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The United States now has a new president. If he should take his Constitutional obligations seriously, both the obligations of international and U.S. law, President Clinton will take the necessary steps to ensure prosecution of Iraqi crimes committed before, during, and after the recent Gulf War. The following essay examines these necessary steps against the background of the Nuremburg prosecutions and the associated concept of *nullum crimen sine poena*, no crime without a punishment.

In his opening statement at Nuremberg on November 21, 1945, Chief U.S. Prosecutor Justice Robert H. Jackson asked rhetorically: "Did we spend American lives to capture [twenty Nazi defendants] only to save them from punishment?"[1] Thus jurisprudentially dramatizing the imperative to prosecute wrongs he describes as calculated, malignant, and devastating.[2] It also highlighted the irony of other options wherein American custody would effectively shelter war criminals. Today, while still lacking custody over Iraqi perpetrators of Nuremberg category crimes, Americans should raise the same question about the 1991 Gulf War. Realizing the answer, this question could move us, as a nation, to give effect to the principle *nullum crimen sine poena* (no crime without a punishment).[3]

Recognizing the right of belligerents to punish as war criminals those who violate the laws or customs of war, Allied forces declared on November 1, 1943, that "atrocities, massacres and cold blooded mass executions

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1. RICHARD A. FALK, ET. AL., CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS AND SOLDIERS FOR CRIMINAL ACTS IN WARS 81 (1971); *See also* Benjamin B. Ferencz, *1 Defining International Aggression: The Search for World Peace* 437 (1975).

2. *See* FALK et. al., *supra* note 1, at 107. This imperative was reaffirmed in Principle I of The Nuremberg Principles (1946): "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." The Nuremberg Principles were later formulated by the International Law Commission, at the request of the General Assembly, in June-July 1950. Article 1: "Offenses against the peace and security of mankind, as defined in this code, are crimes under international law, for which the responsible individuals shall be punished." Draft Code Of Offenses Against The Peace And Security Of Mankind, GAOR Supp., No. 9 (A/2693).

3. Punishment is, quite plausibly, the original meaning of justice, and is assuredly one of its most essential components. For a comprehensive consideration of these concepts, and their interdependence, see ROBERT C. SOLOMON AND MARK C. MURPHY, WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS (1990); *see generally* Haim H. Cohn, *On the Immorality of Punishment*, 25 ISRAEL L. REV., No. 3-4, 284-291 (1991).

which were being perpetrated by the Hitlerite forces. . ." should be the object of criminal prosecution and punishment.[4] With this Moscow Declaration, the three allied powers, the United States, the United Kingdom and the Soviet Union, announced that the 'minor' Nazi war criminals would be tried and punished by the courts of the lands where the crimes took place. As for the major criminals "whose offenses had no particular geographical location,"[5] punishment was to be the product of joint Allied judgment.

Between October 1943 and January 1944, the U.S. and the U.K. established a United Nations Commission for the Investigation of War Crimes, commonly known as the United Nations War Crimes Commission (UNWCC). The commission, meeting in London during 1944, compiled lists of war criminals. On August 8, 1945, the London Agreement and its accompanying Charter[6] provided the constitutional authority for an International Military Tribunal at Nuremberg. The law embodied in this Charter was "decisive and binding upon the Tribunal"[7] and 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) war crimes; (c) crimes against humanity."[8]

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 states are the only subjects of international law and declared authoritatively that *individuals* are punishable for crimes against international law.[9] 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. How comparable, then, is Nuremberg[10] to the current situation concerning Iraqi crimes?[11] Primarily

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4. M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL W. INT'L L. J. 208 n.2 (1979), *citing Moscow Declaration*, 38 AM. J. INT'L L. 7 (Supp. 1944).

5. Bassiouni, *supra* note 4.

6. London Agreement of Aug. 8, 1945, with accompanying Charter, E.A.S. No. 472, 82 U.N.T.S. 284.

7. *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBURG, Judgment 218 (1947).

8. *Supra* note 6, art. 61. Crimes of war, crimes against peace and crimes against humanity are defined in the Charter at Article 6 (a), (b), (c).

9. 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." *Supra* note 7, at 223.

10. *See Persian Gulf: The Question of War Crimes, Hearings Before the Comm. on Foreign Relations*, 102d Congress, 1st Sess., 17-20 (1991). (statement of Anthony D'Amato on the applicability of the Nuremberg precedent to Gulf War Iraqi crimes)[hereinafter D'Amato]. In this connection, Professor D'Amato stressed the "educational impact" of trials of Iraqi war criminals:

> The enormity of the crimes committed by various Iraqi leaders in the Persian Gulf War is a lesson that has to be brought home to the world day after day

because Iraq, unlike Germany, emerged from war unoccupied, it is improbable that a Nuremberg style tribunal could be convened within Iraq or that custody over Iraqi criminals could be gained 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, bind all member states and should compel timely prosecution of Iraqi crimes against peace,[12] war crimes[13] and crimes against humanity.

What crimes were committed in the Gulf War?[14] Persistent and well-documented reports indicate truly horrendous crimes,[15] crimes so terrible

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> and week after week as the trial proceeds in it slowly deliberate way. A war crimes trial should not be today's news forgotten tomorrow. Rather, it should be one of the most fundamental lessons in civics that can be taught to the people of the world, especially young people. The lesson is that there is nothing glamorous about wars of aggression; that the people who wage such wars are the lowest form of criminals; and that they will be brought to justice just as common criminals are brought to justice in the courts of all civilized nations.

See also, William V. O'Brien, *The Nuremberg Precedent and the Gulf War*, 31 VA. J. INT'L L. 391-401 (1991). (Confirming view of the applicability of the Nuremberg precedent).

11. For a comprehensive consideration of Iraqi war crimes and prosecutorial options, *see generally* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351-380 (1991); Louis René Beres, *The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes*, 31 VA. J. INT'L L. 381-390 (1991); William V. O'Brien, *supra* note 10, at 391-402; and John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403-415 (1991).

12. Bassiouni, *supra* note 4, at 206. Cherif Bassiouni reports that "the first prosecution for initiating an unjust war is reported to have been in Naples, in 1268, when Conradin von Hohenstafen was put to death for that reason. *See also*, Remigiusz Bierzanek, *War Crimes: History and Definition, in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 559, 560 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

13. Bassiouni, *supra* note 4, at 206. Bassiouni also reports that the first international prosecution for war crimes was the prosecution of one Peter von Hagenbach in Breisach, Germany, in 1474 before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire. *See also* William H. Parks, *Command Responsibility for War Crimes*, 61 MIL. L. REV. 1, 4 (1973).

14. For documentation of Iraqi crimes, see Amnesty International News Release, "Iraqi Forces Killings (sic) and Torturing in Kuwait, Says Amnesty International Fact-Finding Team," AI Index: MDE 14/15/90. Distr. SC/PO (Oct. 3, 1990) (a preliminary report on widespread charges of Iraqi torture, willful killing, rape, pillage and collective reprisals); Amnesty International Report, "Iraq Occupied Kuwait Human Rights Violations Since 2 August," AI Index MDE 14/16/90. Distr. SC/CO/GR (Dec. 19, 1990). For personal testimonies of Iraqi brutalities, see *Letter from Kuwait*, N.Y. TIMES, Jan. 14, 1991, at A17; and Shafeeq Ghabra, *The Iraqi Occupation of Kuwait: An Eyewitness Account*, 20 J. OF PALESTINE STUDIES 78, 112-125 n.2. For further documentation, see *Crisis in the Persian Gulf: Sanctions, Diplomacy and War, Hearings Before the House Comm. on Armed Services*, 102d Cong., 1st Sess. 920 (1991); *Human Rights Abuses in Kuwait and Iraq, Hearings Before the House Comm. on Foreign Affairs*, 102nd Cong., 1st Sess. 192 (1991); *The Persian Gulf Crisis, Joint Hearings Before the Subcommittees on Arms Control, International Security and Science, Europe and the Middle East, and on International Operations, Committee on Foreign Affairs and the Joint Economic Committee*, 101st Cong., 2d Sess. 576 (1990).

15. Any indictments setting forth criminal charges against Saddam Hussein and other

that they mandate universal cooperation in apprehension and punishment. These crimes, what lawyers call *crimen contra omnes*, crimes against all, concern (1) barbarous and inhuman assaults against Kuwaitis and other nationals in Kuwait; (2) barbarous and inhuman treatment of coalition prisoners of war in Iraq and Kuwait; and (3) aggression and crimes of war against noncombatant populations in Israel and Saudi Arabia.[16] All of these grave breaches of international law are in addition to the original crime against peace[17] committed against Kuwait on August 2, 1990.[18] The United States and all other states bound by the 1949 Geneva

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unnamed defendants must identify violations, *inter alia*, of the following three authoritative codifications: *Convention Against Torture And Other Cruel, Inhumane Or Degrading Treatment Or Punishment*, G.A. Res. 39/46, U.N. GAOR 3d Comm., 93d plen. mtg., Annex, U.N. Doc. E/CN.4/1984/72 (1984); *International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR 6th Comm., 105th plen. mtg., Annex, Supp. No. 39, U.N. Doc. A/34/39 (1979); and *Resolution on Disappeared Persons*, G.A. Res. 33/173, U.N. GAOR, 3d Comm., 90th plen. mtg., U.N. Doc. A/33/509 (1978).

16. 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 the Fourth Geneva Convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3553, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. *See also* International Convention for the Prevention of Pollution of the Sea by Oil, May 29, 1961, 12 U.S.T. 2989, 327 U.N.T.S. 3, (regarding Saddam Hussein's "Eco-Terrorism" against Kuwaiti oil wells).

17. Pursuant to the London Agreement of August 8, 1945, 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 Protocol 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. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

18. For crimes against peace, or waging aggressive war, see *Resolution on the Definition of Aggression*, Dec. 14, 1974, G.A. Res. 3314, 29 U.N. GAOR 142, Supp. No. 31, U.N. Doc. A/9631 (1974). For pertinent codifications of the criminalization of aggression, see also: The 1928 Kellogg-Briand Pact (Pact of Paris); 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 Article 2; Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T. S. No. 993, 1976 U.N.Y.B. 1043 (entered into force, Oct. 24, 1945); *The 1965 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 11, Supp. No. 14, U.N. Doc. A/6014, (1966); *The 1970 U.N. General Assembly 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 121, Supp. No. 28, U.N. Doc. A/8028 (1971); *The 1972 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 5, Supp. No. 30, U.N. Doc. A/8730 (1972); *The Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art. 6, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279; and *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95, 1 U.N. GAOR 1144, U.N. Doc. A/236 (1946). *See also* The Convention on the Rights and Duties of States,

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.[19]

Between August 2, 1990, the date of Iraq's invasion of Kuwait, and October 29, 1990, the Security Council adopted ten resolutions explicitly condemning the Baghdad regime for multiple crimes of the gravest possible nature.[20] These *crimen contra omnes* crimes, which are so terrible that they mandate universal enforcement, jurisdiction and responsibility, cry out for legal prosecution even *absent* authorizing resolutions by the UN Security Council. This is because the prohibition of the now documented barbarous activities of Iraq falls under a "peremptory" rule of international law, which is an absolutely binding rule allowing no form of derogation whatsoever.[21]

Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (known generally as the "Montevideo Convention"); The 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 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (known generally as the "Protocol of Buenos Aires"); The 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"); The American Treaty on Pacific Settlement, April 30, 1948, 30 U.N.T.S. 55 (known generally as the "Pact of Bogota"); and the Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

19. Fourth Geneva Convention, *supra* note 16, at art. 146, 6 U.S.T at 3365.

20. For a comprehensive compilation of authoritative documents pertaining to the Gulf War, see *Current Documents: Gulf War Legal and Diplomatic Documents*, 13 HOUS. J. INT'L L. 281.

21. According to Article 53 of the Vienna Convention, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Even a treaty that might seek to criminalize forms of insurgency protected by this peremptory norm would be invalid. Further, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." The concept is extended to newly emerging peremptory norms by Article 64 of the Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention on the Law of Treaties, May 22, 1969, art. 53, U.N. Conference on the Law of Treaties, First and Second Sessions, Mar. 26-May 24, 1968, and Apr. 9-May 22, 1969, U.N. Doc. A/CONF. 39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679 (1969).

Time is running out! Saddam Hussein and the surviving members of his Revolutionary Council, by evading prosecution, would defile justice and leave international law weak and tragically undermined, whatever the military outcome.

Significantly, the Security Council issued its resolutions *before* the most serious Iraqi crimes were uncovered. What does this imply? Our current system of international law[22] establishes, beyond any reasonable doubt, the primacy of justice and human rights in world affairs. The words used so carefully at Nuremberg, "so far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished,"[23] derive from the very ancient principle: *nullum crimen sine poena*. This principle applies with particular clarity and urgency to the crimes of Saddam Hussein and his henchmen.

It is arguable, of course, that the formal protocol of a trial would prove manifestly unjust applied to such *overwhelming* lawlessness. The concept here is that prosecution of Iraqi crimes under international law would result in a mockery of civilized law-enforcement, not because of perceived abuses of power and legal procedure but because such judicial "remedy" could create an erroneous appearance of proportionality. This argument, which holds that for certain egregious crimes, no amount of punishment can produce justice, leads to two diametrically opposite courses of action: (1) extra-judicial punishment (normally execution), or (2) leaving the crimes unpunished altogether. The first course of action is unsatisfactory. It contains all of the elements of infinite regress. When, if ever, is the amount of extra-judicial punishment finally commensurate with the crime? There are also tactical difficulties involved in killing an "adequate" number of perpetrators. Moreover, this option is plagued by an inadequacy concerning the identification of the wrongdoers, probable cause and the standard of beyond a reasonable doubt.[24] The second

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22. International law, of course, is *part of* U.S. law. Recalling the words used by the U.S. Supreme Court in *The Paquete Habana*, the principal case concerning the incorporation of international law into this country's municipal law

> [I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677, 700 (1900).

23. Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgement of the Tribunal, U.N. Doc. A/8771.

24. The "beyond reasonable doubt" standard, that has characterized the Anglo-American criminal justice system for more than two hundred years, is a component of the broader question of the theory of evidence. Evidentiary doctrines are associated with arrest, pretrial examination, and grand jury indictment. Historically, the study of reasonable doubt has been linked to the work of juries. English law was affected by John Locke who presented an ordered account of levels of probability. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690). Locke's criteria for evaluating testimony emphasized the number of wit-

course of action is unsatisfactory because it represents flagrant disregard for expectations of *nullum crimen sine poena.*

The Nuremberg obligations to bring major Iraqi criminals to trial are doubly binding to the U.S. as these obligations represent not only current obligations under international law,[25] but also the higher obligations found in the American political tradition.[26] By their codification of the

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nesses, their integrity, their skill at presenting evidence and its agreement with the circumstances and the presence or absence of contrary testimony. Samuel Pufendorf links the concept of "conscience" to notions of moral certainty and beyond reasonable doubt. For Pufendorf, the "satisfied conscience" of a jury required rational, unbiased and unemotional acts of the understanding. SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (C. H. Oldfather & W. A. Oldfather trans., 1688). Regarding the concept of "probable cause," it is now the prevailing grand jury evidentiary standard. In the United States, probable cause has usually not been used as a standard to determine the guilt or innocence of accused defendants, but rather to determine whether or not sufficient evidence has been produced to indicate that a crime has been committed by the accused. BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 103 (1991). The concept has also been important in the context of arrest and search standards. This is quite different from our concern with extra-judicial punishment. One partial "remedy" in assassination decisions would be to replace the standard of probable cause with the stricter *prima facia* case standard. For the origins of this standard, see THOMAS STARKIE, 1 PRACTICAL TREATISE OF THE LAW OF EVIDENCE 554 (10th ed., 1876). A coherent and purposeful elucidation of the *prima facie* evidence standard was offered by Chief Justice Shaw's 1832 charge to a Massachusetts grand jury that *prima facie* evidence of guilt ". . . be of such a nature, that if it stood alone, uncontradicted and uncontrolled by any defensive matter, it would be sufficient to justify a conviction on trial." SHAPIRO, at 95. As evidentiary standards, *prima facie* and probable cause suggest different degrees of probability, with probable cause as a less demanding standard. Significantly, there is an important connection between the prima facie case standard and legally admissible/competent evidence, i.e., what grand juries would consider trial-admissible evidence. An advantage of a prima facie case standard in deciding upon extra-judicial punishment is that it demands decisional authorities not to inflict harm on an accused unless it can fairly predict that the accused would be found guilty by a jury. Needless to say, this advantage is complicated and undermined by the fact that (a) fair prediction is an exceedingly complicated calculation; and (b) the jury in question would have been convened in the municipal context of the assassinating state's court. All of this is complicated further by the designated victim's incapacity to confront his accusers, what would certainly seem to be in basic violation of elementary "due process" standards. Moreover, it may be especially difficult to apply probability calculations in extrajudicial settings, i.e., more difficult than in constituted legal arenas.

25. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal (1946) was followed by Resolution 177, adopted November 21, 1947, directing the U.N. International Law Commission to "(a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and (b) prepare a draft code of offenses against the peace and security of mankind. . . ." H.R.J. Res. 177, 80th Cong., 1st Sess. (1947), U.N. Doc. A/519, at 112. For the principles formulated, see RICHARD A. FALK, *supra* note 1, at 107-108.

26. 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 Constitution, it rests upon the acceptance of certain notions of right and justice that obtain because of their own obvious merit. Such notions, as the celebrated 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

principle that basic human rights, in war and in peace, are now peremptory, the Nuremberg obligations reflect perfect convergence of international law and the enduring foundation of our American Republic.[27]

Worldwide lack of concern for legal protection of human rights grew out of the post-Westphalian system of world politics. This system sanctifies untrammeled competition between sovereign States and identifies national loyalty as the overriding human obligation. With these developments, unfettered nationalism and State-centrism have become dominant characteristics of international relations. The resultant world order has come to subordinate all moral and ethical sensibilities to the idea of unlimited sovereignty. Such subordination was more than a little ironic. Even Jean Bodin, who advanced the idea of sovereignty as free of any external control or internal division, recognized the limits imposed by divine law and natural law.

It is equally ironic that former President Bush, reacting to the news of post-war Iraqi crimes against the Kurds and other minorities,[28] spoke of Iraqi "sovereignty" in ways that placed such crimes within the ambit of domestic jurisdiction. All such crimes become matters of international concern because of their international impact and the outrage they invoke

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draft the Declaration 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 of Independence posits a natural order in the world whose laws are external to all human will and which are discoverable 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, whose *Principia* was first published in 1686, 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 defied nature and denatured God.

27. Regarding this foundation, prosecution of war crimes took place during the American Revolution, after the Spanish-American War and after the occupation of the Philippines. After the Civil War, a landmark case was the trial of Confederate Major Henry Wirz for his role in the death of several thousand Union prisoners in the Andersonville prison. For discussions of these cases, including the Revolutionary War trial of Captain Nathan Hale by a British military court and Major John Andre by a board of officers appointed by George Washington. *See* Bassiouni, *supra* note 4, at 206-207. *See also* 8 AMERICAN STATE TRIALS 657 (J. Lawson ed., 1917).

28. To a considerable extent, these crimes were made possible by U.S. betrayal. Throughout the war, U.S. forces played an active role in encouraging Iraqi revolt against Saddam Hussein's rule. Yet, when Iraqi Shiites and Kurds heeded this encouragement, they were left to their own devices; i.e., they were slaughtered with impunity. "The Iraqi people alone have the responsibility and the right to choose their own government—without outside interference," declared a Voice of America editorial on March 7, 1991, when Shiite forces controlled almost all of southern Iraq. Bush administration policy, recalled Peter Galbraith, a Senate Foreign Relations Committee staffer who visited Iraq in March, 1991, was essentially as follows: "We're not going to get involved in Iraq's internal affairs." This was, said Galbraith, "a clear signal to Saddam that he could kill whomever he needed to stay in power." Tony Horwitz, *After Heeding Calls To Turn On Saddam, Shiites Feel Betrayed*, WALL ST. J., Dec. 26, 1991, at A1.

in the conscience of humankind. International law now concedes that limitations on the authoritative competence of each state are imposed not only by the requirements of international comity, but also by the *inherent* rights of each individual person to claims of life and dignity.[29]

International law does not sanctify sovereignty at all costs. Recognizing the peremptory character of a human rights regime, it has now transported a broad range of state-inflicted harms from the realm of domestic jurisdiction to one of international concern.[30] Indeed, in the post-Nuremberg world order, international law has substantially enlarged the right of particular states to intervene within the territory of other states, on behalf of essential human rights.

The Charter of the United Nations, a multilateral, law-making treaty, stipulates in its Preamble and several of its articles that international law protects human rights. 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 their determination "to promote social progress and better standards of life in larger freedom."[31]

These codified expressions of the international law of human rights,

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29. These requirements of comity are normally associated with Emmerich de Vattel's notion of "mutual aid." According to The Law of Nations, "[s]ince Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require." 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW xii (Charles G. Fenwick, trans., 1758). The core of Vattel's argument for comity is as follows:

> The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all Nations is likewise that of mutual assistance in order to perfect themselves and their condition. The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations.

Id.

30. These harms include crimes against the environment. For an exhaustive and authoritative assessment of Iraqi crimes against the environment and their consequences, see ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, AMERICAN LAW DIVISION, 102D CONG., 2D SESS., *The Environmental Aftermath of the Gulf War* (Comm. Print 1992). The principal concerns of the Senate Gulf Pollution Task Force were: (1) the need to extinguish the oil well fires as quickly as possible; (2) to examine potential health impacts on U.S. troops and citizens of the region; (3) to examine the potential global and regional environmental impact; and (4) to review the applicable principles of international law which governed Iraq's actions. Regarding the fourth concern, Iraqi crimes against the environment and international law, the Task Force, *inter alia*, reaffirmed the fundamental principle of responsibility for transnational harm. This principle is grounded in the expression of customary international law that "a State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighboring State." *Id.*

31. U.N. CHARTER preamble.

make abundantly clear that individual States can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens. Notwithstanding Article 2 (7) of the UN Charter, which reaffirms certain areas of domestic jurisdiction, each State is obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions does not confer immunity from responsibility, since all States remain bound by the law of the Charter and by the customs and general principles of law from which such agreements derive.

The international regime on human rights also establishes the continuing validity of natural law as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg.[32] While the Nuremberg Tribunal cast its indictments in terms of existing positive law, law enacted by States, the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its explicit and detailed codification.

Ironically, however, in the most recent case of egregious human rights violation within a state, the genocide-like crimes committed by Saddam Hussein against the Kurdish populations in Iraq, the legal community of humankind stopped short of authentic humanitarian intervention. The fact that such intervention would have taken place in the aftermath of a UN sanctioned war of collective security and collective self-defense against the regime in Baghdad compounds the irony of this failure. Indeed, the allies justified the war against Saddam on behalf of, *inter alia*, the violation of human rights in Kuwait during the Iraqi occupation.

Why the contradiction? Why does such a glaring gap exist between the settled tenets of international law and actual state practice? The answer lies in geopolitics. Fearing a power vacuum in the region and the alienation of U.S. allies, the Bush administration did not comply, in any serious sense, with the Iraqi opposition.[33] The U.S. viewed the Iraqi Shi'a opposing Saddam as pawns of Iran seeking to impose a Khomeini-style regime, in spite of a very different history. The Iraqi Kurds were believed

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32. *See* International Conference on Military Trials, Report of Robert H. Jackson, Department of State, *in* BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION 368-369 (1975). The judgment of the International Military Tribunal of October 1, 1946 rested upon the four Allied Powers' London Agreement of August 8, 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement.

33. In earlier cases, the unwillingness of the United States to support codified and well-established anti-genocide norms derived from its obsessive commitment to anti-Sovietism. Indeed, at the end of World War II, America shielded large numbers of Nazi war criminals from prosecution, preferring to enlist their services as spies against East Germany and the Soviet Union. At a time when the U.S. was involved as the principal architect of the International Military Tribunal at Nuremberg, a secret military program—known aptly as "Ratline"—used Nazi war criminals as highly-paid intelligence agents against the East. All of this took place when tens of thousands of concentration camp survivors were denied admittance to the United States. *See* ABRAM L. SACHAR, THE REDEMPTION OF THE UNWANTED 129 (1983); and Ralph Blumenthal, *Nazi Whitewash in 1940's Charged*, N.Y. TIMES, Mar. 11, 1985, at 1.

to be seeking the complete breakup of Iraq and the creation of an independent Kurdistan, an objective judged to be fundamentally dangerous to our ally Turkey.

The failure of humanitarian intervention on behalf of Iraq's Kurds dates back further than the end of the recent Gulf War. During the 1980's, this beleaguered population began a rebellion that was crushed with extraordinary ferocity. Beginning in 1985, Saddam's regime engaged in a systematic program of destruction of all of the villages of Kurdistan.

In March 1988, the regime used poison gas on the city of Halabja. Later, Saddam launched a broad chemical attack on more than 70 villages along the Iraqi-Turkish and Iraqi-Iranian borders. According to an authoritative report offered by the Committee on Foreign Relations, United States Senate: with that rebellion taking the lives of more than 100,000 Kurds and costing another two million of their homes, the Kurdish leadership was reluctant to proceed without an assurance of success.[34]

Let us return to the matter of criminal prosecution. *Where* should the trials be held?[35] Nuremberg had been expected to be the precursor for the establishment of a permanent international criminal court for the prosecution of international crimes. Yet, even today, no such court has been created. Contrary to commonly held misconceptions, the International Court of Justice at the Hague has absolutely no penal or criminal jurisdiction, and is therefore unsuitable for the task at hand.[36]

One obvious jurisdictional solution, would be to parallel Nuremberg and establish a specially-constituted *ad hoc* Nuremberg-style tribunal

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34. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102d CONG., 1ST SESS., Civil War in Iraq 2 (Comm. Print 1991).

35. After the Second World War, three judicial solutions were adapted to the problem of determining the proper jurisdiction for trying Nazi offenses by the victim States, solutions that were additional to the specially-constituted Nuremberg Tribunal. The first solution involved the creation of special courts set up expressly for the purpose at hand. This solution was adopted in Rumania, Czechoslovakia, Holland, Austria, Bulgaria, Hungary and Poland. 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 accepted in Norway, Denmark and Yugoslavia. This solution was also adopted by Israel, although—strictly speaking—the State of Israel did not exist at the time of the commission of the crimes in question.

36. The International Court of Justice does, however, have jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions. Such jurisdiction is accorded by the Genocide Convention, Dec. 9, 1948, art. 9, 78 U.N.T.S. 277; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1056, art. 10, 266 U.N.T.S. 3; the Convention on the Political Rights of Women, Mar. 31, 1953, art. 9, 193 U.N.T.S. 135; the Convention Relating to the Status of Refugees, July 28, 1951, art. 38, 189 U.N.T.S. 150; and the Convention on the Reduction of Statelessness, Dec. 4, 1954, art. 14, A/Conf. 9/15, 1961, annex. In exercising its jurisdiction, however, the ICJ must still confront significant difficulties in bringing recalcitrant States into contentious proceedings. There is still no way to effectively ensure the attendance of defendant States before the Court. Although many States have acceded to the Optional Clause of the Statute of the ICJ, these accessions are watered down by many attached reservations.

within the defeated country's territory, (probably in Baghdad).[37] Another acceptable, and far more likely possibility would be to undertake such proceedings within the country that had been Iraq's principal victim, Kuwait. The court could display broad coalition representation, if within Iraq, or, depending upon the desired range of indictments, be fully Kuwaiti in representation. The Convention on the Prevention and Punishment of the Crime of Genocide,[38] among other sources, would provide legal precedent and justification for these possibilities. Article VI of this Convention provides that trials for its violation be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."[39]

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37. Such a tribunal could be established under articles 22 and 29 of the United Nations Charter, authorizing creation of subsidiary organs. *See* Luis Kutner & Ved P. Nanda, *Draft Indictment of Saddam Hussein*, 20 DENV. J. INT'L L. & POL'Y 91 (1991) (a very useful draft indictment of Iraqi President Saddam Hussein, his political, military and economic advisors, and of other unnamed defendants).

38. 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, such creation would still be consistent with related "genocide-like" crimes — crimes that may derive from multiple other sources of international law. See *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 606 U.N.T.S. 267 (entered into force, April 22, 1954); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135, (entered into force, July 7, 1976); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Dec. 14, 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of all forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966) (entered into force, Jan. 4, 1969); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967) (entered into force, Jan. 3, 1976); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) (entered into force, Mar. 23, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970) (entered into force, July 18, 1978); The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), the Optional Protocol to the International Covenant on Civil and Political Unrest, and the International Covenant on Economic, Social and Cultural Rights, known collectively as the International Bill of Human Rights, serve as the touchstone for the normative protection of human rights.

39. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The Genocide Convention was submitted to the Senate by President Harry S. Truman in June, 1949. On February 19, 1986, the Senate consented to ratification with the reservation that legislation be passed that conforms U.S. law to the precise terms of the Treaty. This enabling legislation was approved by Congress in October 1988, and signed by President Reagan on November 4, 1988. This legislation amends the U.S. 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 (i.e., killing involving acts constituting crimes of war and crimes against humanity). Although crimes against humanity are linked to war-

Washington and its allies must also 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, focussing primarily on particular Nazi groups defined as inherently criminal. Following the recent defeat of Saddam Hussein, however, many of the crimes against humanity committed by Iraq appeared unplanned and individually conceived. Consequently, coalition lists of suspected war criminals could become so large as to prove altogether unusable. Alternatively, coalition prosecution could focus essentially or even entirely on Saddam and his leadership elite. This 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.

Regarding breadth of prosecutorial concern, the United States and its partners must also decide whether or not to include Iraq's 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.

After the recent Gulf War, 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 Kurdish cities intensely, leveled entire neighborhoods and engaged in wholesale massacres of Kurdish civilians. According to a report issued by the Committee on Foreign Relations, United States Senate: "more than two million Iraqi Kurds have sought refuge on the Iraq-Turkey and the Iraq-Iran borders and they are dying at a rate of up to 2,000 a day."[40] 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.[41]

These crimes continue well up to the present. At the time of this writing, Iraq continues to launch large ground and air attacks against Kurdish towns in northern Iraq. An unofficial cease-fire has remained in

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time actions, the crime of genocide can be committed in peacetime or during a 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.*

40. *Supra* note 34, at vi.

41. *Supra* note 34, at v.

effect. The entire pattern of Iraqi crimes against the Kurds goes beyond domestic jurisdiction, and must be recognized as a matter of international concern.

Finally, it should be noted that a coalition agency charged with creating "another Nuremberg" could adopt the solution favored by the United States, the Soviet Union, Great Britain and France in 1945. The coalition would establish a specially created tribunal for the trial of major criminals while the domestic courts of individual coalition countries would provide the venue for trials of "minor" criminals. As in the prosecution of Nazi offenses, the separation of *major* and *minor* criminals concerns matters of rank or position, and would have nothing to do with the seriousness or horror of particular transgressions.

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

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42. The principle of universal jurisdiction is founded upon the presumption of solidarity between states in the fight against crime. *See generally* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Francis W. Kilsey trans., 1925), and EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE 93 (1916). 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. *Cf.* Art. 49 of Convention No. 1; Art. 50 of Convention No. 2; Art. 129 of Convention No. 3; and Art. 146 of Convention No. 4. For further support of universality for certain international crimes see M.C. BASSIOUNI, 2 INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (1987). *See also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402-404 and 443 (Tentative Draft No. 5, 1984); 18 U.S.C. § 3 (1992).

43. In addition to the territorial principle and the nationality principle, there are three other traditionally recognized bases of jurisdiction under international law: the protective principle, determining jurisdiction by reference to the national interest injured by the offense; the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and the passive personality principle, determining jurisdiction by reference to the nationality of the person injured by the offense. The Genocide Convention itself, however, does not stipulate universal jurisdiction. A recent example supporting the principle of universal jurisdiction in matters concerning genocide involves action by the United States. A Ruling for the extradition to Israel of accused Nazi war criminal John Demjanjuk, by the U.S. Court of Appeals 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 the State of Israel did not exist at the time the heinous crimes were committed. 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 na-

As noted by the Sixth Circuit in *Demjanjuk v. Petrovsky*, "[t]he law of the United States includes international law" and "international law recognizes 'universal jurisdiction' over certain offenses."[44] Article VI of the Constitution, and a number of court decisions make all international law, conventional and customary, the supreme law of the land. The Nuremberg Tribunal acknowledged that the participating powers "have done together what any one of them might have done singly."[45]

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.[46] Pertinent authority for such jurisdiction can be found in sections 818 and 821 of Title 10 of the United States Code, which form part of an

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> tions or against humanity, and that the prosecuting nation is acting for all nations.

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

44. *Id.* at 582-83. In all aspects of recent Iraqi crimes, jurisdiction to prosecute is unambiguously universal. Traditionally, piracy and slave trading were the only offenses warranting universal jurisdiction. Following World War II, however, states have generally recognized an expansion of universal jurisdiction to include: crimes of war; crimes against peace; crimes against humanity; hostage taking; crimes against internationally protected persons; hijacking; sabotage of aircraft; torture; genocide; and apartheid. For the most part, this jurisdictional expansion has its origins in multilateral conventions, customary international law and certain pertinent judicial decisions. The Second Circuit's statement in *Filartiga v. Peña-Irala* declares: "[t]he torturer has become, like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind." Filartiga v. Peña-Irala, 630 F.2d 890 (2d Cir. 1980). The federal district court in *United States v. Layton* recognized that "nations have begun to extend universal jurisdiction to. . .crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy." United States v. Layton, 509 F. Supp. 212, 223 (N.D. Calif. 1981). For other judicial examples of assertions of universal jurisdiction, see United States v. Yunis, 681 F. Supp. 909 (D.C. 1988); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); and Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.C. 1985).

45. Apart from the prosecution of Nazi war criminals, there have been only two trials under the Genocide Convention by competent tribunals of the States wherein the crimes were committed: (1) in Equatorial Guinea, the tyrant Macis had been slaughtering his subjects and pillaging his country for a number of years. He was ultimately overthrown, found guilty of a number of crimes, including genocide, and executed. (In a report on the trial, however, the legal officer of the International Commission of Jurists concluded that Macis had been wrongfully convicted of genocide); and (2) in Kampuchea, when the Khmer Rouge were overthrown by the Vietnamese, the successor government instituted criminal proceedings against the former Prime Minister, Pol Pot, and the Deputy Prime Minister on charges of genocide, and the accused were found guilty of the crime, in absentia, by a people's revolutionary tribunal.

46. Since its founding, the United States has reserved the right to enforce international law within its own courts. 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." U.S. CONST. art. 1, § 8, cl. 10. 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 can be found in the United States. At that time the particular target of this legislation was piracy on the high seas.

extraterritorial statutory scheme and 18 U.S.C. § 3231. It follows from all this that international and U.S. law have already established the legal machinery for bringing Saddam Hussein and his fellow criminals to justice. The only missing element is the political will to make this machinery work.

However, we need to be realistic. Before international law can actually "work" in this matter, its agents will have to acquire *custody* of Saddam Hussein et. al. Ideally, the coalition could obtain custody via the long-established mechanisms of extradition[47] or prosecution, and the associated means of "indirect enforcement" (i.e., prosecution within authoritative municipal courts in the absence of a permanently constituted international criminal court or an *ad hoc* tribunal). But other possibilities must be considered, as these prospects remain extremely remote.

One such possibility would involve the reinsertion of coalition military forces into Iraq. Although the essential rationale of such return would ensure Iraqi compliance with authoritative cease-fire expectations, especially as they concern Baghdad's mandated elimination of weapons of mass destruction, a reinserted multinational military force could also be used to identify and apprehend alleged Iraqi criminals. Though entirely proper from a jurisprudential perspective, reintroduction of appropriate military forces for the sole purposes of such identification and apprehension, subject, of course to the limits[48] of *jus in bello* or the laws of war,[49]

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47. At this time, the United States has extradition agreements with over 100 countries. The treaties range in age from an 1856 agreement with the Austrian Empire, which is still in force with respect to one of its successor states (Hungary) to the protocol with Canada, which entered into force in November, 1991. The Office of International Affairs in the Criminal Division of the Department of Justice plays an important role in extradition matters. From OIA's inception in 1979, its attorneys have cooperated with the Department of State in negotiating all new extradition agreements. According to testimony by Robert Mueller, III, Assistant Attorney General, Criminal Division, Department of Justice:

> In general, our goal in extradition negotiations in recent years has been threefold: first, to expand the number of offenses for which extradition can be obtained by including all conduct that is criminal under the laws of both countries and punishable by a specified minimum period of incarceration; second, to limit the exceptions to extradition, particularly the exception for so-called political offenses; and third, to improve the way in which extradition treaties function by simplifying and clarifying provisions that were inadequately addressed in older treaties.

Consular Conventions, Extradition Treaties and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS); Hearings Before the Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)(Statement by Robert S. Mueller, III).

48. *See* 2 SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 139 (Frank Gardner Moore, trans., 1964) (for an early expression of limits under the law of war).

> As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however,

would be unlikely for both tactical and political reasons.

Another possibility would involve custody by forcible abduction.[50]

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commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

Id.

49. The principle of proportionality, of course, has its origins in the biblical *Lex Talionis*, (law of exact retaliation). The "eye for eye, tooth for tooth" expression is found in three separate passages of the Jewish Torah, or biblical Pentateuch. These Torah rules are likely related to the Code of Hammurabi (c. 1728-1686 B.C.)—the first written evidence for penalizing wrongdoing with exact retaliation. In matters concerning personal injury, the code prescribes and eye for an eye (#196), breaking bone for bone (#197), and extracting tooth for tooth (#199). Among the ancient Hebrews, we should speak not of *the lex talionis*, but of several. The *lex talionis* appears in only three passages of the Torah. In their sequence of probable antiquity, they are as follows: *Exodus* 21:22-25; *Deuteronomy* 19:19-21; and *Leviticus* 24:17-21. (All have affinities to other Near Eastern codes.) These three passages address specific concerns: hurting a pregnant woman, perjury, and guarding Yahweh's altar against defilement. *See* MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW AND LITERATURE 59-186 (1990). In contemporary international law, the principle of proportionality can be found in the traditional view that a state offended by another state's use of force, if the offending state refuses to make amends, "is then entitled to take 'proportionate' reprisals." INGRID DETTER DE LUPIS, THE LAW OF WAR 75 (1987). Evidence of the rule of proportionality can also be found in the International Covenant on Civil and Political Rights of 1966, *supra* note 38, at art. 4. Similarly, the American Convention on Human Rights, *supra* note 38, allows at Article 27(1) such derogations in "time of war, public danger or other emergency which threaten the independence of security of a party" on condition of proportionality. In essence, the military principle of proportionality requires that the amount of destruction permitted must be proportionate to the importance of the objective. In contrast, the political principle of proportionality states that "a war cannot be just unless the evil that can reasonably be expected to ensue from the war is less than the evil that can reasonably be expected to ensue if the war is not fought." DOUGLAS P. LACKEY, THE ETHICS OF WAR AND PEACE 40 (1989).

50. Regarding custody by *abduction*, two discrete issues present themselves: (1) seizure of *hostes humani generis* (common enemy of mankind) when custody cannot be obtained via extradition; and (2) seizure of *hostes humani generis* who is a sitting head of state. On the first issue, we may consider that President Reagan, in 1986, authorized procedures for the forcible abduction of suspected terrorists from other states for trial in U.S. courts. John Walcott, Andy Pasztor & David Rogers, *Reagan Ruling to Let CIA Kidnap Terrorists Overseas is Disclosed*, WALL ST. J., Feb. 20, 1987, sec. 1, at 1, col. 6. The statutory authority for President Reagan's posture, however, was contingent upon the terrorist acts being involved with taking U.S. citizens hostage—acts that are subject to the jurisdiction of U.S. courts under the Act on the Prevention and Punishment of the Crime of Hostage-Taking 18 U.S.C. § 1203 (1992). In 1987, in international waters, the F.B.I. lured a Lebanese national named Fawaz Younis onto a yacht and transported him by force to the U.S. for trial. His abduction was based upon his suspected involvement in a 1985 hijacking of a Jordanian airliner at Beirut airport in which U.S. nationals had been held hostage. G. Gregory Schuetz, *Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L. J. 499, 501 (1988). On the second issue, we may recall that under international law, there is normally a very substantial difference between abduction of a terrorist or other *hostes humani generis* and abduction of *any* head of state. Indeed, there is almost always a presumption of sovereign immunity, a binding rule that exempts each state and its high officials from the judicial jurisdiction of another state. Although the rule of sovereign immunity is certainly not absolute in the post-Nuremberg world order, the right of one state to seize a high official from another state is exceedingly

Under international law, there normally exists a very substantial difference between abduction of an ordinary criminal or even an *hostes humani generis*, common enemy of mankind, and abduction of a sitting head of state. Indeed, a presumption of sovereign immunity, a rule that exempts each state and its high officials from the judicial jurisdiction of another state or transnational authority, persists.[51]

What if neither of these possibilities prove practical? Here international law may have to content itself with conducting trials *in absentia*. According to the Charter of the International Military Tribunal, Annexed to the London Agreement of August 8, 1945:

> the Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter (crimes of war; crimes against peace 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.[52]

Yet, trials in absentia would not be without serious difficulties.[53] Apart from their intrinsic shortcomings, such trials may still run counter to long-settled principles of justice and due process in national and international law. In the UN Report of the 1953 Committee on International

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limited. In an 1812 case before the Supreme Court of the United States, The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812), Chief Justice Marshall went even further, arguing for "the exemption of the person of the sovereign from arrest or detention within a foreign territory." Nevertheless, where the alleged crimes in question are of a Nuremberg-category and no other means exist whereby to gain custody of the pertinent head of state, the expectations of *nullum crimen sine poena* (no crime without punishment) may override those of sovereign immunity. In the United States, the terms of the Posse Comitatus Act, 18 U.S.C. § 1385 (1992), prohibit the U.S. military from undertaking domestic law enforcement. However, this prohibition does not apply outside the United States. *See* John Quigley, *Enforcement of Human Rights in U.S. Courts: The Trial of Persons Kidnapped Abroad, in* WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 59-80 (Mark Gibney ed., 1991). It would appear, therefore, that the United States *has* authority under its own and international law to gain custody of Saddam Hussein, et. al., by forcible abduction if necessary. This argument is all the more compelling in view of U.S. seizure of General Manuel Noriega, whom Washington regarded as a head of state, from Panama in 1990. Noriega, it should be recalled, had been charged with violations of U.S. drug trafficking laws, norms substantially less serious than those revolving around Nuremberg-category crimes.

51. 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. 28 U.S.C. § 1602 (1992).

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

53. Regarding *in absentia* trials, Professor D'Amato, responding to a question by Senator Charles S. Robb at the Hearing on The Persian Gulf and The Question of War Crimes, argued that "there is more psychological impact in having a standing indictment against [Saddam Hussein], hanging over his head, maybe not a 'Sword of Damocles,' but a 'Sword of Justice.'" *See* D'Amato, *supra* note 10, at 19.

Criminal Jurisdiction, the Committee reaffirmed the general principle of law that an accused "should have the right to be present at all stages of the proceedings."[54] In the Annex to this 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."[55]

The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, also stipulates that everyone charged with a criminal offense has the right, "to defend himself in person or through legal assistance of his own choosing. . . ."[56] The International Covenant on Civil and Political Rights, which entered into force in 1976 affirms this right.[57]

Strictly speaking, however, when a tribunal charges someone with a criminal offense and offers them representation through legal assistance of his own choosing, as an alternative to defending himself in person, this opportunity satisfies essential minimum guarantees under law and does not deprive the individual of due process. Similarly, anyone who is charged with a criminal offense and offered but declines the opportunity to defend himself in person, is normally not being mistreated under law.

Finally, though distasteful, assassination may be considered as a very last resort in the matter of Saddam Hussein et. al. Notwithstanding the normal prohibitions of assassination under international law, especially as they pertain to a head of state, circumstances exist wherein the expectations of the anti-genocide regime must override the ordinary prohibitions.[58] After all, if the assassination of a Hitler or a Pol Pot could have saved millions of innocent people from torture and murder, wouldn't justice have required its application?

From the point of view of international law, assassination as a remedy for Iraqi genocide and genocide-like crimes would be least problematic if it originated within Iraq. Such action would qualify under the right of tyrannicide. Aristotle, Plutarch and Cicero offer traditional and authoritative support for such a form of assassination. According to Cicero:

> [T]here can be no such thing as fellowship with tyrants, nothing but bitter feud is possible: and it is not repugnant to nature to despoil, if you can, those whom it is a virtue to kill; nay, this pestilent and godless brood should be utterly banished from human society. For as we

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54. *Report of the Committee on International Criminal Jurisdiction*, Aug. 20, 1953, U.N. GAOR, 9th Sess., Supp. No. 12, at 21, U.N. Doc. A/2645 (1954).

55. Revised Draft Statute for an International Criminal Court, Annex to the Report of the Committee on International Criminal Jurisdiction, *Id.*

56. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

57. International Covenant on Civil and Political Rights, *supra* note 38.

58. Under United States law, "[p]rohibition on Assassination. No person employed by, or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 50 U.S.C. § 401 (1993).

> amputate a limb in which the blood and the vital spirit have ceased to circulate because it injures the rest of the body, so monsters, who under human guise, conceal the cruelty and ferocity of a wild beast, should be severed from the common body of humanity."[59]

What if the assassination remedy originated *outside* Iraq? Could such action be construed as an example of law-enforcement, or would it necessarily be criminal behavior? The answer to this question depends, *inter alia*, upon the presence or absence of a condition of war between the states involved. When a condition of war exists between states, international law normally views transnational assassination as a war crime. According to Article 23(b) of the regulations annexed to Hague Convention IV of October 18, 1907, respecting the laws and customs of war on land, "it is especially forbidden. . .to kill or wound treacherously, individuals belonging to the hostile nation or army."[60] U.S. Army Field Manual 27-10, THE LAW OF LAND WARFARE (1956), has incorporated the Hague prohibition, in Paragraph 31: "this article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy dead or alive."[61] Whether or not a particular state has followed a comparable form of incorporation, it is bound by the Hague regulations entered into customary international law as of 1939, according to the 1945 Nuremburg tribunal.

However, a contrary argument exists. Some maintain that the law should consider enemy officials, operating within the military chain of command, as combatants and *not* enemies *hors de combat!* This reasoning, widely accepted with reference to the assassination of Saddam Hussein during the 1991 Gulf War, views certain enemy officials as lawful targets, and assassination of enemy leaders as permissible. This contrary

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59. Elsewhere, Cicero, citing approvingly to the Greeks, offers further support for tyrannicide:

> Grecian nations give the honors of the gods to those men who have slain tyrants. What have I not seen at Athens? What in the other cities of Greece? What divine honors have I not seen paid to such men? What odes, what songs have I not heard in their praise? They are almost consecrated to immortality in the memories and worship of men. And will you not only abstain from conferring any honors on the savior of so great a people, and the avenger of such enormous wickedness, but will you even allow him to be borne off for punishment? He would confess—I say, if he had done it, he would confess with a high and willing spirit that he had done it for the sake of the general liberty; a thing which would certainly deserve not only to be confessed by him, but even to be boasted of.

This is taken from Cicero's speech in defense of Titus Annius Milo, a speech offered on behalf of an instance of alleged tyrannicide committed by Milo, leader of Lanuvium. Cicero, *The Speech of M. T. Cicero In Defense of Titus Annius Milo, in* SELECT ORATIONS OF M.T. CICERO 208 (C.D. Yonge trans., 1872).

60. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) [hereinafter Laws and Customs of War on Land].

61. U.S. ARMY, THE LAW OF LAND WARFARE 27-10 (1956).

argument, in practice, has simply ignored the position codified at Article 23(b) of Hague Convention IV.

In principle, adherents of the assassination of enemy officials in wartime could offer two possible bases of jurisprudential support: (1) such assassination does not evidence behavior designed "to kill or wound treacherously"[62] as defined at Hague Article 23(b); and/or (2) a "higher" or *jus cogens* obligation allows assassination in particular circumstances that transcends and overrides pertinent treaty prohibitions. To argue the first position would focus primarily on a "linguistic" solution; to argue the second would propose a return to the historic natural law origins of international law.

Where no state of war exists, international law would normally define assassination as the crime of aggression and/or terrorism. Article 1 of the Resolution on the Definition of Aggression defines aggression as: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[63]

In view of the *jus cogens* norm of non-intervention codified in the UN Charter, ordinarily violated by transnational assassination, such killing would generally qualify as aggression. Moreover, assuming that transnational assassination constitutes an example of "armed force," Article 2 of the Definition of Aggression may criminalize such activity as aggression:

> the first use of armed force by a State in contravention of the Charter shall constitute *prima facia* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances.[64]

In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as terrorism. Normally considered a convention on terrorism, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents' particular prohibitions of assassination are also relevant here. After defining 'internationally protected person,' at Article 1, Article 2(a) of the convention identifies as a crime, *inter alia*, "the intentional commission of (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person."[65]

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62. Laws and Customs of War on Land, *supra* note 60.

63. *Resolution on the Definition of Aggression*, Adopted by the U.N. General Assembly, Dec. 14, 1974, G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

64. *Id.*

65. Convention on the Prevention and Punishment of Crimes Against Internationally

The European Convention on the Suppression of Terrorism reinforces the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons. Article 1(c) of this Convention considers any "serious offense involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents as one of the constituent crimes of terror violence. Article 1(e) considers "an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons" another constituent terrorist crime.[66]

These arguments notwithstanding, circumstances exist wherein the expectations of the authoritative human rights regime must override the ordinary prohibitions against transnational assassination, both the prohibitions concerning conditions of peace and conditions of war. The most apparent of such circumstances, such as the present case of Saddam Hussein, involve genocide and related crimes against humanity.[67] Al-

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Protected Persons, Dec. 14, 1973, art. 1, 28 U.S.T. 1975, T.I.A.S. No. 8532 (entered into force Feb. 20, 1977).

66. European Convention on the Suppression of Terrorism, art. 1, Jan. 27, 1977, Europ. T.S. 90.

67. The utilitarian view is that human actions should be evaluated in light of their consequences, and that only this consequentialist approach will enable us to deal with complex moral and legal issues in a rational, clear, objective and precise fashion. The principle of utility, which has its origins with Jeremy 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." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation, in* PRINCIPLES OF MORALS AND LEGISLATION 125 (W. Harrison ed., 1979). A good utility-based argument against those who claim that assassination is impermissible because it arouses antipathy is Bentham's statement against the principle of sympathy and antipathy which

> approves or disapproves of certain actions, not on account of their tending to augment the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground.

Id. at 138-139. Also, says Bentham:

> If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.

1 JEREMY BENTHAM, PRINCIPLES OF PENAL LAW: THE WORKS OF JEREMY BENTHAM 396 (J. Bowring ed., 1962). From the utilitarian point of view, only consequences constitute good reason for punishing or abstaining from punishment; desert and justice do not count in their own right. Punishment is an evil which a utilitarian considers morally justified only when it

though the argument promoting assassination must normally rest on the presumption that leaving Saddam alive would assuredly result in additional Nuremberg-category crimes, further destruction of dissident populations within Iraq and/or additional crimes of war, against peace and against humanity, such an argument may also stand solely on the jurisprudential requirement of punishment.[68] In this retributive view,[69] law enforcement rationale for the assassination of Saddam Hussein would lie not only in the preemption of new crimes but also in the literal claims of *nullum crimen sine poena.*

Exactly how ancient is the principle of *nullum crimen sine poena*, "no crime without a punishment"? The earliest statement of *nullum crimen sine poena* can be found in the Code of Hammurabi (c. 1728-1686 B.C.), the Laws of Eshnunna (c. 2000 B.C.), the even-earlier code of Ur-Nammu (c. 2100 B.C.) and, of course, the *lex talionis*, or law of exact retaliation, presented in three separate passages of the Jewish Torah, or biblical Pentateuch.[70] At Nuremberg, the words used by the Court, "so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished," represented a reaffirmation of this principle.[71]

The Hebrews viewed the shedding of blood as an abomination that

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is a means for securing a greater good. Because of the principle of *nullum crimen sine poena*, this is a principle not always accepted by utilitarians. This is the case because there are occasions, from a utilitarian perspective, where punishment is judged inappropriate. Where punishment would have worse consequences than non-punishment, punishment would be unprofitable and declined. According to utilitarian thought, every unprofitable punishment is *ipso facto* morally unjustified. Or as Bentham puts it: "It is cruel to expose even the guilty to useless sufferings." JEREMY BENTHAM, THEORY OF LEGISLATION 345 (R. Hildreth ed,. E. Dumont trans., 1871).

68. The permissibility of assassination here is contingent upon the underlying theory of punishment. Where one holds to a utilitarian view, assassination would not be justified unless it were judged to prevent further harm. A retributive view of punishment, however, could justify assassination even without expected deterrent benefits because injustice should not be allowed with impunity.

69. A classical supporter of "retributive justice" was Immanuel Kant. Writing in *Philosophy of Law*, Kant identifies the mode and measure of punishment as follows: "[t]his is the right of retaliation (*justalionis*), 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." Immanuel Kant, *Public Right, in Philosophy of Law* (Hastie trans., 1887). On the retributive view generally, see M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 91-139 (1978); SIR WALTER MOBERLY, THE ETHICS OF PUNISHMENT 96-120 (1968); C. L. TEN, CRIME, GUILT, AND PUNISHMENT 38-65 (1987); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-97 (1981); JOHN KLEINIG, PUNISHMENT AND DESERT (1973); D. J. GALLIGAN, *The Return to Retribution in Penal Theory, in* CRIME, PROOF AND PUNISHMENT 154-157 (C. Tapper ed., 1981); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 67-110 (1989); TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 22-51 (1969); A TEXTBOOK OF JURISPRUDENCE 320-326 (G. Paton and Durham eds., 1964); HEINRICH OPPENHEIMER, THE RATIONALE OF PUNISHMENT (1975); MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 21-33 (1981). For a broader but fascinating treatment, see also HENBERG, *supra* note 49.

70. *See supra* note 49.

71. For the court statement, see A. P. D'ENTREVES, NATURAL LAW 110 (1964).

required expiation, "for blood pollutes the land, and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it."[72] This ancient Hebrew belief in "pollution" parallels that of the ancient Greeks. In the words of Marvin Henberg: "The (Greek) Erinyes do for the Greeks of the seventh to fourth centuries B.C.E. what Yahweh does for the ancient Hebrews, they demand the blood of homicides."[73] The pre-Socratic philosophers, especially Anaximander, Heraclitus and Parmenides, displayed a metaphysical view of retributive justice as inherent in the cosmos itself.[74] Among the ancient Greeks, homicide pollution extended to those guilty of accidental murder and, left unpunished, even threatened the community at large. According to Marvin Henberg:

> Homicide pollution entails the following: One guilty of murder, deliberate or accidental, contracts a metaphysical stain, invisible save to the Erinyes and to the gods. Like a deadly disease, pollution renders the agent a danger to others, for until the stain is purified or the polluted person exiled the public at large stands threatened. Crops may be blighted (witness *Oedipus Rex*) as incentive for the populace to seek out the murderer. Liability to suffering, then, is collective; and in its nearly allied form of the curse, pollution can be hereditary as well as collective, visiting each generation of a single family with renewed suffering. Finally, the doctrine of pollution imposes strict liability for its offenses. No excuse, justification or mitigation of penalty is allowed: The accidental manslayer must seek purification equally with one who kills out of greed or passion.[75]

Aeschylus gives a good sense of the Greek view of punishment. In *The Libation-Bearers* (310-14) the chorus intones: "the spirit of Right cries out aloud and extracts atonement due: blood stroke for the stroke of blood shall be paid. Who acts, shall endure. So speaks the voice of the age-old wisdom."[76]

Plato included himself among those who recognize the duty of punishment. Thinking of vice, the source of crime, as an ailment of the soul, just as physical disease to the body, he recommends punishment to restore order in the soul. The criminal, therefore, derives a positive benefit

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72. *Numbers* 35:33. For a contemporary expression of the "blood for blood" conception of punishment, see statement of U.S. Senator, now Vice-President, Al Gore on the fourth anniversary of the gassing of the Kurdish city of Halabja. Offered to the U.S. Senate on March 18, 1992, Gore called for establishment of a formal war crimes tribunal to prosecute Saddam Hussein for "cruel, inhuman, unthinkable repression." In justifying such a tribunal, Gore said it would "perform a sacred duty to the dead whose blood, as the Bible says, cries out from the earth on which it was spilled." *Mass Killings in Iraq, Hearings Before the Comm. On Foreign Relations*, 102d Cong., 2d Sess., 51 (1992).

73. *See* HENBERG, *supra* note 49, at 77.

74. WERNER JAEGER, 1 PAIDEIA: THE IDEALS OF GREEK CULTURE 150-169 (Gilbert Highet trans., 1945); Gregory Vlastos, *Solonian Justice, in* 41 CLASSICAL PHILOLOGY 65 (1946); and HUGH LLOYD-JONES, THE JUSTICE OF ZEUS 80-81 (1971).

75. *See* HENBERG, *supra* note 49, at 79.

76. AESCHYLUS, THE LIBATION - BEARERS, 310-314.

from punishment. Discarding the claims of retributivism, Plato views punishment as just and good only to the extent that it serves the common good by advancing human welfare. Punishment should turn others from vice and teach virtue. Aristotle, Cicero, St. Thomas Aquinas, Hobbes, and Bentham have taken similar positions. Says Bentham:

> The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness; in other words, to exclude mischief. . . . But all punishment is mischief; all punishment in itself is evil. Upon the principle utility, if it ought at all to be admitted, it ought to be admitted in as far as it promises to exclude some greater evil.[77]

It follows that utilitarian views of punishment, in contrast to retributivist perspectives, may or may not support the principle of *nullum crimen sine poena*. As to retributivist perspectives, the philosopher Kant remains the classic example of this view of legal punishment, but here retributive justice has nothing to do with revenge. Kantian retribution, an action of *the state* against the criminal, is an impersonal action, undertaken without passion, and as a sacred duty. Kant views legal punishment of criminals as a distinct categorical imperative. In Kant, we see the strongest possible reaffirmation of *nullum crimen sine poena:*

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.[78]

Kant returns to the beginning, to the concept of "blood-guilt," and to the insistence that society has a *duty* to punish even without resulting utilitarian consequences.

At the Nuremberg Trial, which concluded with an explicit reaffirmation of *nullum crimen sine poena*, the Court based its sentencing not on reformation, not deterrence, but on *retribution*. In the words of Sir Walter Moberly, "the principle really embodied at Nuremberg was the principle of retribution. At the time of the trial public opinion in the victorious countries undoubtedly demanded and acclaimed it. Rightly or wrongly, public opinion saw punishment as not only allowable and expedient, but an imperative duty."[79] This instance of retributive justice, undertaken be-

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77. Bentham, *supra* note 66, at 170.

78. Immanuel Kant, *The Metaphysical Element of Justice, in* THE METAPHYSICS OF MORALS. 102 (John Ladd trans., 1965).

79. MOBERLY, *supra* note 68 at 103.

cause the malefactors so clearly *deserved* punishment, also served to ensure that, henceforth, the most abominable perpetrators of international crimes could reasonably expect enforcement of the principle, *nullum crimen sine poena*. This precedent makes the prosecution of Saddam Hussein for Nuremberg-category crimes an indisputable jurisprudential expectation.

President Clinton has no time to lose. Facing a world described prophetically by the poet Yeats, a world wherein "the blood-dimmed tide is loosed, and everywhere/The ceremony of innocence is drowned;/The best lack all conviction, while the worst/Are full of passionate intensity,"[80] the new American leader can choose to stand for naked geopolitics or for justice. Should he choose the latter, as indeed he must, this country would again be aligned with essential principles of dignity and lawfulness. Should he opt for geopolitics, as would happen if he decided against prosecution of Iraqi crimes, we would have no choice but to agree that "there is no longer a virtuous nation, and the best of us live by candle light."[81]

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80. VATTEL, *supra* note 29, at 135. It is instructive to recall Vattel's argument on the observance of justice between nations:

> Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress. . . .[a]n intentional act of injustice is certainly an injury. A Nation has, therefore, the right to punish it. . . . The right to resist injustice is derived from the right of self-protection.

Id.

81. W. B. YEATS, THE LETTERS OF W. B. YEATS 691 (Allan Wade ed., 1954).