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# Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War

Louis René Beres\*

Coalition military action against Iraqi forces commenced on January 16, 1991. This collective resort to force represented a last attempt to remove Iraqi military units from Kuwait, which had been occupied since Saddam Hussein's invasion of August 2, 1990. On the very same day of the Iraqi invasion, UN Security Council Resolution 660: (1) Condemned the Iraqi invasion of Kuwait; (2) Demanded that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on August 1, 1990; (3) Called upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and to support all efforts in this regard, especially those of the League of Arab States. The war ended when Iraq formally accepted all of the United States-led coalition's terms for a permanent ceasefire on March 3, 1991. Significantly, although elimination of all Iraqi nonconventional force capabilities was an integral part of the ceasefire agreement, Iraq continued after the war to seek a thermonuclear weapons capacity and to disguise this effort from UN inspectors.<sup>1</sup>

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1. N.Y. Times, Oct. 8, 1991, at A1, col. 3. On October 7, 1991, more than seven months after the conclusion of hostilities, "United Nations inspectors . . . discovered a complex of buildings that apparently served as the nerve center of President Saddam Hussein's covert nuclear weapons program, but had largely escaped allied attack during the Persian Gulf war." *Id.* It was here, at an "installation called Al Atheer about 40 miles south of Baghdad," that Iraq planned—according to the report—"to design and produce a nuclear device." *Id.* For assessments of nuclear weapons under international law, see *The Illegality of Nuclear Weapons: Statement of the Lawyer's Committee on Nuclear Policy*, 8 ALTERNATIVES: A JOURNAL OF WORLD POLICY 291 (1982); R. FALK, E. MEYROWITZ & J. SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW (1981); Fried, *First Use of Nuclear Weapons — Existing Prohibitions in International Law*, 1981 BULLETIN OF PEACE PROPOSALS 21-29; Lippman, *Nuclear Weapons and International Law: Towards A Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY L.A. INT'L & COMP. L.J. 183 (1986); Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DEN. J. INT'L L. & POL'Y (1983); Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437 (1965); Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, NW. U.L. REV. 1407 (1986); Stegenga, *Nuclearism and International Law*, 4 PUB. AFF. Q. 69 (Jan. 1990); G. BEST, HUMANITY IN WARFARE (1980); J. JOHNSON, JUST

## I. Introduction

To pursue international legal norms of justice in the closing decade of the twentieth century is to invite anguish. Preoccupied with mere survival and afflicted by growing suffering, our species has now become an intolerable burden to itself. Although the intent of international law is to reduce or even to reverse such tragic self-destructiveness, for the present, at least, emancipation will have to arise largely from non-jurisprudential sources.

Yet, even in our Age of Atrocity, international law can try to narrow the gap between what is expected of states and actual state behavior. This requires, of course, that significant crimes be duly noted and prosecuted, that violators are effectively prevented from confidently expecting their misdeeds to have been undertaken with impunity. At this particular moment, this requirement would best be fulfilled by dedicated and energetic prosecution of recent and ongoing Iraqi crimes.

## II. Iraqi Crimes and Their Prosecution

Shocked by still mounting evidence of Iraqi atrocities against civilians<sup>2</sup> and combatants of diverse nationalities,<sup>3</sup> the victorious coa-

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WAR TRADITION AND THE RESTRAINT OF WAR (1981); NUCLEAR WEAPONS AND INTERNATIONAL LAW (I. Pogany ed. 1987); Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?*, 30 MCGILL L.J. 189 (1984); Thomas, *Atomic Bombs in International Society*, 39 AM. J. INT'L L. 736 (1945); Stowell, *Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784 (1945); Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOKLYN J. INT'L L. 263 (1983); Rostow, *The Great Nuclear Debate*, 8 YALE J. WORLD PUB. ORD. 87 (1981); Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111 (1987); Weston, *Nuclear Weapons Versus International Law: A Contextual Re-assessment*, 28 MCGILL L.J. 542 (1983); Fried, *The Nuclear Collision Course: Can International Law Be of Help*, 14 DEN. J. INT'L L. & POL'Y 97 (1985); and F. BOYLE, *THE CRIMINALITY OF NUCLEAR WEAPONS* (Nuclear Age Peace Foundation Booklet #27, Waging Peace Series, 1991).

2. Civilians are generally mentioned as "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause . . ." Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

3. These atrocities continued within Iraq even after the Gulf War. Crimes such as those directed primarily against Kurdish and Palestinian minorities became matters of international concern because of their international impact and because they outraged the conscience of humankind. See, M.C. Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 1949 (1982). International law now concedes that limits to the authoritative 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 claims of life and dignity. See *infra*, note 49. There are four bases of law (*i.e.*, international conventions; international custom, as evidence of a general practice, accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations). STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1). 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. STATUTE OF THE I.C.J., June 26,

lition should now begin immediate preparations for "another Nuremberg."<sup>4</sup> Animated by the original trials for crimes of war,<sup>5</sup> crimes against peace, and crimes against humanity,<sup>6</sup> and by the associated ancient principle of *nullum crimen sine poena* (no crime without a punishment)<sup>7</sup>, this coalition also would have to make some difficult judgments.<sup>8</sup> Among these decisions are important legal

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1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

4. In June 1945 the governments of the United States, France, the United Kingdom, and the Union of Soviet Socialist Republics agreed to hold a conference in London to negotiate an agreement providing for a trial of German leaders by an international military tribunal. The result of the London Conference was the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter London Agreement]. Also note that the London Charter is annexed to the London Agreement.

5. Today, the laws of war, or *jus in bello*, comprise: (1) laws on weapons; (2) laws on warfare; and (3) humanitarian rules. At the Hague and Geneva Conventions, these rules, known as the law of the Hague and the law of Geneva, were codified and attempted to bring discrimination, proportionality, and military necessity into belligerent calculations. On the main corpus of *jus in bello*, see Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (known commonly as the Hague Regulations); 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, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 2.

6. It is important to note here that the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention], proscribes conduct that is juristically distinct from other forms of prohibited wartime killing—killing involving acts constituting crimes of war and crimes against humanity. Although the term "crimes against humanity" is linked to wartime actions, the crime of genocide can be committed during peacetime or during a war. "Whether committed in time of peace or in time of war," under the Genocide Convention, "[t]he Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish." *Id.*, art. 1.

7. This principle was reaffirmed by the Nuremberg Judgment in which the Tribunal stated: "So far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." A.P. D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 110 (1951). Such reaffirmation, however, was *not* a rejection of the corollary principles of *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law), because the Judgment was founded entirely upon settled norms of international law. The doctrine of *nullum crimen sine poena* can be abused when the definition of crime is left to *ad hoc* determinations of the public authority such as in situations in which punishment is based upon retroactive declarations of penal laws, or in which normative ambiguity makes it impossible to know in advance what conduct is criminal. Such abuse, however, could not be an issue in the prosecution of Iraqi crimes because the definitions of crimes of war, crimes against peace, and crimes against humanity—the categories of criminal conduct that would form the indictment against Saddam Hussein *et. al.*—are already fixed, clear, and established.

8. Crimes of war, crimes against peace, and crimes against humanity are defined in the London Charter, Aug. 8, 1945, art. 6(a), (b), (c), 59 Stat. 1544, 82 U.N.T.S. 279, as follows:

- (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 labour or for any other purpose of civilian population of or in occupied

questions of precedent, jurisdiction,<sup>9</sup> and scope,<sup>10</sup> not to mention enormously complex questions of custody<sup>11</sup> and criminal procedure.<sup>12</sup>

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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 . . . .

*Id.*

See also London Agreement, *supra* note 4. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, August 8, 1945, Appendix, sec. 12, art. 12, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

9. In this connection, the following four traditionally recognized bases of jurisdiction come to mind immediately: (1) the territorial principle, determining jurisdiction by reference to the territory on which the crimes were committed; (2) the protective principle, determining jurisdiction by reference to the national interest injured by the crimes; (3) the universality principle, determining jurisdiction by reference to the custody of the person committing the crimes; and (4) the passive personality principle, determining jurisdiction by reference to the nationality of the persons injured by the crimes.

10. Just how broadly among the Iraqi armed forces and political leadership should the prosecutorial net of criminal indictments be cast?

11. In view of the obvious difficulties surrounding actual custody of Saddam Hussein and other likely Iraqi defendants, some trials may have to be conducted in absentia. Nuremberg set some precedent in this area. According to the London Charter, *supra* note 8, "The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter [*i.e.*, 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." *Id.*, art. 12.

Normally, 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 (27 July - 20 Aug. 1953), the Committee reaffirmed the general principle of law that an accused "should have the right to be present at all stages of the proceedings." See *Report of the Committee on Int'l Crim. Jurisdiction*, 9 U.N. GAOR Supp. (No. 12) art. 129, U.N. Doc. A/2645 (1954). In the Annex to the Report, in the Committee's Revised Draft Statute for an International Criminal Court, the rights of the accused to a "fair trial" include, *inter alia*, "The right to be present at all stages of the proceedings." *Id.* at annex, art. 38(2)(a).

The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, also stipulates that everyone charged with a criminal offense has the right, *inter alia*, "to defend himself in person or through legal assistance of his own choosing . . . ." *Id.*, art. 6, 3(c). The same right is affirmed in the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR 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 normally not being mistreated under law. Amendments IV, V, VI, and VIII to the United States Constitution comprise a "bill of rights" for accused persons. The phrase "due process of law" derives from chapter 29 of the Magna Carta wherein the King promised that: no man (*nullus liber homo*) be taken, imprisoned or put out of his free-hold or his liberties of free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land (*per legem terrae*).

COKE, INSTITUTES, 50 (1669) (cited in CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 217 (1963)).

12. For a comprehensive consideration of Iraqi war crimes and prosecutorial options, refer to the following articles: Paust, *Suing Saddam: Private Remedies for War Crimes and*

How should the coalition begin? Led by the United States, which was also the dominant national force at Nuremberg, the partners must create a specially constituted agency endowed with organizational form, centralized direction and expert legal counsel.<sup>13</sup> Resembling the war-crimes planning group fashioned in the War Department after the allied defeat of the Third Reich, this agency would be charged with the tasks of drafting basic documents, framing pertinent criminal indictments, and preparing courtroom prosecutions.

There is not a moment to lose. Since coalition forces have already left Iraq, identification will be overwhelmingly difficult. Custody will require formal extradition requests to Baghdad and possibly other Arab capitals.<sup>14</sup> Such requests are not likely to be honored.<sup>15</sup>

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*Hostage-Taking*, 31:3 VA. J. INT'L L. 351 (1991); Beres, *The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes*, 31:3 VA. J. INT'L L. 381 (1991); O'Brien, *The Nuremberg Precedent and the Gulf War*, 31:3 VA. J. INT'L L. 391 (1991); and Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31:3 VA. J. INT'L L. (1991).

13. From the point of view of 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 both current obligations under international law and higher-law obligations found in the American political tradition. By their codification of the principle that basic human rights in war and in peace are now "peremptory," the Nuremberg obligations reflect a perfect convergence between international law and the enduring foundation of our American Republic.

14. As such requests can be expected to fail, the requesting states may consider the permissibility of abduction as the only means of securing custody. Normally, of course, there is a presumption of sovereign immunity — a binding rule that exempts each state and its high officials from the judicial jurisdiction of another state. In *The Schooner Exchange v. M'Faddon*, Chief Justice Marshall argued for "the exemption of the person of the sovereign from arrest or detention within a foreign territory." 11 U.S. 116, 137 (1812). Historically, the rule of sovereign immunity may be traced to Roman Law and to the maxim of English law that the King can do no wrong. Under current United States law, the authoritative expression of this rule may be found in the Foreign Sovereign Immunities Act of 1976, 23 U.S.C. §§ 1602-1611 (1976).

15. In the nineteenth century, a principle of granting asylum to those whose crimes were political was established in Europe and in Latin America. This principle is known as the political offense exception to extradition. The political offense clause is included in many treaties. The rationale of this clause is to ensure that the requirements of international and national order are not met at the expense of national and international justice. Aware that all human beings are entitled to certain essential rights under international law, and that particular states are often indifferent or hostile to these rights, legal writers have invoked the political offense exception so that resistance to tyranny and oppression should not be impeded. At the same time, to ensure that especially grievous crimes not be protected by the political offense exception, many treaties contain an exception to the exception for such crimes. For example, the additional protocol to the Extradition Convention of 15 October 1975, excludes from the field of application of the political offense exception, genocide, certain war crimes, and other crimes against humanity. See ADDITIONAL PROTOCOL, E.T.S. No. 86. For a comprehensive assessment of the political offense exception and of the associated doctrine of the "exception to the exception," see 2 INTERNATIONAL CRIMINAL LAW, 414-18; 483-87 (M. Cherif Bassiouni, ed. 1986).

Under current international law, however, genocide and genocide-like crimes are specifically excluded from the realm of the political offense, and therefore, it is illegal to grant asylum to alleged perpetrators of such crimes. See Convention of Genocide, *supra* note 6, art. VII; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Convention on the Non-Applicability of Statutory Limitations to War

What, exactly, happened at Nuremberg? There, it was recognized that belligerents have the right to punish, as war criminals, those who violate the laws or customs of war. On November 1, 1943, allied forces declared that: "atrocities, massacres and cold blooded mass executions that were being perpetrated by the Hitlerite forces . . ." should be the object of criminal prosecution and punishment.<sup>16</sup> With this Moscow Declaration, the three allied powers (United States, United Kingdom, Union of Soviet Socialist Republics) announced that the "minor" Nazi war criminals would be tried and punished within the lands where the crimes had taken place. As for the major criminals "whose offenses had no particular geographical location,"<sup>17</sup> punishment was to be the product of joint allied judgment.

Between October 1943 and January 1944, London and Washington established a United Nations Commission for the Investigation of War Crimes.<sup>18</sup> The commission, meeting in London during 1944, assembled lists of war criminals. On August 8, 1945, the constitutive authority for an International Military Tribunal at Nuremberg was provided by the London Agreement and its accompanying Charter.<sup>19</sup> The law embodied in this Charter was "decisive and binding upon the Tribunal."<sup>20</sup> It provided that:

The 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 member of organizations, committed any of the following crimes: (a) crimes against peace; (b) crimes of war; (c) crimes against humanity.<sup>21</sup>

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Crimes and Crimes Against Humanity (1968) G.A. Res. 2391 (XXIII), 23 U.N. GAOR, Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968). In force on November 11, 1970, in accordance with Article VIII; Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30), paras. 4, 7, U.N. Doc. A/9030 (1973); Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 1(2), U.N. Doc. A/6716 (1967); International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) art. 4(b), U.N. Doc. A/9030 (1974). See also 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) Geneva Convention I, *supra* note 5, art. 49; Geneva Convention II, *supra* note 5, art. 50; Geneva Convention III, *supra* note 5, art. 129; Geneva Convention IV, *supra* note 2, art. 146. It follows that states that might grant Saddam asylum (the usual candidates are Algeria, Tunisia, Yemen, Sudan, and Mauritania) would be in grievous violation of binding international rules.

16. See Moscow Declaration, in 38 AM. J. INT'L L. 7 (Supp. 1944) and cited by Bas-siouni, *International Law and the Holocaust*, 91 CAL. W. INT'L L.J. 201 (1979).

17. *Id.*

18. Commonly known as the United Nations War Crimes Commission (UNWCC).

19. See London Agreement, *supra* note 4; London Charter, *supra* note 4.

20. See International Military Tribunal, I Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg, Judgment 218 (Nov. 1, 1945 - Oct. 1, 1946) published by the Secretariat of the Tribunal, Nuremberg 1947-1949 [hereinafter Trial I].

21. London Charter, *supra* note 4, art. 61.

The results of the Nuremberg Trial of the Major War Criminals are now well-known. Among other things, the Tribunal explicitly rejected the idea that only states are subjects of international law and declared authoritatively that "individuals" are punishable for crimes against international law.<sup>22</sup> As a practical matter, Germany had surrendered unconditionally, and the allies did not encounter any legal problems in gaining custody over the major Nazi criminals.<sup>23</sup>

How comparable, then, is Nuremberg to the current situation concerning Iraqi crimes? Unlike Germany, Iraq emerged from war unoccupied. Thus, it is essentially impossible that a Nuremberg-style tribunal could be convened within Iraq or that custody over Iraqi criminals could be established without resort to forcible abductions. Nevertheless, the Principles of Nuremberg, formulated by the International Law Commission (ILC) and adopted by the United Nations General Assembly in 1950, are fully binding upon all states and compel prosecution of Iraqi crimes against peace, crimes of war, and crimes against humanity.

Exactly what kinds of Iraqi crimes are involved?<sup>24</sup> Judging from persistent and well-documented reports, the crimes are so terrible in law that they mandate universal cooperation in apprehension and punishment,<sup>25</sup> *crimen contra omnes* (crimes against all). They in-

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22. According to the Judgment, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." See Trial I, *supra* note 20, at 223.

23. Twenty-four individuals were named in the indictment as defendants; defendant Ley committed suicide prior to the trial, and defendant Krupp was found unfit to stand trial, leaving twenty-two defendants.

24. For documentation of Iraqi crimes, see *Iraqi Forces Killings and Torturing in Kuwait, Says Amnesty International Fact-Finding Team*, Amnesty Int'l News Release, AI index MDE 14/15/90, Distr. SC/PO (Oct. 3, 1990) (preliminary report on widespread charges of Iraqi torture, willful killing, rape, pillage, and collective reprisals). See also *Iraq/Occupied Kuwait Human Rights Violations Since 2 August 1990*, Dec. 19, 1990, at AI index MDE 14/16/90. For personal testimonies of Iraqi brutalities, see N.Y. Times, Jan. 14, 1991, at A17, col. 1; Ghabra, *The Iraqi Occupation of Kuwait: An Eyewitness Account*, 20 J. PALESTINE STUD. 112 (1991). Further documentation can be found in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102d Cong., 1st Sess., CIVIL WAR IN IRAQ (Comm. Print 1991) (findings of Peter W. Galbraith); *Crisis in the Persian Gulf: Sanctions, Diplomacy and War: Hearings Before the House Comm. on Armed Services*, 101st Cong., 2d Sess. (1990); *Human Rights Abuses in Kuwait and Iraq: Hearings Before the House Comm. on Foreign Affairs*, 102d Cong., 1st Sess. (1991).

25. The principle of universality is founded upon the presumption of solidarity between states in the fight against crimes. It is mentioned in the *Corpus Juris Civilis*, cited in GROTIUS, 2 DE JURE BELLI AC PACIS (1964), and in I VATTEL, LE DROIT DES GENS (1964). 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. See Article 49 of Convention No. 1; Article 50 of Convention No. 2; Article 129 of Convention No. 3; and Article 146 of Convention No. 4. In further support of universality for certain international crimes, see BASSIOUNI, 2 INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE (1983). See also RESTATEMENT (SECOND/THIRD) OF THE FOR-



clude the following: (1) barbarous and inhuman assaults against Kuwaiti 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<sup>26</sup> and Saudi Arabia.<sup>27</sup> All of these "grave breaches" under international law are in addition to the original crimes against peace<sup>28</sup> committed against Kuwait on August 2, 1990.<sup>29</sup> The United States

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EIGN RELATIONS LAW OF THE UNITED STATES, §§ 402-404, 443 (Tent. Draft No. 5, 1984), 18 U.S.C. § (6)(c).

26. Iraq had been an aggressor against Israel from the start. Baghdad sent significant numbers of expeditionary forces in the 1948 War of Independence, the Six Day War (1967), and the Yom Kippur War (1973). During the 1948 War, Iraqi forces entered Trans-Jordan and engaged Israeli forces in Western Samaria. In the aftermath of the 1967 War Iraqi forces, which were again deployed in Jordan, remained there for more than two years. During the 1973 War, Baghdad committed about one-third of its then 95,000 man armed forces to assist Syria in its campaign against the IDF on the Golan Heights.

27. We must also add here Iraq's commission of new forms of environmental destruction and environmental manipulation as a form of warfare. The intentional dumping of millions of barrels of Kuwaiti and Saudi oil into the Gulf and the torching of Kuwaiti oil wells represent clear and egregious violations of Article 53 of Geneva Convention IV, *supra* note 2. *See also* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, T.I.A.S. No. 9614, 16 I.L.M. 88. Regarding Saddam Hussein's "eco-terrorism" against Kuwaiti oil wells, a number of pertinent instruments pertain to marine pollution. *See* International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3. *See also* International Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1969, 9 I.L.M. 45 (1970); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 11 I.L.M. 284 (1972); Convention for the Prevention of Marine Pollution from Land Based Sources, June 4, 1974, 13 I.L.M. 352 (1974); Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration and Exploitation of the Seabed Mineral Resources, Apr. 30, 1978. Other pertinent conventions are the following: International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties; International Convention for the Prevention of Pollution from Ships; and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973; and Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165, *reprinted in* I.L.M. 1294 (1972).

28. Pursuant to the London Agreement, *supra* note 1, the indictment of the International Military Tribunal contained two counts concerning crimes against peace and was founded on the Kellogg-Briand Pact, the Stimson Note of 1932, the Geneva Protocols and the Resolutions of the Eighth Assembly of the League of Nations and the Sixth International Conference of American States. Moreover, the Weimar Constitution had stated that "generally accepted rules of international law" were part of German law and that the outlawry of aggressive war had been one of the "generally accepted rules of international law" in 1939. *See* BROWNLEE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 55-65 (1963).

29. For crimes against peace or waging aggressive war, *see* Resolution on the Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975). For pertinent codifications of the criminalization of aggression, *see* Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 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, 20 U.N. GAOR, Supp. (No. 14) at 11, U.N. Doc. A/6014 (1966), *reprinted in* 5 I.L.M. 374; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR 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, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972); London Charter, *supra* note 4, art. 6. Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg

and all other states bound by the 1949 Geneva Conventions are obligated under international law to search out and prosecute or extradite individuals alleged to have committed "grave breaches" of these Conventions. According to Article 146 of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War):

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>30</sup>

Interestingly, Israel and Saudi Arabia would be on very firm jurisprudential ground if they chose to initiate their own legal proceedings. Afflicted by multiple acts of aggression,<sup>31</sup> both Saudi Arabia and Israel could establish jurisdiction over Saddam Hussein, *et al*, within their own courts based upon not only their particular victimization, but also upon universal jurisdiction. However, because a state of war continues to exist between Israel and every Arab State except Egypt,<sup>32</sup> Israel's leaders would be entirely reasonable in not

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Tribunal, G.A. Res. 95, 1 U.N. GAOR 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, T.S. No. 881, 165 U.N.T.S. 19 (generally known 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, T.I.A.S. No. 2361, 119 U.N.T.S. 3; the Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (generally known as the "Protocol of Buenos Aires"); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681., T.I.A.S. No. 1838, 121 U.N.T.S. 77 (known generally as the "Rio Pact"); American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (generally known as the "Pact of Bogota"); Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

30. *See* Geneva Convention IV, *supra* note 2, art. 146; 3 U.N. Docs. S/RES/670, S RES/674 (1990).

31. For more on aggression, *see* *Draft Code of Crimes Against the Peace & Security of Mankind*, [1954] 2 Y.B. INT'L L. COMM'N 150, U.N. Doc. A/2693 (This was revised in 1987, 1988, and 1989.). *See also* U.N. Doc. A/42/420 (1987), U.N. Doc. A/CN.4/404 (1987), U.N. Doc. A/43/539 (1988), U.N. Doc. A/CN.4/419 (1989), and U.N. Doc. A/44/150 (1989). *See also* Declaration on the Right of Peoples to Peace, G.A. Res. 39/11 Annex, 39 U.N. GAOR Annex 39/11 (No. 51) at 22, U.N. Doc. A/39/L.14 (1984).

32. The agreements that put an end to the first Arab-Israeli War (1947-1949) were general armistice agreements negotiated bilaterally between Israel and Egypt on February 24, 1949, 42 U.N.T.S. 251-70 (1949); Israel and Lebanon on March 23, 1949, 42 U.N.T.S. 287-98 (1949); Israel and Jordan on April 3, 1949, 42 U.N.T.S. 303-20 (1949); and between Israel and Syria on July 20, 1949, 42 U.N.T.S. 327-40 (1949).

Pursuant to these agreements, the Security Council, on August 11, 1949, issued a Resolution which, *inter alia*, "noted with satisfaction the several Armistice Agreements," and "Finds that the Armistice Agreements constitute an important step toward the establishment of permanent peace in Palestine and considers that these agreements supersede the truce provided for in Security Council resolution 50 (1948) of May 29, 1948, and Security Council Resolution 54 (1948) of July 15, 1948. *See* Resolution Noting the Armistice Agreements and Reaf-

expecting co-operation from other states in the Middle East in prosecuting Iraqi crimes.<sup>33</sup>

Whether Israel chose to base its jurisdiction over Iraqi crimes on territoriality or universality principles, it would have to make another far more serious decision: Should prosecution take the form of *in absentia* trials, or should Saddam and others be brought to Israeli courts by abduction? At first glance, the second course is far more problematic jurisprudentially, but it is also potentially far more consequential as a pragmatic path toward real justice. Guided by the expectations of *nullem crimen sine poena* (no crime without a punishment), Israel would be moving more expeditiously toward actual punishment by opting for abduction over trials *in absentia*.

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firming the Order to Observe an Unconditional Cease Fire Pending a Final Peace Settlement, S.C. Res. 73, 4 U.N. SCOR, 1949, at 8, U.N. Doc. S/1376, (1949). With the exception of Egypt, none of the aforementioned armistice agreements has been superseded by an authentic peace treaty. A general armistice is a war convention, an agreement or contract concluded between belligerents. Such an agreement does not result in the termination of a state of war.

The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land stipulates that "[a]n armistice suspends military operations by mutual agreement *between the belligerent parties*." Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, ch. 5, art. 36, 36 Stat. 2277, T.S. No. 539 (emphasis added). The courts of individual states have also affirmed the principle that an armistice does not end a war. *See, e.g., Kahn v. Anderson*, 255 U.S. 1 (1921). Indeed, throughout history, armistices have normally envisaged a resumption of hostilities. It follows from this that since no peace treaties have been concluded between Israel and the Arab states with which it negotiated armistice agreements in 1949 (again, with the prominent exception of Egypt), a condition of belligerency continues to exist between these states and Israel. For pertinent documents and commentary on Israel-Arab agreements, *See R. HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967: THE MIDDLE EAST* (1969), which is a study issued under the auspices of the Royal Institute of International Affairs). For pertinent commentary and documents on the historic status of relations between the Arab states and Israel, *see T.N. DUPUY ELUSIVE VICTORY: THE ARAB-ISRAELI WARS, 1947-1974* (1978), (especially Chapter 12).

33. At the conclusion of the recent Gulf War, the Bush administration announced plans to sell to Saudi Arabia, a country of six million inhabitants, an arms package of \$24 billion which includes over 500 tanks, forty-eight F-15 fighter planes, Apache helicopter gunships, more than thirty Patriot batteries, tens of thousands armored vehicles, multiple rocket-launchers and command/control systems. Rationalizing the Saudi demand for this vast arsenal by pointing to the "growing danger from Iran," the Bush administration ignores that such American arms can be used for aggression against Israel. Indeed, while a Saudi Arabia that joined in the coalition to defeat Saddam now appears benign, this monarchy has been busily compensating the Assad regime in Syria with billions of dollars in aid — money to be used entirely for Syria's ongoing military buildup. Egypt, in addition to acquiring substantial military assets from the United States, is developing its own home-grown missile, the Saqr-80 (which can be launched from FROG-7 launchers), while Iran is deploying its domestically-produced Oghab missile. For more on Arab and Iranian militarization, *see Heller, Coping with Missile Proliferation in the Middle East*, 35 ORBIS 15-28 (1991).

From May to October 1991, Pakistan has received new M-11 missiles from China; Brazil may have concluded a secret deal with the Libyan Air Force to provide technical assistance to service Libyan warplanes; China entered into a reactor project with Algeria that may well have nuclear-weapon related implications; China exported missile or nuclear-weapons related technology to Egypt, Algeria, Libya, Syria, Saudi Arabia, Iran, and Pakistan; Iran tested a modified version of the Soviet SCUD-C intermediate range ballistic missile and has reportedly spent, since March 1990, at least \$200 million annually on a nuclear weapons program aided by Pakistan, Argentina, and China; and Libya has negotiated with North Korea for the purchase of a new IRBM system. *See PROLIFERATION WATCH*. U.S. Senate Committee on Governmental Affairs 12 (May-June 1991).

Upon closer examination, Jerusalem would discover that abduction of a "common enemy of mankind" such as Saddam is *not* nearly as problematic in law as one might think. It would also discover that abduction could involve very considerable tactical (military) difficulties that might be exceedingly costly to overcome. Indeed, these difficulties could create substantial harm to civilians in Iraq, causing death, injury, and destruction that could undermine the operation's rationale as a law-enforcing measure.

Yet, if the tactical problems could be handled without causing collateral harms in Iraq, the abduction of Saddam Hussein, *et al*, for trial in Israel could be defended persuasively under international law.<sup>34</sup> Recognizing that the only practical alternative to such a strategy would likely leave monumental crimes unpunished, Israel's leaders would be justified in going outside the usual mechanisms of extradition. To secure custody would be more lawful than leaving this *hostes humani generis* free to commit further crimes of war, crimes against peace, and crimes against humanity. This argument, however, would be contingent upon the presumption that ordinary mechanisms of extradition were inoperative, but such a presumption is entirely plausible.

Washington and its allies also must decide on how broadly they wish to prosecute Iraqi crimes. In this respect, the special post World War II war crimes planning group had a somewhat easier task. It focused primarily on particular Nazi groups that were defined as inherently criminal (*i.e.*, the SS and the Gestapo). Following the recent defeat of Saddam Hussein, however, it appears that many of the crimes against humanity committed by Iraq were unplanned and individually-conceived atrocities.<sup>35</sup> This means that coalition

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34. On the principle of command responsibility, or respondeat superior, see *In re Yamashita*, 327 U.S. 1 (1945); *The High Command Case (The Trial of Wilhelm von Leeb)* 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 71 (United Nations War Crimes Commission Comp. 1949); see Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605 (1972); U.S. DEPT. OF THE ARMY, ARMY SUBJECT SCHEDULE NO. 27-1 (Geneva Conventions of 1949 and Hauge Convention No. IV of 1907) 10 (1970). The direct individual responsibility of Saddam Hussein and others is unambiguous in view of the London Agreement, *supra* note 4, art. 7 which denies defendants the protection of the act of state defense. Under traditional international law, violations of international law were the responsibility of the state, as a corporate actor, not the individual human decision-makers in government and in the military.

35. This does not mean, however, that if these crimes were planned and directed by Iraqi military authorities, individual soldiers could plead "superior orders" in their defense. With respect to the issue of superior orders, the classical writers on international law had long rejected that doctrine as a proper defense against the charge of war crimes. The German Code of Military Law operative during the war provided that a soldier must execute all orders undeterred by the fear of legal consequences, but it added that this would not excuse him in cases where he must have known with certainty that the order was illegal. This view was upheld in an important decision of the German Supreme Court in Leipzig in 1921. According to the Court, a subordinate who obeyed the order of a superior officer was liable to punishment if it was known to him that such an order involved a contravention of international law. The London Charter, *supra* note 4, which established jurisdiction and authority for the Nuremberg

lists of suspected war criminals could become so large as to be altogether unmanageable. Alternatively, coalition prosecution could focus essentially on Saddam and his leadership elite. Such a judicial strategy would permit many or all rank-and-file Iraqi criminals to avoid punishment, but would at least stand some chance of far-reaching and practical success.<sup>36</sup>

Regarding breadth of prosecutorial concern, the United States and its partners also must decide whether or not to include Iraq's multiple and long-term crimes against its own Kurdish populations. During 1987 and 1988, Baghdad undertook a campaign of destruction of Kurdish villages, and the relocation of large numbers of Kurds to selected areas of Iraq. In 1988 after the Iran-Iraq war ended, the Iraqi air force launched massive chemical attacks on Kurdish villages.<sup>37</sup>

After the Gulf War, in March 1991 Iraq's Kurds were once again the targets of genocidal assaults by Saddam Hussein's regime. In northern and southern Iraq, forces loyal to Saddam Hussein shelled cities intensely, leveled entire neighborhoods, and engaged in wholesale massacres of Kurdish civilians. According to a report issued by the Committee on Foreign Relations of the United States Senate: "More than two million Iraqi Kurds have sought refuge on

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Tribunal, observed in Articles 7 and 8 that "superior orders" were not to be considered by the Tribunal as freeing defendants from responsibility. *Id.* arts. 7, 8. It is stated that:

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 G.A. Res. 177, 2 U.N. GAOR \_\_\_\_\_, U.N. Doc. A/\_\_\_\_\_ (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 relieve him from responsibility under international law." *Id.*

36. The liability of Saddam 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 is designed to ensure that obedience to authority by subordinates entails no criminal consequences. DEPT. OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10 (1956). Moreover, the superior's responsibility extends to situations even where no affirmative orders to commit crimes have been given. *Id.* Based on the judgment over Japanese General Tomoyuki Yamashita, it is stipulated that any commander who had actual knowledge, or should have had knowledge, that troops or other persons under his control were complicit in war crimes and failed to take necessary steps to protect the laws of war was guilty of a war crime. *Id.*, para. 510. Paragraph 510 denies the defense of "act of state" to such alleged criminals by providing that, though a person who committed an act constituting an international crime may have acted as head of state or as a responsible government official, he is not relieved, thereby, from responsibility for that act. This paragraph, of course, is drawn from Principle III of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1946; known commonly as "The Nuremberg Principles") and in the formulation of these principles by the International Law Commission (1950).

37. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102d Cong., 1st Sess., CIVIL WAR IN IRAQ 102-127 (Comm. Print 1991).

the Iraq-Turkey and the Iraq-Iran borders and they are dying at a rate of up to 2,000 a day."<sup>38</sup> In the words of Peter W. Galbraith, author of the report:

My visit to liberated Kurdistan, over the weekend of March 30-31, coincided with the collapse of the Kurdish rebellion and the beginning of the humanitarian catastrophe now overwhelming the Kurdish people. I was an eyewitness to many of the atrocities being committed by the Iraqi army, including the heavy shelling of cities, the use of phosphorous artillery shells, and the creation of tens of thousands of refugees. From Kurdish leaders and refugees I heard firsthand accounts of other horrors including mass executions and the levelling of large sections of Kurdish cities.<sup>39</sup>

Significantly, these crimes continue well up to the present moment.<sup>40</sup> At the time of this writing, in mid-October 1991, Iraq is launching large ground and air attacks against Kurdish towns in northern Iraq. An unofficial cease-fire had been in effect for five months. In this connection, the entire pattern of Iraqi crimes against the Kurds is clearly not a matter of domestic jurisdiction: it is a matter of international concern.

It should be noted that a coalition agency charged with creating "another Nuremberg" could adopt the solution favored by the United States (U.S.), the former Soviet Union (U.S.S.R.), the United Kingdom (U.K.), and France in 1945. Here, a specially-created tribunal would be established 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 (of ordinary Iraqi soldiers and their civilian Iraqi collaborators). As in the distinction employed to prosecute Nazi offenses, the separation of "major" and "minor" criminals concerns matters of rank or position, not the seriousness or horror of particular transgressions. Moreover, because the Iraqi crimes make their perpetrators "common enemies of mankind" under international law, every country now has the legal

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38. *See id.*

39. *See id.*

40. Regarding the criminal responsibility of the individual Iraqi perpetrators of these crimes, the principle is well-established that orders pursuant to domestic law are no defense to violations of international law. *See* Vienna Convention on the Law of Treaties, art. 27, U.N. Conference on Law of Treaties, Doc. A/CONF. 39/27, May 23, 1969, *reprinted* in 8 I.L.M. 679 (1969); *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/B), No. 46, at 167; *Treatment of Polish Nationals in Danzig (parties abbreviated)*, 1932 P.C.I.J. (ser. A/B), No. 46, at 24; *see also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3.2 (collected in Legal Advisor, U.S. Dept. of State, Memorandum on the Application of International Law to Iranian Exchange Regulations (Feb. 15, 1984), *reprinted* in 130 CONG. REC. S. 1679, 1682 (1984).

right to prosecute these crimes in its own courts.<sup>41</sup>

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.<sup>42</sup> But for many complementary reasons, it is the United States that should now take the lead in prosecution of major Iraqi criminals. These reasons include the special U.S. role in military operations supporting the pertinent Security Council resolutions,<sup>43</sup> the historic U.S. role at Nuremberg in 1945, and the long history of US acceptance of jurisdictional competence and responsibility on behalf of international law.

As noted by the Sixth Circuit in 1985, *Demjanjuk v. Petrovsky*:<sup>44</sup> "The law of the United States includes international law" and "international law recognizes 'universal jurisdiction' over certain offenses."<sup>45</sup> Article VI of the U.S. Constitution and a number of court decisions make all international law, conventional and customary, the supreme law of the land.<sup>46</sup> The Nuremberg Tribunal itself acknowledged that the participating powers "have done together what any one of them might have done singly."<sup>47</sup>

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41. A contemporary example is that of Israel. Recognizing that genociders are common enemies of mankind and that no authoritative central institutions exist to apprehend such outlaws or to judge them as a penal tribunal, Israel sought to uphold the antigencide norms of international law in its trial of Adolf Eichmann, a Nazi functionary of German or Austrian nationality. Indicted under Israel's Nazi Collaborators Punishment Law, Eichmann was convicted and executed after the judgment was affirmed by the Supreme Court of Israel in 1962. See 36 INT'L L. REP. 5 (Israel, Dist. Ct. Jerusalem 1961). Affirmed Israel Supreme Court, 36 INT'L L. REV. 277 (1962). Genocide is a crime against humanity with a precise jurisprudential meaning. It identifies as criminal any of a series of stipulated acts "committed with intent to destroy, in whole or part, a national, ethnic, racial, or religious group as such . . ." Genocide Convention, *supra* note 6.

42. Any indictments setting forth criminal charges against Saddam Hussein and other unnamed defendants must identify violations, *inter alia*, of the following three authoritative codifications: Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. E/CN.4/1984/72 (1984), *reprinted in* 23 I.L.M. 1027 (1984); International Convention Against the Taking of Hostages, June 4, 1983, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/786 (1979), *reprinted in* 18 I.L.M. 1456 (1979); Resolution on Disappeared Persons, G.A. Res. 173, 33 U.N. GAOR Supp. (No. 45) at 158, U.N. Doc. A/33/509 (1978).

43. For a comprehensive compilation of authoritative documents pertaining to the Gulf War, see *Current Documents: Gulf War Legal and Diplomatic Documents*, HOUS. J. INT'L L. 281-314 (1991).

44. See *Demjanjuk v. Petrovsky*, 716 F.2d 582-3 (6th cir. 1985).

45. *Id.*

46. "[A]ll treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . ." U.S. CONST. art. 6. Moreover, although Article 6 refers exclusively to treaties, the process of incorporation has also been implemented by the decision of the U.S. Supreme Court in *The Paquete Habana* 175 U.S. 677 (1900) with respect to customary international law. In *United States v. Belmont*, 301 U.S. 324 (1937) and in *United States v. Pink*, 315 U.S. 203 (1942), the Court held that other types of international agreements concluded by the United States Government that have not received the formal advice and consent of the Senate are nonetheless under the protection of the "Supremacy Clause."

47. Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal (1946) was followed by General Assembly Resolution 177 (II), adopted

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. Requisite authority can be found at Sections 818 and 821 of Title 10 of the United States Code (U.S.C.) (which form part of an extraterritorial statutory scheme) and at Section 3231 of Title 18 U.S.C. Thus, legal machinery for bringing Saddam Hussein and his fellow criminals to justice is already well established under international and United States law. All that is needed is the political will to make this machinery work.<sup>48</sup>

### III. Conclusion

Although Nazi crimes were altogether unique and unprecedented in terms of scale and systematization, the crimes committed by Iraq are essentially similar to those defined and prosecuted at Nuremberg.<sup>49</sup> These crimes, therefore, warrant appropriate forms of trial and punishment.<sup>50</sup> Failure by the international community, es-

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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 (1947). The principles formulated are known as the Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal, *Report of the International Law Commission*, U.N. GAOR Supp. (no. 12) at 11, U.N. Doc. A/1316, at 11 (1950).

48. At the conclusion of the Gulf War, President Bush affirmed the proposition that Saddam Hussein *et al* were responsible for numerous violations of international law: "And this I promise you. For all that Saddam has done to his own people, to the Kuwaitis and to the entire world, Saddam and those around him are accountable." President Bush's Address to Joint Session of Congress, *reprinted in* Washington Post, Mar. 7, 1991, at A 32, col. 3.

49. This does not mean, however, that the creation of appropriate tribunals would be contingent upon Iraqi crimes being authentic instances of genocide as defined in the Genocide Convention. Rather, such creation would still be consistent with related "genocide-like" crimes — crimes that may derive from multiple other sources of international law. See especially Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europe T.S. No. 5, 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 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267).

See also Convention on the Political Rights of Women, March 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, March 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), *reprinted in* I.L.M. 368 (1967); American Convention on Human Rights, Nov. 22, 1969, entered into force, July 18, 1978, 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). 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.

50. In terms of the possibility of using domestic courts to uphold international law, the



pecially the United States and its coalition partners,<sup>51</sup> to establish the necessary legal machinery<sup>52</sup> would be intrinsically unjust and could contribute to future instances of international criminality.

Throughout the history of political philosophy and jurisprudential thought, we discover two basic justifications of punishment:<sup>53</sup> (1) the retributive view that punishment is needed because the person who does wrong should suffer as a consequence, usually in proportion

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example of the United States may be of particular interest. Since its founding, the United States has reserved the right to enforce international law within its own courts. Article I, Section 8, Clause 10 of the American Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute. This statute authorizes United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found within the United States. At that time, of course, the particular target of this legislation was piracy on the high seas.

Over the years, United States federal courts have rarely invoked the "law of nations," and then only in such cases where the act in question had already been proscribed by treaties or conventions. In 1979 a case seeking damages for foreign acts of torture was filed in United States federal court. In a complaint filed jointly with his daughter, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's repressive regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. On June 30, 1980, the Court of Appeals for the Second Circuit found that since an international consensus condemning torture had crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute. Therefore, United States court have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States. See *The Alien Tort Claims Act* 28 U.S.C. § 1350 (1982). The statute was enacted as part of the first Judiciary Act of 1789, 1 Stat. 73, 77 (1848). See also the 1980 U.S. Federal appellate case of *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). There is an ironic dichotomy in U.S. law here. In *Filartiga v. Peña-Irala*, the Second Circuit held that 28 U.S.C. § 1350 (*The Alien Tort Claims Act*) provides a basis for aliens to bring actions in U.S. federal court for torts committed in violation of the law of nations. Yet, a district court's holding in another recent case, *Handel v. Artukovic*, means that United States citizens lack the private right to sue for violations of the law of nations. Thus, U.S. federal courts appear to have jurisdiction to hear the claims of aliens more readily than they do the claims of United States citizens. See *Handel v. Artukovic*, 601 F. Supp. 1421 (1985). In this case, plaintiffs, United States citizens, brought a class action seeking compensatory and punitive damages against defendant for his alleged involvement in the deprivations of life and property suffered by Jews in occupied Yugoslavia during World War II.

51. The principles established by the International Military Tribunal were carried forward in a dozen subsequent trials prosecuted by General Telford Taylor, Justice Jackson's successor. (See T. Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, Aug. 15, 1949.) A new law enacted by the four occupying powers, Control Council Law No. 10, set out the procedure for further trials in the various zones of occupation. It restated, and significantly expanded, the principles of the London Charter. "Initiation of invasions of other countries" was now included as a crime against peace, in addition to "planning, preparation, initiation or waging a war of aggression." Allied Control Council Law No. 10, Dec. 20, 1945, reproduced in B.B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 491-96 (1975).

52. See *AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NUREMBERG TRIBUNAL*, adopted by the U.N. General Assembly, Dec. 11, 1946, G.A. Res. 95 (I), U.N. Doc. A/236, at 1144 (1946).

53. For important discussions of the definition of punishment, see C.L. TEN, *CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* (1987); A. FLEW, *The Justification of Punishment*, in *THE PHILOSOPHY OF PUNISHMENT* 83-87 (H.B. Acton ed. 1969); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-6 (1968); J. FEINBERG, *THE EXPRESSIVE FUNCTION OF PUNISHMENT*, in *SENTENCING* (H. Gross and A. von Hirsch eds. 1981).

to his wrongdoing;<sup>54</sup> and (2) the utilitarian view, that punishment is justifiable because it will maintain and possibly even strengthen the social order.<sup>55</sup> Understood in terms of Iraqi crimes, both justifications apply.

The point of the retributive view is not a narrow theory of vengeance, but expiation. While law and morality are not the same, the absolute detachment of the two would confound the requirements of a decent species and a virtuous human society. Punishment, *inter alia*, is simply an integral part of justice, and its value must go beyond its capacity to reform. To leave Iraqi crimes unpunished, therefore, would be immoral and unjust.

There is also a very pragmatic reason for prosecuting Iraqi crimes. Though it is unclear that punishment is always, or even usually, an effective deterrent, a trial of Saddam Hussein *et al* would assuredly incapacitate the particular defendants from the commission of additional crimes and quite possibly inhibit other state leaders from committing similar offenses in the future. The whole argument, in fact, can be extracted from Plato's *Protagoras*:

No one punishes those who have been guilty of injustice solely because they have committed injustice, unless indeed he punishes in a brutal and unreasonable manner. When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no one can bring it about that what has been done may not have been done, but on account of a fault to come in order that the person punished may

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54. A classical supporter of "retributive justice" was Immanuel Kant. Writing in *Philosophy of Law*, Kant identifies the mode and measure of punishment as follows: "This is the Right of Retaliation (*justaliois*), and properly understood, it is the only Principle which in regulating a Public Court . . . can definitely assign both the quality and the quantity of a just penalty." KANT, *PHILOSOPHY OF LAW* (1887) (Part II, "Public Right.") On the retributive view generally, see: M. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 91-139 (1978); W. MOBERLY, *THE ETHICS OF PUNISHMENT* 96-120 (1968); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 38-65 (1987); R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981); J. KLEINIG, *PUNISHMENT AND DESERT* (1973); Galligan, *The Return to Retribution in Penal Theory*, in *CRIME, PROOF AND PUNISHMENT* 154-57 (C. Tapper ed. 1981); I. PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* (1989) (especially pp. 67-110); T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* (1969) (especially pp. 22-51); G.W. PATON, *A TEXTBOOK OF JURISPRUDENCE* 320-26 (1964); H. OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* (1975); M.M. MACKENZIE, *PLATO ON PUNISHMENT* 21-33 (1981). For a broader but fascinating treatment, see also M. HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE* (1990).

55. Emphasizing the deterrence aspects of punishment, the utilitarian view is, of course, closely associated with Bentham (especially *Principles of Penal Law*). A particular application of utilitarianism to jurisprudence, this view holds that punishment is morally justified by its good consequences. Contrary to the most important and influential classical retributivists, among whom Kant and Hegel stand out above all others, Bentham (whose philosophic roots on this issue go back to Plato) bases his theory of punishment on the principle of "utility." This principle, says Bentham, is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. . . . to promote or to oppose that happiness." J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 126 (W. Harrison ed. 1960).

not again commit the fault, that his punishment may restrain from similar acts those persons who witness the punishment.<sup>56</sup>

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56. See PLATONIC DIALOGS; PROTAGORAS § 324. See also GORGIAS § 525; REPUBLIC §§ 380, 615; PHAEDO § 113; LAWS §§ 854, 862, 934, 957. As pointed out by Mary Margaret MacKenzie, Protagoras' theory of punishment rejects the alleged violence and irrationality of "straight retributivism." M. MACKENZIE, PLATO ON PUNISHMENT 189 (1981). For Plato, the rationale of punishment lies in its orientation to the future, preventing the offender himself from repeated wrongdoing and deterring others from similar offenses. Punishment is meant to turn others from doing harm and to teach virtue.