444 (1997) ("According to international legal scholar Louis Henkin, "[w]ar inflicted the greatest injustice, the most serious violations of human rights, and the most violence to self-determination and to economic and social development.")

¹⁵ U.N. Charter art. 2, ¶ 4.

¹⁶ Antonio Cassese, *A Plea for a Global Community Grounded in the Core of Human Rights in Realizing Utopia: The Future of International Law*, REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 137, 139 (2012) (defining *Jus cogens* has been defined as "a core of fundamental values which must be common to all nations, states, and individuals and may not, therefore, be derogated from" and "a set of peremptory norms that may not be derogated from").

¹⁷ See Kondoch, *supra* note 14, at 26.

¹⁸ *Id.*

¹⁹ See U.N. Charter, *supra* note 15.

²⁰ U.N. Charter, *supra* note 15 at art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time

authorization under Chapter VII of the Charter.²¹ Self-defense is available as a justification for the use of force only when: (1) an armed attack is launched, or is immediately threatened; (2) there is an urgent necessity for defensive action against that attack; (3) there is no practicable alternative to action in self-defense; and (4) the action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement.²² The Security Council is one of the six principal organs created by the UN Charter.²³ It is made up of fifteen members: five permanent (P-5) and ten non-permanent elected by the General Assembly for two-year non-renewable terms.²⁴ The P-5 includes the People’s Republic of China, France, the Russian Federation, the United Kingdom, and the United States.²⁵ The Security Council is the UN organ with the “primary responsibility for the maintenance of international peace and security.”²⁶ It “acts on behalf of the entire UN” and can make decisions that bind all members of the UN.²⁷ In order to pass, Security Council decisions require “the affirmative vote of nine members of the Council and no negative votes from permanent members.”²⁸ The requirement of no negative votes from the P-5 is referred to as the veto.²⁹ The veto can “stifle Council action” and was the P-5’s “way of ensuring that no decision related to international peace and security would be taken without their collective support, or at least their acquiescence.”³⁰

such action as it deems necessary in order to maintain or restore international peace and security.”)

²¹ U.N. Charter, *supra* note 15 at arts. 39–42 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall . . . decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”); *Id.* at art. 39 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”); *Id.* at art. 42.

²² Ronald Kramer et al., “*The Supreme International Crime: How the U.S. War in Iraq Threatens the Rule of Law*,” 32 SOC. JUST. 52, 58–59 (2005).

²³ SECURITY COUNCIL REPORT, THE UN SECURITY COUNCIL HANDBOOK: A USER’S GUIDE TO PRACTICE AND PROCEDURE 1 (2019).

²⁴ *Id.* (citing U.N. Charter art. 23).

²⁵ U.N. Charter, *supra* note 15 at art. 23, ¶ 1.

²⁶ U.N. Charter, *supra* note 15 at art. 24; SECURITY COUNCIL REPORT, *supra* note 23, at 3.

²⁷ SECURITY COUNCIL REPORT, *supra* note 23, at 5 (citing U.N. Charter arts. 24–25).

²⁸ *Id.* at 20 (citing U.N. Charter art. 27, ¶ 3).

²⁹ *Id.* at 20–21 (citing U.N. Charter art. 27, ¶ 3).

³⁰ *Id.* at 21.

The Security Council's ability to authorize the use of force is based on "the concept that the Security Council has the primary responsibility for the maintenance of international peace and security."³¹ In order to authorize the use of force, the Security Council must first determine "the existence of any threat to the peace, breach of the peace, or act of aggression,"³² and that it "consider[s] that measures provided for in Article 41 would be inadequate or have proved to be inadequate"³³ Because the Security Council is the only body that can authorize the use of force outside of self-defense and because any member of the P-5 can veto a resolution authorizing or condemning the use of force, the members of the P-5 are effectively unconstrained by the UN Charter's general prohibition on the use of force. This has led to the P-5's ability to flout the most fundamental aspects of the post-WWII international legal order.

D. The Potsdam Declaration

Adopted by China, Great Britain, and the United States on July 26, 1945, the Potsdam Declaration called for Japan's unconditional surrender in WWII.³⁴ The Allied powers declared that they, "insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world[],"³⁵ and that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon . . . prisoners."³⁶ The Potsdam Declaration therefore represents one of the earliest examples of the hypocrisy and victor's justice of three of the members of the P-5.³⁷

³¹ Kondocho, *supra* note 14, at 25 (citing U.N. Charter art. 24).

³² U.N. Charter, *supra* note 15 at art. 39.

³³ *Id.* art. 42.

³⁴ Proclamation Defining Terms for Japanese Surrender, China-Gr. Brit.-U.S., July 26, 1945 [hereinafter Potsdam Declaration]; Potsdam Declaration, ENCYCLOPEDIA BRITANNICA (Oct. 25, 2023, 9:48 PM), <https://www.britannica.com/topic/Potsdam-Declaration>.

³⁵ Potsdam Declaration, *supra* note 34 at ¶ 6.

³⁶ *Id.* at ¶ 10.

³⁷ See discussion *infra* pp. 11–33 at ¶ pp. II.

E. *Nuremberg and Tokyo Charters*

The Nuremberg and Tokyo Charters were selective³⁸—and therefore problematic from a rule of law perspective³⁹—at the very outset. The crimes within the jurisdiction of the Tribunals included crimes against peace, war crimes, and crimes against humanity.⁴⁰ The Nuremberg Charter defined crimes against peace as “planning, preparation, initiation or waging of 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.”⁴¹ The Tokyo Charter’s definition was nearly identical but added “waging of a declared or undeclared war of aggression, or a war in violation of international law” to the list of offenses.⁴²

Both Charters defined war crimes as “violations of the laws or customs of war,”⁴³ but the Nuremberg Charter also provided a non-exhaustive list of conduct amounting to war crimes.⁴⁴ This list included:

³⁸ Charter of the International Military Tribunal arts. 1, 6, Aug. 8, 1945, 82 U.N.T.S. 251 [hereinafter Nuremberg Charter] (stating that the purpose of the Tribunal was for “the just and prompt trial and punishment of the major war criminal of the European Axis” and that “[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.”); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter Tokyo Charter] (though not referring specifically and only to the Axis war criminals like the Nuremberg Charter, it was clear that only Japanese individuals would be tried).

³⁹ See *supra* notes 2, 4, 5 and accompanying text. See also CRYER ET AL., *supra* note 3 (“International criminal justice, and international tribunals, reflect inequalities in the selection of cases. Selective justice is a problem from the point of view of the rule of law, and it can undermine many of the justifications of punishment.”).

⁴⁰ Nuremberg Charter art. 6, Aug. 8, 1945, 82 U.N.T.S. 251; Tokyo Charter art. 5, Jan. 19, 1946, T.I.A.S. No. 1589.

⁴¹ Nuremberg Charter art. 6(a), Aug. 8, 1945, 82 U.N.T.S. 251.

⁴² Tokyo Charter art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589.

⁴³ Nuremberg Charter, *supra* note 41, at art. 6(b); Tokyo Charter *supra* note 42, at art. 5(b).

⁴⁴ Nuremberg Charter, *supra* note 41, at art. 6(b).

murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war [POW] 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.⁴⁵

The other offense listed in both Charters – crimes against humanity – included:

murder, extermination, enslavement, deportation, and other inhumane acts 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.⁴⁶

The only difference between the Charters was the exclusion of religious persecution in the Tokyo Charter.⁴⁷ Importantly, the Charters also removed immunity for heads of state and the defense of following orders.⁴⁸ Though the Charters set the stage for the prosecution of heads of state for the crimes identified in them, they failed to provide accountability for the same or similar acts committed by the Allied Powers. The Nuremberg and Tokyo Charters also paved the way for future UN resolutions. Adopted on December 11, 1946, General Assembly Resolution 95(I) represented a democratic affirmation by the current UN members regarding the principles of international law in the Nuremberg and Tokyo Charters.⁴⁹

F. Geneva Conventions of 1949

The Geneva Conventions were signed on August 12, 1949.⁵⁰ The Geneva Conventions were drafted and adopted after WWII to

⁴⁵ *Id.*

⁴⁶ Nuremberg Charter, art. 6(c). Aug. 8, 1945, 82 U.N.T.S. 251.

⁴⁷ See Tokyo Charter, *supra* note 42, at art. 5(c).

⁴⁸ Nuremberg Charter, arts. 7, 8, Aug. 8, 1945, 82 U.N.T.S. 251; Tokyo Charter, art. 6, Jan. 19, 1946, T.I.A.S. No. 1589.

⁴⁹ See generally, G.A. Res. 95 (I), (Dec. 11, 1946).

⁵⁰ See generally, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the

“limit[] the barbarity of war[]” and constitute “the core of international humanitarian law . . . [which] regulates the conduct of armed conflict and seeks to limit its effect.”⁵¹ In the Preliminary Remarks of the Geneva Conventions, the drafters presciently stated that the articles pertaining to penal sanctions “will doubtless be an important contribution towards defining ‘war crimes’ in International Law.”⁵² In the words of the International Committee of the Red Cross, “[t]he Conventions . . . call for measures to be taken to prevent or put an end to all breaches. They contain stringent rules to deal with what are known as ‘grave breaches.’ Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold.”⁵³ Additionally, the signatories to the Geneva Conventions, which the Conventions labeled as the High Contracting Parties, are prohibited from “absolv[ing] [themselves] or any other High Contracting Party of any liability incurred by [themselves] or by another High Contracting Party in respect of [grave] breaches”⁵⁴ The language of the “grave breaches articles” closely resemble the list of war crimes provided in the Nuremberg Charter,⁵⁵ showing the linear progression and close relationship between the crimes included in the Charter and then agreed to by all the Geneva Conventions signatories.

Grave breaches of Geneva Conventions I and II involve “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and

Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁵¹ *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Jan. 1, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocol>.

⁵² Geneva Conventions of 1949, INT’L COMM. OF THE RED CROSS 19, 22, (1955).

⁵³ *The Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 50.

⁵⁴ Geneva Convention I, art. 51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II, art. 52, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85; Geneva Convention III art. 131, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV art. 148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵⁵ *See* Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II art. 51 Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85; Geneva Convention III art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Nuremberg Charter, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 251.

wantonly.”⁵⁶ While Geneva Conventions III and IV were aimed at protecting prisoners of war and civilians, respectively, the language of their grave breaches articles differs slightly. Geneva Convention III builds upon the list provided in Geneva Conventions I and II by including the language, “compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of air and regular trial prescribed in th[e] Convention.”⁵⁷ Additionally, Geneva Convention IV adds “unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention . . . ” to the breaches already listed in Geneva Conventions I and II.⁵⁸

Under the Geneva Conventions, to which all the High Contracting Parties—including the P-5—agreed, there could be no immunity for grave breaches. Despite this agreement, the following section provides numerous examples of potential grave breaches committed by the P-5 for which they have not faced accountability.

III. VIOLATIONS COMMITTED BY THE P-5

For all the ambitions surrounding justice and accountability following WWII, it was immediately apparent that the governments of the Allied powers intended to ignore any possible atrocities they may have committed during the war, and grant immunity to perpetrators of atrocities when they determined it to be in their interests. The defendants at Nuremberg were precluded from invoking *tu quoque*⁵⁹ arguments surrounding Allied war crimes.⁶⁰ However, some Allied

⁵⁶ Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II, art. 51, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85.

⁵⁷ Geneva Convention III art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵⁸ Geneva Convention IV art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

⁵⁹ Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 935 (2005) (discussing *tu quoque* as a legal argument, “rebutts the charges of the State by claiming that the State cannot prosecute him or her since the State behaved in a similar culpable manner as the accused” and meaning “you too” in Latin). See also *Tu quoque*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tu%20quoque> (last visited Sept. 18, 2023) (defining *tu quoque* as “a retort charging an adversary with being or doing what the adversary criticizes in others.”)

⁶⁰ CRYER ET AL., *supra* note 3, at 119; Heller, K.J., *The Nuremberg Military Tribunals and the origins of International Criminal Law*, LEIDEN UNIVERSITY (June 16, 2011), <https://hdl.handle.net/1887/17757>.

offenses were apparently taken into account in the issuing of indictments, which resulted in no charges being brought against defendants for the Blitz over the UK and some German conduct in the Soviet Union, Poland, and Germany.⁶¹ This trend continued throughout the second half of the twentieth century and continues into the present day.⁶² The following are some of the most well-known of these violations for which no state or individual was held sufficiently accountable. These actions deprived countless victims of justice and destroyed the legitimacy that the post-Nuremberg international criminal system might have otherwise been entitled.

A. *The United States*

The U.S. government has perhaps been, though neck-and-neck with the former Soviet Union and its successor—the Russian Federation—the most frequent and flagrant violator of the post-WWII legal order, which it was instrumental in establishing.⁶³ This section analyzes how the United States has been involved in numerous major military conflicts since WWII; the legality of some of which have been, at best, legally suspect and, at worst, clearly constituted unlawful uses of force or acts of aggression. On top of the *jus ad bellum*⁶⁴ issues, U.S. conduct during the course of some of these conflicts has violated *jus in bello*⁶⁵ principles. Militating against total impunity for war crimes is the haphazard, infrequent, and ultimately unsatisfactory prosecution of individuals accused of war crimes.⁶⁶ Aside from conflict-related

⁶¹ CRYER ET AL., *supra* note 3, at 120 (stating that these charges were not brought because of the difficulty of avoiding *tu quoque* arguments on the devastation wrought by British bombing in Germany and Soviet conduct in the Soviet Union, Poland, and Germany, respectively); *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT JACKSON CENTER, <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Oct. 26, 2023).

⁶² See discussion CRYER ET AL., *supra* note 3, at 43-44.

⁶³ See Kondocho, *supra* note 14, at 25-7; See also DiPaola, *supra* note 14, at 435, 437, 444, 461, 464, 469 (discussing Russia’s violations of customary international law in the Chechen conflict).

⁶⁴ *What are jus ad bellum and jus in bello?*, INT’L COMM. OF THE RED CROSS, *What are jus ad bellum and jus in bello?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0%EF%BB%BF> (defining *Jus ad bellum* as referring “to the conditions under which States may resort to war or to the use of armed force in general”).

⁶⁵ *Id.* (defining “*Jus in bello* as regulating “the conduct of parties engaged in an armed conflict.”).

⁶⁶ See CRYER ET AL., *supra* note 3, at 55 (citing the trial of Lieutenant William Calley, a perpetrator of the My Lai massacre in Vietnam, as a frequently invoked example of leniency in a State’s war crimes prosecution against its own nationals); see also, Leo Shane III, Meghann Myers & Carl Prine, *Trump Grants Clemency to*

offenses, the United States has engaged in other conduct for which the defeated Axis powers were or could have been punished, including human experimentation,⁶⁷ segregation,⁶⁸ and torture.⁶⁹

i. Firebombing of Tokyo and Atomic Bombings of Hiroshima and Nagasaki

In March of 1945, the United States engaged in a firebombing campaign on Tokyo, the capital of Japan.⁷⁰ Some consider this attack to have been “more destructive than the bombings of Dresden, Hiroshima, or Nagasaki.”⁷¹ The officer in charge of the American air campaign in Japan was encouraged by his commanding officer “to adopt incendiary bombing against Japan’s cities and abandon the policy of precision bombing.”⁷² This Tokyo firebombing destroyed nearly 16 square miles of Tokyo, killed at least 80,000 people, and displaced 1 million more.⁷³

Troops in Three Controversial War Crimes Cases, MIL. TIMES (Nov. 15, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/11/16/trump-grants-clemency-to-troops-in-three-controversial-war-crimes-cases/> (identifying three cases of individual U.S. military members charged with war crimes for conduct in Iraq or Afghanistan who were subsequently pardoned or had their rank restored by President Trump). Peter Ross Range, *Only One Man Was Found Guilty for His Role in the My Lai Massacre. This Is What It Was Like to Cover His Trial*, TIME (Mar. 16, 2018, 11:00 AM), <https://time.com/5202268/calley-trial-my-lai-massacre/> (describes William Calley as the only military member involved in the My Lai massacre who was found guilty and was sentenced to life in prison but, President Nixon commuted his sentence to house arrest and he only served about three years).⁶⁷ See generally, Mike Stobbe, *Ugly Past of U.S. Human Experiments Uncovered*, NBC NEWS (last updated Feb. 27, 2011, 6:14 PM), http://www.nbcnews.com/id/41811750/ns/health-health_care/t/ugly-past-us-human-experiments-uncovered/#.XrWczKhKhhE (citing an Associated Press review of medical documents that revealed more than 40 studies involving human experimentation in the United States, most of which occurred between the 1940s and 1960s, that were reminiscent of Nazi experiments on Jews during WWII).

⁶⁸ See generally, Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything but Accidental*, SMITHSONIAN MAG. (May 30, 2017), <https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494/> (identifying U.S. government policies that further entrenched segregation even after it was declared unconstitutional).

⁶⁹ See generally, Anthony Lewis, *Introduction* to KAREN J. GREENBERG & JOSHUA L. DRATEL., *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (compiling and examining U.S. government legal memorandum created to justify the use of torture throughout the War on Terror).

⁷⁰ R.G. Grant, *Bombing of Tokyo*, ENCYCLOPEDIA BRITANNICA (Sep. 17, 2023), <https://www.britannica.com/event/Bombing-of-Tokyo>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

Claiming necessity to end the war, the United States dropped two atomic bombs on the Japanese cities of Hiroshima and Nagasaki.⁷⁴ By their very nature and use on civilian-populated cities, these weapons were indiscriminate. The bomb dropped on Hiroshima destroyed 90 percent of the city and immediately killed 80,000 people, with tens of thousands of delayed deaths from radiation poisoning.⁷⁵ The bomb dropped on Nagasaki three days later killed approximately 40,000 people.⁷⁶ Nagasaki was not the original target for the second atomic bomb, but was selected when there was too much cloud cover over the primary target.⁷⁷ The necessity of the bombings has been subject to debate because it has been argued that alternatives existed to dropping the bombs, including redefining what the Allied powers meant by “unconditional surrender” to preserve Japan’s monarchy, and Russia’s imminent entry into the war.⁷⁸ Those defending the bombings argued that the decision was based on political considerations and the United States’ desire to emerge from WWII as the only global superpower over the Soviets.⁷⁹

Under the language of the war crimes provision of the Nuremberg and Tokyo Charters, these acts almost certainly constituted “wanton destruction of cities . . . or devastation not justified by military necessity.”⁸⁰ However, no investigation into the legality of these acts or prosecutions ever occurred; not least in part because “the Allied powers . . . eliminated strategic bombings from the category of war crimes[] [s]o that [] atomic bombing would not be addressed in war trials.”⁸¹ By drafting the Tokyo Charter to exclude strategic bombings so that the firebombing of Tokyo and the atomic bombings of Hiroshima and Nagasaki, the United States evaded accountability for the destruction of these cities.

⁷⁴ *Bombing of Hiroshima and Nagasaki*, HIST. (Nov. 18, 2009), <https://www.history.com/topics/world-war-ii/bombing-of-hiroshima-and-nagasaki>

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See Hibiki Yamaguchi, Fumihiko Yoshida & Radomir Compel, *Can the Atomic Bombings on Japan Be Justified? A Conversation with Dr. Tsuyoshi Hasegawa*, 2 J. PEACE & NUCLEAR DISARMAMENT 19, 22–23 (2019).

⁷⁹ *See id.* at 23–24.

⁸⁰ Nuremberg Charter, art. 5(b), Aug. 8, 1945, 82 U.N.T.S. 251.

⁸¹ Yamaguchia et al., *supra* note 78, at 32.

ii. Operation Paperclip and Immunity for Unit 731

Immediately problematic, from a rule of law perspective, was the U.S. government's decision to provide immunity to former Nazi and Japanese perpetrators of war crimes or crimes against humanity under "Operation Paperclip."⁸² Additionally, the non-prosecution of members of Unit 731, the unit of the Japanese army engaged in human experimentation, violated rule of law principles.⁸³

Operation Paperclip entailed the recruitment of hundreds of Nazi scientists by the United States—the most famous of whom was Wernher von Braun—and the whitewashing of their war criminal pasts.⁸⁴ Von Braun developed the V-2 rocket that was used by the Nazis to devastating effect in Great Britain, and he had knowledge of what was occurring in concentration camps.⁸⁵ However, neither von Braun nor any of the other Nazi scientists recruited under Operation Paperclip stood trial for their crimes; they were instead rewarded with gainful employment by one of the victorious powers.⁸⁶

Like the Nazi scientists recruited under Operation Paperclip, the United States rewarded members of Japan's Unit 731 with immunity from prosecution and stipends.⁸⁷ These "doctors" were guilty of some of the worst atrocities in WWII, including the use of biological and chemical weapons against thousands of civilians and prisoners of war.⁸⁸ Yet, instead of standing trial with potential execution, as many other Axis war criminals endured, members of Unit 731 went on to

⁸² See Danny Lewis, *Why the U.S. Government Brought Nazi Scientists to America after World War II*, SMITHSONIAN MAG. (Nov. 16, 2016) <https://www.smithsonianmag.com/smart-news/why-us-government-brought-nazi-scientists-america-after-world-war-ii-180961110/>; Laura Schumm, *What Was Operation Paperclip*, HIST. (June 2, 2014), <https://www.history.com/news/what-was-operation-paperclip>.

⁸³ See Jing-Bao Nie, *The United States Cover-up of Japanese Wartime Medical Atrocities: Complicity Committed in the National Interest and Two Proposals for Contemporary Action*, 6 AM. J. BIOETHICS 21, 23-4 (2006); Nicholas D. Kristof, *Unmaking Horror—A Special Report; Japan Confronting Gruesome War Atrocity*, NEW YORK TIMES (Mar. 17, 1995).

⁸⁴ See Lewis, *supra* note 82; see also Schumm, *supra* note 82.

⁸⁵ Lewis, *supra* note 82.

⁸⁶ See *id.*; see also Schumm, *supra* note 82.

⁸⁷ Nicholas D. Kristof, *Unmaking Horror—A Special Report; Japan Confronting Gruesome War Atrocity*, NEW YORK TIMES (Mar. 17, 1995).

⁸⁸ *Id.*

become “Governor of Tokyo, President of the Japan Medical Association[,] and head of the Japan Olympic Committee.”⁸⁹

iii. Korean War

The legality of the entire Korean War is subject to legal debate. Although authorized by the UN Security Council, the Soviet Union abstained from the vote, and the People’s Republic of China (PRC) was excluded.⁹⁰ As the UN forces advanced into North Korea, the PRC intervened on behalf of North Korea against the UN forces and forced them to retreat.⁹¹

During the Korean War, there was at least one instance where the United States should have been investigated and possibly tried for war crimes: the massacre at No Gun Ri.⁹² The U.S. government engaged in a lackluster investigation of the incident half a century after it occurred, concluding that, “American troops killed an unknown number of refugees near the Korean village of No Gun Ri in the early weeks of the Korean War, but no orders were found directing such attacks.”⁹³ The results of this investigation directly contradict the documentary and testamentary evidence used by the Associated Press (AP) when it first broke news of the killings in September 1999.⁹⁴ Since the release of the AP’s report, numerous other allegations of indiscriminate targeting of civilians and refugees by U.S. forces in Korea have been raised.⁹⁵ Indiscriminate targeting or killing of civilians is a violation of Article 147 of the Geneva Conventions of 12 August 1949 because it constitutes wilful killing of persons protected by the Convention.⁹⁶ Because U.S. forces committed the massacre before the jurisdiction of the International Criminal Court began, and is a permanent member of the Security Council that could veto the creation

⁸⁹ *Id.*

⁹⁰ See Kondocho, *supra* note 14, at 28–9.

⁹¹ *Id.*, at 29.

⁹² See *The Truth about No Gun Ri*, ECONOMIST (Feb. 17, 2000), <https://www-economist-com.ezp3.lib.umn.edu/united-states/2000/02/17/the-truth-about-no-gun-ri>.

⁹³ Public Release, William S. Cohen, Department of Defense, News Briefing on No Gun Ri at the Pentagon (Jan. 11, 2005), <https://usinfo.org/wf-archive/2001/010112/epf503.htm>.

⁹⁴ Jeremy Williams, *Kill ‘em All’: The American Military in Korea*, BBC HIST., http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml (last updated Feb. 17, 2011).

⁹⁵ *Id.*

⁹⁶ Geneva Convention IV arts. 3–4, 146–147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

of, or referral to, any international justice mechanism, the acts were excluded from international prosecution, so there will likely never be justice for the victims or their descendants.

iv. Vietnam War

The Vietnam War stands as another—among many—stains on the reputation of the United States. Both the act of engaging in the armed conflict itself (*jus ad bellum*) and instances of U.S. conduct during the war (*jus in bello*) potentially violated international criminal law.⁹⁷ In 1966, before the Pentagon Papers were released showing the U.S. government lied about its involvement and conduct in escalating the war,⁹⁸ and before the declassified documents in 2005 revealed that the second Gulf of Tonkin incident giving rise to the Gulf of Tonkin Resolution that brought the United States into the war never occurred,⁹⁹ international law professor Richard Falk argued that the U.S. government's legal argument for military involvement in Vietnam did not constitute a valid justification under international law.¹⁰⁰ He additionally took note of the failure of the UN to subject the U.S. government's action to legal scrutiny.¹⁰¹ Even if U.S. involvement were legal, Falk argued that the U.S. military's conduct during the war was disproportionate to the objectives sought.¹⁰² Despite violating the prohibition on the use of force in the UN Charter—and lying to create a justification—and committing violations of *jus in bello* rules like “strategic area bombing against dispersed targets of little military value”¹⁰³ among others,¹⁰⁴ it is likely that the U.S. government never faced accountability in the international legal arena because of its position in the P-5.

⁹⁷ See generally, TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970) (juxtaposing U.S. involvement and conduct in the Vietnam War with that of the Nazis the author tried as Chief Prosecutor at Nuremberg); Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1138 (1966) (arguing that U.S. involvement and conduct in the Vietnam War runs counter to principles of international law).

⁹⁸ See *Pentagon Papers*, HIST. (Aug. 2, 2011), <https://www.history.com/topics/vietnam-war/pentagon-papers>.

⁹⁹ See Jesse Greenspan, *The Gulf of Tonkin Incident, 50 Years Ago*, HIST. <https://www.history.com/news/the-gulf-of-tonkin-incident-50-years-ago> (last updated June 16, 2023).

¹⁰⁰ See Falk, *supra* note 93, at 1132–1136.

¹⁰¹ *Id.* at 1141.

¹⁰² *Id.* at 1144–1146.

¹⁰³ *Id.* at 1144.

¹⁰⁴ See TAYLOR, *supra* note 97.

v. “Highway of Death”

The Highway of Death is the name given to Highway 80, which connects Kuwait to Iraq, following the U.S. and coalition bombing of Iraqi forces retreating from Kuwait.¹⁰⁵ In 1991, U.S. planes dropped cluster bombs on the front and rear of the withdrawing Iraqi convoy to prevent the withdrawal and thereafter continued bombing and strafing the stopped vehicles for at least ten hours.¹⁰⁶ The attack killed hundreds, possibly thousands of retreating Iraqi soldiers.¹⁰⁷ Given that attacks, even against otherwise legitimate military targets, must be militarily necessary,¹⁰⁸ the U.S. bombing of the retreated Iraqi forces is highly problematic. There is also the issue of the scope of the use of force authorized by the Security Council in Resolution 678, which was to expel Iraqi forces from Kuwait.¹⁰⁹ Therefore, the United States may have violated the Geneva Conventions’ requirement of military necessity, which constitutes a grave breach,¹¹⁰ and may have also engaged in the use of force without clear legal authority. Because of the United States’ membership in the P-5, there was no further investigation or move toward potential accountability for those responsible for ordering and carrying out the attack.

vi. Invasion and Occupation of Iraq

¹⁰⁵ See Steve Coll & William Brannigan, *U.S. Scrambled to Shape View of ‘Highway of Death’*, WASH. POST. (Mar. 11, 1991), <https://www.washingtonpost.com/archive/politics/1991/03/11/us-scrambled-to-shape-view-of-highway-of-death/05899d9a-f304-441d-8078-59812cdacc5c/>; Torie Rose DeGhett, *The Photo No One Would Publish*, ATLANTIC (Aug. 8, 2014), <https://www.theatlantic.com/international/archive/2014/08/the-war-photo-no-one-would-publish/375762/>; Ian Harvey, *The Highway of Death—First Gulf War*, WAR HIST. ONLINE (Feb. 7, 2016), <https://www.warhistoryonline.com/war-articles/the-kuwait-highway-of-death.html>.

¹⁰⁶ Coll et al., *supra* note 105; Harvey, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ See Geneva Conventions I art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (listing “extensive destruction . . . not justified by military necessity” as a grave breach).

¹⁰⁹ See Kramer et al., *supra* note 14, at 62 (“Resolution 678 authorized the use of force explicitly and exclusively to compel Iraq to withdraw from Kuwait. This authorization expired once Iraqi forces retreated behind their own border.”); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 183 (2004) (“[A] mantra of the administration of George H.W. Bush was that U.S. forces in March 1991 could not go all the way to Baghdad in part because they lacked UN authorization to do so.”).

¹¹⁰ See Geneva Convention I art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

The U.S. and coalition invasion of Iraq has resulted in a death toll exceeding 100,000 people.¹¹¹ The United States asserted a variety of policy reasons as justifications for its invasion of Iraq, and in the months leading up to the invasion, began developing the theory of preemptive self-defense.¹¹² However, that was not the legal justification ultimately adopted by the United States. The United States claimed that the invasion was authorized by Security Council 678, which had been adopted in 1990—thirteen years prior and regarding a completely separate incident.¹¹³ This same theory was also adopted by the other nations that joined the U.S. coalition.¹¹⁴

One scholar, Sean Murphy, argues that this legal justification is unpersuasive¹¹⁵ because the U.S. interpretation of Resolution 678 ignores Resolution 686, which laid out eight specific demands, which until met, would cause the authorization to use force to remain in effect.¹¹⁶ After Iraq claimed to have met these demands, the Security Council passed Resolution 687, formally establishing a cease-fire to definitively end hostilities.¹¹⁷ Additionally, even if Iraq had not complied with the eight demands in Resolution 686 at the time of the U.S.-led coalition invasion in 2003, the United States did not use this as justification but cited to a purported breach of Resolution 687, which had its own measures for non-compliance.¹¹⁸ Far short of authorizing the use of force, Resolution 687 provided for economic sanctions and further Security Council action.¹¹⁹ Murphy lastly argues that even if Resolution 678 could be revived for a serious breach of Resolution 687, such revival would only authorize measures that were necessary and proportionate to address the breach, which would fall short of a full-scale coalition invasion and subsequent overthrow of the Iraqi government.¹²⁰ Regardless, the United States invaded Iraq without explicit Security Council authorization when it became apparent that explicit authorization would not be forthcoming.¹²¹

¹¹¹ Kramer et al., *supra* note 14, at 66.

¹¹² Murphy, *supra* note 109, at 173–175.

¹¹³ *Id.* at 175–176.

¹¹⁴ *Id.* at 176.

¹¹⁵ *Id.* at 177, 179.

¹¹⁶ *Id.* at 189.

¹¹⁷ *Id.* at 192.

¹¹⁸ *Id.* at 193–194.

¹¹⁹ *Id.* at 194, 202–203.

¹²⁰ *Id.* at 196–197.

¹²¹ *Id.* at 244, 252; Kramer et al., *supra* note 14, at 61–62.

Neither was the United States clearly acting in legitimate self-defense because Iraq posed no imminent threat to it.¹²² The U.S. government’s arguments that Iraq had connections to the 9/11 attacks and had weapons of mass destruction as grounds for invoking self-defense both proved to be at best the result of faulty intelligence that should have been subjected to greater scrutiny and at worst deliberately false and misleading.¹²³ On top of its violation of *jus ad bellum*, the U.S. invasion and occupation resulted in numerous violations of *jus in bello* principles as well.¹²⁴ Despite these violations, the U.S. officials responsible for them never faced accountability thanks, at least in large part, to the United States’ membership in the P-5.

B. *The Soviet Union and the Russian Federation*

Like the United States, the Soviet Union and its recognized successor state, the Russian Federation, committed large-scale violations of international law during and after WWII. Most recently and blatantly, Russia invaded and subsequently annexed parts of Ukraine.¹²⁵ Thanks to its status as a member of the victorious Allied Powers and subsequent membership in the P-5, Russia has engaged in these violations with virtual impunity.

i. Katyn Massacre

During the Soviet occupation of eastern Poland in WWII, thousands of Polish military officers were imprisoned in Russian concentration camps.¹²⁶ At some point in early 1940, Russian forces executed up to 20,000 of these Polish prisoners and buried them in mass graves.¹²⁷ Murder of prisoners of war constituted a war crime under the Nuremberg Charter.¹²⁸ Though the Russian government in 2010 declared Joseph Stalin and the Soviet government responsible for

¹²² Kramer et al., *supra* note 14, at 53, 58.

¹²³ *Id.* at 58.

¹²⁴ *See id.* at 67–73.

¹²⁵ See Center for Preventive Action, *War in Ukraine*, COUNCIL ON FOREIGN RELS. (last updated Aug. 15, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.

¹²⁶ See *Records Relating to the Katyn Forest Massacre at the National Archives*, NAT’L ARCHIVES, <https://www.archives.gov/research/foreign-policy/katyn-massacre> (last visited May 6, 2020); *Katyn Massacre*, ENCYCLOPÆDIA BRITANNICA (Apr. 28, 2017), <https://www.britannica.com/event/Katyn-Massacre>.

¹²⁷ See *Records Relating to the Katyn Forest Massacre at the National Archives*, *supra* note 126.

¹²⁸ Nuremberg Charter, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 251.

the massacre,¹²⁹ and the U.S. government determined that the Soviets were responsible for the deaths,¹³⁰ there were no prosecutions. If the Soviet Union were not a member of the Allied Powers during WWII or a member of the P-5 after the creation of the UN, those responsible for the massacre would have stood trial like some of the Nazi and Japanese perpetrators of similar crimes.

ii. Invasion and Occupation of Afghanistan

Despite initial international opposition to the Soviet invasion of Afghanistan in December of 1979—when it became apparent the Soviet occupation was going to be prolonged—the debate shifted from the legality of the invasion and use of force to the legality of the Soviet military's conduct.¹³¹ Soviet military advisers and military aid were sent to Afghanistan throughout the late 1970s and were involved in atrocities committed by Afghan forces.¹³² The Soviets, just like the Americans in Vietnam, were heavily subsidizing an unpopular and brutal regime that they claimed to be the legitimate government of Afghanistan.¹³³ The full-scale Soviet invasion began on December 24, 1979.¹³⁴ Following a confusing chain of assassinations and successions, a new President of Afghanistan was declared on December 28, 1979, who called for Soviet military aid.¹³⁵ The Soviet Union also engaged in what amounted to annexation of part of Afghanistan and population transfer.¹³⁶ Under Professors Reisman and Silk's scholarly legal analysis, the conflict in Afghanistan was an international armed conflict because the consent given to Soviet forces did not come from the Afghan government and was extended after the invasion began.¹³⁷ The consequence of this was that the Geneva Conventions were applicable

¹²⁹ See *Records Relating to the Katyn Forest Massacre at the National Archives*, *supra* note 126.

¹³⁰ *Id.*

¹³¹ W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 459 (1988).

¹³² *Id.* at 469–470.

¹³³ See *id.* at 469–471.

¹³⁴ *Id.* at 472.

¹³⁵ *Id.* at 473.

¹³⁶ *Id.* at 478–479.

¹³⁷ *Id.* 481–482 (“The factual record indicates that the alleged invitation issued to the Soviet Union to enter Afghanistan did not emanate from the Government of Afghanistan at that time. On the contrary, it was issued within the Soviet Union by an Afghan who had no official position in the Government. On the basis of this ‘invitation,’ Soviet forces invaded Afghanistan, attacked the presidential palace, killed the President, and installed in his place the person who had “invited” them in the first place.”).

to the conflict in their entirety as opposed to the more narrow requirements for a non-international armed conflict.¹³⁸

The issue of whether the Soviet Union breached Article 2(4) of the UN Charter and engaged in an act of aggression aside, some the Soviets’ conduct during the nine-year war clearly amounted to war crimes.¹³⁹ From reports of executions of civilians¹⁴⁰ to the wholesale destruction of villages,¹⁴¹ numerous violations of the post-Nuremberg principles occurred during the Soviet occupation of Afghanistan, for which there was no justice. The Soviet Union’s membership in the P-5 ensured that the international community could not hold it accountable for its acts.

iii. First and Second Invasions of Chechnya

After the fall of the Soviet Union, the Russian Federation continued to engage in conduct that was legally questionable or illegal under international law. The Russian invasions of Chechnya in 1994 and 1999 should both have been subjected to independent investigations regarding their legality, at a minimum. However, the international community essentially ignored any *jus ad bellum* issues with regard to Russia’s invasion of Chechnya in 1994 and merely condemned loss of civilian life.¹⁴² In addition to the possible illegality of the 1994 invasion itself, Russia likely violated principles of *jus in bello* by relying on largely indiscriminate air and heavy artillery attacks that resulted in significant civilian casualties.¹⁴³ It has been argued that the international community’s decision to ignore Russian crimes in Chechnya was based on a desire not to alienate the Russian government and to maintain stability.¹⁴⁴

¹³⁸ *Id.* at 485.

¹³⁹ See Vincent J. Schodolski, *Soviets Reveal Afghan Atrocities*, CHI. TRIB. (Feb. 16, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-02-16-8903050824-story.html>.

¹⁴⁰ *Id.*

¹⁴¹ Alan Taylor, *The Soviet War in Afghanistan, 1979–1989*, THE ATLANTIC (Aug. 4, 2014), <https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/>.

¹⁴² See DiPaola, *supra* note 14, at 436–437.

¹⁴³ *Id.* at 442–444; Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 INT’L SECURITY 5, 6 (1998) (Estimating that Russian military action in Chechnya before the 1999 invasion had resulted in nearly 100,000 deaths, hundreds of thousands of homeless and refugees, and the near-complete destruction of Chechnya’s capital and many other towns).

¹⁴⁴ See DiPaola, *supra* note 14, at 464–469; see also Lapidus, *supra* note 143, at 6–7.

Two years after its 1994 invasion began, Russia withdrew its forces from Chechnya only to return again in 1999.¹⁴⁵ Instead of justifying the second invasion as it had the first by claiming it was an internal matter of maintaining territorial integrity,¹⁴⁶ Russia framed this invasion and subsequent occupation as a counter-terrorism operation in response to a series of bombings blamed on Chechnyans.¹⁴⁷ However, some evidence seems to suggest that at least one—possibly all—of the apartment bombings were part of a plot carried out by the Russian security agency.¹⁴⁸ The Chechnyans denied responsibility, and there was no independent investigation into the attacks.¹⁴⁹ Not only could the Russian government have committed a crime against humanity on its own population, but it may also have used that crime as justification to begin an illegal war and occupation in Chechnya. Again, the Russian Federation's membership in the P-5 prevented the international community from stopping or holding the Russian Federation accountable for its acts.

iv. Annexation of Crimea and Invasion of Ukraine

On March 21, 2014, the Russian Federation annexed the autonomous region of Crimea in Ukraine.¹⁵⁰ This followed Russia's

¹⁴⁵ See *Chechnya Profile—Timeline*, BBC (Jan. 17, 2018), <https://www.bbc.com/news/world-europe-18190473>.

¹⁴⁶ See generally, DiPaola, *supra* note 14; Lapidus, *supra* note 143.

¹⁴⁷ See *Chechnya Profile—Timeline*, *supra* note 145; *Russian Forces Enter Chechnya*, HIST. (July 20, 2010), <https://www.history.com/this-day-in-history/yeltsin-orders-russian-forces-into-chechnya>.

¹⁴⁸ See Scott Anderson, *None Dare Call It a Conspiracy*, GQ (Mar. 31, 2017), <https://www.gq.com/story/moscow-bombings-mikhail-trepashkin-and-putin>; F. Joseph Dresen, *Foiled Attack or Failed Exercise? A Look at Ryazan 1999*, <https://www.wilsoncenter.org/publication/foiled-attack-or-failed-exercise-look-ryazan-1999> (last visited Oct. 19, 2023); Gregory Feifer, *Ten Year on, Troubling Questions Linger over Russian Apartment Bombings*, RADIO FREE EUR. RADIO LIBERTY (Sept. 9, 2009), https://www.rferl.org/a/Ten_Years_On_Troubling_Questions_Linger_Over_Russian_Apartment_Bombings/1818652.html; Lamar Salter, Linette Lopez & Alana Kakoyiannis, *How a Series of Deadly Russian Apartment Bombings in 1999 Led to Putin's Rise to Power*, BUS. INSIDER (Mar. 22, 2018), <https://www.businessinsider.com/how-the-1999-russian-apartment-bombings-led-to-putins-rise-to-power-2018-3>.

¹⁴⁹ See Anderson, *supra* note 148.

¹⁵⁰ Hiruni Alwishewa, *Revisiting Crimea and the Utility of International Law*, OPINIO JURIS (Aug. 3, 2022), <http://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law/>; Thomas D. Grant, *Annexation of Crimea*, 109 AM J. INT'L L. 68, 71 (2017); *Archive of By International Law, Crimea is Ukraine*, EUR. UNION EXTERNAL ACTION (Mar. 16,

armed intervention in Crimea.¹⁵¹ The Russian Federation made no claim that Crimea or Ukraine had engaged in, nor were imminently going to engage in, an armed attack against Russia, which could have triggered Russia’s right to self-defense. The Security Council also did not authorize the use of force.¹⁵² Instead, the Russian Federation claimed that its armed intervention was aimed at protecting Russian nationals and that it had been invited by the Ukrainian government.¹⁵³ Even if Russia’s alleged reasons for armed intervention were legitimate, the subsequent forcible annexation of Crimea was not, since such acquisitions are prohibited under international law.¹⁵⁴ Since its invasion and annexation of Crimea, Russia has committed numerous human rights and international humanitarian law violations in Crimea including conscription, enforced disappearances, unlawful transfer of prisoners, and restrictions of fundamental rights and has faced allegations of torture and ill-treatment of detainees.¹⁵⁵

On February 24, 2022, the Russian Federation engaged in the crime of aggression and violated the territorial integrity of Ukraine by conducting a full-scale invasion of Ukraine.¹⁵⁶ Russia attempted to confer legitimacy to its actions by claiming, without providing evidence, that Russian-speaking Ukrainians were being subjected to genocide.¹⁵⁷ As it did with the draft Security Council resolution declaring invalid the referendum in Crimea to accede to Russia, Russia vetoed the Security Council’s attempt to condemn Russia’s aggression

2018),<http://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law/>; https://www.eeas.europa.eu/node/41530_en.

¹⁵¹ Grant, *supra* note 150, at 68.

¹⁵² In fact, the Security Council voted on a draft resolution declaring the referendum in Crimea to accede to Russia invalid, but Russia vetoed the resolution. Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT’L L. & POL. 747, 756, 776–777 (citing S.C. Draft Res. 2014/189 (Mar. 15, 2014)).

¹⁵³ Grant, *supra* note 150, at 80–83; Robin Geib, *Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind*, 91 INT’L L. STUD. 425, 431–432.

¹⁵⁴ Geib, *supra* note 147, at 432–437; Grant, *supra* note 150, at 77.

¹⁵⁵ Statement on the Human Rights Situation in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine by Assistant Secretary-General for Human Rights at the Arria Formula Meeting of the Security Council, UNITED NATIONS HUM. RTS., (Mar. 6, 2020), <https://www.ohchr.org/en/statements/2020/03/human-rights-situation-autonomous-republic-crimea-and-city-sevastopol-ukraine>.

¹⁵⁶ Ingrid Brunk & Monica Hakimi, *Russia, Ukraine and The Future World Order*, 116 AM. J. INT’L L., 687, 688, (2022).

¹⁵⁷ Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order on Provisional Measures, 2022 I.C.J. ¶ 37, 59 (Mar. 16); Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russia Federation Vields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022).

in this invasion.¹⁵⁸ Russia further attempted to legitimize its invasion and occupation by holding referendums in occupied Ukrainian territories and then annexing those areas.¹⁵⁹ The human toll of Russia's invasion has been staggering, with nearly 18 million people requiring humanitarian assistance, 8,000 non-combatant deaths, 13,300 non-combatant injuries, 487 child deaths, more than 100 cases of conflict-related sexual violence,¹⁶⁰ and potentially tens or hundreds of thousands of combatant deaths.¹⁶¹ Given Russia's permanent seat on the Security Council as a member of the P-5 and refusal to withdraw from Ukraine, there is no clear end to the conflict in sight.

C. *Great Britain*

i. Fire-Bombing of Dresden

The Allied firebombing of Dresden began on February 13, 1945, at the tail-end of the war with Germany.¹⁶² The subsequent conflagration killed 25,000 people and destroyed much of the city.¹⁶³ Even if the stated Allied goal of the attack—to disrupt German communications and industry—was legitimate, it is far from clear that the indiscriminate firebombing of an entire historic city full of refugees was proportionate to that goal.¹⁶⁴ This firebombing campaign likely constituted a grave breach of the Geneva Conventions as “wilful killing . . . and extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly.”¹⁶⁵ Great Britain's

¹⁵⁸ Brunk, *supra* note 156, at 693; Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russia Federation Wields Veto, *supra* note 157.

¹⁵⁹ Pavel Polityuk, *Russia Holds Annexation Votes; Ukraine Says Residents Coerced*, REUTERS, (Sept. 24., 2022), <https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/>.

¹⁶⁰ *UN Rights Chief Deplores Ukraine Death Toll One Year After Russian Invasion*, UN NEWS (Feb. 21, 2023), <https://news.un.org/en/story/2023/02/1133737>.

¹⁶¹ Julia Mueller, *Russian Deaths in Ukraine Surpass All Its War Fatalities Since WWII Combined: Study*, THE HILL (Feb. 28, 2023), <https://thehill.com/policy/international/3877727-russian-deaths-in-ukraine-surpass-all-its-war-fatalities-since-wwii-combined-study/>; Guy Faulconbridge, *Blood and Billions: The cost of Russia's war in Ukraine*, REUTERS (Aug. 23, 2023), <https://www.reuters.com/world/europe/blood-billions-cost-russias-war-ukraine-2023-08-23/>.

¹⁶² *Firebombing of Dresden*, HIST. (Nov. 5, 2009), <https://www.history.com/this-day-in-history/firebombing-of-dresden>; Toby Luckhurst, *Dresden: The World War Two Bombing 75 Years on*, BBC (Feb. 13, 2020), <https://www.bbc.com/news/world-europe-51448486>.

¹⁶³ See *Firebombing of Dresden*, *supra* note 162; Luckhurst, *supra* note 162.

¹⁶⁴ See *Firebombing of Dresden*, *supra* note 162.

¹⁶⁵ See Geneva Convention I, art. 50.

role as an Allied Power and member of the P-5 ensured that it would not have to answer for the firebombing of Dresden.

ii. Mau Mau Uprising

The Mau Mau Uprising is the name given to the anti-colonial struggle of Kenyans against British rule in the 1950s.¹⁶⁶ In response to the armed uprising, the British colonial authorities placed tens of thousands of Kenyans in concentration camps and engaged in torture and other inhuman treatment of detainees.¹⁶⁷ It was not until 2009 that Kenyan victims of British atrocities gained the right to sue British authorities.¹⁶⁸ Then, in 2013, the British government announced it would pay \$30 million as compensation to the thousands of victims of abuse in Kenya.¹⁶⁹ However, the government did not issue a full apology and “continue[d] to deny liability on behalf of the government . . . for the actions of the colonial administration.”¹⁷⁰ Though some paltry compensation for victims of war crimes or crimes against humanity is preferable to nothing, this is not justice. Justice would require full accounting of, and admission of responsibility and liability, on the part of the British government.¹⁷¹ Because the officials responsible for these acts are gone, justice can never be fulfilled.¹⁷² The United Kingdom’s membership in the P-5 guaranteed that it could freely engage in these acts without fear of reprisal in the Security Council or anywhere else on the international stage.

D. China

i. Tibet

¹⁶⁶ See *Mau Mau Uprising: Bloody History of Kenya Conflict*, BBC (Apr. 7, 2011), <https://www.bbc.com/news/uk-12997138>.

¹⁶⁷ *Id.*

¹⁶⁸ Alan Cowell, *Britain to Compensate Kenyan Victims of Colonial-Era Torture*, N.Y. TIMES, (June 7, 2013), <https://www.nytimes.com/2013/06/07/world/europe/britain-colonial-torture-kenya.html>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019) (providing a definition of justice as “[t]he legal system by which people and their causes are judged; esp., the system used to punish people who have committed crimes.”)

¹⁷² See *id.*

Prior to 1951, Tibet was an independent state.¹⁷³ In 1950, the army of the People's Republic of China invaded Tibet.¹⁷⁴ On May 23, 1951, Tibetan officials, under duress, signed the "Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet," also known as the Seventeen Point Agreement.¹⁷⁵ China therefore acquired the territory of Tibet through the use of force and attempted to make its acquisition legitimate by coercing representatives of the Tibetan government to sign an agreement. Since its annexation of Tibet, the Chinese government has engaged in, and continues to engage in, violations of human rights and humanitarian law such as repressing religious freedom, violating the rights of children, transferring its population to the occupied territory of Tibet, discriminating against people of Tibetan descent, torture, and arbitrary arrest and detention.¹⁷⁶ In response to a letter from several UN Special Rapporteurs expressing concerns about China's "labor transfer" and "vocational training" programs in Tibet,¹⁷⁷ China's Foreign Ministry spokesperson said that "China's Tibet Autonomous Region enjoys social stability, economic development, ethnic solidarity and religious harmony" and called the experts' concerns "completely unfounded."¹⁷⁸ The PRC's membership in the P-

¹⁷³ Carole McGranahan, *Empire out of Bounds Tibet in the Era of Decolonization*, IMPERIAL FORMATIONS 177, 178; Regina M. Clarke, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement to Self-Determination*, 12 IND. INT'L & COMP. L. REV. 293, 296–298 (2002); Robert D. Sloane, 16 EMORY INT'L L. REV. 107, 131–132 (2002); BBC, *Tibet Profile – Timeline*, BBC, <https://www.bbc.com/news/world-asia-pacific-17046222> (last updated Nov. 13, 2014).

¹⁷⁴ McGranahan, *supra* note 173, at 178; Clark, *supra* note 173, at 297; Sloane, *supra* note 173, at 140

¹⁷⁵ McGranahan, *supra* note 173, at 178; Clark, *supra* note 173, at 297–298, 300–301; Sloane, *supra* note 173, at 145, 152–154.

¹⁷⁶ See Clarke, *supra* note 173, at 312–322; Press Release, Office of the High Commissioner for Human Rights, China: UN Experts Alarmed by Separation of 1 Million Tibetan Children from Families and Forced Assimilation at Residential Schools (Feb. 6, 2023), <https://www.ohchr.org/en/press-releases/2023/02/china-un-experts-alarmed-separation-1-million-tibetan-children-families-and>; *Tibet Profile – Timeline*, *supra* note 173.

¹⁷⁷ See Press Release, Office of the High Commissioner for Human Rights, China: "Vocational training" Programmes Threaten Tibetan Identity, Carry Risk of Forced Labour, say UN experts, (Apr. 27, 2023), <https://www.ohchr.org/en/press-releases/2023/04/china-vocational-training-programmes-threaten-tibetan-identity-carry-risk>.

¹⁷⁸ William Yang, *Analysts Say China Violates Human Rights in Tibet*, VOICE OF AMERICA, (Aug. 2, 2023, 12:30 AM), <https://www.voanews.com/a/analysts-say-china-violating-human-rights-in-tibet-7207984.html>.

5 has precluded accountability for its acts in, and continued occupation of, Tibet.

ii. North Korea

Assuming that the Security Council authorization for military force against North Korea was legitimate,¹⁷⁹ China’s intervention against the UN forces could be seen as a breach of Article 2(4) of the Charter and potentially as an act of aggression.¹⁸⁰ Additionally, during the conflict, the U.S. established a War Crimes Division to investigate possible North Korean and Chinese war crimes, and this investigation concluded that when POWs were not immediately executed upon or shortly after capture, they were tortured, abused, and subjected to other inhuman treatment.¹⁸¹ The Senate Report of the findings of the investigation documents a number of massacres of captured U.S. troops and torture while in captivity.¹⁸² Despite these violations, the PRC officials responsible for them never faced accountability because of China’s position in the Security Council.

iii. Tiananmen Square Massacre

Between June 3 and 5, 1989, the Chinese government responded to democracy protests in Tiananmen with a brutal crackdown.¹⁸³ The protesters had swelled to one million by the time of the intervention.¹⁸⁴ On June 4, Chinese police and soldiers began firing live ammunition into the protesters which resulted in the deaths of hundreds and potentially thousands of protesters, and the arrest of 10,000 others.¹⁸⁵ The government of China has since sought to suppress discussion of the incident and to downplay its severity.¹⁸⁶ China’s membership in the P-5 has insulated it from accountability for the mass murder of its own citizens.

¹⁷⁹ See Kondocho, *supra* note 14, at 28–30.

¹⁸⁰ *Id.*

¹⁸¹ See S. REP. NO. 83-848, at 3 (1954).

¹⁸² *Id.* at 4.

¹⁸³ See *Tiananmen Square: What Happened in the Protests of 1989?*, BBC (June 4, 2019), <https://www.bbc.com/news/world-asia-48445934>; *Tiananmen Square Incident*, ENCYCLOPAEDIA BRITANNICA (Apr. 20, 2020), <https://www.britannica.com/event/Tiananmen-Square-incident>; *Tiananmen Square Protests*, HIST. (May 31, 2019), <https://www.history.com/topics/china/tiananmen-square>.

¹⁸⁴ See *Tiananmen Square Protests*, *supra* note 183.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*

iv. Uighur Detention

For the past several years, the Chinese government has gone to extreme lengths to monitor and repress its Uighur Muslim minority in Xinjiang.¹⁸⁷ It is estimated one million or more people are detained in concentration camps that the Chinese government calls voluntary job training centers.¹⁸⁸ Chinese officials have declared that released documents showing the true purpose of the camps as re-education centers are fake news and that anything going on in Xinjiang constitutes an internal affair.¹⁸⁹ It appears that the decisions to send individuals to these camps are arbitrary, and once there, the detainees are subjected to torture and other inhuman treatment.¹⁹⁰ These crimes against humanity have so far gone unpunished and continued unabated despite widespread international awareness. Even in the face of allegations of genocide,¹⁹¹ the PRC's position in the P-5 has ensured that it can continue to act with impunity against its Uighur minority.

E. France

i. Vietnam/Indochina

¹⁸⁷ See *Secret Documents Reveal How China Mass Detention Camps Work*, ASSOCIATED PRESS (Nov. 25, 2019), <https://apnews.com/4ab0b341a4ec4e648423f2ec47ea5c47>; *Data Leak Reveals How China "Brainwashes" Uighurs in Prison Camps*, BBC (Nov. 24, 2019), <https://www.bbc.com/news/world-asia-china-50511063>; see Ewelina U. Ochab, *The Fate of Uighur Muslims in China: From Re-education Camps to Forced Labor*, FORBES (Apr. 4, 2020, 8:30 AM), <https://www.forbes.com/sites/ewelinaochab/2020/04/04/the-fate-of-uighur-muslims-in-china-from-re-education-camps-to-forced-labor/#6e8ddb722f73>.

¹⁸⁸ See *Secret Documents Reveal How China Mass Detention Camps Work*, *supra* note 187; *Data Leak Reveals How China "Brainwashes" Uighurs in Prison Camps*, *supra* note 187; *The Fate of Uighur Muslims in China: From Re-education Camps to Forced Labor*, *supra* note 187.

¹⁸⁹ *Secret Documents Reveal How China Mass Detention Camps Work*, *supra* note 187.

¹⁹⁰ See *id.*

¹⁹¹ See Press Statement, Antony J. Blinken, U.S. Secretary of State, UN Office of the High Commissioner for Human Rights Report on the Human Rights Situation in Xinjiang (Sept. 1, 2022), <https://geneva.usmission.gov/2022/09/01/statement-on-un-human-rights-office-report-on-xinjiang/>; Press Statement, Michael R. Pompeo, U.S. Secretary of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/>.

Immediately following WWII, the French government attempted to regain control of its former colony in Vietnam, despite the clear efforts of its people to establish their own nation.¹⁹² The French used torture, napalm, and frequently killed civilians in their attacks, though it is clear that violations of the law of armed conflict were perpetrated by both sides.¹⁹³ Somewhere between 150,000 and 250,000 civilians were killed between 1945 and 1956.¹⁹⁴ Torture and the targeting of civilians are considered grave breaches of the Geneva Conventions.¹⁹⁵ Because of its membership in the P-5, France—and the French officials responsible for its conduct in Vietnam/Indochina—never faced accountability.

ii. Algeria

The French government’s atrocities in Algeria are far more well-known than those in Vietnam. In the last days of WWII in Europe, nationalist sentiment in Algeria led to demonstrations against French occupation.¹⁹⁶ Thousands of unarmed protesters were killed and French forces were ordered to begin killing civilians and bombing villages as reprisals which resulted in tens of thousands more civilian deaths.¹⁹⁷ At the onset of the full-scale insurgency in 1954, French forces began bombing villages and continued arresting and torturing Algerians.¹⁹⁸ French forces relied “heavily on helicopter bombing of opposition territory.”¹⁹⁹ The conflict continued until 1962, when Algeria gained its independence, and claimed the lives of 1.5 million Algerians.²⁰⁰ France has never officially apologized or taken responsibility for the

¹⁹² See *Indochina: First Indochina War*, WORLD PEACE FOUND. (Aug. 7, 2015), <https://sites.tufts.edu/atrocityendings/2015/08/07/indochina-1st-indochina-war/>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; see Geneva Convention IV, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁹⁶ See Yasmina Allouche, *Remembering the Massacre of 45,000 Algerians*, MIDDLE E. MONITOR (May 8, 2017, 8:00 AM), <https://www.middleeastmonitor.com/20170508-remembering-the-massacre-of-45000-algerians/>; see also Tony Todd, *France Commemorates Algerian Massacres for First Time*, Fr. 24 (Apr. 19, 2015, 12:34 PM), <https://www.france24.com/en/20150419-france-commemorates-1945-algerian-massacre-first-time>.

¹⁹⁷ See Allouche, *supra* note 196.

¹⁹⁸ See *Algeria: War of Independence*, WORLD PEACE FOUND. (Aug. 7, 2015), <https://sites.tufts.edu/atrocityendings/2015/08/07/algeria-war-of-independence/>.

¹⁹⁹ *Id.*

²⁰⁰ Allouche, *supra* note 196.

massacres, but in 2005, recognized that they had occurred.²⁰¹ France's targeting of civilians and use of torture violated the Geneva Conventions.²⁰² Again, because of its membership in the P-5, France—and the French officials responsible for its conduct in Algeria—never faced accountability.

IV. CONCLUSION

The post-Nuremberg world has shown that—far from subjecting all perpetrating states and leaders to the law—international criminal justice has been selectively applied and therefore does not comport with one of the most basic principles of the rule of law. If one of the purposes of international criminal law is putting an end to impunity, it has failed spectacularly. While the importance of providing some semblance of justice to the victims of atrocities in places like the former Yugoslavia, Rwanda, Sierra Leone, Lebanon, Cambodia, the Democratic Republic of the Congo, and Sudan cannot be discounted, it must be paled by the countless millions of other victims of the illegal acts of the major powers during and after WWII for whom justice may never come.

It is inconceivable that any member, much less all, of the P-5 would agree to amend the UN Charter to remove the veto power so that is hardly an option toward ensuring accountability. As long as the members of the P-5 remain outside the jurisdiction of the International Criminal Court, it also cannot guarantee justice for crimes they commit absent amendment.²⁰³ A ray of hope, though partially symbolic, is the ICC arrest warrant issued for Vladimir Putin, the President of the Russian Federation, for “the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.”²⁰⁴ However, President Putin would likely have to leave

²⁰¹ See Todd, *supra* note 196.

²⁰² See Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; see Geneva Convention IV, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁰³ See Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST. SEC. (Mar. 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/>.

²⁰⁴ See Press Release, International Criminal Court, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin->

Russia and any country friendly to Russia for there to be any chance of his arrest. Members of the P-5’s disdain for, or recalcitrance to join, the ICC²⁰⁵ appears to have also emboldened other nations to oppose the ICC or threaten withdrawal from the Rome Statute that established the Court.²⁰⁶ With the current international systems incapable of holding the most powerful accountable, they must be amended or altered to provide justice to the victims of the P-5’s international crimes. Aside from amending these systems—though not discussed in this article—is the possibility of a state exercising universal jurisdiction over P-5 officials alleged to have violated international criminal law.²⁰⁷ This would, however, require the P-5 officials’ presence in the arresting state and the arresting state’s political will to detain an official from the most powerful and influential countries.

and#:~:text=Mr%20Vladimir%20Vladimirovich%20Putin%2C%20born,articles%208(2).

²⁰⁵ See *Russia Indicts ICC prosecutor, Judge Who Issued War Crimes Warrant for Putin*, ASSOCIATED PRESS (May 21, 2023), <https://apnews.com/article/russia-indictment-icc-prosecutor-judge-putin-260100f9ba533e15ebee3084dba74ff4>; see generally *The International Criminal Court and the United States*, HUM. RTS. WATCH, <https://www.coalitionfortheicc.org/country/united-states#:~:text=2.,Is%20the%20US%20a%20member%20of%20the%20ICC%3F,voted%20against%20the%20Rome%20Statute> (last visited Sept. 11, 2023).

²⁰⁶ See THE GUARDIAN, *Philippines: Duterte threatens to arrest International Criminal Court prosecutor* (Apr. 13, 2018), <https://www.theguardian.com/world/2018/apr/13/philippines-duterte-threatens-to-arrest-international-criminal-court-prosecutor>; Franck Kuwonu, *ICC: Beyond the threats of withdrawal*, U.N. AFRICA RENEWAL (July 2017), <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

²⁰⁷ See generally CRYER ET AL., *supra* note 3, at 56–68 (providing an overview of the concept of universal jurisdiction).

