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Volume 15 | Number 3

Article 3

4-1-1993

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Recommended Citation

Louis Rene Beres, *Iraqi Crimes during and After the Gulf War: The Imperative Response of International Law*, 15 Loy. L.A. Int'l & Comp. L. Rev. 675 (1993).

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ESSAY

Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law

LOUIS RENÉ BERES*

I. INTRODUCTION

When the victorious allied powers established a special military tribunal at Nuremberg on August 8, 1945, they reaffirmed an ancient and peremptory principle of law: *nullum crimen sine poena*, "no crime without a punishment."¹ The court based its sentencing not on reformation or deterrence, but *retribution*.² The Nuremberg court's use of retribution ensured that the most abominable perpetrators of international crimes could reasonably expect enforcement of the *nullum crimen sine poena* principle.

Today, as the world begins to lose sight of major Iraqi crimes committed both during and after the 1991 Gulf War,³ including crimes of war, crimes against peace, and crimes against humanity,⁴

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1. In the words of Sir Walter Moberly, "The principle really embodied at Nuremberg was the principle of *retribution*. At the time of the trial public opinion in the victorious countries undoubtedly demanded and acclaimed it. Rightly or wrongly it was felt that, to punish, was not only allowable and expedient but an imperative duty." SIR WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* 303 (1968).

2. *Id.*

3. The official account of the Gulf War is found in U.S. DEP'T OF DEFENSE, *CONDUCT OF THE GULF WAR* (1992). Appendix 0 of this document addresses the following issues under the law of war: hostages; treatment of civilians in occupied territory; targeting, collateral damages and civilian casualties; enemy prisoner of war programs; treatment of prisoners of war; repatriation of prisoners of war; uses of ruses and perfidy; war crimes; environmental terrorism; conduct of neutral nations; and "surrender" in the conduct of combat operations. *Id.* app. 0. For an excellent policy-centered treatment of these issues, see W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 *DICK. J. INT'L L.* 393-423 (1992).

4. Crimes of war, crimes against peace, and crimes against humanity are defined in the Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(a)-(c), 59 Stat. 1546, 1547, 82 U.N.T.S. 279 [hereinafter IMT Charter] as follows:

this principle once again needs institutionalized jurisprudential support.⁵ Such support should derive from the creation of another special tribunal or from existing municipal courts used for the prosecution of Saddam Hussein and his Revolutionary Council.⁶

(a) Crimes Against Peace: namely, 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;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation 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;

(c) Crimes Against Humanity: namely, 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.

5. *Nullum crimen sine poena* is a principle that distinguishes between criminal and non-criminal law. Without punishment there can be no distinction between a penal statute and any other statute. See *Redding v. State*, 85 N.W.2d 647, 652 (Neb. 1957) (concluding that a criminal statute without a penalty clause is of no force and effect).

6. In view of the obvious difficulties surrounding actual custody of Saddam Hussein and other Iraqi defendants, some trials may have to be conducted in absentia. According to the IMT Charter, Annexed to the London Agreement:

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter [crimes against peace, war crimes, and crimes against humanity] in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

IMT Charter, *supra* note 4, art. 12, at 1548. However, trials in absentia may run counter to long-settled principles of justice and due process in national and international law. In the United Nations Report of the 1953 Committee on International Criminal Jurisdiction, the Committee reaffirmed the general principle of law that an accused "should have the right to be present at all stages of the proceedings." U.N. GAOR, 9th Sess., Supp. No. 12, at 19, U.N. Doc. A12645 (1953) [hereinafter U.N. Committee Report]. In the Annex to the Report, the Committee's Revised Draft Statute for an International Criminal Court, the rights of the accused to a "fair trial" include "the right to be present at all stages of the proceedings." *Id.* at 25. The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950, also stipulates that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing." The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(3)(c), 213 U.N.T.S. 221. The same right is affirmed in the *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966). Strictly speaking, of course, anyone charged with a criminal offense who is offered representation "through legal assistance of his own choosing" as an alternative to defending himself in person, is being allowed essential minimum guarantees under law and is not being deprived of due process by trials in absentia. *Id.* Similarly, anyone charged with a criminal offense who is offered the opportunity "to defend himself in person," but declines to do so, is not being mistreated under the law. *Id.*

II. IRAQI CRIMES DURING THE GULF WAR

During the Gulf War, Iraq committed truly horrendous crimes⁷ so terrible that they mandate universal cooperation in apprehension and punishment (*crimen contra omnes*, crimes against all).⁸ These crimes involve human rights violations under international law such as: (1) barbarous and inhuman assaults against Kuwaiti citizens and other nationals in Kuwait; (2) barbarous and inhuman treatment of coalition prisoners of war in Iraq and Kuwait; and (3) aggression and crimes of war against noncombatant populations in Israel and Saudi Arabia.⁹ One rationale for protection of human rights violations under international law is that "certain forms of depredations become matters of international concern when committed under the aegis of state policy because of the presumed international impact of such be-

7. It is arguable, of course, that the formal protocol of a trial can never be applied appropriately to *overwhelming* lawlessness, and that such a trial—contrary to all of the usual expressions of concern for "justice"—would necessarily be manifestly unjust. In this connection, prosecution of Iraqi crimes under international law must be understood as a mockery of civilized law-enforcement, not because of perceived abuses of power and legal procedure but because such judicial "remedy" would create an unfounded appearance of proportionality. This argument, which holds that in the cases of certain egregious or "truly horrendous" crimes, e.g., the Holocaust, no amount of judicial punishment can produce justice, and leads only to the diametrically opposite courses of action: (1) extra-judicial punishment (normally execution), or (2) leaving the crimes unpunished altogether. The first course of action is unsatisfactory because it contains all of the elements of infinite regress (i.e., *when if ever* is the amount of extra-judicial punishment finally commensurate with the crime) and because of the tactical difficulties involved in killing an "adequate" number of perpetrators. Moreover, this option is plagued by evidentiary issues concerning proper identification of wrongdoers, "probable cause" and "beyond a reasonable doubt." The second course of action is unsatisfactory because it represents flagrant disregard for expectations of *nullum crimen sine poena*.

8. The principle of universality is founded upon the presumption of solidarity between states in the fight against crimes. See 2 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* bk. II, ch. 20, sec. 8 (1625); EMMERICH DE Vattel, *THE LAW OF NATIONS* bk. I, ch. 19 (Charles G. Fenwick trans., 1916) (1758). The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. Geneva Convention No. 1, Aug. 12, 1949, art. 49, 6 U.S.T. 3114; Geneva Convention No. 2, Aug. 12, 1949, art. 50, 6 U.S.T. 3217; Geneva Convention No. 3, Aug. 12, 1949, art. 129, 6 U.S.T. 3316; Geneva Convention No. 4, Aug. 12, 1949, art. 146, 6 U.S.T. 3516. In further support of universality for certain international crimes, see 2 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* ch. 6 (1983). See also *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 402-04, 443 (Tent. Draft No. 5, 1984).

9. For an early but authoritative inventory of Iraqi crimes, see John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403, 410-411 (1991). See also STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 1ST SESS., *REPORT ON CIVIL WAR IN IRAQ* (Comm. Print 1991).

havior."¹⁰ However, this rationale is independent of international implications whenever the depredations in question outrage the conscience of humankind. International law now concedes that limits to the omnipotence of each state are determined not only by the requirements of international comity, but also by the *inherent* rights of each individual person to human life and dignity. All of these violations under international law,¹¹ of course, are in addition to the original crimes against peace committed against Kuwait on August 2, 1990,¹² and to the ensuing crimes against humanity in Kuwait between August 2, 1990, and January 18, 1991.

The United States and its allies must decide on how broadly they wish to prosecute Iraqi crimes. The special post World War II war crimes planning group did not have to address this issue, as it focused primarily on particular Nazi groups that were defined as inherently criminal (e.g., the SS and the Gestapo). In the Gulf War, however, it

10. M. Cherif Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 194 (1982).

11. The jurisprudential bases of this concession may be found in all of the sources of international law identified at Article 38 of the Statute of the International Court of Justice, reprinted in MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* app. 4, at 677 (1943).

12. For crimes against peace, or waging aggressive war, see *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975). For pertinent codifications of the criminalization of aggression, see also Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 U.N.T.S. 57; U.N. CHARTER art. 2, para. 4; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess. Supp. No. 28 at 121, U.N. Doc. A/8028 (1971); *Declaration on the Non-Use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons*, G.A. Res. 2936, U.N. GAOR, 27th Sess., Supp. No. 30 at 5, U.N. Doc. A/8730 (1972); CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, Annex, 59 Stat. 1544, 82 U.N.T.S. 279; *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess. at 1144, U.N. Doc. A/236 (1946). See also Convention on the Rights and Duties of States, Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, 165 L.N.T.S. 19 (known generally as the "Montevideo Convention"); Pact of the League of Arab States, March 22, 1945, art. 5, 70 U.N.T.S. 237; CHARTER OF THE ORGANIZATION OF AMERICAN STATES, April 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, 119 U.N.T.S. 3 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (known generally as the "Protocol of Buenos Aires"); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 121 U.N.T.S. 77 (known generally as the "Rio Pact"); the American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (known generally as the "Pact of Bogota"); and CHARTER OF THE ORGANIZATION OF AFRICAN UNITY, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

appears that many of the crimes against humanity committed by Iraq were unplanned and individually conceived atrocities.¹³ This means that coalition lists of suspected war criminals could become so large as to be altogether unusable. Alternatively, coalition prosecution could focus primarily on Hussein and his leadership elite. This strategy would result in many or all rank-and-file Iraqi criminals avoiding punishment, but would stand some chance of far-reaching and practical success.¹⁴

Finally, it should be noted that a coalition agency charged with creating "another Nuremberg" could adopt the solution favored by the United States, the former Soviet Union, Great Britain, and France in 1945. This would involve establishing a special tribunal for the trial of major criminals (Saddam Hussein and the surviving members of his Revolutionary Council), while the domestic courts of individual coalition countries would provide the venue for trials of minor criminals (ordinary Iraqi soldiers and their civilian Iraqi collabora-

13. This does not mean that individual soldiers could plead "superior orders" in their defense if these crimes were planned and directed by Iraqi military authorities. The London Charter, which established jurisdiction and authority for the Nuremberg Tribunal, observed in Articles 7 and 8 that the tribunal could not consider "superior orders" as absolving defendants from responsibility. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, Aug. 8, 1945, art. 7-8, 59 U.S.T. 1544, 82 U.N.T.S. 279. "The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." *Id.* This principle was reaffirmed in 1950 when the United Nations International Law Commission, pursuant to General Assembly Resolution 177 (II), adopted November 21, 1947 (by a vote of 42 to 1, with 8 abstentions) formulated the *Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal*. According to Principle IV: "The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law."

14. The particular liability of Hussein and his ruling associates for crimes committed under international law is well established in the principle of *respondeat superior*. Literally "let the master answer," this principle is the converse of the doctrine of "superior orders," and thus seeks to ensure that lawful obedience to authority entails no criminal consequences. Moreover, the superior's responsibility extends to where no affirmative orders to commit crimes have been given. Paragraph 501 of U.S. DEP'T OF ARMY, THE LAW OF LAND WARFARE: FIELD MANUAL 27-10 (1956)—based on the judgment over Japanese General Tomayuki Yamashita—stipulates that any commander who had actual knowledge, or should have had knowledge, that troops or other persons under his control participated in war crimes and failed to take necessary steps to protect the laws of war *was guilty of a war crime*. Paragraph 510 denies the "act of state" defense to alleged criminals by providing that a person who committed an international crime remains responsible even though he may have acted as head of state or as a responsible government official. *Id.*

tors). As in the distinction employed to prosecute Nazi offenses, the separation of *major* and *minor* criminals concerns matters of rank or position, and would have nothing to do with the seriousness or horror of particular transgressions. Because the Iraqi crimes make their perpetrators "common enemies of humankind" under international law, every country now has the legal right to prosecute these crimes in its own courts.¹⁵ In addition, every state has a reciprocal obligation not to grant asylum to alleged perpetrators of genocide and genocide-like crimes. States that might grant Hussein asylum (such as Algeria, Tunisia, Yemen, Sudan, and Mauritania) would violate binding international rules in doing so.¹⁶

III. IRAQI CRIMES AFTER THE GULF WAR

Iraq's crimes did not cease with the end of the Gulf War.¹⁷ The

15. Traditionally, piracy and slave trading have been offenses warranting universal jurisdiction. Following World War II, however, states have generally recognized an expansion of universal jurisdiction to include: crimes of war, crimes against peace, crimes against humanity, hostage taking, crimes against internationally protected persons, hijacking, sabotage of aircraft, torture, genocide, and apartheid. For the most part, this jurisdictional expansion has its origins in multilateral conventions, customary international law, and certain pertinent judicial decisions. The Second Circuit Court of Appeals declared, "The torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). One federal district court recognized that "nations have begun to extend . . . jurisdiction to . . . crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy." *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981). The Sixth Circuit Court of Appeals acknowledged universal jurisdiction over war crimes in a case involving extradition of a Ukrainian Nazi to Israel. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985). Other judicial examples of universal jurisdiction over war crimes include *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); and *Von Dardel v. Union of Soviet Socialist Republics* 623 F. Supp. 246 (D.D.C. 1985).

16. See *Convention on the Prevention and Punishment of the Crime of Genocide*, art. 7, G.A. Res. 260, U.N. GAOR, 3rd Sess., at 174 (1948); *Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, art. 3, G.A. Res. 2391, U.N. GAOR, 23rd Sess., at 40 (1968); *Declaration on Territorial Asylum*, art. 1(2), G.A. Res. 2312, U.N. GAOR, 22nd Sess., at 81 (1967); *International Convention on the Suppression and Punishment of the Crime of Apartheid*, art. 4(3), G.A. Res. 3068, U.N. GAOR, 28th Sess., at 75, U.N. Doc. A/9030 at (1973); and the four Geneva Conventions of 1949, Geneva Convention No. 1, *supra* note 8; Geneva Convention No. 2, *supra* note 8; Geneva Convention No. 3, *supra* note 8; Geneva Convention No. 4, *supra* note 8. The provisions of the four Geneva Conventions stem from the maxim *aut dedere aut punire*, i.e., either a State must extradite or make sure that a criminal is punished in its own municipal court proceedings.

17. Coalition military action against Iraqi forces commenced on January 16, 1991. The war ended when Iraq formally accepted all of the United States-led coalition's terms for a permanent cease fire on March 3, 1991. Although elimination of all Iraqi nonconventional force capabilities was an integral part of the cease fire agreement, Iraq continued after the war

Baghdad regime committed vast crimes against humanity upon its own Kurdish populations.¹⁸ Should these non-wartime crimes be included in the indictments under discussion? Soon after the entry into force of the cease fire agreement, United States President George Bush and Secretary of State James Baker identified these crimes as actions falling under the category of "domestic jurisdiction."¹⁹

However, according to Article 1 of the Genocide Convention: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."²⁰ This does not mean, however, that the creation of appropriate tribunals would be contingent upon Iraqi crimes being authentic instances of genocide as defined at the Genocide Convention. Rather, such creation would still be appropriate with "genocide-like" crimes that derive from other sources of international law.

In addition, notwithstanding the traditionally expressed prerogatives of sovereignty, a state no longer has the right to claim itself the sole judge in matters involving crimes against humanity.²¹ These are

to seek a thermonuclear weapons capacity and to disguise this effort from United Nations inspectors.

18. It is essential to understand that the Kurds, under international law, certainly have had the right to use force in rebellion against the Saddam Hussein regime. Although specially-constituted United Nations committees and the United Nations General Assembly have repeatedly condemned acts of international terrorism, they exempt those activities that derive from "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations." *Report of the Ad Hoc Committee On International Terrorism*, U.N. GAOR, 28th Sess., Supp. No. 28, U.N. Doc. A/9028 (1973); *Resolution On The Definition Of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975). Article 7 refers to the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971). For a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination, see Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, E/CN.4/Sub. 2/404/Rev. 1, United Nations, New York, 1981.

19. U.N. CHARTER art. 2, para. 7.

20. *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 16, art. 1.

21. See *Universal Declaration of Human Rights*, G.A. Res. 217, 3rd Sess., U.N. Doc. A/810, at 71 (1948); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221; *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (This Convention should be read in conjunction with the

now authoritatively understood as matters of "international concern." In contrast to the principle of "domestic jurisdiction," which recognizes a reserved domain within which a state can act at its own discretion, "international concern" recognizes limits on this domain compelled by matters of absolutely overriding importance.²² A state's demand for exclusive competence must be grounded in far more than a declared interest in avoiding "intervention."

Therefore, within the current system of international law, external decisionmakers, in this case United States and other coalition leaders, are authorized to intercede in matters that may have at one time been regarded as "internal." This trend in authoritative decision-making toward an expansion of the doctrine of "international concern" falls outside of Lauterpacht's definition of intervention.

Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a demand which, if not complied with, involves a threat of, or recourse to, compulsion, though not necessarily physical compulsion, in some form.²³

We can see that intervention is not always impermissible,²⁴ and that any assessment of its lawfulness must be contingent upon intent. Applying Lauterpacht's standard, where there is no interest in exert-

Protocol Relating to the Status of Refugees, G.A. Res. 2198, U.N. GAOR, 21st Sess., at 48, U.N. Doc. A/6586 (1966) (entered into force October 4, 1967)); Convention on the Political Rights of Women, March 31, 1953, 193 U.N.T.S. 135; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, March 7, 1966, 660 U.N.T.S. 195 (1966); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 220, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); American Convention on Human Rights, Nov. 22, 1969. O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970) (entered into force, July 18, 1978). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights—known collectively as the International Bill of Rights—serve as the touchstone for the normative protection of human rights.

22. U.N. CHARTER art. 2, para. 7. See also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex 1, No. 28, at 121, U.N. Doc. A/8028 (1970); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 12.

23. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 167 (1950).

24. For an informed discussion of intervention and "domestic jurisdiction," see LOUIS HENKIN, *THE AGE OF RIGHTS* ch. 4 (1990).

ing “dictatorial interference,” the act of intervening may represent the proper enforcement of pertinent legal norms.²⁵ This concept of intervention greatly transforms the exaggerated emphasis on “domestic jurisdiction” that has been associated improperly with individual national interpretations of Article 2(7) of the United Nations Charter.²⁶

The importance of the changing doctrine of “intervention” to the shift in global “allocation of competence” was prefigured by the *Tunis-Morocco* case before the Permanent Court of International Justice in 1923 (“Permanent Court”).²⁷ In this case, the Permanent Court stated that whether or not a matter is essentially within the “domestic jurisdiction” of a particular State “depends upon the development of international relations.”²⁸

Although this test is hardly free of ambiguity, it does clarify that the choice between “international concern” and “domestic jurisdiction” is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competences. This means that whenever particular events create significant violations of human rights, the general global community is entitled to internationalize jurisdiction and to authorize appropriate forms of decision and action.

Where conditions are judged to permit “humanitarian intervention,” the general community “may enter into the territory of the defaulting state for the purposes of terminating the outrage and securing compliance with a minimum international standard of human rights.”²⁹ This doctrine of humanitarian intervention echoes Edwin M. Borchard’s prior formulation in 1915:

[W]here a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these “human” rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not perma-

25. *Id.*

26. U.N. CHARTER art. 2, para. 7.

27. Nationality Decrees Issued in Tunis and Morocco (Fr. v. Gr. Brit.), 1923 P.C.I.J. (ser. B) No. 4 (Nov. 8).

28. *Id.*

29. MYRES McDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN RIGHTS 239 (1980).

nently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law and will be protected, in last resort, by the most appropriate organ of the international community.³⁰

Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased limits on the doctrine of humanitarian intervention. These limits flow from the greatly reduced justification for the use of force in the Charter system of international law, especially the broad prohibition contained in Article 2(4).³¹ However, one must understand that the Charter does not prohibit all uses of force and certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding the drafters' attempts to centralize the legal processes of world politics, the Charter system has not impaired the long-standing right of individual states to act on behalf of the international legal order. In the absence of effective central authoritative processes for decision and enforcement, the legal community must continue to require humanitarian intervention by individual states.

Notwithstanding the basis for humanitarian intervention, by late summer 1992 the United States, Great Britain, and France, acting on behalf of the United Nations coalition, agreed to limit such intervention in Iraq to declarations of "no fly zones." Designed essentially to protect abused Shiite populations in the southern part of the country, these declarations fell short of what was required and sanctioned by the international law of human rights. Moreover, they did nothing to bring Hussein into jurisdiction for prosecution.

This is the crux of the problem of punishing Iraqi crimes. The

30. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 14 (1915).

31. "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 other manner inconsistent with the Purposes of the United Nations." U. N. CHARTER art. 2, para. 4.2. While one cannot deny that humanitarian intervention might be used as a pretext for aggression, it is also incontestable that a strictly literal interpretation of Article 2(4) would summarily destroy the entire corpus of normative protection for human rights—a corpus that is coequal with "peace" as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which peace is dependent upon widespread respect for human dignity, a strict interpretation of Article 2(4) might impair the prospects for long-term security. *Id.* "The use of armed force in defense of human rights may be emphatically in the common interest as a mode of maintaining international peace and security." MCDUGAL ET AL., *supra* note 29, at 241.

rules of extradition cannot operate while Hussein remains in control of Iraq, so would-be prosecutors must rely upon forcible abduction to bring him to trial. Optimally, such abduction would take place in concert with more general interventionary relief for Kurdish or Shiite populations, but would also be permissible and distinctly legal on its own.

There is, in view of Nuremberg, absolutely no question that Hussein, his civilian officials, military officers, and even enlisted personnel are personally subject to trial and punishment for pertinent crimes.³² The solution of forcible abduction for trial is acceptable according to certain major writings of highly-qualified scholars. According to Vattel, for example: "if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid."³³ What are the limits of such aid? Vattel continues: "As for those monsters who, under the name of the sovereigns, act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth."³⁴

Forcible abduction is not an unknown remedy in international law.³⁵ Although great care must be taken not to violate peremptory human rights, if extradition is not a viable option the only alternative may be to leave major crimes unpunished.

In addition, forcible abduction is not a new concept. Israel, in 1960, abducted Nazi war criminal Adolph Eichmann from Argentina on charges of Nuremberg-category crimes.³⁶ In 1985, a United States military aircraft forced down an Egyptian aircraft over international waters on the grounds that the Egyptian plane held accused terrorists

32. On the matter of personal criminal liability, see William V. O'Brien, *The Nuremberg Precedent and the Gulf War*, 31 VA. J. INT'L. L. 391 (1991).

33. VATTEL, *supra* note 8, bk. II, ch. 4, at 13.

34. *Id.* at 132.

35. See John Quigley, *Enforcement of Human Rights in U.S. Courts: The Trial of Persons Kidnapped Abroad*, in *WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 59-80 (Mark Gibney ed., 1981); Manuel R. Garcia-Mora, *Criminal Jurisdiction Of A State Over Fugitives Brought From A Foreign Country By Force Or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957); Kandy G. Webb, *Constitutional And International Law - International Kidnapping - Government Illegality As A Challenge To Jurisdiction*, 50 TUL. L. REV. 169, 170 (1975).

36. See M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 30 (1973).

in the Achille Lauro affair.³⁷ In 1987, again in international waters, the FBI lured Fawez Younis, a Lebanese national, onto a yacht and eventually transported him by force to the United States for trial.³⁸ And on April 2, 1990, Humberto Alvarez-Machain, a medical doctor and a citizen of Mexico, was forcibly abducted from his office by persons answerable to the Drug Enforcement Agency ("DEA") and flown by private plane to Texas to face charges of kidnapping and murdering a DEA agent and the agent's pilot.³⁹

IV. JURISPRUDENTIAL FOUNDATIONS AND JURISDICTIONAL CHOICES

If Saddam Hussein and the surviving members of his Revolutionary Council are not prosecuted, justice will be defiled and international law will be left weak and tragically undermined. Between August 2, 1990, the date of Iraq's invasion of Kuwait, and October 29, 1990, the Security Council adopted ten resolutions explicitly condemning the Baghdad regime for multiple crimes of the gravest nature.⁴⁰ These *crimen contra omnes* would cry out for legal prosecution even if there had been no authorizing resolutions by the United Nations Security Council. The prohibition of the now documented barbarous activities of Iraq against Kuwaitis and other nationals in Kuwait, against coalition prisoners of war in Iraq and Kuwait, and against noncombatant populations in Israel and Saudi Arabia is known as a "peremptory" rule of international law—an absolutely binding rule allowing no form of derogation whatsoever.

For the United States, the Nuremberg obligations to bring major Iraqi criminals to trial are, in a sense, doubly binding. This is because these obligations represent not only current obligations under international law,⁴¹ but also the obligations of a higher law found in the

37. See generally Gregory v. Gooding, *Fighting Terrorism in the 1980s: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158 (1987).

38. See G. Gregory Schuetz, *Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L.J. 499, 501 (1988).

39. See *United States v. Alvarez-Machain*, No. 91 - 712 (U.S. June 15, 1992), which held that a respondent's forcible abduction does not prohibit his trial in a United States court for violations of this country's criminal laws.

40. For a comprehensive listing of these resolutions and associated pertinent documents, see *Current Documents: Gulf War Legal and Diplomatic Documents*, 13 HOUS. J. INT'L L. 281 (1991).

41. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers *supra* note 12, and IMT Charter, *supra* note 4. The principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of

United States political tradition. By codifying the principle that basic human rights in war and in peace are now "peremptory," the Nuremberg obligations reflect perfect convergence between international law and the enduring foundation of our American Republic.

Where should the trials be held? Nuremberg had been widely expected to be a precursor for the establishment of a permanent criminal court for the prosecution of international crimes.⁴² Yet, even today, no such court has been created. Contrary to common misconceptions, the International Court of Justice at the Hague has absolutely no penal or criminal jurisdiction, and is therefore unsuitable.

One solution would be to parallel Nuremberg, and establish a specially constituted *ad hoc* tribunal within the defeated country's territory (probably at Baghdad). Another acceptable (and far more likely) possibility would be to undertake such proceedings within the country that had been Iraq's principal victim—Kuwait. Here, the court could be coalition-wide, as it would be within Iraq, or it could (depending upon the desired range of indictments) be fully Kuwaiti. Legal precedent and justification for all of these possibilities can be found, among other sources, in the Convention on the Prevention and Punishment of the Crime of Genocide ("Convention").⁴³ Article VI of this Convention provides that trials for its violation be conducted "by a competent tribunal of the State in the territory of which the act

the Tribunal were affirmed by the U.N. General Assembly as *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess., at 1144 Doc. A/236 (1946). The U.N. General Assembly next made Resolution 177 (II), adopted November 21, 1947, directing the U.N. International Law Commission to "(a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offenses against the peace and security of mankind . . ." U.N. Doc. A/519, at 112. The principles formulated are known as the *Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal*, G.A. Res. 127, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1946) [hereinafter *Nuremberg Principles*].

42. The origin of the idea of an established international criminal court is embedded in the First Hague Convention for the Pacific Settlement of International Disputes, July 19, 1899, 32 Stat. 1779, 26 Martens Nouveau Recueil (ser. 2d) 720. For development of this idea, see generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in New International World Order*, 25 VAND. J. OF TRANSNAT'L L. 151 (1992); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987) [hereinafter *CRIMINAL DRAFTS*]; Symposium, *Draft International Criminal Court*, 52 REVUE INTERNATIONALE DE DROIT PENAL [R.I.D.P.] 331 (1984).

43. See *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 16.

was committed, or by any such international penal tribunal as may have jurisdiction."⁴⁴

From a strictly jurisprudential point of view, crimes of war, crimes against peace, and crimes against humanity are offenses against humankind over which there is universal jurisdiction and a universal obligation to prosecute. But, in this case, it is the United States, for many reasons, that should now take the lead in prosecution of major Iraqi criminals. These reasons include the special United States role in military operations supporting the pertinent Security Council resolutions, the historic United States role at Nuremberg in 1945, and the long history of United States acceptance of jurisdictional competence and responsibility on behalf of international law.

As noted by the Sixth Circuit in 1985 in *Demjanjuk v. Petrovsky*, "The law of the United States includes international law" and "international law recognizes 'universal jurisdiction' over certain offenses."⁴⁵ The United States Constitution⁴⁶ and a number of court decisions⁴⁷ make all international law, conventional and customary, the supreme law of the land. And the Nuremberg Tribunal itself acknowledged that the participating powers "have done together what any one of them might have done singly."⁴⁸

Finally, in exercising its special responsibilities under international and municipal law concerning prosecution of egregious Iraqi crimes, the United States already has the competence to prosecute in its own federal district courts.⁴⁹ The legal machinery for bringing Hussein and his fellow criminals to justice is already well-established under international and United States law. Therefore, what is immediately needed is the political will to make this machinery work.⁵⁰ If

44. *Id.* art. 6.

45. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985).

46. U.S. CONST. art. VI.

47. See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). For a general discussion of these cases, see FRANCIS A. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987).

48. *Nuremberg Principles*, *supra* note 41.

49. See 10 U.S.C. §§ 818, 821; 18 U.S.C. § 3231 (1988).

50. Regarding such "political will," United States Senator Al Gore (now Vice-President), speaking on the fourth anniversary of the founding of the Kurdish city of Halabja, on March 18, 1992, strongly criticized the failure of the Bush Administration's policy toward Iraq and the Administration's failures to hasten the removal of Iraqi police records documenting crimes by Saddam Hussein and others. For the full text of this statement, which refers to Hussein's "genocidal war," see *Mass Killings in Iraq: Hearings Before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 49-51 (1992).

the new President of the United States, preferably in concert with other coalition partners, can now build upon the important precedents and expectations of Nuremberg, his efforts would represent a fitting conclusion to the Gulf War.⁵¹

V. CONCLUSION

Writing in 1784, the German philosopher Immanuel Kant observed: "Out of timber so crooked as that from which man is made, nothing entirely straight can be built."⁵² Today, perhaps more than ever before, the validity of the philosopher's observation is affirmed by the almost limitless cruelty taking place throughout the world. Whether it is in Bosnia-Herzegovina, Somalia, Cambodia, Lebanon, or South Africa, just to name a few, the willful capacity of human beings to bring death and torture to others is well documented. Indeed, the systematic and barbarous extinction of vast numbers of people has become the ironic legacy of our post-Holocaust and post-Nuremberg world order.

Where *was* international law? Where *is* international law? Created over the millenia, as an authoritative body of norms that would mediate between civilization and chaos, the law of nations has typically been immobilized, content with a history that swallows up innocents without even a glance at treaties or other binding expectations. It should come as no surprise, therefore, that those who commit or prepare to commit Nuremberg-type crimes pay scant attention to international law. How could it be otherwise?

Yet there is a remedy! Beginning with the egregious and ongoing crimes of Hussein, various national governments, acting on behalf of our decentralized system of international law, must now take the necessary steps toward effective prosecution.⁵³ The result would not be a

51. In this connection, such efforts would give effect to the peremptory expectation of *nullum crimen sine poena*. Here Plato's view is instructive. Thinking of vice, the source of crime, as an ailment of the soul (in the fashion that physical disease is an ailment of the body), Plato recommended punishment to restore order in the soul. The criminal, therefore, derives a positive benefit from punishment. Discarding the claims of retributivism, Plato contended that punishment is just and good only to the extent that it serves the common good by advancing human welfare. Punishment is meant to turn others from vice and teach virtue.

52. The original German is: "Aus so krummen Holze, als woraus der Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden." IMMANUEL KANT, *GESCHICHTE IN WELTBURGERLICHER ABSICHT* (1784).

53. These steps must begin with the fulfillment of each state's peremptory obligation to search for and bring into custody and to initiate prosecution of or to extradite those persons who are reasonably accused of crimes of war, crimes against peace, and crimes against human-

straightening of humankind's "crooked timber," but the subjection of our harm-inclined species to elementary rules on international justice. A more immediate result, of course, would be an end to genocidal and near genocidal harms still being inflicted on Iraq's Kurdish populations.⁵⁴

"The real aim of punishment by human beings," says Samuel Pufendorf, "is the prevention of attacks and injuries."⁵⁵ In this aim, "punishment seeks the interest of the victim, which is that he should not suffer the same thing again either from the same man or from others."⁵⁶ Understanding Pufendorf, the prosecution of Iraqi crimes committed during and after the Gulf War would contribute importantly to the prevention of future crimes of war, crimes against peace, and crimes against humanity.⁵⁷

ity. See, e.g., CRIMINAL DRAFTS, *supra* note 42, at 110. See generally Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT'L L. 337 (1989).

54. Extraordinary documents dating back to 1988 and 1989, the worst years for Iraq's Kurds, were spirited out of Iraq in May and June 1992. These included 14 tons of paper, audio and film record interrogations, torture sessions, and executions. See Patrick E. Tyler, *U.S. to Help Retrieve Data on Iraqi Torture of Kurds*, N. Y. TIMES, May 17, 1992, at 3; Amy Kaslow, *Documents Give Evidence of Atrocities Against Iraqi Kurds*, CHRISTIAN SCI. MONITOR, June 10, 1992, at 1, 4.

55. See SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 159 (James Tully ed. & Michael Silverthorne trans., 1991).

56. *Id.* at 160.

57. Sadly, it is already too late for the victims of "ethnic cleansing" in the death camps of Bosnia and Herzegovina. Arguably, more expeditious prosecution of Iraqi crimes would have had a deterrent effect on the crimes in former Yugoslavia. But while the United States and other countries have indicated an unwillingness to use military force except to insure the flow of relief supplies, former Deputy Secretary of State Lawrence S. Eagleburger still called for a war crimes investigation. At the moment, however, it appears that the political will to proceed to appropriate tribunals is lacking. See R.W. Apple, Jr., *State Department Asks War Crimes Inquiry into Bosnia Camps*, N.Y. TIMES, Aug. 6, 1992, at A1, A6.