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# RESTRUCTURING FOR PEACE: CHALLENGES FOR THE 21st CENTURY

## Redress for Gulf War Violations of Human Rights

FRANK C. NEWMAN\*

While addressing a Honolulu audience in October 1990, President Bush mentioned the Nuremberg Trials, and pronounced that, "Saddam Hussein . . . will be held accountable for his 'outrageous' behavior. . . . [He] must know [that the] stakes are high."<sup>1</sup> Addressing the United Nations General Assembly a month earlier, the President had declared:

Iraq and its leaders must be held liable for these crimes of abuse and destruction. But this outrageous disregard for *basic human rights* does not come as a total surprise. Thousands of Iraqis have been executed on political and religious grounds and even more through a genocidal, poison gas war waged against Iraq's own Kurdish villagers.<sup>2</sup>

Who is still looking to Nuremberg Law and will Saddam and his ruling clique really be "held liable?" As yet we do not know. We do know, however, that the Iraqi government has been proclaimed accountable and that severe penalties have been prescribed via a series of United Nations Security Council resolutions.

The most important question we confront is how the United Nations, the United States, and other nations will continue to deal with Iraq's victims as well as its vanquished. We recognize the stakes are high not only because of the wrongdoings but because people's legal rights and, as President Bush said, "basic human rights," have been grossly violated.

My inquiries here are, first, whether those who manage the affairs of

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1. Don Balz, *Near Site of Japanese Attack, Bush Issues Warning to Saddam Hussein*, WASH. POST, Oct. 29, 1990, at A19.

2. President George Bush, *The U.N.: World Parliament of Peace*, DEP'T STATE DISPATCH, Oct 1, 1990, Current Policy No. 1303.

the United Nations and its member nations really do respect the Rule of Law; and second, whether they have the sagacity, while seeking to restructure the world order, to honor international law as well as mandates of the United Nations Charter that concern "human rights and fundamental freedoms" and "universal peace."<sup>3</sup>

#### I. RESOLUTION 687 OF APRIL 3, 1991

"[A]cting under Chapter VII of the Charter" (to maintain or restore international peace and security), the United Nations Security Council in Resolution 687 declared a cease-fire "effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678." Resolution 678 and twelve others were affirmed "except as expressly changed to achieve the goals" of Resolution 687.<sup>4</sup>

At present, many media representatives continue to hold the view that civilians in Iraq are suffering more than those in Kuwait, Jordan, and Iran. Facts are cited which imply that the leaders of the United States and the United Nations are focusing primarily on Kurdish needs and on nuclear and other weapons-controls, as well as oil slicks and burned oil wells. There is at least an awareness regarding two items: the Security Council's "prohibitions against the sale or supply to Iraq of commodities or products"<sup>5</sup> and other embargo rules, and the modifications of those rules that may be forthcoming because of "humanitarian needs" as well as Iraq's desire for income sufficient to meet its obligations regarding burned wells and other gigantic costs of the war.

That brief summary, whether or not accurate, must next be tested by careful examination of words in Resolution 687 such as the following:

Kuwaiti Property: The Security Council requested a Secretary General's report on "steps taken to facilitate the return of all Kuwaiti property seized by Iraq, including a list of any property that Kuwait claims has not been returned or which has not been returned intact."<sup>6</sup>

Losses, damages, debts: The Council reaffirmed "that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to *foreign Governments, nationals and corporations*, as a result of Iraq's unlawful invasion and occupation of Kuwait," and decided "to create a fund to pay compensation for claims . . . and to establish a Commission that will administer the fund."<sup>7</sup> Those words in Resolution 687 restate paragraph 8 of Resolution 674, which warned Iraq that "under

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3. U.N. Charter art. 1, ¶¶ 2, 3.

4. S.C. Res. 687, U.N. SCOR, 46th Sess, at 6, U.N. Doc. S/RES/687 (1991), reprinted in 30 I.L.M. 847, 852 (1991).

5. *Id.*

6. *Id.*

7. *Id.* (emphasis added).

international law, it is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>8</sup>

Further, all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and "Iraq must adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt."<sup>9</sup>

## II. REDRESS, REPARATIONS, AND INTERNATIONAL LAW

The 1990-91 Security Council resolutions as a whole, which duly respect often-scoffed-at commands of the United Nations Charter, are precedent-shattering. Regardless of how or whether they continue to be enforced, they are destined to have an immense impact on the international laws of armed conflict, whether external or internal.

My focus is on *civil redress* and on the critical issue of how we can best help people whose human rights are being or have been violated.<sup>10</sup> My hope is that ideas such as these may be of aid to the many dedicated United Nations leaders who believe that for us "to blame" is merely one approach among many labeled "to help," and that the victims of a war that has been won merit much more attention than do violators of laws that clearly should have governed. A quintessential United Nations protagonist at the moment is Theodoor van Boven of the Netherlands, whose report was presented to the United Nations Human Rights Sub-Commission in August, 1991. Since 1989, he has been entrusted with the undertaking of a study concerning the right to compensation and rehabilitation for victims of gross violations of human rights, taking into account relevant existing international human rights norms on compensation and relevant decisions and views of international human rights organs, with a view to exploring the possibility of developing some basic principles and guidelines.

## III. WHAT ABOUT NUREMBERG LAW?

A powerful fact is that the post-World War II Nuremberg trials enlightened us regarding not only criminal law but also civil law. A brief recently filed in a United States court reads, in part:

It is true that many torturers and others . . . should be punished as criminals. Yet it is not always true that seeking criminal punishment

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8. S.C. Res. 674, U.N. SCOR, 45th Sess, at 3, U.N. Doc. S/RES/674 (1990), *reprinted in* 29 I.L.M. 1561, 1563 (1990).

9. S.C. Res. 687, *supra* note 4, 30 I.L.M. at 852.

10. Here I will not discuss national law (e.g. constitutional powers of the President v. Congress; federations v. "republics;" civilian uprisings, etc.). Nor will I propose any amendments or revisions of law, because I want to stress how implementation and enforcement of existing law might be made more effective. I also reserve for future study some obviously troubling questions regarding criminal punishment.

is an effective means of helping people whose human rights have been violated.

The forms of redress that most often help victims of human rights violations are not penal fines or imprisonment. So what are they? The list includes restitution, damages (including punitives), injunctions (court ordered) and cease and desist orders (from administrative tribunals), declaratory judgments and orders (judicial and administrative), and the imposition of varied types of *civil discipline*: rebuke, demotion, and discharge of military personnel and other government officials, suspension and revocation of licenses and permits, etc.

Most people whose international human rights have been violated will be aided more by non-criminal than by criminal sanctions. The main contribution of international criminal law will be the proscription of conduct regarded as wrongful. If the wrongs are provable, jurists and activists can then design forms of redress that will be far more constructive than are fines and imprisonment.

Related is this excerpt from Vasak and Alston's UNESCO book on human rights:

Here there is no room for a summary or précis of the case law and practice of international criminal law. There is room, however, for a warning that repeatedly seems to be unheeded. This is the warning: Human rights activists must remember that a main contribution of the relevant criminal law is its proscribing of illegal conduct. . . .

Why is that important? For many reasons. A crucial fact is that too many people, once the word "Nuremberg" is mentioned for example, immediately begin discussing criminal intent, proof beyond reasonable doubt and related concepts of penal law. Because those topics are labyrinthine, we tend to forget that governments and government officials may well have committed illegal acts whether or not the acts also were criminal.

That is exactly what happened, for example, in numerous discussions of "Nuremberg and Vietnam." The cost to human rights law was not that possibly guilty individuals escaped prosecution. The greater cost was that, too often, all the talk of criminality left undiscussed and unsettled the basic issues as to whether the new and brutal techniques of warfare that were used in Vietnam were illegal or not. . . .<sup>11</sup>

Those paragraphs suggest these conclusions: (1) a variety of noncriminal forms of redress may often be enforceable against some participants in wars, other armed conflicts, or related confrontations; and (2) the patent needs of many victims for such redress can be bolstered by pertinent provisions of international criminal law.

Several of the United Nations Gulf War resolutions refer to "interna-

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11. KAREL VASAK, *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 166 (Philip Alston ed., rev. ed. 1982).

tional law" and "international humanitarian law." Security Council Resolution 674 adds "general principles of international law."<sup>12</sup> Those phrases include treaties and also customary law.<sup>13</sup> Iraq, like many nations, has arguably not ratified a treaty that defines the Nuremberg crimes of aggression, war crimes, or crimes against humanity. Those three proscriptions illustrate the full sweep of customary law. Sometimes it incorporates words of treaties that have not been universally ratified.<sup>14</sup> Sometimes only a few nations have inaugurated it.<sup>15</sup> And sometimes every nation is bound even when the inaugurating lawmakers are unidentified.<sup>16</sup>

The most authoritative pronouncements of "customary" Nuremberg wrongs are found in Allied Control Council Law No. 10 and read as follows:

(a) *Crimes against Peace*: Planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes*: Violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) *Crimes against Humanity*: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or *other inhumane acts committed against any civilian population*, or persecutions on political, racial or religious grounds.<sup>17</sup>

#### IV. WHAT ABOUT SADDAM HUSSEIN AND HIS COHORTS?

This conflict [may] reinvigorate the arcane "law of war" and further advance it from its genesis as an oxymoron to an increasingly operative rule of law. Perhaps most sensitive . . . is the extent to which war

12. S.C. Res. 674, *supra* note 8, at 2, 29 I.L.M. at 1562.

13. For a widely endorsed restatement of that phenomenon, see the Statute of the International Court of Justice article 38(1)(b & c); *cf.* Frank C. Newman, *Introduction: The United States Bill of Rights, International Bill of Human Rights, and Other "Bills,"* 40 EMORY L.J. 731, 738 (1991) (text preceding n.23).

14. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, T.I.A.S. 3364; U.N. CHARTER.

15. *E.g.*, Agreement For the Prosecution and Punishment of the Major War Criminals of the European Axis at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 278.

16. For example piracy, slave-trade, torture, etc.

17. *See* Frank C. Newman & Weissbrodt, INTERNATIONAL HUMAN RIGHTS 715-716 (1990).

crimes may have been committed and, if so, whether those who committed them will be held to account, and how.<sup>18</sup>

From 1950 to 1990, innumerable Nuremberg wrongdoers were not punished. Should we nonetheless now reinvigorate the punishment process? The only tolerable answer is YES. If the question involved wrongs like piracy and the slave trade, or drug barons and other terrorists, there would be few objections. Are unpenalized crimes against peace, war crimes and crimes against humanity for any reason more tolerable? NO!

In future years the world will need international courts and prosecutors, as well as processes that assure fairness and adjudications that respect due process. Yet while we strive for those goals we need not abjure the assessment of blame. By utilizing national tribunals, as in grave breaches of the 1949 Geneva Conventions, and international "civil" penalties, as achieved via the Security Council's Gulf War resolutions, we can certainly penalize wrongdoing and at the same time aid victims.

Since 1950 have some tyrants been penalized in ways to help their victims? Yes, often, and progress is gradually being made. That it has been "modest" suggests that we contemplate "modest victories" that for decades have marked the hesitant use of penalties and remedies other than the injunction, say, in so many civil liberties and civil rights conflicts in the United States.

#### V. WHAT ABOUT THE KURDS — AND OTHER ILL-TREATED GROUPS?

On April 5, 1991 the Security Council in Resolution 688 condemned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas."<sup>19</sup> The Resolution demanded that Iraq "immediately end this repression" and expressed "the hope that an open dialogue will take place to ensure that *the human and political rights* of all Iraqi citizens are respected."<sup>20</sup> The Secretary-General was asked to report and also "to address urgently the critical needs of the refugees and displaced Iraqi population," and the Council decided "to remain seized of the matter."

The media have not focused on the fact that Resolution 688 should protect many more than Kurds. Far too little attention has been given to phrases in the Resolution such as "the Iraqi civilian population" and "the human . . . rights of all Iraqi citizens." Note too that the Secretary-General must "use all the resources at his disposal . . . to address urgently the critical needs of the refugees *and displaced Iraqi population*."<sup>21</sup>

Writing with acerbity in *The Humanist*, Gerry O'Sullivan has predicted that, "With the war now officially declared over, the United Na-

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18. Homer E. Moyer, Jr., *Legal Issues of the Gulf War*, 20 INT'L L. NEWS 2, 4 (1991).

19. S.C. Res. 688, U.N. SCOR, 46th Sess, at 1, *reprinted in* 30 I.L.M. 858, 858 (1991).

20. *Id.* (emphasis added).

21. *Id.* (emphasis added).

tions will again be about as newsworthy as a cat up a tree.”<sup>22</sup> While the media recently may have improved the “pre-peace” coverage of United Nations news I suggest that, overall, no more than a B-minus is merited. To illustrate: could many reporters, media analysts, and pundits answer questions like these?

1. How many coalition allies did the United States muster, and which sent military aid in what quantity? Who are currently “active” United Nations allies?

2. Which United Nations bodies have participated, other than UNICEF and the Office of the High Commissioner for Refugees?

3. Has the United States at last paid all dues and other moneys and services it has owed to the United Nations?

4. Has the United Nations estimated its Gulf War costs and published the figures?

5. Do United States citizens have access to reasonable estimates regarding how many dollars the United States “spent” from August 1990 through 1991?

6. Have United Nations bodies, the ICRC, and other organizations supplied reasonable estimates of war deaths, both military and civilian? Other casualties? And the number of refugees from August 1990 through 1991?

7. Have friends of the United Nations become more satisfied or less satisfied as to the good faith and the performance of United States representatives in United Nations forums?

8. Most significantly, on whom do we rely for information that citizens in the United States and elsewhere need concerning *all* who have suffered or are suffering “direct loss, damage . . . or injury [or analogous harm]?”<sup>23</sup>

## VI. WHAT ARE WE LEARNING FROM THE MEDIA?

On the morning of July 15, 1991, illustratively, newspapers announced: *Iraqi Atom Effort Exposes Weakness in World Controls*;<sup>24</sup> “[Iraqi officers] thought they were going to get medals. . . Instead, they were hanged;”<sup>25</sup> “Eighteen people were killed in an increasingly bloody struggle between Kurdish rebels and security forces in southeast Turkey;”<sup>26</sup> “Two . . . Marine Corps reservists who filed for conscientious objector discharges during the gulf war and now face possible court-martial for desertion are no longer threatened with the death penalty, members

22. Gerry O’Sullivan, *Against the Grain*, THE HUMANIST, May/June 1991.

23. S.C. Res. 674, *supra* note 8.

24. N.Y. TIMES, July 15, 1991, at A1, col. 3.

25. *Generals Reported Dead in Hussein Purge*, L.A. TIMES, July 15, 1991, at A4, col. 3.

26. L.A. TIMES, July 15, 1991, at A13, col. 1.



of their family said."<sup>27</sup>

On that day the *New York Times* mentioned neither the Middle East nor the United Nations, but one letter to the editors does refer to a July 1 editorial that proposed "to let Iraq export oil but turn the proceeds over to the United Nations."<sup>28</sup> The only pertinent pundit, appearing several days earlier in the *New York Times*, was A.M. Rosenthal, who concluded, "We should now recognize a whole series of coalition mistakes, misjudgments and delusions. They add up to one huge, historic error, uncorrectable until understood, acknowledged and rectified: allowing a beaten dictator to stay in power, slaughter his domestic enemies and prepare for renewed struggle with foreign enemies."<sup>29</sup> The lead *San Francisco Chronicle* editorial, concerning the London session of the G-7 leaders, predicts that "global arms trade . . . and other items will crowd the agenda — environmental issues, Third World debt, *the Middle East* and Yugoslavia, among others — and none should be shortchanged."<sup>30</sup>

The morning's sole report on victims was Jean Mayer's column, "Iraq's Malnourished Children."<sup>31</sup> But what about the many foreign governments, nationals and corporations that also were promised redress by the United Nations Security Council resolutions? Indeed, what has happened to them, and who among the media will now keep us informed?

Of course not all has been lost. For instance, George Bush's overall approval rating remained sky high several months after the gulf war.<sup>32</sup> And the United Nations Security Council is, thank God, still in business. Yet hauntingly relevant is this metaphor (unwitting I think) supplied by columnist Herb Caen: "Don't miss Steinhart Aquarium's finest sign, the one above the shark tank which reads, 'If you are in the water with a dangerous shark, swim normally, not excitedly, and *try not to bleed.*'"<sup>33</sup>

For me, the uniquely thoughtful and poignant piece is Arthur Hoppe's "Suffer Little Children:"

Another waif was at the door [and] said he was from Iraq. "Go away," I said testily. "I'm already supporting 10 Bangladeshi, 6 Eri-treans and my lazy brother-in-law."

"Oh, please, sir . . ." he said. "I was hoping you might see your way clear to releasing some of those frozen Iraqi assets so that I could buy a little food and medicine."

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27. S.F. CHRONICLE, July 15, 1991, at A15.

28. N.Y. TIMES, July 1, 1991, at A12, col. 2.

29. *On My Mind: Mistakes of the War*, N.Y. TIMES, July 12, 1991, at A29, col. 6.

30. *London Summit's Urgent Agenda*, SAN FRANCISCO CHRONICLE, July 15, 1991, at A18 (emphasis added).

31. N.Y. TIMES, July 15, 1991, at A1, col. 1.

32. See e.g. N.Y. TIMES, Apr. 21, 1991, at D1, col. 1.

33. Herb Caen, *There Are The Times*, SAN FRANCISCO CHRONICLE, July 15, 1991, at D1 (emphasis added).

"Well, I'd like to," I said, "but we froze those assets to punish you for invading Kuwait."

"Excuse me, sir", he said, "but a Harvard research team said . . . that 170,000 Iraqi children would succumb to malnutrition and disease unless you lifted your sanctions. And 6,000 have already died." "Lift our sanctions?" I cried. "I can see you don't understand a thing about our foreign policy, young man."

. . . I [then] said patiently, "Our president has made it quite clear that we can't lift those sanctions until you get rid of that monster Saddam Hussein. . . . We licked him fair and square [and] now we're going [to] keep those sanctions on to teach him a lesson. . . . The man's a selfish, lying, power-mad, corrupt dictator. Our plan is to make him suffer by starving you. . . . Don't you worry, son. . . . We'll save you from that rotten tyrant. Our policy never fails. Look at all the Nicaraguans and Vietnamese we saved from communism through our starve-the-kids policy."

"But I thought millions of Vietnamese children survived to live under communism," he said. "I'm speaking of the ones who didn't," I explained.

The scrawny tyke sighed. "Well, I'll do my best to go along [but] my hunger pangs are getting just awful, and I think I'm coming down with a fever." I couldn't help but pat him on the head. "Keep up the good work, son," I said encouragingly. "We'll get that S.O.B. yet."<sup>34</sup>

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34. Arthur Hoppe, *Suffer Little Children*, SAN FRANCISCO CHRONICLE, July 15, 1991, at A19.

