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After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law

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ABSTRACT

In this Article, Professor Beres proposes that Iraqi crimes committed during the Gulf War should be prosecuted under international law. He suggests that the United States should take the lead in this prosecution, utilizing a Nuremberg-style trial.

The Article first discusses history of the antigenocide regime in the international arena. The criminalization of genocide has been built upon the norms of international custom, natural law principles, and generally-accepted principles of law recognized by civilized nations. Moreover, evidence of this regime may be found in the Genocide Convention, the United Nations Charter, and other treaties and conventions.

Professor Beres next examines the problems attendant to enforcement of an antigenocide regime. States must reject claims to domestic jurisdiction and allow humanitarian intervention when the claim involves gross outrages against human rights.

The Article concludes that the antigenocide regime must be enforced against Iraq now. There is an obligation, particularly by the United States, to bring major Iraqi war criminals to trial. The author suggests that a specially-created ad hoc tribunal, such as the one created at Nuremberg, could be convened in Iraq or, more likely, in Kuwait. Professor Beres contends that the United States should lead this prosecution effort because of its special role in military operations supporting the Security Council resolutions, its historic role at Nuremberg, and its authority in prosecuting such crimes in its own federal courts.

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In the months immediately following the end of the recent Gulf War, evidence mounted for major Iraqi crimes under international law[1]—including crimes of war, crimes against peace, and crimes against humanity.[2] Significantly, however no authoritative steps have been taken

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1. Although criminal acts of terrorism sponsored by Iraq during the brief Gulf War were not technically "Nuremberg-category crimes," they could qualify as an additional offense for allied prosecution. For current conventions in force concerning terrorism, see generally, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *done* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (entered into force for the United States, Feb. 20, 1977); Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States, Dec. 13, 1972); Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), *done* Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force for the United States, Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (entered into force for the United States, Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, 10 I.L.M. 1151 (entered into force for the United States, Jan. 26, 1973); International Convention Against the Taking of Hostages, *done* Dec. 17, 1979, T.I.A.S. No. 1, 18 I.L.M. 1456 (entered into force on June 3, 1983; entered into force for the United States, Jan. 6, 1985); European Convention on the Suppression of Terrorism of Jan. 27, 1977, Europ. T.S. No. 90 (entered into force, Aug. 4, 1978). On December 9, 1985, the United Nations General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. The United Nations left unaddressed, however, the issue of which particular acts constitute terrorism, other than acts such as hijacking, hostage-taking, and attacks on internationally protected persons, which have been criminalized by previous custom and conventions. *See* G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985).

2. Saddam Hussein's enormous crimes against the environment in Kuwait quite plausibly will lead to a broadening of the concept of "crimes against humanity" or to the creation of the altogether new crime of "ecocide." A defense, paralleling the defense at Nuremberg, may raise the issue of retroactivity. If this happens, prosecutors should consider that there are always special occasions and circumstances for which the codified law fails to make an explicit and precise provision. In any event, natural law would be binding here. Moreover, ex post facto laws are not always unjust. Such a reminder would recognize that the defendant should object to ex post facto laws when, after the defendant

yet to prosecute these crimes along the lines established by the special military tribunal at Nuremberg.[3] Recognizing that the time to act is now, and that further delay would seriously imperil the foundations of international criminal law, victorious coalition states should move expeditiously to establish a Nuremberg-style trial.[4] Naturally, these prosecutorial arrangements should be made under the general aegis and

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commits an action indifferent in itself, a legislator for the first time declares it to have been a crime. 1 WILLIAM BLACKSTONE, COMMENTARIES *46. Under such circumstances, it is impossible for the perpetrator of the action to foresee that the action, innocent when done, should afterwards be converted to a crime. In the case of Iraqi crimes against the environment, however, especially the torching of Kuwaiti oil wells, Hussein's actions were hardly indifferent; he assuredly had *mens rea*, or criminal intent. Furthermore, all civilized states considered these acts criminal at the time of their commission.

Iraq's commission of new forms of environmental destruction and environmental manipulation as a form of warfare are clearly international crimes under existing conventions. The international dumping of millions of barrels of Kuwaiti and Saudi oil into the Persian Gulf and the torching of Kuwaiti oil wells represent clear and egregious violations of international agreements. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, art. 53, 6 U.S.T. 3516, 3552, 75 U.N.T.S. 287, 322; *see also* Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, *done* Dec. 10, 1976, 31 U.S.T. 333, 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, *opened for signature* May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3; *see also* Convention for the Prevention of Marine Pollution from Land-Based Sources, *opened for signature* June 4, 1974, 13 I.L.M. 352; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *done* Dec. 18, 1971, 11 I.L.M. 284; International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 19, 1969, 9 I.L.M. 45.

3. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, *done* Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

4. *See* REPORT OF ROBERT H. JACKSON TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, 223 (Department of State ed., 1949). The judgment of the International Military Tribunal of October 1, 1946 rested on the four Allied Powers' London Agreement of August 8, 1945, to which they annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the London Agreement. In addition to the 42 volumes of official documents on the *Nuremberg Trial of the Major War Criminals before the International Military Tribunal* published by that Tribunal, the United Nations War Crimes Commission selected and edited 89 additional cases, published in 15 volumes. UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (H.M. Stationery Office ed. 1947). *See also* 15 *id.* at 155-88 (analysis of defense pleas of "superior orders" in various war crimes trials). For German war crimes trials after the First World War, including the case of Dithmar and Boldt, see *Judicial Decisions Involving Questions of International Law*, 16 AM. J. INT'L L. 674, 708 (1922).

authority of the United Nations.

I. BACKGROUND OF THE ANTIGENOCIDE REGIME

Although genocide has always been prohibited by international law,[5] the post-World War II criminalization of genocide has been especially explicit and far-reaching. Building upon the norms established by international custom, the general principles of law recognized by civilized nations, the writings of highly qualified publicists, various treaties and conventions, and the overriding principles of natural law, this criminalization has taken place under the auspices of the Allies and the United Nations and has flowed largely from initial reactions to the Holocaust.

A. *The Genocide Convention*

The core element of the antigenocide regime is the Genocide Convention.[6] While this convention excludes liability when potential offenders annihilate victims solely on political grounds, the exclusion has little or nothing to do with the problem of limiting mass murder under international law.[7]

B. *Genocide as Contrary to a* Jus Cogens

Today, there exists a well-established normative order for the protection of all human rights. Peremptory norms, or *jus cogens* rules, that

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5. This prohibition results because the norms of international law can be found in sources other than treaties and conventions.

6. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948. S. EXEC. DOC. O, 81st Cong., 1st Sess. 7 (1949), 78 U.N.T.S. 277 [hereinafter Genocide Convention].

7. According to the language of the Genocide Convention, it is unlikely that such mass murders as took place in Indonesia in 1965, in which the victims were identified as communists, or in Cambodia from 1975 to 1979, in which the victims were classes deemed suspect by the Khmer Rouge, can be called genocide. Helen Fein calls these "ideological slaughters." *See* Helen Fein, *Scenarios of Genocide: Models of Genocide and Critical Responses*, in TOWARD THE UNDERSTANDING AND PREVENTION OF GENOCIDE, PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE HOLOCAUST AND GENOCIDE (Israel W. Charny, ed., 1984). Leo Kuper calls them "genocidal massacres." *See* LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 10 (1981). Other similar acts of genocide include Stalin's liquidation of the Kulaks and Idi Amin's murders in Uganda. In Uganda, although ethnicity sometimes played a role in the killings, as in the massacre of Acholi and Lango soldiers in the Ugandan army, instances of political massacres also occurred. For example, the annihilation of the supporters of the ousted president and of his opponents in general were political killings.

endow all human beings with a basic measure of dignity and that permit no derogation by states, comprise this order. These internationally protected human rights can be grouped into three broad categories. The first is the right to be free from governmental violations of the integrity of the person, violations that include torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest or imprisonment; denial of a fair public trial; and invasion of the home. The second category is the right to the fulfillment of vital needs such as food, shelter, health care, and education. The third category includes the right to enjoy civil and political liberties, including freedom of speech, press, religion, and assembly; the right to participate in government; the right to travel freely within and outside one's own state; and the right to be free from discrimination based on race or sex.

C. *The United Nations Charter*

Taken with other important covenants, treaties, and declarations, which together make up the human rights regime, the Genocide Convention represents the end of the idea of absolute sovereignty concerning nonintervention when human rights are in grievous jeopardy. The Charter of the United Nations (the Charter) stipulates in its Preamble and several articles that international law protects human rights.[8] In the Preamble, the peoples of the United Nations reaffirm their faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and in their determination "to promote social progress and better standards of life in larger freedom."[9]

Article 1 lists a main purpose of the United Nations as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[10] Similarly, in article 55, the Charter seeks "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[11] And in article 56, all members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in [a]rticle 55."[12]

In promoting human rights, various special responsibilities devolve

8. U.N. CHARTER pmbl., arts. 1, 13, 55, 56, 62.
9. *Id.* at pmbl.
10. *Id.* at art. 1, para. 3.
11. *Id.* at art. 55.
12. *Id.* at art. 56.

upon specific organs of the United Nations. Under article 13 of the Charter, one function of the General Assembly is to assist "in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[13] In addition to referring human rights matters to certain permanent committees, the General Assembly periodically has established ad hoc subsidiary organs.[14]

Under article 62 of the Charter, the Economic and Social Council has certain responsibilities for promoting human rights. Article 64 confers additional responsibilities. The Commission on Human Rights, established in 1946, is one of the fundamental commissions of the Economic and Social Council. Since its inception, the Commission has worked towards submitting proposals, recommendations, and reports to the Council on matters regarding virtually all aspects of human rights. Finally, all of the other primary organs of the United Nations may be concerned occasionally with the protection of human rights.

In light of these codified expressions of the international law of human rights, individual states no longer can claim sovereign immunity from responsibility for gross mistreatment of their own citizens. Notwithstanding article 2(7) of the Charter, which reaffirms certain areas of domestic jurisdiction, international law now clearly obligates each state to uphold basic human rights.[15] Even the failure to ratify specific treaties or con-

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13. *Id.* at art. 13, para. 1(b).

14. Primary responsibility for the promotion of human rights under the United Nations Charter rests in the General Assembly and, under its authority, in the Economic and Social Council and the Commission on Human Rights. The Commission's activity, for the most part, is undertaken by subsidiary working groups, one of which is created each year to consider and make recommendations concerning alleged "gross violations" of human rights. From time to time, the Commission on Human Rights also appoints special envoys to examine human rights situations on an ad hoc basis and to prepare reports on these situations. Since 1980, the Commission has publicly disclosed reports of particular investigations initiated by complaints against Equatorial Guinea, Bolivia, Democratic Kampuchea, El Salvador, Guatemala, pre-Sandinista Nicaragua, the Soviet Union (relating to Afghanistan), Poland, and Iran. Special examples of subsidiary organs of an ad hoc character created by the General Assembly include the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

15. This point was at the very heart of the Nuremberg process, and a defense for its pertinent prosecutorial implications under international criminal law was made by the British Chief Prosecutor:

> Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. . . . Yet international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not

ventions[16] does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which these agreements derive.[17]

D. *Natural Law*

The international regime on human rights also establishes, beyond any reasonable doubt, the continuing validity of natural law as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg. While the allies cast the indictments of the Nuremberg Tribunal in terms of existing positive law,[18] the actual decisions of the tribunal unambiguously rejected the proposition that the validity of international law depends upon its positiveness. The words used by the Tribunal[19] derive from the principle; *nullum crimen sine poena*, or no crime without a punishment. This principle, however, contradicts the central idea that underlies positive jurisprudence, or law as command of a sovereign.

II. Genocide and International Law

While there exists a regime of binding international agreements that places worldwide human welfare above the particular interests of individual states or elites, what can this regime be expected to accomplish? Admittedly, explicit and codified rules of international law that pertain to genocide and genocide-like crimes exist, but what can be done about

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> disentitled to the protection of mankind when the State tramples upon its rights in a manner that outrages the conscience of mankind. . . . The fact is that the right of humanitarian intervention by war is not a novelty in international law—can intervention by judicial process then be illegal?

SECRETARY GENERAL OF THE UNITED NATIONS, THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL 71, U.N. Doc. A/CN. 4/5, U.N. Sales No. 149.V.7 (1949).

16. The United States, for example, had not ratified the Genocide Convention until recently.

17. The rationale for this claim is grounded in the understanding, codified at article 38 of the Statute of the International Court of Justice, that there are multiple sources of international law and in the associated principle, codified at article 53 of the Vienna Convention of the Law of Treaties, or that *jus cogens* are overriding norms and permit no derogation. *See* Statute of the International Court of Justice, *done* June 26, 1945, art. 38 59 Stat. 1055, 1060, 3 Bevans 1153, 1187; Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 [hereinafter Vienna Convention].

18. Positive law is defined as law enacted by states.

19. "So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished." A. P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 110 (1964).

their effective enforcement? A consideration of post-World War II history reveals many instances of genocide and genocide-like crimes. Where was international law?

To answer these questions, one must first recall that international law is a distinctive and unique system of law. It is decentralized rather than centralized, and it exists within a social setting—the world political system—that lacks a comprehensive government. In the absence of central authoritative institutions for the making, interpretation, and enforcement of law, these juridical processes devolve upon individual states. Individual states have the responsibility, acting alone or in collaboration with each other, to enforce international law with respect to genocide and genocide-like crimes.[20]

How can this be done? In terms of the law of the Charter, it is essential that states continue to reject the article 2(7) claim to domestic jurisdiction whenever the claim involves gross outrages against human rights. Although judgments of national self-interest typically determine the tension between the doctrines of domestic jurisdiction and international concern, it would be in the long-term interest of all states to oppose forcefully all crimes against humanity. As Vattel correctly observed:

> But we know too well from sad experience how little regard those who are at the head of affairs pay to rights when they conflict with some plan by which they hope to profit. They adopt a line of policy which is often false, because often unjust; and the majority of them think that they have done enough in having mastered that. Nevertheless it can be said of States, what has long been recognized as true of individuals, that the wisest and the safest policy is one that is founded upon justice.[21]

With this observation, Vattel echoes Cicero's contention that "[n]o one

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20. An important aspect of this responsibility revolves around the obligation to extradite *hostes humani generis* or an enemy of all mankind. This characterization is a basis in international law for universal jurisdiction. The obligation to extradite under this concept has been recognized by Vattel:

> If the sovereign of the country in which the crimes of this nature [crimes involving "common enemies of mankind"], have been committed requests the surrender of the perpetrators for the purpose of punishing them, they should be turned over to him as being the one who has first interest in inflicting exemplary punishment upon them; and as it is proper that the guilty should be convicted after a trial conducted with due process of law, we have another reason why criminals of this class are ordinarily delivered up to the States in which the crimes have been committed.

3 EMMERRICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 93 (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

21. *Id.* at 12a.

who has not the strictest regard for justice can administer public affairs to advantage."[22] The issue arises, however, of how to move from assessment to action, from prescription to policy. Where, exactly, is the normative juncture between the theory of human rights as pragmatic practice and the operationalization of that theory?

The terms of article 56 of the United Nations Charter urge member states to "take joint and separate action in cooperation with the organization" to promote human rights. Reinforced by an abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed require, humanitarian intervention by individual states in certain circumstances. Intervention, however, must not be used as a pretext for aggression, and it must conform to settled legal norms governing the use of force, especially the principles of discrimination, military necessity, and proportionality. Understood in terms of the long-standing distinction between *jus ad bellum* and *jus in bello*, this means that even where the justness of humanitarian intervention clearly exists, the means used in that intervention must be limited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

The legality of humanitarian intervention has been established for a long time.[23] Although it has been reinforced strongly by the post-Nuremberg human rights regime, one may find support for the doctrine in Grotius' seventeenth-century classic, *The Law of War and Peace.* Here, the author advanced and defended the idea that states may interfere within the valid territorial sphere of other states to protect innocent persons from their own rulers. The natural law origins of international law nurtured and sustained this idea:

> This too is a matter of controversy, whether there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands. Now it is certain that, from the time when political associations were formed, each of their rulers has sought to assert some particular right over his own subjects.[24]

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22. *Id.* (quoting MARCUS TALLIUS CICERO, DE LEGIBAS, Book 1).

23. The actual practice of humanitarian intervention on behalf of beleaguered citizens of other states has ample precedent, prefiguring even the post-Nuremberg legal order. One of the earliest recorded cases of such intervention concerns an event that took place in 480 B.C., when Prince Gelon of Syracuse, after defeating the Carthaginians, demanded as one of the conditions of peace that they abandon the custom of sacrificing their children to Saturn. In the nineteenth century, the high point of positivist jurisprudence, the humanitarian intervention of Great Britain, France, and Russia in 1827 attempted to end Turkey's inhumane methods against the Greek struggle for independence.

24. The quotation continued:

Vattel's argument in *The Law of Nations* supports the idea that nations have obligations to contribute to the welfare and happiness in other states. For example, Vattel argues that in the event of civil war, states "must aid that one of the two parties 'which seems to have justice on its side' or protect an unfortunate people from an unjust tyrant."[25]

While the theory of international law still oscillates between an individualist conception of the state and a universalist conception of humanity, the post-World War II regime of treaties, conventions, and declarations concerning human rights necessarily bases itself upon a broad doctrine of humanitarian intervention. Indeed, this regime's purpose is to legitimize an allocation of competencies that favors the natural rights of humankind over any particular interests of the state. Since violations of essential human rights are now undeniably within the ambit of global responsibility, the subjectivism of state primacy has been subordinated unambiguously to the enduring primacy of international justice.[26] In

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As we see in the *Children of Hercules*, by Euripides makes: "Just are we who within our city dwell, And judgment we may render with full power." Here too applies the following: "Sparata, which is thy lot, adorn; we for Mycenae shall have care." Among the signs of supreme power Thucydides reckoned "having their own courts of justice" no less than "the right to make their own laws and levy taxes. . . ." The purpose no doubt is, as Ambrose correctly explains, "to prevent men from provoking wars by usurping the care for things under the control of others."

In Thucydides the Corinthians find it just that "each party should punish its own subjects." Perseus, in his speech to Marcius refused to present a defence [sic] of his conduct toward the Dolopes, saying: "I have acted by viture of my right, since they belonged to my kingdom and were subject to my authority." But all these rights have force in cases, where subjects are actually in the wrong, and also, you may add, where the cause is doubtful.

If, however, the wrong is obvious, in case some Busiris, Phalaris, or Thracian Diomede should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right in human society is not precluded.

2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 583-84 (James Brown Scott ed. & Francis W. Kelsey trans., Oxford University Press 1925) (1625).

25. VATTEL, *supra* note 19, at xii.

26. As an answer to the question, *quid ius*?—what is law?—international law now rejects all empirical solutions that substitute force for justice. Rather than accept the neo-Kantian distinction between the "concept" and the "ideal" of law, international law now recognizes that the concept and the ideal coincide. Evidence of this recognition can be found in the documentary forms of the current human rights regime and in the generally diminished willingness by states to exempt internationally important activity from international legal regulation by deference to the dogma of domestic jurisdiction. For example, the United Nations has rejected persistently South Africa's invocation of article 2(7) to shield its practice of apartheid. Significantly, apartheid is linked with genocide in the International Convention on the Suppression and Punishment of the Crimes of

place of the Hegelian concept of the state as an autonomous, irreducible center of authority—because it is an ideal that is the perfect manifestation of Mind—there is now in force a greatly expanded version of the idea of international concern.

III. Enforcing the Antigenocide Regime Against Iraq

A. *The Obligation to Prosecute Iraqi War Criminals*

Now that the Gulf War has ended, prosecution of Saddam Hussein and the surviving members of his Revolutionary Council must occur, or justice will be defiled and international law will be undermined tragically. Between August 2, 1990, the date of Iraq's invasion of Kuwait, and October 29, 1990, the Security Council adopted ten resolutions explicitly condemning Hussein's regime for multiple crimes of the gravest possible nature. These *crimen contra omnes*;[27] crimes so terrible that they mandate universal enforcement, jurisdiction, and responsibility; would cry out for legal prosecution even if there had been no authorizing resolutions by the United Nations Security Council. This is because the now-documented barbarous activities of Iraq against Kuwait and other nationals in Kuwait, against coalition prisoners of war in Iraq and Kuwait, and against noncombatant populations in Israel and Saudi Arabia violated peremptory norms of international law, which are absolutely binding and allow no deviation whatsoever.[28]

Significantly, the Security Council issued its resolutions before the co-

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Apartheid, and several efforts have been undertaken to make the practice of apartheid an offense under the terms of the Genocide Convention. Moreover, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity qualifies "inhuman acts resulting from the policy of apartheid" as "crimes against humanity." Also, various United Nations documents associate apartheid with both genocide and crimes against humanity. *See, e.g.*, Measures to Be Taken Against Nazism and Racial Intolerance, G.A. Res. 2545, U.N. GAOR, 24th Sess., U.N. Doc. A7820 (1970); G.A. Res. 2438, U.N. GAOR, 23rd Sess., U.N. Doc. A/7435 (1969). On the particular crime of apartheid, see International Convention on the Suppression and Punishment of the Crime of Apartheid, *done* Nov. 30, 1973, 1015 U.N.T.S. 243. *See also* International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

27. *Crimen contra omnes* literally means "crimes against all."

28. Even a treaty that seeks to criminalize forms of insurgency protected by a peremptory norm would be invalid. According to article 53 of the Vienna Convention, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention, *supra* note 16, at art. 53. The concept is extended to newly emerging peremptory norms by article 64 of the Vienna Convention: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* at art. 64.

alition forces uncovered the most serious Iraqi crimes.[29] This implies that our current system of international law establishes, beyond any reasonable doubt, the primacy of justice and human rights in world affairs. The ancient principle of *nullum crimen sine poena*, or no crime without penalty, applies with particular clarity and urgency to the crimes of Saddam Hussein and his followers.

From the United States point of view, the Nuremberg obligations to bring major Iraqi criminals to trial in a sense doubly binds it. These obligations not only represent current obligations under international law, but also the higher law obligations found in the political tradition of the United States. Therefore, the United States may be compelled to act.[30] By the codification of 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 the United States.

B. *Location of the Trials*

The question of where to hold the trials remains.[31] Nuremberg had been expected widely to be a precursor for the establishment of a perma-

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29. Two later resolutions concerning enforcement were adopted on November 28 and November 29, 1990.

30. The principle of a higher law is one of the enduring and canonic principles in the history of the United States. Codified in both the Declaration of Independence and in the United States Constitution, it rests upon the acceptance of certain notions of right and justice that obtain because of their intrinsic merit. *See* EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 84-85 (1928). These notions, as Blackstone declared, are nothing less than "the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover so far as they are necessary for the conduct of human actions." When Jefferson set to work to draft the Declaration of Independence, he drew freely upon Aristotle, Cicero, Grotius, Vattel, Pufendorf, Burlamaqui, and Locke's *Second Treatise of Government*. Asserting the right of revolution whenever government becomes destructive of "certain unalienable rights," the Declaration posits a natural order in the world whose laws are external to all human will and is coverable through human reason. Although by the eighteenth century God had withdrawn from immediate contact with humankind and had been transformed into Final Cause or Prime Mover of the universe, nature provided an appropriate substitute. Reflecting the decisive influence of Isaac Newton, all of creation could now be taken as an expression of divine will. Hence, the only way to know God's will was to discover the law of nature; Locke and Jefferson had deified nature and denatured God.

31. After the Second World War, the Allies adopted three judicial solutions to the problem of determining the proper jurisdiction for trying Nazi offenses by the victim states, solutions additional to the specially constituted Nuremberg Tribunal. The first solution involved the creation of special courts set up expressly for the purpose at hand.

nent international criminal court for the prosecution of international crimes. Yet no such court has been created to date. Contrary to commonly held misconceptions, the International Court of Justice at the Hague has absolutely no penal or criminal jurisdiction, and therefore is unsuitable.[32]

One obvious jurisdictional solution would be to parallel Nuremberg by establishing a specially constituted ad hoc tribunal within the defeated state's territory, perhaps at Baghdad. Another acceptable and more likely possibility would be to undertake the proceedings within the state that was Iraq's principal victim, Kuwait. Here, the court could be coalition-wide, as it would be within Iraq, or it could be fully Kuwaiti, depending upon the desired range of indictments. 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.[33] Article VI of this Convention provides that trials for its violation

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Rumania, Czechoslovakia, the Netherlands, Austria, Bulgaria, Hungary, and Poland adopted this solution. The second solution, adopted in Great Britain, Australia, Canada, Greece, and Italy, involved the establishment of special military courts. The third solution brought the Nazis and their collaborators before ordinary courts, a solution that Norway, Denmark, and Yugoslavia accepted. Israel also adopted this solution, although the State of Israel did not exist at the time of the commission of the crimes in question.

32. The International Court of Justice (ICJ) does have, however, jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions. Jurisdiction is accorded by article 9 of the Genocide Convention; article 10 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; article 9 of the Convention on the Political Rights of Women; article 8 of the Convention Relating to the Status of Refugees; and article 14 the Convention on the Reduction of Statelessness. In exercising its jurisdiction, however, the ICJ still must confront significant difficulties in bringing recalcitrant states into contentious proceedings. No method currently exists to ensure effectively the attendance of defendant states before the ICJ. Although many states have acceded to the Optional Clause of the Statute of the ICJ, article 36, paragraph 2, several have attached reservations that weaken these accessions.

33. 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 Convention. Rather, the creation would still be consistent with related genocide-like crimes, those that may derive from multiple other sources of international law. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810, at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, Eur. T.S. No. 5; Convention Relating to the Status of Refugees, *done* 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, *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267); Convention on the Political Rights of Women, *done* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force for the United States, July 7, 1976); Declaration on the Granting of

be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction."[34]

C. *The United States Role*

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[35] and a universal obliga-

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Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), 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, *adopted* Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; American Convention on Human Rights, *done* Nov. 22, 1969, 9 I.L.M. 673. 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.

34. Genocide Convention, *supra* note 5, at 8, 78 U.N.T.S. at 281-82. The Genocide Convention was submitted to the Senate by President Harry Truman in June 1949. On February 19, 1986, the Senate consented to ratification with the reservation that legislation be passed that conforms United States law to the precise terms of the treaty. Congress approved this enabling legislation in October 1988, and President Reagan signed it on November 4, 1988. This legislation amends the United States Criminal Code to make genocide a federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. The Genocide Convention proscribes conduct that is juristically distinct from other forms of prohibited wartime killing. For example, the Convention proscribes killing that involves acts constituting crimes of war and crimes against humanity. Although crimes against humanity are linked to wartime actions, the crime of genocide can be committed during times of peace or war. According to article I 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." *Id.* at 7, 78 U.N.T.S. at 280.

35. In this connection, Israel's trial of Adolph Eichmann was consistent with the post-Nuremberg imperatives of international law, and its jurisdiction in the matter flowed properly from the universal nature of the crime, as well as from the particular suffering of the Jewish people. The crimes set forth by Israeli law, namely crimes of war and crimes against humanity, had been established unambiguously as crimes by the Nuremberg Tribunal and the human rights regime derivative from that Tribunal. Therefore, all of the crimes set forth under the Israeli indictment had been recognized by the universal conscience of mankind and by its institutionalized legal expressions as *delicta juris gentium*, or crimes of international law. An international tribunal that might have judged these crimes did not exist because Nuremberg dealt only with humanity and not the Jewish People. Israel now has invested properly its legislative and judicial organs of

tion to prosecute.[36] The United States, however, for many complementary reasons, 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.[37]

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state with the power of enforcement. In so doing, it acted upon the well-established practice that each state reserves the right to punish a crime that violates the norms of the law or nations, regardless of the place in which the offense occurred or the nationality of the accused or victim. In acting to punish the crime of genocide, Israel acted to safeguard not only its own interests, but also the interests of the entire community of humankind. By acting upon the principle of universal jurisdiction, it established beyond any reasonable doubt that the punishment of genocide is not an internal question for each state, but a peremptory obligation of humankind.

36. The principle of universal jurisdiction is founded upon the presumption of solidarity between the states in the fight against crime. It is mentioned in the Corpus Juris Civilis; in Grotius' *De jure belli ac pacis libri tres* (Book II, Ch. 20); and in Vattel's *Le droit des gens* (Book I, Ch. 19). The case for universal jurisdiction is also in the four Geneva Conventions of August 12, 1949. These Conventions unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction occurred or the nationality of the authors of the crimes. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *done* Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *done* Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 236; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 386. In further support of universality for certain international crimes, see 2 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 251-314 (2d ed. 1987). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 402-04 (1987).

37. In addition to the territorial principle, the nationality principle, and the universality principle, two other traditionally recognized bases of jurisdiction exist under international law: the protective principle, determining jurisdiction by reference to the national interest injured by the offense; and the passive personality principle, determining jurisdiction by reference to the nationality of the person injured by the offense. The Genocide Convention, however, does not stipulate universal jurisdiction. A recent example supporting the principle of universal jurisdiction in matters concerning genocide involves an action by the United States. Ruling for the extradition to Israel of accused Nazi war criminal John Demjanjuk, the United States Court of Appeals for the Sixth Circuit in 1985 recognized the applicability of universal jurisdiction for genocide, even though the crimes charged were committed against persons who were not citizens of Israel and notwithstanding that the State of Israel did not exist at the time the defendant committed

In *Demjanjuk v. Petrovsky*, the United States Court of Appeals for the Sixth Circuit noted in 1985, "[t]he law of the United States includes international law" and "[i]nternational law recognizes a 'universal jurisdiction' over certain offenses."[38] Article VI of the United States Constitution and a number of court decisions make all international law, conventional and customary, the supreme law of the land. The Nuremberg Tribunal itself acknowledged that the participating powers "have done together what any one of them might have done singly."[39]

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.[40] Pertinent authority can be found in various sections of

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the heinous crimes. In the words of the court:

> [w]hen proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of the nations or against humanity and that the prosecuting nation is acting for all nations.

Demjanjuk v. Petrovsky, 776 F.2d. 571, 582-83 (6th Cir. 1985), *cited in* 1 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 286 (1986).

38. *Demjanjuk*, 776 F.2d at 582.

39. Apart from the prosecution of Nazi war criminals, only two trials under the Genocide Convention have been held by competent tribunals of the states wherein the crimes were committed. In Equatorial Guinea, the tyrant Macias was responsible for widespread massacres, as well as pillaging his country. Ultimately, a revolution overthrew him. Subsequently, he was found guilty of a number of crimes, including genocide, and was executed. In a report on the trial, however, the legal officer of the International Commission of Jurists deemed Macia's conviction to the invalid. In Kampuchea, when the Vietnamese overthrew the Khmer Rouge, the government brought criminal actions against the former Prime Minister, Pol Pot, and the deputy prime minister on charges of genocide. A people's revolutionary tribunal found the accused guilty of the crime *in absentia*. *See* LEO KUPER, THE PREVENTION OF GENOCIDE 16-17 (1985).

40. 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 United States 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 authorized 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 are in the United States. 28 U.S.C. § 1350 (1988). 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 for cases in which the acts in question already had been proscribed by treaties or conventions. In 1979, a case filed in the United States District Court for the Eastern District of New York sought damages for foreign acts of torture. In a complaint filed jointly with his daughter, Dr. Joel Filartiga, a well known Paraguayan physician,

the United States Code.[41] Therefore, the legal machinery for bringing Saddam Hussein and his fellow criminals to justice is well established under international and United States law. The political will to make this machinery work, however, does not exist currently.[42] If President Bush, preferably in concert with other coalition partners, can build upon the important precedents and expectations of Nuremberg, his efforts would represent a fitting and distinguished epilogue to the Gulf War.

IV. CONCLUSION

In the aftermath of the Holocaust, Karl Jaspers addressed the question of German guilt. His response to this question articulates one of the most fertile and important concepts of modern philosophy and law, the idea of metaphysical guilt. In this connection, Jaspers wrote that "[t]here exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge. If I fail to do whatever I can to prevent them, I too am guilty."[43] Understood in terms of the obligation to prosecute Iraqi crimes, Jaspers' doctrine suggests an urgent need to confront Nuremberg obligations while it would still be timely.

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artist, and opponent of President Alfredo Stroessner's genocidal regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. Filartiga v. Penn-Irala, 630 F.2d 876, 878 (1980). On June 30, 1980, the United States Court of Appeals for the Second Circuit found that since an international consensus condemning torture has crystallized, torture violates the law of nations for purposes of the Alien Tort Statute. *Id.* at 887-88. Therefore, United States courts have jurisdiction under the statute to hear civil suits by victims of foreign torture if the alleged international outlaws are found in the United States. *Id.*

41. *See, e.g.*, 10 U.S.C. §§ 818-21 (1988) (forming part of the extraterritorial statutory scheme); 18 U.S.C. § 3231 (1988).

42. Recognizing the perpetrators of Iraqi crimes as common enemies of mankind, one might even accept that the pertinent legal machinery, in certain residual circumstances, could exclude any sort of tribunal, and that assassination or summary execution would be appropriate law enforcement. As stated by the earlier views of Vattel:

> [W]hile the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who, by profession, are poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations by destroying the foundations of their common safety.

3 VATTEL, *supra* note 19, at 93.

43. KARL JASPERS, THE QUESTION OF GERMAN GUILT 32 (E.B. Ashton trans., Caprixorny Books 1961) (1947).